

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

PJM Interconnection, L.L.C.)	Docket No. ER11-2875-002
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)	

**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 (2010), Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (“Market Monitor”), moves for leave to answer and answers the answer filed by PJM Interconnection, L.L.C. (“PJM”) in this proceeding on June 24, 2011 (“June 24th Answer”).¹ The Commission order of April 12, 2011 (“April 12th Order”) correctly required (at PP 118–123) that PJM file an efficient process, based on the established model, for the review of unit specific offers to determine whether they raise buyer-side market power issues, rather than rely on Commission review in the first instance as PJM initially proposed.² The April 12th Order explained (at P 120): “The procedure proposed by the IMM and accepted here does not give the IMM the discretion to unilaterally decide whether a resource gets mitigated. We therefore find that the IMM’s proposal is consistent with our precedent.”

¹ Capitalized terms used herein and not otherwise defined shall have the meaning specified in the PJM Open Access Transmission Tariff (“OATT”) or the PJM Operating Agreement.

² *PJM Interconnection, L.L.C., et al.*, 135 FERC ¶61,022.

PJM has not demonstrated that its proposed review process, filed in response to the April 12th Order, is consistent with that order. Among other things, PJM's proposed approach is premised on a misunderstanding of the Market Monitor's role in reviewing offers to detect market power issues. Accordingly, PJM's proposed review process should be rejected, and the Market Monitor's alternative proposal, which, as required in the April 12th Order, closely adheres to the review process established in the order on PJM's compliance with Order No. 719³ for the review of inputs to prospective mitigation and formula rates (referred to hereafter as the "Order 719 Review Process") should be accepted in its place.

The Order 719 Review Process generally provides for the Market Monitor to review the level of costs which are inputs used in prospective mitigation for market power issues and for PJM to review inputs in connection with its administration of the PJM Tariff. The 719 Compliance Order clarified that PJM makes the final determination about accepting or rejecting offers in the PJM markets. The approved process also explicitly recognized that the Market Monitor could bring to the Commission issues about whether the level of a Market Participant's offer involved the potential exercise of market power or manipulation.

I. BACKGROUND

Like other reviews of inputs to prospective mitigation, the purpose of a review under the Minimum Offer Price Rule ("MOPR") is not for the Market Monitor (or PJM) to

³ See *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶31,281 at PP 370–79 (2008) ("Order No. 719"), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶31,292 (2009), *reh'g denied*, Order No. 719-B, 129 FERC ¶ 61,252 (2009); *see also*, *PJM Interconnection, L.L.C.*, 129 FERC ¶61,250 (2008) ("719 Compliance Order").

dictate the level of offers Market Participants can submit into PJM markets. Neither the Market Monitor (nor PJM) should have the authority to limit what a Market Participant can offer. That authority should be reserved exclusively to the Commission. The PJM Market Rules do not include any rule that permits the Market Monitor (or PJM) to set binding offer caps or floors. Setting binding offer caps and floors is not part of PJM's administration of the PJM Market Rules, although PJM can reject an offer that does not comply with the PJM Market Rules.

The purpose of the Market Monitor's review is to provide advance notice to a Market Participant that an offer below a certain level, in the case of MOPR review, raises market power or manipulation concerns; and that if a Market Participant submits an offer that is deemed too low using the standards defined by the Commission, then the Market Monitor will bring the matter to the Commission for resolution. A Market Participant that wants certainty could also request a determination by the Commission.

PJM, as the administrator of the tariff, also reviews offers and can reject them if they violate PJM Market Rules.⁴ The Commission approved the Order 719 Review Process essentially in the form filed by PJM, despite the objections of the Market Monitor.⁵ The Market Monitor was concerned that the language describing the Order 719 Review Process was unclear, and that it could be misinterpreted to allow an inefficient, confusing and duplicative process. The Market Monitor was also concerned that the filed language could be misinterpreted to permit interference with the ability of the Market Monitor to make

⁴ See, e.g., PJM Operating Agreement Schedule 1 § 1.10.1A(d); OATT Attachment DD § 5.8.

⁵ 719 Compliance Order at PP 142–185.

independent determinations on questions of market power and the ability to bring clearly framed disputes about market power issues to the Commission for resolution. PJM responded in its proceeding to comply with Order No. 719 that its role in the review process did not include a review of offers to determine whether such offers constitute potential exercise of Market Power.⁶

Although the tariff does not set forth the Order 719 Review Process as the Market Monitor would prefer, it is the formulation approved by the Commission, and it is a workable approach as long it is correctly interpreted to allow the Market Monitor to submit, without interference, filings with the Commission to timely resolve market power issues, that is, before offers incorporating market power have set market prices, or have set prices for a sustained period.

