Pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure,¹ PJM Interconnection, L.L.C. (“PJM”), submits this answer to the motion filed on behalf of the Intervenor State Agencies² seeking to compel responses from PJM Interconnection, L.L.C. to Data Request Nos. JMC-PJM-3.6 and 3.7” (“Motion to Compel”).³ For the reasons stated below, the Motion to Compel should be denied.

I. Background

On January 8, 2015, Mr. Steven R. Herling filed cross-answering testimony on behalf of PJM in the captioned dockets.⁴ On January 13, 2015, the Joint Consumer Advocates propounded a Third Set of Data Requests upon PJM (“JCA-PJM-3”). PJM counsel served its preliminary

² The Intervenor State Agencies include: The Pennsylvania Office of Consumer Advocate, the Virginia Office of the Attorney General’s Division of Consumer counsel, the Delaware Division of the Public Advocate and the Maryland Office of People’s Counsel (“Joint Consumer Advocates”) and the Maryland Public Service Commission and the Delaware Public Service Commission (“Indicated State Commissions”).
³ Potomac-Appalachian Transmission Highline, LLC and PJM Interconnection, L.L.C., Intervenor State Agencies’ Motion to Compel Responses from PJM Interconnection, L.L.C. to Data Request Nos. 3.6 and 3.7, Docket Nos. ER09-1256-002, et al. (Feb. 18, 2015) (“Motion to Compel”).
objections to the Joint Consumer Advocates’ Third Set of Data Requests by letter dated January 21, 2015 (“January 21 Objections”), which included specific objections to data requests JCA-PJM-3.6 and 3.7 based on the attorney work product doctrine. Such objections remain unresolved and are the subject of this motion.

For completeness, PJM includes both the data requests for JCA-PJM-3.6 and 3.7, as well as PJM’s responses.

JCA-PJM-3.6 stated as follows:

**JCA-PJM-3.6.** Please provide all documents containing or reflecting written communications between or among PJM officers or employees and any and all officers or employees of any PATH Company, AEP and/or FirstEnergy with regard to the preparation or filing of Mr. Herling’s Cross-Answering Testimony. If you elect to withhold any documents responsive to this data request on the basis of privilege, please provide a privilege log which includes document-by-document description of the privilege asserted and the facts supporting it, which must include for each and every such document: (i) the author’s name and job description; (ii) the names of all recipients (whether direct or copied) and their relationship with you; (iii) a general description of the document (e.g., email, memorandum, et al.); (iv) the document’s date; (v) the specific privilege asserted; and, (vi) a general description of the document’s subject matter sufficiently detailed to allow the presiding administrative law judge to determine whether you have properly discharged your burden of establishing the requirements for asserting any such privilege.

PJM provided the following objection including a common interest and joint defense privilege between PJM and the PATH Companies:

**PJM OBJECTION:** PJM objects to this data request, in its entirety, pursuant to the work product doctrine. All such documents exchanged between Mr. Herling and PJM’s counsel, Ms. Foley, were maintained consistent with the attorney-client

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privilege and, therefore, are protected by the attorney work product doctrine. All facts discussed were memorialized in Mr. Herling’s testimony as served upon the Commission and all parties to this proceeding.

In addition, the documents requested are protected from discovery and disclosure by the common interest and joint defense principle. Consistent with that principle, PJM is obligated to protect from disclosure and strictly preserve all privileges and confidentiality with respect to all such Communications and Materials requested.

In addition, PJM provided the following specific response to the JCM-PJM-3.6 request:

**PJM RESPONSE:** Subject to and without waiving any objections to this data request, including separately submitted objections to this set of data requests and objections to definitions and instructions, PJM responds:

*See* attached Privilege Log to Data Request JCA-PJM-3.6.

**JCA-PJM-3.7** stated as follows:

**JCA-PJM-3.7:** Please state whether Mr. Herling or any other officer or employee of PJM conversed with any officer or employee of any PATH Company, AEP and/or FirstEnergy with regard to the preparation or filing of Mr. Herling’s Cross-Answering Testimony. If so, please provide the dates on which these conversations took place, the purpose(s) of each and every such conversation, and provide any and all written notes of any such conversations. If you elect to withhold any information or documents responsive to this data request on the basis of privilege, please provide a privilege log which includes document-by-document description of the privilege asserted and the facts supporting it, which must include for each and every such document: (i) the author’s name and job description; (ii) the names of all recipients (whether direct or copied) and their relationship with you; (iii) a general description of the document (e.g., email, memorandum, et al.); (iv) the document’s date; (v) the specific privilege asserted; and, (vi) a general description of the document’s subject matter sufficiently detailed to allow the presiding administrative law judge to determine whether you have properly discharged your burden of establishing the requirements for asserting any such privilege.
PJM provided the following objection including a common interest and joint defense privilege between PJM and the PATH Companies:

**PJM OBJECTION:** PJM objects to this data request, in its entirety, pursuant to the work product doctrine. All such discussions exchanged between Mr. Herling and PJM’s counsel, Ms. Foley, were maintained consistent with the attorney-client privilege and, therefore, are protected by the attorney work product doctrine. All facts were memorialized in Mr. Herling’s testimony as served upon the Commission and all parties to this proceeding.

