

142 FERC ¶ 61,020  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.

Docket No. EL12-45-001

ORDER DENYING REHEARING

(Issued January 8, 2013)

1. In this order, the Commission denies the request for rehearing, or in the alternative, clarification, filed by Mr. Marlin Yorty (Mr. Yorty) regarding the June 7, 2012 order on PJM Interconnection, L.L.C.'s (PJM) request for a declaratory order regarding its responsibilities with respect to worker safety related to transmission owner upgrades.<sup>1</sup>

**I. Background**

2. On September 30, 2008, 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.<sup>2</sup> 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

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<sup>1</sup> *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,183 (2012) (June 7 Order).

<sup>2</sup> A wave trap is a device that enables communication between component parts of transmission facilities. *Id.* P 2 n.1.

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 was set to begin on June 11, 2012, but apparently has been postponed.

**A. PJM Petition, Protest and Comments**

4. On March 12, 2012, 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. PJM argued that its only role in the work on the Juniata-Conemaugh line, during which Mr. Yorty's injuries occurred, related to its RTO responsibilities and functions. PJM asserted 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 500kV transmission 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 asserted 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 asserted 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 noted 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.”<sup>3</sup> PJM asserts that, three hours later, “power on [the

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<sup>3</sup> June 7 Order, 139 FERC ¶ 61,183 at P 6 (citing PJM Petition at 8-9).

Juniata-Conemaugh] line that had been induced from a parallel high voltage line (PPL's Juniata-Keystone line) resulted in serious injury to Mr. Yorty.”<sup>4</sup> PJM states that PPL investigated the injury, and found 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.

7. PJM asserted 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, PJM stated that the PJM Transmission Owners Agreement (TOA) makes clear that PJM does not directly control the transmission grid. Rather, PJM asserted, 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.”<sup>5</sup> PJM further argued 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 asserted that this meaning cannot be separated from the Tariff and other documents that set forth PJM's responsibilities. PJM pointed 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.”<sup>6</sup> Functional control, PJM argued, means that the RTO will not perform the physical operations associated with transmission control. Second, regarding worker safety, PJM cited to several sections in the PJM Manuals that, it asserted, show Transmission Owners, not PJM, are responsible for worker safety. Third, PJM noted 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.

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<sup>4</sup> *Id.*

<sup>5</sup> June 7 Order, 139 FERC ¶ 61,183 at P 7 (citing PJM Petition at 12 (citing PJM TOA at §§ 4.1.2, 4.7 and 5.1)).

<sup>6</sup> *Id.* P 8 (citing 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))).

8. On the issue of limited liability, PJM stated the limited liability provision accepted by the Commission restricts its liability to cases of gross negligence or willful misconduct. It argued 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 noted 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. PJM also noted 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 asserted that the actions it took were done in its role as a regional transmission planner and were associated with service under the PJM Tariff.

**1. Mr. Yorty's Protest**

9. Mr. Yorty protested PJM's petition, asserting 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 argued that the state court, and not the Commission, should make this decision. Mr. Yorty asserted 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 asserted that PJM's Tariff cannot answer the question of whether PJM violated a duty of care to him.

10. Further, Mr. Yorty asserted 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 argued 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 asserted that the Tariff does not apply to him. Further, Mr. Yorty argued, the determination of whether PJM owes him a duty of care 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 argued 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 argued that PJM cannot contract its way out of a duty of care to a third party. He asserted it is the party's actions which create a duty of care, rather than any assumption of responsibilities under a contract.

## **2. Comments**

11. Several parties intervened in support of PJM's position. The Participating PJM Transmission Owners argued that the public interest would be harmed if PJM's Tariff were interpreted so that PJM assumes responsibilities beyond those outlined in the Tariff. They asserted that, as between PJM and its Transmission Owners, the Transmission Owners assume responsibility for worker safety. The ISO/RTO Council also supported PJM's position, asserting 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. Edison Electric Institute, P3 and the American Public Power Association (APPA) and National Rural Electric Cooperative Association (NRECA) also supported PJM, noting that PJM is not responsible for worker safety and does not have physical control of the transmission grid.

### **B. June 7 Order**

12. On June 7, the Commission issued an order granting PJM's request for a declaratory order and providing the requested interpretations. On the issue of functional control, the Commission found that, under the Tariff and TOA, PJM lacks direct, physical control over the transmission grid, particularly during construction and maintenance. Rather, the Commission found, the Transmission Owners physically operate the grid in response to PJM's direction. Specifically in the context of a transmission maintenance outage such as the one at issue in this proceeding, the Commission found that PJM performs a planning and scheduling function to ensure compliance with reliability standards, while the responsibility for physically performing the maintenance and ensuring safety remains with the Transmission Owner. The Commission also noted that PJM is not required under its Tariff, and lacks the resources, to ensure that a Transmission Owner properly implements its safety procedures.