It is essential that this proceeding confirm the Order 719 Review Process in a form consistent with the basis upon which it was approved and not become a vehicle to alter its substance, or confuse its application. Yet PJM's filed review process for MOPR introduces the duplicative process that concerned the Market Monitor on compliance with Order No. 719, and omits language intended to protect the Market Monitor from interference with its ability to communicate concerns to the Commission ex ante about the potential exercise of

⁶ See Motion for Leave to Answer and Answer of PJM Interconnection, L.L.C. to Protests and Comments in Docket No. ER09-1063 at 7-8 (July 28, 2009) ("PJM reiterates that it is not seeking to substitute its market power decisions for those of the IMM or exercise control over the IMM's determinations. Any decision PJM may make to reject an input proposed by the IMM will not be based on PJM rendering opinions on questions of market power. Rather, and as previously noted, such decisions will rest on whether PJM believes it and the relevant market participants are acting in a manner consistent with PJM's Tariff and related business rules.").

market power. There is no reason to treat the review of inputs for MOPR review any differently than other mitigation inputs.

II. ANSWER

A. The IMM's Proposed Alternative Process for Review of the Prospective Inputs to Mitigation Closely Adheres to the Order 719 Review Process and Is Within the Scope of the Commission's Compliance Directive in This Proceeding.

In response to the Market Monitor's June 2nd Protest (and other protests), the Commission directed that PJM file in the MOPR proceeding a process to review MOPR exceptions consistent with the Order 719 Review Process.⁷ The Market Monitor explained in its June 2nd Protest (at 10) that its alternative language closely tracks the Commission's approved Order 719 Review Process and that PJM's language creates a new and different process. The specific elements of the Market Monitor's proposal to which PJM objects in its June 24th Answer (at 3–6) are all elements of the existing Order 719 Review Process. These elements are: (i) the mandate that the Market Monitor file with the Commission to seek resolution of market power issues that it identifies; (ii) the explicit specification of the Commission's role in providing a final decision on market power issues, if necessary; and (iii) the provision allowing PJM to suspend clearing the auction while Commission review is pending.

PJM argues (at 4) that it is "unnecessary" to include the first two of these elements because the Market Monitor and the Commission can already take the indicated actions, as PJM understands them. This is not a reason to omit a clear statement of the process to be

⁷ April 12th Order at P 119; Protest of the Independent Market Monitor for PJM filed Docket No. ER11-2875-000 ("June 2nd Protest").

followed in the MOPR review, particularly when PJM's filing makes it evident that improved clarity is required. These provisions help to make PJM's and the Market Monitor's roles explicit and clear. PJM, the Market Monitor and Market Participants need to understand their rights and responsibilities and to understand each stage of the review process.

PJM argues (at 5) that tariff sections setting forth the Order 719 Review Process specify only "IMM referrals to Commission staff" and that "mandatory IMM petition to the Commission ... is unprecedented." PJM misconstrues the applicable language. The Order 719 Review Process for offer caps in RPM Auctions, approved by the Commission in the 719 Compliance Order,⁸ includes a provision: "Should the Market Monitoring Unit 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 Market Monitoring Unit'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" [emphasis added].⁹ The provision includes a reference to the authority of the MMU to inform Commission staff, and includes a reference to the authority of the MMU to request a determination from the Commission on an expedited basis. The authority to make such a request for a determination directly to the Commission has nothing to do with a referral under the PJM Market Monitoring Plan (Attachment M).

⁸ 719 Compliance Order at PP 164–165 & n.134 & n.135.

⁹ OATT Attachment DD § 6.4(d).

The language proposed by the Market Monitor, “the Market Monitoring Unit shall petition the Commission to resolve the matter on an expedited basis,” is also consistent with other sections of the OATT which provide comparable authority to the Market Monitor. For example, the Market Monitor’s proposed language is consistent with Section 114 of the OATT, which states, in connection with review of Deactivation Avoidable Cost Credits, “the Market Monitoring Unit may petition the Commission for an order that would require the generating unit owner to include an appropriate cost component.” The Market Monitor’s proposed language is also consistent with the provision in section 17 of Schedule 6A to the OATT concerning inputs to black start service rates: “the Market Monitoring Unit may petition the Commission for an order that would require the Black Start Service generator to utilize the values determined by the Market Monitoring Unit or such other values as determined by the Commission.” More than ample precedent exists supporting the Market Monitor’s proposal. In fact, the precise point of the April 12th Order was that PJM should follow the process defined by the Order 719 Review Process. The 719 Compliance Order is the precedent.

