152 FERC ¶ 61,035
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

PJM Interconnection, L.L.C. Docket No. ER14-1469-002

ORDER DENYING MOTION FOR CLARIFICATION AND REQUEST FOR REHEARING

(Issued July 16, 2015)

1. On March 12, 2014, PJM Interconnection, L.L.C. (PJM) filed a revised tariff record under the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (Operating Agreement) to modify the confidentiality rules to allow PJM to share non-public, operational information with natural gas pipeline operators to implement the Commission's regulations adopted in Order No. 787.[1] On May 9, 2014, the Commission accepted the revised tariff record, subject to conditions.[2] On May 27, 2014, PJM filed a revised tariff record to comply with the May 9th Order. PJM's compliance filing was accepted for filing in a delegated letter order on July 16, 2014.[3] On August 15, 2014, National Fuel Gas Distribution Corporation (NFG Distribution) filed a motion for clarification or, in the alternative, request for rehearing of the July 16th Order. As discussed below, the Commission denies NFG Distribution's motion for clarification and request for rehearing.

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[1] *Communication of Operational Information Between Natural Gas Pipelines and Electric Transmission Operators*, Order No. 787, 78 Fed. Reg. 70,163 (Nov. 22, 2013), FERC Stats. & Regs. ¶ 31,350 (2013) (cross-referenced at 145 FERC ¶ 61,134 (2013)), *order on reh'g*, Order No. 787-A, 147 FERC ¶ 61,228 (2014).

[2] *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,105 (2014) (May 9th Order).

[3] *PJM Interconnection, L.L.C.*, Docket No. ER14-1469-001 (July 16, 2014) (delegated letter order) (July 16th Order).

I. Background

2. In Order No. 787, the Commission revised its regulations to provide explicit authority to interstate natural gas pipelines and public utilities that own, operate, or control facilities used for the transmission of electric energy in interstate commerce to share non-public, operational information with each other for the purpose of promoting reliable service or operational planning on either the public utilities' or pipelines' systems. Order No. 787 also prohibited such recipients of non-public, operational information from subsequently disclosing that information to third parties or marketing function employees as defined in section 358.3(d) of the Commission's regulations. However, the Commission stated that Order No. 787 does not supersede any existing tariff provisions. With respect to communications between transmission operators and local distribution companies (LDCs), the Commission stated that the rule does not affect the ability of an electric transmission operator to share its own information with an LDC, if otherwise permitted under its tariff. In addition, the rule does not prohibit electric transmission operators from sharing non-public, operational information received from a pipeline pursuant to this rule with LDCs, if otherwise provided for in tariff provisions approved by the Commission.[4] Thus, to the extent a transmission operator wants to take advantage of the explicit authority provided under Order No. 787, and that transmission operator has tariff provisions prohibiting the communications, it must first make a section 205 filing with the Commission to revise the relevant tariff provisions to permit such sharing of information.[5]

3. On March 12, 2014, PJM proposed to modify the confidentiality rules in section 18.17 of its Operating Agreement to allow PJM to share non-public, operational information with natural gas pipeline operators to implement the Commission's regulations adopted in Order No. 787. PJM proposed the addition of a new subsection to section 18.17.1 of the Operating Agreement to explicitly permit PJM to share non-public, operational information with interstate natural gas pipeline operators for the purpose of promoting reliable service and operational planning as permitted by the Commission's regulations adopted in Order No. 787. In addition, PJM proposed revisions to allow it to share non-public, operational information with LDCs and intrastate natural gas pipeline operators, provided that such party or parties have acknowledged, in writing, that they are prohibited from disclosing, or using anyone as a conduit for disclosure of non-public, operational information received from PJM to a third party or to its "marketing function employees" as that term is defined by section 358.3(d) of the Commission regulations.

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[4] Order No. 787, 145 FERC ¶ 61,134 at P 16 & n.27, P 56.

[5] Order No. 787, 145 FERC ¶ 61,134 at P 135.

