

129 FERC ¶ 61,250  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

PJM Interconnection, L.L.C.

Docket Nos. ER09-1063-000  
ER09-1063-001

ORDER ON COMPLIANCE FILING

(Issued December 18, 2009)

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## I. Introduction

1. On April 29, 2009, as amended on May 1, 2009, PJM Interconnection, L.L.C. (PJM) submitted a compliance filing in response to Order No. 719.<sup>1</sup> PJM explains that its compliance filing includes revisions to its Open Access Transmission Tariff (OATT) and its Amended and Restated Operating Agreement (Operating Agreement), addressing the participation and comparable treatment of demand response resources in its ancillary services markets and pricing during periods of operating reserve shortages. PJM also discusses the functional expectations of the external market monitor and its participation in the mitigation process. Additionally, PJM explains that it will incorporate a long-term power contracting bulletin board on its website.<sup>2</sup> PJM also explains that its existing stakeholder process satisfies the four stakeholder responsiveness criteria.

2. PJM also requests that its compliance obligations in Docket Nos. ER09-1063-000 and ER09-1063-001 be considered, in part, pursuant to filings that have been made, or will be made, in related proceedings. Specifically, PJM requests: (1) that its obligation to permit an aggregator of retail customers to bid demand response on behalf of retail customers directly into its markets be addressed pursuant to its February 9, 2009 filing in Docket ER09-701-000, *et al.*;<sup>3</sup> and (2) that its obligation to address any remaining barriers to comparable treatment of demand resources be addressed in other proceedings.<sup>4</sup>

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<sup>1</sup> *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008) (Order No. 719), *order on reh'g*, Order No. 719-A, FERC Stats. & Reg. ¶ 31,292 (2009).

<sup>2</sup> See PJM's website at: <http://www.pjm.com/markets-and-operations/etools/power-contracts-bulletin-board.aspx>.

<sup>3</sup> In an order issued September 14, 2009, the Commission accepted PJM's filing, subject to conditions. See *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,238 (2009).

<sup>4</sup> On July 28, 2009, PJM filed to amend its metering requirements in Docket No. ER09-1508-000. See *PJM Interconnection, L.L.C.*, (September 9, 2009) (unpublished letter order) (addressing metering requirements). On August 26, 2009, PJM filed a report on demand response compensation in Docket No. EL09-68-000. Additional issues related to PJM's compliance with Order No. 719 have been considered by the Commission in addressing PJM's reliability pricing model (RPM) compliance filings. See *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,081 at P 31 (2009) and *PJM Interconnection, L.L.C.*, Docket No. ER10-15-000 (November 24, 2009) (unpublished letter order) (addressing RPM credit requirements).

3. For the reasons discussed below, we accept PJM's compliance filing, subject to conditions discussed herein, to be made effective June 29, 2009, as requested. We also grant PJM's request for extension regarding its scarcity pricing proposal.
4. With respect to PJM's obligations regarding the participation and comparable treatment of demand response resources in its ancillary services markets (*see* section IV.B.1-5, below), we accept PJM's compliance filing, subject to conditions. Specifically, we require PJM to submit an additional compliance filing, within 90 days of the date of this order: (1) further supporting its Manual provision allowing aggregators to submit demand response bids at a minimum increment of 0.5 MW, while imposing a higher bid requirement of 1 MW on generators; (2) revising its OATT and Operating Agreement to include its existing Manual provision addressing bid thresholds for demand response resources; and (3) addressing its efforts to eliminate the institutional barriers that exist at the intersection of retail and wholesale markets, including its efforts to better integrate the impact of price responsive load on wholesale market operations.
5. With respect to PJM's obligations regarding the facilitation of long-term power contracting (*see* section IV.C, below), we accept PJM's proposal to post, on its bulletin board, all transactions involving long-term power contracting services.
6. We also accept PJM's compliance filing, subject to conditions regarding market monitoring and mitigation matters (*see* section IV.D.1-6, below). Specifically, we require PJM to submit, in its 90-day compliance filing: (1) revisions to its OATT regarding functions to be carried out by its external Marketing Monitoring Unit (MMU), as required by 18 C.F.R. § 35.28(g)(3)(ii);<sup>5</sup> (2) a further discussion of its position regarding the appropriate exceptions to be allowed, and data to be used, to calculate values pursuant to section 6.6 (Minimum Generator Operating Parameters) of its Operating Agreement; (3) revisions to its OATT to include, in its MMU Code of Ethics, the standards set forth in the Commission's regulations at 18 C.F.R. § 35.28(g)(3)(vi)(B), (D), (E) and (G); (4) revisions to its OATT, at Attachment M, section VI, regarding the MMU's availability for regular conference calls with the Commission and state commission staff, representatives of PJM, and market participants; (5) revisions to its website to provide a direct link to the MMU's annual and quarterly reports; (6) revisions to its OATT to implement a four month lag time applicable to the release of offer and bid data; (7) further support addressing PJM's policies regarding the aggregation or lack thereof of offer and cost data and further support regarding the extent to which these policies avoid participant harm and the possibility of collusion, while fostering market transparency; (8) revisions to its OATT and Operating Agreement specifying that the

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<sup>5</sup> PJM's external MMU is Monitoring Analytics, LLC, an intervenor in this proceeding.

MMU may, at its discretion, produce information about general market trends and the performance of the wholesale markets in response to a state commission's tailored information request where the information would not violate confidentiality restrictions, is not designed to aid state enforcement actions, and does not contravene the Commission's confidentiality rules regarding referrals; (9) revisions to its OATT and Operating Agreement affording market participants the opportunity to contest any data released by PJM that is specific to them and to provide context to such data; and (10) revise its OATT at Attachment M, section IV.I.2, to include Order No. 719's requirements regarding MMU referrals to the Commission.

7. As to PJM's obligations to perform an assessment, through pilot projects or other mechanisms, of the technical feasibility and value to the market of smaller demand response resources providing ancillary services, PJM explains that it will submit a compliance filing on or before October 28, 2009, to comply with this requirement.<sup>6</sup>

## **II. Background**

8. In Order No. 719, the Commission amended its regulations, under the Federal Power Act (FPA), to improve the operation of organized wholesale electric power markets. The Commission stated that its market reforms were intended to improve wholesale competition by providing more supply options during periods of operating reserve shortage, encouraging new entry and innovation, spurring deployment of new technologies, removing barriers to demand response, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers.<sup>7</sup>

9. In the area of demand response, Order No. 719 required RTOs and ISOs to: (1) accept bids from demand response resources in the RTO's or ISO's markets for certain ancillary services, on a basis comparable to other resources; (2) eliminate, during a system emergency, a charge to a buyer that takes less electric energy in the real-time market than it purchased in the day-ahead market; (3) in certain circumstances, permit an aggregator of retail customers to bid demand response on behalf of retail customers directly into the organized energy market; and (4) modify their market rules, as necessary, to allow the market-clearing price, during periods of operating reserve shortage, to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power.<sup>8</sup>

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<sup>6</sup> We note that PJM submitted its small demand response resource pilot projects compliance filing on October 28, 2009, in Docket No. RM07-19-001.

<sup>7</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 1.

<sup>8</sup> *Id.* P 4, 15.

10. Additionally, the Commission recognized that further reforms may be necessary to eliminate barriers to demand response in the future. Accordingly, the Commission required each RTO or ISO, and their respective MMU, to assess and report on any remaining barriers to comparable treatment of demand response resources that are within the Commission's jurisdiction.<sup>9</sup>

11. With respect to long-term power contracting, Order No. 719 required RTOs and ISOs to dedicate a portion of their websites for market participants to post offers to buy or sell power on a long-term basis.<sup>10</sup>

12. To improve market monitoring, the Commission required RTOs and ISOs to provide their MMUs with access to market data, resources and personnel sufficient to carry out the MMUs' duties. The Commission further required that the MMU report directly to the RTO or ISO board of directors. In addition, the Commission specified core MMU functions, including the responsibility for: (1) identifying ineffective market rules and recommending proposed rules and tariff changes; (2) reviewing and reporting on the performance of the wholesale markets to the RTO or ISO, the Commission, and other interested entities; and (3) notifying appropriate Commission staff of instances in which a market participant's behavior may require investigation. The Commission also addressed an MMU's participation in tariff administration and market mitigation, required each RTO and ISO to include ethics standards for MMU employees in its tariff, and required each RTO and ISO to consolidate its MMU provisions in one section of its tariff.

13. Order No. 719 also required each RTO and ISO to ensure its responsiveness to its customers and other stakeholders by establishing processes by which these entities would have direct access to the RTO or ISO board of directors.

14. In each of the four areas described above, the Commission required each RTO or ISO to consult with its stakeholders and make a compliance filing within six months of the date of the Commission's order. Order No. 719 also required RTOs and ISOs to assess the technical feasibility and value to the market of smaller demand response resources providing ancillary services and to report to the Commission within one year of the date of the Commission's order.

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<sup>9</sup> *Id.* P 274. As noted below, PJM's MMU submitted its report on July 1, 2009.

<sup>10</sup> *Id.* P 301.

### **III. Notice of Filing and Responsive Pleadings**

15. Notice of PJM's compliance filing was published in the *Federal Register*, 74 Fed. Reg. 21796 and 23180 (2009), with interventions, comments and protests due on or before June 26, 2009.<sup>11</sup> Timely filed motions to intervene, notices of intervention, comments and protests were filed by the entities listed in the appendix to this order.<sup>12</sup>

16. On July 1, 2009, the MMU submitted its report addressing any remaining barriers to comparable treatment of demand response resources, as required by Order No. 719.<sup>13</sup>

17. Answers to protests or answers to answers were submitted by: (1) PJM, on June 4, 2009 and July 28, 2009; (2) the MMU, on July 22, 2009 and August 28, 2009; (3) Comverge, Inc. (Comverge, *et al.*), on July 21, 2009;<sup>14</sup> (4) the Pennsylvania Public Utility Commission (Pennsylvania Commission), on August 12, 2009; (5) the Public Service Commission of Maryland (Maryland Commission), on August 13, 2009; (6) the Indiana Utility Regulatory Commission (Indiana Commission), on August 17, 2009; and (7) the Delaware Public Service Commission (Delaware Commission), on August 19, 2009.

### **IV. Discussion**

#### **A. Procedural Matters**

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and 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) (2009), prohibits an answer to a protest or an answer to an answer, unless otherwise ordered by the decisional authority. We will accept the answers submitted by PJM, the MMU, Comverge, *et al.*, the Pennsylvania Commission, the Maryland

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<sup>11</sup> See May 20, 2009 notice extending comment date.

<sup>12</sup> The abbreviated names used for these entities are noted in the appendix.

<sup>13</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 274. As noted above, Order No. 719 required that this issue be addressed by both the RTO or ISO, and the RTO's or ISO's MMU.

<sup>14</sup> Joined by CPower, Inc., EnergyConnect, Inc., EnerNOC, Inc., the PJM Industrial Customer Coalition, and Viridity Energy, Inc.

Commission, the Indiana Commission, and the Delaware Commission because they provided information that assisted us in our decision-making process.

**B. Substantive Matters**

19. We find that, with certain modifications, PJM's filing complies with Order No. 719 in the areas of: (1) demand response and pricing during periods of operating reserve shortage; (2) long-term power contracting; and (3) market-monitoring policies. Accordingly, we accept PJM's filing with respect to those issues, to be effective June 29, 2009, subject to further compliance filings as discussed below. PJM is directed to make compliance filings as discussed herein. This order makes no findings as to PJM's compliance with the fourth area of reforms identified in Order No. 719: the responsiveness of RTOs and ISOs to their customers and other stakeholders. The Commission recently issued a notice announcing that its staff will hold a technical conference in the near future to provide a forum for interested participants to discuss that topic.<sup>15</sup> Following that technical conference, the Commission will issue a separate order addressing PJM's compliance with this aspect of Order No. 719.

**C. Demand Response and Pricing During Periods of Operating Reserve Shortages in Organized Markets**

**1. Ancillary Services Provided by Demand Response Resources**

20. Order No. 719 required RTOs and ISOs to accept bids from demand response resources on a basis comparable to any other resources for ancillary services acquired in a competitive bidding process, if such demand response resources: (1) are technically capable of providing the ancillary service within the response time requirements and meet reasonable requirements adopted by the RTO or ISO as to size, telemetry, metering and bidding; and (2) submit a bid under the generally-applicable bidding rules at or below the market-clearing price, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. All accepted bids will receive the market-clearing price.<sup>16</sup> Order No. 719 also required RTOs and ISOs to adopt reasonable standards necessary for system operators to call on demand response resources, together with mechanisms to measure, verify, and ensure compliance with any such standards.<sup>17</sup> In addition, Order No. 719 required RTOs and ISOs to describe their

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<sup>15</sup> See First Notice of Technical Conference on RTO/ISO Responsiveness, Docket Nos. ER09-1048-000, *et al.*, 74 Fed. Reg. 59159 (Nov. 13, 2009).

<sup>16</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 47, 49.

<sup>17</sup> *Id.* P 61.

efforts to develop adequate customer baselines,<sup>18</sup> coordinate with each other in the development of technical requirements for demand response resources participating in ancillary services markets, and to provide the Commission with a technical and factual basis for any necessary regional variations.<sup>19</sup> Finally, Order No. 719 required RTOs and ISOs to assess the technical feasibility and value to the market of smaller demand response resources providing ancillary services.<sup>20</sup>

### **PJM's Filing**

21. PJM states that the existing provisions of its OATT, Operating Agreement, and Manuals generally comply with the requirements of Order No. 719, regarding demand response participation in PJM's ancillary services markets, without the need for further revisions at this time. As explained below, however, PJM also proposes to address, in a separate filing, its obligations to perform an assessment of the technical feasibility and value to the market of smaller demand response resources providing ancillary services.

22. By way of background, PJM explains that it currently offers ancillary services in the following markets: (1) the real-time energy market (i.e., energy imbalance, as used in Order No. 719); (2) the synchronized reserve market (i.e., spinning reserves, as used in Order No. 719); (3) the day-ahead scheduling reserve market (i.e., supplemental reserves, as used in Order No. 719); and (4) the regulation market (i.e., regulation and frequency response, as used in Order No. 719). PJM adds that while it does not currently offer a reactive supply or voltage control service, Order No. 719 does not require it to supply ancillary services it is not already providing.

23. PJM states that, as required by Order No. 719, demand response resources are currently participating in PJM's ancillary services markets in a manner comparable to other resources. PJM explains that, currently, demand resources are bid into PJM's markets through curtailment service providers, the functional equivalent of the term "aggregator of retail customers," or ARCs, as that term is used in Order No. 719.<sup>21</sup> PJM

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<sup>18</sup> *Id.* P 57.

<sup>19</sup> *Id.* P 59.

<sup>20</sup> *Id.* P 97.

<sup>21</sup> PJM notes that a curtailment service provider is a PJM member that acts on behalf of itself, or other members, or non-members, including end-use customers, to submit demand reductions into PJM's markets. PJM states that, potentially, any PJM member can be a curtailment service provider, whether an electricity distribution company, a load serving entity, a large industrial customer, or any company that

also explains that it pays the market clearing price to demand response resource bids that clear its ancillary service markets. With regard to day-ahead scheduling reserves, PJM explains that the simultaneous optimization of day-ahead scheduling reserve with energy in the day-ahead energy market ensures payment of the market clearing price and ensures the provision of day-ahead scheduling reserve service at least cost. As to synchronized reserve and regulation services, PJM states that the simultaneous optimization of synchronized reserves with energy and regulation in the hour-ahead clearing process ensures the provision of regulation and synchronized reserve service at least cost. Regarding the real-time energy market, PJM pays load reducers in its economic load response program LMP minus the generation and transmission portion of its retail rate.<sup>22</sup> With respect to PJM's real-time energy market, PJM states that curtailment service providers currently have two options for participation as an economic load response resource: (1) through real-time dispatch; or (2) as a self-scheduled resource. PJM adds that it treats demand resources and generation resources participating in its real-time energy market symmetrically because the effect of reducing load or increasing production, as it relates to maintaining the balance between load and supply, is the same. PJM states that its economic dispatch rules ensure that the least cost set of resources will be utilized to meet its system requirements.<sup>23</sup>

24. PJM states that its current rules (*see* PJM Manual 11 at section 4) limit participation by demand resources to 25 percent of the synchronized reserve requirement in each synchronized reserve zone. PJM explains that as a member of Reliability First Corporation (RFC), it will need to request authorization from RFC in order to raise or eliminate the existing 25 percent limitation at such times as: (1) the level of market participation reaches a level near the limit; and (2) the PJM stakeholders have reviewed demand response performance. PJM proposes to follow RFC's guidelines until it gains

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specializes in demand reductions. *See* PJM transmittal letter at 5, *citing* PJM Operating Agreement at Schedule 1, sections 1.3.1B.02 and 1.5A.3.

<sup>22</sup> *See supra* note 4.

<sup>23</sup> As clarified in PJM's answer (*see* below), PJM also states that it has revised its existing aggregation and bid rules for demand response resources as they relate to PJM's synchronized reserve, day-ahead scheduling reserve, and regulation markets, pursuant to a July 30, 2009 stakeholder vote. Specifically, the revised rules permitted aggregation of smaller load reduction capability located in the same synchronized reserve sub-zone to meet a lower bid threshold of 0.5 MW, compared to a 1 MW threshold as applicable to generation resources. PJM asserts that a lower threshold for demand resources is appropriate because the average size of a demand response resource is significantly smaller than a generation resource.

additional experience with demand response resources given the importance of these synchronized reserve, day-ahead scheduling reserve and regulation services to ensuring system reliability. PJM notes that actual levels of demand response participation are significantly below 25 percent.

25. With respect to Order No. 719's requirement regarding the need to develop adequate customer baselines, i.e., the means by which PJM can estimate the amount of energy its customers would normally consume but for a load reduction, PJM states that it has worked with its stakeholders to develop these baselines in connection with its economic load response settlements.<sup>24</sup> The efforts by PJM and stakeholders culminated into a tariff filing that proposed substantial revisions to the customer baseline calculation and related rules.<sup>25</sup>

26. With respect to RTO/ISO coordination, PJM states that it has participated in the ISO/RTO Council in order to coordinate demand response developments across ISO/RTO markets. PJM states that in a study issued by the ISO/RTO Council (Demand Response Matrix), regional variations were identified. PJM states that one such variation, in its markets, is the absence of a general telemetry requirement for demand resources. In support of its telemetry variation, PJM asserts that two fundamental reasons support its continued application. First, PJM states that its operations department has not identified a need to monitor the performance of demand resources in real time, as opposed to an after-the-fact determination. In addition, PJM asserts that the current cost of telemetry for each end-use site participating as a demand resource is out of proportion to the reliability impact and market value of the demand reduction provided by all but the very largest end-use sites. PJM asserts that this cost would create a further and unnecessary barrier to demand resource participation. PJM asserts that the only PJM market that requires telemetry for demand response resources is the regulation market.

27. PJM states that a second notable variation is the requirement that curtailment service providers give notice, to PJM, of self-scheduled economic load response. In support of this variation, PJM notes that it operates the only wholesale market that enables curtailment service providers to initiate or self-schedule economic load response on behalf of an end-use site.

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<sup>24</sup> PJM notes that customer baselines do not need to be estimated for demand resources that participate in the synchronized reserve or regulation markets because reductions and increases in load, in these markets, can be accurately determined by one minute data or telemetry.

<sup>25</sup> See *PJM Interconnection, L.L.C.*, Letter Order, Docket No. ER08-824-000 (June 12, 2008).

28. Finally, with respect to Order No. 719's requirement that RTO's and ISO's, in cooperation with their customers and other stakeholders, perform an assessment, through pilot projects or other mechanisms, of the technical feasibility and value to the market of smaller demand response resources providing ancillary services,<sup>26</sup> PJM commits to addressing this matter in a separate filing. PJM states that its compliance filing will include a definition of what constitutes a small demand resource in PJM and will also address measurement and verification standards. PJM adds that its compliance filing will also include an explanation of its existing pilot assessing the capability of a 1 MW battery to provide regulation service.<sup>27</sup> PJM states that efforts to develop communications standards for small demand resources will be deferred pending further development of the Commission's Smart Grid policy.<sup>28</sup>

### **Protests and Comments**

29. Intervenors challenge the extent to which demand response resources are currently participating in PJM's ancillary services markets on a sufficiently comparable basis to other resources. First, the Delaware Commission takes issue with PJM's current rules limiting participation by demand resources to 25 percent of the spinning reserve requirement in each spinning reserve zone until PJM gains additional experience with demand resources. The Delaware Commission argues that when, or if, the 25 percent participation limitation is approached, PJM should be required to demonstrate, in a status report filing, whether it would be reasonable to maintain this limitation. The Delaware Commission asserts that, at a minimum, PJM should be required to discuss the impact of its limitation on least cost, or system reliability.

