

184 FERC ¶ 61,179
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

PJM Interconnection, L.L.C.

Docket No. ER23-2327-000

ORDER ON RECOVERY OF PENALTY ASSESSMENTS

(Issued September 21, 2023)

1. On June 30, 2023, pursuant to section 205 of the Federal Power Act (FPA)¹ and section 1.5 of Schedule 11 of the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (PJM) (Operating Agreement), PJM submitted a request for approval of the recovery of \$140,000 in penalties from a Settlement Agreement between PJM and ReliabilityFirst Corporation (ReliabilityFirst). PJM also requests approval to recover the costs of the reliability-related North American Electric Reliability Corporation (NERC) penalty from customers under Schedule 9-1 of PJM's Open Access Transmission Tariff (Tariff). For the reasons discussed below, we grant PJM's request, effective August 30, 2023.

I. Background

A. 2008 Guidance Order

2. In 2008, the Commission issued an order² providing guidelines to Regional Transmission Organizations (RTO) and Independent System Operators (ISO) for cost recovery of penalties that may be assessed against them under FPA section 215³ for noncompliance with mandatory and enforceable Reliability Standards. Concerned that an automatic pass-through of penalty costs to consumers would reduce the incentives of RTOs and ISOs to comply with Reliability Standards, the Commission stated it would

¹ 16 U.S.C. § 824d (2018).

² *Reliability Standard Compliance & Enf't in Regions with Reg'l Transmission Orgs. or Indep. Sys. Operators*, 122 FERC ¶ 61,247 (2008) (Guidance Order).

³ 16 U.S.C. § 824o.

allow section 205 filings for RTOs and ISOs to request recovery of penalty costs by spreading those costs among their members and/or customers on a case-by-case basis.⁴

3. The Commission established factors it would consider when reviewing requests to recover costs associated with these penalties. These factors include whether the RTO or ISO had a sound compliance program in place to prevent the violations, whether the violations were intentional or grossly negligent (rather than negligent), whether management was involved in the violations, the ability of the RTO or ISO to pay the penalty, and the fairness of the assessment mechanism proposed by the RTO or ISO.⁵

B. PJM's Operating Agreement and Tariff

4. In 2008, in response to the Guidance Order, PJM filed, and the Commission accepted, a new Schedule 11 to its Operating Agreement.⁶ As relevant here, Schedule 11 of the Operating Agreement provides a mechanism by which either PJM or a Member may directly allocate monetary penalties imposed by NERC on the registered entity to the entity or entities whose conduct is determined by NERC to have led to a Reliability Standards violation.⁷ Section 1.5 of Schedule 11 of the Operating Agreement further provides that any and all costs associated with the imposition of NERC Reliability Standards penalties that may be assessed against PJM either directly by NERC or allocated by a Member or Members shall be (i) paid by PJM, and (ii) recovered as set forth in Schedule 9 of the Tariff, or as approved by the Commission.⁸

⁴ Guidance Order, 122 FERC ¶ 61,247 at PP 26-27.

⁵ *Id.* P 27.

⁶ *PJM Interconnection, L.L.C.*, Filing for Allocation of Costs Associated with NERC Penalty Assessments, Docket No. ER08-1144-000 (June 20, 2008) (2008 Compliance Filing). The Commission accepted the filing on September 18, 2008, effective September 19, 2008. *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,260 (2008) (2008 Order).

⁷ PJM, Intra-PJM Tariffs, Operating Agreement, Schedule 11, § 1.1 (0.0.0).

⁸ In particular, the tariff provision provides that “[a]ny and all costs associated with the imposition of NERC Reliability Standards penalties that may be assessed against PJM either directly by NERC or allocated by a Member or Members under this Schedule shall be (i) paid by PJM notwithstanding the limitation of liability provisions in Section 16 of the Operating Agreement; and (ii) recovered as set forth in Schedule 9 of the PJM Tariff, or as otherwise approved by the FERC.” PJM, Intra-PJM Tariffs, Operating Agreement, Schedule 11, § 1.5 (1.0.0). All Schedule 11 claims “must come before the Commission as section 205 filings, and in accordance with our Guidance Order, we must

C. Settlement Agreement

5. PJM and ReliabilityFirst entered a Settlement Agreement to resolve PJM's two violations. PJM submitted its first Self-Report⁹ to ReliabilityFirst for violating TOP-001-4 R18, which states that "[e]ach Transmission Operator shall operate to the most limiting parameter in instances where there is a difference in [System Operating Limits]."¹⁰ ReliabilityFirst submitted and accepted a Mitigation Plan¹¹ to address PJM's violation of TOP-001-4 R18.¹² On May 3, 2021, ReliabilityFirst certified that PJM completed the Mitigation Plan on March 13, 2021.¹³

