

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

Refinements to Horizontal Market Power)	Docket No. RM19-2-000
Analysis for Sellers in Certain Regional)	
Transmission Organization and Independent)	
System Operator Markets)	
)	

COMMENTS OF THE INDEPENDENT MARKET MONITOR FOR PJM

Pursuant to the Notice of Proposed Rulemaking that initiated this proceeding on December 20, 2018 (“NOPR”),¹ Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor (“Market Monitor”) for PJM Interconnection, L.L.C. (“PJM”),² submits these comments. These comments respond to the Commission’s proposed relaxation of the requirements to obtain authorization for market based sales in RTOs based on a presumption that market monitoring in RTOs is sufficient to support finding a lack of market power. The NOPR’s approach is efficient, logical and correct, but establishing a presumption of a lack of market power based on the existence of the market monitoring function requires additional clarification if it is to accomplish the objectives of the NOPR. The NOPR should address the necessary preconditions for market monitors to be successful in establishing effective competitive market rules and effective market power mitigation rules.

¹ *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets*, 165 FERC ¶ 61,268.

² Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff (“OATT”), the PJM Operating Agreement (“OA”) or the PJM Reliability Assurance Agreement (“RAA”).

I. COMMENTS

The NOPR proposes (at P 23) to adopt a rule that market-based rate sellers operating within RTO/ISO markets with Commission approved monitoring and mitigation for energy, ancillary services and capacity markets may obtain or retain authorization to make market-based rate sales without submitting evidence that they pass indicative screens supporting a rebuttable assumption of a lack of market power. The Commission states (at P 25) that “[a]lthough this proposal would eliminate the requirement to submit indicative screens in certain RTO/ISO markets, it would not eliminate other market-based rate regulatory reporting requirements.” The Commission states (*id.*) “that the RTO/ISO market power monitoring and mitigation combined with the remaining market-based rate reporting requirements will enable the Commission to adequately address market power concerns in the RTO/ISO markets.”

The Commission states (at P 53) that its proposal would “maintain the rebuttable presumption that Commission-approved monitoring and mitigation is currently presumed to adequately address market power concerns.” The Commission also states (*id.*), “[b]y its terms, the rebuttable presumption established in Order No. 697-A that existing RTO/ISO monitoring and mitigation is sufficient to address market power concerns is not immune to challenge.”

The Commission recognizes (at P 31) that for RTO/ISO monitoring and mitigation to address market power concerns, it is important that RTO/ISO independent market monitors continually evaluate market monitoring and mitigation efforts. To that end, the Commission (*id.*) “requires the RTO/ISO independent market monitors to evaluate market monitoring and mitigation efforts on an ongoing basis.” The Commission states (*id.*) that “Market monitors are required to periodically report on the performance of market power mitigation practices, evaluate tariff inadequacies or proposals, and report on the general competitiveness of their respective markets.”

The Market Monitor agrees with the Commission that market power monitoring and mitigation are superior to the indicative screens in identifying the existence of structural market power and exercises of market power. But despite monitoring and mitigation, sellers can and do exercise market power in RTO markets. Market monitors identify market design flaws that undermine the competitiveness of RTO markets and inform the Commission of exercises of market power. To ensure the efficacy of monitoring and mitigation, continued support for independent market monitors is appropriate. The recourse available to market monitors to initiate necessary tariff changes to ensure effective monitoring and mitigation should be strengthened.

A. Monitoring and Mitigation Are Superior to Indicative Screens in Identifying Market Power.

Approving market-based rates in RTO markets does not require indicative screens so long as the RTO tariff provides adequate market monitoring and mitigation processes. The RTO markets form locational marginal prices using detailed system models that reflect conditions on the transmission system, reliability requirements, and sell offers for all market participants in addition to the application of subjective judgments by the system operator. Assessing market power in these markets requires detailed information that is not available to market-based rate applicants. Interpreting the details of market conditions and behavior to draw conclusions about market power requires detailed knowledge of the markets.

The Market Monitor has access to all PJM market data, including details about market conditions and market participant behavior. The Market Monitoring Plan, Attachment M to the PJM OATT, requires that the Market Monitor provide independent assessments of the competitiveness of the PJM markets to the RTO, the Commission, state commissions, and the public. The Market Monitoring Plan protects the independence of the Market Monitor's market power review and requires PJM to provide full access to all market information. The Market Monitor's responsibilities and independence ensure that

the Commission is apprised of the competitiveness of the PJM markets and the adequacy of market power mitigation processes.