30. Dayton Power and Light Company (Dayton) takes issue with PJM's rule change allowing demand response aggregators to submit bids at a lower minimum increment (0.5 MW) than generators, who are required to meet a 1 MW increment. Dayton argues that this differential represents an undue preference that cannot be justified, as PJM asserts, based on relative (smaller) size of a demand response resource. Dayton also asserts that this lower threshold will result in a demand response participation level that PJM will be unable to effectively manage. Dayton points out that, regardless, aggregation of demand response resources compensates for the smaller size of each individual resource. Dayton argues that demand response resources and generators will also not be treated on a

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<sup>26</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 97.

<sup>27</sup> PJM further notes that Allegheny Power has proposed a pilot involving the provision of regulation by residential customers located in Maryland.

<sup>28</sup> See *Smart Grid Policy*, Proposed Policy Statement and Action Plan, 126 FERC ¶ 61,253 (2009) (*Smart Grid Policy Order*).

sufficiently comparable basis, absent the application of comparable credit requirements and penalties for non-performance.

31. Dayton also argues that as smaller increments are used, the administrative complexity for the RTO may exponentially increase. Dayton notes that with a small enough increment, potentially tens of thousands of individual, non-aggregated entities could become eligible for RTO participation but that it is questionable whether there would be any benefit beyond that which could be obtained through aggregation from such eligibility. Dayton contends that as the RTO customer MW threshold decreases, the line between wholesale and retail markets also blurs and the potential increases for complex and jurisdictionally-troubling issues to arise between retail jurisdictions and the wholesale markets. Dayton asserts that the 1 MW level has proven to an effective and efficient threshold. Dayton further contends that the creation of too small a wholesale entry threshold would be problematic, as retail rate issues begin to intermingle with wholesale market issues. Dayton concludes that the task of measuring and verifying energy reductions for each individual entity would likely exceed the benefit.

32. Old Dominion Electric Cooperative<sup>29</sup> (ODEC, *et al.*) argue that certain of PJM's demand response proposals have not yet been finalized and that once finalized, these provisions, which may be included only in PJM's Manuals, may not be consistent with the PJM OATT and/or the PJM Operating Agreement. ODEC, *et al.* request that PJM be required to: (1) complete all necessary Manual revisions on or before October 1, 2009, and (2) submit a FPA section 205 filing, no later than 60 days after completion of the Manual revisions, addressing any PJM OATT and Operating Agreement changes as may be required by its Manual changes. ODEC *et al.* argue that, in this filing, PJM should be required to demonstrate that the PJM OATT and Operating Agreement are consistent with PJM's Manuals.

33. Intervenors also challenge PJM's compliance with the Order No. 719's requirement that RTOs and ISOs coordinate with each other in the development of technical requirements for demand response resources. ELCON and Converge, *et al.* argue that PJM's filing fails to address the demand response needs identified by the Commission, in Order No. 719, on a sufficiently uniform, standardized basis across all RTO/ISO markets. ELCON argues that lack of standardization will impose significant costs on large industrial consumers, in particular. ELCON therefore urges the Commission to consider the adoption of uniform *pro forma* language to comply with the

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<sup>29</sup> Joined by Southern Maryland Electric Cooperative, Inc., PJM Industrial Customer Coalition, District of Columbia Office of the People's Counsel and Public Power Association of New Jersey.

requirements of Order No. 719. Comverge, *et al.* add that standardized requirements will facilitate greater demand response participation and increased efficiency.

34. In comments addressing each of the RTO/ISO compliance filings, ELCON argues that Order No. 719's directives regarding comparability have not been satisfied. ELCON asserts that the term "comparable treatment," in this regard, has been incorrectly equated with the term "identical treatment." ELCON also takes issue with the conditions placed on demand response providers, as modeled on conditions applicable to generators and systems that were originally established to meet the needs of generators. ELCON argues that demand response providers should not be penalized because the control systems in which they seek to participate were originally designed to operate on behalf of generation resources only.

35. The Delaware Commission argues that PJM's filing fails to comply with the Order No. 719 requirement that PJM perform an assessment, through pilot projects or other mechanisms, of the technical feasibility and value to the market of smaller demand response resources providing ancillary services, including whether (and how) smaller demand response resources can reliably and economically provide operating reserves.<sup>30</sup> The Delaware Commission characterizes as insufficient, in this regard, PJM's reliance on its requirement that demand resources must provide meter data at no less than a one-minute scan rate within 24 hours in order to participate in PJM's spinning and supplemental reserve markets. ELCON and the Delaware Commission request that PJM be required to implement a pilot program addressing PJM's ability to accept demand resources' participation in the spinning and supplemental reserve markets with meter interval data from advanced digital meters on a basis other than a one-minute scan rate.<sup>31</sup>

36. ODEC, *et al.* add that PJM's demand response pilot programs were not discussed during the stakeholder process. ODEC, *et al.* asserts that the Commission should require

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<sup>30</sup> Delaware Commission comments at 4-5, *citing* Order No. 719, FERC Stats & Regs. ¶ 31,281 at P 97.

<sup>31</sup> *See also* Ohio Commission comments at 11-13 (noting that: (1) it is pursuing the development of dynamic retail pricing options for large energy users who already have interval meters, has approved significant deployments of advanced metering infrastructure, and is exploring the development of dynamic and time-differentiated pricing for electricity consumers as the metering to support such pricing is put in place; and (2) PJM will need to implement changes in its tariff and business practices in order to provide an opportunity for states that choose to implement dynamic retail pricing and pursue price responsive demand to realize the benefits of these policies).

PJM to conduct the necessary stakeholder process to facilitate this assessment and make a subsequent compliance filing addressing this issue.

### **PJM's Answer**

37. PJM responds to the Delaware Commission's argument regarding the 25 percent demand response participation limitation. PJM explains that its limitation is designed to allow PJM to gain experience with demand resources in each of its ancillary services markets. PJM adds that this limitation was never intended to be permanent. Additionally, PJM argues that RFC has included the 25 percent limitation for demand response participation in its reliability guideline, BAL-002-RFC-02.<sup>32</sup> PJM points out that, as such, it cannot act unilaterally. Rather, PJM asserts that it would be required to submit a request to RFC to raise or eliminate the 25 percent limitation if, and when, the level of market participation by demand response resources approaches this limit.<sup>33</sup> However, PJM explains that it will look for opportunities to revisit this issue with RFC and to provide an adequate forum for the Delaware Commission and other interested stakeholders to express their concerns. Specifically, PJM commits that it will advise stakeholders when actual demand response participation approaches the 25 percent limit so that the stakeholders can review demand response performance. PJM states that it will then initiate processes, as appropriate, to raise or eliminate the existing limits.

38. PJM also responds to Dayton's argument that PJM has failed to justify its rule change allowing aggregators to submit demand response bids at a minimum increment of 0.5 MW, while imposing a higher bid requirement (1 MW) on generators. PJM asserts that the Manual provision at issue was endorsed by PJM's markets implementation committee.<sup>34</sup> PJM further asserts that its aggregation rule satisfies the 11 criterion outlined in Order No. 719, regarding the submission of demand response bids, including

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<sup>32</sup> We note that the North American Reliability Corporation's BAL-002 (Disturbance Control Performance) standard is to ensure that a control area is able to utilize its contingency reserve to balance resources and demand thereby returning interconnection frequency within defined limits following a reportable disturbance.

<sup>33</sup> PJM notes that the current participation levels are well below the 25 percent limitation. Specifically, PJM states that participation in the synchronized reserve, RFC Mid-Atlantic sub zone, Virginia-Carolinas (VACAR), and day-ahead scheduling reserves markets are 15.3 percent, 15.8 percent, 0 percent, and 0.1 percent, respectively. PJM adds that, to date, demand response resources have yet to be offered, or qualify to provide, regulation service. *See* PJM answer at 3.

<sup>34</sup> These revisions were later presented to the Markets and Reliability Committee and were thereafter endorsed, on July 30, 2009, by the full PJM membership.

the requirement that the demand response bid of the aggregator meet the same requirements as a demand response bid from any other entity.<sup>35</sup> PJM argues that its market rules confer no preference or privilege on the bid or performance of a compliant aggregation of demand response resources.

39. PJM also responds to ODEC, *et al.*'s concern that these Manual revisions be consistent with (or be made consistent with) the PJM OATT and Operating Agreement. PJM responds that its submission of any section 205 filing regarding this matter will be guided by its stakeholder process and the filing requirements applicable to PJM. PJM asserts that, as such, it should not be required to make a compliance filing addressing this matter.

40. Finally, PJM responds to the Delaware Commission's asserted need for pilot programs addressing PJM's ability to accept demand resources' participation in the spinning and supplemental reserve markets. PJM argues that this directive would be unworkable and should be rejected. PJM states that it welcomes and will consider any submitted pilot proposal designed to test, measure and/or verify small demand resource market participation in the synchronized reserve, day-ahead scheduling reserve, or regulation markets. However, PJM explains that its existing tariff already provides an avenue for non-interval metered sites to participate as demand resources. PJM further explains that it works with market participants that propose measurement and verification regimes for non-interval metered sites to participate as demand response resources pursuant to the authority conferred by the Commission for 500 MW of economic or emergency load response. PJM states that an electric distribution company-wide deployment of advanced metering infrastructure could enable participation by small demand response resources in the spinning reserve and day-ahead scheduling reserve markets. PJM argues that simply changing the meter data interval may actually shortchange, rather than enhance, demand response participation.

### **Commission Determination**

41. We accept PJM's compliance filing, subject to conditions. Order No. 719 requires PJM to accept bids from demand response resources on a basis comparable to any other resources for ancillary services acquired in a competitive bidding process, subject to certain operating conditions and allowances.<sup>36</sup> Under PJM's existing OATT and Operating Agreement, demand response resources may participate in PJM's ancillary service markets (i.e., in PJM's synchronized reserve, day-ahead scheduling reserve and

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<sup>35</sup> PJM answer at 16-17, *citing* Order No. 719, FERC Stats & Regs. ¶ 31,281 at P 158.

<sup>36</sup> Order No. 719, FERC Stats & Regs. ¶ 31,281 at P 47, 49.

regulation services markets) and receive the market clearing price. Additionally, PJM asserts that its existing market rules limiting participation by demand response resources to 25 percent of the synchronized reserve requirement in each synchronized reserve zone is consistent with this requirement. PJM further explains that this limitation is tied to an RFC guideline, the North American Electric Reliability Corporation's (NERC) designated regional entity, and that, as such, PJM would be required to revisit this issue, with RFC, prior to making any modifications to its own requirements.

42. Accordingly, we accept PJM's commitment to "advise the stakeholders when actual [demand response] participation reaches the 25 percent limit so stakeholders can review [demand response] performance, and then PJM will initiate processes as appropriate to raise or eliminate the existing caps of [demand response] participation limitation."<sup>37</sup> In addition, we will require PJM to file a status report on the results of the stakeholder process mentioned above in an informational filing submitted to the Commission.<sup>38</sup> In addition, with regard to BAL-002, we note that the Commission directed NERC in Order No. 693 to develop a continent-wide approach to contingency reserve policy, and thus the Commission and parties will have the opportunity to consider this issue in NERC's revised reliability standards.<sup>39</sup>

43. Dayton argues that PJM has failed to justify its Manual provision allowing aggregators to submit demand response bids at a minimum increment of 0.5 MW, while imposing a higher bid requirement (1 MW) on generators. Dayton argues that a reduced threshold could result in demand response participation levels that PJM will be ill-equipped and/or ultimately unable to manage. PJM explains that a lower threshold is appropriate for demand response resources because the average size of such a resource is smaller than a generation resource and therefore a difference is warranted. We find that PJM's proposal to use a 0.5 MW threshold for demand response resources complies with Order No. 719's requirement to treat demand response resources on a comparable basis to any other resources. However, we direct PJM to explain, in its 90-day compliance filing, why the same lower threshold should not also apply to generation resources that currently have a 1.0 MW threshold. In addition, we find unpersuasive Dayton's argument that as smaller increments are used, the administrative complexity for the RTO may exponentially increase, since PJM does not appear to view this as a problem.

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<sup>37</sup> PJM answer at 3.

<sup>38</sup> Upon receipt, the Commission will not act on or notice this informational filing.

<sup>39</sup> See *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 344, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

44. Dayton argues that demand response resources and generators should be: (1) subject to similar credit requirements; (2) available for reasonably comparable time periods for system demands; and (3) be subject to the same penalties for non-performance. Dayton's argument, however, lacks sufficient support to demonstrate that demand response resources and generators in PJM are not subject to similar credit requirements, available for comparable time periods or subject to comparable penalties for non-performance.

45. ODEC, *et al.* assert that PJM's aggregation and bid rule changes to its Manuals may require changes to PJM's OATT and Operating Agreement. Accordingly, ODEC, *et al.* request that PJM be required to make an additional compliance filing addressing this issue, including the submission of FPA section 205 revisions, as necessary, to ensure that the PJM OATT and Operating Agreement are fully consistent with the PJM Manuals. We agree with ODEC, *et al.* In Order No. 890, the Commission stated that rules that significantly affect transmission service must be included in the transmission provider's tariff.<sup>40</sup> We find that PJM's Manual changes regarding its aggregation and bid rules will significantly affect transmission service. Accordingly, we require PJM to submit, in its 90-day compliance filing, provisions modifying its OATT and Operating Agreement, as necessary, to reflect the bid threshold for demand response resources. In addition, we also require PJM to make any necessary conforming changes, as requested by ODEC, *et al.*

46. Regarding ELCON's request that the Commission conduct thorough, independent analysis of all Order No. 719 compliance filings, we note that the Commission is required under section 205 of the FPA, to ensure that rates are just and reasonable and not unduly discriminatory or preferential, and the instant filing in this proceeding is no exception. We agree with ELCON that "comparability" is not achieved by setting conditions for demand response resources the same as those set for generating resources. We address a few specific issues in this order and require PJM to adequately address "comparability" in a way which enables demand response resources to participate on terms that both address the characteristics of demand response resources and ensure reliable operations. ELCON also requests that the Commission pursue uniform demand response standards. In Order No. 719, the Commission specifically chose not to develop "a standardized set of minimum requirements for minimum size bids, measurement, telemetry and other factors, and instead allowed RTOs and ISOs to develop their own minimum requirements, including bidding parameters."<sup>41</sup> It would be inappropriate to use the

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<sup>40</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1633-1661 (2007), Order No. 890-A, FERC Stats & Regs. ¶ 31,261 (2007).

<sup>41</sup> *Id.* P 87.

compliance filing process as a forum to reconsider that determination in the Final Rule. However, we note that the North American Energy Standards Board (NAESB) has adopted Phase I business practice standards for the measurement and verification of demand response, a first step in a process that may lead to greater standardization through the NAESB consensus process.<sup>42</sup> The Commission will continue to examine the need for further generic policy reforms to identify and eliminate barriers of comparable treatment to demand response, and ELCON's concerns with standardization can be addressed in relevant future Commission proceedings.

47. The Delaware Commission and ELCON assert that PJM's small demand resource pilot programs lack appropriate metering. We note that PJM's compliance filing, in Docket No. RM07-19-0001, on October 28, 2009, addresses its small demand response resource pilot. Accordingly, we will not address, here, the concerns raised by the Delaware Commission and ELCON.

### **Eliminating Deviation Charges During System Emergencies**

48. Order No. 719 required RTOs and ISOs to modify their tariffs to eliminate a deviation charge to a buyer in the energy market for taking less electric energy in the real-time market than was scheduled in the day-ahead market. This charge would be eliminated only during a real-time market period for which the RTO or ISO declares an operating reserve shortage or makes a generic request to reduce load in order to avoid an operating reserve shortage.<sup>43</sup> Order No. 719 also required RTOs and ISOs to modify their tariffs to eliminate deviation charges for virtual purchasers, during the same period as they are eliminated for physical purchasers, unless the RTO or ISO demonstrates the appropriateness of assessing such a charge for virtual purchasers during this period.<sup>44</sup>

### **PJM's Filing**

49. PJM proposes to comply with the Order No. 719's requirement, regarding the elimination of certain deviation charges attributable to an existing or possible operating reserve shortage, by cross-referencing an anticipated, but still pending provision addressing operating reserve shortages and scarcity pricing. Specifically, PJM proposes

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<sup>42</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, Notice of Proposed Rulemaking, Docket No. RM05-5-017, FERC Stats. & Regs. ¶ 32,646 (Sept. 17, 2009).

<sup>43</sup> *Id.* P 111.

<sup>44</sup> *Id.* P 127.

to revise its existing OATT, at Attachment K – Appendix, section 3 (Accounting and Billing), by adding the following italicized cross-reference:

*Demand deviations will be assessed by comparing all day-ahead demand transactions at a single transmission zone, hub, or interface against the real-time demand transactions at that same transmission zone, hub, or interface; except that the positive values of demand deviations, as set forth in the PJM Manuals, will not be assessed Operating Reserve charges in the event of an Operating Reserve shortage in real-time or where PJM initiates the request for load reductions in real-time in order to avoid an Operating Reserve shortage as described herein at Attachment K – Appendix, section 6A, Scarcity Pricing. [<sup>45</sup>]*

50. PJM acknowledges that its proposed compliance revision relies, in part, on a scarcity pricing trigger point to signal the existence of an operating reserve shortage. PJM further notes, however, for the reasons discussed in section IV.B.4 of this order, below, that it has not submitted a compliance proposal, at this time, addressing scarcity pricing. Rather, PJM proposes to submit this proposal on or before April 1, 2010.<sup>46</sup>

51. PJM states that, under Order No. 719, deviation charges may be allocated either on a socialized or a localized basis, as may be appropriate. PJM states that the Commission in an order issued November 26, 2008 addressed this allocation issue, as it relates to

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<sup>45</sup> See proposed OATT revision at Fifth Revised Sheet No. 381A; PJM also proposes to make a corollary revision to its Operating Agreement. See proposed Operating Agreement revision at Ninth Revised Sheet No. 112B.

<sup>46</sup> PJM adds that the method for calculating negative demand deviations (negative defined as a day-ahead quantity that is less than the real-time quantity) will remain unchanged. PJM also explains, in the transmittal letter to its filing, that its market rules are designed to reflect that positive demand deviations (positive defined a day-ahead quantity greater than real-time quantity) will not be assessed operating reserve charges in the event that PJM experiences a reserve shortage in real-time, or requests load reductions in real-time to avoid a reserve shortage. PJM states that these deviations will still be calculated and assessed operating reserve charges at the appropriate RTO or regional operating reserve rate.

PJM's Operating Reserves market.<sup>47</sup> PJM asserts that no additional compliance revisions are required.

### **Protests and Comments**

52. Dayton expresses its support for PJM's proposed revision. Specifically, Dayton supports the comparable treatment of virtual and physical energy purchases. Dayton also asserts that a region experiencing scarcity conditions, triggering elimination of deficiency charges, is the region that should be held responsible for the associated costs.

### **Commission Determination**

53. We accept PJM's compliance filing, subject to condition. Order No. 719 requires PJM to modify its OATT and Operating Agreement to eliminate deviation charges in the case of an existing or possible operating reserve shortage. PJM's proposed revision would implement this requirement by tying the term "operating reserve shortage" to its scarcity pricing trigger (a trigger that is incorporated by reference in PJM's proposed provision but which is not otherwise before us here). Accordingly, we condition our acceptance of PJM's proposed OATT change on PJM's scarcity pricing proposal to be submitted April 1, 2010. Order No. 719 allows RTOs or ISOs to allocate deviation charges locally or regionally, as may be appropriate.<sup>48</sup> We agree with PJM that the Commission's acceptance of PJM's allocation methodology, in the November 26 Order, satisfies this requirement.

