

139 FERC ¶ 61,030
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

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

PJM Interconnection, L.L.C.

Docket No. ER12-469-000

ORDER ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES

(Issued April 10, 2012)

1. In a filing, submitted November 22, 2011, PJM Interconnection, L.L.C. (PJM) requests that the Commission establish hearing and settlement judge procedures to address the effects of a billing error it has made, applicable to its allocation of Balancing Operating Reserve credits.¹ PJM requests that a final determination be made in this proceeding regarding its obligation to collect repayment charges from certain market participants and to issue refunds to others. PJM also requests waiver of certain provisions of PJM's open access transmission tariff (OATT) and/or the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (Operating Agreement), as may be necessary, to implement the Commission's determination. For the reasons discussed below, we grant PJM's request, in part, subject to certain threshold determinations addressing the scope of the requested hearing.

I. Background

A. Software Coding Errors

2. PJM states that the need for the billing adjustments giving rise to its filing is attributable to an error discovered by PJM, in August 2011, in the software code

¹ PJM states that it is submitting its filing under seal, pursuant to 18 C.F.R. § 388.112 (2011), along with a confidentiality agreement, given that the underlying billing matters relate to the market activities of individual market participants and is proprietary. PJM also submitted a public version of its filing.

associated with its Market Settlement Calculation System.² PJM states that the error at issue involved the Market Settlement Calculation System's failure to properly calculate Balancing Operating Reserve credits associated with Lost Opportunity Costs (Opportunity Cost).³

3. PJM states that, under its tariff, Opportunity Cost credits are owed to steam-electric, combustion turbine, and combined cycle generating units, when such units: (i) reduce their output at PJM's direction; or (ii) are scheduled to produce energy in the day-ahead energy market, but are not called upon by PJM in real time. PJM further states that Opportunity Cost credits are required to be calculated, pursuant to Section 3.2.3(f-1), by subtracting from the real-time locational marginal price (LMP) the higher of the relevant market participant's price-based offer, or the cost-based schedule, as provided by the generator, for the applicable generating unit.⁴ Section 3.2.3(f-1) provides in relevant part as follows:

A Market Seller's combustion turbine unit or combined cycle unit operating in simple cycle mode that is pool scheduled (or self-scheduled [as provided by this agreement]), [and] operated as requested [by PJM], shall be compensated for lost opportunity cost if either of the following conditions occur: (i) if the unit output is reduced at the direction of [PJM] and the real time LMP at the unit's bus is higher than the unit's offer corresponding to the level of output requested by [PJM] . . . then the Market Seller shall be credited in a manner consistent with that described above for a steam unit or combined cycle unit operating in combined cycle mode; (ii) if the unit is scheduled to produce energy in the day-ahead market, but the unit is not

² PJM notes that the market settlement calculation system error originated during the design of the software, in 2003, and was then carried forward into the design of the market settlement calculation system implemented in August 2008.

³ See PJM Operating Agreement, Schedule 1 at Section 3.2.3(f-1). When additional operating reserves are needed in real-time, to maintain system reliability, PJM may be required to cancel, or reduce, day-ahead committed units. Under these circumstances, Section 3.2.3(f-1) obligates PJM to make these resources whole through the payment of their lost opportunity costs.

⁴ PJM states that a price-based offer, under its rules, is a market-based offer to PJM, not limited by a unit's costs. PJM adds that a cost-based schedule, by contrast, refers to the means by which generation owners report the cost-based offers used by PJM when price-based offers are mitigated due to transmission constraints.

called on by PJM and does not operate in real time, then the Market Seller shall be credited hourly in a amount equal to [the higher of two, alternative equations].⁵

4. PJM states that, due to its software coding error, the relevant Opportunity Cost credits were not calculated as required by its tariff. PJM states that, instead, these credits were calculated based solely on the price-based offer in the settlement calculations, even in instances where the generation owner had submitted to PJM a cost-based schedule that was higher than its price-based offer for the relevant generating unit. PJM states that, due to this error, market participants received Opportunity Cost credits to which they were not entitled, when their price-based bids were less than their cost-based schedules, while load serving entities were assessed higher Opportunity Cost charges than they were obligated to pay.

