

LAW OFFICES
STEIN, MITCHELL & MEZINES
L.L.P.
1100 CONNECTICUT AVE., N.W., STE. 1100
WASHINGTON, D. C. 20036

GLENN A. MITCHELL
JACOB A. STEIN
GERARD E. MITCHELL
ROBERT F. MUSE
DAVID U. FIERST
RICHARD A. BUSSEY
PATRICK A. MALONE
ROBERT L. BREDHOFF
CHRISTOPHER H. MITCHELL
ANDREW M. BEATO
LAURIE A. AMELL
DENIS C. MITCHELL
ARI S. CASPER
JOSHUA A. LEVY

OF COUNSEL
GEORGE ANTHONY FISHER
RETIRED
BASIL J. MEZINES

TELEPHONE: (202) 737-7777
TELECOPIER: (202) 296-8312
www.SteinMitchell.com

July 10, 2007

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

Re: *Allegheny Elec. Coop. Inc. et al v. PJM Interconnection, LLC*, Docket
Nos. EL07-56-000 and EL07-58-000

Dear Ms. Bose:

In this memorandum, we respond to the several statements made by PJM Interconnection, LLC ("PJM"), as well as the affidavits in support of the company's submissions.

I. **Introduction**

To put this inquiry in context, it is useful to review the manner in which this matter has been presented to the Commission. FERC directed PJM and Dr. Bowring to answer questions about the same events identified in Dr. Bowring's April 5 testimony before the Commission. Given PJM's repeated claim that it has acted properly, one would reasonably suspect that there would be sharp distinctions in the two presentations of the core evidence. But, in fact, there are not. Why is this?

Dr. Bowring presented an affidavit, supported by hundreds of documents, that cataloged events he has carefully tracked as the market monitor. As Dr. Bowring made his response, under oath, he was acutely aware of the import of the statement and its significance to this Commission. He was able to provide specific details, *i.e.*, evidence that permits the Commission to reach conclusions. He is perfectly willing to let the facts be judged. Quite contrary to PJM's assertion, he is not the "judge, jury, and executioner."

He is a witness.

PJM, on the other hand, does not challenge the material facts as much as it tries to explain them away or tends to be dismissive of them. It cannot – and does not – say an event did not occur or words were not spoken. To be sure, Dr. Bowring’s factual presentation is left largely unchallenged.

By this memorandum, Dr. Bowring, through counsel, reaffirms his affidavit and April 5 testimony. If a factual dispute remains, Dr. Bowring would be pleased to appear before the Commission and let these factual issues be evaluated. At present, we are left with a series of specific assertions by Dr. Bowring in his affidavit, the underlying facts of which do not appear to be in dispute. For example:

1. PJM “Insisted” Dr. Bowring Remove Key Conclusions from the 2005 State of the Market Report.
2. PJM Plans to Authorize PJM’s Market Services Division to Add to and Delete Data from the MMU Database.
3. PJM Barred the MMU from Presenting Its Full Views on Exempting Interfaces from Mitigation to the Markets Implementation Committee on January 31, 2007.
4. PJM Sought Changes to, Prevented the Issuance of, or Delayed the Release of Five MMU Reports on Regulation Markets.
5. PJM’s Confidential Internal Procedures Authorized PJM Management’s Prior Review of MMU Reports.
6. PJM Removed the MMU from the Cost Development Task Force Chairmanship.
7. PJM Prevented the MMU from Analyzing the BGS Auction for the New Jersey BPU.
8. PJM Pressured the MMU to Modify Its Positions on the Implementation of the RPM Market Power Mitigation Rules.
9. PJM Interfered with MMU’s Role as Chair of the Market Monitoring Advisory Committee.
10. PJM Reduced the MMU Staff.

Rather than refute these facts, PJM offers several sweeping arguments that exhibit its disregard for the independence of the MMU. We address them here: 1) the independence of the MMU is not, as PJM claims, an “ethereal notion,” but is a central

question before this Commission; 2) PJM confuses peer review with censorship; 3) PJM's *ad hominem* attacks on Dr. Bowring are inappropriate and lack merit; and 4) competitive markets depend upon an independent MMU.