13. On the issue of the scope of the limitation of liability provision in PJM's Tariff, the Commission found that section 10.2 of PJM's Tariff shields it from liability for tort claims in the absence of a demonstration of gross negligence by PJM. First, the Commission determined that section 10.2 does, in fact, apply to a non-Transmission Customer given the express language of the Tariff section at issue. Second, the Commission found that the limitation of liability is not itself limited to claims related to "service provided under this Tariff" also given the express language of the Tariff section at issue. The Commission noted that it gave broad limitations of liability to RTOs because the Commission is the only regulator able to prevent RTOs from being subjected to excessive damages awards.

## II. Request for Rehearing

### A. Mr. Yorty's Request for Rehearing

14. On July 9, 2012, Mr. Yorty filed a motion for clarification, or in the alternative, rehearing of the June 7 Order, on four grounds and alleged eight separate issues. First, he asserts that section 4.5 of PJM's Tariff makes clear that PJM, and not the Transmission Owners, directs the operation and maintenance of the transmission facilities under its control. Mr. Yorty asserts that section 4.5 of the TOA requires each Transmission Owner to operate and maintain its facilities in accordance with "the direction of PJM ...."<sup>7</sup> Mr. Yorty notes that Transmission Owners will continue to direct the operation and maintenance of facilities which are not listed in the PJM Designated Facilities List in the PJM Manual on Transmission Operations, but asserts that there has been no claim by PJM that the Juniata-Conemaugh line is included in that list. Mr. Yorty also asserts that the Commission must clarify that PJM has responsibility under its Tariff to approve scheduled outages of transmission lines for maintenance.

15. Next, Mr. Yorty asks the Commission to clarify that, when the Commission stated that Transmission Owners and not PJM have responsibility for worker safety, it meant this solely in regards to the Tariff and TOA, not common law. Mr. Yorty asserts that the question of whether PJM has any obligation to ensure safety cannot be answered solely by reference to the tariff; it must be answered with reference to all of the facts and circumstances to determine if a duty of care has been imposed. Mr. Yorty asserts that the question of whether PJM owes him a duty of care will be answered by considering: (1) what PJM did and did not do; (2) what PJM knew or should have reasonably known; and (3) whether Mr. Yorty's injuries were the reasonably foreseeable consequence of PJM's actions or inactions.

16. Mr. Yorty further argues that contractual obligations cannot extinguish common law duties owed to non-contracting parties and asserts that the courts must look past the contract to determine if a separate and distinct duty of care exists outside of the contract. Mr. Yorty argues that, regardless of PJM's Tariff or TOA, PJM owed a duty of care to Mr. Yorty if PJM acted negligently and in such a way that increased the risk of reasonably foreseeable harm to Mr. Yorty. He further asserts that, although PJM's Tariff does not expressly assign such obligations to PJM, the absence of the obligation does not absolve PJM of liability under common law for injuries arising out of its own negligence. He also argues that the Commission lacked jurisdiction under the FPA to absolve utilities of liability for tort claims.

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<sup>7</sup> Mr. Yorty's Request for Rehearing at 4, 15 (citing PJM TOA § 4.5).

17. Mr. Yorty further asserts that the Commission must clarify that nothing in PJM's Tariff or TOA precludes a state court from reaching the issue of whether PJM breached a duty of care under common law in approving an outage schedule for the Juniata-Conemaugh 500kV transmission line, while a parallel line remained energized.

18. Mr. Yorty asserts that the Commission ignored his arguments related to the common law duty of care in his protest to PJM's petition. He further argues that the Commission lacks jurisdiction to insulate a utility from the type of liability at issue in the instant proceeding, and may not interfere with his rights to seek damages in state court. He asserts that the legislative history of the Federal Power Act demonstrates that the Commission's jurisdiction is limited and "focused on only those aspects of the industry that were 'beyond the pale of effective state supervision.'"<sup>8</sup>

19. Mr. Yorty also repeats his arguments regarding sections 10.2 and 10.3, asserting that the Commission's reading of section 10.2 cannot be reconciled with section 10.3. He argues that section 10.3 foresees liability in circumstances where there is neither gross negligence nor intentional misconduct, by stating that PJM must be indemnified as to liabilities to third parties "except in cases where there is negligence or intentional wrongdoing ...."<sup>9</sup> If PJM were only liable in cases where there is gross negligence or intentional misconduct, Mr. Yorty asserts, then the exception would swallow the rule since there would be no point at which PJM would be indemnified. Mr. Yorty asserts that the proper interpretation of section 10.3 is found in the Commission's decision in a *Southwest Power Pool* decision, where he asserts that the Commission found that the two liability provisions comparable to section 10.2 and 10.3 are not inconsistent because they are not intended to foreclose all third party claims, only those by customers.<sup>10</sup> He further repeats his argument that the limitation of liability provision was only intended to protect PJM from indirect damages related to service interruptions.