5. PJM states that it is required, under its tariff, to issue adjusted billing statements to correct errors, of the sort at issue here, for a period of up to two years prior to discovery of the error.⁶ PJM states that, in carrying out this obligation, it issued a notice of error to

⁵ The two equations set forth in Section 3.2.3(f-1) are: (i) $URTLMP - UDALMP \times DAG$; and (ii) $URTLMP - UB \times DAG$, where “URTLMP” equals the real time at the unit’s bus; “UDALMP” equals the day-ahead LMP at the unit’s bus; “DAG” equals the day-ahead scheduled unit output for the hour; and “UB” equals “the offer price for the unit, as determined according to the schedule on which the unit was committed day-ahead, unless such schedule was a price-based schedule and the offer associated with that price schedule is less than the cost-based offer provided for the unit, in which case the offer for the unit will be determined from the cost-based schedule; and where $URTLMP - UDALMP$ and $URTLMP - UB$ shall not be negative.”

⁶ See PJM OATT at Section 10.4:

(a) No claim seeking an adjustment in the billing for any service, transaction, or charge under the Tariff may be asserted with respect to a month, if more than two years has elapsed since the first date upon which the billing for that month occurred. [PJM] may make no adjustment to billing with respect to a month for any service, transaction, or charge under this Tariff, if more than two years has elapsed since the first date upon which the billing for that month occurred, unless a claim seeking such adjustment had been received by the Transmission Provider prior thereto.

(b) For claims that arose prior to the effective date of [this provision], the claimant shall have two years from the effective date to assert such claims.

all affected generation owners, by letter dated November 2, 2011, indicating its intent to issue corrected bills for the period October 2009 through October 2011. PJM states that it also discussed this matter in a separate oral communication with Dominion Virginia Power (Dominion), a generator for whom the billing error was particularly significant. PJM states that a revised bill for Dominion, should be calculated beginning with transactions that cleared in August 2009, while revised bills as to all other affected market participants should be calculated beginning with transactions that cleared in October 2009.

6. PJM states that, of the 57 entities for which Opportunity Cost credits were incorrectly calculated, for the period 2009-11, challenges to PJM's revised bills have been raised by only two entities: Dominion and Ingenco Wholesale Power LLC (Ingenco). PJM adds that, in an earlier filing, it sought and was granted a temporary waiver of its obligations under the above-noted re-billing provision, as these obligations will apply to Dominion and Ingenco, subject to the submission of its billing adjustment requests, herein.⁷

B. Proposed Billing Adjustments

7. PJM states that it has identified \$99.7 million in over-payments for the relevant two-year refund period, including the required re-payment amounts it claims are owed by Dominion and Ingenco. PJM notes, however, that these obligations are disputed by both Dominion and Ingenco.

8. Accordingly, PJM requests that the Commission establish procedures in this docket to determine the proper billing adjustments PJM will be required to issue and collect. PJM further requests that, to the extent necessary, the Commission grant a waiver of certain provisions of its tariff to enable PJM to implement the Commission's decision. In particular, PJM notes that a waiver may be required were the Commission to determine that retroactive changes to a generation owner's cost based schedules can, or must, be considered, in this proceeding, in recalculating the Opportunity Cost credits and corresponding charges at issue.

⁷ See *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,184 (2011) (order granting request for limited tariff waiver).

II. Notice of Filing and Responsive Pleadings

9. Notice of PJM's filing was published in the *Federal Register*, 76 Fed. Reg. 63,291 (2011), with interventions and protests due on or before December 22, 2011.⁸ Notices of intervention and timely-filed motions to intervene were filed by the entities noted in the appendix to this order. Timely-filed protests and/or comments were submitted by Ingenco, Dominion, Old Dominion Electric Cooperative (ODEC), and Financial Marketers.⁹ On January 6, 2012, answers were submitted PJM, Dominion, and Ingenco. On January 23, 2012, Ingenco submitted an answer to an answer.

A. Protests and Comments

10. Ingenco argues that PJM's filing should be summarily dismissed, with no further action taken. Ingenco asserts that the assumption underlying PJM's filing, that Section 3.2.3(f-1) embodies an unambiguous "higher of" requirement, is inconsistent with PJM's prior reasonable interpretation of this provision, an interpretation on which Ingenco has detrimentally relied. Ingenco asserts that, over a six year period, PJM has consistently represented, both in its Manual 28, as well as in written and verbal communications, that if a generator honors PJM's dispatch instructions and does not run in real time, PJM will pay the generator a Opportunity Cost credit calculated by subtracting the price-based bid, not the higher of the price-based bid or the cost-based offer, from the real-time market-clearing price.