In addition, any discussions between PJM and Counsel for the PATH Company are protected from discovery and disclosure by the common interest and joint defense principle. Consistent with that principle, PJM is obligated to protect from disclosure and strictly preserve all privileges and confidentiality with respect all such Communications and Materials requested.

In addition, PJM provided the following specific response to the JCM-PJM-3.6 request:

**PJM RESPONSE:** Subject to and without waiving any objections to this data request, including separately submitted objections to this set of data requests and objections to definitions and instructions, PJM responds:

Neither Mr. Herling nor any other officer or employee of PJM conversed with any officer or employee of any PATH Company, AEP and/or FirstEnergy with regard to the preparation or filing of Mr. Herling’s Cross-Answering Testimony. However, to the best of their recollection, Mr. Herling and PJM’s in-house counsel, Pauline Foley, conversed with Mr. Ken Jaffe, counsel for the PATH Companies, on December 19, 2014 and January 5, 2015 with respect to the preparation of Mr. Herling’s testimony. No notes of those conversations exist. The conversation on December 19 lasted approximately one-half hour and discussed areas that might be included in Mr. Herling’s testimony. The conversation on January 5 lasted approximately fifteen minutes and discussed the efforts remaining to complete and file the testimony.
The Intervenor State Agencies continue to assert a right to the information protected as attorney work product and under the common interest and joint defense principle. The Intervenor State Agencies have failed to provide any basis to support disclosure of such attorney work product documents.

II. Argument

A. The Documents Detailed in the Privilege Log Is Protected Under the Attorney Work Product Doctrine

The information sought by the Intervenor State Agencies in Data Requests JCM-PJM-3.6 and 3.7 is communication between attorneys and clients in the preparation of testimony for trial. Such information has consistently been referred to as attorney work product. A party seeking to prevent disclosure of such documents or communication has the burden of showing that the attorney client privilege or work product actually applies. As acknowledged by both PJM and the PATH Companies, the “protected information” is specific to the preparation of the Herling Testimony and PJM seeks to protect disclosing such information to opposing parties. The Intervenor State Agencies do not dispute such facts.

Material withheld on the grounds of privilege or work product must be described adequately to ensure that the privilege applies. As such, opposing counsel ordinarily is entitled to a privilege log with a description of the privileged material that includes the date, author, and names and identification of the parties who received the communication, the subject matter of the communication and the basis for asserting a privilege but not the substance of the

6 Fed.R.Civ.P. 26(b)(3) codifies the judge-made rule providing protection of an attorney’s “work product,” i.e., documents prepared in anticipation of litigation or for trial by or for another party or its representative.


communication. However, care must be taken not to waive the privilege inadvertently during discovery.

The Intervenor State Agencies have acknowledged that PJM provided a privilege log for the documents in question. By the submission of the privilege log, PJM has satisfied the requirements of Fed.R.Civ.P. Rule 26(b)(5) by: (i) expressly making the claim and (ii) describing the nature of the documents not produced or disclosed without waiving the privilege to enable other parties to assess the claim. The Intervenor State Agencies have not objected to the adequacy of the privilege log, which describes the communication as (i) sent between December 19, 2014 and January 8, 2015, (ii) exchanged solely between counsel and client, and (iii) solely related to the preparation and contents of Mr. Herling’s Cross-Answering Testimony filed in this case. There is no evidence to refute that the documents were not maintained consistent with the attorney work product doctrine nor do the Intervenor State Agencies challenge such facts. Based on the foregoing, Intervenor State Agencies have failed to make a showing that PJM or the PATH Companies waived the protection of the attorney work product doctrine.

Finally, the State Intervenor Agencies have failed to make the showing necessary to pierce work product protections, which requires that the party seeking disclosure must show “both a substantial need and an inability to secure the substantial equivalent of the materials by

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11 February 6 Letter at 4, 5.

12 See Fed.R.Civ.P. 26(b)(3)(A)(ii) (Work product material is protected from disclosure unless the party seeking it can show that the party has “substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”).
alternate means without undue hardship.” At a minimum, the State Intervenor Agencies have not put forward any argument of a substantial need for the information. In addition, any relevant facts were memorialized in the Herling Testimony. The fact that PJM and the PATH Companies communicated in the preparation of Mr. Herling’s testimony is not indicative of any “wrongdoing.” PJM’s interest in this proceeding is to ensure a complete record particularly as it relates to those issues only PJM can testify to. Certainly the parties will have opportunity to question Mr. Herling through cross examination.

