

132 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

PJM Interconnection, L.L.C.

Docket No. ER10-1196-000

ORDER CONDITIONALLY ACCEPTING PROPOSED TARIFF REVISIONS

(Issued September 3, 2010)

1. On May 5, 2010, pursuant to section 205 of the Federal Power Act (FPA),¹ PJM Interconnection, L.L.C. (PJM or LLC) submitted for filing revised tariff sheets to the PJM Open Access Transmission Tariff (PJM Tariff)² and the PJM Amended and Restated Operating Agreement (Operating Agreement)³ designating PJM Settlement, Inc. (PJM Settlement), a new public utility, as the counterparty to transactions in the PJM markets. In addition, PJM requests certain waivers from the Commission's regulations for PJM Settlement. In this order, we conditionally accept the tariff revisions for filing, to become effective January 1, 2011, subject to PJM making a compliance filing. We also grant in part and deny in part PJM's requested waivers.

I. Background

2. PJM states that for approximately two years, as part of its comprehensive credit risk management program, it has been actively pursuing initiatives that clarify and define who is doing business with whom when market participants transact in the PJM markets.

¹ 16 U.S.C. § 824d (2006).

² PJM Interconnection, L.L.C., FERC Electric Tariff, Sixth Revised Vol. No. 1.

³ PJM Interconnection, L.L.C., Third Revised Rate Schedule FERC No. 24.

In early 2008, PJM was advised by outside counsel that its netting and set-off practices⁴ were vulnerable in a bankruptcy context because of ambiguity as to who are the parties to pool transactions.⁵ PJM states that nowhere in its governing documents and associated tariffs is it clearly stated that market participants are transacting with PJM as the regional transmission organization (RTO) and market administrator, rather than with unspecified parties in the “market” or “pool.” PJM asserts that this ambiguity exposes PJM and its members to the risk that PJM may be unable to enforce its contractual rights and ensure that netting and set-off obligations are enforceable in the event of customer defaults and bankruptcies. PJM contends that the risk of default by market participants and the potential need to enforce netting and set-off rights is a real concern to its stakeholders because there have been recent defaults in the PJM markets that resulted in mutualized charges to the PJM membership of millions of dollars of unpaid obligations.

3. PJM states that it undertook a counterparty clarity initiative to clarify the contracting counterparty to market participants in various circumstances. As the first step, on December 2, 2008, in Docket No. ER09-368-000, PJM submitted revisions to PJM’s credit risk management rules to reduce credit risk exposure to PJM members regarding “non-pool” bilateral transactions in the PJM energy markets.⁶ PJM states that these tariff revisions made clear that the members of the “pool” are not responsible for defaults when two market participants engage in a bilateral transaction for the purchase and sale of physical energy, and that the parties to the bilateral transaction must make their own credit arrangements. On April 1, 2010, in Docket No. ER10-1003-000, PJM submitted a filing extending this clarification regarding bilateral energy transactions to other markets, including PJM’s Financial Transmission Rights (FTR), Auction Revenue Rights (ARR), capacity, and ancillary services markets.⁷ In PJM’s April 1, 2010 filing,

⁴ PJM explains that when market participants both purchase and sell in the PJM marketplace, PJM issues “net” bills for the resulting total activity. PJM states that these netting and set-off practices significantly reduce transaction costs associated with financial security and produce lower prices to consumers.

⁵ PJM Transmittal at 6 (citing Memorandum of Wachtell, Lipton, Rosen & Katz to PJM regarding Setoffs and Credit Risk of PJM in Member Bankruptcies (March 17, 2008) (Wachtell Memo)).

⁶ *Id.* at 3-4. On January 30, 2009, the Commission conditionally accepted the tariff changes, and directed a compliance filing, in *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,084 (2009).

⁷ *Id.* at 4-5. On May 5, 2010, the Commission accepted this filing by delegated letter order.

PJM noted that it would be making the instant filing in the future to clarify the counterparty with respect to “pool” transactions in the PJM markets.

II. Details of the Filing

4. PJM submitted revised tariff sheets to the PJM Tariff and Operating Agreement proposing to designate a new entity, PJM Settlement, as the counterparty to market participants and customers with respect to transmission services, ancillary services transactions, purchases and sales in PJM’s energy markets, purchases and sales of capacity in the Reliability Pricing Model (RPM) auctions, purchases and sales of FTRs in auctions, and the contractual rights and obligations of holders of FTRs and ARRs. PJM states that its proposal received overwhelming support from its members, having been endorsed by acclamation in PJM’s Members Committee following 95 percent approval in a sector vote of the PJM Markets and Reliability Committee.⁸

5. PJM states that the counterparty clarification proposed in the filing will establish mutuality between market participants and a specified counterparty to best ensure the enforceability of netting and set-off of a market participant’s debits and credits in a default situation, reducing the risk of exposure of members to defaults.⁹ Furthermore, PJM asserts that this filing is consistent with the Commission’s Credit Reform Notice of Proposed Rulemaking (NOPR), in which the Commission proposed that each RTO include in the credit provisions of its tariff revisions to clarify its status as a party to each transaction so as to eliminate any ambiguity or question as to its ability to manage defaults and to offset market obligations.¹⁰ PJM further asserts that its proposal represents far more, as PJM’s stakeholders have developed counterparty clarification revisions specifically to address the unique attributes of the PJM Tariff and Operating Agreement, the various PJM market rules, the transactions that occur in the PJM region, the bilateral trading that PJM’s web-based tools facilitate, and the self-supply that many market participants continue to provide.¹¹

⁸ *Id.* at 1-2.

⁹ *Id.* at 5.