11. As a threshold matter, Ingenco argues that PJM's position overlooks and misrepresents an underlying ambiguity in Section 3.2.3(f-1). Specifically, Ingenco labels as vague the definition for the formulaic input for "UB" as the "*offer price* for the unit, determined according to the schedule on which the unit was committed day-ahead, *unless such schedule was a price-based schedule and the offer associated with that price schedule is less than the cost-based offer provided for the unit, in which case the offer for the unit will be determined from the cost-based schedule[.]*"¹⁰ Ingenco argues that the term "offer price," as used in this provision, is not defined in PJM's tariff. In addition, Ingenco asserts that the requirement that the unit offer be determined, under the so-called

⁸ See *PJM Interconnection, L.L.C.*, Docket No. ER12-469-000, Notice of Extension of Time (Dec. 5, 2011).

⁹ Financial Marketers consist of: City Power Marketing LLC, Coaltrain Energy LP, Energy Endeavors LP, Monterey MA LLC, SESCO Enterprises LLC, Twin Cities Power LLC, West Oaks Energy LLC, and XO Energy Cos.

¹⁰ Emphasis added. See *supra* P 6.

“unless clause,” on the basis of a “cost-based schedule” is unaccompanied by any guidelines under the tariff addressing the preparation of these cost schedules.¹¹

12. Ingenco argues that because Section 3.2.3(f-1) is vague on its face, it is appropriate to consider extrinsic evidence to resolve the ambiguity.¹² Ingenco asserts that, here, such evidence exists in the form of PJM’s course of performance, namely, its long-standing interpretation of Section 3.2.3(f-1). Ingenco further argues that while the term “offer price” is undefined by PJM’s tariff, this term has been generally understood to mean the relevant price from the price-based schedule, not the cost-based schedule.

13. Ingenco argues that this interpretation of Section 3.2.3(f-1) is also justified as a matter of simple economics. Ingenco notes that a price-based bid approach makes sense because, in a competitive energy market, a generator that lacks market power has a strong incentive to bid its marginal cost, such that a price offer is a reasonable proxy for the true marginal cost of the unit.¹³

14. Ingenco further argues that its interpretation of Section 3.2.3(f-1) is consistent with the practices followed by three other regional transmission providers: the Midwest Independent System Operator, Inc., the California Independent System Operator and ISO New England, Inc. Ingenco adds that, as a matter of contract interpretation, its reading of Section 3.2.3(f)(1) is supported by reference to the PJM Operating Agreement, as a whole, which is silent on the issue of how a “higher of” approach, as proposed now by PJM, would be implemented in practice.

¹¹ Ingenco argues that, to avoid future confusion, PJM should eliminate the “unless clause” in Section 3.2.3(f-1), and clarify that “offer price” in the definition of “UB” means the price offer submitted by a generator in the day-ahead market.

¹² See Ingenco Protest at 22, citing *Nicole Gas Production, Ltd.*, 105 FERC ¶ 61,371, at P 10 (2003) (“when presented with a dispute concerning the interpretation of a tariff or contract, the Commission looks first to the tariff or contract itself, and only if it cannot discern the meaning of the contract or tariff from the language of the contract or tariff, will it look to extrinsic evidence.”).

¹³ Ingenco adds that PJM uses this same approach in an analogous setting, i.e., under Schedule 1, Section 3.2.3A, which provides that a load serving entity that does not meet its synchronized reserve obligation by using its own generation, or by purchasing it under contract with another party, can buy it in the synchronized reserve market at the synchronized reserve market clearing price.

15. Ingenco argues, in the alternative, that even if Section 3.2.3(f-1) supports PJM's asserted reading of this provision, ordering retroactive refunds would be arbitrary and capricious and unduly discriminatory, given that the generation owner cost schedules on which PJM would rely have likely not been prepared on a uniform, consistent basis and may not be accurate, or appropriate, for Opportunity Cost credit purposes, because they were prepared for only market mitigation purposes. Ingenco notes that, by contrast to the bid caps required for market mitigation purposes, the purpose of cost-based offers in the Opportunity Cost credit calculation should be, in theory, to enable the Opportunity Cost credit calculation to reflect the cost of a generator's true lost opportunity in foregoing the margins that could be earned through operations. Ingenco argues that, as such, PJM's cost guidelines should allow generators to include not only positive marginal costs of operation but also allow the inclusion of certain offsets to marginal costs, including tax credits.