4. In the May 9th Order, the Commission accepted the proposed tariff record, subject to conditions.[6] The Commission found that PJM's proposal to explicitly allow PJM to share non-public, operational information with interstate natural gas pipeline operators for the purpose of promoting reliable service and operational planning was consistent with Order No. 787.[7] With respect to PJM's proposal to require LDCs and intrastate natural gas pipelines who receive non-public, operational, information from PJM to acknowledge, in writing, that they are prohibited from disclosing non-public, operational information to a third party or "to its marketing function employees as that term is defined by FERC regulations at 18 CFR 358.3 (d)," the Commission found that PJM's reference to the term "marketing function employee" was unclear.[8] The Commission explained that the definition of marketing function employee in the Standards of Conduct is narrow and linked to the relationship between the transmission provider and its marketing function employee or to an interstate pipeline and its marketing function employees.[9] The Commission ruled that PJM's tariff was not entirely clear as to how it would apply, particularly to LDCs without marketing function employees as defined by the Standards of Conduct. The Commission stated "[t]he potential sharing of non-public, operational information creates an opportunity that the information can be used in an unduly discriminatory or preferential manner by the recipient or to the detriment of the market."[10] The Commission found PJM's proposed revisions were ambiguous as to how they would prevent such results. Therefore, PJM's filing was accepted subject to the condition that PJM file a revised tariff record to clarify section 8.17.1(f).

5. On May 27, 2014, PJM filed a revised tariff record to comply with the May 9th Order (May 27 Compliance Filing). PJM proposed to amend section 18.17.1(f) of the Operating Agreement to reflect the Commission's May 9th Order by requiring that a recipient LDC or intrastate pipeline operator acknowledge, in writing, that it shall not disclose, or use anyone as a conduit for disclosing, non-public, operational information received from PJM to a third party or in an unduly discriminatory or preferential manner or to the detriment of any natural gas or electric market.

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[6] May 9th Order, 147 FERC ¶ 61,105.

[7] May 9th Order, 147 FERC ¶ 61,105 at P 7.

[8] May 9th Order, 147 FERC ¶ 61,105 at P 9.

[9] 18 C.F.R. § 358.3(d) (2013).

[10] May 9th Order, 147 FERC ¶ 61,105 at P 9.

6. No party protested the May 27 Compliance Filing and it was accepted for filing on July 16, 2014.[11] On August 15, 2014, NFG Distribution filed a motion for clarification and, in the alternative, request for rehearing of the July 16th Order.[12]

II. Motion for Clarification and, in the Alternative, Rehearing.

7. NFG Distribution submits that by requiring PJM to amend its Operating Agreement to prevent recipients of non-public operational information (including LDCs) from subsequently disclosing that information to third parties or in an unduly discriminatory or preferential manner to the detriment of any natural gas or electric market may inhibit appropriate sharing of operational data and discourage LDCs and intrastate pipelines from maximizing use of the data to improve reliability. NFG Distribution also states that the proposed restrictions threaten to impose liabilities on LDCs and intrastate pipelines for uses of shared data that cannot harm the markets or market participants. Therefore, NFG Distribution requests that the May 9th Order and July 16th Order be either clarified or amended to ensure that the goals of Order No. 787 are more fully met.

8. NFG Distribution argues that the blanket prohibition against sharing data with third parties includes third parties qualified to receive data as well as third parties whose operational cooperation is needed in order to increase reliability. NFG Distribution states that the definition of "third parties" would include interstate pipelines qualified to receive data under Order No. 787, as well as third parties whose operational cooperation is needed in order to increase reliability, including independent electric generators connected to the LDC with whom the LDC may need to communicate in light of the non-public, operational data received from PJM. NFG Distribution also argues that LDCs cannot simply absorb non-public, operational data from entities like PJM without having the ability to communicate some of that data to their own major customers in order to address the operational problems stemming from the electric system data. NFG Distribution states that if information about a sudden likely increase in electric generator use of natural gas in one segment of the interstate pipeline affects one load pocket of the LDC, then the LDC may need to contact large customers in that load pocket to inform them of the impact of expected capacity constraint. NFG Distribution states that it may be possible for the LDC to avoid discussing why the load shifts or constraints were appearing, but directly or indirectly, some LDC customers would become aware of the operational data conveyed by PJM. NFG Distribution also states that the prohibition

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[11] *PJM Interconnection, L.L.C.*, Docket No. ER14-1469-001 (July 16, 2014) (delegated letter order).