A. The Independence of the MMU Is Not an "Ethereal Notion," But a Central Question before the Commission.

Unable to deny the factual basis for these charges, PJM dismisses the importance of independence as an "ethereal notion."¹

But the independence of the MMU is a central question before the Commission. In addition to the question raised in this matter by OPSI and other complainants of whether PJM violated provisions of its existing tariff, FERC is also examining the question of what enforceable provisions the tariff should include in order to guarantee the independence of the MMU. Independence was explicitly addressed by the Commission in its 2006 and 2007 technical conferences on market monitoring,² where Dr. Bowring offered his testimony on the independence of the market monitor generally and, more specifically, on PJM's interference with his independence as the market monitor. The instant proceedings before the Commission grew out of that testimony. Accordingly, independence is an issue in this proceeding, too.

The primary issue raised by Dr. Bowring's April 5 statement and supporting affidavit is: What level of independence must be defined and assured for market monitors in order to ensure that market monitors can perform the functions defined by the Commission and assist in enhancing the competitiveness of RTO markets? Only the Commission can define the desired level of independence and assure that it is achieved.

PJM, in its responses, offers justifications for its interference with the independence of the MMU and dismisses altogether the importance of independence, placing the term in quotes nearly everywhere it appears and arguing that neither the tariff nor any other authority requires an independent MMU. This approach represents a significant departure from the position taken in November 2003 by the PJM Board of Managers, which called the MMU "an internal, independent arm of PJM" and noted that "[s]everal important FERC orders and directives have further defined the role of the Market Monitoring Unit functions."³ The Board also stated that in that November 2003 report that it "sought to ensure that the independent MMU's relationships to other organizations, specifically the Office of President, the Board, and regulatory agencies, are optimal."⁴ The PJM Board of Managers also stated:

First and foremost, the proper organization of the MMU function within

¹ PJM Supplemental Response of July 2, 2007, at 13.

² 119 FERC ¶ 61,306, at 104 & 106, 2007 WL 1795502, at **25-26 (June 22, 2007).

³ PJM Board of Managers Review of Market Monitoring Unit Organization, PJM Interconnection, LLC, November 2003, at 1. SMM-2078.

⁴ PJM Board of Managers Review of Market Monitoring Unit Organization, PJM Interconnection, LLC, November 2003, at 2. SMM-2079.

PJM's business demands that the Market Monitor has the independence required by regulators and market participants. Independence is a key ingredient to the deterrent effect that market monitoring must create. The Board, itself an independent entity, must ensure that the MMU has the proper degree of autonomy from both PJM management and market participants. The Market Monitor must be able to report, independently and objectively, to the FERC. The independence of the MMU must be preserved both in fact and perception with participants and regulators so as to maintain credibility and trust that market outcomes in PJM are fair, efficient, and free from abuses of market power and manipulation.⁵

Further underscoring its disregard for the independence of the MMU, PJM also charges that "Bowring has chosen to highlight various past events, not as evidence of any Tariff violations, but in service of his goal of changing the PJM Tariff in numerous ways to increase his autonomy, particularly by eliminating the requirement that he report to the PJM President."⁶ Dr. Bowring does not contest this. He does indeed want the MMU to become more "autonomous," *i.e.*, to make the MMU more independent of PJM management than it is willing to permit. Dr. Bowring requests that the Commission define the level of independence that FERC believes is necessary for market monitors to perform the functions defined by the Commission and assist in enhancing the competitiveness of RTO/ISO markets. Only the Commission can ensure that the desired level of independence is achieved. That defined level of independence must be included in enforceable tariff provisions to ensure that the events of the last several years at PJM do not and can not recur. Dr. Bowring's examples of PJM's interference are relevant both to the question of tariff violations and, as FERC asked, whether the MMU has been able "to perform its functional responsibilities." See FERC Data Request #1.

Also, PJM seems to argue in its responses that because the MMU is accountable to the PJM President, PJM management can prevent the MMU from acting independently. The tariff states that "The Market Monitoring Unit shall be accountable to the President and PJM Board regarding the implementation of this Plan." The MMU is required to implement the tariff, as approved by the Commission, and the Commission has the authority to enforce the independence of the market monitor and to hold the RTO accountable for ensuring the independence of the MMU. The Commission stands as checks against PJM management, when it interferes with the independence of the market monitor.