16. Ingenco adds that nothing in PJM's tariff compels retroactive rebilling. Ingenco argues, moreover, that the Commission has discretion to deny refunds and to fashion an appropriate remedy.¹⁴ Ingenco further argues that forcing it to pay retroactive refunds would be unfair, given its detrimental reliance on PJM's prior-communicated policy and given the Commission's policy against unwinding market transactions.¹⁵ For all these reasons, Ingenco requests that PJM's filing be summarily dismissed. In the alternative, Ingenco requests that the Commission set for hearing and settlement judge procedures, the equitable amount of any retroactive adjustments that should be made in this case, based on Ingenco's right to submit revised, restated cost schedules addressing all of its relevant lost opportunity costs.

17. Dominion agrees with Ingenco that PJM's course of dealing in calculating its Opportunity Cost credits followed Manual 28, not Section 3.2.3(f-1). Dominion also agrees with PJM, however, that the Opportunity Cost credits at issue in this case should be recalculated, pursuant to the Section 3.2.3(f-1) "higher of" requirement, provided that generation owners, such as Dominion, be given the opportunity to submit revised cost schedules to provide the basis for these recalculations.

¹⁴ Ingenco Protest at 30, citing *Towns of Concord v. FERC*, 955 F.2d 67 (D.C. Cir. 1992).

¹⁵ *Id.* at 33, citing *Midwest Independent Transmission System Operator, Inc.*, 117 FERC ¶ 61,113, at P 94 (2006); *N.Y. State Elect & Gas Corp.*, 133 FERC ¶ 61,094, at P 63 (2010).

18. Dominion asserts that this allowance is justified and required under principles of equity. Specifically, Dominion asserts that revised cost schedules must be considered because Dominion's prior cost schedules, as provided to PJM, were unrepresentative of its lost opportunity costs, given that they were based on oil prices for 30 dual-fuel units that can use either gas or oil as a fuel, and were provided and relied upon based on considerations unrelated to the Opportunity Cost credits.¹⁶ Dominion asserts that it believed this practice was reasonable and appropriate based on PJM Manual 28, PJM's representations, and PJM's actual settlement practices. Dominion adds that had PJM followed the requirements of Section 3.2.2(f-1), rather than Manual 28, in calculating its Opportunity Cost credits, Dominion would have changed its practices in response. Specifically, Dominion asserts that it would have submitted cost-based offers for its dual fuel units, based on gas instead of oil, when gas reflected its actual costs. Dominion argues that if revised cost data is not permitted to reflect these considerations, Dominion will be required to pay excessive refunds, while load serving entities will be permitted to reap an unjustified windfall.

19. Dominion also asserts that hearing and settlement judge procedures are unnecessary, given that PJM already has in place a procedure that may be utilized. Dominion notes that Manual 15 establishes procedures for calculating the costs of products, or services, provided to PJM at a cost-based rate for generators.

20. Dominion also argues that the Commission should reject PJM's proposal to establish a rebilling period for Dominion dating back from August 2011 (the date on which PJM discovered its software coding error and called Dominion), as opposed to the rebilling period PJM proposes to apply to all other affected generation owners, dating back from October 2011 (the date reflecting PJM's written notice to all affected generation owners). Dominion notes that PJM's position is based on its claim that under its two-year billing adjustment limitation period provision, under Section 10.4, PJM is required to issue adjusted billing statements to correct errors for a period of up to two years "prior to the discovery of the error."¹⁷ Dominion argues, however, that there is no

¹⁶ Dominion explains that for many of its dual-fueled units, the oil stored in tanks at the unit site is the only fuel with certainty of supply at all times, while gas supplies are conditional, based on the seasonal and daily availability of non-firm transmission service and daily procurement decisions. Dominion argues that without the Opportunity Cost credit implications to consider, it was administratively more convenient to leave in place the cost-based offer on the oil price rather than switching it from oil to gas and then back, as conditions changed.