## **2. Aggregation of Retail Customers**

54. Order No. 719 required RTOs and ISOs to amend their market rules, as necessary, to permit an aggregator of retail customers to bid demand response on behalf of retail customers directly into the RTO's or ISO's markets, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate.<sup>49</sup> PJM asserts that its February 9, 2009 filing, in Docket No. ER09-701-000, *et al.*, addresses this requirement. We agree that PJM's compliance with this issue is being

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<sup>47</sup> See *PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,244 (2008) (*Operating Reserves Order*).

<sup>48</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 117.

<sup>49</sup> *Id.* P 154.

addressed by the Commission in Docket No. ER09-701-000, *et al.*<sup>50</sup> Accordingly, we need not further address this issue here.

**3. Market Rules Governing Price Formation During Periods of Operating Reserve Shortage**

55. Order No. 719 established reforms to remove barriers to demand response by requiring RTOs and ISOs to reform their market rules in such a way that prices during operating reserve shortages more accurately reflect the value of energy during such shortages. Order No. 719 required each RTO or ISO to reform or demonstrate the adequacy of its existing market rules to ensure that the market price for energy reflects the value of energy during an operating reserve shortage.<sup>51</sup> Specifically, the Commission stated that each RTO or ISO may propose in its compliance filing one of four suggested approaches to pricing reform during an operating reserve shortage, or develop its own alternative approach to achieve the same objectives.<sup>52</sup> In addition, the Commission required that each RTO or ISO must address how its selected method of shortage pricing interacts with its existing market design.<sup>53</sup>

56. Order No. 719 also required each RTO or ISO to provide adequate factual support for its compliance filing and outlined six criteria that will be considered in reviewing whether the factual record compiled by the RTO or ISO meets the requirements of the rule.<sup>54</sup> The Commission also allowed an RTO or ISO to implement any new pricing rules, as may be required, on a phased-in basis, subject to a justification supporting the proposed phase-in period.<sup>55</sup>

**PJM's Filing**

57. PJM states that while its currently-effective scarcity pricing mechanism allows prices to rise during emergency conditions, this existing mechanism may not fully

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<sup>50</sup> *See supra* note 3.

<sup>51</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 194.

<sup>52</sup> *Id.* P 208.

<sup>53</sup> *Id.* P 204.

<sup>54</sup> *Id.* P 246-47.

<sup>55</sup> *Id.* P 258.

achieve compliance with the six scarcity pricing criteria listed in Order No. 719.<sup>56</sup> Specifically, PJM states that its existing mechanism results in price impacts only when emergency procedures are implemented during, or in anticipation of, an energy shortage, but does not result in price impacts during an operating reserve shortage.

58. PJM states that while a compliance filing is required addressing this issue, PJM and its stakeholders have been unable to develop an adequate proposal, to date, due to the complexity of the issues involved.<sup>57</sup> Accordingly, PJM requests that it be granted an extension of time, until April 1, 2010, to make its filing. PJM states that it would be prepared to implement its filing on June 1, 2010.

### **Protests and Comments**

59. Except as otherwise noted, below, intervenors either support, or do not object to PJM's requested extension.<sup>58</sup> Exelon and P3 do not object to PJM's requested extension, but request that the Commission establish certain internal parameters to ensure that PJM's stakeholder process proceeds on a timely basis. First, Exelon asserts that by September 1, 2009, PJM should have settled on the outline of a specific pricing mechanism. Accordingly, Exelon requests that PJM be required to submit a status report to the Commission confirming its achievement of this interim goal. P3 concurs, adding that PJM's interim report should be required to identify any impediment that might prevent PJM from meeting its filing deadline.

60. Exelon argues that PJM's status report should include a definition of the terms "operating reserves" and "operating reserve shortage." Exelon argues that having a clear definition of these terms is crucial to successful implementation and operation of a pricing mechanism that will correctly signal shortages and elicit demand response.

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<sup>56</sup> PJM's existing market rules address scarcity pricing at Schedule 1, section 6A.3 of the PJM Operating Agreement.

<sup>57</sup> PJM notes that, in conjunction with its stakeholder process, it has developed guiding principles applicable to its anticipated revised pricing mechanism proposal. PJM notes that, in addition, several stakeholders, including Exelon, DTE Energy Trading, and the Market Monitor, have made their own proposals. PJM states that it has proposed developing and implementing an operating reserve demand curve, similar, in concept, to those already implemented by ISO New England and the New York ISO. PJM states, however, that additional time is required to consider the specifics of this proposal, along with an adequate factual record supporting its proposal.

<sup>58</sup> See, e.g., EPSA comments at 7; Dayton comments at 9; DC Energy comments at 6.

61. Exelon further requests that the Commission impose a timetable for progress in developing implementation plans so that the new construct can be implemented by June 1, 2010 in time for the summer season. Specifically, Exelon asserts that PJM should be required to file its proposed tariff revisions and business rule changes on or before December 1, 2009.<sup>59</sup> Exelon further requests that the Commission adopt a timetable for comments that would permit the Commission's order to be issued by April 1, 2010. Exelon argues that, with this timetable, the period April 1 through May 1, 2010 could be devoted to technical and market preparation, assuming PJM confirms that this will be a sufficient amount of time.

### **Commission Determination**

62. We grant PJM's request for extension regarding the submission of its scarcity pricing proposal, until April 1, 2010. We also grant, in part, the requests made by Exelon and P3.

63. PJM's filing demonstrates a good faith effort made, to date, by PJM and its stakeholders to develop a scarcity pricing proposal. PJM also asserts (and numerous intervenors concur) that an additional time allowance, through April 1, 2010, is both necessary and appropriate.

64. However, we also agree with Exelon and P3 that a status report would be appropriate regarding PJM's ability to meet its revised filing deadline. Accordingly, we require PJM to submit an informational filing, within 30 days of the date of this order, confirming its ability to meet its revised filing deadline.<sup>60</sup> We also require that PJM's informational filing both identify and discuss any issues that have, or may, arise, that could impede or delay PJM's ability to make its April 1, 2010 filing or impede or delay its ability to implement its scarcity pricing proposal by June 1, 2010.

65. We will not prejudice here, or at any time prior to our review of PJM's April 1, 2010 filing, the substance, or merits, of PJM's scarcity pricing proposal, whether in whole or in part. Accordingly, we reject Exelon's request that PJM be required to define the terms "operating reserves" and "operating reserve shortage" prior to its submission of its April 1, 2010 filing.

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<sup>59</sup> See also P3 comments at 5; Constellation comments at 8.

<sup>60</sup> Upon receipt, the Commission will not act on or notice this informational filing.

#### 4. Reporting on Remaining Barriers to Comparable Treatment of Demand Response Resources

66. Order No. 719 required RTOs and ISOs to assess and report on any remaining barriers to comparable treatment of demand response resources that are within the Commission's jurisdiction, and to submit their findings and any proposed solutions to the Commission, along with a timeline for implementation.<sup>61</sup> The Commission also required RTOs and ISOs to identify all known barriers, to provide an in-depth analysis of those that are practical to analyze in the compliance time frame given, and to supply a time frame for analyzing the remainder, including, but not limited to, technical requirements and performance verification limitations.<sup>62</sup> Finally, Order No. 719 required RTOs and ISOs to identify any significant minority views in their compliance submittals.

#### PJM's Filing

67. PJM identifies the following recently-resolved and/or remaining barriers to the comparable treatment of demand response resources in its markets: (1) the prior uncertainty and lack of precision relating to PJM's customer baseline load calculations, i.e., the rules relied upon by PJM for measuring and verifying the amount of power that might be used by an end-use customer absent a reduction in its MWh usage;<sup>63</sup> (2) the existing lack of timely, cost effective access to end-use customer meter data and the labor intensive and often contentious review and reconciliation of customer baseline load and "billing quality" meter data applicable to curtailment service providers and electric distribution companies;<sup>64</sup> (3) the existing absence of adequate demand response

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<sup>61</sup> *Id.* P 274. As noted above, the Commission also required that the RTO's or ISO's MMU address these same issues.

<sup>62</sup> *Id.* P 275.

<sup>63</sup> PJM asserts that these issues have largely been addressed and resolved in Docket No. ER08-824-000. *See PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,257 (2008) (*Customer Baseline Revisions Order*) (order accepting tariff revisions subject to conditions). PJM states that as additional experience is gained utilizing these revised customer baseline load calculations, additional rule revisions may become warranted. However, PJM proposes no additional rule changes at this time. PJM also states that its calculation of customer baseline loads will be enhanced when it implements a new software application, as planned. *See PJM's eLoad Response Systems at:* <http://www.pjm.com/markets-and-operations/etools/elrs.aspx>.

<sup>64</sup> *See supra* note 4.

compensation;<sup>65</sup> and (4) institutional barriers at the intersection of the retail and wholesale markets.<sup>66</sup>

68. In addition to these issues, PJM states that its stakeholders identified concerns relating to frequent rule changes, the existence of an unlevel playing field for independent curtailment service providers *vis a vis* a customer's load serving entity, and the asserted inadequacy of PJM's aggregation rules.<sup>67</sup>

69. With respect to retail/wholesale market coordination issues, PJM asserts that more work remains to be done regarding the institutional barriers that exist at the intersection of these markets. PJM states it is currently working with a number of state regulators to better integrate the impact of price responsive load on wholesale market operations. However, PJM proposes no revisions at this time.

### **The MMU's Report**

70. As noted above, Order No. 719 required the MMUs to address, similar to the RTO's and ISO's, any remaining barriers to comparable treatment of demand response resources that are within the Commission's jurisdiction. The MMU submitted its report on July 1, 2009.

71. The MMU states that most end-use customers do not face the market price of energy or capacity, thus resulting in a market failure and what it considers to be the most basic barrier to a fully functional demand side of the market.

72. In order to receive the benefit, or pay the costs, associated with responding to real time prices, the MMU states that customers must have the appropriate metering capability. The MMU asserts that most end-use customers in PJM do not have this technology, the absence of which represents a barrier both to the development of PJM's demand side markets.

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<sup>65</sup> *Id.*

<sup>66</sup> PJM also cites, as a significant barrier to demand response participation, the asserted lack of a uniform straightforward and automated process for state regulatory review of participation. As noted above, the Commission has recently addressed this in Docket No. ER09-701-000, *et al.*

<sup>67</sup> These issues are addressed in greater detail in the "protests and comments" section that follows.

73. The MMU acknowledges that PJM's new settlement screens and customer baseline load revisions, as approved in the *Customer Baseline Revisions Order*, have significantly improved PJM's measurement and verification of load reductions.<sup>68</sup> However, the MMU asserts that market participants cannot yet be confident that the demand reductions currently being credited by PJM are, in fact, price-responsive reductions. In addition, the MMU asserts that PJM's existing procedures fail to ensure with sufficient accuracy that customer baseline load calculations will adequately capture end-use customer operations in a manner that will prevent demand response payments for load levels that would have occurred regardless of PJM's market opportunities. The MMU further notes that PJM does not evaluate daily settlements to assess responsiveness to price or accuracy of the customer baseline.

74. The MMU notes that curtailment service providers are in direct competition with the local utility because the local utility earns revenues from the sale of each KWh. The MMU explains that, as a result, the utility does not have an incentive to cooperate with a curtailment service provider. While it may be generally more cost effective to retrofit the existing utility provided meter by installing a meter module, the MMU asserts that installing a meter module would require the utility's consent and that there are no rules governing the response time. In addition, the MMU points out that there are no rules governing the response time when a curtailment service provider requests meter data. The MMU states that this fact, taken alone, does not mean that utilities engage in anti-competitive behavior; however, the MMU underscores the importance of recognizing the structural incentives resulting from the design of markets and regulations.

75. The MMU asserts that regulatory uncertainty reduces the incentives of end users and CSPs to offer demand resources into PJM wholesale power markets. The MMU states that Kentucky, Indiana and Ohio have taken actions that could constitute barriers to the ability of suppliers to offer demand resources into PJM wholesale markets. PJM reports that Virginia, West Virginia, North Carolina, Kentucky, Tennessee, Ohio and Indiana indicated, in response to PJM's canvassing in 2007, an intent to regulate in some manner the availability of demand resources and distributed resources to PJM's wholesale power markets, the MMU observes.<sup>69</sup>

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<sup>68</sup> See *Customer Baseline Revisions Order*, 123 FERC ¶ 61,257 at P 21.

<sup>69</sup> PJM cites PJM Interconnection, L.L.C., FERC Status Report: Integrating Efficiency into the Capacity Market and Forum for Identifying and Resolving Impediments to Demand Response at 14, Docket No. ER05-1410-000, *et al.* (September 24, 2007).

76. In addition, the MMU asserts that the mitigation of existing demand resources in RPM auctions can be a barrier to the entry of existing demand resources by creating a risk that such resources will be committed at a capacity market price less than their incremental cost. The MMU explains that existing sellers of demand resources, if they would otherwise affect the clearing price, are subject to an offer cap of \$0 per MW-day.

77. Finally, the MMU asserts that PJM's market rules and the processes by which these rules are modified and promulgated constitute a barrier to entry to demand response resources. The MMU argues that these rules require revision in order to add clarity, consistency and comprehensiveness. The MMU adds that there should be clearly specified timelines for implementation of any changes to these rules and that the PJM settlement review process and any further settlement screening criteria should be fully described and clearly documented in either the PJM OATT or in the PJM Manuals.

### **Protests and Comments**

78. Intervenors address a number of the issues subsequently addressed by PJM in the separate filings, noted above, regarding: (1) the use and availability of metering data (*see* PJM's July 28, 2009 filing in Docket No. ER09-1508-000); and (2) demand response compensation (*see* PJM's August 26, 2009 filing in Docket No. EL09-68-000).

79. Intervenors further argue that certain rules set forth in PJM's RPM protocols create barriers to demand response participation in PJM's capacity market. First, with respect to PJM's zero offer requirement, Comverge, *et al.* argue that forcing a resource owner to bid into the auction at \$0/MW-day exposes that resource to the risk of clearing at \$0, as well as the risk of being forced to curtail and the untenable risk of incurring *net* costs as a result of its participation.<sup>70</sup>

80. Comverge, *et al.*, also characterize, as burdensome, the credit and collateral requirements imposed on demand response resources interested in participating in PJM's RPM auctions. Comverge, *et al.* note that, for future delivery years, demand response must be bid into the RPM auction as a "planned demand response," requiring the curtailment service provider to post credit deposits. Comverge, *et al.* assert that these costs can create a substantial burden on curtailment service providers.

81. Intervenors also challenge PJM's assertion that the *Customer Baseline Revisions Order* and related changes involving settlement screens address and resolve all remaining demand response barriers relating to PJM's existing rules for measuring and verifying the

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<sup>70</sup> Comverge, *et al.* note that, in contrast to the zero offer requirement applicable to resource owners, the offer requirement for generation resources is set at the net avoidable cost rate.

amount of power that might be used by an end-use customer. Comverge, *et al.*, argue that, in fact, PJM's implementation of these procedures acts as a barrier to greater participation by demand response resources because it is unclear, in the majority of instances, exactly what criteria is being used by PJM to determine whether to begin the screening process. For example, Comverge, *et al.* note that the screen used by PJM to determine whether a given load reduction has been made based on "normal operations," and not in response to price, flags for review highly active participation. Comverge, *et al.* argues that blindly screening this type of behavior actually discourages increased and valuable demand response. Comverge, *et al.* further argue that investigating market participants and subjecting them to increased scrutiny when they engage in more demand response sends a confusing and mixed message about the participation of demand resources in the PJM market.

82. Comverge, *et al.* argue that PJM's aggregation rules also represent a remaining barrier to demand side response for smaller resources. Comverge, *et al.* note that, currently, PJM's aggregation allowances apply only for the purpose of meeting PJM's minimum size criteria of 100 kW. Comverge, *et al.* assert that, as such, smaller resources remain fully subject to PJM's other rules on a non-aggregated basis, including all measurement and verification rules. Comverge, *et al.* argues that because compliance with these rules is costly, and may operate to lower participation levels in PJM's demand response programs, PJM should be required to consider measurement and verification rules and telemetry requirements for aggregated demand response resources.

83. Comverge, *et al.* also assert that constantly changing rules adds another layer of uncertainty and difficulty for resource owners. For example, Comverge, *et al.* further object to PJM's introduction of its customer baseline screening proposals, on October 31, 2008 and subsequent implementation on November 3, 2008. Accordingly, Comverge, *et al.* request that PJM be prohibited from placing its rule changes into effect for a minimum of 30 days following Commission approval so that curtailment service providers and/or aggregators will have sufficient time to communicate these changes to their customers and implement any necessary supplier changes. Intervenors also argue that PJM's request for market rule changes should be limited to an annual filing. These intervenors assert that constantly changing rules for demand response participation in PJM add a layer of uncertainty and discourage participation in demand response programs.

84. Comverge, *et al.* argue that the involvement of electric distribution companies and load serving entities in the demand response registration and settlement process only adds another layer of process without adding any significant benefit in return. Accordingly, Comverge, *et al.* ask that the Commission remove any role in this process for these entities. Alternatively, Comverge, *et al.* ask that the Commission require electric distribution companies and load serving entities to obtain approval from either their respective state regulatory authority or the Commission.

### **PJM's Answer**

85. PJM responds to intervenors' arguments that certain rules set forth in PJM's RPM protocols, including PJM's zero offer requirement and credit requirements, create barriers for demand response participation in the capacity market. PJM responds that these asserted barriers are currently being reviewed and will be addressed by PJM, subject to the Commission's compliance directives in a separate proceeding involving PJM's RPM protocols.<sup>71</sup>

86. PJM also responds to Comverge, *et al.*'s argument that PJM should not be permitted to make constant rule changes. PJM asserts that the example cited by Comverge, *et al.* is erroneous. PJM asserts that, in fact, it gave notice of its proposal to its demand response steering committee more than a month prior to its implementation, i.e., on September 30, 2008.

87. PJM also responds to intervenors' request that PJM's entitlement to seek market rule changes be limited to one filing per year. PJM responds that such a limitation would be unreasonable on a practical level as it would, among other things, stifle PJM's ability to continue to timely respond with innovative solutions to market evolution. PJM asserts that, limiting changes to once per year would also stifle PJM's and its stakeholders' ability to correct design flaws, forcing the market to live with any such flaws longer than necessary.

88. Finally, PJM responds to Comverge, *et al.*'s argument that the involvement of electric distribution companies and load serving entities in the demand response registration and settlement process should be eliminated. PJM responds that it has no independent means of verifying participant data, including the retail account number, metering arrangements, the applicable retail rate or other contractual commitments of the end-use site. PJM adds that the management of this data has been improved and streamlined through its recent implementation of eLoad Response System, an application that allows for the calculation of a customer baseline for settlement.

### **Commission Determination**

89. We find PJM to be in partial compliance with respect to the reporting requirement on existing barriers to comparable treatment. PJM acknowledges that barriers to demand response participation remain in its markets. However, PJM asserts that certain of these barriers have been addressed by PJM in related proceedings, as noted above. Accordingly, we will not address, here, PJM's assertions (and intervenors' counter-assertions) relating to these issues. Specifically, we will not address here demand

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<sup>71</sup> See *e.g.*, *supra* note 4.

response compensation matters. As noted, above, this topic is being addressed by PJM in a separate filing submitted in Docket No. EL09-68-000. Accordingly, we accept PJM's compliance filing, subject to the outcome of this proceeding. We also decline to address, here, intervenors' arguments regarding PJM's RPM auction protocols, and the extent to which these RPM rules may operate as a barrier to demand response participation because the Commission has addressed these concerns in separate proceedings.<sup>72</sup>

90. PJM also identifies customer baseline load calculations as a potential barrier to the comparable treatment of demand response resources in its markets, but asserts that the tariff revisions recently approved by the Commission in the *Customer Baseline Revisions Order* represent a significant step forward in enhancing the measurement and verification of economic demand reductions. We agree. In the *Customer Baseline Revisions Order*, the Commission accepted PJM's request to defer market rule changes regarding system enhancements. These enhancements were subsequently implemented by PJM on June 3, 2009 to operationalize flexible bidding parameters for demand response resources in the day-ahead and real-time markets.