PJM appears to dismiss the need for a market monitor, as well as the Commission's role in ensuring market monitoring independence. On June 27, 2007, the PJM President, Phillip Harris, addressed a meeting for PJM employees at an event held under a tent in the PJM parking lot in Norristown, Pennsylvania. Mr. Harris said:

⁵ PJM Board of Managers, Review of Market Monitoring Organization, November 2003, at 2. SMM-2079.

⁶ PJM Supplemental Response, July 2, 2007, at 2.

...You know, we didn't ask for [a] market monitor. FERC made us have a market monitor, and all they said was, "Here's some general rules." So over time that's evolved to the point now that there's an actual dispute over what the role versus the accountability is. It's a shame that that dispute got turned into a public debate, and which led to litigation. But the genesis of it, as Vince [Duane] was saying, is something we should expect. You're in a transition industry, things haven't been formed. You have the federal government trying to say what it should be, which isn't how you turn process, so you're just ripe for dispute and debate. That will be worked out through the litigation, and we'll move ahead with that. Indeed, FERC issued a NOPR, an Advanced NOPR[] actually, where some of that [was] debated at the federal level, but it won't end. I mean it's governance, what we are and how we are is just something that's with us as we move forward over time, and we have to anticipate that.⁷

Mr. Harris' comments speak volumes. It is fundamentally wrong to call this policy debate a "shame" because this is a matter of public interest that should be debated openly. PJM's responses to the Commission's May 18 data request should be read in that context.

B. PJM's Confuses "Peer Review" with "Censorship."

PJM has attempted to defend its interference with the independence of the MMU by insisting on the need for peer review and arguing that the Commission has upheld PJM's brand of peer review in other contexts. But PJM has confused peer review with its repeated practice of censorship, ordering the MMU to modify the substance of his content and viewpoints in MMU reports and presentations. The MMU has consistently submitted its reports and findings for peer review within PJM and works cooperatively with PJM staff. Equally important, the MMU's published reports are subject to widespread review and critique by market participants, by academics and by regulators. This is the strongest form of peer review, and it provides effective incentives to assure accurate and objective analysis of market issues.

PJM's reliance on past Commission orders to defend its exercise of censorship is misplaced. The FERC order, from which PJM selectively quotes, reviews the Southwest Power Pool ("SPP") agreement, which states: "SPP may not screen, alter, delete, or delay the [external market monitor's] findings, conclusions, and recommendations."⁸ PJM also neglected to quote from the Commission's rationale for its finding that the SPP agreement did not compromise the market monitor's independence:

⁷ Transcript of June 27, 2007 PJM meeting. SMM-2245-2247.

⁸ Southwest Power Pool, FERC Electric Tariff, Fourth Rev. Vol. No. 1, 2nd Rev. Sheet No. 704. SMM-1872.

We interpret the proposed [external market monitor] agreement to prohibit SPP from forcing the external market monitor to change any findings or recommendations. Further, we interpret the phrase, “give full consideration to SPP feedback,” as requiring the external market monitor to listen to SPP’s feedback, but not necessarily take action in response to that feedback.⁹

PJM is therefore wrong when it asserts that “[t]he Commission has held that such review cannot be used to defeat the market monitor’s independent reporting, but a prior review requirement necessarily implies some consequence if the required review is ignored.”¹⁰

This frequently cited defense of its interference with the independence of the MMU – i.e., the need to have peer review – is therefore misplaced and mischaracterized. Neither this Commission’s orders nor other tariffs require censorship of the market monitor; to the contrary, they have repeatedly condemned it.

C. PJM’s *Ad Hominem* Attacks on Dr. Bowring Are Inappropriate and without Merit.

PJM loads its supplemental response, in particular, with *ad hominem* attacks on Dr. Bowring. From day one, Dr. Bowring has scrupulously avoided making and will not make any such personal attacks on individuals at PJM. But as his counsel, we must address certain of PJM’s unfounded and unfortunate remarks.