20. Mr. Yorty argues that he has a constitutionally-protected property right in any damages he may obtain in litigation against PJM, and the June 7 Order denies him of those rights without due process of law. He asserts that at the time PJM filed the tariff language for section 10.2, Mr. Yorty had no notice that this tariff change may impact his

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<sup>8</sup> Mr. Yorty's Request for Rehearing at 23 (citing *Duke Power Co. v. FPC*, 401 F.2d 930, 934 (D.C. Cir. 1968)).

<sup>9</sup> Mr. Yorty's Request for Rehearing at 25.

<sup>10</sup> Mr. Yorty's Request for Rehearing at 25 (citing *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,100, *order on reh'g*, 113 FERC ¶ 61,287 (2005) (*SPP*)).

rights and as such, he did not intervene. He also asserts that the June 7 Order commits a taking against his property rights.

**B. Mr. Yorty's Motion to Lodge**

21. On July 18, 2012, Mr. Yorty filed a motion to lodge, seeking to introduce the July 13, 2012 opinion of Judge Gary F. Di Vito of the First Judicial District of Pennsylvania. Mr. Yorty asserts that PJM filed a motion for summary judgment on October 6, 2011, claiming immunity from the lawsuit, which the court denied on March 5, 2012. Mr. Yorty further asserts that, on March 20, 2012, PJM filed a motion for reconsideration, or in the alternative, asked the court to allow an interlocutory appeal, which the court denied on May 1, 2012. Mr. Yorty asserts that PJM subsequently sought review of the denial, which Judge Di Vito denied on July 13, 2012.

22. Mr. Yorty seeks to lodge Judge Di Vito's denial before the Commission. He asserts that the opinion addresses whether: the limitation of liability provision in PJM's Tariff carries the force of federal law in the state court suit; whether PJM's Tariff strictly limits the duties PJM is authorized to take; whether it preempts claims outside of the Tariff; and whether Pennsylvania law imposes a duty of care on an RTO. Mr. Yorty asserts that he could not have included the opinion with his request for rehearing because it had not been issued at the time when he filed that request for rehearing.

**C. PJM Answer and Informational Filings**

23. On July 24, 2012, PJM filed an answer to Mr. Yorty's request for rehearing. On October 2, 2012, PJM filed an informational filing with the Commission, providing an update on the proceedings before the Pennsylvania state court.

24. On December 10, 2012, PJM filed a second informational filing with the Commission. PJM notes that the state court proceeding is stayed pending an interlocutory appeal regarding the trial court's denial of PJM's motion for summary judgment, and asks the Commission to take notice of the state court proceeding.

**III. Discussion**

**A. Procedural Matters**

25. We will grant Mr. Yorty's motion to lodge, and accept the July 13, 2012 opinion of Judge Gary F. Di Vito of the First Judicial District of Pennsylvania into the record of this proceeding. We deny, however, PJM's July 24, 2012 motion to answer Mr. Yorty's

request for rehearing, as the Commission's Rules of Practice and Procedure explicitly prohibit such answers.<sup>11</sup>

**B. Commission Determination**

26. As discussed in greater detail below, we deny Mr. Yorty's request for rehearing and motion for clarification.

**1. Operational Authority and Worker Safety**

27. First, Mr. Yorty both moves for clarification and seeks rehearing of the June 7 Order's findings regarding section 4.5 of the PJM TOA. Section 4.5 states:

Each Party shall operate and maintain its Transmission Facilities in accordance with: (i) the terms of this Agreement; (ii) applicable reliability principles, guidelines, and standards of the Applicable Regional Reliability Council and NERC; (iii) the PJM Manuals; (iv) the direction of PJM consistent with this Agreement; and (v) Good Utility Practice. Consistent with the provisions of this Section 4.5, the Parties shall conform to PJM's operating instructions as they apply to such Party's Transmission Facilities. The Parties will continue to direct the operation and maintenance of Transmission Facilities that are not listed in the PJM Designated Facilities List contained in the PJM Manual on Transmission Operations or any successor thereto and each Party will physically operate and maintain all Transmission facilities that it owns.<sup>12</sup>

Mr. Yorty asserts that section 4.5 makes clear that PJM and not the Transmission Owner is responsible for directing the operation and maintenance of the transmission facilities under its control, asserting as error "the June 7 Order's categorical statement that the TOs 'direct' the operation and maintenance of transmission facilities." He asserts that the clause in the Tariff stating that the Transmission Owners will continue to direct the operation and maintenance of Transmission Facilities that are not listed in the PJM Designated Facilities List (non-designated facilities) implies that PJM directs the

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<sup>11</sup> See 18 C.F.R. § 385.713(d)(1) (2012).

