

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

))
PJM Interconnection, L.L.C.) Docket No. ER09-1063-000, -001
))

**MOTION FOR LEAVE TO ANSWER AND
ANSWER OF THE INDEPENDENT MARKET MONITOR FOR PJM**

Pursuant to Rules 212 and 213 of the Commission’s Rules and Regulations, 18 CFR § 385.212 & 385.213 (2008), Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (“Market Monitor”),¹ moves for leave to answer and answers PJM’s answer, filed July 28, 2009,² to the Market Monitor’s Protest and Compliance Proposal (“Market Monitor Compliance Proposal”) filed May 27, 2009, in the above captioned proceeding.³ PJM’s answer mischaracterizes the facts about the Market Monitor’s role in developing the inputs provided to PJM by Market Participants and raises two new arguments about PJM’s proposed new role in evaluating cost-based

¹ PJM Interconnection, L.L.C. is a FERC approved Regional Transmission Organization. Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff (“OATT”) or the PJM Operating Agreement (“OA”).

² Motion for Leave to Answer and Answer of PJM Interconnection, L.L.C. to Protests and Comments in Docket No. ER09-1063.

³ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶61,071 (2008) (“Order No. 719”), *order on reh’g*, Order No. 719-A, 128 FERC ¶61,059 (2009).

offers and in evaluating the Market Monitor's determinations about cost-based offers, to which the Market Monitor should have a fair opportunity to respond.

I. RESPONSE TO PJM ANSWER

In its July 28th answer, PJM claims (at 4) that the Market Monitor and other protestors do not accept what Order No. 719 requires, but it is evident that PJM fails to appreciate how the Commission has refined its position on the role of MMUs in tariff administration in the compromise adopted in Order No. 719 from what was initially proposed in the preceding Notice of Proposed Rulemaking. Although PJM may have expected the Commission to modify its settlement of market monitoring independence issues in 2007, this did not happen.⁴ The Commission instead expressly carved out a role for the market monitoring function in developing the inputs for mitigation. Indeed, the scope of that role significantly exceeds the role that the Market Monitor plays in PJM. The role of the Market Monitor for PJM is limited to a review and potential agreement with sellers about the level of their cost-based offers, but does not permit the Market Monitor to determine the input that a seller provides to PJM. That remains the seller's sole responsibility.

⁴ See *Organization of PJM States, Inc. v. PJM Interconnection, L.L.C., et al.*, 122 FERC ¶61,257 (2008).

PJM argues (at 5) that it must have some residual authority regarding the determination of inputs for use in prospective mitigation because the Commission does not require that all "RTOs obtain these inputs from their MMUs." The first error of this argument is that it ignores the nature of the specific framework established for PJM under prior orders and settlements.⁵ The Market Monitor's role relates entirely to monitoring whether the Market Participant's conduct in submitting a cost-based offer constitutes an exercise of market power or other anticompetitive behavior. Contrary to PJM's characterization (at 3-4), the Market Monitor does not apply mitigation rules nor does it confuse mitigation with monitoring. Moreover, contrary to PJM's continued misrepresentation, the Market Monitor does not provide inputs to PJM. The Market Monitor and others have addressed these mischaracterizations in prior pleadings. PJM's answer, however, raises new issues to which the Market Monitor should have an opportunity to respond.

The second error is that while Order No. 719 does not expressly prohibit an RTO from choosing to monitor the development of the inputs to prospective mitigation, and would permit frameworks other than that established for PJM, it does not require an RTO to play any role in that process. Order No. 719 does require (at PP 373, 378), however, that the RTO refrain from joint administration of the tariff in order to prevent

⁵ See, e.g., *Id.*; *PJM Interconnection, L.L.C.*, 117 FERC ¶61,331 (2006).

subordination of the MMU to the RTO.⁶ If, in the PJM framework, as PJM now seems to agree, the role of monitoring market power in the development of the inputs to prospective mitigation is exclusively the province of the market monitoring function, then Order No. 719 specifically prohibits the role in the process that PJM seeks to assert for itself, in the guise of a compliance filing.