B. Sellers Can and Do Exercise Market Power in RTO Markets.

While market monitoring and mitigation are necessary to provide a rebuttable presumption that market power by a seller will be mitigated within an RTO market, the RTO market monitoring and mitigation are not sufficient to guarantee the ongoing mitigation of market power by a seller within an RTO Market. Market sellers can and do exercise market power within Commission approved market designs and market power mitigation rules.

The development and implementation of RTO market rules is not flawless. PJM develops market rules through its stakeholder process. Members subject to market power mitigation accept and reject and modify market power mitigation rules in the stakeholder process. Member influence also shapes the implementation of market rules.³ The actual, technical implementation of market rules may not cover all potential exercises of market power, either due to imperfect implementation or gaps in the rules themselves.

Problems with market power mitigation affect almost all PJM markets. The State of the Market reports contain the most comprehensive listing of identified issues. The reports identify offer strategies that allow sellers to evade the TPS test in the energy market.⁴ Sellers have opportunities to overstate their marginal costs in the energy market.⁵ The capacity market offer cap is too high, resulting in the capacity market results not being competitive

³ See, for example, Docket No. EL19-27.

⁴ See Monitoring Analytics, 2018 State of the Market Report for PJM, Vol. II, Section 3: Energy Market at 143–146.

⁵ See Monitoring Analytics, 2018 State of the Market Report for PJM, Vol. II, Section 3: Energy Market at 154–161.

in the 2021/2022 Base Residual Auction.⁶ The Day Ahead Scheduling Reserve Market lacks market power mitigation.⁷

C. The Commission's Proposal Requires Ongoing and Active Market Design Review and Commission Action on the Results of that Review

The Commission correctly observes (at P 31) that for market power monitoring and mitigation to be effective RTO independent market monitors must continually evaluate and report on monitoring and mitigation efforts. Market monitors continually evaluate and report on their market monitoring and mitigation efforts and report market issues to the RTOs, to the RTO members, to the states and to the Commission. Market Monitors engage in ongoing efforts within stakeholder processes and in filings before the Commission to correct observed issues in Commission approved rules. Market Monitors report market recommendations in annual and quarterly reports, inform the Commission's Office of Enforcement of inappropriate market conduct through referrals, and intervene in Section 205 and 206 filing dockets before the Commission.

1. Section 205 Filings

Like other market rules, the Commission approves most RTO market power mitigation rules through Section 205 filings by the RTOs. When proposing a market design rule under the 205 standard, the RTO only has to make the case that its proposal is just and reasonable. Such showing does not require the RTO to show that such proposal is the best proposal, only that it is within a zone of reasonableness.⁸ A challenge to a 205 filing cannot prevail based on a demonstration that an alternative is better, more just and more

⁶ See Docket No. EL 19-47.

⁷ See Monitoring Analytics, 2018 State of the Market Report for PJM, Vol. II, Section 10: Ancillary Services at 478-479.

⁸ See, e.g., Me. PUC v. FERC, 520 F.3d 464, 471 (2008) ("The Commission correctly noted that there is not a single "just and reasonable rate" but rather a zone of rates that are just and reasonable; a just and reasonable rate is one that falls within that zone.").

reasonable, more efficient or more likely to prevent market power abuse. A successful challenge to the 205 filing must show that the RTO has not supported its claim that its proposal is just and reasonable, with the application of considerable deference. Over time, through a series of 205 filing approvals, the market design can degrade as an accumulation of flawed proposals take their toll on design efficiency.⁹

Ensuring adequate market power monitoring and mitigation requires that market monitors have equal standing with the RTO and its membership to file tariff revisions to the market monitoring and mitigation sections of the tariff. The Commission could achieve equal standing by requiring that all filings to change monitoring and mitigation fall under Section 206. The Section 206 approach would allow the Commission to choose the most effective monitoring and mitigation practices, ensuring that markets remain competitive and ensuring that market based rates are justified.

2. Section 206 Filings

Filing complaints under Section 206 of the Federal Power Act is currently the market monitors' strongest tool for initiating changes to inadequate monitoring and mitigation rules. Under Section 206, the market monitors' proposal receives equal weight to the RTOs' proposal.¹⁰ The standard for approving a change to the rules under Section 206 is which is better. Such 206 filings do not receive special deference but simply serve to provide the Commission an opportunity to act if the Commission wishes to. Unlike a Section 205 Filing that goes into effect without a Commission order, a Section 206 filing must be acted on to take effect.