First, PJM makes the contrived charge that Dr. Bowring seeks to be the “judge, jury, and executioner.”¹¹ If a courtroom parallel is to be made, Dr. Bowring is a witness, nothing more. While Dr. Bowring has stated that PJM’s interference with MMU independence is inconsistent with the objectives of the tariff, and is concerned that if left unchecked PJM could violate the tariff in the future, he has consistently deferred to the Commission to make the judgment about whether a tariff violation occurred. Further, as

⁹ Southwest Power Pool, Inc., 115 FERC ¶ 61,051, at ¶ 42 (2006).

¹⁰ PJM Supplemental Response, July 2, 2007, at 22. To the extent that other tariffs are considered relevant, Section 50.4 of the Midwest ISO (“MISO”) tariff states that the Independent Market Monitor (“IMM”):

shall be granted complete independence to perform those activities necessary to provide impartial and effective market monitoring within the scope of the [Independent Market Monitoring] Plan. No person, party or agent, including the Transmission Provider, State Regulatory Commissions, or any other administrative oversight group responsible for the administration of the IMM activities, shall be granted authority to screen, alter, delete or delay IMM investigations or the preparation of findings conclusions, and recommendations developed by the IMM that fall within the scope of market monitoring responsibilities contained in the Plan.

Midwest ISO, FERC Electric Tariff, Third Revised Volume No. 1, issued on April 6, 2005, Second Revised Sheet No. 706. SMM-1886. Although this section is headed as “50.1,” it appears that was a clerical error and, based on the preceding sequence of subsections within the tariff, should be section 50.4.

¹¹ PJM Supplemental Response, July 2, 2007, at 4.

a witness in these proceedings, he has not and will not make any procedural arguments as to whether relief should be granted.

Second and ironically in light of its foregoing remark, PJM notes repeatedly that Dr. Bowring has not alleged a violation of the tariff and – remarkably – attacks him for “tr[ying] to avoid the plain facts by demurring (at 35) that it is for the Commission, not him, to ‘make the judgment as to whether the MMU may not be able to fulfill its obligations under the tariff.’”¹² Meanwhile, throughout its responses, PJM is guilty of its own accusation of serving as judge and jury, as it argues that PJM management has the authority to suppress and censor the MMU’s otherwise independent views and reports.¹³

Third, PJM mischaracterizes the issue when it asserts that “Bowring evidently views ‘independence’ as unfettered license to reach any conclusion and make any allegation, and mere disagreement with his views as an infringement on the scope of his autonomy.”¹⁴ It is PJM management, not Dr. Bowring, that appears to view disagreement with its views as unacceptable, and it is PJM that has suppressed the MMU’s disagreement with PJM management’s positions.

Dr. Bowring’s affidavit makes clear that he has tried to work with the PJM structure. He fully understands the need to cooperate with management and to respect its prerogatives. It was only after an unrelenting assault on his independence that he testified before FERC in April. Even then, he issued no judgment as he attempted to give voice to the principle of independence. He was properly concerned with management’s challenge to independence which threatened – and continues to threaten – significant public interests. In response to his April statement, the Commission set an agenda with specific questions; Dr. Bowring, in turn, responded to them. Again, he made no judgments but instead deferred to the Commission. In PJM’s responses, Dr. Bowring confronts a personal assault on his integrity and competence. This last and least effective response of “kill the messenger” captures the arrogance of management and its disregard for the importance of independence.

D. Competitive Markets Depend upon an Independent Market Monitor.

With comments like these, the need for an independent MMU at PJM may be self-evident. But because PJM attacks the very need for independence in their supplemental response, it is also important to explain why such independence is necessary as a matter of practicality and policy. The MMU must operate independently of RTO management. Regional Transmission Organization (“RTO”) markets are complex, and their inner workings are opaque. FERC established market monitors for each RTO and Independent System Operator (“ISO”) to help ensure robust, competitive markets. Part of that role is to shed light on complex market issues for the stakeholders. In the interest of maintaining a competitive market based on the best information

¹² PJM Supplemental Response, July 2, 2007, at 9 (quoting Affidavit of Joseph E. Bowring, June 12, 2007, at 35).

¹³ PJM Supplemental Response, July 2, 2007, at 20-23, 25.