A. PJM’s Concession That It Does Not Render Judgment on Questions of Market Power Is A Welcome Development, But PJM’s Compliance Proposal Does Not Include This Limitation

PJM repeatedly states (at 7, 8) that it does not review cost information for the purpose of “rendering any judgment on questions of market power,” and recognizes that “opinions of this sort are the province of the Market Monitor and judgments of this sort ultimately rest with the Commission.” PJM does not explain why it is appropriate, if review of market power is not among its duties, for PJM to review the cost-based offers of Market Participants. 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 is not built into them. Market Participants, absent the need for mitigation to prevent the exploitation of structural conditions conducive to the exercise of market power, are free to determine their Sell Offers in

⁶ See also, discussion in Protest and Compliance Proposal of the Independent Market Monitor for PJM, filed in Docket No. ER09-1063-000, -001 at 51–55 (May 27, 2009).

accordance with their own market-based rate authorizations. PJM wants to sit across the table from Market Participants to scrutinize their costs, but does not appreciate the fundamental purpose of this task.

Despite PJM's recognition that it should not render judgment on questions of market power, PJM still resists the logic that the Market Monitor must continue to administer those provisions that relate to market power mitigation tasks.

The Market Monitor recognizes that PJM's statement may reflect positive movement in PJM's position, because, after months of discussion and stakeholder process on this issue, PJM proposes, for the first time, a limitation on its role that in principle could do much to address the Market Monitor's concern to preserve its ability to monitor the conduct of Market Participants related to cost development. However, PJM has not proposed any modification to its proposed tariff changes that would actually codify this limitation and expressly reserve this role to the independent market monitoring function. The Market Monitor's alternative compliance proposal, on the other hand, clearly excludes PJM from this limited but important role. Moreover, PJM's belated acceptance of a limited role in making its own judgments about market power, as explained below, is more than offset by its stated willingness to adopt instead the self-interested judgments of its constituents.

B. PJM’s Explanation That It Intends to Rely on Market Participants Objections’ to the Market Monitor’s Determinations as a Potential Basis for PJM’s Contrary Determinations Demonstrates the Precise Conflict of Interest That Is the Critical Flaw in PJM’s Compliance Proposal

PJM reveals (for the first time), why and how it has carved out a new role for itself in developing the inputs to prospective mitigation. PJM clarifies (at 7–8) that:

PJM does not intend to arbitrarily “pick and choose which inputs it allows,”[citation omitted] nor reconsider every, most or even more than a *de minimis* number of calculations or determinations made by the IMM. Instead, PJM will rely on a market participant to notify PJM of any concerns with an IMM determination or input... Finally, any position PJM may take contrary to the IMM is not to suggest PJM is rendering any judgment on questions of market power. (emphasis in original)

Although PJM purports that it does not intend to render independently “any judgment on questions of market power,” it explains, for the first time, that it is prepared under its compliance proposal to accept, advocate and/or implement the judgments on questions of market power rendered by its Market Participant constituents. PJM is prepared to take such positions even as it disclaims any intention to develop a duplicative capability to evaluate the substance of such disagreements.

As the Market Monitor indicated in its May 27th protest (at 53–56), PJM’s faulty approach reflects PJM’s intent to pursue either one or both of two courses, both inappropriate and inconsistent with Order No. 719. PJM would either (i) create a

wastefully duplicative shadow market monitoring function or (ii) insert itself into the process in order to take the part of Market Participants who are unhappy with the Market Monitor's determinations. In either case, the result would reduce the ability of the Market Monitor to efficiently and effectively deter anticompetitive conduct. The Market Monitor appreciates PJM's desire to solve problems for its constituents, but interference in the process that allows for effective ex ante determinations on market power and market misconduct (but not binding judgments, which are solely the Commission's prerogative) should not number among the solutions that PJM can offer. Market Participants should have clear responsibility for their own conduct, and should be prepared to explain directly their actions to the Market Monitor and defend them, if necessary, directly before the Commission.

