

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

PA Solar Park LLC )  
 ) Docket No. ER18-1226-000  
 )

To: The Honorable Carmen A. Cintron  
Presiding Administrative Law Judge

**MOTION OF THE INDEPENDENT MARKET MONITOR FOR PJM FOR  
RECONSIDERATION OR, IN THE ALTERNATIVE, TO PERMIT APPEAL**

Pursuant to Rules 212 and 715 of the Commission’s Rules and Regulations,<sup>1</sup> Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM<sup>2</sup> (“Market Monitor”), submits this motion for reconsideration of the order of denying late motion to intervene of the Market Monitor issued July 10, 2018 (“July 10<sup>th</sup> Order”), or, in the alternative, motion to permit appeal. The July 10<sup>th</sup> Order denies the Market Monitor’s late motion to intervene in this proceeding. The order does so on the sole grounds that the Market Monitor fails to demonstrate that its “participation is in the public interest,” a basis to intervene (whether late or timely) under Rule 214(b). The sole support for the this finding is an order of the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) that denied a petition to intervene as a matter of right in a case pending before it. Reliance on dicta from that case, *ODEC v. FERC*, No. 16-1111 (June 14, 2018), is misplaced.

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<sup>1</sup> 18 CFR §§ 385.213 & 715(2017).

<sup>2</sup> 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”).

As the D.C. Circuit itself recognizes, Article III impose a different standard for standing than federal agencies.<sup>3</sup> The D.C. Circuit relied on incorrect facts about the nature and role of the Market Monitor. The Commission defines the nature and role of the Market Monitor, and has permitted for nearly ten years the Market Monitor to intervene in numerous cases pending before it. Other market monitoring units have also intervened in or initiated Commission proceedings.

Accordingly, the Market Monitor asks that the Presiding Judge reconsider the July 10<sup>th</sup> Order and grant intervention.

If motion for reconsideration is not granted, the Market Monitor requests that it be permitted to raise on appeal to the Commission this important question on the nature, role, independence and strength of the market monitoring function.

## **I. ARGUMENT**

### **A. The July 10<sup>th</sup> Order Should Be Reconsidered and the Market Monitor's Motion Should Be Granted.**

#### **1. ODEC Addresses Standing Only Before the D.C. Circuit in a Particular Court Case, is Dicta, and Does Not Apply to Standing Before FERC or Federal Agencies.**

Standing before the D.C. Circuit as a matter of right is subject to the requirements of Article III of the U.S. Constitution. The D.C. Circuit and other courts have held that those requirements do not apply to proceedings before federal agencies.<sup>4</sup> *ODEC* does not bear

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<sup>3</sup> See *ODEC* slip. op. at 18.

<sup>4</sup> See, e.g., *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 897 (2006) (“administrative agencies, unlike federal courts, are not jurisdictionally constrained by the case-and-controversy limitation in Article III”); *Envirocare, Inc. v. NRC*, 194 F.3d 72, 74 (1999) (“Agencies, of course, are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to the federal courts. The criteria for establishing ‘administrative standing’ therefore may permissibly be less demanding than the criteria for ‘judicial standing,’” citing, e.g., *Pittsburgh & W.Va. Ry. v. United States*, 281 U.S. 479, 486 (1930); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249 (1930)); see also, *Yates v. Charles County*

upon standing in matters before regulatory agencies. *ODEC* does not bear upon who may file complaints against whom in FERC proceedings. FERC can continue to make such determinations based on its authority and discretion, based on its own expertise, as the law plainly allows.

*ODEC* concerns the Market Monitor's assertion of a right to intervene in a court proceeding under F.R.A.P. 15(d). *ODEC* directly applies only to the D.C. Circuit.

*ODEC* explicitly insulates its holding from consideration of whether the Market Monitor or MMUs may intervene in proceedings before federal agencies. *ODEC* acknowledges, even in its incorrectly narrow description of the Market Monitor's and an MMU's role, that "its function" includes "regulatory filings." *ODEC* explained (at 18) that the scope of the Market Monitor's and MMUs' functions "are not at stake in this case."