<sup>12</sup> PJM Consolidated Transmission Owners Agreement § 4.5, Operation and Maintenance, 1.0.0.

operation and control of those facilities listed in the Designated Facilities List (Designated Facilities).<sup>13</sup>

28. Mr. Yorty misconstrues both section 4.5 of the TOA and the June 7 Order, which need to be interpreted in light of the functions performed by RTOs. The last clause of section 4.5 expressly provides, and accordingly the June 7 Order found, that each Transmission Owner will “physically operate and maintain *all* Transmission facilities that it owns.”<sup>14</sup> The use of the term “physically operate” recognizes that, with respect to Designated Facilities, the RTO plays a role in scheduling and planning, but that physical operation and maintenance remain with the Transmission Owner. Mr. Yorty cites to an earlier portion of section 4.5 which provides that the Transmission Owners will continue to “direct” the operation and maintenance of non-designated facilities. He argues that the specific exemption from PJM “direction” over operation and maintenance for non-designated facilities means that for the other, Designated Facilities PJM retains full control over operation and maintenance. We disagree with that interpretation. The fact the Tariff specifies that Transmission Owners retain full control to direct the operation and maintenance for non-designated facilities does not mean that PJM obtains full control over the operation and maintenance for the Designated Facilities. While PJM plays little role with respect to the non-designated facilities, it does have a role with respect to the Designated Facilities, such as scheduling those facilities and being consulted with respect to the timing of maintenance. However, it does not have control over the actual performance of maintenance on those Designated Facilities. As the last clause in section 4.5, quoted above, states, the Transmission Owners “physically” control both operations and maintenance for those Designated Facilities.

29. In the June 7 Order, the Commission emphasized that direct physical control resides with the Transmission Owners. Indeed, as we noted in the June 7 Order, other sections of the Tariff recognize the Transmission Owner’s control over maintenance. Section 4.1.2 of the Transmission Owner’s Agreement states that the transfer of facilities to PJM does not “require any change in the physical operations or control over

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<sup>13</sup> PJM Manual 35 defines Designated Transmission Facilities as those transmission facilities owned by a Transmission Owner that are within the PJM RTO, are identified in the Designated Facilities List, and have a nominal operating voltage of 230 kV or greater or are facilities operating at a voltage of less than 230 kV that meet several other criteria. PJM Manual 35 at 21.

<sup>14</sup> June 7 Order, 139 FERC ¶ 61,183 at P 30 (emphasis added) (citing PJM Consolidated Transmission Owners Agreement § 4.5. PJM, we emphasize, owns no transmission facilities. Rather, the Transmission Owners own the transmission facilities).

Transmission Facilities.”<sup>15</sup> PJM Manual 3 confirms this interpretation by expressly assigning responsibility for compliance with any relevant OSHA regulations, and therefore general worker safety, to the Transmission Owner.<sup>16</sup> Moreover, as we found in the June 7 Order, while section 4.5 requires that Transmission Owners adhere to PJM’s “direction” and conform to “PJM’s operating instructions” those terms do not include physical supervision of construction nor ensuring worker safety in physically performing maintenance by PJM.

30. The Commission therefore sees no basis to change its conclusions that PJM lacks direct, physical control over the transmission grid, particularly during construction and maintenance, and that Transmission Owners physically operate their transmission facilities in response to PJM’s directions. While PJM performs a planning and scheduling function to ensure transmission operation and maintenance comply with grid reliability standards, Transmission Owners physically perform the operations and maintenance work once PJM has ensured the proposed timing of the work schedule protects grid reliability. More importantly, the Commission distinguishes between the planning and scheduling role played by PJM in the context of a transmission maintenance outage, like the one at issue here, and the direct, physical control of the Transmission Owners, who physically operate and maintain their transmission facilities. In other words, PJM merely ensures that, when a Transmission Owner requests scheduling of a transmission outage, the outage will not compromise the reliability of the PJM transmission system.

31. As noted in the June 7 Order, moreover, PJM does not, and given the substantial resources required, could not direct the maintenance work performed by the thousands of utility work crews performing maintenance across PJM’s entire multi-state footprint. A contrary finding would result not only in significant cost increases for PJM’s customers, but also an unnecessary regime under which both the public utilities that own transmission assets and PJM itself would, in a duplicative manner, each be required to ensure worker safety.

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<sup>15</sup> PJM Consolidated Transmission Owners Agreement § 4.1.2, Directing the Operation of Transmission Facilities, 0.0.0.