¹⁰ *Credit Reforms in Organized Wholesale Electric Markets*, Notice of Proposed Rulemaking, FERC Stats. & Regs., ¶ 32,651, at P 25 (2010).

¹¹ PJM Transmittal at 8.

A. Details of PJM Settlement

6. PJM states that PJM Settlement will be a public utility under the FPA and subject to the Commission's jurisdiction. PJM states that PJM Settlement is not yet formed but is planned to be a nonprofit member organization formed on a nonstock basis under the Pennsylvania Nonprofit Corporation Law of 1988, with PJM serving as the Executive Member with all voting rights.¹² PJM asserts that establishing PJM Settlement as a separate entity will: (i) isolate any potential liability from taking title to power, incurring payables and receivables, and providing related credit and settlement functions; (ii) isolate any potential regulatory issues related to these centralized functions; and (iii) facilitate any evolution to the novation of positions to third-party clearing houses, if that becomes desirable as markets evolve in the future.¹³ In addition, PJM states that establishing PJM Settlement as a not-for-profit corporation is intended to clarify its tax status as PJM might potentially be exposed to certain state taxes, such as gross receipt taxes, if it were to itself act as a counterparty as a for-profit limited liability company.¹⁴

7. PJM states that PJM Settlement will be a buyer to each market seller and a seller to each market buyer, taking title to electricity and other products and assuming liability for payables, in its own name and right.¹⁵ Proposed section 1.7.01a of the Operating Agreement states that "Counterparty" shall mean "PJM Settlement as the contracting party, in its name and own right and not as an agent, to an agreement or transaction with Market Participants or other entities, including the agreements and transactions with customers regarding transmission service and other transactions under the PJM Tariff and this Operating Agreement..."¹⁶ However, the proposed tariff sheets provide that PJM

¹² *Id.* at 10, n. 24 (citing 15 Pa. Cons. Stat. § 5101 *et seq.* (2010)).

¹³ *Id.* at 9-10.

¹⁴ *Id.* at 10, n. 23.

¹⁵ *Id.* at 9.

¹⁶ Operating Agreement, Eleventh Revised Sheet No. 19. Proposed section 1.6D of the PJM Tariff similarly defines "Counterparty" as "PJM Settlement as the contracting party, in its name and own right and not as an agent, to an agreement or transaction with a market participant or other customer." PJM Tariff, Tenth Revised Sheet No. 34.

Settlement shall not be a counterparty to bilateral transactions between market participants or to self-supplied or self-scheduled transactions reported to PJM.¹⁷

8. PJM states that it will remain as the RTO for the PJM region,¹⁸ continuing to: (i) administer the PJM Tariff and Operating Agreement and all of PJM's markets; (ii) operate the PJM grid and be responsible for maintaining reliability; and (iii) conduct all of its transmission planning and generation interconnection services and activities.¹⁹

9. PJM states that PJM Settlement will take over certain functions currently performed by PJM, including: (i) performing billing and settlement functions for the PJM markets; (ii) issuing invoices to, and receiving payments from, market participants; and (iii) serving as the entity with which market participants establish credit and be a beneficiary under market participant guarantees and letters of credit.²⁰ In addition, PJM Settlement will act as a billing agent on behalf of PJM with respect to PJM fees and

¹⁷ See, e.g., PJM Tariff, Original Sheet No. 50.001; Operating Agreement, Eleventh Revised Sheet No. 19 and Original Sheet No. 27A.

¹⁸ Proposed sections 1.6 and 1.6A of the Operating Agreement and PJM Tariff describe the "scope of services" of the Office of Interconnection and PJM Settlement, respectively. Operating Agreement, Ninth Revised Sheet No. 75, Fifth Revised Sheet No. 76, and Original Sheet No. 76A; PJM Tariff, Second Revised Sheet No. 334F, Tenth Revised Sheet No. 335, Third Revised Sheet No. 336, and First Revised Sheet No. 336A.

¹⁹ PJM Transmittal at 7. Proposed section 3.3(a) of the Operating Agreement provides that "the LLC administers the provision of transmission service and associated ancillary services to customers and operates and administers various centralized electric power and energy markets. In obtaining transmission service and in these centralized markets, customers conduct transactions with PJM Settlement as a counterparty." Operating Agreement, Fourth Revised Sheet No. 27.

²⁰ Section 7 of the PJM Tariff and section 14B of the Operating Agreement set forth billing and payment procedures. Proposed section 14B.1 of the Operating Agreement provides that "PJM Settlement shall issue bills and billing statements pursuant to the provisions in this section...on behalf of itself and as agent for [Transmission Provider/the Office of Interconnection], as applicable. Payment of bills pursuant to this section...shall be made for the benefit of PJM Settlement and [Transmission Provider/the Office of Interconnection], as applicable." PJM Tariff, Original Sheet No. 50.002; Operating Agreement, Fifth Revised Sheet No. 49. Proposed section 14B.4 of the Operating Agreement provides additional details of the revised billing and payment procedures. Operating Agreement, Fifth Revised Sheet No. 49.

services as to which PJM Settlement is not the counterparty, and will invoice, collect, and remit, as a conduit, such fees and charges due to PJM. PJM states that by having PJM Settlement act as the billing agent its members will continue to receive a single invoice for all PJM activities.²¹

10. Proposed section 6A.3 of the PJM Tariff and proposed section 3.3(d) of the Operating Agreement provide that PJM has acquired the right to use the transmission capacity of the transmission system that is required to provide service under the PJM Tariff and the authorization to resell transmission service using such capacity on the transmission system, and that PJM compensates Transmission Owners for the use of their transmission capacity.²² These sections state that the “LLC has assigned its right to use the transmission capacity of the Transmission System to PJM Settlement. Accordingly, PJM Settlement shall compensate the Transmission Owners for the use of the transmission capacity required to provide service under the PJM Tariff and this Agreement.”²³ In addition, proposed section 6A.9 of the PJM Tariff and section 3.3(j)(i) of the Operating Agreement provide that Transmission Service Agreements in effect at the time the section becomes effective shall be deemed to be revised to include PJM Settlement as a Counterparty to the agreement in the same manner and to the same extent as agreements entered after the effective date.²⁴

²¹ PJM Transmittal at 11.