*ODEC* does not address who may intervene in proceedings before administrative agencies. The PJM Tariff authorizes the Market Monitor to file complaints and petitions and make appropriate regulatory filings.<sup>5</sup> The Commission approved tariff also constitutes a

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Bd. of Educ., 212 F. Supp. 2d 470, 472 (2002) ("it is a "familiar rule that an administrative agency is not bound by Article III or prudential judicial tests of standing"); *Gardner v. FCC*, 234, 530 F.2d 1086, 1090–91 (D.C. Cir. 1976) ("Administrative adjudications ... are not an article III proceeding to which either the "case or controversy" or prudential standing requirements apply; within their legislative mandates, agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court," citing *Ecee, Inc. v. Federal Energy Regulatory Com.*, 645 F.2d 339, 349 (1981).

<sup>5</sup> OATT Attachment M § IV.D-1 ("If the Market Monitoring Unit detects a compliance issue and determines that there is an issue about the proper and lawful application of a rule, and the Market Monitoring Unit makes a preliminary determination that no misconduct is evident and the issue involves a difference about the appropriate calculation of the level of an input, the Market Monitoring Unit may file a petition or initiate other regulatory proceedings addressing the issue.") E-1 ("In the event that a market participant determines to use an offer or cost input at a level or value that the Market Monitoring Unit has found to involve a potential exercise of market power, the Market Monitoring Unit may file a petition or initiate other regulatory proceedings addressing the issue. If the potential exercise of market power is related to a Sell Offer submitted in an RPM Auction, the Market Monitoring Unit may file a complaint with the Commission addressing the issue."); V.B.2 ("If an information request recipient does not provide requested information within a reasonable time, the Market Monitoring Unit may initiate such regulatory or judicial proceedings

“right to participate ... conferred by ... Commission ... action” that is a basis for demonstrating an interest in a proceeding sufficient to support an intervention under Rule 214(b).<sup>6</sup> Thus, even if the finding that Market Monitor does not meet the prong set forth in Rule 214(b)(iii) is not reconsidered, intervention should still be granted under the separate prong set forth in Rule 214(b)(i).

*ODEC* does not require the Commission to change or clarify its administrative procedures. *ODEC* does not require the Commission to change its policies on MMUs or RTOs. *ODEC* applies solely to interventions as a matter of right in matters before the D.C. Circuit.

*ODEC* specifically provides for the Market Monitor to participate in that case as an amicus curiae. This practice, and many other rules governing court proceedings, does not apply in FERC proceedings. Commission rules allow a person to demonstrate an interest in a proceeding because such “participation is in the public interest.”<sup>7</sup> The point of reference for a determination of the public interest is the public’s interest, not the movant’s interest. Even if an entity were, unlike an MMU, primarily “an outside observer,” its participation may be allowed if it is “in the public interest” because, for example, it helps to provide a complete record or facilitates the decision making process. Many entities today who

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to compel the production of such information as may be available and deemed appropriate by the Market Monitoring Unit, including petitioning the Commission for an order that the information is necessary and directing its production;” J.2 (“Excepting matters governed by Section IV.I, 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.”); *see also*, *PJM Interconnection, L.L.C.*, 86 FERC ¶ 61,247 (1999) (“The MMU... has the authority under the Plan to pursue corrective actions. They include ...complaints to state and federal agencies...”).

<sup>6</sup> 18 CFR § 385.214(b)(i).

<sup>7</sup> *See* 18 CFR § 385.214(b)(iii).

routinely intervene in FERC proceedings may be denied intervention if FERC were to begin using the standards applied in *ODEC* by the D.C. Circuit.<sup>8</sup>

*ODEC* does not foreclose the Market Monitor from participating in future federal proceedings. *ODEC* does not prevent a market monitor from becoming a party to future court proceedings in federal court, including the D.C. Circuit. The D.C. Circuit retains the ability to grant permissive intervention.<sup>9</sup> Unlike *ODEC*, future cases may concern matters more core to the operation of PJM markets and not a particular claim for equitable relief. Because the case is dicta and rooted in incorrect facts, it does not bind future D.C. Circuit's determination on the Market Monitor's or MMUs' standing.

Accordingly, the motion for reconsideration should be granted and intervention should be permitted under Rule 214(b)(iii) or Rule 214(b)(i).