91. Additionally, we find reasonable PJM's explanation that it provided the Demand Response Steering Committee with a comprehensive overview and timeline for eLoad Response Systems on June 13, 2008, more than a year in advance of implementation. In addition, PJM explains that it has worked closely with market participants during both its evaluation of the old system, beginning in late 2007, and during its development and implementation of its eLoad Response Systems.<sup>73</sup> This has increased transparency for electric distribution companies and load serving entities. According to PJM, electric distribution companies and load serving entities can see all notifications and settlement submissions and download information for analysis. In addition, the new eLoad Response Systems prevents certain inappropriate settlements from being requested such as settlements without advanced notifications.<sup>74</sup> Accordingly, we find that no further

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<sup>72</sup> *Id.*

<sup>73</sup> In the *Customer Baseline Revisions Order*, the Commission accepted PJM's filing, subject to the condition that PJM file revised tariff sheets applicable to the implementation of its required system enhancements 14-days in advance of its proposed implementation date. In Docket No. ER08-824-003 and ER08-824-004, PJM filed sheets to implement the rules for flexible bidding parameters in the day-ahead and real time markets, effective June 3, 2009. The Commission approved the revised tariff sheets applicable to the implementation of PJM's system enhancements on August 17, 2009.

<sup>74</sup> See PJM's Executive Report at p. 24 at: <http://www.pjm.com/committees-and-groups/committees/~media/committees-groups/committees/mc/20091119/20091119-item-07a-markets-executive-report.ashx>.

revisions are required at this time regarding this issue. However, we encourage interested parties to continue to work through PJM's stakeholder processes to consider and propose any additional enhancements, as may be appropriate.

92. The MMU and others express concerns that the *Customer Baseline Revisions Order* did not go far enough. Specifically, the MMU states that market participants cannot yet be confident that the demand reductions currently being credited by PJM are price-responsive reductions. The MMU further states that PJM's existing procedures fail to ensure with sufficient accuracy that customer baseline load calculations will adequately capture end-use customer operations in a manner that will prevent demand response payments for load levels that would have occurred regardless of PJM's market opportunities. Given these legitimate concerns, we require PJM to use its stakeholder process to develop solutions to ensure that load reductions reflect actions taken in response to price. We also require PJM to address in its 90-day filing the status of its stakeholder deliberation and to submit, in that filing, a proposed timeline for implementation. Finally, we require PJM to revise its OATT and Operating Agreement to reflect the normal operations review criteria posted on PJM's website.<sup>75</sup>

93. PJM asserts that additional work remains to be accomplished regarding the institutional barriers that exist at the intersection of retail and wholesale markets. PJM notes that it is currently working with state regulators to better integrate the impact of price responsive load on wholesale market operations and asserts that the implementation of "smart rates" and "smart meters" will enhance this effort. We agree that the lack of appropriate coordination between the wholesale and retail markets, as described by PJM, can operate as a barrier to demand response participation. Accordingly, we encourage PJM to continue its efforts in this regard. We also require PJM to provide the Commission with information as to the status of PJM's efforts with regard to it working with state regulators on this matter in an informational filing within 90 days of the date of this order and every six months thereafter, until February 14, 2011.<sup>76</sup>

94. In addition to the demand response barriers identified by PJM, in its compliance filing, intervenors raise additional alleged barriers. First, Comverge, *et al.* assert that PJM's request for market rule changes should be limited to an annual filing, given the asserted uncertainty and burden associated with changes implemented on a more frequent basis. We reject this argument. We are not persuaded that imposing restrictive timing

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<sup>75</sup> See PJM's website at:

<http://www.pjm.com/committees-and-groups/closed-groups/~media/committees-groups/committees/drsc/20081031-item-04-dsr-activity-review-proc.ashx>.

<sup>76</sup> Upon receipt, the Commission will not act on or notice this informational filing.

requirements on the submission of proposed market rule changes, without regard to the need or urgency of the proposed change, can be justified by any countervailing burden such a filing may pose on market participants, or that a blanket limitation of this sort is otherwise consistent with a public utility's filing rights under FPA section 205.

95. Additionally, with respect to Comverge, *et al.*'s request that in the alternative, we require electric distribution companies and load serving entities to obtain approval from a state regulator or the Commission before imposing requirements, this issue is being addressed in a separate proceeding, i.e., in Docket No. ER09-701-000.<sup>77</sup> In addition, the concerns raised by the MMU regarding the aggregator of retail customer provisions are being addressed in the above mentioned proceeding (i.e., Docket No. ER09-701-000).

96. The MMU alleges that demand response rules that appear in various, non-centralized sections of the PJM OATT, PJM Operating Agreement, and PJM Manuals pose unnecessary administrative burdens on PJM's market participants and thus can operate as a barrier to demand response. We agree that PJM's rules governing load response should be available in one place. On June 11, 2009, PJM announced, on its website, that it will be developing a centralized load response manual to address this issue.<sup>78</sup> We also note that PJM has posted a web link for interested parties to review all applicable rules governing its demand response programs.<sup>79</sup> We find that these steps sufficiently address the concerns raised by the MMU.

97. The MMU and Comverge, *et al.*, raise concerns about the role of electric distribution companies and load serving entities in PJM's wholesale demand response markets. With respect to Comverge, *et al.*'s concern about the involvement of electric distribution companies and load serving entities in the registration and settlement process, we note that such participation is explicitly permitted pursuant to provisions in PJM's OATT and Operating Agreement and reflects Commission policy.<sup>80</sup> PJM explains that, as a wholesale operator, it has no independent means of verifying participant data,

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<sup>77</sup> See *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,238 at PP 21-24 and 40.

<sup>78</sup> See <http://www.pjm.com/committees-and-groups/committees/~media/committees-groups/committees/mic/20090611/20090611-item-08-pjm-manual-for-load-response.ashx>.

<sup>79</sup> See <http://www.pjm.com/markets-and-operations/demand-response/dr-reference-materials.aspx>.

<sup>80</sup> See Attachment K-Appendix PJM OATT at section 1.5.A.3 (Registration) and the corresponding provision in Schedule 1 of the PJM Operating Agreement; see also *PJM Interconnection, L.L.C.*, 99 FERC ¶ 61,227, 61,936 (2002).

including the retail account number, metering arrangements, the applicable retail rate or other contractual commitments of the end-use site. In addition, PJM states that the management of this data has been improved and streamlined through its recent implementation of eLoad Response System, an application that allows for the calculation of a customer baseline for settlement, discussed above.

98. While we agree that the potential exists for a lack of cooperation between the local utilities and the curtailment service providers, we decline to require any additional rules at this time. We note that the MMU commented in general terms about the potential for prospective concern on this issue; it did not provide any evidence of actual anti-competitive behavior. However, we appreciate the concerns raised by the MMU. Therefore, we direct that, in the event the MMU detects anti-competitive behavior affecting PJM's load response programs, we expect the MMU to promptly inform the Commission of such behavior. We also find that Comverge, *et al.* has failed to show why the Commission should remove any role for the electric distribution companies in the demand response process.

99. With respect to Comverge, *et al.*'s argument that PJM should be required to consider measurement and verification rules and telemetry requirements for smaller demand response resources, we note that PJM's compliance filing in Docket No, RM07-19-001, on October 28, 2009, addresses its small demand response resource pilot. Accordingly, we will not address Comverge, *et al.*'s request here.

100. Commenters have identified several additional barriers to demand response. We note that PJM's report and the comments and answers filed in this proceeding will provide information that will be considered by the Commission staff in its evaluation of remaining barriers to demand response participating in PJM's wholesale markets.

#### **D. Long-Term Power Contracting in Organized Markets**

101. Order No. 719 required RTOs and ISOs to dedicate a portion of their websites for market participants to post offers to buy and sell electric energy on a long-term basis.<sup>81</sup> The Commission did not mandate any specific form for the website, but instead allowed each RTO or ISO to work with its stakeholders to implement the website. This discretion includes decisions over the type and amount of data to be posted by participants, whether participants must include a proposed price in their posting, and password and security requirements.<sup>82</sup> Order No. 719 required RTOs and ISOs to explain in their compliance

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<sup>81</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 277. The Commission defined "long-term" as one year or more, but stated that RTOs and ISOs may include offers for contracts of less than a year on their websites as well. *Id.*

<sup>82</sup> *Id.* P 303.

filings the actions they have taken to comply with these requirements and to provide information on the bulletin board they have chosen to implement.<sup>83</sup>

### **PJM's Filing**

102. PJM states, in the transmittal letter to its filing, that it will comply with the Order No. 719 requirement that it dedicate a portion of its website for market participants to post offers to buy and sell electric energy on a long-term basis (a commitment subsequently addressed by PJM in the website addition noted at *supra* P 1).

### **Protests and Comments**

103. ODEC *et al.* request that PJM be required to consider any arrangements, as may be necessary, to allow PJM's members to have reciprocal access to the bulletin boards established by other ISO/RTO Council members. ODEC, *et al.* assert that, given PJM's offer to make its bulletin board available at no cost to all other RTOs who are members of the ISO/RTO Council and to their members, a reciprocal arrangement would be appropriate for the purpose of providing a broader access to all potential buyers and sellers and thus further facilitating long-term contracting.

### **Commission Determination**

104. We find PJM's proposal to administer a bulletin board facilitating long-term power contracting activity on its website complies with Order No. 719. PJM will recover the cost for the creation and maintenance of the bulletin board through the administrative service provisions of its OATT (Schedule 9-3 Market Support Service). PJM commits to cover ongoing operating costs up to \$20,000 annually. If annual operating costs exceed \$20,000, PJM will provide other RTOs and ISOs with six months notification so that they can elect to reimburse PJM for the increased costs on a *pro rata* basis, or develop an alternative solution to support long-term power contracting activities in their region. We reject ODEC *et al.*'s request that PJM make arrangements with the other ISO/RTO Council members to provide reciprocal access to the long-term contracting bulletin boards. These arrangements, which could be of potential use to PJM's market participants and therefore may be worthy of further consideration among interested stakeholders, are not required by Order No. 719. However, we note that other RTOs and ISOs are using PJM's bulletin board (e.g., CAISO, SPP and NYISO) and we encourage others to consider this option.

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<sup>83</sup> *Id.* P 309.

### **E. Market Monitoring Policies**

105. Order No. 719 found that to improve the performance and transparency of organized RTO/ISO markets, market monitoring reforms were required addressing: (1) the independence and functions of the MMU; and (2) information sharing.<sup>84</sup>

106. With respect to the independence and function of MMUs, Order No. 719 declined to mandate a specific MMU structure, whether it be an internal MMU, external MMU, or a hybrid MMU. However, the Commission required each RTO and ISO to include provisions in its tariff ensuring that its MMU would possess the appropriate tools to carry out its designated functions. Order No. 719 also required that the MMU report directly to the RTO's or ISO's board of directors, not to the RTO's or ISO's management. In addition, Order No. 719 addressed required MMU functions, the extent to which the MMU would be permitted to engage in tariff administration, including mitigation functions, mandatory ethical standards applicable to the MMU, and the requirement that all RTO or ISO tariff provisions addressing MMU matters be included in a centralized section of the RTO/ISO tariff. We address each of these requirements, below, in subsections 1 ("Functions"), subsection 2 ("Mitigation and Operations") and subsection 3 ("Ethics").

107. With respect to information sharing, Order No. 719 expanded the types of recipients for whom MMUs can gather information as well as their reporting requirements. We address these requirements, below, in subsection 4 ("Enhanced Information Dissemination") and subsection 5 ("Tailored Requests for Information"). Finally, Order No. 719 expanded the role of MMUs to include the obligation to refer to the Commission any perceived market design flaws as well as tariff and rule violations. We address these requirements in subsection 6, below ("Commission Referrals").

108. Except as otherwise noted, below, we accept PJM's compliance filing addressing these issues.

#### **1. Functions**

109. Order No. 719 required that RTOs and ISOs adopt provisions, in their tariffs authorizing their MMUs to engage in three core functions, namely, to: (1) evaluate existing and proposed market rules, tariff provisions and market design elements, and recommend proposed rule and tariff changes to the RTO or ISO, and also to the Commission's Office of Energy Market Regulation and to other interested entities (i.e., state commissions and market participants); (2) review and report on the performance of the wholesale markets to the RTO or ISO, the Commission, and other interested entities

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<sup>84</sup> *Id.* P 310.

(i.e., state commission and market participants);<sup>85</sup> and (3) identify and notify the Commission's Office of Enforcement of instances in which a market participant's behavior, or that of the RTO or ISO, may require investigation, including suspected tariff violations, violations of Commission-approved rules and regulations, market manipulation, and inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.<sup>86</sup>

### **PJM's Filing**

110. PJM states that it complies with Order No. 719 regarding MMU functions. Specifically, PJM relies on revisions made to its OATT, at Attachment M, as required by a settlement agreement entered into by PJM in Docket No EL07-56-000, *et al.* (PJM/MMU Settlement Agreement).<sup>87</sup> With respect to Order No. 719's allowance, permitting an RTO or ISO to require its MMU to submit its reports in draft form to the RTO or ISO for review (but not for the purpose of altering the MMU's report or dictating the MMU's conclusions), PJM notes that its MMU, consistent with its prior practice, will continue to provide drafts of its reports to PJM prior to their public dissemination. PJM also notes that it is already compliant with the Commission's determination that the Tariffs must indicate that the RTO or ISO has no authority to alter or dictate the conclusion of the MMU report.

### **Protests and Comments**

111. No protests or comments were filed.

### **Commission Determination**

112. We accept PJM's compliance filing, subject to conditions. As noted above, Order No. 719 required PJM to adopt, in its OATT, three core MMU functions.<sup>88</sup> PJM proposes to include, at Attachment M, section VI of the PJM OATT, one of these three

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<sup>85</sup> Order No. 719 provided that an RTO or ISO may require its MMU to submit its reports in draft form to the RTO or ISO for review, but may not alter the reports generated by the MMU or dictate its conclusions. *Id.* P 360.

<sup>86</sup> *Id.* P 354.

<sup>87</sup> See *Allegheny Electric Cooperative, Inc., et al. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,257 (2008) and 120 FERC ¶ 61,254 (2007) (*PJM/MMU Settlement Agreement Order*).

<sup>88</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 354.

specified functions, namely the requirement addressing the MMU's preparation of annual and quarterly reports.

113. However, PJM's OATT fails to adequately address the remaining two required functions, as set forth at 18 C.F.R. § 35.28(g)(3)(ii). Specifically, PJM's OATT fails to specify the MMU's responsibility for evaluating existing and proposed market rules, tariff provisions and market design elements, and for recommending proposed rule and tariff changes to PJM, the Commission's Office of Energy Market Regulation and to other interested entities (i.e., state commissions and market participants). Attachment M, section IV.C, in this regard, provides only that, if the MMU "detects a design flaw or other problem with the PJM Markets," it may initiate and propose changes to such market design. This language, however, is limited to "design" issues relating to existing provisions and thus does not address the full scope of the core MMU function addressed by the Commission in Order No. 719. In addition, PJM's existing language fails to specify the entities to whom the MMU's proposed changes should be made. Accordingly, we require PJM to modify this provision consistent with the requirements of Order No. 719 in its 90-day compliance filing.

114. In addition, PJM's existing OATT lacks specification regarding the MMU's responsibility for identifying and notifying the Commission's Office of Enforcement of instances in which a market participant's behavior, or that of PJM, may require investigation, including suspected tariff violations, violations of Commission-approved rules and regulations, market manipulation, and inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.<sup>89</sup> For example, Attachment M, section IV.I.2 provides for a required MMU referral to the Commission when the MMU has reason to believe that a market participant or PJM has violated a PJM market rule or Commission market rule. These provisions, however, fail to comply fully with Order No. 719's requirement. Accordingly, we require PJM, in its 90-day compliance filing, to modify sections IV.I.1 and IV.I.2 to replace references to "PJM Market Rules" or "FERC Market Rules" with the term "Market Violations," as required by Order No. 719.

## **2. Mitigation and Operations**

115. In examining whether an MMU should be permitted to be involved in tariff administration operations of any kind, including mitigation, Order No. 719 observed, on the one hand, that there is an inherent conflict of interest when the MMU is permitted to conduct mitigation and then required to address the health and state of the market, including the quality of its own mitigation determinations. The Commission further

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<sup>89</sup> *Id.*

observed that by supporting RTOs and ISOs in the administration of their tariffs, the MMU effectively becomes subordinate to these entities, thus weakening the MMU's independence.

116. On the other hand, the Commission acknowledged that there were advantages attributable to the MMU's continued participation in the mitigation process, including the benefits associated with the MMU's expertise and impartiality. The Commission further acknowledged that RTOs and ISOs may have conflicts of their own in conducting mitigation to the extent they may have a vested interest in accommodating their market participants.

117. In weighing these competing considerations, Order No. 719 adopted a balanced approach, allowing modified participation by the MMU in mitigation matters, while protecting against the conflict of interest and subordination concerns inherent in the MMU's unfettered participation. In striking this balance, the Commission relied, in part, on the distinction between prospective and retrospective mitigation.<sup>90</sup> Specifically, the Commission held that a sole internal or sole external MMU would be permitted to conduct retrospective mitigation, but would be prohibited from conducting prospective mitigation, subject to the allowance that the RTO or ISO may permit its MMU to provide inputs to its respective RTO or ISO to assist these entities in conducting prospective mitigation.<sup>91</sup>

118. Order No. 719 also directed RTOs and ISOs to specify in their tariffs, which functions are to be performed by MMUs, and which by RTOs or ISOs. Finally, Order No. 719 required RTOs and ISOs to revise the mitigation provisions of their tariffs, as necessary, to render these provisions as non-discretionary as possible.<sup>92</sup>

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<sup>90</sup> Prospective mitigation is that which can affect market outcomes on a forward-going basis, such as altering prices or physical parameters of offers (i.e., ramp rates and start-up times) at or before the time they are considered in a market solution. All other mitigation is retrospective. *Id.* P 375.

<sup>91</sup> *Id.* P 375. *See also* Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 125 (noting that any mitigation performed by the RTO or ISO will be monitored by the MMU, and, if the RTO or ISO is not performing its job properly, it will be the duty of the MMU to refer the conduct to Commission staff).

<sup>92</sup> *Id.* P 379.

### **PJM's Filing**

119. PJM proposes numerous OATT and Operating Agreement revisions in response to Order No. 719's requirements regarding mitigation. PJM states that these revisions prohibit the MMU from exercising final authority over prospective mitigation, or other matters relating to tariff administration and tariff implementation, and the various processes by which market participants will submit, and the MMU will review, data supporting the MMU's calculation of inputs to mitigation.

120. In support of its proposed revisions, PJM asserts that the Commission's express intent, in Order No. 719, was to ensure that external MMUs will not be involved in tariff administration matters of any kind. PJM relies, in particular, on the three core MMU functions outlined by Order No. 719.<sup>93</sup> PJM asserts that because these specified functions do not include "tariff administration" as a specified function, final authority over its tariff is intended to reside in PJM. PJM also relies on the codified language of Order No. 719, stating that an RTO or ISO "may not permit its [MMU . . .] to participate in the administration of the [RTO's or ISO's] tariff or, except as provided in paragraph (g)(3)(iii) (D) of this section, [<sup>94</sup>] to conduct prospective mitigation."<sup>95</sup>

121. PJM states that its proposed revisions also address Order No. 719's requirement that the respective functions performed by the MMU and PJM be clearly delineated in PJM's tariff.<sup>96</sup> Finally, with respect to the Commission's requirement that ISOs and

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<sup>93</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 354. These core MMU functions are now codified in the Commission's regulations at 18 C.F.R. § 35.28(g)(3)(ii) (2009).

<sup>94</sup> Sub-paragraph (g)(3)(iii) (D) provides that "[a] Commission-approved [ISO or RTO] with a hybrid [MMU] structure may permit its internal market monitor to conduct prospective and/or retrospective mitigation, in which case it must assign to its external market monitor the responsibility and the tools to monitor the quality and appropriateness of the mitigation." *See* 18 C.F.R. § 35.28(g)(3)(iii)(D) (2009).

<sup>95</sup> *Id.* § 35.28(g)(3)(iii)(A).

<sup>96</sup> PJM notes, for example, its revisions addressing: (1) the MMU's approval of opportunity-cost compensation to market sellers that reduce or suspend output pursuant to PJM dispatcher instructions for purposes of providing operating reserves (*see* PJM Operating Agreement at Schedule 1, section 3.2.3(f-3)) or maintaining reactive reliability (*see id.* at section 3.2.3B(h)); and (2) the requirement that the MMU provide written notice to establish that a unit satisfies the tariff criteria defining a "frequently mitigated unit" (*see id.* at section 6.4.2(b)), or "associated unit" (*see id.* at section 6.4.2(c)).

