

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 22-1096

XO ENERGY MA, LP; XO ENERGY LLC,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

**BRIEF OF INTERVENOR FOR RESPONDENT,
INDEPENDENT MARKET MONITOR FOR PJM
(MONITORING ANALYTICS, LLC)**

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Dated: November 7, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and L.A.R. 26.1, Intervenor for Petitioners Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (“Market Monitor”), hereby provides the following disclosure statement in this case:

Monitoring Analytics, LLC has no parent corporation or publicly traded stock. Monitoring Analytics, LLC acts in its capacity as the Independent Market Monitor for PJM and performs the market monitoring function for PJM Interconnection, L.L.C. (“PJM”), which is a Regional Transmission Organization approved by the Federal Energy Regulatory Commission. *See* 18 CFR § 35.28(g)(3) (2021); PJM Open Access Transmission Tariff Attachment M.

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TABLE OF AUTHORITIES

The Market Monitor incorporates by reference the Table of Authorities included in the Brief of Respondent FERC for the sections of such brief incorporated by reference.

INTRODUCTION

The Market Monitor incorporates by reference the Introduction included in the Brief of Respondent FERC.

JURISDICTIONAL STATEMENT

The Market Monitor incorporates by reference the Jurisdictional Statement included in the Brief of Respondent FERC.

ISSUES PRESENTED FOR REVIEW

The Market Monitor incorporates by reference the Issues Presented for Review included in the Brief of Respondent FERC.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The Market Monitor incorporates by reference the Statement of Related Cases and Proceedings included in the Brief of Respondent FERC.

STATEMENT OF THE CASE AND FACTS

The Market Monitor incorporates by reference the Statement of the Case and Facts included in the Brief of Respondent FERC.

STANDARD OF REVIEW

The Market Monitor incorporates by reference the Standard of Review included in the Brief of Respondent FERC.

GLOSSARY

FERC or Commission	Federal Energy Regulatory Commission
FPA	Federal Power Act, 16 U.S.C. §§ 791 <i>et seq.</i>
FTR	Financial Transmission Right
Market Monitor (or IMM)	The Independent Market Monitor for PJM (Monitoring Analytics, LLC), Intervenor for Respondent
LMP	Locational Marginal Price
Orders	The 2022 Order, the Rehearing Order and the Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, 179 FERC ¶ 62,008 (April 4, 2022).
2017 Order	<i>PJM Interconnection, L.L.C.</i> , 158 FERC ¶ 61,038 (2017).
2021 Order	<i>PJM Interconnection, L.L.C., et al.</i> , 175 FERC ¶ 61,137 (2021).
2022 Order	<i>PJM Interconnection, L.L.C.</i> , 178 FERC ¶ 61,079 (2022).
Rehearing Order	<i>PJM Interconnection, L.L.C.</i> , 179 FERC ¶ 61,010 (2022).
Pre-2017 Rule	The FTR forfeiture rule, PJM Operating Agreement Schedule 1 § 5.2.1(b), as it existed prior to January 19, 2017.
2017 Compliance Rule	The FTR forfeiture rule, as it existed in the version of the PJM Operating Agreement Schedule 1 § 5.2.1(b), proposed but not approved in the compliance filing submitted by PJM on April 18, 2017 in FERC Docket No. ER17-1433.
Reformed FTR Forfeiture Rule	The FTR forfeiture rule, PJM Operating Agreement Schedule 1 § 5.2.1(b), approved in the Orders.

SUMMARY OF ARGUMENT

The Petitioners raise on appeal matters that were resolved in the 2021 Order and are therefore outside of the scope of the Orders appealed in this case. Petitioners' arguments should be rejected because they are not within the proper scope of this appeal. The Commission fully explained in the 2021 Order (not part of this appeal) why Petitioners' argument on the treatment of portfolios and leverage have no merit. This brief also supports rejection of Petitioners' arguments for lack of merit.

ARGUMENT

The Reformed FTR Forfeiture Rule, as defined in the 2021 Order and the Orders, is balanced, just and reasonable, protects competition and complies with the directive in the 2021 Order. The directive included in the 2021 Order is not part of this appeal. Petitioners seek review only of the Orders.

The 2021 Order resolved the portfolio and leverage issues raised by XO Energy. The Orders address only the impact test and do not revisit the findings of the 2021 Order. The appeal applies only to the Orders and is therefore limited to the impact test.

Despite the fact that the 2021 Order resolved the portfolio and leverage issues, XO Energy objects (Br. at 36–42) that the Reformed FTR Forfeiture Rule does not appropriately treat portfolios and nonleveraged positions. XO Energy's

objections have no merit. XO Energy's objections are not within the scope of the appeal.