The Market Monitor’s proposal is also supported by and consistent with the provision in section IV.J.2 of the Market Monitoring Plan that provides for the Market Monitor to “file reports and make appropriate regulatory filings with Authorized Government Agencies to address design flaws, structural problems, compliance, market power, or other issues, and seek such appropriate action or make such recommendations as the Market Monitoring Unit shall deem appropriate.”¹⁰ The explicit language of the Market

¹⁰ OATT Attachment M.

Monitoring Plan as well as explicit and specific language elsewhere in the Order 719 Review Process contradicts the assertion that the Market Monitor is not authorized to make filings with the Commission to request a decision on market power issues.¹¹

PJM's notion that issues that develop in the course of reviewing MOPR inputs could be handled through a referral to the Office of Enforcement has no precedent and is fundamentally impractical. Referrals from the Market Monitor about participant behavior are to address past actions that have already inflicted damage and require remedial action. Referrals are confidential and may lead to investigations by Commission Staff, the existence of which and the substance of which are confidential from the Market Monitor, from market participants and from PJM, with no specified timetable for resolution. The Order 719 Review Process is about monitoring inputs to the market before market power or manipulation has impacted prices in order to ensure just and reasonable pricing in PJM's markets.

The Market Monitor has never referred a party for investigation by the Commission due to an open and ex ante disagreement over the appropriate level of a cost component. Market Participants are entitled to their views about cost input issues, full participation in the process for evaluating them, and to have disputes about them quickly adjudicated. Moreover, PJM does not explain what role it envisions for itself in a confidential investigation of a referral by the Office of Enforcement. PJM is free to intervene and make its views known in a noticed proceeding.

¹¹ See, e.g., OATT Attachment DD § 6.4(d); OATT Schedule 6A § 17.

Given PJM's stated reluctance to wait the traditional 60 days for resolution of a matter pending at FERC, why would it suppose that the time frame for the conclusion of an investigation of a referral is workable? There are no deadlines for resolution of referrals. PJM's position on this issue is impractical and shows little appreciation for what the review of inputs is meant to accomplish. The language proposed by the Market Monitor is necessary to provide a transparent and timely process understood by all involved.

PJM's concern with this phrasing could be that the obligation of the Market Monitor to take matters to the Commission involving potential market power issues is mandatory rather than left to the Market Monitor's discretion. The Market Monitor should not have discretion in this matter. The Market Monitor does not envision a circumstance where it would or should simply drop a matter involving the potential exercise of market power rather than bring it to the Commission for resolution.

B. The Market Monitor's Proposed Alternative MOPR Review Process Includes Objective, Practical Deadlines That Are Consistent with Current Practice.

The Market Monitor agrees that there should be clear deadlines for the review process. However, PJM proposes an extended period for review of MOPR inputs which is out of sync with the time frame for review of other RPM inputs under the 719 review process.¹² The Market Monitor does not see the need to conduct MOPR review of inputs on a schedule different from other mitigation inputs.

PJM objects (at 6) to certain language proposed by the Market Monitor as vague: "[O]ne month before the auction, the IMM is to report either its 'initial conclusion' or that it

¹² Review of Market Seller Offer Caps requires Market Sellers to support information two months prior to the auction's opening and the Market Monitor to calculate and provide its determination of an appropriate level one month prior. OATT Attachment DD § 6.7.

does not have enough information to make a decision” [emphasis in original]. This statement is quite clear and addresses the possibility that the Market Monitor has not been provided adequate information to make a decision. The consequences of the inadequate provision of information by the deadline must be made clear. The alternative is that the process could be manipulated by failing to provide adequate information. Market Participants should understand that if the Market Monitor does not receive requested information by the stated deadline and the result is an inconclusive determination, Market Participants still must provide the requested information if their offer is to be considered for acceptance, and the Market Monitor will bring any issue identified to the Commission. The point of the Market Monitor’s review is to produce an informed statement of the Market Monitor’s position. This requires access to information that only Market Participants have.

C. A Determination by the Market Monitor About an Offer, Absent the Agreement of the Offeror, Constitutes a Non-Binding Advance Statement of the Market Monitor’s Position that Is Irrelevant to PJM’s Evaluation of Whether an Offer Can Be Accepted Under the Tariff.

PJM states (at 8), “The IMM makes a confusing argument that there are aspects of the IMM’s conclusion on a MOPR exception request that PJM is not permitted to review, and that only the Commission may review.” The confusion arises due to PJM’s mischaracterization of the Market Monitor’s role. The Market Monitor makes determinations that, if necessary, it requests the Commission to enforce. The Commission’s review is not required to accord any special weight to the Market Monitor’s findings. The Market Monitor’s role is to facilitate the Commission’s evaluation of market power issues. One important contribution of the review process is that it avoids the need for the Commission to consider whether the Market Participant acted with intent. The Market Participant has acted with knowledge that the Market Monitor believed its offer to be an

exercise of market power. The Commission may, if it chooses, proceed directly to consideration of the substance of the participant's conduct.