RTOs make their mitigation tariff provisions as non-discretionary as possible,<sup>97</sup> PJM states that, where possible, specific formulas or calculations are provided. PJM asserts, however, that to the extent any applicable OATT or Operating Agreement provision requires interpretation, PJM should be allowed to exercise its reasonable discretion in doing so, consistent with the Commission's prior interpretation of its authority under these circumstances.<sup>98</sup>

### **Protests and Comments**

122. The MMU, the state regulatory commissions of Delaware, Illinois, Indiana, Maryland, Ohio, Pennsylvania and the District of Columbia,<sup>99</sup> and other intervenors,<sup>100</sup> oppose the revisions granting PJM ultimate authority over tariff administration matters for which the MMU currently exercises exclusive responsibility. These Intervenors argue that PJM's proposed revisions are not required by Order No. 719. Intervenors add that PJM's proposed revisions are barred by PJM's existing tariff commitments, as agreed to in the PJM/MMU Settlement Agreement.<sup>101</sup>

123. Intervenors assert that under the PJM/MMU Settlement Agreement, the PJM OATT was revised, at Attachment M, to restructure the MMU as a fully external, independent entity, with responsibilities that include market power mitigation. Intervenors further assert that the PJM/MMU Settlement Agreement provided a critical clarification regarding the MMU's duties and responsibilities, namely that "[n]o person or entity shall have the right to preview, screen, alter, delete, or otherwise exercise control over or delay [the MMU's] actions or investigations, or the [MMU's] findings,

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<sup>97</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 379.

<sup>98</sup> PJM transmittal letter at 45, citing *Operating Reserves Order*, 125 FERC ¶ 61,244, at P 37 (2008) .

<sup>99</sup> As noted below, the positions of the Delaware Commission, the Indiana Commission and the D.C. Commission were set forth in these intervenors' answers.

<sup>100</sup> See ODEC, *et al.* protest at 7; American Public Power Association (APPA) comments at 5; Organization of PJM States (OPSI) protest and comments at 3-8; North Carolina Electric Membership Corporation and Borough of Chambersburg, PA (North Carolina Coop, *et al.*) protest at 3; Pennsylvania Office of Consumer Advocate (Pennsylvania OCA) protest at 5; and American Municipal Power –Ohio, Inc. (AMP-Ohio) protest and comments at 8.

<sup>101</sup> See *PJM/MMU Settlement Agreement Order*, 122 FERC ¶ 61,257 at P 22.

conclusions or recommendations.”<sup>102</sup> Intervenors add that the PJM/MMU Settlement Agreement contains a *Mobile-Sierra* clause applying a public interest standard of review regarding all proposed revisions concerning Attachment M of the PJM OATT, including those provisions recognizing the MMU’s role in developing the inputs to prospective mitigation.<sup>103</sup>

124. Intervenors reject PJM’s position that Order No. 719 requires the removal of the market monitoring function from all aspects of tariff administration. With respect to the Commission’s statement, in Order No. 719, that public utilities will be held accountable for the implementation of their tariffs, the MMU responds that the quoted reference appears only in the background summary of Order No. 719 and otherwise overlooks the discussion that follows, in which the Commission acknowledged countervailing considerations supporting an MMU’s continued involvement in tariff administration matters. The MMU adds that, regardless, the suggestion that Order No. 719 was intended to remove the MMU from all tariff administration matters leads to the faulty and unsupported conclusion that Order No. 719 also requires PJM’s OATT to deprive the

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<sup>102</sup> PJM/MMU Settlement Agreement at 6-7 (Explanatory Statement), *quoting* revised Attachment M at section III.C .

<sup>103</sup> *See id.* at section III:

For a period of six (6) years from the effective date of the attached revisions to Attachment M, if any party to the Commission proceedings in Docket Nos. EL07-56 or EL07-58, Dr. Bowring or the company established by Dr. Bowring petitions the Commission for a change to Attachment M or section 18.17.4 of the PJM Operating Agreement (including Schedules 10 and 10A), such change shall, in the absence of agreement of all such entities, be governed by the “public interest” standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The foregoing protections shall include the standards and processes set forth in sections III. F of Attachment M at the end of the initial contract term. Notwithstanding the foregoing, if the Commission issues a final rule in Docket No. RM07-19 (or in any other rulemaking proceeding affecting market monitoring) that requires a change to Attachment M or section 18.17.4 of the PJM Operating Agreement, PJM shall not be precluded by this Settlement Agreement from submitting a compliance filing effecting such change, provided, however that any such filing shall be limited solely to changes required by the Commission, not discretionary changes made on behalf of PJM or any other person or entity.

MMU of the ability to make referrals to the Commission, as permitted under Attachment M, section IV.I.2, or issue state of the market reports, as required under Attachment M, section VI.A, without affording an opportunity for PJM to reverse such actions. The MMU further asserts that had the Commission intended to issue a blanket prohibition against any role by MMUs in administering or implementing any and all tariff provisions, as PJM suggests, Order No. 719's inclusion of a specific prohibition against an MMU's involvement with "purely administrative matters" would have been superfluous.<sup>104</sup>

125. With respect to Order No. 719's omission of the term "tariff administration" from the Commission's specified core MMU functions, as codified at 18 C.F.R. § 35.28(g)(3)(ii) -- and PJM's asserted inference drawn from this omission that MMU's may not engage in this "function" -- the MMU responds that the Commission's asserted omission incorrectly assumes that the term "tariff administration" is itself a function, rather than a process. The MMU argues that the relevant tariff administration processes at issue here are simply the means by which the MMU's core Commission-authorized functions are carried out.

126. With respect to PJM's reliance on section 35.28(g)(3)(A) of the Commission's regulations, the MMU argues that PJM fails to cite to the Commission's rules that follow in the next two sub-sections (subsection (3)(iii)(B)) and subsection (3)(iii)(A), stating that MMUs may "provide the inputs required for [RTOs] to conduct prospective mitigation," and may "conduct retrospective mitigation." ODEC, *et al.* argue that while PJM must have the authority to administer its tariff, nothing in Order No. 719 prevents the MMU from exclusively serving the role of implementing the MMU provisions of the tariff. The Illinois Commission adds that market mitigation input development is not "tariff administration."

127. Intervenors assert that, under Order No. 719, the Commission expressly found that the MMU may act independently of the RTO with respect to certain tariff administration matters. First, the MMU cites the Commission's statement that "the MMU's role in recommending rule and tariff changes is advisory in nature, and . . . the MMU should not become involved in implementing rule and tariff changes (*unless a tariff provision specifically concerns actions to be undertaken by the MMU itself*)."<sup>105</sup> The MMU also

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<sup>104</sup> See Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 377 ("Purely administrative matters, [. . . including] enforcement of late fees and the untimely submission of outage reports and meter data[,] should be conducted by the RTO or ISO, rather than the MMU.").

<sup>105</sup> MMU protest at 45 (emphasis added), *citing* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 357. See also ODEC, *et al.* protest at 12.

relies on the Commission's asserted conclusion that the MMU becomes subordinate to the RTO or ISO when it serves in the capacity of supporting the RTO or ISO in the administration of its tariff.<sup>106</sup> In addition, the MMU relies on the Commission's asserted clarification that it did not intend to disturb existing arrangements assigning administrative tasks to external MMUs.<sup>107</sup>

128. The Maryland Commission asserts that PJM's ability to second-guess the MMU's determinations will enable market participants dissatisfied for any reason with the outcome of negotiations with the MMU, or those who simply do not desire to engage in the process, to seek redress from PJM. The MMU adds that the Commission's stated concerns about the MMU role in tariff administration should apply only when the market monitoring function participates or shares responsibility for carrying out functions that the RTO must also be involved in and for which the RTO must take ultimate responsibility.

129. Intervenors also assert that the requirements of Order No. 719 include the stated goal of strengthening an RTO's and ISO's market monitoring function. The Pennsylvania Commission asserts that this objective can only be met, here, by prohibiting PJM from serving as a shadow market monitor, a role for which it is not well-equipped or well-suited. Specifically, the Pennsylvania Commission notes that the effective prospective mitigation of generation offers in PJM depend, in part, on expert review of generator-by-generator offers – not only for price terms and offer caps, but also for the operational parameters that condition the price offer in various ways. The Pennsylvania Commission asserts that this review requires the skills and expertise that the MMU alone possesses.

130. The Office of the Ohio Consumers' Counsel and Maryland Office of People's Counsel (Joint Consumers Counsel) argue that PJM's proposed revisions weaken the MMU and subordinate the MMU to PJM management. The Maryland Commission agrees, noting that to the extent PJM's proposed revisions duplicate functions already performed by the MMU (by permitting PJM to substitute its own market power determinations for those of the MMU) these revisions will not strengthen PJM's market

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<sup>106</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 371.

<sup>107</sup> *See Id.* P 376, providing in relevant part:

[A] number of our orders specifically lodge elements of mitigation and administration within the MMUs. Many of these may properly be considered retroactive mitigation, and the RTOs' or ISOs' tariff would not need to be adjusted to remove these responsibilities from the MMU's purview.

monitoring function.<sup>108</sup> The MMU asserts that this is so because the establishment of an additional layer of market monitoring, as proposed by PJM, will vitiate the existing incentives market participants have to voluntarily comply with the MMU's existing authority to issue *ex ante* determinations.

131. ODEC, *et al.* argue that PJM's proposed establishment of an internal market monitoring oversight function is also inconsistent with the Commission's finding, in Order No. 719, that the PJM/MMU Settlement Agreement, and the tariff provisions it established, were in accord with Order No. 719, regarding both an MMU's appropriate structure and with respect to the tools required by the MMU, including market data, resources, and personnel, to carry out its functions.<sup>109</sup> The MMU adds that nothing in Order No. 719 suggests that the Commission intended to disturb in any way the arrangement approved under the PJM/MMU Settlement Agreement.

132. The MMU argues that there is a clear division between the role of administering the markets and coordinating network operations, on the one hand, and the role of reviewing market participants' conduct in these markets, on the other hand. The MMU adds that while PJM has a tariff-defined responsibility to address market power issues as a regulated RTO, it can discharge these responsibilities by supporting a fully independent and objective market monitoring function.

133. The MMU also argues that its existing role in developing the inputs to prospective mitigation is limited and does not constitute participation in PJM's administration of prospective mitigation. The MMU explains that under PJM's existing rules, the MMU and market participants discuss issues related to cost-based offers prior to offer submission, including issues relating to market behavior or compliance concerns, but market participants alone make the ultimate decision about what offers to submit to PJM. The MMU adds that PJM determines whether to accept offers, including cost-based offers, on the basis of certain objective bright-line rules in the OATT that relate primarily to whether the offer can be used to clear the markets. The MMU asserts that PJM has never had a role duplicating the MMU's review of market participant's offers regarding whether an offer constitutes an attempt to exercise market power or constitutes a violation of the Commission's market rules prohibiting manipulation.

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<sup>108</sup> See also ODEC, *et al.* protest at 10; OPSI protest and comments at 12; Pa OCA protest at 5-6; Illinois Commission comments at 6; AMP-Ohio protest and comments at 8.

<sup>109</sup> MMU protest at 13, *citing* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 330 (“[W]e observe that the PJM/MMU Settlement Agreement is in accord with our determination . . . regarding the appropriate MMU structure and tools.”).

134. The MMU also argues that its existing duties and functions implicate none of the conflict of interest concerns addressed by the Commission, in Order No. 719, while PJM's proposed revisions will give rise to new RTO conflicts of interest. With respect to MMU conflicts, the MMU argues that none currently exist because the role it plays in prospective mitigation, including its review of the cost data market participants include in their offers, can lead only to a voluntary commitment by the market participant. The MMU adds that only participation in the process is compulsory. With respect to RTO conflicts, the MMU asserts that PJM's proposed role in monitoring its members' market behavior would conflict with the RTO's need to respond to a variety of interests in addition to its own institutional interests. The Pennsylvania Commission adds that it is PJM's conflicts of interest that should be of concern to the Commission.

135. Finally, intervenors object to specific tariff provisions proposed by PJM and/or propose revisions of their own. We address these provisions below.

### **PJM's Answer**

136. PJM responds to intervenors' argument that PJM's proposed tariff revisions are not required by Order No. 719. PJM asserts that the Commission, in Order No. 719, clearly found that tariff administration and implementation, including prospective mitigation, are roles that must be performed by the RTO as the jurisdictional utility. PJM adds, however, that it is not seeking to substitute its market power decisions for those of the MMU or exercise control over the MMU's determinations and that any decision PJM may make to reject an input proposed by the MMU will rest on whether PJM believes it and the relevant market participants are acting in a manner consistent with PJM's tariff and related rules.

137. PJM also responds to intervenors' argument that PJM's new MMU oversight authority will effectively duplicate functions carried out by the MMU. PJM responds that its revisions do not create an internal, management controlled shadow market monitoring function, but instead make clear the respective roles and responsibilities of PJM and the MMU and remove the MMU from performing certain tariff administration and prospective mitigation functions as required by Order No. 719. PJM states that it will rely on market participants to notify PJM of any concerns with a MMU determination or input. PJM further states that it does not expect to disagree with the MMU's determinations on other than rare occasions and that the MMU has all resources at its disposal to air its concerns further. Finally, PJM states that its proposed revisions do not seek to limit the MMU's ability to develop inputs to prospective mitigation. PJM asserts that, in fact, the MMU will continue to provide the same inputs to PJM as it does currently.

### **Additional Answers**

138. The Pennsylvania Commission and the D.C. Commission respond to PJM's argument that PJM, as a public utility, cannot delegate its regulatory function to its MMU, a non-regulated entity. The Pennsylvania Commission and D.C. Commission assert that PJM's proposed tariff revisions, in fact, will require PJM to determine the justness and reasonableness of rates charged by its members, pursuant to their market-based rate authorizations. The Pennsylvania Commission and D.C. Commission argue that, as such, PJM's proposed tariff revisions would allow PJM to oversee a wholesale rate function, an authority that it does not and should not be given.

139. The Maryland Commission responds to PJM's argument that PJM does not seek to limit, or otherwise undermine, the MMU's ability to develop inputs to prospective mitigation. The Maryland Commission argues that this cannot be so if, as PJM also claims, it will rely on market participants, not the MMU, to notify PJM of any concerns that may be implicated by an MMU determination or input. The Maryland Commission concludes that anytime the Commission allows authority to shift from the market monitor to market participants, retail ratepayers in restructured states become that much more vulnerable to the conduct of market participants charged with the fiduciary duty to maximize their profits.

140. The MMU responds to PJM's clarification that PJM does not intend to review cost information for the purpose of rendering any judgment on questions of market power. The MMU asserts that while this acknowledgement is helpful, it fails to explain the purpose for which PJM will now make its cost review. The MMU adds that the only purpose for developing cost-based offers is their use as inputs in prospective mitigation, and the only purpose for monitoring their development is to ensure that market power played no role in their development. The MMU further submits that PJM should be required to propose a modification to its proposed tariff changes, based on its aforementioned concession (i.e., a revision of the sort that the MMU has included in its proposed tariff changes).

141. The MMU also responds to the P3's request for clarification regarding the MMU's obligations, following its referral of a matter to the Commission, to preserve confidential information. The MMU clarifies that its referrals, as authorized under the Attachment M – Appendix, will be subject to PJM's confidentiality policies, as established under the PJM Operating Agreement at section 18.17. The MMU adds that existing confidentiality provisions would continue to apply to the MMU's interactions with the Commission, other regulatory bodies and the public.

#### **a. Commission Determination**

142. For the reasons discussed below, we accept PJM's compliance filing, subject to the conditions discussed herein. First, we address intervenors' threshold challenge

regarding PJM's proposed revisions to the PJM market monitoring plan, at Attachment M of the PJM OATT, and whether these proposed revisions are within the scope of this compliance proceeding. Second, we address specific revisions proposed by PJM and intervenors.

**i. Whether PJM's Proposed Revisions are Required by Order No. 719**

143. PJM's proposed revisions, as noted above, address the role to be played by the MMU with respect to mitigation matters.<sup>110</sup> In general, these Attachment M revisions and/or the non-Attachment M revisions to which they expressly refer or relate, clarify that PJM, as the public utility responsible for implementing and administering its tariff, is not obligated to accept the MMU's determinations regarding mitigation inputs and other cost-related matters for which the MMU is currently responsible.

144. Intervenors assert that these proposed revisions, even if qualifying as discretionary changes permitted under Order No. 719, are not "required" by Order No. 719. Intervenors add that, if not required, these proposed revisions must be rejected under the PJM/MMU Settlement Agreement. Specifically, intervenors assert that, under the PJM/MMU Settlement Agreement, at Article III, a *Mobile-Sierra* public interest showing must be made to support revision of any Attachment M provision, as approved pursuant to the PJM/MMU Settlement Agreement. Intervenors further assert that, under the PJM/MMU Settlement Agreement, the MMU's sole authority over mitigation inputs was preserved.

145. For the reasons discussed below, we find that PJM's existing tariff is inconsistent with the requirements of Order No. 719 and that its proposed Attachment M tariff changes are needed to comply with Order No. 719. We further find that PJM's proposed

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<sup>110</sup> These revisions address, among other things: (1) risk premiums applicable to nuclear generation resources (*see* proposed Attachment M – Appendix at section II.B.4, Original Sheet No. 453L); (2) the submittal of market seller offer caps by a generation capacity resource (*Id.* at proposed sections II.C.5 and II.E.2, Original Sheet Nos. 453M and 453N); (3) the submittal of a retirement avoidable cost rate by a capacity market seller (*Id.* at proposed section II.H, Original Sheet No. 453O); (4) the determination of opportunity costs (*Id.* at proposed section II.J, Original Sheet No. 453P); (5) requested changes in the revenue requirements applicable to black start service (*Id.* at proposed section III.B, Original Sheet Nos. 453P); (6) deactivation rates (*Id.* at proposed section IV.2, Original Sheet No. 453Q); (7) the calculation of transmission congestion credits (*Id.* at proposed section IV.2, Original Sheet No. 453Q); and (8) forced outages (*Id.* at proposed section VII.2, Original Sheet No. 453R).

changes leave in place the commitments agreed to by the parties to the PJM/MMU Settlement Agreement. We conclude that, as such, PJM's proposed revisions are not barred by that agreement.

146. We begin our analysis with the Mobile-Sierra clause in the Settlement. This clause states that in complying with Order No. 719 or a similar rulemaking affecting market monitoring, PJM is permitted to submit "a compliance filing effecting such change, provided, however that any such filing shall be limited solely to changes required by the Commission, not discretionary changes made on behalf of PJM or any other person or entity."<sup>111</sup> Thus, the issue raised by this clause is whether Order No. 719 requires the changes proposed by PJM to limit the discretion of the Market Monitor with respect to mitigation. We find that they are required, and therefore do not have to determine whether the public interest requires these revisions.

147. In the regulatory text approved by the Commission in Order No. 719, RTOs and ISOs are required to "consolidate the core [MMU] provisions into one section of [their] tariff."<sup>112</sup> RTOs and ISOs are further required to modify their tariffs regarding the functions and duties of their MMU to provide, among other things, that their MMU, whether internal or external, will not be permitted to participate in (1) the administration of the ISO's or RTO's tariff; or, (2) except as provided by 18 C.F.R. § 35.28(g)(3)(iii)(D), to conduct prospective mitigation.<sup>113</sup> External MMUs are permitted only to "provide the inputs required for the [RTO or ISO] to conduct prospective mitigation, including, but not limited to, reference levels, identification or system constraints, and cost calculations."<sup>114</sup> In addition, RTOs and ISOs are required to "identify in [their] tariff[s] the functions the [MMU] will perform and the functions the [RTO or ISO] will perform."<sup>115</sup> Finally, Order No. 719 required RTOs and ISOs to

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<sup>111</sup> See supra note 106.

<sup>112</sup> 18 C.F.R. § 35.28(g)(3)(ii)(F) (2009).

<sup>113</sup> *Id.* § 35.28(g)(3)(iii)(A). As noted above, sub-paragraph (g)(3)(iii) (D) provides that "[a] Commission-approved [ISO or RTO] with a hybrid [MMU] structure may permit its internal market monitor to conduct prospective and/or retrospective mitigation, in which case it must assign to its external market monitor the responsibility and the tools to monitor the quality and appropriateness of the mitigation." See *id.* at § 35.28(g)(3)(iii)(D). This provision does not apply to PJM because PJM does not employ a hybrid MMU structure.