¹⁷ Dominion Protest at 18, citing PJM Filing at 3.

language in PJM's tariff supporting PJM's position. Instead, Dominion argues that the two-year adjustment period should run from the date on which a claim has been asserted. Dominion notes, in this regard, that when it spoke with PJM, in August 2011, PJM had not calculated the size of its asserted billing error or the time frame for which it would seek to recalculate its Opportunity Cost credits.

21. ODEC generally supports PJM's filing, but argues that the recalculations at issue should be made with respect to all affected generation owners, not only for Ingenco and Dominion, and should include consideration of how any refunded Opportunity Cost credits will be reallocated.

22. Financial Marketers urge the Commission to ensure that the refund proceeds generated by recalculated Opportunity Cost credits are allocated to all market participants in a fair and equitable manner and that any affected generation owner that was overpaid, initially, not be permitted, either directly or through its affiliate, to collect a refund for over-charges. Financial Marketers also request that all refunds paid include carrying charges. With respect to Ingenco and Dominion, in particular, Financial Marketers argue that the recalculations required be based on the cost-based schedules previously provided by these entities. Financial Marketers assert that, under FPA section 205, any changes that a generation owner might seek to its cost-based schedules are subject to the filed rate doctrine, may be made effective on a prospective basis only, and thus may not be applied to the recalculated Opportunity Cost credits at issue here.¹⁸ Financial Marketers also request clarification regarding how the over-payments PJM will recover will be refunded and to whom these refunds will be paid. Finally, Financial Marketers argue that PJM should be required to address the processes, or procedures, that will be needed to ensure that the errors underlying this case do not recur and/or are minimized to the extent possible.

B. PJM's Answer

23. In response to Ingenco's argument, regarding ambiguity, PJM argues that the terms of its tariff are controlling, regardless of PJM's oral or written representations, or the provisions found in its manuals. PJM also argues that the tariff provisions at issue are clear and unambiguous. PJM adds that, under the terms of these provisions, no reference is made to PJM manuals. PJM acknowledges, however, that if its manuals and prior representations were reasonably relied upon, as intervenors claim, an appropriate

¹⁸ Financial Marketers Protest at 9, *citing Towns of Concord v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992).

equitable consideration for this reliance interest should be accorded in fashioning an appropriate remedy.

24. PJM also responds to Dominion's argument regarding the limitation period applicable to a billing adjustment. PJM argues that the information it conveyed to Dominion, in August 2011, represented a "claim" for purposes of calculating the limitation period. PJM also responds to Dominion's argument that hearing and settlement judge procedures are not required in make the billing adjustments required in this case. PJM notes that while it has no objection to applying the principles of Manual 15 to guide resolution of the issues presented by its filing, Manual 15 includes no provisions or procedures authorizing PJM to accept revised, retroactive cost schedule of the sort intervenors are proposing to submit.

25. Finally, PJM responds to the arguments made by ODEC and Financial Marketers that the scope of the hearing established in this case should include consideration of how any refunded Opportunity Cost credits will be reallocated. PJM argues that while proper re-billings will be required, it is unnecessary to expand the scope of the proceeding it has requested. PJM adds that it intends to re-calculate all Opportunity Cost charges pursuant to the same methodology it has used previously, as required by its tariff.¹⁹

C. Intervenors' Answers

26. Dominion, in its answer, responds to the filed rate doctrine argument raised by Financial Marketers in their protest. Dominion argues that a cost-based schedule is not a Commission-filed rate, but rather is submitted directly to PJM.²⁰

27. Ingenco, in its answer, renews its argument that Section 3.2.3(f-1) is ambiguous. Ingenco argues that while PJM, in its answer, makes the claim that this provision is express in its terms, PJM, in fact, cites to another provision that is not at issue, i.e., Section 3.2.3(f), a provision that does not apply to Ingenco's generating units. Ingenco adds, however, that reference to Section 3.2.3(f) is nonetheless instructive, given that this provision's uses the term "unit offer," in place of the more confusing and self-contradictory term, "offer price," in Section 3.2.3(f-1), when defining UB. Ingenco further argues that PJM's answer is silent on the point that neither Section 3.2.3(f-1), nor any other provision of PJM's tariff, addresses how cost schedules should be prepared for

¹⁹ See PJM Answer at 11, *citing* PJM OATT, Attachment K-Appendix at Section 3.2.3(h).