<sup>16</sup> June 7 Order, 139 FERC ¶ 61,183 at P 32 (citing PJM Manual 03: Transmission Operations at 13-14 (Rev. 31, Sept. 15 2008)). The manual provides: “Personnel Requirements – Transmission system operators shall: ... Develop, document and maintain switching and blocking procedures consistent with OSHA 29 CFR Part 1910.269.” *Id.* at 14.

32. Second, Mr. Yorty asks the Commission to clarify that PJM has the obligation, under its Tariff, to approve scheduled outages of transmission lines. He claims that this authority includes the ability to deny or reschedule any outage, or to require a Transmission Provider to implement an alternative outage schedule. Specifically, he asserts that PJM might have been negligent in failing to schedule a simultaneous outage on the transmission line that was parallel to the Juniata-Conemaugh 500 kV transmission line.

33. We deny clarification on the issue of PJM's obligation to approve scheduled outages of transmission lines. In the June 7 Order, we found that:

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. 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.<sup>17</sup>

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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 the Transmission Owner.<sup>18</sup>

34. PJM's role, in this regard, is limited to ensuring that the transmission grid remains reliable. Under its Tariff, PJM may deny or reschedule an outage request if it is "deemed necessary to ensure reliable system operations,"<sup>19</sup> and the PJM Tariff specifically authorizes PJM to require a Transmission Owner to utilize an alternative outage schedule if the proposed schedule "would significantly affect the efficient and reliable operations of the PJM Region ...."<sup>20</sup> Further, section 2.2 of PJM Manual 38, which governs transmission outage coordination, states that, once PJM receives a request to schedule a

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<sup>17</sup> June 7 Order, 139 FERC ¶ 61,183 at P 31 (citations omitted).

<sup>18</sup> June 7 Order, 139 FERC ¶ 61,183 at P 32.

<sup>19</sup> PJM Tariff, Att. K § 1.9.2(c)(v).

<sup>20</sup> PJM Tariff, Att. K § 1.9.2(c).

transmission outage, PJM will provide all relevant information required to perform system studies, such as critical facility status designations and known interchange transactions that may impact the request, as well as relevant load, generation, and operating reserve projections. Using such data, PJM staff is required only to analyze the requested outage to ensure that it does not violate PJM reliability criteria and market rules.<sup>21</sup>

35. Although PJM has responsibility for approving scheduled transmission outages and, in some instances, denying or rescheduling outages, this authority does not extend to forcing an outage on another transmission line that happens to be parallel and in close proximity to the line for which the initial outage request was filed. When a Transmission Owner submits an outage scheduling request, PJM's role under its Tariff and TOA is to consider whether the timing of that outage will impact the reliability and efficiency of the transmission system. Neither the PJM Tariff nor the TOA requires PJM to determine whether any additional transmission facilities need to be taken out of service for any reason, as the responsibility for physically performing maintenance and thus for ensuring worker safety remains with the Transmission Owner.

36. Third, Mr. Yorty seeks clarification that, when the June 7 Order found that the responsibility for ensuring safety lies with the Transmission Owner, it referred solely to responsibilities under the PJM Tariff and not under common law. He also seeks rehearing on this issue, asserting that PJM owed a duty of care to Mr. Yorty under the common law and if the June 7 Order categorically found that PJM did not have any safety obligations with regards to Mr. Yorty, then it was in error. Similarly, Mr. Yorty also asks the Commission to clarify that nothing in the PJM Tariff or TOA precludes a state court from reaching the issue of whether PJM breached a duty of care under common law, particularly in approving an outage schedule that called for one 500 kV Juniata-Conemaugh transmission line to be de-energized, while a parallel 500 kV Juniata-Conemaugh transmission line less than 100 feet away remained energized.

37. As discussed in greater detail below, the June 7 Order is limited to a construction of the meaning of PJM's tariff and other jurisdictional agreements, and the Commission makes no findings with regard to common law obligations.

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<sup>21</sup> In addition, section 4 of PJM Manual 3 requires the scheduling Transmission Owner to coordinate the outage with any other Transmission Owner which might be affected by the outage. PJM Manual 03: Transmission Operations at 58 (Rev. 31, Sept. 15 2008).

## 2. Limitation of Liability

38. On rehearing, Mr. Yorty raises three arguments regarding the limitation of liability language contained in section 10.2 of PJM's Tariff. First, Mr. Yorty asserts that the June 7 Order adopted an "unreasonable" interpretation of section 10.2, which is irreconcilable with section 10.3. He asserts that the Commission's reading of section 10.2 as shielding PJM from liability except in the case of gross negligence or intentional misconduct is contrary to section 10.3, which provides for indemnification of PJM as to liabilities to third parties except in the case of negligence or intentional wrongdoing.

39. The Commission expressly rejected Mr. Yorty's reading of sections 10.2 and 10.3 in the June 7 Order.<sup>22</sup> We affirm that finding on rehearing. Section 10.2 of PJM's Tariff provides that:

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, 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.