⁹ The concept of a zone of reasonableness should be limited to cost of service ratemaking. Such a concept does not properly apply to ratemaking that relies on competition and competitive market design. Applying the concept of a zone of reasonableness to the mechanics of a market design conflicts with the premise of the market design, which is to ensure that rates are consistent with competitive price formation.

¹⁰ See, e.g., *Calpine Corp., et al. v. PJM*, 163 FERC ¶ 61,236 at P 157 (2018).

As the Commission notes (at P 65), Section 206 is the proper method for initiating a rebuttal of the presumption of effective market monitoring and mitigation. The Market Monitor has initiated such a rebuttal in the case of PJM's capacity market.¹¹ PJM argues that the Market Monitor does not have the authority to make such a filing.¹² Market monitors' ability to initiate a 206 proceeding when markets are not competitive is a critical part of the NOPR's reliance on effective market monitoring to support market-based rates.

3. Stakeholder Process

The Market Monitor raises issues, educates stakeholders, and comments on proposed rules through the PJM stakeholder process. The Market Monitor has successfully initiated rule changes to improve market efficiency through the stakeholder process.¹³ Rule changes needed to improve market power mitigation rules generally encounter insurmountable resistance.¹⁴ Voting in the lower levels of the PJM stakeholder process is not sector weighted, so suppliers, especially large suppliers with multiple affiliates, can easily block proposals that would prevent the exercise of market power. While the stakeholder process is a useful platform for market monitors to educate and inform the RTO and stakeholders of its findings, the Commission and the public cannot reasonably rely on the RTO and its stakeholder process to correct inadequacies in monitoring and mitigation rules.

¹¹ See Docket No. EL 19-47.

¹² See, e.g., PJM Request for Clarification, Docket No. ER16-372-004 (March 6, 2017).

¹³ Examples of Market Monitor identified issues include changes to transmission constraint penalty factors (Docket No. ER19-323), limitations to UTC trading (Docket No. ER18-88), and inefficiency in the regulation market (Docket No. ER18-87).

¹⁴ Examples of mitigation issues unresolved in the stakeholder process include maintenance costs in cost-based offers (Docket No. EL19-8) and excessive capacity market offer caps (Docket No. EL19-47).

4. Referrals

The Market Monitor uses the referral process to inform the Commission of market rule violations.¹⁵ Referrals of market rule violations are only as effective as the underlying market rules. If the market rules allow for the exercise of market power, or do not specifically address the identified behavior, the Commission's ability to prosecute a market violation is limited.

There is a limited benefit to using market design referrals. Market design flaws are listed in the Market Monitor's State of the Market Reports. Market design referrals do not create a clear path to the Commission for corrective action to solve problems. Market design referrals do not allow reasonable notice and opportunity to be heard to other stakeholders. It is not realistic to expect enactment of reforms under such circumstances.

While referrals are an important means for market monitors to provide confidential information to the Commission, referrals do not substitute for the ability to initiate tariff change proceedings to correct deficiencies in market design and market power mitigation rules.

5. Report Recommendations

The Market Monitor reports market recommendations in annual and quarterly State of the Market reports. The State of the Market report recommendations are the most comprehensive list of all issues identified by the Market Monitor, including flaws identified in the market design. The reports provide education and transparency to all stakeholders and regulators. The State of the Market report recommendations require no action by the RTO or the Commission to initiate improvements to the markets. Reporting market issues is an important channel by which market monitors provide information, but reporting does

¹⁵ See OATT Attachment M § IV.I.1; 18 CFR § 35.28(g)(3)(iv).

not substitute for action before and by the Commission to ensure adequate monitoring and mitigation.

II. CONCLUSION

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

Respectfully submitted,



Jeffrey W. Mayes

General Counsel
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eagleville, Pennsylvania 19403
(610) 271-8053
jeffrey.mayes@monitoringanalytics.com

Joseph E. Bowring
Independent Market Monitor for PJM
President
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eagleville, Pennsylvania 19403
(610) 271-8051
joseph.bowring@monitoringanalytics.com

Howard J. Haas
Chief Economist
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eagleville, Pennsylvania 19403
(610) 271-8054
howard.haas@monitoringanalytics.com

Catherine Tyler
Senior Economist
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eagleville, Pennsylvania 19403
(610) 271-8050
catherine.tyler@monitoringanalytics.com

Dated: March 18, 2019

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 18th day of March, 2019.



Jeffrey W. Mayes

General Counsel

Monitoring Analytics, LLC

2621 Van Buren Avenue, Suite 160

Eagleville, Pennsylvania 19403

(610) 271-8053

jeffrey.mayes@monitoringanalytics.com