²² PJM Tariff, Seventh Revised Sheet No. 50; Operating Agreement, Original Sheet No. 27A.

²³ *Id.* In addition, proposed Schedule 1A of the PJM Tariff provides that the “Transmission Provider shall administer the provision of Transmission Owner Scheduling, System Control, and Dispatch Service. PJM Settlement shall be the Counterparty to the purchases of Transmission Owner Scheduling, System Control and Dispatch Service...Each month, PJM Settlement shall pay to each Transmission Owner an amount equal to the charges billed for that Transmission Owner’s Zone...” PJM Tariff, Ninth Revised Sheet No. 226 and Third Revised Sheet No. 226.01.

²⁴ PJM Tariff, Original Sheet No. 50.001; Operating Agreement, Original Sheet No. 27A. In addition, the proposed revisions include the addition to the listed contract parties of “PJM Settlement Inc. (‘Counterparty’) as the counterparty” to the Form of Service Agreements set forth in Attachments A, A-1, B, F, and F-1. Therefore, the parties to these agreements will be “the Office of Interconnection of PJM Interconnection, L.L.C. (the Transmission Provider) as administrator of the Tariff,” PJM Settlement “as the counterparty,” and the Transmission Customer.

11. PJM states that PJM Settlement will not be a market participant.²⁵ PJM explains that, as the counterparty, PJM Settlement will not: (i) take on market or price risk; (ii) maintain open positions; or (iii) provide offers to sell or bids to buy energy, capacity, or other products. PJM states that PJM Settlement will be the contracting accommodation party to the purchases and sales that clear the PJM markets and auctions, but it will not otherwise be a participant in the markets.²⁶

12. PJM states that PJM Settlement's Board of Directors and Officers will be distinct from PJM's Board of Managers, but will be drawn exclusively from employees of PJM.²⁷ PJM states that PJM Settlement will not retain any of its own employees, assets, or offices, but will conduct its business operations by way of a services contract with PJM. Therefore, PJM Settlement will pay a fee to PJM as consideration for use of PJM's employees and assets, as specified in the services contract.²⁸ PJM Settlement will charge PJM for the costs it incurs as a billing agent for PJM with respect to the activities for which PJM Settlement is not the counterparty.²⁹

13. PJM states that PJM Settlement will be compensated by market participants to cover its costs in providing the billing, settlement, and credit services that PJM will no longer be providing.³⁰ However, PJM states that there will be no change in the total costs to PJM customers and therefore PJM is not proposing any changes to the Schedule 9 stated rates for PJM's administrative services.³¹ The proposed revisions to Schedule 9 provide: "These rates and charges in Schedule 9 and its subsidiary Schedules include the charges for PJM Settlement services to Transmission Customers and Market Participants. Transmission Provider will remit the portion of the charges for PJM Settlement services to PJM Settlement."³²

²⁵ PJM Transmittal at 10.

²⁶ *Id.*

²⁷ *Id.* at 11.

²⁸ *Id.*

²⁹ *Id.* at 11, n. 25.

³⁰ *Id.* at 11.

³¹ *Id.*

³² PJM Tariff, Fourth Revised Sheet No. 250.

B. Requested Waivers

14. PJM states that PJM Settlement will be a public utility under the FPA and subject to the Commission's jurisdiction because PJM Settlement will hold title to energy and therefore will be making wholesale sales of energy.³³ PJM argues, however, that given the unique nature of PJM Settlement's involvement in the PJM environment and PJM's continued administration of the PJM Tariff and Operating Agreement as the RTO, Commission regulation of PJM as an RTO should obviate any need for any significant additional regulatory oversight of PJM Settlement.³⁴ Accordingly, PJM requests waiver of certain regulatory requirements for public utilities insofar as they might otherwise apply to PJM Settlement.

15. PJM seeks, to the extent required, a waiver or exemption for PJM Settlement of the filing requirements of section 205 of the FPA.³⁵ PJM states that, because the rates and charges for any transmission or sale subject to the Commission's jurisdiction for which PJM Settlement will be in the chain of title are already set forth in the PJM Tariff and Operating Agreement, additional filing requirements for PJM Settlement would be duplicative and could contravene the filing rights of others. Moreover, PJM states that PJM Settlement does not have discretion regarding the rates and charges for the services or wholesale power sales for which it is the counterparty, and the PJM Tariff and Operating Agreement will continue to set forth the rates, terms and conditions for transmission service and wholesale power sales subject to the Commission's jurisdiction.

16. PJM also requests that the Commission clarify that PJM Settlement will not be subject to annual charges under section 382.201 of the Commission's regulations beyond what is already assessed to PJM as a public utility, or alternatively grant waiver of the reporting requirements and annual charge obligations.³⁶ PJM states that, if PJM Settlement had to report or pay annual charges, it would be with respect to the very same transmission service for which PJM is already reporting and paying annual charges.