²⁰ See Dominion Answer at 3, *citing* PJM Operating Agreement, Schedule 1, Section 1.10.1A(d).

purposes of calculating Opportunity Cost credit. Ingenco submits that, in analogous circumstances, the Commission has concluded that the underlying tariff language is ambiguous.²¹

III. Procedural Matters

28. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest, or an answer to an answer, unless otherwise ordered by the decisional authority. We will accept the answers to protests and answer to answers submitted by PJM, Dominion, and Ingenco because they have provided information that assisted us in our decision making process.

IV. Discussion

29. As discussed below, we find that under PJM's tariff PJM is required to bill based on the higher-of requirement and that a billing adjustment is required. We will establish hearing and settlement judge procedures, however, to determine the proper billing adjustments to be applied to individual companies. We first discuss, below, several preliminary determinations that will not be subject to the hearing and settlement judge procedures.

A. Preliminary Determinations

1. The "Higher of" Requirement

30. We agree with PJM that the proper interpretation of its tariff is that Opportunity Cost credits are required to be calculated by subtracting from the real-time LMP the higher of the relevant market participant's price-based offer, or the cost-based schedule, as provided by the generator for the applicable generating unit. We note that using the

²¹ See Ingenco Answer at 7, citing *New York Independent System Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216, at P 31 (2007) (finding that the tariff at issue was ambiguous because it was essentially silent on the issue of what type of information must be submitted by new generation resources in order to qualify as installed capacity suppliers).

higher of the bid or the cost based rate results in a lower opportunity cost payment. In those cases in which the offer price is used,²² PJM's tariff provides that the offer price:

equals the offer price for the unit, determined according to the schedule on which the unit was committed day-ahead, unless such schedule was a price-based schedule and the offer associated with that price schedule is less than the cost-based offer provided for the unit, in which case the offer for the unit will be determined from the cost-based schedule.[²³]

31. We interpret this provision to mean that, when the generator has submitted a cost-based offer that is higher than the price-based schedule, PJM will use the cost-based offer to determine the credit. This means that when a unit has submitted a price-based schedule that is lower than its actual marginal costs, the credit will be based on its actual marginal costs, thereby reducing the amount of the credit.²⁴

32. Ingenco argues that the provision should not be interpreted in this way, asserting that Section 3.2.3(f-1) is ambiguous, as a whole, given that it fails to define the term "offer price" and fails to clarify how a "cost-based schedule" is to be prepared. Ingenco argues that course of dealing must be considered, to resolve these ambiguities, and that the broader clause in which these terms appear, as quoted above, i.e., the "higher of" requirement, should simply be eliminated from Section 3.2.3(f-1), going forward, to avoid confusion. With respect to course of dealing, Ingenco argues that Section 3.2.3(f-1) must be interpreted consistent with PJM's oral and written representations, and its manuals, all of which support a finding here, as a matter of law, that the Opportunity Cost credits at issue were calculated correctly and thus need not be recalculated.

33. However, we disagree with Ingenco's interpretation of the tariff provision. While several terms in this specific provision may not have stated definitions, the provision nevertheless indicates that the cost-based offer for the unit should be used when it is higher than the priced-based schedule. In this regard, each unit is required to have a cost-

²² This occurs when the unit's offer price is less than the day-ahead LMP.

²³ PJM Operating Agreement at Schedule 1, Section 3.2 - Market Buyers, 9.0.0.

²⁴ Suppose the LMP is \$20/MW and a unit submits a priced-based schedule at \$10/MW, but its cost-based determination of marginal cost is \$15/MW. If that unit had actually operated in real-time, its profit would be \$5 rather than the \$10 if its priced-based schedule were used. PJM therefore limits the unit's opportunity cost to the \$5/MW.

based schedule on file with PJM, and we think that interpreting the provision as referring to this requirement, as PJM does, is a reasonable interpretation of the provision. To interpret the provision as Ingenco does would read out of the provision the term “cost-based offer.” We do not agree that any claimed ambiguity in the provision should be read to nullify the broader import of the clause itself, i.e, the use of a cost-based offer when it is higher than the price-based schedule. A tariff should be interpreted to give all of its provisions meaning.²⁵ While the arguments made by Ingenco with respect to course of performance do not justify eliminating the use of a cost-based” offer in interpreting the tariff provision, the judge in the hearing ordered below may consider whether PJM’s prior conduct and manuals created a sufficient reliance interest that companies should be permitted an opportunity to provide restated cost offers.