## **2. ODEC Relies on Incorrect Facts About the Market Monitor and MMUs.**

The July 10<sup>th</sup> Order improperly relies on *ODEC* to determine the nature of the Market Monitor and the market monitoring function. Commission rules determine the nature of the market monitoring function. The Commission approved PJM Tariff defines the nature, responsibilities and role of the Market Monitor. *ODEC*'s characterization of the

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<sup>8</sup> See, e.g., *PJM Interconnection, LLC*, 137 FERC ¶ 61,251 (2011) ("The regulations recognize that consumers that are not direct wholesale customers may have a sufficient direct interest in proceedings that affects their retail rates. Protesters are retail consumers in an area whose rates may be affected by the rates charged under the PJM OATT. As such they have a sufficient direct interest in the proceeding under Rule 214 and their interventions are granted," citing *Dominion Transmission, Inc.*, 106 FERC ¶ 61,029 at P 10 (2004) ("indirect customer" has shown sufficient interest in this proceeding to warrant a grant of his motion to intervene); *United Gas Pipe Line Company*, 49 FERC ¶ 61,005 at 61,017 (1989) (indirect customers have an interest in the outcome of a proceeding); *Panhandle Eastern Pipe Line Co.*, 35 FERC ¶ 61,146 at 61,344 (1986) (intervention granted when it is in the public interest), *American Electric Power Service Corporation*, 28 FERC ¶ 61,072 at 61,140 (1984) (indirect interest is sufficient for intervention); *Texas Eastern Transmission Corporation*, 21 FERC ¶ 61,281 at 61,761 (1982) ("even an indirect interest can be sufficient to warrant intervention in the public interest where, as here, the petitioner represents consumers of natural gas").

<sup>9</sup> See F.R.A.P. 15(d); F.R.C.P. 24(b).

Market Monitor's role is not consistent with Commission rules and policy, and should not be relied upon instead of Commission policy.

ODEC primarily relies (at 18) on its finding that a Market Monitor "is not a creature of statute and operates under no affirmative duty imposed by public law," and that "its existence is a matter entirely within PJM's discretion."

ODEC correctly determined (*id.*) that "the market monitor is not a creature of statute." But that fact alone cannot be a basis to deny standing. Although the Market Monitor was not created directly by the Federal Power Act or other statute, many entities routinely granted standing as a matter of right in court proceedings are not creatures of statute either.

ODEC stated (*id.*) incorrectly that the Market Monitor "operates under no affirmative duty imposed by public law." Market monitors are required by FERC rules and have duties imposed by FERC rules.<sup>10</sup> Administrative law is a branch of public law.<sup>11</sup>

ODEC's determination (*id.*) that a Market Monitor's "existence is a matter entirely within PJM's discretion" is also false. The Commission rule that created RTOs requires RTOs to have an MMU function (one of eight required functions).<sup>12</sup> PJM had an MMU prior to the rule, but PJM did not propose to have an MMU. PJM was required to create the

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<sup>10</sup> See 18 CFR §§ 35.34(k)(6), 35.28(g)(3)(v)(A); ; see also, *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) ("Order No. 2000"), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) ("Order No. 2000-A"), *aff'd sub nom.* Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001); *Wholesale Competition in Regions with Organized 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).

<sup>11</sup> See *Northwest Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 679 (2007) ("Public law is the body of law regulating relations between private parties and the government and regulating the structure and operation of the government itself. See Black's Law Dictionary 1267 (8th ed. 2004). Public law consists of the fields of constitutional law, criminal law, and administrative law. *Id.*").

<sup>12</sup> Order No. 2000 slip. op. at 461-466.

Market Monitor by order issued November 10, 1997.<sup>13</sup> ODEC also falsely stated (*id.*) that an MMU exists “as an outside service provider (like an auditor) to the ISO.” Order No. 2000 permits an MMU to be organized in different ways, including internal to the RTO.<sup>14</sup> Market monitors are not analogous to any outside service provider (e.g. software vendors or auditors or legal counsel). FERC imposes requirements on entities seeking RTO status, one of which is to have an independent MMU.<sup>15</sup> Market Monitors are effectively part of and integral to the RTO, regardless of their particular role in the organizational structure of the RTO. The Commission has determined that the Market Monitor has the independent responsibility to administer and implement the Market Monitoring Plan, even though the Plan is in the PJM Tariff. Market monitors have a direct relationship with the RTO board of directors that is insulated from interference by PJM management.<sup>16</sup> MMUs fulfill a FERC required and FERC defined role under the RTO tariff. FERC requires that MMUs include market design and market behavior monitoring in addition to the reporting function.<sup>17</sup> The D.C. Circuit recognized only the reporting function.

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<sup>13</sup> See *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257, 62,282.

<sup>14</sup> *Id.*; Order No. 719 at PP 326–344.