40. Section 10.3 of PJM's Tariff provides that:

The Transmission Customer shall at all times indemnify, defend, and save each Transmission Owner, the Transmission Provider, and each Generation Owner acting in good faith to implement or comply with the directives of the Transmission Provider, and their directors, managers, members, shareholders, officers and employees harmless

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<sup>22</sup> June 7 Order, 139 FERC ¶ 61,183 at n.33.

from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the Transmission Provider's, a Transmission Owner's, or a Generation Owner's (acting in good faith to implement or comply with the directives of the Transmission Provider) performance of its obligations under this Tariff on behalf of the Transmission Customer, except in cases of negligence or intentional wrongdoing by such Transmission Owner, the Transmission Provider, or such Generation Owner acting in good faith to implement or comply with the directives of the Transmission Provider.

41. We reject Mr. Yorty's argument that applying a gross negligence standard to third parties in section 10.2 of PJM's Tariff would eviscerate section 10.3. The purpose of section 10.2 is to set forth the limitations of liability applicable to PJM, or a Transmission Owner or a Generation Owner acting in response to PJM's directives. The purpose of section 10.3 is to set forth the circumstances in which a Transmission Customer shall indemnify PJM, or a Transmission Owner or a Generation Owner, from any damages, losses or claims to which it may be subjected. As we found in previous orders, the scope of an indemnification clause does not impact the scope of a limitation of liability clause, as these two clauses have different purposes.<sup>23</sup>

42. Second, Mr. Yorty again asserts that the correct reading of section 10.2 is to be found in an order addressing the Southwest Power Pool's (SPP) limitation of liability provision.<sup>24</sup> Mr. Yorty's reference to the Commission's interpretation of section 10.2 of

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<sup>23</sup> See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,301-02 ("We note, however, that liability is a separate issue from indemnification" and finding that the scope of the indemnification provision does not affect the scope of liability), *reh'g denied*, Order No. 888-B, 81 FERC ¶ 61,248, at 62,080-81 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>24</sup> Mr. Yorty's Request for Rehearing at 25 (citing *SPP*, 112 FERC ¶ 61,100 at P 39).

SPP's Tariff is not determinative here, because the SPP open access transmission tariff (Tariff) differs in relevant part from the PJM Tariff. Specifically, the SPP Tariff refers to "Transmission Customer or User" in its section 10.2,<sup>25</sup> while the PJM Tariff refers to "Transmission Customer, *third party or other person*."<sup>26</sup> Therefore, while SPP's Tariff by its terms does not specifically limit liability to third parties, PJM's does. Accordingly, the Commission's finding in its order approving SPP's limitation of liability that the SPP Tariff provision applies only to customers is not determinative of the scope of PJM's Tariff provision.<sup>27</sup>

43. Third, Mr. Yorty asserts that the June 7 Order's reading of section 10.2 is unreasonable because it ignores the Commission's prior recognition that the limitation of liability applies only to those taking service and third parties injured as a result of a failure to provide service. He asserts that the intention of the limitation of liability provision was to protect an ISO or RTO from indirect damages resulting from an interruption in service, but not to eliminate such liability altogether.<sup>28</sup> He also claims that all of the examples in section 10.2 relate to service interruptions, such that the section only limits PJM's liability in regards to service interruptions. He also claims that, at best, section 10.2 is ambiguous in light of section 10.3 and other Commission precedent.

44. We are not persuaded by Mr. Yorty's arguments. In the June 7 Order, the Commission set forth its interpretation of section 10.2, finding that the language of the Tariff section expressly sets forth that it applies "to any Transmission Customer, *third party or other person ...*"<sup>29</sup> for actions "*including but not limited to,*"<sup>30</sup> service

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<sup>25</sup> SPP Tariff § 10.2. ("The Transmission Provider shall not be liable for money damages or other compensation *to any Transmission Customer or Users*" for actions or omissions by the Transmission Provider or Transmission Owner in performing its obligations under this Tariff or any Service Agreement thereunder, except to the extent such act or omission by the Transmission Provider is found to result from its gross negligence or intentional wrongdoing ....") (emphasis added)).

<sup>26</sup> PJM Tariff § 10.2 (emphasis added).

<sup>27</sup> SPP, 112 FERC ¶ 61,100 at P 39.

<sup>28</sup> Mr. Yorty's Request for Rehearing at 27 (citing *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,164, at P 29 (2005)).

<sup>29</sup> June 7 Order, 139 FERC ¶ 61,183 at P 34 (emphasis in original).

