

139 FERC ¶ 61,183
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.

Docket No. EL12-45-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued June 7, 2012)

1. On March 12, 2012, PJM Interconnection, L.L.C. (PJM) filed a petition for declaratory order asking the Commission to provide its interpretation on two aspects of its tariff, relating to (1) whether, under its Open Access Transmission Tariff (Tariff), PJM has responsibility to oversee worker safety in maintenance operations performed by employees of a Transmission Owner; and (2) whether the limitation of liability clause in section 10.2 of its Tariff precludes a negligence tort claim against PJM by an injured utility worker. In this order, the Commission provides guidance on these two issues.

I. Background

2. On September 30, 2008, Marlin Yorty (Mr. Yorty), a journeyman electrician employed by PPL Electric Utilities Corp. (PPL), was working at the Juniata substation in Pennsylvania to replace a wave trap on the Juniata-Conemaugh 500kV transmission line.¹ The line is owned by PPL and other PJM Transmission Owners. During this maintenance work, Mr. Yorty suffered severe electrical burns, which resulted in the amputation of his right hand and three of the fingers on his left hand.

3. Mr. Yorty filed suit in Pennsylvania state court, naming PPL, PJM and twenty-two other defendants, including the owners and operators of the Conemaugh generating plant, and the owners and operators of the Conemaugh switching station. The claims against PPL were settled through worker's compensation, since PPL was Mr. Yorty's employer. Mr. Yorty voluntarily dismissed the Conemaugh power plant owners and the Conemaugh

¹ A wave trap is a device that enables communication between component parts of transmission facilities. PJM Petition at 6.

switching station owners from the lawsuit without specifying the reason for the dismissal. Only PJM remains as a defendant in the state court suit. Mr. Yorty asserts that PJM's negligence in the performance of its duties associated with the work on the Juniata-Conemaugh transmission line resulted in his injuries. PJM filed a motion for summary judgment, which the court denied in a one-page order on March 5, 2012. A jury trial is currently set to begin on June 11, 2012.

II. PJM's Petition

4. PJM filed a petition for declaratory order, asking the Commission to interpret its Tariff on two issues: (1) whether, under its Tariff, PJM has responsibility to oversee worker safety in maintenance operations performed by employees of a Transmission Owner; and (2) whether the limitation of liability clause in section 10.2 of its Tariff precludes a negligence tort claim against PJM by an injured utility worker.² PJM argues that its only role in the work on the Juniata-Conemaugh line during which Mr. Yorty's injuries occurred relates to its RTO responsibilities and functions. PJM asserts that, as part of its RTO obligations, it notified PPL of a potential reliability problem on the Juniata-Conemaugh line in June 2006. PPL then identified the cause of the potential reliability problem as wavetraps at the Juniata substation and made plans to replace those wavetraps. PPL subsequently asked PJM to approve PPL's schedule to take the Juniata-Conemaugh line out of service, and PJM, as the RTO, studied whether the timing of PPL's request would impact grid reliability. PJM completed its studies on the morning of September 30, 2008, and granted permission to PPL to take the line out of service.

5. PJM asserts that PPL prepared PPL Permit 241, which instructed its workers to take certain steps at the direction of the PPL dispatchers in Allentown, PA. This included taking the Juniata-Conemaugh line out of service and de-energizing the equipment on which they would be working. PJM also asserts that FirstEnergy, which operates the Conemaugh switching station, generated FirstEnergy Switching Order Control No. 93011B, which instructed the work crew to take the Juniata-Conemaugh line out of service and de-energize it. PJM notes that it played no part in either of these work orders.

6. PJM states that: "[c]ontrary to OSHA regulations and PPL's own safety procedures, the PPL work crew failed to place the appropriate temporary safety grounds around the wavetraps in order to protect against the hazards of induced current from other lines in the Juniata Substation."³ PJM asserts that three hours later, "power on [the Juniata-Conemaugh] line that had been induced from a parallel high voltage line (PPL's

² PJM Petition at 1.

³ PJM Petition at 8-9.