17. PJM also seeks clarification that PJM Settlement will not be subject to the regulations and requirements regarding market-based rate authorizations and wholesale

³³ PJM Transmittal at 12.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 13 (citing 18 C.F.R. § 382.201 (2010)).

sale of electric energy, capacity, and ancillary services at market-based rates.³⁷ Alternatively, PJM seeks a waiver of any requirement that PJM Settlement must comply with these regulations. PJM argues that PJM Settlement will have no discretion regarding which transactions clear the markets or the prices at which they clear pursuant to the PJM Tariff and Operating Agreement, and will not be a “market seller”³⁸ with discretion to sell at market-based rates as defined in the Commission’s regulations.³⁹

18. PJM requests a waiver for PJM Settlement of the Electric Quarterly Reports (EQR) requirements for all transmission service contracts for which PJM Settlement will be a party.⁴⁰ PJM also requests a waiver of the EQR reporting requirements regarding PJM Settlement’s sales to market participants that result from PJM Settlement’s presence in the chain of title of transactions.⁴¹ PJM states that, if PJM Settlement were required to report its transactions with EQRs, the information provided would not provide any additional information beyond the information the Commission already receives from the market participant sellers.

III. Notice of Filing and Responsive Pleadings

19. Public notice of the filing was issued on May 6, 2010, with protests and interventions due on or before May 26, 2010. Motions to intervene were filed by Duke Energy Corporation; JP Morgan Ventures Corporation; American Municipal Power, Inc.; Monitoring Analytics, LLC; Old Dominion Electric Cooperative; PPL EnergyPlus LLC; Borough of Chambersburg, Pennsylvania; Dynegy Power Marketing, Inc.; NRG Companies; Exelon Corporation; IPA Trading, LLC; and Ameren Services Company. Motions to intervene and comments were filed by North Carolina Electric Membership

³⁷ *Id.* at 13-14.

³⁸ The Commission’s regulations define “seller” as any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act. 18 C.F.R. § 35.36(a)(1) (2010).

³⁹ PJM Transmittal at 14 (citing 18 C.F.R. § 35.36(a)(1) (2010)).

⁴⁰ *Id.* at 14.

⁴¹ *Id.* at 14-15.

Corporation and Electric Power Supply Association (EPSA). PPL Parties⁴² filed comments.⁴³ Motions to intervene and protests were filed by Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC (collectively, PSEG Companies); Shell Energy North America (U.S.), L.P. (Shell Energy); and Mirant Energy Trading, LLC, Mirant Chalk Point, LLC, Mirant Mid-Atlantic, LLC, and Mirant Potomac River, LLC (collectively, Mirant Parties); and Dominion Resources Services, Inc. (Dominion).

20. On June 10, 2010, PJM filed an answer to the four protests. On June 18, 2010, Shell Energy filed a motion for leave to reply and a reply to PJM's answer.

A. Protests

21. The PSEG Companies state in their protest that PJM's filing represents a fundamental and material legal and functional restructuring of PJM.⁴⁴ The PSEG Companies argue that the tariff changes have the potential to increase stakeholders' liability as a result of bankruptcy filings and that there may be other unintended and expensive consequences of the filing, including an increased likelihood of the Commodity Futures Trading Commission (CFTC) asserting jurisdiction over PJM Settlement.⁴⁵ The PSEG Companies also argue that the tariff changes do not resolve the

⁴² PPL Parties are PPL EnergyPlus, LLC; Lower Mount Bethel Energy, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; and PPL University Park, LLC.

⁴³ Commenters support the proposal and encourage the Commission to accord significant weight to the stakeholder process that resulted in the proposal. EPSA urges the Commission to consider the PJM case in isolation, since it is the product of an extensive regional stakeholder process undertaken at the behest of PJM and its stakeholders.

⁴⁴ PSEG Companies Protest at 3.

⁴⁵ *Id.* at 4-5, 11.

identified mutuality risk,⁴⁶ and even if they do, the mutuality risk itself has not been demonstrated to be an actual problem.⁴⁷

22. Shell Energy states that it does not oppose restructuring PJM into two separate public utilities but believes there are a number of areas in need of clarification by PJM and the Commission.⁴⁸ Shell Energy states that its protest is conditional upon the Commission's resolution of certain issues before moving forward with the restructuring of PJM.

23. Specifically, Shell Energy argues that the scenario identified by MISO in its comments in the Credit Reform NOPR proceeding in which the mutuality benefit⁴⁹ of a counterparty proposal could be defeated by a court evaluating the substance of the transaction, not its form, could apply in PJM's case and should be explored.⁵⁰ Shell Energy also argues that the Commission should assure that the restructuring proposal does not result in potential credit consequences identified by MISO and will not lead to the reduction or elimination of unsecured credit in PJM.⁵¹ Shell Energy states that the Commission should require PJM to commission a further legal opinion from an expert law firm to give comfort that the counterparty approach does not have the flaws that

⁴⁶ The mutuality risk referred to by the PSEG Companies is the risk that PJM may be unable to enforce its contractual rights because of the ambiguity as to who are the parties to pool transactions.

⁴⁷ *Id.* at 5.

⁴⁸ Shell Energy Protest at 11-12.

⁴⁹ The mutuality benefit to which Shell Energy refers is the benefit of establishing mutuality between market participants and a specified counterparty to ensure the enforceability of netting and set-off of a market participant's debits and credits in a default situation.

⁵⁰ *Id.* at 8.

⁵¹ Shell Energy states that MISO believes that the counterparty should be adequately capitalized to avoid a "short pay" situation, requiring increased collateral from its members/counterparties and creating a situation where the ability to extend unsecured credit in an RTO would be limited. Shell Energy states that MISO explains that the resulting payment obligation would change the profile of the RTO/counterparty in the eyes of its lenders.