There is no constructive role for PJM to play in this process. If, as PJM claims (at 7-8), it does not intend to develop a duplicative function that would provide a basis for it to evaluate questions of market power, but rather intends to throw its considerable weight behind Market Participants with whom, for whatever reason, PJM sympathizes, its role would be harmful to a transparent and rational process for monitoring the development of cost-based offers. The appropriate answer from PJM to a Market Participant aggrieved by a determination of the Market Monitor should be to remind the Market Participant that it alone is responsible for its own market conduct, that the Market Monitor evaluates but does not dictate that conduct, and if advance regulatory

certainty is needed, the Commission can resolve the matter. Any other course is inconsistent with the duties of an RTO as an independent and neutral administrator of its market rules.

C. The Market Monitor's Alternative Compliance Proposal Is the Only Proposal That is Consistent with Order No. 719 and with PJM's Representation That Its Role Does Not Include "Rendering Any Judgment on Questions of Market Power"

PJM explains (at 12) that the Commission "directs[s] that the tariffs of RTOs and ISOs clearly state which functions are to be performed by MMUs, and which by the RTO or ISO" (emphasis in original), but ignores that directive with its awkward proposal for PJM and the Market Monitor to jointly administer the process for monitoring the development of the inputs used in prospective mitigation. The Market Monitor has provided an alternative approach which clearly separates the monitoring function from application of the mitigation rules, and which comes well within the scope of the exception for MMUs in developing inputs provided in Order No. 719. The Market Monitor's proposal also is consistent with PJM's newly proposed explanation of who makes determinations about market power, while PJM's own proposal is not. Accordingly, the Market Monitor's alternative compliance proposal should serve as the basis for PJM's compliance with Order No. 719's market monitoring policies.

II. MOTION FOR LEAVE TO ANSWER

This answer is necessary to resolve confusion raised by PJM's answer regarding the Market Monitor's position, to correct inaccuracies in the record and to provide for a more complete record that will facilitate the Commission's decision making process. The Commission has found good cause exists to accept an answer when the answer helps the Commission understand the issues, clarifies certain errors and misstatements, responds to new arguments or provides useful and relevant information that will assist the Commission in its decision-making process.⁷ For these reasons, the Market Monitor requests that the Commission waive the rule against answers to answers⁸ and accept this pleading.

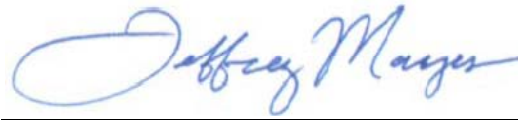
III. CONCLUSION

The Market Monitor respectfully requests that the Commission accept this answer and afford it due consideration as it resolves the issues raised in this proceeding.

⁷ See, e.g., *Columbia Gas Transmission Corporation*, 110 FERC ¶61,063 at P 4 n.3 (2005) (accepted answers to answer that "allow a better understanding of the issues"); *Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶61,017 at 61,036 (2000) (accepted answer to answer found "helpful in the development of the record"); *Revision Of Existing Regulations Under Part 157 and Related Sections of the Commission's Regulations Under the Natural Gas Act*, Order No. 603-A, 88 FERC ¶61,297 *mimeo* at 7 (1999) (accepted answer to answer "[t]o achieve a complete and accurate record"); *SFPP, L.P.*, 127 FERC ¶61,312 at P 17 (2009) (accepted answer "further elucidating the issues"); *Tesoro Refining and Marketing Company v. SFPP, L.P.*, 118 FERC ¶61,092 (2007) (accepted answer because counterparty "raised some new arguments"); *PJM Interconnection, L.L.C.*, 119 FERC ¶61,318 at P 36 (2007) (accepted answer to answer that "provided information that assisted ... [] decision-making process").

⁸ 18 CFR § 385.213(a)(2).

Respectfully submitted,



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Dated: August 28, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Eagleville, Pennsylvania,
this 28th day of August, 2009.



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