[12] On August 9, 2014, National Fuel filed an errata to its motion for clarification or, in the alternative, request for rehearing.

ignores the fact that LDCs face codes of conduct restricting their ability to use, or potentially misuse data, which further reduces the need for a blanket prohibition against any third-party communications as to the data newly available under Order No. 787.

9. NFG Distribution also argues that requiring LDCs to guarantee that their use of data will not be "to the detriment of any natural gas or electric market" is unfairly vague and creates unnecessary compliance risks. First, NFG Distribution states that LDCs are well familiar with restrictions against undue discrimination or preference and can navigate that restriction. However, NFG Distribution states that, under the standard approved in PJM's tariff, even if the LDC acts in a not unduly discriminatory and not unduly preferential manner as to the data, it may still violate the undertaking to PJM if, as a result of its actions, there is detriment to any natural gas or electric market. Second, NFG Distribution argues that it may be impossible to avoid having a detrimental impact on a natural gas or electric market, in order to improve reliability for the natural gas pipeline market as a whole. NFG Distribution contends that changing capacity use inevitably affects some retail customers negatively just as changing upstream supplies may affect market participants negatively.

10. Accordingly, NFG Distribution argues that the Commission should clarify the scope and meaning of the two PJM restrictions for LDCs in a manner that would permit and encourage LDCs to communicate freely with PJM and then use that information to work with other natural gas industry players to improve reliability. Specifically, NFG Distribution requests that the Commission clarify that PJM's restriction against LDCs' communicating non-public, operational data will not apply to the LDCs' communications with: (1) interstate pipelines eligible to receive the information directly from PJM; and (2) LDCs' customers or other connecting suppliers (i.e., other non-jurisdictional natural gas transporters such as gathering companies) with whom the LDC has communicated on operational matters subject to its state regulatory restrictions. NFG Distribution also requests that the Commission clarify that the PJM restriction on the LDC communicating non-public, operational information that would have a detrimental market impact will not apply to detrimental impacts on natural gas or electric markets except as to "willful" or "intentional" detrimental impacts, which are not necessary results of steps taken by the LDC to improve reliability of natural gas deliveries as a result of the non-public, operational information.

11. Should the Commission deny the requested clarifications described above, NFG Distribution requests rehearing of the Commission's acceptance of PJM's proposal which requires written undertaking by LDCs receiving non-public operational data not to communicate it to third parties or in a way that would result in a detriment to natural gas or electric markets. NFG Distribution argues that PJM's restrictions are unlawfully vague, improperly burden LDCs with potential liabilities for creating minor detriments while achieving reliability gains, and is too difficult to avoid due to the ramified nature of the natural gas and electric markets. Accordingly, NFG Distribution argues that the

Commission should require PJM to amend its tariff consistent with the clarifications requested above.

12. On September 3, 2014, PJM filed an answer to NFG Distribution's motion for clarification and request for rehearing. PJM argues that NFG Distribution's proposal to allow an entity to share non-public, operational information with certain third parties is not well defined and contradicts the Commission's explicit determination in Order No. 787 to limit distribution of such information. PJM contends that defining tariff rules to conceive of every possible scenario or draw the line between "permissible third parties" and "restricted third parties," could prove to be extremely difficult to draft and, ultimately, enforce. PJM further contends that including one class of third party recipients could, and would likely, include a sub-class of recipients that otherwise should not receive such data, or could use such data in a manner that is preferential or potentially harmful to markets. PJM notes that it has established its own line of communications with pipelines in the PJM region so as to communicate sensitive, non-public operational information which may affect reliability, and so that it does not need to rely upon pipeline communications with other operators to disseminate this information "down the line."

13. PJM also argues that prohibiting recipient entities from utilizing data in a manner that is not unduly discriminatory or preferential or to the detriment of any natural gas or electric market is sufficiently well-defined. PJM states that its tariff-accepted language utilizes the term "detriment," which implicitly concedes that a recipient may utilize the data received from PJM in a manner that may have some effect on the natural gas and electricity markets, but prohibits the recipient from using that information in a way that is injurious to those markets. PJM contends that the phrase "…or in an unduly discriminatory manner or preferential manner or to the detriment of any natural gas and/or electricity market," is meant to be read as a whole; the meaning of the latter part of that statement is informed by the descriptive modifiers at the beginning, such that the "injury" (or detrimental effect) would result from unduly discriminatory and/or preferential utilization of the information obtained from PJM.