MISO asserts and confirm that unsecured credit will not be affected nor will PJM's or PJM Settlement's credit be degraded.⁵²

24. Shell Energy argues that a divergence in regulation between the Commission and the CFTC would likely lead to confusion and potential regulatory inconsistency.⁵³ Shell Energy also argues that the filing creates a new type of public utility and asserts that the Commission should clarify the elements of PJM Settlement's structure that will be exempt from the FPA and PJM Settlement's liability for refunds and associated interest in a section 206 complaint concerning sales by PJM Settlement or a legal defect in the PJM tariff structure.⁵⁴ Shell Energy also requests that the Commission clarify that resettlements could occur with PJM Settlement effectively acting as billing agent.

25. Shell Energy requests clarification as to how PJM stakeholders will interact with PJM Settlement.⁵⁵ Shell Energy asserts that, to the degree that PJM Settlement has any distinct identity separate from PJM, there will be a gap in the stakeholder process, and PJM needs to describe how any such gap will be filled. Shell Energy also requests clarification from PJM on the status of physical participants upon default.⁵⁶

26. Shell Energy also states that while PJM Settlement will be formed as a not-for-profit entity, it could potentially raise tax nexus issues or utility gross receipt tax issues.⁵⁷ Shell Energy requests that the Commission condition approval of the proposal upon a showing by PJM that PJM members will not be subject to increased costs due to tax liability resulting from the establishment of PJM Settlement and its role as a counterparty.

27. Shell Energy states that PJM Settlement could be an expensive undertaking, requiring additional staff, computer systems, credit support, and billing. Shell Energy contends that these costs may exceed any reasonable benefit they provide. Therefore,

⁵² Shell Energy Protest at 9.

⁵³ *Id.*

⁵⁴ *Id.* at 11.

⁵⁵ *Id.* at 12.

⁵⁶ Shell Energy states that it understands that if there is a default to PJM Settlement, PJM Settlement will continue to provide service to the defaulting physical participant until PJM instructs otherwise with any losses socialized to PJM members.

⁵⁷ Shell Energy Protest at 13.

Shell Energy argues that the Commission should require an estimate of the cost and rates of supporting this new structure and PJM Settlement. In addition, Shell Energy requests that the Commission require PJM to explore outsourcing aspects of PJM Settlement's operations to the degree they could be more cost effectively provided.⁵⁸

28. Mirant Parties support PJM's proposal on the condition that PJM Settlement be required to maintain a credit rating with Moody's and/or Standard & Poor's.⁵⁹ Mirant Parties argue that, with PJM Settlement clearly defined as the counterparty to future Mirant sales, creditors, and counterparties will likely look first and perhaps solely to the credit rating of PJM Settlement in valuing those sales. Mirant Parties also argue that clarity with respect to the rating of PJM Settlement will assist PJM members in establishing an appropriate credit reserve and make financing capital improvements and new capacity resources easier.

29. Dominion requests that the Commission defer action until after ruling on the Credit Reform NOPR.⁶⁰

B. PJM's Answer

30. In its answer, PJM argues that the Commission should reject Shell Energy's and PSEG Companies' protests as vague and unsupported.⁶¹ PJM asserts that, contrary to protestors' contentions, PJM stakeholders have determined based on expert advice and years of deliberation that the risks of continuing the *status quo* are real and should be confronted.

31. PJM asserts that the proposal is just and reasonable, and that under section 205 of the FPA, the Commission only evaluates whether proposed tariff changes are just and reasonable, not whether other alternatives also might be acceptable.⁶²

32. PJM responds to protestors' argument that PJM is addressing an unproven problem by asserting that, while litigation regarding mutuality in a bankruptcy context

⁵⁸ *Id.* at 14.

⁵⁹ Mirant Parties Protest at 4.

⁶⁰ Dominion Protest at 4-6.

⁶¹ PJM Answer at 3.

⁶² *Id.* at 5.

may not have occurred often in the energy context, it occurs regularly in other contexts.⁶³ PJM responds to protestors' argument that the mutuality benefit of a counterparty proposal could be defeated by a court evaluating the substance of the transaction, not its form, by arguing that no legal support exists for this result and that experienced bankruptcy counsel have advised both PJM and the Commission that the current PJM structure is risky and the proposed counterparty structure would reduce that risk.

33. PJM responds to protestors' argument that PJM Settlement would not be able to extend unsecured credit and will require increased collateral by asserting that PJM has not been advised that there would be any requirement for PJM market participants to post additional collateral because of the new structure or for PJM Settlement to be capitalized to any greater extent than PJM is capitalized today.⁶⁴

34. PJM argues that the Commission should not condition its acceptance of the proposal on PJM obtaining a credit rating.⁶⁵ PJM states that it confirmed to its members during stakeholder discussions that it intends to obtain a credit rating for PJM Settlement. PJM asserts that the FPA does not give the Commission authority to require a public utility to maintain a credit rating from a particular rating agency and, in any case, there is no need to impose such a requirement because PJM Settlement will have exactly the same credit profile as PJM has today.

35. PJM asserts that Shell Energy and PSEG Companies do not provide any basis for concluding that PJM and PJM members would be subject to additional taxes due to the proposal.⁶⁶ PJM asserts that it has taken prudent steps to minimize any tax exposure, including by establishing PJM Settlement as a not-for-profit corporation.

36. PJM argues that, contrary to Shell Energy's contentions, the operation of PJM Settlement will not result in additional costs to market participants, as PJM Settlement will not retain its own employees, assets, or offices, and will instead conduct its business operations by way of a services contract with PJM.⁶⁷ PJM states that the cost recovery for PJM Settlement will be included in the existing rates and charges to market

⁶³ *Id.* at 9.