<sup>30</sup> June 7 Order, 139 FERC ¶ 61,183 at P 35 (emphasis in original).

interruptions. We found that the order approving PJM's limitation of liability did not limit the section's applicability to service interruptions, and we noted that it stated 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."<sup>31</sup> As Professor Pierce noted a decade ago in arguing for expanded federal limitation on liability provisions, subjecting an RTO to liability in a situation where a similarly-situated Transmission Owner would be exempt would only discourage Transmission Owners from joining, and thus transferring operational authority, to an RTO.<sup>32</sup> In this case, for example, PPL could be covered by the provisions of a state workmen's compensation law. However, if, as Mr. Yorty argues, PJM becomes liable for the same accident, then under the Transmission Owner's Agreement, PPL would be responsible for indemnifying PJM and thus effectively liable when it may not have otherwise been liable. The broad limitation of liability clause found in the PJM Tariff operates to ensure that membership in an RTO does not expand the liabilities that the Transmission Owners would have otherwise face.

45. Finally, we also find unpersuasive Mr. Yorty's claim that section 10.2 is ambiguous; Mr. Yorty has failed to demonstrate any ambiguity in this tariff language. Section 10.2 on its face limits PJM's liability to instances of gross negligence or willful misconduct in cases where it is performing its obligations under its Tariff as a federally-authorized and regulated regional transmission organization or RTO.<sup>33</sup> And, as discussed above, PJM's Tariff delineates its obligations regarding transmission outage requests.

### **3. Other Arguments**

46. Mr. Yorty raises three additional arguments on rehearing. First, he asserts that the Commission must address the relevance of the common law arguments made by Mr. Yorty, particularly the putative limited value of PJM's Tariff and TOA in determining

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<sup>31</sup> June 7 Order, 139 FERC ¶ 61,183 at P 35 (citing *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,264, at P 9 (2005)). As pointed out in the June 7 Order, the Commission majority adopted the broad limitation of liability provision over the objection of one Commissioner who thought the provision was too broad because it could apply even in the case of ordinary negligence. June 7 Order, 139 FERC ¶ 61,183 at P 36 n.32. Therefore, the limited interpretation of this provision argued by Mr. Yorty is not warranted.

<sup>32</sup> R. Pierce, *Regional Transmission Organizations: Federal Limitations Needed For Tort Liability*, 23 Energy L.J. 63, 78 (2002).

<sup>33</sup> See June 7 Order, 139 FERC ¶ 61,183 at P 37.

whether PJM owes him a duty of care. Mr. Yorty's arguments are without merit. As the Commission noted in the June 7 Order:

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.[FN 35]

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FN 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.<sup>34</sup>

47. This Commission was asked to interpret PJM's Tariff and TOA to determine whether (1) under its Tariff, PJM has a responsibility to oversee worker safety during maintenance performed by employees of a Transmission Owner; and (2) the limitation of liability provision contained in section 10.2 shields PJM from liability for tort claims in the absence of gross negligence. The June 7 Order provided the Commission's interpretation of PJM's Tariff and TOA, addressing matters within this Commission's jurisdiction and within this Commission's expertise.<sup>35</sup> The Commission has no need to refer to Pennsylvania state law or common law to interpret jurisdictional tariffs. Common law claims on the particular facts alleged by Mr. Yorty are best left to the determination of the Pennsylvania state courts, albeit taking into account this Commission's interpretation and analysis of the jurisdictional tariffs and agreements at issue in this proceeding.

48. Second, Mr. Yorty argues that the Commission lacks jurisdiction to protect PJM from tort liability to a utility employee. He argues that neither sections 201 nor 205 of

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<sup>34</sup> June 7 Order, 139 FERC ¶ 61,183 at P 37 n.35. We note that we make no finding whether, on the facts in this proceeding, PJM has gone beyond its Tariff responsibilities.

<sup>35</sup> In this proceeding, Mr. Yorty asks the Commission to interpret common law legal principles guiding the interpretation of tort law, a subject not contemplated in the enabling statute we implement. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). The Commission has only those authorities conferred upon it by Congress. *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (citing *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)); see also *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986). As such, we deny Mr. Yorty's request for rehearing on this point.

the FPA give the Commission jurisdiction to regulate the liability of public utilities to utility employees.<sup>36</sup> Specifically, he asserts, the purpose of the FPA was to focus on those aspects of the utility industry which were not regulated by the states. We deny rehearing. As noted in the June 7 Order, “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 regulator ...*’” of an RTO.<sup>37</sup> Moreover, limitation of liability provisions do affect or relate to rates and terms and conditions of service,<sup>38</sup> because PJM and its Transmission Owners’ rates may be affected, i.e., have to be raised to accommodate any increased risk of liability.<sup>39</sup> We add that, in other contexts, courts have found that the Commission’s regulation of transmission facilities under the FPA may preempt tort claims based on state law.<sup>40</sup>