¹⁴ PJM Supplemental Response, July 2, 2007, at 21.

available, it is essential that the market monitor collect and maintain data, analyze that data, and release reports independently of the RTO/ISO management.¹⁵ Rather than suppress open discussion and debate which were central to the creation of PJM markets, PJM should encourage debate and support the MMU in its role even when the MMU reaches different conclusions from PJM management. By no means, does such support mean that PJM should always stand in agreement with the MMU. But PJM should permit rather than try to hide such disagreements.

The Commission and market participants must be assured that there is an independent MMU with access to data and PJM staff that is free to uncover the workings of the PJM markets and to keep the Commission and market participants informed about them. The MMU exists only as the result of Commission action. Ultimately, the continued efficacy of the MMU can be ensured only by the Commission.

We note the Commission's words in its recent Advanced Notice of Proposed Rulemaking of June 22, 2007, stating:

[T]he Commission is in general agreement with the importance of both safeguarding MMU independence and ensuring useful and transparent market analysis by the MMUs. Indeed, since the very beginnings of market monitoring, the Commission has emphasized the importance of independence and objectivity on the part of market monitors, and has required that MMUs analyze and report on any inefficiencies and structural flaws they detect in the market.¹⁶

In contrast to PJM's apparent dismissal of the need for an independent market monitor, the Commission noted in its ANOPR that "virtually every commenter [at the 2007 technical conference on market monitoring] agreed with the need for independence."¹⁷

The market monitor requires the ability to report on his independent views of the market without having PJM management *ordering* him either to modify the substance of those reports, to delay those reports, to suppress his presentations when they conflict with management's views, or to abandon opportunities that would allow the MMU to "provide the comprehensive market analysis critical for informed policy decision making"¹⁸ relevant to key decisions to be made about the market by PJM. Independence of the MMU is essential to a competitive market, and it is assured, when the MMU is in a position to implement its tariff-defined obligations. The MMU can meet its obligations, when it is provided adequate resources, full access to data and information, and full

¹⁵ The Commission indicated as much in its Advanced Notice of Proposed Rulemaking, 119 FERC P 61306, ¶ 99, 2007 WL 1795502, **24 (June 22, 2007) (observing that "[t]he Commission ordered RTOs to incorporate in their market monitoring plans certain standards to be met by the MMUs, which include ensuring objective information about the markets that the RTO operates or administers").

¹⁶ 119 FERC ¶ 61,306, at 107, 2007 WL 1795502, at **26 (June 22, 2007).

¹⁷ 119 FERC ¶ 61,306, at 108, 2007 WL 1795502, at **26 (June 22, 2007).

¹⁸ 111 FERC ¶ 61,267 (2005), "Policy Statement on Market Monitoring Units," at 1.

cooperation among PJM employees.

II. PJM Fails to Justify Its Interference with the Independence of the MMU.

In the following pages, we discuss the most serious of the efforts by PJM to undermine the independence of the MMU. This submission will also point out assertions made by PJM in its June 12 and July 2 filings that are contrary to the evidence. PJM's responses are most noteworthy for what they concede, do not deny, and do not say. PJM also includes inaccurate statements, which must be clarified for the record. In the following section, we address these points.

1. PJM "Insisted" Dr. Bowring Remove Key Conclusions from the 2005 State of the Market Report.

Ultimately, PJM concedes that it ordered Dr. Bowring to remove key conclusions from the 2005 State of the Market ("SOM") report, before it was released to FERC and the entire PJM Board, as Dr. Bowring stated before the Commission on April 5, 2007.

PJM's July 2 position on this issue contradicts its prior statements.