6. PJM submitted its second Self-Report to ReliabilityFirst for violating NUC-001-3 R4, which states that "[p]er the Agreement developed in accordance with this standard, the applicable Transmission Entities shall: Incorporate the [Nuclear Plant Interface Requirements] into their operating analyses of the electric system."¹⁴ ReliabilityFirst submitted and accepted a Mitigation Plan to address PJM's noncompliance with NUC-001-3 R4.¹⁵ On December 21, 2020, ReliabilityFirst certified that PJM completed the Mitigation Plan on November 15, 2020.¹⁶

7. ReliabilityFirst granted PJM a mitigating credit because PJM promptly identified and reported the violations and was cooperative throughout the monitoring and enforcement process.¹⁷ PJM agreed to pay a monetary penalty of \$140,000 to

review those filings on a case-by-case basis." 2008 Order, 124 FERC ¶ 61,260 at P 41.

⁹ Settlement Agreement at P 12. A Self-Report details the extent, cause, discovery, and mitigation of noncompliance.

¹⁰ *Id.* P 11.

¹¹ A Mitigation Plan is a plan an entity creates to address and correct noncompliance and prevent future violations. *Id.* P 8.

¹² *Id.* P 21.

¹³ *Id.* P 23.

¹⁴ *Id.* P 26.

¹⁵ *Id.* P 35.

¹⁶ *Id.* P 37.

¹⁷ *Id.* PP 39-40.

ReliabilityFirst to settle the violations.¹⁸ On February 29, 2023, NERC filed a Notice of Penalty in Docket No. NP23-13-000 (NERC Filing). On March 20, 2023, the Commission issued a notice indicating that it would not further review, on its own motion, the Notice of Penalty.¹⁹

II. Filing

8. PJM requests approval to recover from its customers the costs of the NERC penalties assessed under the Settlement Agreement. PJM also requests approval to allocate these NERC penalty costs through a one-time addition to the costs PJM will recover under Tariff, Schedule 9-1 in the first calendar month after the calendar month in which the filing is accepted.²⁰ PJM requests an effective date of August 30, 2023.

9. PJM explains that, at the time it filed Schedule 11, it recovered its administrative costs through a stated rate specified in Schedule 9 of its Tariff. PJM states that, as explained in its 2008 Compliance Filing, it therefore would “pay its share of any and all NERC penalty costs from the sum of (i) projected current year stated rate revenues less projected current year operating expenses (excluding the penalties) and (ii) any earnings retained in the financial reserve portion of the deferred regulatory liability fund.”²¹ PJM states that in its 2008 Compliance Filing it also explained that, if its current operating expenses and retained earnings “are insufficient to absorb penalty costs, PJM will be required to file for rate relief pursuant to FPA section 205.”²² PJM states that, as of January 2022, it replaced the stated-rate construct of Schedule 9 with a new formula rate approach that directly passes through to customers PJM’s administrative costs and consequently, because PJM’s administrative cost recovery rates are no longer a source of retained earnings that would be “[s]ufficient to absorb penalty costs,” it is proceeding here under the “or as otherwise approved by FERC” portion of section 1.5 to seek case-specific approval under FPA section 205 for these NERC penalty costs.

10. PJM argues its proposed recovery of the NERC penalties is consistent with the guidelines outlined by the Commission in the 2008 Guidance Order.²³ PJM states it has

¹⁸ *Id.* P 42.

¹⁹ *N. Am. Elec. Reliability Corp.*, 182 FERC ¶ 61,212 (2023).

²⁰ Transmittal at 2.

²¹ *Id.* at 4 (citing 2008 Compliance Filing at 19-20).

²² *Id.* (citing 2008 Compliance Filing at 20).