B. PJM’s Assertion of a Privilege under the Common Interest Principal is Relevant to the Discovery Requests

PJM raises the common interest and joint defense exception (“Common Interest Principle”). PJM had a reasonable expectation that such communication would be maintained as confidential as such communication was: (i) restricted to counsel and client; and (ii) the parties had a joint defense and common interest agreement, as well as an understanding that such agreement provided the necessary protection to allow for such communication. In order to establish the existence of a Common Interest privilege, the party asserting the privilege must demonstrate that “(1) communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.”

In responses to data requests JCM-PJM-3.6 and 3.7, PJM withheld release of documents between PJM and the PATH Companies based on the Common Interest Principle because such

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14 The intentions and reasonable understanding of a party are important and necessary considerations in making a factual determination as to whether the common interest privilege applies. A court’s determination regarding the existence of a privilege “is factual in nature.” U.S. v. Bay State Ambulance & Hosp. Rental Serv. at 28. In order to qualify for the common interest privilege, “the communication must have been made in confidence.” Id. In evaluating whether a given communication was meant to be confidential, “what the client reasonably understood is the key question.” Id. The First Circuit additionally notes that it “looks to the intent of the client to answer whether a communication was made in confidence.” Id.

documents were relevant to the preparation and/or filing of the Herling Testimony. While the Intervenor State Agencies do not challenge the existence of a common interest and joint defense agreement between PJM and the PATH Companies, they argue that the privilege is not applicable to the parties on the grounds that the common interest “must be identical, not similar.”

While PJM agrees that it must demonstrate that PJM’s and The PATH Companies’ share a “common legal interest,” PJM is not required to demonstrate that there is a total uniformity of interests between them in order to invoke common interest as a privilege. Rather, “[c]ommunications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests.”

The Intervenor State Agencies argue that the Common Interest Principle cannot apply because the issues in this matter are solely financial, i.e., (i) the PATH Companies compliance or non-compliance with the FERC Uniform System of Accounts rules and regulations, (ii) the determination of the appropriate return on equity, and (iii) the prudency or reasonableness of the PATH Companies’ expenditures preceding and up to the abandonment of the PATH Project. The fact that PJM acknowledged that it does not have a financial interest in whether the PATH Companies complied with the FERC Uniform System of Account rules, or the determination of the appropriate return on equity or the prudency or reasonableness of the PATH Companies expenditures preceding and up to the abandonment of the PATH Project, is not an automatic or unequivocal bar to the common interest privilege.

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16 Motion to Compel at 7.

17 *Cavallaro v. U.S.*, 284 F.3d 236, 249 (1st Cir. 2002).

18 *U.S. v. Bay State Ambulance & Hosp. Rental Serv.*, 874 F.2d at 28 (internal citations omitted).

19 Motion to Compel at 7.

20 *Id.* at 7.
Despite the Intervenor State Agencies’ narrow view of this case, \textit{i.e.}, it is \textit{solely} financial, PJM (and the PATH Companies) have an interest in whether the record accurately reflects that (i) the PATH Project was intended to address benefits to transmission customers and (ii) whether the PATH Companies’ acted prudently regarding suspension of the project. The answer to both of those issues will weigh heavily on the appropriateness of the PATH Companies’ financial interests, particularly with regard to the prudence or reasonableness of the PATH Companies’ expenditures preceding and up to the abandonment of the PATH Project. That is not “only a common business interest” as the Intervenor State Agencies would like to lead the Commission to believe;\textsuperscript{21} rather, it is clearly a litigation interest.

\textbf{C. PJM Disputes the Intervenor State Agencies’ Assertion that PJM has Failed to Provide a Response to JCA-PJM-3.7}

In its response to JCA-PJM-3.7, PJM stated that “[n]either Mr. Herling nor any other officer or employee of PJM conversed with any officer or employee of the PATH Companies.”\textsuperscript{22} Clearly that answer alone would have been responsive to the data request. Nonetheless, PJM continued and stated that there were conversations with counsel for the PATH Companies and to the best of their recollection such conversations occurred on December 19, 2014 and January 5, 2015.\textsuperscript{23} In addition, Mr. Herling testified that no notes of the conversation exist.\textsuperscript{24} There is nothing more to say in response. PJM request that the Commission find PJM’s response to be complete and deny the Intervenor State Agencies’ request to produce anything further regarding this data request.

\textsuperscript{21} Motion to Compel at 8.

\textsuperscript{22} See PJM Response to JCM-PJM-3.7.

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.}
III. Conclusion

For all of the reasons stated above, PJM respectfully requests that the Presiding Administrative Law Judge deny the Motion to Compel.

Respectfully submitted,

By: _______________________
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in Docket Nos. ER09-1256-002 and ER12-2708-003

Date at Audubon, PA this 27th day of February, 2015.

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