- On June 12, 2007, PJM's response to the Commission's May 18, 2007 Data Request stated that "PJM *did not order* Mr. Bowring to modify the 2005 State of the Market report; rather, PJM management *asked Mr. Bowring to reconsider* his last minute proposal...."¹⁹
- But, as Dr. Bowring stated in his June 12 affidavit, PJM – through its Chief Operating Officer Audrey Zibelman and its Vice President of Market Services Andrew Ott – did order Dr. Bowring to modify the report.²⁰ PJM made it clear that Dr. Bowring must remove the conclusions and did not, as PJM's June 12 response indicates, politely "ask [him] to reconsider" the inclusion of those conclusions in the report.
- After Dr. Bowring presented the facts in his sworn affidavit, PJM modified its prior position. On July 2, 2007, PJM, in its supplemental response, concedes that management ordered Dr. Bowring to remove the conclusions from the 2005 State of the Market Report report, as follows: "PJM took no inappropriate action *when it insisted* that the 2005 SOM reflect what was reviewed by the CMC prior to publication and that new conclusions be published later, following the customary opportunity for review and comment."²¹

PJM's rationales for ordering Dr. Bowring to remove these key conclusions from the 2005 SOM Report do not and cannot justify their interference with the independence

¹⁹ PJM Response, June 12, 2007, at 24 (emphasis added).

²⁰ Affidavit of Joseph E. Bowring, June 12, 2007, at 22-24.

²¹ PJM Supplemental Response, July 2, 2007, at 23.

of the MMU to prepare and publish the SOM Report.

First, PJM confuses “peer review” with management’s attempt to exercise impermissible *control* over the MMU’s SOM Report. The established process for preparing the SOM Report is that after receiving the peer review comments, the MMU decides whether to accept, incorporate, or reject those comments and release a final report.²² Even based on PJM’s internal procedures, the SOM Report should be the independent work of the MMU and should not be subject to modification by PJM management. The significance of the SOM Report, as recognized by PJM management, is precisely that it is the independent analysis of the MMU. As such, PJM management lacked the authority to have “insisted” that the MMU remove key conclusions from the State of the Market Report and does not point to any such authority.

Second, PJM protests that it “insisted” Dr. Bowring remove the conclusions from the 2005 SOM report because it was presented to them “at the last minute.”²³ Neither internal procedures nor external authorities required the MMU to *re-circulate* the document to PJM management, before the MMU released it. But as a courtesy, consistent with past practice, the MMU *re-circulated* the document to management in ample time for them to review it. That is made clear in PJM’s June 12 response, which states that after Dr. Bowring circulated the report to PJM on February 28, 2006, PJM management “responded *that same day* with significant concerns about the assumptions, methodology and conclusions of the new analysis.”²⁴ In fact, PJM “insisted” that Dr. Bowring remove key conclusions from the report because management disagreed with his conclusions.

Third, PJM explains that Dr. Bowring’s recommendation (i.e., that two pivotal suppliers remain subject to cost-based offer caps in the regulation markets) reflects the status quo; thereby indicating that when PJM “insisted” Dr. Bowring remove the conclusion, the order to remove had no impact because PJM has, in practice, adopted his conclusion. If that is the case, and his conclusion was not only innocuous, but adopted by PJM, it makes no sense why PJM would “insist” he remove it.

Fourth, PJM attempts to justify its insistence that Dr. Bowring remove key conclusions from the report by stating that the Competitive Markets Committee (“CMC”) had not seen these conclusions.²⁵ But this rationale is no more valid than the others. The CMC’s role is that of peer technical review. This is consistent with the fact that the SOM Report is the report solely of the MMU. That role is also consistent with the defined process followed by the MMU for every SOM Report. Under that process, the MMU continues to revise the report through early March. By Commission order, the MMU is to release the SOM Report *simultaneously* to the Board and the Commission.²⁶

²² Affidavit of Joseph E. Bowring, June 12, 2007, at 24-26.

²³ PJM Supplemental Response, July 2, 2007, at 23. PJM Response, June 12, 2007, at 25.

²⁴ PJM Response, June 12, 2007, at 25.

²⁵ PJM Supplemental Response, July 2, 2007, at 22.

²⁶ Affidavit of Joseph E. Bowring, June 12, 2007, at 25 n.47 (citing order).