<sup>114</sup> *Id.* § 35.28(g)(3)(iii)(B).

<sup>115</sup> *Id.* § 35.28(g)(3)(iii)(E).

revise the mitigation provisions of their tariffs, as necessary, to render these provisions as non-discretionary as possible.<sup>116</sup>

148. PJM's proposed tariff revisions comply with these requirements, subject to the conditions set forth at section IV.E.1 of this order, above. First, PJM's proposed Attachment M - Appendix appropriately consolidates in a single place each of the core functions and duties of the MMU, as required. Second, PJM's proposed revisions provide, as required, that the MMU will not be permitted to participate in the administration of PJM's tariff or conduct prospective mitigation, except that it will be permitted to provide inputs to PJM, the entity responsible for making the final determination.

149. A good example is proposed Attachment M – Appendix, section II.C.3, which addresses the extent of the MMU's responsibilities regarding the establishment of a capacity seller's forced outage rate, or EFORD. The EFORD assigned to a generator affects the seller's allowed offer price in PJM's RPM auction. Specifically, proposed section II.C.3 specifies that the MMU "shall evaluate the data and documentation provided to it by a potential Capacity Market Seller to establish the EFORD to be included in a Sell Offer [and shall then] notify [PJM] of any EFORD to which it and the Generation Capacity Resource agree or its determination of the EFORD if agreement is not obtained."

150. The current tariff section therefore vests final authority in the MMU to determine the EFORD for a generator, which is used to determine the sell offer a mitigated generator may submit. This provision therefore is at odds with Order No. 719 because it involves the MMU in tariff administration, by influencing a necessary determination establishing the offer a seller may bid and ultimately processed by PJM to clear the market. It also directly involves the MMU in prospective mitigation, since the EFORD determines the mitigated rate the seller may bid into the market. While Order No. 719 permits the MMU

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<sup>116</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 379.

to provide inputs into this calculation, it requires that the RTO make the final determination regarding offers and rates.<sup>117</sup>

151. PJM's proposed revision to Attachment DD, section 6.6(d) complies with Order No. 719. It maintains the MMU's responsibility for providing data to help determine the EFORD, but it vests the final determination of the EFORD in PJM. The revised provision states "[i]n the event that a Capacity Market Seller and the [MMU] cannot agree on the level of the EFORD, [PJM] shall make its own determination of the level of the EFORD based on the requirements of the [OATT] and the PJM Manuals."

152. Intervenors, as noted above, raise numerous arguments supporting their position that the MMU must be permitted to retain the exclusive authority for the tariff administration functions it currently exercises under the mitigation provisions of the PJM OATT, without the right of PJM to interpose its own independent determinations. These arguments, however, rely, either expressly or by implication, on a collateral challenge to the balance struck by the Commission in Order No. 719 and/or on an overly narrow interpretation of the prohibition, under 18 C.F.R. § 35.28(g)(iii)(A), against MMU involvement in tariff administration.

153. With respect to the policy considerations previously addressed by the Commission in Order No. 719, intervenors reiterate some or all of these same arguments. Specifically, intervenors assert that if PJM is permitted to second-guess the determinations of the MMU, PJM will: (1) have a conflict of interest, as it attempts to keep its customers, especially its larger, investor-owned utility customers, satisfied; (2) lack the expertise and experience that will be required; and (3) perform largely duplicative, wasteful functions. However, each of these considerations was expressly considered by the Commission in Order No. 719 in establishing the proper balance between the RTO and the MMU.<sup>118</sup> In

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<sup>117</sup> We also find that certain specific provisions of the tariff resulting from the Settlement Agreement would not preclude PJM from filing to revise these provisions. Attachment M (Market Monitoring Plan) section IV. E, which addresses mitigation, provides that: "[n]othing in this Plan shall be deemed to supersede any authority the [MMU] may have under the PJM Market Rules, *nor shall anything in this Plan preclude any person or entity from seeking to modify such authority in a filing with the Commission.*" (emphasis supplied). Thus, PJM reserved the right to file to modify the mitigation provisions.

<sup>118</sup> *Id.* P 372 ("Many commenters . . . raise substantial concerns over removing MMUs from mitigation, including the following: (1) there is a greater conflict of interest for the RTO or ISO to administer mitigation, as it has a vested interest in keeping its market participants happy, especially the larger players who can threaten to leave the RTO or ISO if they choose; . . . (4) the MMU is better equipped by training and market

(continued...)

addressing these considerations, the Commission held that while “many of the objections raised by commenters [are] meritorious[,] we remain concerned that the unfettered conduct of mitigation by MMUs makes them subordinate to the RTOs and ISOs and raises conflicts of interests concerns.”<sup>119</sup> The Commission therefore chose to adopt a compromise approach, “one that strikes the appropriate balance between allowing modified participation by the MMUs in mitigation, while protecting against the conflict of interest and subordination inherent in their unfettered participation.”<sup>120</sup> We decline to reconsider this policy determination here.<sup>121</sup>

154. Intervenors also request that we minimize or ignore the express language of section 35.28(g)(iii)(A). ODEC, *et al.* and the Illinois Commission, for example, assert that the MMU’s exclusive authority to implement the MMU provisions of the PJM OATT should not be read to mean “tariff administration,” as prohibited by 35.28(g)(iii)(A). The MMU adds that PJM’s administration of its tariff duties can be distinguished from the MMU’s role of reviewing market participants’ conduct. However, we disagree that the MMU’s role, as it relates to prospective mitigation, and the strained parsing of the regulatory text which it requires, can be reconciled with the express language of section 35.28(g)(iii)(A). Determining the components of a Commission-authorized rate fall within the meaning of tariff administration, as contemplated by Order No. 719. Here, the existing provisions of the PJM OATT give the MMU final authority to determine various default bids for mitigated generators, an authority that may affect the final rates payable in PJM’s markets. This authority encompasses something more than simply reviewing market participant conduct. Rather, it involves the MMU in the process of administering the rate provisions of PJM’s OATT as well as determining the extent of prospective mitigation to be applied.

155. The MMU suggests that Order No. 719’s underlying rationale, that the public utility that must be held accountable for the implementation of its tariff, is either negated

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access to detect the need for mitigation; . . . [and] (7) there would be much duplication of costs, since the MMU would have to retain most of its mitigation capabilities in order to monitor the RTO’s or ISO’s conduct of mitigation[.]”).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> However, we also note PJM’s clarification, in its answer, that it is not seeking to substitute its market power decisions for those of the MMU or exercise control over the MMU’s determinations and that any decision PJM may make to reject an input proposed by the MMU will rest on whether PJM believes it and the relevant market participants are acting in a manner consistent with PJM’s tariff and related rules.

or otherwise qualified by the countervailing considerations noted by the Commission in reaching its determination, including the Commission's acknowledgment that there are advantages attributable to the MMU's continued participation in the mitigation process. The Pennsylvania Commission makes a similar argument, noting Order No. 719's stated goal of strengthening the role played by MMUs. However, these considerations are not inconsistent with the express prohibition set forth in section 35.28(g)(iii)(A). To the contrary, while the MMU may continue to participate in the mitigation process, as contemplated under PJM's proposed OATT revisions, and must be permitted to actively monitor these activities on an independent basis, it is PJM, not the MMU, that must be ultimately responsible for the administration of its tariff and the determination of prospective mitigation.

156. The MMU further asserts that section 35.28(g)(iii)(A) must be read narrowly, as a non-absolute prohibition against MMU involvement in tariff administration, given the two sub-sections that follow, namely, subsection (3)(iii)(B) and subsection (3)(iii)(A), stating that MMUs may "provide the inputs required for [RTOs] to conduct prospective mitigation," and may "conduct retrospective mitigation." However, these subsections, are consistent with our interpretation of PJM's proposals. PJM is retaining the provisions that allow the MMU to provide the inputs for determining prospective mitigation, while reserving the final authority to determine the appropriate default rates. Moreover, PJM's proposal relates only to the determination of default rates for prospective mitigation, not retrospective mitigation.

157. We also reject the MMU's argument that interpreting the prohibition against MMU tariff administration, in section 35.28(g)(iii)(A), as an absolute prohibition, would lead to a result that permits PJM to second guess and/or countermand each and every MMU tariff-prescribed function, including the MMU's duty to refer matters to the Commission, and/or issue state of the market reports. In fact, the result feared by the MMU is neither proposed by PJM, nor permitted under Order No. 719. Under Order No. 719, an RTO or ISO "may not alter the reports generated by the [MMU], or dictate the conclusions reached by the [MMU]."<sup>122</sup> The MMU, meanwhile, must, among other things, evaluate existing and proposed market rules, tariff provisions and market elements,<sup>123</sup> review and report on the performance of the wholesale markets,<sup>124</sup> and make referrals to the Commission regarding matters requiring investigation, including but not

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<sup>122</sup> 18 C.F.R. § 35.28(g)(3)(i)(E) (2009).

<sup>123</sup> *Id.* § 35.28(g)(3)(ii)(A).

<sup>124</sup> *Id.* § 35.28(g)(3)(ii)(B).

limited to suspected market violations.<sup>125</sup> PJM's proposed tariff revisions do not violate these requirements, nor are these requirements inconsistent with the additional regulatory requirement barring the MMU from participating in the administration of PJM's OATT.<sup>126</sup>

158. We also reject the MMU's argument that had the regulatory text approved by the Commission, in Order No. 719, been intended to prohibit any role by the MMU in tariff administration, the Commission would not have been required to note, in its preamble, a specific prohibition against an MMU's involvement in "purely administrative matters." In fact, the Commission's statement that the MMU may not be responsible for the enforcement of late fees and the untimely submission of outage reports and meter data (i.e., for activities that the Commission characterized as "purely administrative matters"), was a non-inclusive list identified, in the first instance, by an intervenor seeking clarification on the matter.<sup>127</sup> Regardless, the Commission's preamble commentary, in this instance, cannot to be read to either trump or dilute the express language of Order No. 719's regulatory text.

159. We also reject intervenors' argument that the Commission, in Order No. 719, expressly found PJM to be in compliance with the Commission's MMU directives, with no further compliance changes required. Intervenors rely on the Commission's statement that "the PJM/MMU Settlement Agreement is in accord with [Order No. 719] regarding the appropriate MMU structure and tools."<sup>128</sup> However, the term "structure and tools," as used by the Commission in Order No. 719, refers not to mitigation functions (the matter at issue here), but to the market data, resources, and personnel necessary for the MMU to carry out its functions.<sup>129</sup>

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<sup>125</sup> *Id.* § 35.28(g)(3)(ii)(C).

<sup>126</sup> *Id.* § 35.28(g)(3)(iii)(A).

<sup>127</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 377 ("We also direct that purely administrative matters, such as those identified by [the California Independent System Operator, Inc.] . . . should be conducted by the RTO or ISO, rather than the MMU.").

<sup>128</sup> *Id.* P 330.

<sup>129</sup> Compare 18 C.F.R. § 35.25(g)(3)(i)(A) (requiring each RTO and ISO to provide its MMU access to "market data, resources and personnel to enable the [MMU] to carry out its functions) and 18 C.F.R. § 35.25(g)(3)(iii) (addressing tariff administration and mitigation).

ii. **PJM's and Intervenors' Specific Proposed Tariff Changes**

160. We next consider PJM's and intervenors' specific proposed tariff changes and intervenors' protests relating to these provisions. First, we accept PJM's proposed tariff changes subject to conditions discussed herein, consistent with our finding, above, that PJM is ultimately responsible for the administration of its tariff.<sup>130</sup> Except as otherwise noted below, we also accept PJM's remaining tariff changes.

161. *MMU Protest section III.A (Establishment) and section III.E (Mitigation) (MMU), Attachment M:* The MMU asserts that it shall perform exclusively the functions set forth in the MMU Plan. Additionally, the MMU asserts that it shall have exclusive authority to administer the provisions for retrospective mitigation and the development of inputs for use in prospective mitigation described in Attachment M – Appendix. As we discuss above, we find that this proposal is in direct conflict with the directive in 18 C.F.R. § 35.28(g)(3)(iii)(A) that an RTO may not permit its MMU, whether internal or external, to participate in the administration of the RTOs tariff, or, except as provided in paragraph (g)(3)(iii)(D) to this section, to conduct prospective mitigation. The exception applies to RTOs with hybrid internal and external market monitoring structures and thus is inapplicable to PJM. While the MMU argues that its proposals to Attachment C of its protest are clarifications,<sup>131</sup> we find that the MMU's protest primarily removes PJM as the entity that would administer its tariff and provides the MMU with such authority. For example, under the MMU's proposed section 5.6.6(d) (Availability of Capacity Resources for Sale), the MMU, not PJM would have the final determination of whether or not a generator can delist. The MMU's proposed provision provides, in relevant part:

A Generation Capacity Resource located in the PJM Region shall not be removed (delisted) from PJM Capacity Resource status to the extent the resource is committed to service of PJM loads as a result of an RPM Auction, FRR Capacity Plan, or by designation as a replacement resource under this Attachment DD. To the extent not so committed, a Generation Capacity Resource (including any portion thereof not so committed or for any time period not so committed) located in the PJM Region may be removed from PJM Capacity Resource status if the Market Seller *obtains a*

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<sup>130</sup> We require PJM to replace “midified” with “modified” in section 3.2.3B(h) (Reactive Service) Schedule 1 of PJM's Operating Agreement.

<sup>131</sup> See MMU protest at Attachment C.

*determination from the Market Monitoring Unit* - that the resource has a financially and physically firm commitment to an external sale of its capacity, in accordance with the procedure *and criteria* set forth in section II.C of Attachment M - Appendix. Nothing herein shall require a Market Seller to offer its resource into an RPM auction prior to delisting, subject to the foregoing[.]<sup>132</sup>

162. *PJM OATT, Attachment DD, section 5.8(h)*: The Maryland Commission and the Pennsylvania Commission object to PJM's proposed revisions to Attachment DD, section 5.8, giving PJM the final authority to accept sell offers in RPM auctions "in accordance with the terms of the [PJM OATT] and the PJM Manuals."<sup>133</sup> The Maryland Commission asserts that PJM's authority should be more narrowly tailored, i.e., that PJM should only be allowed to accept or reject a sell offer based on the existing criteria

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<sup>132</sup> See also the MMU's proposed Attachment M – Appendix V (Opportunity Cost Calculation) which provides, in relevant part:

"The [MMU] shall review requests for opportunity cost compensation under sections 3.2.3(f-3) (Operating Reserves) and 3.2.3B(h) (Reactive Services) and work with Market Participants to develop an appropriate level, if any, for such compensation. The [MMU] shall notify [PJM] of any risk premium to which it and a Market Participant agree or its determination of an appropriate level or mechanism for compensation, if any, if agreement is not obtained. In the event that a Market Participant and the [MMU] cannot agree to a risk premium, then the Market Participant shall have recourse to the Commission to establish an appropriate level, if any for opportunity costs.

In addition, the MMU's proposed Attachment M – Appendix III. (Black Start Service) provides, in relevant part:

Pursuant to the terms of Schedule 6A of the PJM Tariff and the PJM Manuals, the [MMU] will analyze any requested generator black start cost changes on an annual basis and shall notify [PJM] of any costs to which it and the Black Start Service generator owner have agreed or the [MMU's] determination regarding any cost components to which agreement has not been obtained. If a Black Start Service generator owner includes a cost component inconsistent with its agreement or inconsistent with the [MMU's] determination, the [MMU] may petition the Commission for an order that would require the Generation Resource to include an appropriate cost component.

<sup>133</sup> See PJM OATT at proposed Second Revised Sheet No. 582.

specified at section 5.8, not a vague catch-all cross reference. The Pennsylvania Commission adds that because PJM has control over its own Manuals, section 5.8 effectively gives PJM a blank check to revise its own rules as it sees fit.

163. We accept PJM's proposed revision to Attachment DD, section 5.8 and reject the protest arguments raised by the Maryland Commission and the Pennsylvania Commission. First, it is appropriate, as PJM proposes, to exercise its authority under Attachment DD, section 5.8, consistent with the PJM OATT. In fact, this obligation, if not made expressly, would be implied. Second, the additional obligation imposed on PJM to exercise its section 5.8 authority consistent with the PJM Manuals cannot be interpreted as a blank check authorization to disregard or in any way abridge PJM's OATT obligations. Should this hypothetical concern arise in the context of a specific dispute, the Maryland Commission, the Pennsylvania Commission, or any other aggrieved party will have the opportunity to bring this dispute before the Commission in the form of an FPA section 206 complaint.

164. *PJM OATT, Attachment DD, sections 6.4(d) and 6.6(d)*: The MMU objects to PJM's proposed revisions to Attachment DD, at section 6.4(d) and a corollary revision at section 6.6(d), regarding PJM's authority when a capacity market seller and the MMU cannot agree on the level of a market seller offer cap, or on the level of the EFORD.<sup>134</sup>

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<sup>134</sup> See *id.* at Original Sheet No. 606A and Second Revised Sheet No. 608A. Proposed section 6.4(d) provides as follows:

In the event that a Capacity Market Seller and the [MMU] cannot agree on the level of a Market Seller Offer Cap, [PJM] shall make its own determination of the level of the Market Seller Offer Cap based on the requirements of the Tariff and the PJM Manuals. If the Capacity Market Seller submits a Sell Offer that [PJM] determines would result in an increase of greater than five percent in any Zonal Capacity Price determined through such auction compared to [PJM's] determination of the level of the Market Seller Offer Cap, [PJM] shall apply to [the Commission] for an order, on an expedited basis, directing such Capacity Market Seller to submit a Sell Offer consistent with the [MMU's] determination, or for other appropriate relief, and PJM shall postpone clearing the auction pending [the Commission's] decision on the matter. Should the [MMU] exercise its powers to inform Commission staff of its concerns and request a determination, on an expedited basis, directing a Capacity Market seller to submit a Sell Offer consistent with the [MMU's] determination, or for other appropriate relief, pursuant to section II.E of Attachment M – Appendix, PJM may postpone clearing the auction pending FERC's decision on the matter.

Specifically, the MMU objects to the discretionary authority that would be given to PJM regarding PJM's obligation to delay clearing the auction at the request of the MMU. The MMU argues that if it seeks recourse from the Commission, under PJM's proposed change, it would be unclear against whom the MMU should seek recourse. The MMU proposes that section 6.4(d) and 6.6(d) be revised to provide that if the MMU notifies PJM that a market seller offer cap is the subject of a referral or petition to the Commission, PJM will suspend clearing the auction for up to 90 days in order to allow the Commission time to act on such referral or petition.

165. We accept PJM's proposed revisions to Attachment DD, sections 6.4(d) and 6.6(d) and reject the MMU's protest as it relates to these provisions. The MMU objects to the authority given to PJM, under these provisions, to make its own determination regarding the level of the market seller offer cap, or the level of the EFORD, in the event the capacity market seller and MMU cannot agree. However, PJM's authority is consistent with its ultimate authority, under Order No. 719, over tariff administration. Moreover, the MMU, in this instance, may request a timeframe for action that includes a rationale for the requested action date when it submits a referral or petition to the Commission. In the event that: (1) the MMU believes a sell offer or the level of an EFORD submitted in an auction has a significant market impact; and (2) the MMU is unable to reach agreement with PJM, the MMU, in that case, may submit a referral or petition to the Commission requesting expedited action.<sup>135</sup>

166. However, we cannot agree that the Commission should be constrained by a predetermined time period, i.e., 90 days, for all such requests. As such in PJM's request for an Order or the MMU's submittal of a referral or a petition, both PJM and the MMU

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<sup>135</sup> For instance, on April 29, 2009, the MMU submitted a letter to the Commission that asserted the default avoidable cost rates (i.e., the costs that the seller would avoid if the unit shut down) applicable to the first incremental auction of RPM for the 2011-12 delivery year were higher than appropriate for that auction (i.e., 4.55 percent higher). In the letter, the MMU requested that the Commission take expedited action in order to correct this problem prior to the June 1-5, 2009 auction and stated that a decision was needed from the Commission by May 25, 2009, in order to allow time for participants to adjust the default values entered into RPM-related systems. *See* April 29, 2009 Letter from the MMU regarding default Avoidable Cost Rates filed in Docket No. ER05-1410-000 *et al.* Similarly, here the MMU may request a timeframe in the event it submits a referral or petition to the Commission due to concerns regarding a sell offer or EFORD submitted in an auction that it believes has a significant market impact (i.e., a sell offer or the level of an EFORD that would result in an increase of less than five percent in any zonal capacity price determined through an auction). We find that the inclusion of such a request should remove the ability of either entity to act in a discriminatory manner.

respectively, must include a rationale for their requested action date. With regard to the MMU's concern regarding recourse, given that a referral or petition is not before the Commission, it is premature to determine in this proceeding against whom the MMU should seek recourse.