The 2021 Order directed PJM (at P 27) to file a "replacement rate that uses either a reasonable threshold for the FTR Impact Test or an alternative approach to triggering forfeiture that strikes a more appropriate balance between deterring manipulative behavior and not burdening legitimate hedging activity." The 2022 Order stated (at P 41): "[T]he remaining question is whether the revised FTR Impact Test meets the May 2021 Order's requirement that the test sufficiently deter manipulative behavior but do so without so significantly burdening legitimate hedging activity."

The 2022 Order found (at P 42) that the revised impact test "will substantially reduce the amount of money forfeited because it targets only the constraints at which violations occur." The 2022 Order further found (*id.*): "[B]y maintaining a similarly sensitive threshold, the [Reformed FTR Forfeiture Rule] will provide a similar ability to deter manipulative behavior." The 2022 Order determined that the revised impact test is appropriately balanced. *Id.*

XO Energy's objections do not address the issue subject to the directive in the 2021 Order. The only issue remaining to be addressed in the Orders on appeal is whether the revised impact test is appropriately balanced. The portfolio and

leverage issues are not relevant to the impact test. XO Energy's objections are outside the scope of the Orders on appeal in this proceeding.

XO Energy argues (at 38) that the 2021 Order was "plainly not final, appealable agency action." XO Energy does not support this claim. The 2021 Order, including the rejection of the 2017 compliance filing, is final. The Orders appropriately address the only remaining issue: the impact test. XO Energy did not appeal the decision in the 2021 Order narrowing the scope of the compliance directive. XO Energy's arguments are all directed at findings in the 2021 Order and earlier orders. XO Energy's arguments are not timely raised.

The 2021 Order is not part of this appeal, and challenges to determinations in the 2021 Order and prior orders are outside the proper scope of this appeal. The Commission acted reasonably when it accepted PJM's compliance filing pursuant to the Orders and for the reasons explained in the Orders.

The Commission had no obligation to repeat findings in its prior cases. Nevertheless, the Commission reasonably and adequately explained its position on the merits. That the Commission referred to its prior arguments in prior orders does not mean that these issues are properly raised in this proceeding. The Commission makes no such concession in its brief.

A. THE REFORMED FTR FORFEITURE RULE TREATS PORTFOLIOS APPROPRIATELY.

Despite the fact that XO Energy’s attempts to raise this issue are not within the proper scope of this appeal, the Market Monitor explains why the substance of XO Energy’s argument about portfolios has no merit.

XO Energy states (at 36): “An FTR holder might have an FTR on a given path but nevertheless have a neutral or net-negative position overall with respect to that path, such that congestion that favors the FTR in isolation would have no effect—or even a negative effect—on the holder’s overall portfolio.” XO Energy states (at 36–37) “In such circumstances, the holder would have no incentive whatsoever to attempt to ‘manipulate’ congestion to favor the one FTR, because doing so would either have no effect on the holder’s overall position (if that overall position were neutral) or cause the holder to lose money (if the overall position were net-negative). Yet the [the Reformed FTR Forfeiture Rule] would trigger forfeitures in such circumstances.”

XO Energy further argues that the 2017 Order (at 39, citing P 58) “invalidated the [Pre-2017 Rule] precisely because it required ‘forfeitures from some participants who have offsetting positions elsewhere’ XO Energy claims (at 39): “That exact rationale applies—with the exact same force—to any proposal that fails to consider FTR portfolios.” XO Energy argues (at 36) that “[t]he Commission’s refusal to require PJM to evaluate transactions on a net FTR

portfolio basis is both unreasoned and flatly inconsistent with FERC's prior orders." XO Energy essentially argues that use of the plural ("FTRs") indicates that the 2017 Order requires consideration of the portfolio of FTRs rather than individual FTRs. This is not consistent with the plain language of the Orders and is not convincing.

Even if XO Energy's arguments were properly raised, its assertions are incorrect and unsubstantiated and addressed directly in the 2021 Order. The 2021 Order explains (at P 76) that "using an FTR portfolio when determining FTR forfeitures would create opportunities to mask the manipulation of individual FTRs." The 2021 Order recognizes that XO Energy's approach would create opportunities to mask the manipulation of individual FTRs and would result in the discriminatory treatment of specific FTRs paths based on whether or not they were part of a portfolio. An FTR in a portfolio should not be shielded from forfeiture when the same FTR outside a portfolio would not be. The 2021 Order (at P 76) correctly concludes: "[I]t is just and reasonable for PJM to evaluate the effects of virtual transactions as a portfolio, while evaluating the profitability of each FTR individually."

