



Monitoring Analytics

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June 26, 2018

Hon. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: PJM Interconnection, L.L.C., Docket No. ER16-372-004

Dear Ms. Bose:

Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (“Market Monitor”) submits this letter in response to the letter filed by PJM Interconnection, L.L.C. (“PJM”) moving to lodge a decision of the U.S. Circuit Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) denying a contested motion to intervene as matter of right,¹ holding that “a market monitor does not have standing to intervene in a proceeding on judicial review of Commission orders.”²

PJM argues in support of its motion that *ODEC* “is instructive on the subject of PJM’s pending clarification request.” On the contrary, this decision on intervention as a matter of right in Article III court cases has no bearing on any aspect of PJM’s clarification request and does not limit the ability of the Commission to determine whether and how any person may participate in a Commission proceeding. *ODEC* offers no guidance on the specific issue raised by PJM concerning whether a market monitor may file a complaint against the Regional Transmission Organization (“RTO”) to which it provides monitoring services.

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

¹ See F.R.A.P. 15(d); F.R.C.P. 25(a).

² *Old Dominion Elec. Coop. v FERC*, 2018 U.S. App. LEXIS 16105 (D.C. Cir. 2018) (“*ODEC*”).

requirements do not apply to proceedings before federal agencies.³ *ODEC* does not bear upon who may file complaints against whom in FERC proceedings. FERC should continue to make such determinations at its 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. FERC has a relatively liberal "adversely affected" standard for filing complaints.⁴

ODEC primarily relies (at 10) 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 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 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.

³ See, e.g., *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 897 (206) ("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 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).

⁴ See, e.g., *Southern Union Gas Co. v. Northern Natural Gas Co.*, 71 FERC ¶ 61,198 (1995) ("The Commission has consistently construed Rule 206 to permit any person, as defined in Rule 102(d) of the Commission's procedural rules, [footnote omitted] to file a complaint, even where that person is not a direct customer of the pipeline, so long as the person is adversely affected by the actions that are the subject of the complaint.")

Contrary to PJM's attempt to distinguish its own basis for standing, the Federal Power Act does not create RTOs, nor does it create "public utilities" or "electric utilities."

ODEC stated 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.⁵ Administrative law is a branch of public law.⁶

ODEC's determination 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 independent market monitoring function.⁷ Prior to the rule, PJM was required to create a market monitor by order issued November 10, 1997.⁸ ODEC also falsely stated that a market monitor exists "as an outside service provider (like an auditor) to the ISO." Order No. 2000 permits a market monitor to be organized in different ways, including internal to the RTO.⁹ Market monitors are not analogous to any other outside service provider (e.g. software vendors or auditors or legal counsel). Market monitors have a direct relationship

⁵ 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), *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).

⁶ 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.*").

⁷ Order No. 2000 slip. op. at 461–466.

⁸ See *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257, 62,282.

⁹ *Id.*; Order No. 719 at PP 326–344.

with the RTO board of directors that is insulated from interference by PJM management.¹⁰ Market monitors fulfill a FERC required and FERC defined role under the RTO tariff.

ODEC offers no useful guidance to the Commission on the role of market monitors because its legal conclusions rely on false premises about the Commission's policies for market monitoring. No part of the rationale in *ODEC* has any bearing on the issues raised by PJM in this case. *ODEC* does not address who may file complaints against whom before administrative agencies. *ODEC* does not address any of the arguments raised by PJM or the relief requested by PJM. *ODEC* does not require the Commission to change or clarify its administrative procedures. *ODEC* does not require the Commission to change its policies on market monitors or RTOs. *ODEC* applies solely to interventions as a matter of right in matters before the D.C. Circuit, and only in heavy reliance on misunderstanding that market monitors were created by and at the discretion of RTOs and not pursuant to the Commission's requirements.

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. *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.¹¹

ODEC does not bear upon the issues raised in this proceeding concerning whether a market monitor can file complaints against RTOs, and the outcome of that case should not influence the outcome of this proceeding.

Sincerely,



Jeffrey W. Mayes, General Counsel

¹⁰ 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.

¹¹ See F.R.A.P. 15(d); F.R.C.P. 24(b).

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 26th day of June, 2018.



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