14. PJM states that, should the Commission be inclined to grant NFG Distribution's clarification request relating to the "detriment" standard, PJM would suggest the language be modified to prohibit LDCs and/or intrastate pipeline operators from utilizing non-public, operational information they receive from PJM in a manner that is "…unduly discriminatory, preferential or detrimental to any natural gas or electric market." PJM states that amending the language in this manner could then be read to exclude actions that have tangential, or even justifiable, effects on those markets, but still ensure the recipient is bound to take all necessary precautions to ensure the information is not utilized in a manner that can be improperly harmful to markets.

15. On September 18, 2014, NFG Distribution filed an answer to PJM's answer. In it, NFG Distribution acknowledges that the wording of Order No. 787 appears restrictive on its face, but that is why it is seeking clarification. NFG Distribution also points out that it

has found no cases or rules that would endow “detrimental” with useful constraints. Further, NFG Distribution contends that one outcome of adopting PJM’s approach could be to incent LDCs to decline to accept the data, which NFG Distribution will certainly consider unless rehearing/clarification is granted.

III. Discussion

A. Procedural Matters

16. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2014), prohibits answers to requests for rehearing. However, NFG Distribution has styled its pleading, foremost, as a motion for clarification to which answers are permitted and PJM seeks leave to answer the request for clarification. Accordingly, we accept PJM’s answer to the extent it addressed PJM’s opposition to the motion for clarification.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We accept NFG Distribution’s answer because it has provided information that assisted us in our decision-making process.

B. Motion for Clarification and Request for Rehearing

18. As discussed below, the Commission denies NFG Distribution’s request for clarification and, in the alternative, rehearing.

19. In Order No. 787, the Commission intentionally made the scope of information sharing very broad:

> The Commission is intentionally permitting the communication of a broad range of non-public, operational information to provide flexibility to individual transmission operators, who have the most insight and knowledge of their systems, to share that information which they deem necessary to promote reliable service on their system.[13]

The Commission found that the broad scope of non-public, operational information permitted to be shared under the Final Rule, and the potential competitive harm from its disclosure, warranted limiting the blanket authorization of the exchange of such information to interstate natural gas pipelines and public utilities, and prohibiting such recipients of non-public, operational information from subsequently disclosing that

[13] Order No. 787, FERC Stats. & Regs. ¶ 31,350 at P 41.

information to third parties or marketing function employees as defined in section 358.3(d) of the Commission's regulations (also known as, the No-Conduit Rule).[14]

20. In Order No. 787, several commenters contended that the No-Conduit Rule was too restrictive and recommended that the Commission adopt various modifications, including exceptions to the third party restriction. The Commission denied those requests, stating the scope of information allowed to be shared under the Final Rule warranted the restrictions in the No-Conduit Rule, as proposed.[15] The Commission also declined to require three-way communications between transmission operators and electric generators because it was concerned that such sharing could result in the transmission operators inadvertently sharing non-public, operational information with only that generator, which could be characterized as permitting a public utility or interstate pipeline to make or grant an undue preference.[16] PJM states that it intended its restrictions on LDCs and intrastate pipelines to be an extension of the Commission's No-Conduit Rule to non-FERC jurisdictional facilities, applied in a manner that mimics, as closely as possible, those restrictions.

21. First, we deny NFG Distribution's request for rehearing of the Commission's acceptance of PJM's tariff amendment prohibiting LDCs and intrastate pipelines from sharing non-public, operational information received from PJM with third parties. NFG Distribution's request for rehearing of PJM's third party restriction is an untimely and thus statutorily-barred request for rehearing of the May 9th Order. The May 9th Order approved PJM's proposal to prohibit LDCs and intrastate pipelines from sharing the subject information with third parties, and only required PJM to clarify a different provision in PJM's proposed tariff record prohibiting LDCs and intrastate pipelines from sharing the subject information with certain of their own employees. The May 27 Compliance Filing resulted from this latter requirement, and NFG Distribution cannot use rehearing of the order accepting that compliance filing as a means to challenge the May 9th Order's acceptance of the unrelated third-party restriction. Having failed to seek

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[14] *See e.g.*, Order No. 787, FERC Stats. & Regs. ¶ 31,350 at P 56, 96.