XO Energy misinterprets the 2017 Order. The full passage states (at P 58):

We find that a just and reasonable FTR forfeiture rule must accurately reflect a participant's virtual transactions' net impacts on constraints because forfeits should be limited to those who actually increase the value of their FTR positions through their portfolio of virtual

transactions. Under the current rule, when individual transactions are evaluated in isolation, the forfeitures are based on a single transaction's contribution to flow across a constraint. This may lead to forfeitures from some participants who have offsetting positions elsewhere and thus whose virtual transactions did not actually impact the constraint.

This passage does not critique forfeitures based on individual FTRs. This passage critiques the Pre-2017 Rule's forfeitures based on individual virtual transactions against a participant's FTRs.

The 2017 Order makes plain (at PP 57–59) that the worst case combination of virtual bids, rather than the participant's own net virtual portfolio effect, was the reason that the Commission determined that the Pre-2017 Rule was unjust and unreasonable. The 2017 Order explains (at P 59):

Under the worst-case scenario bus, one market participant's virtual transaction may be compared against another, different market participant's virtual transaction. The assumption that power flows between the market participant's virtual transaction and another market participant's worst-case transaction is not an accurate representation of the incremental power flows created due to the virtual transaction.

The discussion refers only to the participant's virtual portfolio when discussing positions in the plural and not to portfolios of FTRs and/or net flows of FTRs.

XO Energy argues (at 39) that the conclusion in the 2021 Order that, unlike virtual transactions, "FTRs have no impact on the dispatch or energy flow on the system either individually or cumulatively," is a "non-sequitur."

Even if XO Energy's arguments were properly raised, XO Energy's arguments have no merit. The Commission's logic is sound and supports its conclusions. The 2021 Order explains (at P 76) that FTRs are individual contracts for congestion rent based on price differences at specific points and a fixed amount of units (the MW). FTR MW do not and cannot have any effect on the day-ahead market. Unlike virtual transactions, FTRs have no impact on the flow of energy or dispatch of the system and they do not affect prices. They do not flow in the day-ahead or real-time market or market model, they are only valid within the context of the FTR auction itself and for determining the allocation of day-ahead congestion rent. Although a participant may hold portfolios of these FTR contracts, the FTRs are themselves individual source and sink pairs, and they are properly treated as such for preventing manipulation under the Reformed FTR Forfeiture Rule.

The Commission explained and justified the treatment of portfolios in its 2017 Order.

B. THE REFORMED FTR FORFEITURE RULE TREATS NONLEVERAGED POSITIONS APPROPRIATELY.

Despite the fact that XO Energy's attempts to raise this issue are not within the proper scope of this appeal, the Market Monitor explains why the substance of XO Energy's argument about leverage has no merit.

XO Energy (at 41) argues that leverage is “required to achieve the type of potentially manipulative conduct of concern to PJM and the IMM, and a rule that does not distinguish between leveraged and non-leveraged positions is overbroad.” XO Energy (at 41) argues that “[i]n the absence of leverage, it is not possible to engage in the type of conduct of concern that underlies the purported need for any automatic forfeiture rule for FTRs.”

Even if XO Energy’s arguments were properly raised, XO Energy is incorrect when it asserts (at 41) that leverage is required to benefit from the manipulation of the value of an FTR and absent such benefit the manipulative activity must be considered legitimate. The 2017 Order (at P 40) considered and rejected these arguments.

The Reformed FTR Forfeiture Rule targets virtual activity that benefits a participant’s FTR positions by creating divergence between day-ahead and real-time market results at the expense of other market participants’ positions and ensures that such activity is not profitable. The Reformed FTR Forfeiture Rule is designed to determine whether a participant’s virtual trades in the day-ahead market benefit the participant’s FTR positions by contributing to greater nodal price differences in the day-ahead market than in the real-time market. Such differences determine profitability or the offset to losses. The Reformed FTR Forfeiture Rule removes the incentive to make virtual trades that impact the value

of the trader's FTRs at the expense of market convergence and other participant positions.

The relative size of the virtual portfolio relative to an individual FTR is not relevant. What is relevant is whether or not the virtual activity has a material effect on the value of an FTR and whether or not virtual activity is consistent with day-ahead and real-time market divergence. To that end, the Reformed FTR Forfeiture Rule only triggers a forfeiture when three criteria are met: the value of the day-ahead market price spread is greater than the real-time market price spread for the FTR for the affected hour; the net flow across a constraint attributable to a participant's portfolio of virtual transactions is in the direction that increases the value of an FTR; and the net flow across a constraint attributable to a participant's portfolio of virtual transactions exceeds a defined percentage of the physical limit of a binding constraint.

The Commission explained and justified its decision on leverage in its prior orders.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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Dated: November 7, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Petitioner certifies that this brief:

(i) complies with Rule 32(a)(7)(B) because it contains less than 13,000 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it is set in Times New Roman font in 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that that on November 7, 2022, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

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