The Market Monitor does not tell Market Participants what to offer. It allows them to make informed decisions. By obtaining a determination from the Market Monitor in advance, Market Participants also have an opportunity to obtain prior review from the Commission. The Order 719 Review Process allows Market Participants to obtain the desired degree of certainty about the consequences of actions before the actions are taken. A Market Participant may come to agreement with the Market Monitor about the appropriate calculation of an offer, but it is not required to do so.

PJM cites the Commission's order on PJM's compliance with Order No. 719, which "requires that the RTO make the final determination regarding offers and rates," implying that the Market Monitor's alternative proposed process provides that the Market Monitor would make such determinations.¹³ PJM misconceives the Market Monitor's role, assuming, in the case of MOPR, that the Market Monitor determines the lowest level at which an offer can be submitted. PJM is free to accept or reject offers on the basis of whether they comply with the PJM Market Rules. This does not mean that PJM makes determinations about the level of offers that it accepts based on whether they involve an exercise of market power.

PJM explains (at 11), "PJM conceivably might have a different view than the IMM on, for example, whether a lower financing cost claimed by a public power entity is simply a function of that entity's long-standing business model than an effort to suppress RPM prices." In that case, presumably, PJM would accept the offer over the Market Monitor's

¹³ PJM at 10, citing "719 Compliance Order at P 150.

objections. Presumably, PJM would find that this offer is consistent with the PJM Market Rules. If that is PJM's finding, the Market Monitor does not claim that PJM cannot appropriately accept the offer. By accepting the offer, however, PJM does not take a position about whether or not the offer involves market power. PJM would only err if it accepted the offer contrary to the plain language of its tariff.

However, if the Market Monitor determined that the inclusion of lower financing costs constituted an exercise of market power (which is possible without regard to whether the offeror had any intent to "suppress RPM prices" and without regard to whether the rules explicitly address the issue), then the Market Monitor would raise the matter with the Commission. If the Commission agreed with the Market Monitor, the Commission could order a higher offer level regardless of whether the offer was otherwise consistent with the PJM Market Rules.

Based on more than a decade of experience reviewing inputs to mitigation, the Market Monitor does not expect that the Commission would often have to resolve disagreements about input levels. PJM concedes (at 11) that even under its formulation, "most cases" would result in "accepting the IMM's findings."

Once it is recognized that the ability to issue binding determinations concerning offer levels is the Commission's prerogative, the practical consequence of PJM's proposed duplication of the Market Monitor's review becomes limited. If a Market Participant determines to submit an offer with which the Market Monitor has an issue, then the issue would end up at the Commission as a result of a filing by the Market Monitor or the Market Participant. Unnecessary, duplicative review by PJM does not change this result. At best, it only delays market administration and wastes PJM's resources. At worst, PJM's apparent countermanding the Market Monitor's determination would provide false comfort to a

Market Participant, before the Commission considered the issue. Once it is understood that the Market Monitor does not purport to make determinations that either the Market Participant or PJM is bound to accept, but only to inform Market Participants of the Market Monitor's position, which it will bring to the Commission for resolution if necessary, then it becomes clear that PJM's proposed review of the Market Monitor's determination serves no useful purpose and should be rejected.

III. MOTION FOR LEAVE TO ANSWER

The Commission's Rules of Practice and Procedure, 18 CFR § 385.213(a)(2), do not permit answers to answers or protests unless otherwise ordered by the decisional authority. The Commission has made exceptions, however, where an answer clarifies the issues or assists in creating a complete record.¹⁴ In this answer, the Market Monitor provides the Commission with information useful to the Commission's decision-making process and that provides a more complete record. Accordingly, the Market Monitor respectfully requests that this answer be permitted.

IV. CONCLUSION

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

¹⁴ See, e.g., *N.Y. Indep. Sys. Operator, Inc.*, 121 FERC ¶61,112 at P 4 (2007) (answer to protest accepted because it provided information that assisted the Commission in its decision-making process); *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"); *California Independent System Operator Corporation*, 110 FERC ¶61,007 (2005) (answer to answer permitted to assist Commission in decision-making process); *New Power Company v. PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,208 (2002) (answer accepted to provide new factual and legal material to assist the Commission in decision-making process).

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Respectfully submitted,



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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 list compiled by the Secretary in this proceeding.

Dated at Eagleville, Pennsylvania,
this 15th day of September, 2011.



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