²³ *Id.* at 1.

a robust internal compliance program, which is overseen by PJM's Regulatory Compliance Officer. In addition, PJM explains that it has multiple internal departments involved with compliance efforts, including NERC reliability standards, Code of Conduct, tariff compliance, and North American Energy Standards Board policies, procedures and security.²⁴ PJM states that it established a Regulatory Oversight and Compliance Committee (ROCC), which maintains an enterprise-wide compliance management and enforcement program, coordinates compliance functions, including reliability criteria, tariff compliance and legal compliance. PJM notes that both violations were self-reported by PJM.²⁵

11. PJM maintains that both NERC violations were inadvertent and no harm to the bulk energy system resulted from the violations. PJM states that ReliabilityFirst did not find PJM's violations to be intentional or grossly negligent, and that ReliabilityFirst accepted PJM's mitigation plans regarding both violations.²⁶

12. PJM states that PJM's management personnel were not involved in the violations, but PJM's management was involved in the decision to self-report the violations and in PJM's response to the violations. PJM notes that PJM's senior management team concurred with the ROCC recommendation to self-report the violations, and PJM was extremely cooperative with ReliabilityFirst's inquiries.²⁷

13. PJM states that, as a result of its transition on January 1, 2022 to a formula-rate approach for recovery of its administrative costs, PJM's rates recover only the costs of operations and do not provide for separate revenues that it could use to absorb the NERC penalty costs, as was the case when Schedule 9. PJM also states that it operates on a revenue-neutral basis, and approval for it to recover these costs from customers is warranted.²⁸

14. PJM proposes to recover the penalty costs for the violations of the NERC reliability standards under Schedule 9-1 of the Tariff. PJM contends that Schedule 9-1 of the Tariff allows for recovery of costs for all of PJM's activities "associated with

²⁴ *Id.* at 5.

²⁵ *Id.* at 6.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

preserving the reliability of the PJM Region.”²⁹ PJM argues that this approach provides a broad allocation of the costs while preserving a nexus between its responsibility that gave rise to the costs and the types of customers being allocated the costs. PJM also argues that the impact of the broad allocation of costs on individual customers will be minimal, with an estimated cost of \$0.001842 per MWh if fully recovered in a single month.³⁰

III. Notice of Filing and Responsive Pleadings

15. Notice of PJM’s filing was published in the *Federal Register*, 88 Fed. Reg. 43,560 (July 10, 2023), with interventions and protests due on or before July 21, 2023. Timely motions to intervene were submitted by Public Citizen, Inc. (Public Citizen), Rockland Electric Company, Duquesne Light Company, American Municipal Power, Inc., and Delaware Division of the Public Advocate. The New Jersey Division of Rate Counsel filed a motion to intervene out-of-time. On July 19, 2023, Public Citizen filed a protest to PJM’s filing. On August 4, 2023, PJM filed a motion for leave to answer and answer to Public Citizen’s protest. On August 9, 2023, Public Citizen filed a motion to answer and answer to PJM’s answer.

16. Public Citizen protested the filing stating that PJM’s request to recover an administrative penalty from consumers is inconsistent with the public interest and is unjust and unreasonable.³¹ Public Citizen states that PJM executives and PJM’s Board of Managers should be financially responsible for the penalties. And if any PJM executives are paid performance bonuses that in any way relate to reliability of the bulk-power market, Public Citizen contends that there would be an even stronger case that PJM executives be liable for the penalty rather than blameless consumers.³² Public Citizen likens PJM’s situation to that of ISO-New England Inc. (ISO-NE) in 2022 after it settled alleged tariff violations with the Office of Enforcement,³³ that resulted in ISO-NE reducing its executive compensation to pay the agreed-to civil penalty.³⁴ Public Citizen further contends that the recovery of PJM’s penalty costs does not fall under Tariff, Schedule 9-1 because violating a NERC reliability standard is not “associated

²⁹ *Id.*

³⁰ *Id.* at 6-7.

³¹ Public Citizen Protest at 1.

³² *Id.* at 3.

³³ *Id.* at 2 (citing *ISO New England, Inc.*, 180 FERC ¶ 61,223 (2022)).

³⁴ Public Citizen Protest at 2.

with preserving the reliability of the PJM Region,” but rather a punitive action to ensure compliance.³⁵ Public Citizen concludes by stating that it is unclear whether PJM consulted stakeholders and that the Commission should require PJM to describe the efforts taken to consult with stakeholders prior to this filing.³⁶