⁶⁴ *Id.* at 11-12.

⁶⁵ *Id.* at 12.

⁶⁶ *Id.* at 14.

⁶⁷ *Id.* at 15.

participants set forth in Schedule 9 of the PJM Tariff, and no changes are being made to Schedule 9's stated rates for PJM's administrative services.

37. PJM denies Shell Energy's assertion that isolation of PJM Settlement's functions may lead to CFTC jurisdiction.⁶⁸ PJM asserts that it is not the entity that would give rise to CFTC regulation, but rather its settlement and credit risk management functions.

38. PJM argues that, contrary to Shell Energy's assertions, PJM Settlement will not have a unique legal status and PJM is not seeking to exempt PJM Settlement from its status as a public utility.⁶⁹ PJM asserts that many public utilities operate without their own tariffs. PJM states that transmission owners that have transferred operational control over their facilities to an RTO or ISO do not have their own tariffs on file with the Commission, but operate under the RTO or ISO tariff and are nonetheless still public utilities. PJM states that PJM Settlement will operate in accordance with the PJM Tariff and therefore will not have independent section 205 rights. PJM responds to Shell Energy's concerns about resettlements by stating that any market resettlements required by Commission order in the future would require that PJM Settlement, as counterparty to the transactions, be responsible for the resettlements.

39. PJM states that, contrary to Shell Energy's contentions, the creation of PJM Settlement will not cause a gap in the PJM stakeholder process.⁷⁰ PJM states that the current stakeholder process will continue to address market rules, rate schedules, and tariffs. Therefore, PJM states that no changes are necessary to the current PJM stakeholder process to accommodate PJM Settlement.

40. PJM responds to Shell Energy's request for clarification on the status of physical market participants upon a default to PJM Settlement by stating that the filing does not propose any changes regarding physical participation in the PJM markets following a default and the issue is beyond the scope of this proceeding.⁷¹

41. PJM argues that the Commission cannot defer action on the filing beyond its proposed effective date of January 1, 2011.⁷² PJM states that the Commission must act

⁶⁸ *Id.* at 16.

⁶⁹ *Id.* at 18.

⁷⁰ *Id.* at 19.

⁷¹ *Id.* at 20.

⁷² *Id.* at 21.

on the filing within the timeframe prescribed by section 205 of the FPA and it may not simply “hold this docket in abeyance” pending the outcome of the Credit Reform NOPR.

C. Shell Energy’s Reply

42. In its reply to PJM’s answer, Shell Energy reiterates that PJM’s filing creates a new type of public utility without section 205 rights and asserts that case law cited by PJM for the proposition that PJM Settlement will not have unique legal status is distinguishable. Shell Energy argues that the Commission should require a compliance filing remedying this element of the filing and addressing other aspects of the filing as requested in its protest.⁷³

IV. Discussion

A. Procedural Matters

43. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure,⁷⁴ the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

44. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure⁷⁵ prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept PJM’s and Shell Energy’s answers because they have aided us in our decision-making.

B. Substantive Matters

1. Proposed Tariff Revisions

45. We find PJM’s proposal to establish PJM Settlement as the counterparty in PJM pool transactions to be just and reasonable.⁷⁶ The establishment of PJM Settlement as

⁷³ Shell Energy Reply at 3-5.

⁷⁴ 18 C.F.R. § 385.214 (2010).

⁷⁵ 18 C.F.R. § 385.213(a)(2) (2010).

⁷⁶ To be clear, we find the following functions to be performed by PJM Settlement for the PJM market to be just and reasonable: (1) performing billing and settlement functions; (2) issuing invoices to, and receiving payments from, market participants; (3) serving as the entity with which market participants establish credit and being a

(continued...)

counterparty addresses ambiguity regarding the identity of contracting parties in PJM pool transactions by clarifying that there is a single, specified counterparty to market participants. Thus, the proposal provides the clarity that PJM has identified as lacking in the current PJM governing documents and associated tariffs. Furthermore, the proposal represents a reasonable solution to address a potential mutuality risk, and received substantial support from stakeholders. We will therefore conditionally accept PJM's proposed tariff revisions subject to PJM submitting a compliance filing, as discussed below.

46. While protestors question the existence of the mutuality risk and whether the proposed solution solves the problem, PJM asserts that the proposal is necessary to address an identified risk and that it adequately addresses that risk. PJM's proposal is reasonable. Moreover, the Commission is only required to determine whether the proposal is just and reasonable, not whether the proposal is the only reasonable solution or whether it is more reasonable than alternative solutions.⁷⁷

47. Furthermore, we do not find protestors' arguments that there may be unintended consequences of PJM's proposal, such as increased stakeholder liability, increased tax liability, and increased likelihood of the CFTC asserting jurisdiction over PJM Settlement, to be persuasive as to the justness and reasonableness of PJM's proposal. With regard to protestors' argument that the establishment of PJM Settlement could be an expensive undertaking, we note that PJM is not proposing any changes to the stated rates for administrative charges and has stated that PJM Settlement will not retain any employees, assets, or offices, and that the costs that PJM Settlement will incur are costs that PJM already incurs today.

48. Mirant Parties argue that PJM Settlement should be required to maintain a credit rating with Moody's and/or Standard & Poor's. We agree with PJM's assertion that there is no provision in the FPA explicitly authorizing such a requirement regarding PJM's commercial decisions and in any case there is no need to impose it. PJM Settlement will have the same credit profile as PJM because ultimately it is the agreement of PJM

beneficiary under market participant guarantees and letters of credit; and (4) acting as a billing agent on behalf of PJM with respect to PJM fees and services to which PJM Settlement is not the counterparty. *See supra* P 9 and note 20.