Juniata-Keystone line) resulted in serious injury to Mr. Yorty.”⁴ PJM states that PPL investigated the injury, finding that an induced current from the Juniata-Keystone line to the Juniata-Conemaugh line caused Mr. Yorty’s injury. The incident report cited a violation of a PPL safety rule that requires workers working on a de-energized line within 100 feet of an energized line to properly ground that line.

A. Operational Authority and Worker Safety

7. PJM asserts that, although it has operational authority over the transmission grid in its region, it does not have direct, physical control, and its Tariff makes clear that the Transmission Owner is responsible for worker safety. First, it states that the PJM Transmission Owners Agreement (TOA) makes clear that PJM does not directly control the transmission grid. Rather, PJM asserts, it provides operating instructions to Transmission Owners that both physically operate the grid and have the right to “take or decline to take any action(s) that it deems necessary to prevent injury to persons or loss of human life or prevent damage to property.”⁵

8. PJM further argues that the terms “functional control” and “operational authority” are terms of art that the Commission has invested with specific meaning in the regional transmission organization (RTO) context. PJM asserts that this meaning cannot be separated from the Tariff and other documents that set forth PJM’s responsibilities. PJM points to Order No. 2000 as defining operational authority: “[o]perational authority refers to the authority to control transmission facilities, either directly or through contractual agreements with the entities that do have direct control.”⁶ Functional control, PJM argues, means that the RTO will not perform the physical operations associated with transmission control.⁷

⁴ *Id.* at 9.

⁵ *Id.* at 12 (citing PJM TOA at §§ 4.1.2, 4.7, and 5.1).

⁶ PJM Petition at 21 (citing *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regulations Preambles 1996-2000 ¶ 31,089, at 31,087 n.377 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. Regulations Preambles 1996-2000 ¶ 31,092 (2000), *petitions for review dismissed sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)).

⁷ PJM Petition at 21 (citing *Midwest Indep. Transmission Sys. Oper., Inc.*, 84 FERC ¶ 61,231, at 62,160 (1998) (defining functional control as meaning that ISO employees will not perform physical operations associated with transmission control)).

9. Second, regarding worker safety, PJM cites to several sections in the PJM Manuals that, it asserts, show Transmission Owners, not PJM, are responsible for worker safety. First, PJM states, PJM Manual 3 obliges Transmission Owners to “develop, document and maintain switching and blocking procedures consistent with OSHA 29 CFR Part 1910.269.”⁸ PJM asserts this language is found in the very section governing worker safety. It also asserts that pursuant to the PJM Manuals, Transmission Owners are responsible for maintenance and are specifically required to “be accountable for directing field forces in transmission system switching activities.”⁹

10. Third, PJM notes that it would be impractical for PJM to be responsible for worker safety, given the size of the PJM footprint and the lack of resources for PJM to oversee 27 Transmission Owners with more than 100,000 workers.

B. Limitation of Liability

11. PJM states the limited liability provision accepted by the Commission restricts its liability to cases of gross negligence or willful misconduct. It argues that its own Tariff, as well as the tariffs of SPP and MISO, contemplates that only the Commission has jurisdiction over the services provided pursuant to the RTO’s tariff. PJM also notes that the Commission has recognized that, absent an adequate limitation of liability provision, the potential damages from an ordinary negligence claim could push an RTO into bankruptcy.¹⁰ The PJM Tariff’s limitation of liability provision thus provides:

Liability: Neither the Transmission Provider [i.e., PJM], a Transmission Owner, nor a Generation Owner acting in good faith to implement or comply with the directives of the Transmission Provider shall be liable, whether based on contract, indemnification, warranty, tort, strict liability or otherwise, to any Transmission Customer, third party or other person for any damages whatsoever, including, without limitation, direct, incidental, consequential, punitive, special exemplary, or indirect damages arising or resulting from any act or omission in any way associated with service provided under this Tariff or any Service Agreement hereunder,

⁸ PJM Petition at 3 (citing 29 C.F.R. § 1910.269(a)(1)).

⁹ PJM Petition at 3 (citing PJM Manual 03: Transmission Operations at 13-14 (Rev. 31, Sept. 15, 2008)); *Id.* at 12-13.