167. *PJM OATT, Attachment DD, section 6.6(k)*: The MMU proposes to revise section 6.6(k) to provide that the MMU may (but is not required) to apply to the Commission for an order directing a capacity market seller to participate in PJM's RPM auction, if the MMU determines that the capacity seller's failure to offer part or all of one or more existing generation resources into an auction would increase zonal capacity prices determined through such auction. The MMU also proposes to require PJM to postpone clearing the auction, under these circumstances, for up to 90 days pending the Commission's decision.<sup>136</sup>

168. We find that the MMU's proposed revision to 6.6(k) exceeds the scope of this proceeding. The MMU's proposal grants itself exclusive power to petition the Commission to require a generator to bid into the RPM capacity markets at a level that the MMU finds appropriate, if the bid would result in an increase of zonal capacity prices, which is inconsistent with Order No. 719's requirement that the RTO have ultimate authority to implement its tariff. In addition, the MMU's proposal exceeds the existing Commission-approved standard of PJM applying to the Commission for an order, if a capacity market seller's failure to offer all or part of existing resources into an auction would result in an increase of "greater than five percent in any zonal capacity price" determined through an auction.

169. Notably, the MMU has no objection to retaining the greater than five percent threshold for mandatory reporting, provided that nothing would interfere with the ability of the Market Monitor to call to the Commission's attention a lesser but nonetheless

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<sup>136</sup> Section 6.6(k) currently provides that "[i]n addition to the remedies set forth in [the] subsections [to section 6.6], if the [MMU] determines that one or more Capacity Market Sellers' failure to offer part or all of one or more existing generation resources into an auction would result in an increase of greater than five percent in any Zonal Capacity Price determined through such auction, [PJM] shall apply to the [Commission] for an order, on an expedited basis, directing such Capacity Market Seller to participate in the auction, or for other appropriate relief, and PJM will postpone clearing the auction, or for other appropriate relief, and PJM shall postpone clearing the auction for up to 90 days pending {the Commission's} decision on the matter." See PJM OATT at Second Revised Sheet No. 609. See also sections 5.8(i) (Submission of Sell Offers and Buy Bids) 6.4(d) (Market Seller Offer Caps) and 6.5(a)(ii) (Mitigation) Attachment DD (RPM) of the MMU's protest.

significant market impact. Attachment M of the PJM OATT provides that that MMU may recommend that PJM take specific mitigation action that it is authorized to take to address market behavior or conditions. In the event PJM does not accept the MMU's recommendations regarding mitigation action, the MMU may report its mitigation recommendation to Commission staff, State Commissions, Authorized Government Agencies or the PJM members, as the MMU deems appropriate. The MMU may also submit a written referral to Commission staff in accordance with 18 C.F.R. § 35.28 of the Commission's regulations or exercise its rights pursuant to section 206 of the FPA.

170. *PJM OATT, Attachment M, section II (Definitions) at Proposed d-1:* The MMU proposes to add to the definitions section of Attachment M a definition for the term "incremental cost." The MMU proposes to define this term as "the operating costs determined in accordance with the Cost Development Guideline that are intended to equal the short run marginal costs of a specific generation unit."<sup>137</sup>

171. We reject the MMU's proposal as beyond the scope of this proceeding. While we suggested, but did not require, that RTOs and ISOs consider structuring their MMU tariff sections to include general categories such as "Definitions,"<sup>138</sup> the question of the definition of incremental cost was not addressed in Order No. 719 and therefore any proposed change to this provision is beyond the scope of an Order No. 719 compliance filing. To the extent that this definition needs to be adopted, we encourage the MMU to pursue a proper filing by using the stakeholder process.

172. *PJM OATT, Attachment M – Appendix, section II (Definitions) at Proposed c-1* The MMU proposes to define the term "cost development guidelines" as the manual that includes the detailed method for determining the components of incremental costs for operating capacity in accordance with Schedule 2 of the PJM Operating Agreement.

173. We reject the MMU's proposal as beyond the scope of this proceeding. Order No. 719 does not require the revision of cost development guidelines to identify the roles and responsibilities of the RTO and the MMU. While the cost development guidelines are used in connection with the development of cost-based data, the cost development guidelines are not included in the tariff.<sup>139</sup> However, we encourage the MMU to use the stakeholder process to discuss a definition for cost development guidelines.

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<sup>137</sup> See PJM OATT at Attachment M, proposed Eighth Revised Sheet No. 446.

<sup>138</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 475.

<sup>139</sup> See PJM Manual 15: Cost Development Guidelines at: <http://www.pjm.com/~media/documents/manuals/m15.ashx>

174. *PJM OATT, Attachment M – Appendix at section II.B:* The Attachment M – Appendix at section II.B, as proposed by PJM, addresses minimum generator operating parameters, including the obligation of the MMU to notify generation capacity resources of the MMU’s determination regarding a request for an exception to a value specified in the parameter limited schedule matrix or other applicable parameters, as specified in the PJM Operating Agreement or PJM Manuals.<sup>140</sup> With respect to these obligations, the MMU proposes to list the guidelines that will apply for developing unit specific exceptions to the unit default values included in PJM’s parameter limited schedule Matrix.<sup>141</sup>

175. We accept PJM’s proposed section II.B, subject to conditions, and reject the MMU’s proposed revisions. With respect to PJM’s proposal, we are not convinced that PJM’s parameter limited schedule revisions are necessary to clearly state which functions are performed by the MMU and which by PJM.<sup>142</sup> As to the MMU’s provisions, it proposes to have exclusive authority to make exceptions to parameters for generators in Attachment M – Appendix II. B (Minimum Generator Operating Parameters)<sup>143</sup> which is

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<sup>140</sup> *Id.* at proposed Original Sheets 453K and 453L.

<sup>141</sup> Parameter Limited Schedules are schedules that conform to the actual physical parameters of the unit, when the unit owner fails the three pivotal supplier test, and PJM: (i) declares a Maximum Generation Emergency; (ii) issues an alert that a Maximum Generation Emergency may be declared[;] or (iii) schedules units based on the anticipation of a Maximum Generation Emergency or Maximum Generation Emergency Alert for part or all of an Operating Day. *See* Schedule 1 of the PJM Operating Agreement and Attachment K - Appendix of the PJM OATT at section 6.6(a)(i)(ii).

<sup>142</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 378.

<sup>143</sup> Attachment M – Appendix II.B (Minimum Generator Operating Parameters) of the MMU’s protest states, in part:

In the event that a generation unit believes that a physical operational limitation prevents such unit from meeting the minimum parameters or the parameters defined in (i) through (vii) above, the Market Monitoring Unit shall, upon request, analyze the historical operating data of such unit and shall agree to a value that is no less flexible than a value that it determines is supported on the basis of the actual historical operating data of the unit (inclusive of any data provided on a timely basis by the generating unit)... The Market Monitoring Unit shall notify the Office of the Interconnection of any exception to which it and the Generation Resource agree or its determination if agreement is not obtained. If a Generation Resource submits a Parameter Limited Schedule value inconsistent with its

(continued...)

in conflict with Order No. 719's requirements that an RTO may not permit its external MMU, whether internal or external, to participate in the administration of the tariff.<sup>144</sup> In Order No. 719, the Commission directed RTOs and ISOs to review their mitigation requirements with a view to making them as non-discretionary as possible and to reflect any needed changes in their compliance filings.<sup>145</sup> We find that PJM and the MMU's proposed standards accurately characterize PJM's existing practices and would benefit from further discussion at the stakeholder level. Therefore, we require PJM to review the specific rules in Manual 11 (Scheduling Operations) regarding unit specific exceptions to the parameter limited schedules and the default parameter schedule values using the stakeholder process. We also require PJM, in its 90 day compliance filing, to incorporate the Manual 11 rules and the parameter limited schedule matrix (i.e., the default values) into the PJM OATT and Operating Agreement.

176. *Obligation of the MMU to Provide Written Explanations:* P3 seeks clarification that in the event that the market participant and the MMU disagree as to the appropriate bid calculation or bidding parameters, the MMU will be required to provide a timely, written explanation to both the market participant and to PJM. P3 asserts that this requirement would aid the market participant and PJM in determining how to proceed.

177. We find that Order No. 719 does not require the MMU to provide written notification in the event the MMU and market participant are unable to reach agreement with respect to bid calculations or bidding parameters. However, we strongly encourage P3 to work through the stakeholder process to develop provisions regarding notification of cost calculation discrepancies.

178. *PJM OATT, Schedule 6A(17) and Attachment M – Appendix at section III:* P3 seeks clarification regarding the MMU's obligations following its referral of a matter to the Commission. Specifically, P3 seeks clarification that any such referral will be made in compliance with PJM's confidentiality policy. P3 further requests that this clarification be made to PJM's proposed revision to its OATT, at Schedule 6A, regarding the MMU's authority to petition the Commission regarding a generation owner's black start service revenue requirement.

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agreement or inconsistent with the Market Monitoring Unit's determination regarding such value, the Market Monitoring Unit may petition the Commission for an order that would require the Generation Resource to submit an appropriate value.

<sup>144</sup> 18 C.F.R. § 35.28(g)(3)(iii)(A)(2009).

<sup>145</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 379.

179. We grant P3's requested clarification. The Commission's regulations provide that an MMU is to make a non-public referral to the Commission in all instances where the MMU has reason to believe market design flaws exist that could effectively be remedied by rule or tariff changes and a referral in all instances where the MMU has reason to believe a market violation has occurred.<sup>146</sup> We clarify that all alleged market violations or perceived market design flaws are to be made in accordance with § 18 C.F.R. 35.28 and agree that PJM's confidentiality provisions, as set forth at section 18.17 of the PJM Operating Agreement and Attachment M, will apply to the MMU's interactions with the Commission. As we stated in a previous order, the Commission is specifically authorized to keep all referrals non-public and to protect confidential information and sources.<sup>147</sup>

180. *Attachment M – Appendix at section II.C:* Attachment M – Appendix at section II.C, as proposed by PJM, addresses the RPM must offer obligation and provides a cross reference to the corollary provision, as found in PJM's RPM protocols, at Attachment DD.<sup>148</sup> P3 argues that section II.C, as proposed, fails to specify the standard to be applied by the MMU in determining if a unit is subject to the must offer requirement.

181. We accept PJM's proposed tariff language, subject to conditions. We agree with P3 that Appendix II.C of Attachment M fails to provide the standards to be applied in determining whether a unit is subject to the must offer requirement for RPM. Although section II.C.4 discusses exceptions to the must offer requirement, and section 6.6 of Attachment DD further discusses the offer requirement, PJM's proposed provision, at the Attachment M – Appendix, lacks a description of the standards that will be used to determine if a generation capacity resource is subject to the must offer requirement. Accordingly, we require PJM to revise its provisions, in its 90-day compliance filing, to address this matter.

182. *Attachment M – Appendix at section II.A.1:* PJM proposes that the “[MMU] or his designee shall serve as the Technical Advisor to PJM's Cost Development Task Force and shall advise [PJM] whether it believes that the cost references, methods and rules included in the Cost Development Guidelines are accurate and appropriate, as specified in the PJM Manuals.”<sup>149</sup> The MMU, by contrast, proposes that the MMU serve as the chair, not merely a technical advisor to the Cost Development Task Force, and that the MMU be given the responsibility to “ensure” that the cost references, methods and rules

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<sup>146</sup> 18 C.F.R. § 35.28(g)(3)(iv).

<sup>147</sup> *PJM Interconnection, L.L.C.*, 117 FERC 61,263, at PP 27-30 (2006).

<sup>148</sup> See proposed Original Sheet No. 453L.

<sup>149</sup> See proposed Original Sheet No. 453K.

included in the Cost Development Guidelines are accurate and appropriate, without express reference to the PJM Manuals.

183. We reject PJM's proposed tariff language. Whether the MMU chairs or is a technical advisor of the Cost Development Task Force is an issue beyond the scope of this proceeding and would be best addressed using stakeholder mechanisms. Accordingly, we require PJM, in its 90-day compliance filing, to remove the Technical Advisor provision in Attachment M – Appendix II.A of its OATT.

184. *Attachment M – Appendix at section VI. and section 5.2.1(d) of the PJM Operating Agreement:* PJM proposes to include its FTR Forfeiture Rule as a MMU-listed function at the Attachment M – Appendix at section VI.<sup>150</sup> The MMU proposes provisions in Attachment M – Appendix VI. of its protest. Duke argues that PJM's proposed provision is not the appropriate section of the tariff to address settlements.

185. We accept PJM's proposed revision and reject the MMU's proposal in Attachment M – Appendix VI. FTR Forfeiture Rule. This rule limits the amount of return an entity making increment or decrement bids in the day-ahead market to create congestion and artificially increase the value of its FTRs. An entity making such incremental or decremental bids will receive no return over the cost of the FTRs when the result of its incremental or decremental bids is to create congestion in the day-ahead markets that exceeds congestion in real-time. Without the possibility of higher prices (and thus profits), the incentive to use increment and decrement bids in the day-ahead market to increase congestion and artificially raise the value of the FTRs will be mitigated. The MMU proposes to have exclusive authority over the FTR Forfeiture Rule in Attachment M - Appendix which is in conflict with Order No. 719's requirements that an RTO may not permit its external MMU, whether internal or external, to participate in the administration of the tariff.<sup>151</sup> Additionally, PJM's proposed FTR Forfeiture Rule provisions include a reference to the corresponding tariff provisions - - section 5.2.1(b) (Transmission Congestion Credit Calculation). We find that PJM's proposed FTR

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<sup>150</sup> See Original Sheet No. 453Q. The FTR Forfeiture Rule was created to address concerns that an entity can purchase FTRs in the monthly FTR auction and then enter increment and decrement bids in the day-ahead market so as to create congestion and artificially increase the value of its FTRs. To mitigate this possibility, the FTR Forfeiture Rule provisions were developed to limit the amount of return an entity making such increment or decrement bids may receive. An entity making such bids will receive no return over the cost of the FTRs when the result is to create congestion in the day-ahead market that exceeds congestion in real-time.

<sup>151</sup> 18 C.F.R. § 35.28(g)(3)(iii)(A)(2008).

Forfeiture Rule in Attachment M – Appendix VI. is consistent with the context and clarity required for the centralized MMU section in Order No. 719. We also agree with the MMU’s clarification to Duke’s concern that the purpose of this provision is not to discuss settlements, but to provide for retrospective adjustment based on the application of an objective retroactive mitigation rule, as is done currently. Order No. 719 provides that RTOs and ISOs may allow their MMUs to conduct retroactive mitigation.<sup>152</sup>

### 3. Ethics

186. Order No. 719 adopted minimum ethics standards for MMUs and their employees, to be included in RTO and ISO tariffs.<sup>153</sup> The Commission also clarified that these standards do not prohibit employees of MMUs from performing independent monitoring for entities other than RTOs and ISOs. However, if the employing entity is a market participant in the RTO or ISO for whom the MMU performs market monitoring, the proposed work would entail the same conflict of interest as would any other consulting services. The Commission directed RTOs and ISOs to notify the Commission of such engagements in their compliance filing, and to propose a transition plan for dealing with conflicts in a manner consistent with Order No. 719.<sup>154</sup>

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<sup>152</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 375.

<sup>153</sup> 18 C.F.R. § 35.28(g)(3)(vi) (2009). The ethics standards must require, at a minimum, that the MMU and its employees: (1) have no material affiliation with any market participant; (2) do not serve as an officer, employee, or partner of a market participant; (3) have no material financial interest in any market participant or affiliate, with potential exceptions for mutual funds and non-directed investments; (4) do not engage in any market transactions other than the performance of their duties under the tariff; (5) are not compensated, other than by the Commission-approved RTO or ISO that retains or employs the MMU, for any expert witness testimony or other commercial services, either to the Commission-approved RTO or ISO or to any other party, in connection with any legal or regulatory proceeding or commercial transaction relating to the RTO or ISO or to its markets; (6) may not accept anything of value from a market participant in excess of a *de minimis* amount; and (7) must advise a supervisor in the event they seek employment with a market participant, and must disqualify themselves from participating in any matter that would have an effect on the financial interest of market participants.

<sup>154</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 385.

### **PJM's Filing**

187. PJM states that as part of the PJM/MMU Settlement Agreement, PJM and the MMU executed a conflicts of interest policy that satisfies Order No. 719's minimum ethics standards. PJM further states that it has incorporated this agreement in its OATT.<sup>155</sup>

### **Protests/Comments**

188. No protests or comments were filed.

### **Commission Determination**

189. We accept PJM's compliance filing, subject to conditions. PJM's proposed MMU Code of Ethics, while addressing certain of the Commission's standards, fails to address the standards set forth at 18 C.F.R. § 35.28(g)(3)(vi)(B), (D), (E) and (G).<sup>156</sup> Accordingly, we require PJM to revise its MMU Code of Ethics, in its 90-day compliance filing, to include these required standards. In Order No. 719-A, the Commission revisited the issue of potentially conflicting engagements of the MMU with entities that are market participants in the RTO or ISO monitored by the MMU. Therefore, we make no determination here as to the instant filing's compliance on this issue, and instead will defer the matter to the compliance filing on 719-A.

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<sup>155</sup> See proposed Attachment M at section XI (Code of Ethics).

<sup>156</sup> Specifically, the MMU Code of Ethics fails to incorporate the Commission's standards prohibiting the MMU and its employees from: (1) prohibiting the MMU and its employees from serving as an officer, employee, or partner of a market participant (*see* section 35.28(g)(3)(vi)(B)); (2) prohibiting the MMU and its employees from engaging in any market transactions other than the performance of their duties under the tariff (*see* section 35.28(g)(3)(vi)(D)); (3) prohibiting the MMU and its employees from being compensated, other than by PJM, for any expert witness testimony or other commercial services to the ISO/RTO or any other party, in connection with any legal or regulatory proceeding or commercial transactions relating to the ISO/RTO or the ISO/RTO's markets (*see* section 35.28(g)(3)(vi)(E)); and (4) requiring the MMU and its employees to advise a supervisor if they seek employment with a market participant and disqualifying themselves from participating in any matter that would have an effect on the financial interest of the market participant (*see* section 35.28(g)(3)(vi)(G)).

#### 4. Enhanced Information Dissemination

190. Order No. 719 required RTOs and ISOs to include in their tariffs a requirement that the MMU prepare an annual state of the market report on market trends and the performance of the wholesale market, as well as less extensive quarterly reports. These reports must be disseminated to Commission staff, staff of interested state commissions, the management and board of the RTO or ISO, and market participants, with the understanding that dissemination may be accomplished by posting on the RTO's or ISO's website.<sup>157</sup> Order No. 719 also required that MMUs be available for regular conference calls, which may be attended by the Commission, state commissions, and representatives of the RTO or ISO, and market participants. The information to be provided in the MMU reports and in the conference calls may be developed on a case-by-case basis, but is generally to consist of market data and analyses gathered and prepared by the MMU in the course of its business, subject to appropriate confidentiality restrictions.

191. Additionally, Order No. 719 required RTOs and ISOs to release offer and bid data on a three-month lag. An RTO or ISO may propose a shorter lag time for the release of offer and bid data and provide accompanying justification. If the RTO or ISO demonstrates a potential collusion concern, it may propose a four-month lag period or some other mechanism to delay release of the data if it were otherwise to occur in the same season as reflected in the data.<sup>158</sup> The identity of market participants must remain masked, although the RTO or ISO may propose a time period for eventual unmasking. Order No. 719 requires RTOs and ISOs to include in their compliance filings a justification of their policies on the aggregation (or lack of same) of offer and cost data, discussing participant harm, collusion and transparency.<sup>159</sup>

#### PJM's Filing

192. PJM states that it has complied with the information dissemination requirements of Order No. 719. First, PJM states that its OATT, at Attachment M, section VI.A, provides that the MMU will prepare and submit contemporaneously to the Commission, the state commissions, the PJM board, PJM management, and to the PJM members committee, annual state-of-the-market reports on the state of competition within, and the efficiency of, the PJM markets. PJM states that section VI.A has also been revised to

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<sup>157</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 424.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

provide that the MMU is required to prepare and submit quarterly reports that update selected portions of the annual report.<sup>160</sup>

193. With respect to Order No. 719's requirement regarding an RTO's obligation to release bid and offer data, PJM states that a majority of its stakeholders voted in favor of a four month data lag, based on the rationale that market participants would be safely outside of the seasonal summer and winter peak periods only if this data was withheld from release for this interval. However, PJM asserts that, in its view, it remains unclear whether there would be any real or identifiable collusion concern attributable to the earlier release date favored by PJM. Accordingly, PJM asserts that it does not have sufficient justification to request a four month lag period.