⁷⁷ *Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,282, at P 31 & n.34 (2009) (citing *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 692 (1995); *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984); *Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,265, at P 21 (2009)).

members to mutualize any PJM losses among themselves when there are defaults, rather than PJM's actual assets and liabilities, which determines the creditworthiness of PJM today. Furthermore, PJM has committed to its stakeholders that it intends to obtain a credit rating for PJM Settlement once PJM Settlement is established.

49. Protestors request that the Commission defer action on the instant proposal until ruling on the Credit Reform NOPR. As stated by PJM, under section 205 of the FPA, the Commission cannot defer action on the filing beyond its proposed effective date of January 1, 2011. In order to ensure that it has the ability to set up its programming in time for the effective date, PJM has requested action on this filing by September 1, 2010.⁷⁸ Therefore, we find that it is appropriate to make a determination now. Should the final rule regarding credit reform require any changes to this proposal, PJM will need to make such changes.

50. While we find PJM's proposal to be just and reasonable, we agree with Shell Energy that PJM should provide additional information about the relationship between PJM and PJM Settlement. We therefore accept this filing subject to the condition that PJM file with the Commission: (1) the services agreement between PJM and PJM Settlement, and (2) copies of PJM Settlement's articles of incorporation and PJM Settlement's by-laws, or any comparable documents, within either 30 days of the date of this order or 15 days after execution of the document. Further, PJM is directed to explain the proposed financing and the capital structure of PJM Settlement, whether PJM will guaranty the financial commitments of PJM Settlement, and whether the proposal will trigger any filing requirements under sections 204⁷⁹ and 305⁸⁰ of the FPA.

⁷⁸ The Commission has discretion to determine how best to address the issues before it. *See, e.g., Mobil Oil Exploration v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how to handle related, yet discrete, issues in terms of procedures . . . [such as] where a different proceeding would generate more appropriate information and where the agency was addressing the question.") (citations omitted); *Tennessee Gas Pipeline Co v. FERC*, 972 F.2d 376, 381 (D.C. Cir. 1992) ("The agency is entitled to make reasonable decisions about when and in what type of proceeding it will deal with an actual problem"); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) ("[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload.").

⁷⁹ 18 U.S.C. § 824c (2006).

⁸⁰ 18 U.S.C. § 825d (2006).

2. Waiver Requests

a. Section 205 Filing Requirements

51. PJM seeks waiver for PJM Settlement of the section 205 requirement that every public utility must file rate schedules, arguing that the rates and charges for any transmission or sale for which PJM Settlement will be in the chain of title are already set forth in the PJM Tariff and Operating Agreement and therefore additional filing requirements for PJM Settlement would be duplicative.

52. We deny PJM's request for waiver of the section 205 filing requirements and require PJM to make a compliance filing with proposed tariff language setting forth the rates, terms, and conditions of PJM Settlement's jurisdictional sales. In this regard, PJM acknowledges that PJM Settlement will be a public utility under the FPA and subject to the Commission's jurisdiction,⁸¹ and section 205 of the FPA requires that all public utilities file with the Commission schedules showing all rates and charges for any transmission or wholesale sales subject to the jurisdiction of the Commission. Therefore, PJM Settlement must have a rate schedule on file with the Commission as it is a public utility that, as a seller to every buyer, will be selling energy, capacity and ancillary services. PJM must split out in the tariffs the rates, terms, and conditions of the services provided by each entity (PJM and PJM Settlement), including the break out of the administrative charge. PJM has options for establishing the rates, terms, and conditions of service for PJM Settlement. For example, PJM may request a separate corporate identification number for PJM Settlement and file the rates, terms, and conditions of service of PJM Settlement as a stand alone tariff. Alternatively, PJM may propose an individual rate schedule as an attachment to the PJM Tariff.⁸²

53. PJM argues that many public utilities operate without their own tariffs and cites *Atlantic City Electric Company v. FERC* for the proposition that nothing prevents a public utility from ceding its section 205 rights to other entities as PJM Settlement does here.⁸³ However, *Atlantic City* is distinguished from the instant case. In *Atlantic City*,

⁸¹ PJM Transmittal at 2.

⁸² Such a filing would be a shared tariff as described in Order No. 714. *Electronic Tariff Filings*, Order No. 714, 73 FR 57,515 (Oct. 3, 2008), FERC Stats. & Regs. ¶ 31,276, at P 65-73 (2008).

⁸³ PJM Answer at 18-19 (citing *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (*Atlantic City*) ("Of course, utilities may choose to voluntarily give up, by contract, some of their rate-filing freedom under section 205.")).

the issue was whether the Commission could require a public utility to cede its section 205 filing rights with respect to its tariff, not whether the utility would be exempt from the requirement to have a tariff on file. That case did not address the issue of whether a public utility could entirely avoid the requirement to file a tariff establishing the rates and terms and conditions of its service.

b. Annual Charge Requirements

54. PJM requests that the Commission clarify that PJM Settlement will not be subject to annual charges under section 382.201 of the Commission's regulations, or grant waiver of the reporting requirements and annual charges, since reports or annual charges submitted by PJM Settlement would be regarding the same transmission service for which PJM is already reporting and paying charges.