¹⁰ PJM Petition at 14 (citing *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,264, at P 7 (2005)).

including, but not limited to, any act or omission that results in an interruption, deficiency or imperfection of service, except to the extent that the damages are direct damages that arise or result from the gross negligence or intentional misconduct of the Transmission Provider, the Transmission Owner, or the Generation Owner, as the case may be.¹¹

12. PJM argues that there is precedent to protect it from liability to a third party absent gross negligence. PJM reasons that for the Commission to allow otherwise would expose PJM to the potential of significant damages. PJM also notes that the Commission established limitation of liability provisions because RTOs, which are created and regulated by the Commission, would not otherwise have any such limitations of liability provisions in their tariffs, unlike traditional utilities, such as the Transmission Owners, which have limited liability provisions in their state-regulated tariffs. PJM further asserts that the actions it took were done in its role as a regional transmission planner and were associated with service under the PJM Tariff.

III. Notice of Filing, Interventions, Protest, Comments, and Answer

13. Notice of PJM's petition was published in the Federal Register, 77 Fed. Reg. 16,218 (Mar. 20, 2012), with interventions and protests due by April 11, 2012. Timely motions to intervene were filed by Exelon Corporation, Duke Energy Corporation, Maryland Public Service Commission, Jersey Central Power & Light Company, Rockland Electric Company, Edison Electric Institute, PSEG Companies, Duquesne Light Company, the Dayton Power and Light Company, Dominion Resources Services, Inc., Old Dominion Electric Cooperative, Monitoring Analytics, Inc. American Electric Power Service Corporation, Pepco Holdings, Inc., and American Municipal Power, Inc. Timely motions to intervene and comments were filed by American Public Power Association and National Rural Electric Cooperative Association (APPA/NRECA), ISO/RTO Council, Participating PJM Transmission Owners,¹² and PJM Power Providers

¹¹ PJM Tariff § 10.2.

¹² The Participating PJM Transmission Owners are: (i) American Electric Power Service Corporation on behalf of its affiliates, Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Wheeling Power Company, AEP Appalachian Transmission Company, AEP Indiana Michigan Transmission Company, AEP Kentucky Transmission Company, AEP Ohio Transmission Company, and AEP West Virginia Transmission Company; (ii) The Dayton Power and Light Company; (iii) Dominion Resources Services, Inc., on behalf of the following jurisdictional affiliates operating within PJM:

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Group (P3). Mr. Yorty filed a timely motion to intervene and protest. On April 26, 2012, PJM filed an answer to Mr. Yorty's protest.

A. Mr. Yorty's Protest

14. Mr. Yorty responds that the appropriate question is not whether PJM has responsibility under its Tariff for worker safety, but whether PJM assumed a duty of care to Mr. Yorty as a result of the totality of circumstances, including PJM's actions. Mr. Yorty argues that the state court, and not the Commission, should make this decision. Mr. Yorty asserts that the issue of whether PJM has operational authority is too narrow; rather, PJM's conduct in exercising functional control and operational authority give rise to the duty of care. Mr. Yorty asserts that PJM's Tariff cannot answer the question of whether PJM violated a duty of care to him.

15. Further, Mr. Yorty asserts that the limitation of liability provision should not apply to an individual who is neither a customer taking service under the Tariff, nor a third party injured by PJM's failure to serve a customer. Mr. Yorty asserts that PJM's Tariff does not govern PJM's relationship with public utility employees. Since Mr. Yorty is not a PJM Member, Transmission Owner, or Transmission Customer, he asserts the Tariff does not apply to him.