2. Generation Owners Subject to Re-Calculated Credits

34. ODEC argues that the recalculations required to be made in this proceeding should be made with respect to all affected generation owners, not only for Ingenco and Dominion. ODEC argues, in effect, that PJM should be obligated to address the billing adjustments that may be required for all 57 affected generation owners, including: (i) entities for whom PJM has not sought a Commission forum, herein; (ii) entities that have not challenged PJM’s adjustments, or filed a claim pursuant to Section 10.4; and/or (iii) entities that have not sought intervenor status in this case.

35. Since we are establishing a hearing, any party to the proceeding that believes its billing adjustment should be revised may participate in the hearing and make the arguments it feels may be appropriate with respect to its specific costs.

3. Claim-Limitation Period

36. PJM claims that, as to Dominion, the two-year claim limitation period under Section 10.4 should be deemed to run from the date that PJM first discovered its error and discussed this matter, over the phone, with Dominion, in August 2011. Dominion argues, to the contrary, that the Section 10.4 limitation period can only be triggered once a “claim” has been asserted, and that no such claim was asserted by PJM, when it first discussed this matter with Dominion. Dominion argues, instead, that PJM’s claim was not asserted until it provided written notice to all affected market participants concerning the Opportunity Cost crediting errors, on November 2, 2011, explaining PJM’s intent to re-bill the affected generation owners for the two-year period ending October 2011.

²⁵ See *High Island Offshore System, L.L.C.*, 138 FERC ¶ 61,114, at P 21 (2012) (an agreement must be interpreted as whole, giving meaning to all provisions, if possible).

37. We agree with Dominion that the claim limitation period, under Section 10.4 of the PJM OATT, runs from the date that PJM provided written notice of its claim, not from the date that PJM first discussed this matter with Dominion, informally, over the telephone.²⁶ Section 10.4, in this regard, authorizes PJM to issue billing adjustments based on a “claim seeking an adjustment.”²⁷ Given the rights and obligations that such a claim triggers, we interpret the term “claim,” under Section 10.4, to require reasonable specificity and notice of intent, as provided in the form of written notice.²⁸

4. Opportunity Cost Charges

38. ODEC and Financial Marketers request that this proceeding be expanded to include consideration of the specific allocations PJM may ultimately be required to make, following its recoupment of any Opportunity Cost credits from Dominion and Ingenco, i.e., the recalculation of Opportunity Cost charges as well as Opportunity Cost credits. Financial Marketers’ argue that, in considering these additional issues, its rights to carrying charges must be acknowledged. In addition, Financial Marketers argue that a repayment of Opportunity Cost charges should be denied to any entity who either directly, or through an affiliate, received an Opportunity Cost credit to which it was not entitled.

39. We deny ODEC’s and Financial Marketers’ requests to expand the scope of this proceeding. Issues relating to PJM’s calculation of its Opportunity Cost charges are beyond the scope of this proceeding. In calculating these charges, PJM is required follow its tariff. We will not otherwise pre-judge any such issues here, or unnecessarily expand the scope of this proceeding to address these matters.

²⁶ PJM’s written notice to all affected generation owners was issued November 2, 2011, following PJM’s August 2011 phone conversation with Dominion.

²⁷ *See supra* note 6.

²⁸ PJM’s Operating Agreement also contains a provision generally requiring that notices to its members be in writing. *See* PJM Operating Agreement at Section 18.14(a) (Notice): “[e]xcept as otherwise expressly provided herein, notices required under this Agreement shall be in writing and shall be sent to a Member by overnight courier, hand delivery, telecopier or other reliable electronic means to the representative on the Members Committee of such Member at the address for such Member previously provided by such Member to the Office of the Interconnection.”

5. Need for Hearing and Settlement Judge Procedures

40. Dominion argues that hearing and settlement judge procedures are unnecessary, given an alternative, informal procedure already available. However, we agree with PJM that, given the potentially significant costs involved in this case, and the disputed tariff administration issues presented, the Commission's hearing and settlement judge processes and continued oversight of this matter are appropriate.