17. PJM answered Public Citizen’s protest stating that PJM showed in its June 30 Filing that the recovery of the NERC penalty costs is consistent with the Commission’s 2008 Guidance Order.³⁷ Specifically, PJM states that PJM has a robust internal compliance program, the violations were inadvertent, PJM’s management personnel were not involved, PJM’s formula-rate approach does not provide for separate revenues for PJM to absorb the NERC penalty costs, and the recovery of costs under Tariff, Schedule 9-1 allocates the NERC penalty costs fairly.³⁸ PJM argues that Public Citizen’s protest does not show that PJM’s recovery of the NERC penalty costs is unwarranted or unjust and unreasonable, but rather is an attack on the Commission’s 2008 Guidance Order for allowing recovery of cost from RTO customers.³⁹ PJM also argues that the 2022 ISO-NE violation is dissimilar to PJM’s violation because: (1) the Commission’s 2008 Guidance Order was not applicable to the ISO-NE violation; (2) the ISO-NE violation did not concern a NERC penalty recovery, as it resulted from a stipulation and agreement resolving an investigation by the Commission’s Office of Enforcement; (3) the ISO-NE matter included allegations against management personnel; (4) ISO-NE chose to absorb the cost of the penalty agreed to via the settlement and was not ordered by the Commission to reduce executive compensation; and (5) the Commission stated that ISO-NE could seek to recover the penalty costs from its customers.⁴⁰ PJM concludes by stating that its proposed assessment mechanism is fair and that the Commission has repeatedly accepted similar recovery mechanisms as meeting the Commission’s 2008 Guidance Order standards.⁴¹

18. Public Citizen responded to PJM’s answer arguing that the Commission cannot address whether PJM’s recovery of penalties is just and reasonable until the Commission

³⁵ *Id.*

³⁶ *Id.* at 3.

³⁷ PJM Answer at 3.

³⁸ *Id.* at 3-4.

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 4-5.

⁴¹ *Id.* at 5.

determines if the “PJM executives are paid financial incentives tied to meeting reliability goals.”⁴² Public Citizen argues that the Commission should compel PJM to disclose information about PJM’s performance-based bonuses and “regulatory costs in this docket that it expects to recover from consumers.”⁴³

IV. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2022), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

20. Pursuant to Rule 214(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), we grant the late-filed motion to intervene of the New Jersey Division of Rate Counsel given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

21. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2022), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept PJM’s answer and Public Citizen’s answer because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

22. As discussed below, we grant PJM’s request to recover from its customers the NERC penalty costs arising from the Settlement Agreement pursuant to section 1.5 of Schedule 11 of the PJM Operating Agreement as well as PJM’s proposal to allocate these penalty costs using the cost-allocation method included in Schedule 9-1 of the Tariff. In particular, we find that PJM’s request satisfies the requirements of the Guidance Order.

23. In the Guidance Order, the Commission explained that it would entertain FPA section 205 filings by RTOs and ISOs requesting recovery and allocation of reliability penalty costs among their members and/or customers.⁴⁴ The Commission evaluates such filings on a case-by-case basis, including: (1) whether the RTO or ISO had a sound

⁴² Public Citizen Answer at 1.

⁴³ *Id.* at 2.

⁴⁴ Guidance Order, 122 FERC ¶ 61,247 at P 27.

compliance program in place to prevent the violations (including, for example, personnel policies that place incentives on employees and management to comply with the rules or risk adverse actions); (2) whether the violations were intentional or grossly negligent, rather than negligent; (3) whether management was involved in the violations; (4) the ability of the RTO or ISO to pay the penalty; and (5) the fairness of the assessment mechanism proposed by the RTO or ISO.⁴⁵

24. In its filing, PJM provides support for its claim that recovery of this NERC penalty is appropriate under the factors identified by the Commission in the Guidance Order. First, PJM has produced evidence of a compliance program that addresses compliance with NERC reliability standards, Code of Conduct, tariff compliance, and North American Energy Standards Board policies, procedures, and security.⁴⁶ Additionally, PJM has a ROCC to maintain effective compliance management and enforcement within PJM.⁴⁷

25. Second, there is no evidence that the violations here were intentional or grossly negligent. PJM self-reported the violations, and ReliabilityFirst found that the violations were neither intentional nor grossly negligent.⁴⁸

26. Third, there is no evidence that management personnel were involved in the violations. Rather, the record indicates that PJM promptly identified and reported the violation at issue and was “extremely cooperative throughout the monitoring and enforcement processes.”⁴⁹

27. Fourth, with respect to PJM’s ability to pay the penalty, we agree with PJM that “as a result of PJM’s transition on January 1, 2022 to a formula-rate approach for recovery of its administrative costs, PJM’s rates recover only the costs of operations, and do not provide for separate revenues that PJM could use to absorb the NERC penalty costs.”⁵⁰

⁴⁵ *Id.*

⁴⁶ Transmittal at 6.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Settlement Agreement at PP 39-40.