16. Specifically, Mr. Yorty asserts that section 10.2 does not apply to him because that section only applies to actions or inactions related to service provided under the PJM Tariff. He argues that section 10.2 is not intended to be a "shield against all actions based in state law."¹³ Mr. Yorty argues that he is not a PJM Transmission Owner, a PJM Member, Generation Owner, customer taking transmission service under the Tariff, or a

Dominion Energy Marketing, Inc., Elwood Energy, LLC, Fairless Energy, LLC, State Line Energy, LLC, Kincaid Generation, LLC and Virginia Electric and Power Company; (iv) Duquesne Light Company; (v) Exelon Corporation; (vi) Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Monongahela Power Company, The Potomac Edison Company, West Penn Power Company, American Transmission Systems, Incorporated, and Trans-Allegheny Interstate Line Company; (vii) Old Dominion Electric Cooperative; (viii) Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.; (ix) Pepco Holdings, Inc., Potomac Electric Power Company, Atlantic City Electric Company and Delmarva Power & Light Company; (x) Public Service Electric and Gas Company; (xi) Rockland Electric Company; and (xii) UGI Utilities, Inc. – Electric Division.

¹³ Yorty Protest at 12 (citing *Goens v. Southern Union Co.*, 2010 WL 2777391 at *6 (W. Mo. 2010)).

third party whose injury occurred due to a failure to provide service. Rather, he asserts that he was an employee of a Transmission Owner, performing work on a PJM-operated transmission line. He asserts he was injured due to PJM's negligent actions and oversight, without specifying what those actions and oversight were or should have been.

17. Further, Mr. Yorty argues, the determination of whether PJM owes a duty of care to him is not a matter of tariff interpretation. Rather, he asserts, the duty of care arises under common law, the interpretation of which is traditionally left to the courts. He argues that whether PJM violated a duty of care to him turns on: (1) what PJM did and did not do; (2) what PJM knew or reasonably should have known; and (3) whether his injuries were a reasonably foreseeable outcome of PJM's actions or inactions. Further, he argues that PJM cannot contract its way out of a duty of care to a third party. He asserts it is the party's actions which create a duty of care, rather than any assumption of responsibilities under a contract.

B. Other Comments

18. The Participating PJM Transmission Owners support PJM's position and comment on the limitation of liability issue. They argue that the public interest would be harmed if the Tariff provision is interpreted so that PJM assumes responsibilities beyond those in the Tariff. They assert that, as between the Transmission Owner and PJM, the Transmission Owner assumes liability for worker safety standards. Participating PJM Transmission Owners further assert, if the Commission does not determine that the limited liability provision limits PJM's liability in this and similar circumstances, PJM will need to increase its charges to members to cover increased costs. Participating PJM Transmission Owners argue the courts have long recognized that limitations of liability directly relate to regulated rates and have considered this direct relationship in upholding liability limitations.¹⁴ Participating PJM Transmission Owners point out the Supreme Court stated that the rate specified in a tariff may reflect the reduced costs a utility would face if it were protected by a limited liability provision. They argue this rationale should also apply to PJM, which is a non-profit entity passing through its costs to its members.

19. In addition, Participating PJM Transmission Owners assert a finding of liability beyond that allowed by the limited liability provision would violate the filed rate doctrine. They note the Supreme Court has held that the rate of a regulated entity "duly filed is the only lawful charge and that deviation from it is not permitted upon any

¹⁴ Participating PJM Transmission Owners Comments at 6 (citing *Sw. Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 417-18 (1959)).

pretext.”¹⁵ They add that the Texas Supreme Court, citing *AT&T*, held “the filed rate doctrine prohibits a customer from suing a utility in contract or tort over issues that a publicly filed tariff’s terms govern.”¹⁶ Thus, Participating PJM Transmission Owners contend that the Commission-approved rate in PJM’s Tariff, which necessarily includes the limited liability provision, defines the full scope of liability PJM faces in the exercise of its RTO functions.

20. The ISO/RTO Council also supports PJM’s position. It asserts that under PJM’s governing documents, PJM (and other RTOs) have the operational authority to direct a transmission owner to operate transmission facilities in accordance with regulations and reliability rules, but do not have direct, physical control of those facilities or the workers who maintain them. The ISO/RTO Council notes that in the context of the Midwest Independent Transmission System Operator (MISO), the Commission observed that an independent system operator’s (ISO) “functional control” means that “ISO employees will not perform the actual physical operations associated with transmission control.”¹⁷ It cites to Order No. 2000 as enumerating an ISO and RTO’s obligations in relation to maintenance as largely approval of maintenance and outage schedules if they meet reliability standards;¹⁸ and notes that several ISO and RTO documents accepted by the Commission explicitly state that the Transmission Owner remains responsible for the maintenance of their facilities and the health and safety of their workers.¹⁹

¹⁵ Participating PJM Transmission Owners Comments at 8 (citing *Amer. Tel. & Teleg. Co. v. Central Office Tel. Inc.*, 524 U.S. 214, 222 (1998) (*AT&T*)).