Fifth, PJM indicates that its insistence that Dr. Bowring remove conclusions from the SOM Report is justified based on selective quotations from an order issued by the Commission, finding that the Southwest Power Pool's agreement with its market monitor "does not 'compromise the independence of the external market monitor.'"²⁷ But this attempt by PJM to justify its interference with the independence of the PJM MMU fails as well. The Southwest Power Pool ("SPP") tariff, as quoted by PJM, states that its external market monitor ("EMM") "will submit draft reports to SPP for review prior to publication and give full consideration to SPP feedback on such drafts." PJM, however, does not quote the very next sentence of the same SPP tariff, which states: "However, SPP may not screen, alter, delete, or delay the EMM's findings, conclusions, and recommendations."²⁸ PJM also neglected to include the Commission's rationale for finding that the SPP agreement did not compromise the market monitor's independence:

"We interpret the proposed EMM agreement to prohibit SPP from forcing the external market monitor to change any findings or recommendations. Further, we interpret the phrase, 'give full consideration to SPP feedback,' as requiring the external market monitor to listen to SPP's feedback, but not necessarily take action in response to that feedback."²⁹

None of these rationales can or do excuse the now undisputed fact that PJM management interfered with the independence of the PJM market monitor by ordering him to remove key conclusions from the 2005 SOM Report. That independence is required by the Commission and relied upon by market participants. The PJM tariff, a Commission order, and even the PJM confidential internal procedures require that the PJM Market Monitoring Unit has sole responsibility for the State of the Market Report. PJM takes the public position that the State of the Market Report is the MMU's independent analysis. Indeed, PJM's Vice President of Markets, Andrew Ott, once informed the Commission: "The PJM market monitor produces extensive analyses on the market, produces a state of the market report, and the conclusions of the market report are his own. Obviously, I don't think anyone is questioning the independence of PJM, the organization, so I would take issue with Mr. Spinner saying that we need an independent entity doing an analysis of the competitiveness of the market. We have one."³⁰

Finally, PJM falsely represents that Dr. Bowring never brought this episode to the attention of the PJM President or Board.³¹ At the time, Dr. Bowring told Ms. Zibelman that it was wrong, but that he would do as ordered. In May 2006 and in February 2007, Dr. Bowring reported this event to the PJM President, Phillip Harris.

²⁷ PJM Supplemental Response, July 2, 2007, at 7 & nn.14-15 (quoting Southwest Power Pool, Inc., 115 FERC ¶ 61,051, at ¶ 42 (2006)).

²⁸ Southwest Power Pool, FERC Electric Tariff, Fourth Rev. Vol. No. 1, 2nd Rev. Sheet No. 704.

²⁹ Southwest Power Pool, Inc., 115 FERC ¶ 61,051, at ¶ 42 (2006).

³⁰ SMM-00365-00366.

³¹ PJM Response, June 12, 2007, at 26.

2. **PJM Plans to Authorize PJM's Market Services Division to Add to and Delete Data from the MMU Database.**

At no point has Dr. Bowring alleged that PJM has, to date, denied the MMU access to the MMU database. On this point, Dr. Bowring and PJM agree.

PJM does not respond to or contest the key issues in Dr. Bowring's June 12, 2007 affidavit:

The importance of the MMU's control over its data repository cannot be overstated. The ability to monitor the market and the credibility of MMU analyses are dependent on the quality, extent and organization of our data. The MMU allocates significant resources to the ongoing maintenance and development of our data repository so that MMU staff can rely on it and produce the analyses that stakeholders, states and FERC rely on. If the Markets Division or anyone else, whether PJM division or market participant, can control the type, amount and quality of the MMU's data, the MMU will not be able to produce the objective analyses required by the tariff and the Federal Power Act.³²

This is a simple and direct point which speaks to the proper function of the MMU. Does PJM management agree with it or not?

PJM also appears to acknowledge that, as Dr. Bowring stated before the Commission on April 5, 2007, PJM management has explicitly and repeatedly asserted its intention to remove the MMU database, data collection process, and data maintenance process from the MMU's control over the last several years.

But for the current proceeding before this Commission, the investigation of Dr. Bowring's April 5, 2007 testimony by the PJM Board of Managers' independent counsel, and the attention paid to his April 5 testimony by the U.S. Senate Committee on Energy and Natural Resources, PJM management may have delivered on its earlier threat to deny the MMU access to its database. PJM has not renounced its authority to remove the MMU database from the MMU and has made it clear that it is awaiting judgment from the Commission before taking further action.³³ Hence, there is reason to believe that

³² Affidavit of Joseph E. Bowring, June 12, 2007, at 44-45.