⁵⁰ Transmittal at 6.

28. Fifth, we find reasonable PJM's proposal to use the cost-allocation method in Schedule 9-1 of the Tariff for recovering the penalty costs imposed on PJM through the Settlement Agreement.⁵¹

29. We are not persuaded by Public Citizen's arguments that PJM should be required to allocate penalty costs to PJM executives and PJM's Board of Managers. The Guidance Order has no such requirement, and, as stated above, PJM has adequately addressed the factors identified by the Guidance Order.⁵² Further, additional evidence, such as whether PJM executives are paid reliability-related performance bonuses, is not necessary for the Commission to rule on the proposed recovery. Further, Public Citizen's reliance on the 2022 ISO-NE matter is inapposite. In 2022, ISO-NE settled an investigation by the Commission's Office of Enforcement, and pursuant to the settlement agreed to pay a civil penalty.⁵³ Neither the Commission's order approving the settlement, nor the settlement agreement itself, dictated how ISO-NE would fund payment of the agreed-to civil penalty.⁵⁴

30. Finally, we are not persuaded by arguments that PJM should have consulted with its stakeholders before submitting the request to recover the penalties from PJM's customers. Neither Schedule 11 of the Operating Agreement nor the Guidance Order requires PJM to seek stakeholder approval prior to making its FPA section 205 filing to recover the penalty costs at issue here.

⁵¹ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,118, at P 21 (2011) (approving MISO's proposal to recover penalty from customers taking Network and Point-to-Point Transmission Service).

⁵² Guidance Order, 122 FERC ¶ 61,247 at P 27 (stating that the Commission will entertain section 205 filings by the RTOs and ISOs requesting recovery of penalty costs by spreading those costs among their members and/or customers).

⁵³ *ISO-New England, Inc.*, 180 FERC ¶ 61,223 at P 2.

⁵⁴ *Id.* at PP 101-105 (contemplating that ISO-NE might pass the penalty on to market participants).

The Commission orders:

PJM's request for approval to recover certain NERC penalties as described herein is hereby granted, effective August 30, 2023, as requested.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.

Docket No. ER23-2327-000

(Issued September 21, 2023)

DANLY, Commissioner, *concurring*:

1. PJM Interconnection, L.L.C. (PJM) is the public utility charged with administering the bulk power markets in a large section of the United States covering all or part of 13 states and the District of Columbia. I have previously stated on numerous occasions my concerns with PJM's administration of the bulk power markets, namely its "leadership" in undercutting or dismantling core market design principles essential for just and reasonable rates, like honoring auction clearing prices and preventing state-subsidized renewable resources from gaming the markets.¹ But with this order,² we learn that PJM also is not very good at reliability, having incurred \$140,000 in penalties for reliability rule violations.³
2. The FERC-approved PJM tariff, however, permits PJM to file with the Commission pursuant to section 205 of the Federal Power Act (FPA)⁴ to pass through these penalties to ratepayers in line with Commission guidance.⁵ I reluctantly agree that

¹ See, e.g., *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109 (2023) (Danly, Comm'r, dissenting at PP 31, 38) (listing capacity market design failures).

² *PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,179 (2023) (Order).

³ *Id.* PP 5-6 (identifying PJM reliability violations). I agree that these reliability violations likely were not "intentional or grossly negligent," *see id.* P 25, but reliability violations still are serious matters and demonstrate a significant failure in PJM's operation of the bulk power markets.

⁴ 16 U.S.C. § 824d.

⁵ Order, 184 FERC ¶ 61,179 at PP 4, 9-10.

PJM has met its relatively light burden under FPA section 205 and its existing tariff to pass through these penalties.

3. But I do not like it. I would treat PJM like the public utility that it is and act pursuant to FPA section 206⁶ to investigate PJM's manifest failures to ensure or at least advocate for just and reasonable rates—and now to also investigate whether PJM is complying with existing reliability rules. The Commission should not hesitate to inquire whether a public utility serving as a Regional Transmission Organization—including PJM—should continue in this critical role when rates and reliability failures suggest it is not doing very well.

4. To date, the Commission has not instituted such an action against PJM, but any entity with standing can file a similar 206 action at any time. That might have more of an effect on policing PJM's administration of the bulk power markets than a \$140,000 penalty that we pass through to ratepayers.

For these reasons, I respectfully concur.

James P. Danly
Commissioner

⁶ 16 U.S.C. § 824e.