¹⁶ Participating PJM Transmission Owners Comments at 9 (citing *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 217 (Tex. 2002). The Texas Supreme Court held that “a tariff provision that limits liability for economic damages arising from a utility’s negligence is reasonable.” *Id.* at 217. The Court reasoned that “a regulatory agency’s ratemaking authority authorizes it to approve a tariff’s provision limiting liability, because a limitation on liability is an inherent part of the rate the utility charges for its services.”) *Id.*, referencing *W. Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921).

¹⁷ ISO/RTO Council Comments at 6 (citing *Midwest Indep. Trans. Sys. Op.*, 84 FERC at 62,160).

¹⁸ ISO/RTO Council Comments at 6 (citing Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,104-05).

¹⁹ ISO/RTO Council Comments at 6 (citing the Transmission Owners Agreements for CAISO, ISO-NE, MISO, and SPP. PJM also argues that its TOA assigns such

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21. Edison Electric Institute states that it supports PJM's position that its Tariff makes clear that it is not responsible for overseeing worker safety operations performed by employees of a Transmission Owner. Edison Electric Institute notes that only the Transmission Owner has the knowledge, personnel, records, equipment, processes, procedures and system access to perform maintenance. Edison Electric Institute also notes that it has long supported limited liability provisions such as the one contained in PJM's Tariff, because of the potential increased costs if such a provision were not to adequately limit an RTO's liability.

22. P3 supports PJM's petition, noting that PJM does not have physical control of transmission facilities, including physical operation and maintenance, which is in the control of the Transmission Owners. P3 states that, as an RTO, PJM participates in transmission system planning, including determining which projects are needed and the timing of such projects. It does not, however, participate in physical construction or engineering of new facilities or upgrades to existing facilities. P3 also notes that PJM is a non-profit entity funded by its members, and the costs of any additional liability insurance (or liability claims) could be enormous to PJM's members and consumers.

23. APPA/NRECA also support PJM's petition and comment that the provisions of Order No. 2000 direct RTOs to exercise higher-level directorial functions such as monitoring system conditions, switching transmission elements into and out of operation, monitoring and controlling reactive power flows and voltage levels, scheduling and operating reactive resources, and acting as the North American Electric Reliability Corporation (NERC) security coordinator. According to APPA/NRECA, these functions do not include day-to-day operational tasks such as supervision of Transmission Owner line crews.

C. PJM's Answer

24. On April 26th, PJM filed an answer, clarifying that it has not asked the Commission to make any determinations on state tort law or common law duties of care. PJM asserts, however, that a common law duty of care cannot override PJM's Tariff, and argues that its Tariff is not merely a contract but carries the force of federal law.²⁰ As such, PJM argues that the general principle that contractual obligations do not extinguish

responsibility to the Transmission Owners). PJM Petition at 23-24; *see also* APPA/NRECA Comments at 6.

²⁰ PJM Answer at 3 (citing *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992)).

common law duties to third parties does not apply to a claim governed by PJM's Commission-approved Tariff.

25. PJM further states that its Tariff is the exclusive source for defining its obligations with regard to RTO activities. It notes that it could be "subject to other non-[Tariff] legal regimes with respect to non-RTO activities,"²¹ and does not argue that section 10.2 applies to non-RTO activities. However, PJM emphasizes that it is shielded from liability under the ordinary (not gross) negligence standard for actions taken in the execution of its RTO obligations. PJM further notes that Section 10.2 clearly states the section applies to services provided under the Tariff "including but not limited to" service interruptions. As such, it asserts that all Tariff services are covered by this section, not only service interruptions. It also notes that section 10.2 applies to Transmission Customers "and other third parties" for issues related to service under the Tariff.