<sup>15</sup> See Order No. 2000 slip op. at 462 (“the Commission will require that RTO proposals contain a market monitoring plan that identifies what the RTO participants believe are the appropriate monitoring activities the RTO, or an independent monitor, if appropriate, will perform. We believe that such approach will provide those proposing an RTO sufficient flexibility to design a monitoring plan that fits the corporate form of the RTO as well as the types of markets the RTO will operate or administer.”), *reh’g denied*, Order No. 2000-A slip. op. 67–68; 18 CFR § 35.34(k)(6).

<sup>16</sup> Order No. 719 at P 310 (“The Final Rule requires tariff provisions that will remove the MMU from the direct supervision of RTO or ISO management, and requires, in most instances, that the MMU report directly to the RTO or ISO board of directors.”); OATT Attachment M § III.

<sup>17</sup> Order No. 719 at P 353 (“The revised functions should provide MMUs with ample authority to evaluate any needed changes to the markets and bring them to the attention of concerned entities,...”); 18 CFR § 35.28(g)(3)(ii).

*ODEC* offers no useful guidance to the Presiding Judge and the Commission on the role of market monitors because its legal conclusions primarily rely on false premises about the Commission's policies for market monitoring. Also, because the Market Monitor's position in the *ODEC* matter in support of FERC prevailed and the Market Monitor's arguments are included in the record, the determination on standing is not decisive to the outcome of the *ODEC* proceeding. An attempt by the Market Monitor to appeal the *ODEC* determination despite its reliance on incorrect facts would be moot. The D.C. Circuit's holding is merely irrelevant dicta.

Because the July 10<sup>th</sup> Finding solely relies on incorrect statements in *ODEC* and not on Commission rules and policy, motion for reconsideration should be granted.

**B. If the Motion for Reconsideration Is Denied, the Market Monitor Should Be Granted Leave to Appeal to the Commission.**

If the motion for reconsideration of the July 10<sup>th</sup> Order is not granted, the Market Monitor should be granted leave to appeal to the Commission. If the Market Monitor is not allowed to intervene in Commission proceedings, then the way in which the PJM Market Rules are established and developed will change significantly and change in a manner inconsistent with the PJM OATT. The Commission should have an opportunity to consider a finding that could have a significant impact on its regulatory process.

The Market Monitor has actively participated in FERC proceedings since its separation from PJM effective August 1, 2008. Other MMUs have also actively and regularly participated in FERC proceedings. The Commission frequently refers to arguments raised by the Market Monitor and other MMUs in decisions and orders issued during the past ten years. The Commission has repeatedly found that the Market Monitor's comments have facilitated the decision making process. Many matters that end up in proceedings before the Commission originate in PJM stakeholder processes where the Market Monitor has played a significant role. The Market Monitor has a perspective, and often has access to information and historical background, and the ability to perform analysis that is not available or not readily available to the Commission or any other party.



Many proceedings would benefit from greater participation. In many cases affecting PJM markets in which the Market Monitor is involved, the Market Monitor is the only active party other than the filing public utility and Commission trial staff. The ability to reach informed decisions on important law and policy matters affecting PJM will be compromised if the Market Monitor is not permitted to participate as a full party to FERC proceedings. Restrictions on MMU participation, unique to MMUs, will not serve the public interest and will not facilitate the Commission's decision making. Many parties routinely participate in FERC proceedings who would not have standing in an Article III court.

Lack of party status would mean that MMUs will not be able to file procedural motions affecting the course of the proceeding, engage in discovery and engage in settlement discussions. The Market Monitor will not be able to effectively present its views in proceedings affecting regulatory policy precisely when the consequences of those decisions have the most impact. MMUs will not be able to present their views in settlement processes where very significant rules, such as the RPM rules, the MOPR rules and, currently, Regulation Market rules are developed. Settlement proceedings often operate as stakeholder processes, yet MMUs would be excluded. MMUs could be denied access to confidential information in those settlement processes.

The Market Monitor's ability to intervene in Commission proceedings consistent with Commission rules, tariff, policy and practice should be accepted in this proceeding, but, if not, leave to appeal the issue to the Commission should be granted.

## II. CONCLUSION

The Market Monitor respectfully requests that the Presiding Judge afford due consideration to this answer as your Honor resolves the issues raised in this proceeding.

Respectfully submitted,



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Dated: July 20, 2018

## 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 20<sup>th</sup> day of July, 2018.



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