[15] *Id*. P 96.

[16] *Id*. PP 115-116.

rehearing of the May 9th Order of this issue, NFG Distribution cannot challenge here that order's acceptance of PJM's third party restriction.[17]

22. Even assuming NFG's request is not statutorily-barred, we reject NFG Distribution's assertions of error concerning the third-party restriction on the merits, as well as its motion for clarification of this issue. PJM's filing to restrict LDCs from further sharing non-public information with third parties is reasonable and consistent with the No-Conduit Rule adopted in Order No. 787, which permitted sharing of non-public, operational information only between jurisdictional pipelines and public utilities, but prohibited their sharing of that information with third parties. The Commission, in fact, limited even such sharing between pipelines and public utilities by not allowing the information to be given to marketing function employees that might be able to use that information to their advantage in the energy or natural gas marketplaces. PJM's tariff amendment prohibiting LDCs and intrastate pipelines from sharing non-public, operational information received from PJM with third parties, including large customers and electric generators, is consistent with the requirements of Order No. 787.

23. NFG Distribution may share its own operational information with its customers or other interconnecting entities involved in ensuring the reliability of system operations.[18] Moreover, nothing in PJM's tariff amendments forbids NFG Distribution, or any other intrastate pipeline or LDC, from communicating non-specific pipeline or LDC information, without revealing confidential operational information As long as NFG Distribution does not reveal, directly or indirectly, the non-public, operational information shared by PJM (*e.g.,* information concerning a particular electric generator), NFG Distribution can request or direct its customers and operational counterparties to perform specific actions based on such information.

24. We also deny NFG Distribution's request for clarification and rehearing with respect to PJM's restriction on the disclosure of non-public, operational information in "an unduly discriminatory or preferential manner or to the detriment of any natural gas or electric market."[19] PJM's compliance filing reflects the Commission's finding in the May 9th Order that the provision in PJM's initial filing restricting an LDC or intrastate pipeline from sharing the subject information with "its marketing function employees"

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[17] *See Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 335 (D.C. Cir. 2006) (late filed request for rehearing cannot claim that the 60 day time to seek judicial review begins after the Commission issued a compliance order when the agency action challenged is embodied in an earlier order the petitioner failed to challenge).

[18] *See New York Independent System Operator, Inc.*, 151 FERC ¶ 61,159 (2015).

[19] *See* section 18.17.1(f) of the Operating Agreement.

was not sufficiently clear as to how it would apply to LDCs without marketing function employees as defined in the regulation and therefore failed to ensure that the information cannot be used in "an unduly discriminatory or preferential manner by the recipient or to the detriment of the market."[20] In its compliance filing, PJM adopted the Commission's language and revised its tariff to provide that LDCs and intrastate pipelines cannot "disclose, or use anyone as a conduit for disclosing, non-public, operational information received from PJM to a third party or in an unduly discriminatory or preferential manner or to the detriment of any natural gas or electric market." As we have found in other orders, this language means that LDCs or intrastate pipelines cannot disclose non-public, operational information to their employees who are involved in marketing natural gas or who otherwise make sales of natural gas.[21] We therefore deny NFG Distribution's request to further clarify or modify PJM's tariff language.

The Commission orders:

The Commission denies NFG Distribution's motion for clarification and request for rehearing as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[20] May 9th Order, 147 FERC ¶ 61,105 at P 9.

[21] *See New York Independent System Operator, Inc.*, 149 FERC ¶ 61,122, at P 23 & n.20 (2014) (citing *Enable Gas Transmission, LLC, et al.*, 147 FERC ¶ 61,229, at P 18 (2014) (order on waivers requiring that, to avoid adverse competitive effects, non-public, operational information cannot be shared with non-marketing function employees who engage in marketing or otherwise make natural gas sales).