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²² the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority.²³ We will accept the answer filed by PJM, because it has provided information that has assisted us in our decision-making process.

B. Substantive Matters

27. As discussed below, the Commission grants PJM's request for declaratory order, providing guidance on the proper interpretation of PJM's Tariff on the two matters at issue in this proceeding.

1. Operational Authority and Worker Safety

28. PJM asks the Commission to determine whether, under its Open Access Transmission Tariff (Tariff), PJM has responsibility to oversee worker safety in maintenance operations performed by employees of a Transmission Owner. While the

²¹ PJM Answer at 4.

²² 18 C.F.R. § 385.214 (2011).

²³ 18 C.F.R. § 285.213(a)(2).

Commission in Order No. 2000 delineates some of the general responsibilities of an RTO, it leaves “to the discretion of the region to decide on the combination of direct and functional control that works best for its circumstances.”²⁴ Therefore, the Commission looks to the order authorizing PJM to become an RTO and accepting PJM’s Tariff, TOA and other governing documents to determine whether PJM has assumed direct, physical control over construction and maintenance of such transmission facilities.

29. The order authorizing PJM to become an RTO does not expressly discuss the manner in which PJM will control the transmission system. Rather, the order states that PJM will direct the operation of transmission assets while physical control over those assets remains with the Transmission Owners.²⁵ Moreover, the PJM TOA clarifies the interaction between PJM and its Transmission Owners in regards to physical operations and maintenance. Section 4.1.2 of the TOA provides:

Each Party shall transfer to PJM, pursuant to this Agreement and in accordance with the Operating Agreement, the responsibility to direct the operation of its Transmission Facilities provided that such transfer is not intended to require any change in the physical operations or control over Transmission Facilities.²⁶

30. Further, section 4.5 of the TOA provides that each Transmission Owners shall continue to direct the physical operation and maintenance of its transmission facilities and will “physically operate and maintain all Transmission facilities that it owns.”²⁷ Each Transmission Owner also retains the right, under the TOA, to “adopt and implement procedures it deems necessary to protect its electric facilities from physical damage or to prevent injury or damage to persons or property.”²⁸

²⁴ Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,091.

²⁵ *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,345, at P 28 (2002). *See also id.* P 29 n.25 (setting forth dates on which TOs will turn over operational control to PJM).

²⁶ PJM Consolidated Transmission Owners Agreement § 4.1.2.

²⁷ *Id.* § 4.5.

²⁸ *Id.* § 5.1. *See also id.* § 4.7 (stating that Transmission Owners shall follow PJM’s instructions during an emergency, but may take or decline to take any actions necessary to prevent injury to persons or loss of human life or prevent damage to property).

31. The Commission therefore finds that, under its Tariff and TOA, PJM lacks direct, physical control over the transmission grid, particularly during construction and maintenance, and that Transmission Owners physically operate the grid in response to PJM's directions. In the context of a transmission maintenance outage, like the one at issue here, PJM instead performs a planning and scheduling function to ensure compliance with reliability standards.²⁹ But once PJM has determined that a proposed schedule for maintenance is permissible to resolve a reliability problem, the responsibility for physically performing the maintenance, and ensuring safety, lies with the Transmission Owner.

32. The Commission further finds that, under its Tariff and TOA, PJM, as an RTO, is not responsible for ensuring that maintenance procedures are implemented safely by Transmission Owner employees working on transmission facilities owned by that Transmission Owner. As cited by PJM and the PJM Transmission Owners, PJM Manual 3 assigns responsibility for compliance with the relevant OSHA regulations to the Transmission Owner.³⁰ Further, as noted by PJM and several intervenors, we agree that PJM lacks the resources to supervise the work crews of all of its Transmission Owners across its entire multi-state footprint.