194. PJM adds that a three month lag in the release of data is effectively a three to four month lag, given the fact that PJM releases this data monthly, not daily. PJM further notes that it masks the identity of market participants whose offer and bid data is being released. Finally, PJM confirms that the release of bid and offer data will include not only physical offers and bids, but virtual offers and bids as well as demand bids.

### **Protests and Comments**

195. DC Energy argues that PJM's proposed release of bid and offer data fails to include provisions offering adequate transparency because this data is neither location-specific nor participant-specific. DC Energy asserts that the release of all non-aggregated, masked bid and offer data would enhance transparency and, in conformance with Order No. 719, allow market participants to assess the functioning of the market. Accordingly, DC Energy requests that PJM be required to publish all physical, demand and virtual offers and bids for all market activities by location and participant.

196. The Illinois Commission requests that Attachment M. section IV.A be revised to require that the MMU's quarterly reports provide the number of instances where the MMU submitted a referral to the Commission for anti-competitive behavior or tariff violations during the reporting period and a summary of the publicly available data associated with each such referral. The Illinois Commission asserts that the PJM OATT should also require that the annual and quarterly reports be posted on PJM's website. In

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<sup>160</sup> PJM notes that section VI.A further provides that the MMU will submit reports to authorized government agencies and prepare a public report regarding the MMU's activities. PJM states that these reporting obligations can be addressed in the annual report, subject to the protection of confidential information and activities. PJM states section VI.A also provides that the MMU may make recommendations, in these reports, regarding any matter within its purview and clarifies that PJM will not require the MMU to provide draft reports.

addition, the Illinois Commission requests a specific OATT assurance that these reports will be issued in a timely basis, with the annual report to be issued no later than the end of the first quarter of the following year and each quarterly report to be issued no later than the end of the following quarter.

### **Answers**

197. The MMU responds to DC Energy's request for greater transparency regarding the release of bid and offer data, suggesting that such a policy would facilitate the exercise of market power. The MMU also objects to PJM's proposed three-month lag, noting that the shorter the lag between the clearing of the market and the availability of information, the more relevant the data will be to the current market and the greater the concern about its potential to facilitate anticompetitive behavior. The MMU argues that an additional one-month delay should be adopted.

### **Commission Determination**

198. We accept PJM's compliance filing, subject to conditions. Order No. 719 requires PJM to adopt, in its OATT, provisions addressing the MMU's obligation to make one or more of its staff members available for regular conference calls, to be attended, either telephonically or in person, by Commission and state commission staff, representatives of the RTO or ISO, and market participants.<sup>161</sup> However, PJM's proposed revisions to Attachment M, section VI.A, fail to include a reference to this required availability. Accordingly, we require PJM to include such a provision in its 90-day compliance filing. We deny the Illinois Commission's request to require that specific information be included in the MMU's quarterly reports. Order No. 719 requires that the MMUs report on aggregate market performance on a quarterly basis, but does not require that RTOs and ISOs specify, in their tariffs, the specific contents of these reports.<sup>162</sup> Order No. 719 requires that the MMU's annual and quarterly reports be posted on PJM's website.<sup>163</sup> However, while PJM's website refers to the availability of the MMU's annual and quarterly reports by offering a link to the MMU's website, PJM's website fails to ensure that these reports will be directly accessible via PJM. Accordingly, we require PJM to modify its website to include the MMU's annual and quarterly reports as a direct link, downloadable from PJM's website. We also require PJM to update the Commission regarding its accomplishment of this directive, in its 90-day compliance filing.

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<sup>161</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 424.

<sup>162</sup> *Id.* P 414.

<sup>163</sup> *Id.* P 396.

199. We reject the Illinois Commission's argument that PJM should be required to include in its OATT a specified deadline regarding the MMU's submission of its annual and quarterly reports, i.e., that these reports should be issued no later than the end of the quarter following the study period. Order No. 719 does not require such a provision. In addition, the Illinois Commission acknowledges the MMU's timeliness in issuing its past state of the market reports. Accordingly, we are not persuaded that express timing mandates are required.

200. In Order No. 719, the Commission found that the lag time for the release of offer and bid data should be reduced to three months, but held that if the RTO or ISO identifies a potential collusion concern, it may propose a four-month lag period or, alternatively, some other mechanism to delay release of the data.<sup>164</sup> PJM proposes to implement a three month lag, asserting that it has identified no credible evidence that would indicate a collusion concern associated with this shortened lag time.<sup>165</sup> The MMU, however, argues that a full four month lag is required. The MMU asserts that there are incentives to anticipate and react to the behavior of rivals and that the competition in PJM's markets would not be enhanced by a three month lag. The MMU adds that the difference between a three and four month lag is meaningful because knowledge of competitors' actions within the period of comparable seasonal conditions greatly increases its predictive value and thereby facilitates anticompetitive behavior.

201. We agree with the MMU that a significant percentage of market power tests involve one or more failing suppliers and indicate a significant presence of market power throughout the PJM region. By releasing data with a three-month lag period, PJM would be allowing information to be provided within the same seasonal period such that these parties could potentially ascertain the bidding behavior of their rivals and exploit market power. We also agree that a potential collusion concern exists within the PJM region. Accordingly, we require PJM to revise its OATT, in its 90-day compliance filing, to establish a four-month lag period or some other mechanism to delay the release of the data to prevent releases from occurring in the same season as reflected in the data.

202. Order No. 719 requires that when the RTO or ISO releases bid and offer data, the identity of market participants is to remain masked, but that RTO or ISO may propose a

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<sup>164</sup> *Id.* P 398 and 421.

<sup>165</sup> PJM adds that a three-month lag would effectively be a longer lag, in certain cases, given that PJM releases bid data on a monthly basis. PJM notes, for example, that while a bid submitted on April 15<sup>th</sup> would be released in early August, a bid submitted on April 1<sup>st</sup> would be released on that same August day.

time period for eventual unmasking.<sup>166</sup> PJM proposes to mask the identity of market participants whose offer and bid data is released. The MMU concurs with this approach, noting that disaggregating or unmasking bid and offer data would facilitate the exercise of market power. Industrial Customers and DC Energy disagree, arguing that PJM should be required to release non-aggregated and masked bid and offer data to enhance transparency. We accept PJM's proposal. Although unmasking bid and offer data may enhance transparency and allow market participants to assess the functioning of the market, we agree with the MMU that such a policy also poses the risk of increasing the ability of market participants to exercise market power.

203. Finally, Order No. 719 requires RTOs and ISOs to justify their policies regarding the aggregation or lack thereof of offer and cost data, and to discuss the extent to which these policies avoid participant harm and the possibility of collusion, while fostering market transparency.<sup>167</sup> PJM explains that it does not intend to post virtual data down to the bus level because it would give an advantage to entities that have the resources and ability to glean the bidding strategies of virtual traders. PJM does not otherwise explain its policies on offer and cost data. Accordingly, we require PJM to provide, in its 90-day compliance filing, a justification of its policies, as required by Order No. 719.

## **5. Tailored Requests for Information**

204. Order No. 719 required that MMUs entertain state commissions' tailored requests for information regarding general market trends and performance of wholesale market, but not requests for information designed to aid state enforcement actions. The Commission noted that granting or refusing such requests is at the MMU's discretion, based on its agreements with the RTO or ISO and the states, or otherwise based on time and resource availability.<sup>168</sup> Order No. 719 also required RTOs and ISOs to develop confidentiality provisions to protect commercially sensitive material that may be included in response to tailored requests for information.<sup>169</sup>

### **PJM's Filing**

205. PJM proposes to revise its OATT, at Attachment M - Appendix, section I.D, to address the conditions under which the MMU will be required to disclose confidential

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<sup>166</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 424.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* P 459.

<sup>169</sup> *Id.*

information to authorized commissions. PJM proposes that authorized commissions may request information about general market trends and the performance of the wholesale market from the MMU, and the MMU shall supply confidential information unless the MMU or an affected member object and request a conference with the authorized commission to resolve differences concerning the scope or timing of the information request. PJM proposes that if the conference is refused, terminated, or fails to resolve the dispute, the MMU or the affected member may file a complaint with the Commission. PJM proposes that if a complaint is filed, and the Commission does not act on that complaint within 90 days, the complaint would be deemed denied and the MMU would be required to use its best efforts to respond to the information request promptly.

### **Protests and Comments**

206. The Illinois Commission asserts that PJM's proposed language, at section I.D. Attachment M – Appendix, is overly restrictive and may require a state commission to comply with current PJM confidentiality provisions as a prerequisite to making a tailored request for information, even if the requested information is not confidential. The Illinois Commission notes that it is statutorily required to provide access to confidential information to other state agencies for other purposes, including law enforcement purposes, and thus cannot make the representations required under the PJM tariff and non-disclosure agreements. The Illinois Commission proposes that PJM incorporate language into section I.D.1 of Attachment M-Appendix that would specify that the MMU will entertain tailored requests for information from authorized state commissions regarding general market trends and the performance of the wholesale markets.

207. EPSA requests that the Commission direct PJM to modify proposed section 18.17.4 of the Operating Agreement and section I.D. (Disclosure to Authorized Commissions) of Attachment M-Appendix to include provisions for allowing affected market participants to contextualize tailored requests for information from the MMU and to include a direct reference that all information is subject to redaction of commercially sensitive information. EPSA argues that consistent with Order No. 719, affected market participants should be afforded the opportunity to be heard and otherwise to participate when RTOs receive tailored requests for information from states. EPSA appreciates that Order No. 719 not only gave market participants the opportunity to contest such a request, but also provided the opportunity to supplement MMU data with a contextual explanation. EPSA asserts that the proposed and existing tariff language sets forth procedures by which an affected market participant can object to an information request, including with respect to timing and scope, but affords affected market participants no opportunity to provide contextual information.

208. EPSA requests that PJM be required to adopt language adopted at section 3.3(b)(iii) of ISO New England's Information Policy, which provides that "the Market Participant whose data is the subject of the request to provide input on the terms and

conditions under which that data may be released and afford the Market Participant a forum before the Commission should it feel that those protections are not adequate.”

209. In addition, EPSA argues that PJM’s tariff should include a reference to the redaction of confidential information and a provision stating that not all tailored requests from states are subject to redaction. EPSA contends that the Commission should not accept PJM’s tariff section 18.17.4 of the Operating Agreement and the reciprocal provisions of newly created section I.D of Attachment M – Appendix as in compliance with Order No. 719, but instead, should direct PJM to further refine these sections to include provisions for allowing affected market participants to contextualize tailored requests for information from the MMU and to include a direct reference that all information is subject to redaction of commercially sensitive information.

### **Commission Determination**

210. We accept PJM’s compliance filing, subject to conditions. Order No. 719 requires that MMUs entertain state commissions’ tailored requests for information regarding general market trends and performance of wholesale market, but not requests for information designed to aid state enforcement actions.<sup>170</sup> However, we agree with the Illinois Commission that PJM’s OATT and Operating Agreement fail to specify that the MMU may, at its discretion, produce information about general market trends and the performance of the wholesale markets in response to a state commission’s tailored information request where the information would not violate confidentiality restrictions, is not designed to aid state enforcement actions, and does not contravene the Commission’s confidentiality rules regarding referrals. Accordingly, we require PJM to include, in its 90-day compliance filing, revisions to its OATT and Operating Agreement addressing this matter.

211. Order No. 719 requires that market participants be given the opportunity to contest any data specific to them and to provide context to such data, so long as the process does not unduly delay release of the information.<sup>171</sup> However, we agree with EPSA that PJM’s OATT and Operating Agreement fail to address this allowance. Accordingly, we require PJM to include, in its 90-day compliance filing, revisions to its OATT and Operating Agreement to comply with this requirement.

212. We reject EPSA’s request that all commercially sensitive information be redacted. In accordance with Order No. 719, PJM has developed confidentiality provisions to protect commercially sensitive material that are no more restrictive than necessary to

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<sup>170</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 459.

<sup>171</sup> *Id.* P 455.

protect the information.<sup>172</sup> For example, PJM’s proposed revision to section I.D of Attachment M – Appendix and its existing provision, at section 18.17.4 (addressing disclosure to authorized commissions), require that third-party contractors be given access to confidential information if they sign a non-disclosure agreement. Because this information will be released subject to these confidentiality requirements, an additional redaction requirement is not necessary.<sup>173</sup>

213. Additionally, PJM limits its information sharing provisions to “Authorized Commission[s]”, that is, state commissions “within the geographic limits of the PJM Region”. Consistent with our determination in *California Independent System Operator Corporation*, we require PJM to revise section I.D of Attachment M – Appendix to also include a provision that addresses information sharing with other state commissions and make any conforming changes necessary in its 90 day compliance filing.<sup>174</sup>

## **6. Commission Referrals**

214. Order No. 719 required RTOs and ISOs to include, in their tariffs, protocols addressing the referral by MMUs to the Commission of suspected market violations and perceived market design flaws.<sup>175</sup> Under these protocols, all information and documents obtained during the course of an investigation are non-public, and may not be released, except to the extent the Commission directs or authorizes in a given instance, unless the material is already made public during an adjudicatory proceeding or disclosure is required by the Freedom of Information Act.<sup>176</sup>

### **PJM’s Filing**

215. PJM’s compliance filing does not address Order No. 719’s requirements regarding the issue of MMU referrals to the Commission, as required by 18 C.F.R. § 35.28(g)(iv) and (v).

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<sup>172</sup> *Id.* P 459.

<sup>173</sup> See, e.g., *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,210 (2001); *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,322, at PP 12-15 (2004).

<sup>174</sup> See *California Independent System Operator Corporation*, 129 FERC ¶ 61,157 at P 132 (2009).

<sup>175</sup> See 18 C.F.R. § 35.28(g)(iv) and (v) (2009).

<sup>176</sup> Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 465 (citing 18 C.F.R. § 1b.9).

### Protests and Comments

216. No protests or comments were filed.

### Commission Determination

217. We require PJM to revise its OATT, consistent with the requirements of 18 C.F.R. § 35.28(g)(iv) and (v). PJM's existing OATT, at Attachment M, section IV.I.2, addresses MMU referrals to the Commission. Section IV.I.2 provides, among other things, that "where the [MMU] has reason to believe, based on sufficient credible information, that a Market Participant or PJM has either violated (a) a PJM Market Rule, or (b) any of the FERC Market Rules, the [MMU] will refer the matter to the Commission's Division of Investigations (or any successor)[.]"<sup>177</sup>

218. The MMU may also correct certain behavior without a referral to the Commission if it meets the following criteria: (1) the activity must be expressly set forth in the tariff; (2) the activity must involve objectively identifiable behavior; and (3) the activity does not subject the actor to sanctions or consequences other than those expressly approved by the Commission and set forth in the tariff, with the right of appeal to the Commission. The type of "traffic ticket" behavior that would be exempt from referrals would include activities such as late payments and failure to notify PJM of an outage and the like.

219. However, it is insufficient for the PJM OATT to state generally that the MMU will not refer to the Commission matters that fall within this category because that would leave the determination of whether a particular type of activity qualified for exclusion up to the MMU, rather than to the Commission. We note that, consistent with 18 C.F.R. § 35.28(g)(iv) and (v), if the MMU has reason to believe that a market violation has occurred, it should make a referral to the Commission. In addition, PJM's tariff does not incorporate the protocols for the identification of market design flaws and recommended tariff changes. Accordingly, we require PJM to revise its OATT, at Attachment M, section IV.2, in its 90-day compliance filing, to conform to the Commission's protocols for: (1) referral of suspected violations, as set forth at 18 C.F.R. § 35.28(g)(3)(iv); and (2) referrals as set forth at 18 C.F.R. § 35.28(g)(3)(v).<sup>178</sup>

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<sup>177</sup> See PJM OATT at First Revised Sheet No. 448.06.

<sup>178</sup> Specifically, with respect to suspected market violations, we require PJM to revise section IV.I.2 Attachment M of its OATT to incorporate therein the regulatory text language set forth at 18 C.F.R. § 35.28(g)(3)(iv)(D)(3) and (6), and 18 C.F.R. § 35.28(g)(3)(iv)(E). As to referrals to the Commission of perceived market design flaws and recommended tariff changes, we require PJM to revise section IV.I. 2 Attachment M

(continued...)

The Commission orders:

(A) PJM's compliance filing is hereby accepted, subject to condition, as discussed in the body of this order. PJM's proposed tariff changes are hereby accepted, subject to condition, to become effective June 29, 2009, as requested, as discussed in the body of this order.

(B) PJM is hereby directed to submit a compliance filing within 90 days of the date of this order and to submit such informational filings and additional status reports, as discussed in the body of this order.

(C) PJM is hereby direct to submit updates for scarcity pricing within the timeframe discussed herein.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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of its OATT to incorporate therein the regulatory text language set forth at 18 C.F.R. § 35.28(g)(3)(iv)(A)-(E).

## Appendix

ER09-1063-000, *et al.*List of Intervenors

Allegheny Electric Cooperative, Inc.  
Allegheny Energy Companies  
American Municipal Power – Ohio, Inc. (AMP-Ohio)\*  
American Public Power Association (APPA)\*  
Baltimore Gas and Electric Company  
Blue Ridge Power Agency  
Calpine Corporation  
Comverge, Inc.; CPower, Inc.; EnergyConnect, Inc.; EnerNOC, Inc  
PJM Industrial Customer Coalition, Viridity Energy, Inc.  
(Comverge, *et al.*) \*  
Constellation Energy (Constellation) \*  
Dayton Power and Light Company (Dayton) \*  
DC Energy, LLC (DC Energy)\*  
Delaware Public Service Commission (Delaware Commission)\*  
Dominion Resources Services, Inc.  
Duke Energy Corporation\*  
Electricity Consumers Resource Council (ELCON)\*  
Electric Power Supply Association (EPSA) \*  
Exelon Corporation (Exelon)\*  
FirstEnergy Service Company  
Illinois Commerce Commission (Illinois Commission) \*  
Illinois Municipal Electric Agency  
Indiana Utility Regulatory Commission  
Mirant Parties  
North Carolina Electric Membership Corporation and  
Borough of Chambersburg, PA (North Carolina Coop, *et al.*)\*  
Monitoring Analytics, LLC (MMU)\*  
New Jersey Board of Public Utilities  
New Jersey Division of Rate Counsel  
NRG Companies  
Office of the Ohio Consumers' Counsel and  
Maryland Office of People's Counsel (Joint Consumers Counsel)\*  
Old Dominion Electric Cooperative, Southern Maryland  
Electric Cooperative, Inc., PJM Industrial Customer Coalition, District of  
Columbia Office of the People's Counsel and Public Power Association of New  
Jersey (ODEC, *et al.*) \*  
Organization of PJM States, Inc. \*  
Pepco Holdings, Inc.

Pennsylvania Office of Consumer Advocate (Pennsylvania OCA)\*  
Pennsylvania Public Utility Commission (Pennsylvania Commission)\*  
PJM Industrial Customer Coalition (Industrial Customers)  
PJM Power Providers Group (P3) \*  
PJM Steel & Cement Manufacturers Coalition  
Portland Cement Association and the  
    ArcelorMittal USA, Inc. (Portland Cement, *et al.*)\*  
PPL Parties  
PSEG Companies (PSEG)\*  
Public Service Commission of the District of Columbia (DC Commission)  
Public Service Commission of Maryland (Maryland Commission)\*  
Public Utilities Commission of Ohio (Ohio Commission)\*  
RRI Energy, Inc. (RRI)\*  
Shell Energy North America (US), L.P. (Shell)\*  
Steel Dynamics and Nucor Steel \*  
Wal-Mart Stores, Inc. \*

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\* Intervenors submitting comments or protests