49. Third, Mr. Yorty argues that the June 7 Order has denied his constitutional right to due process, because he did not have notice of the PJM limitation of liability provision’s filing, and that provision would unconstitutionally deprive him, without just compensation, of his property interest in any damages he may recover from PJM. We again deny rehearing. Mr. Yorty contends that, even though public notice that PJM filed a limited liability Tariff revision appeared in the Federal Register, that notice did not indicate that the filing would affect the rights of public utility employees or other individuals who do not take service under PJM’s Tariff.<sup>41</sup> Mr. Yorty asserts that, where there is a direct impact on a non-customer who had no reason to monitor the Federal Register and PJM’s filings, publication in the Federal Register is not sufficient to provide constructive notice.<sup>42</sup> Mr. Yorty relies on *Camp v. United States Bureau of Land*

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<sup>36</sup> 16 U.S.C. § 824d (2006).

<sup>37</sup> June 7 Order, 139 FERC ¶ 61,183 at P 36 (emphasis added).

<sup>38</sup> We cannot help but note, though, that while Mr. Yorty is pursuing a claim against PJM, he is not a PJM employee.

<sup>39</sup> See *supra* n.29, R. Pierce at 68.

<sup>40</sup> See, e.g. *Transmission Agency of Northern California v. Sierra Pacific Power Co.*, 295 F.3d 918, 928-29 (2002) (finding that the Commission’s regulation of interstate transmission lines preempts a tort claim based on state law relating to the operation of such transmission lines).

<sup>41</sup> Mr. Yorty’s Request for Rehearing at 30.

<sup>42</sup> Mr. Yorty’s Request for Rehearing at 30.

*Management*<sup>43</sup> for the proposition that notice by publication in the Federal Register was insufficient because the Bureau had an independent legal duty under the applicable statute to serve notice directly to petitioner. *Camp* is inapplicable here, because it involved a statute that required that “notice of realty action shall be sent to . . . adjoining landowners.”<sup>44</sup> In contrast, neither the Commission nor PJM has an independent legal duty under the Federal Power Act or any other source, to ensure that utility employees like Mr. Yorty are provided personal notice of PJM Tariff revisions.<sup>45</sup> Therefore, the Commission finds that publication of PJM’s limited liability Tariff revision in the Federal Register was legally sufficient to impose constructive notice upon Mr. Yorty.

50. Mr. Yorty further contends that the Commission’s regulations do not contemplate utility employees acting as a party themselves in proceedings before the Commission.<sup>46</sup> However, the Commission’s regulations provide that any entity who has a “direct interest” or whose participation is in the public interest may become a party to a proceeding before the Commission.<sup>47</sup> Mr. Yorty also asserts that the June 7 Order deprives him of his constitutionally protected property interest in any rights he might have to recover damages in his lawsuit against PJM. Mr. Yorty argues that the June 7 Order interprets section 10.2 of PJM’s tariff such that he is stripped of any rights to recover tort damages from PJM for the express “public use” of protecting regional transmission operators from potentially excessive damage awards. The Commission rejects Mr. Yorty’s argument. Even assuming for the sake of argument that Mr. Yorty has a constitutionally protected property interest in any prospective damages he might receive as a result of his civil action against PJM, Mr. Yorty fails to demonstrate that PJM’s limitation of liability provision actually deprives him of that interest. Simply

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<sup>43</sup> *Camp v. United States Bureau of Land Management*, 183 F.3d 1141, 1145 (9<sup>th</sup> Cir. 1999) (*Camp*).

<sup>44</sup> *Camp*, 183 F.3d, at 1143, 1145.

<sup>45</sup> *See Covelo Indian Community v. FERC*, 895 F. 2d 581, 587-88 (9<sup>th</sup> Cir. 1990) (rejecting an argument that the Federal Energy Regulatory Commission deprived certain Native Americans of due process by failing to give them actual notice of license renewal proceedings).

<sup>46</sup> Mr. Yorty’s Request for Rehearing at 30 (citing 18 C.F.R. § 385.214(b)(2) (2012)).

<sup>47</sup> 18 C.F.R. § 385.214(b)(iii) (2012), *see Potomac-Appalachian Transmission Highline, LLC*, 140 FERC ¶ 61,229, at P 107 n.121 (2012) (even persons with indirect interests have a right to intervene).

because PJM's Tariff provision regarding limitation of liability requires Mr. Yorty to show at least gross negligence in order to recover damages for his injuries does not mean that he is prevented from recovering damages from PJM.<sup>48</sup> Nor is he prevented from filing a tort case against the Transmission Owner alleged to be responsible for the injury he suffered.

The Commission orders:

Mr. Yorty's request for rehearing and motion for clarification are hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>48</sup> All utility limitation of liability provisions deprive parties of the right to obtain redress for alleged negligence of the utility. But these provisions have been found in the public interest and constitutional. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978).