2. Limitation of Liability

33. PJM asks the Commission to interpret whether section 10.2 of its Tariff shields PJM from liability for tort claims in the absence of gross negligence, for service provided under its Tariff. This analysis requires two steps: first, we must consider whether section 10.2 applies to a third party such as a Transmission Owner employee, not just Transmission Customers as argued by Mr. Yorty; and second, we must consider whether section 10.2 covers only service interruptions or is intended to more broadly address actions that PJM may take in providing service under its Tariff.

34. In determining the scope of section 10.2, as it relates to third parties such as employees of Transmission Owners, we first look to the language of the Tariff. Section 10.2 is a broad limitation of liability that protects PJM from liability, other than due to gross negligence or intentional misconduct, "whether based on contract, indemnification, warranty, tort, strict liability or otherwise, to any *Transmission Customer, third party or other person* for any damages ... arising or resulting from any act or omission in any way associated with service under this Tariff." This provision therefore on its face would apply to a tort claim by a third party, such as Mr. Yorty, as long as the actions at issue

²⁹ See, e.g., *id.* § 4.8.5.

³⁰ PJM Manual 03: Transmission Operations at 13-14 (Rev. 31, Sept. 15, 2008).

were related to service under the PJM Tariff. As discussed above, PJM's actions in this case, consisting of identifying a reliability constraint and approving PPL's schedule for maintenance, are actions associated with service under its Tariff.

35. Section 10.2, as Mr. Yorty points out, includes an example of actions "associated with service provided under this Tariff," "*including, but not limited to*, any act or omission that results in an interruption, deficiency or imperfection of service."³¹ But we do not read the "including, but not limited to" list as limiting the scope of the protection from liability given both the language of the section and the breadth of the Tariff protection for tort liability for actions associated with service under the Tariff. Although the order approving section 10.2 does not discuss the scope of this section at great length, it does state that PJM would not be liable "to any Transmission Customer or third-party for damages arising out of ordinary negligence associated with services provided under the PJM Tariff."³² That order, we note, does not limit the section's applicability only to service interruptions.³³

36. This interpretation is consistent with the Commission's policy for granting RTOs limitation of liability. As we have previously noted, broad limitation of liability provisions for RTOs are warranted because RTOs "are solely regulated by the Commission for their provision of transmission services, so the Commission is the only

³¹ PJM Tariff § 10.2 (emphasis added).

³² *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,264 at P 9. While not determinative here, a view similar to Mr. Yorty's was expressed in a dissenting opinion by Commissioner Kelly in a case involving similar tariff language filed by the Midwest ISO, but the majority accepted the broad MISO tariff provision without requiring revisions to address the dissent. *See Midwest Indep. Transmission Sys. Oper. Corp.*, 110 FERC ¶ 61,164 (2005) (Kelly, Comm. dissenting). Commissioner Kelly incorporated this dissent by reference in her dissent on the order approving PJM's section 10.2. *See PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,264 (Kelly, Comm. dissenting).

³³ Mr. Yorty also asserts that a broad reading of section 10.2 would eviscerate section 10.3 of PJM's Tariff, which provides an indemnification mechanism by which PJM shall recover costs paid to third parties from Transmission Customers. Section 10.3, even with the interpretation provided here, however, is consistent with section 10.2, which allows for the recovery of "direct damages resulting from gross negligence or willful misconduct on the part of PJM and its Transmission and Generation Owners." *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,264 at P 9.

regulator with the ability to ensure that [RTOs] are protected from potentially excessive damage awards by adequate limitation of liability provisions.”³⁴

37. To the extent PJM’s conduct related to Mr. Yorty’s accident are within PJM’s Tariff responsibilities as a federally-regulated RTO, its liability is limited by section 10.2.³⁵

The Commission orders:

PJM’s petition for declaratory order is hereby granted, as discussed above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁴ *Midwest Indep. Transmission Sys. Oper. Inc.*, 110 FERC ¶ 61,164, at P 29 (2005). Such protection is also warranted because the RTO has no shareholders from which to recover costs, and therefore any damage awards will be recovered from the RTO’s Transmission Customers. *Id.* P 13

³⁵ If, as Mr. Yorty alleges, PJM has gone beyond its Tariff responsibilities, that is a different matter and the limitation of liability provision contained in section 10.2 would not apply.