55. We grant PJM's request for waiver of the section 382.201 annual charge requirements. Section 382.201 assesses annual charges to "public utilities that provide transmission service." We interpret PJM's filing as continuing to preserve PJM's status as transmission provider, as section 1.46 of the PJM Tariff states: "The Transmission Provider shall be the Office of the Interconnection for all purposes..." and proposed section 1.27 of the Operating Agreement states the "Office of the Interconnection shall mean the LLC."⁸⁴ Therefore, we find that it is appropriate for PJM to continue to pay annual charges and that PJM Settlement need not pay annual charges since PJM, and not PJM Settlement, will be acting as the transmission provider.

c. Market-Based Rate Authorization Requirements

56. PJM seeks clarification that PJM Settlement will not be subject to the regulations and requirements regarding market-based rate authorization and wholesale sale of electric energy, capacity, and ancillary services at market-based rates. Alternatively, PJM seeks a waiver of these requirements. PJM states that PJM Settlement will not set market prices, and will not submit bids or offers with respect to electric energy, capacity, or ancillary services. PJM further asserts that PJM Settlement will simply be a facilitating counterparty to the bids and offers that clear the PJM administered markets and that PJM Settlement will have no discretion regarding which transactions clear the markets or the prices at which they clear pursuant to the PJM Tariff and Operating Agreement. PJM states that, while PJM Settlement will be a seller of electric energy, capacity, and ancillary services to facilitate, and clarify, the counterparty to transactions in the PJM centralized markets, it will not have any discretion to transact, or not transact, at prices of its choosing. Thus, PJM states that, while PJM Settlement will be in the chain of title, "it

⁸⁴ Operating Agreement, Seventh Revised Sheet No. 22.

will not be a ‘market seller’ with discretion to sell at market-based rates as defined in the Commission’s regulations.”

57. Based on PJM’s representations regarding PJM Settlement’s proposed activities as a counterparty in PJM pool transactions, we find that PJM Settlement does not need market-based rate authority under Part 35, Subpart H of our regulations. While PJM Settlement will be in the chain of title, we agree that PJM Settlement will simply be a facilitating counterparty to the bids and offers of other market participants with respect to pool transactions and will not be a market seller, and will not submit bids or make offers, and thus will not affect which transactions clear the markets or the prices at which they clear. While PJM Settlement does not need market-based rate authority given its proposed activities, as discussed above, PJM Settlement nevertheless must maintain a rate schedule on file with the Commission in order to comply with section 205. In addition, although PJM Settlement does not need to obtain market-based rate authority for its role as a counterparty, the administrative fee PJM Settlement charges, and any other fees that it charges for or in connection with its role as counterparty, will be cost-based rates subject to the Commission’s jurisdiction.

d. EQR Reporting Requirements

58. PJM requests a waiver for PJM Settlement of EQR reporting requirements regarding PJM’s transmission service contracts and sales to market participants that result from PJM Settlement’s presence in the chain of title. PJM states that, as the administrator of the PJM Tariff, it currently reports its transmission service contracts in its EQRs and that market participants report their sales where the RTO merely facilitates transactions of its members without taking title.

59. With respect to power sales contracts and transactions, PJM acknowledges Commission precedent in Order No. 2001 that we “did not distinguish between an RTO and a traditional public utility concerning the requirement to report power sale transaction data” and “[t]o the extent that an RTO makes wholesale power sales or transmission sales, these sales are subject to the same reporting requirements that would be applicable to any other public utility.”⁸⁵ PJM also refers to the Commission statement in Order No. 2001 that, “[t]o the extent that an RTO facilitates transactions by its members but title to the power never passes to or from the RTO, these transactions would be reported by the parties making the sales and not by the RTO itself.”⁸⁶ PJM argues that, while PJM

⁸⁵ *Revised Public Utility Filing Requirements*, Order No. 2001, 5 FERC Stats. & Regs., Regulations Preambles 2001-200 ¶ 31,127, at P 334.

⁸⁶ *Id.* at P 335.

Settlement will be in the chain of title, it will only be acting to facilitate market participant transactions. PJM states that PJM Settlement will not be a market participant, will not have pricing discretion, and will not affect what occurs in the markets. PJM adds that sales made into the PJM markets still would be reported by the parties making the sales, and the Commission will have the full ability to monitor this sales data. And, also, PJM states that requiring PJM Settlement to report the very same volumes and prices duplicates that others provide would not assist the Commission in identifying situations that indicate the possible exercise of market power, provide any greater price transparency, or further enhance confidence in the fairness of markets or provide a better means to detect and discourage discriminatory practices.

60. We will grant PJM's request for waiver of PJM Settlement's EQR reporting requirements. PJM will remain a party to the transmission contracts that are required to be reported in the EQR, and services under these contracts will be provided under PJM's tariff. PJM currently reports on its transmission service contracts and will continue to do so, and so there is no reason for PJM Settlement to file EQRs on such contracts.

61. Regarding PJM Settlement's obligation to report power sales in EQRs, sellers are already required to file EQRs and, in practice, this means that all market participants selling into an RTO, including into PJM, must already report their hourly sales into the market. Moreover, at this time, requiring EQR reporting by PJM Settlement, would, under these conditions, establish an asymmetric reporting obligation providing detailed sales information in just PJM but not the other operating RTO markets. Therefore, we will not, at this time, require PJM Settlement to provide this information in the form of EQRs.⁸⁷

The Commission orders:

(A) PJM's proposed tariff revisions are hereby conditionally accepted for filing effective, as requested, on January 1, 2011, as discussed in the body of this order.

(B) PJM is hereby directed to make a compliance filing within either 30 days of the date of this order or 15 days of the execution of the document, as discussed in the body of this order.

⁸⁷ The Commission is also currently reviewing EQR reporting requirements given the changes that have occurred in the electric market since the issuance of Order No. 2001 and the enhancement of its electric market transparency authority. *Electricity Market Transparency Provisions of Section 220 of the Federal Power Act*, Notice of Inquiry, FERC Stats. & Regs. ¶ 35,505 (2010).

(C) PJM's requested waivers are granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.