41. We reject Financial Marketers' argument that, under the filed rate doctrine, PJM's recalculation of its Opportunity Cost credits cannot be based on revised cost schedules, but rather must be based on the cost schedules submitted to PJM at the time that PJM initially, albeit erroneously, calculated its Opportunity Cost credits. As Dominion notes in its answer, a cost-based schedule is not a Commission-filed rate giving rise to the need to determine a final just and reasonable rate, but rather is an informational input governed by the terms of PJM's tariff, as used by PJM for multiple purposes, including Opportunity Cost credit calculations and cost mitigation. Moreover, the Commission's authority is at its "zenith" in determining appropriate remedies for tariff violations.²⁹ Whether, and to what extent, revised cost schedules should be utilized in this case to recalculate PJM's Opportunity Cost credits is an issue of fact that should be addressed at the hearing or by a settlement.

6. Additional Issues

42. We deny, without prejudice, PJM's request that we grant waiver of PJM's tariff, as may be necessary, to implement any final determination ordered in this proceeding. PJM's request is unaccompanied by a recitation of any tariff provision to which its waiver request would apply and is not otherwise supported.

43. Finally, we deny Financial Marketers request that PJM be required to further address, in this proceeding, the processes or procedures necessary to ensure that the initial software coding errors giving rise to this case will not recur. PJM has addressed its software coding error and the unfolding circumstances giving rise to this proceeding in its

²⁹ See *New York Independent System Operator, Inc.*, 110 FERC ¶ 61,244, at P 64 (2005):

While the Commission's general policy is to provide refunds for a violation of the filed rate doctrine, we have found that refunds are not appropriate in certain circumstances. In determining whether to order refunds, the Commission must balance equity considerations and determine what is just and reasonable, and also determine whether an alternate remedy is more appropriate.

filing. We are not persuaded that PJM's existing obligations to manage its system prudently would be further aided, or altered, by a ruling here expanding the scope of this proceeding to address PJM's daily management of its system.

B. Hearing and Settlement Judge Procedures

44. Subject to the preliminary determinations made above, we find that material issues of disputed fact have been raised regarding all remaining matters raised by PJM's filing, including: (i) the specific billing adjustments PJM will be required to calculate and collect from Ingenco and Dominion; (ii) whether generators should be permitted to submit restated offers due to PJM's failure to apply its tariff correctly; (iii) whether generators reasonably relied upon PJM's course of conduct and manual and, if so, whether appropriate equitable consideration should be afforded in fashioning an appropriate remedy; and (iv) whether the cost-based offers can be restated with sufficient accuracy and if not, what other remedy should be adopted. We agree that these matters should be set for hearing and settlement judge procedures.

The Commission orders:

(A) PJM's petition is hereby granted, in part, and denied, in part, as discussed in the body of this order;

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held, as discussed in the body of this order, concerning: (i) the specific billing adjustments PJM will be required to calculate and collect from Ingenco and Dominion; (ii) whether generators should be permitted to submit restated offers due to PJM's failure to apply its tariff correctly; (iii) whether generators reasonably relied upon PJM's course of conduct and manual and, if so, whether appropriate equitable consideration should be afforded in fashioning an appropriate remedy; and (iv) whether the cost-based offers can be restated with sufficient accuracy and if not, what other remedy should be adopted. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 15 days of the date of this order. Such settlement judge shall have all the powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they

must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(D) Within 30 days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 15 days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Intervenors

American Electric Power Service Corp.
American Municipal Power, Inc.
City Power Marketing LLC,
Coaltrain Energy LP,
Energy Endeavors LP,
Monterey MA LLC.,
SESCO Enterprises LLC,
Twin Cities Power LLC,
West Oaks Energy LLC, and
XO Energy Companies.
Consolidated Edison Energy, Inc. and
Consolidated Edison Solutions, Inc.
Dominion Resources Services, Inc.
Exelon Corporation
FirstEnergy Companies
GDF Suez Energy North America, Inc.
Hess Corporation
Ingenco Wholesale Power, L.L.C.
Monitoring Analytics, LLC
Old Dominion Electric Cooperative
PJM Industrial Customer Coalition
Retail Energy Supply Association