³³ Letter from PJM to members and stakeholders, May 4, 2007, at 1 (quoting Board statement: "The MMU's ongoing processes for collecting and maintaining data will not be modified by PJM until these matters are resolved.") (emphasis added). SMM-2091-92; PJM Answer, May 3, 2007, at 3 ("The MMU's access to data is unchanged....and will remain unchanged pending the submission to the Commission of the results of the Board's investigation") (emphasis added), at 7 (stating that "as this change has not yet been implemented, PJM will defer any change") (emphasis added); PJM Answer April 30, 2007, at 3 ("pending any change to PJM's market monitoring structure") (emphasis added), at 15 ("PJM will defer any change, pending submission of the results of the Board's investigation to the Commission.").

PJM, if not prevented by the Commission from doing so, will implement even the most far-reaching of its proposals to deny the MMU the ability to collect and maintain the data necessary for implementing the Market Monitoring Plan as required by the tariff.³⁴

PJM has reiterated its explicit intention, including statements by Mr. Harris at the March 29, 2007 meeting with the MMU and by Ms. Zibelman at an April 9, 2007 meeting with the MMU, to remove control of the MMU database from the MMU and turn it over to the Markets division of PJM, which would then have the unilateral authority to create, update and delete data from the MMU database. PJM concedes and reiterates this proposal in its June 12 filing.³⁵

As Dr. Bowring said in his April 5 written statement to FERC, “I also believe that if PJM management continues on its current path, within a very short time we will not be able to collect and maintain information as we are required to do under the tariff.”³⁶ The “current path” is the plan to change stewardship of the data. That plan would prevent the MMU from fulfilling its tariff responsibility under Attachment M, Section VI.D and impair the ability of the MMU to fulfill all its tariff responsibilities. The tariff requires that the MMU “collect and maintain the data it deems necessary for implementing the Plan.” In fact, PJM does not dispute Dr. Bowring’s assertions in his affidavit of June 12, 2007 that MMU stewardship of MMU data is required by the tariff.³⁷

The tariff also requires (Section VI.F) that the MMU “shall evaluate, and shall refine on the basis of experience, the information it collects and maintains, or that it receives from other sources, regarding the operation of the PJM Market or other matters relevant to the Plan.” This point is critical. As Dr. Bowring stated in his June 12 affidavit: “Ongoing development and maintenance of the data repository requires knowledge of market monitoring because the data repository is a dynamic structure, rather than a static one.” In addition, he stated, “The central organizing factor of the MMU data repository is MMU analysis. It is not simply a historical markets database.”³⁸

Although PJM explicitly states that it intends to make its Vice President of Market Services, Andrew Ott, the “technical security ‘steward’ of certain data used by the MMU (the so-called Market Monitoring Data Mart),” it misrepresents the impact of the proposal by stating that it “would not change the MMU’s access to data.”³⁹ But this proposal most assuredly would change the MMU’s access to data, as PJM concedes that transferring stewardship to Market Services would give it the authority to create, update,

³⁴ PJM Supplemental Response, July 2, 2007, at 6 n.12 (quoting PJM Response, June 12, 2007, at 19).

³⁵ PJM Response, June 12, 2007, at 19 (“The only effect of this proposed change would be that Mr. Ott would have the responsibility to establish or modify an individual’s user’s ability to create, read, update or delete the subject data.”).

³⁶ Prepared Statement of Joseph E. Bowring, April 5, 2007, at 14.

³⁷ Affidavit of Joseph E. Bowring, June 12, 2007, at 42-45.

³⁸ Affidavit of Joseph E. Bowring, June 12, 2007, at 12.

³⁹ PJM Response, June 12, 2007, at 19. PJM incorrectly states that its “later proposal to designate Market Services as the ‘steward’ of certain data used by the MMU ‘contemplated no change whatsoever in the MMU’s access to the data.’” PJM Supplemental Response, July 2, 2007, at 6 n.12 (quoting PJM Response, June 12, 2007, at 19).

and delete data from the MMU database (including links to other data), and it would also authorize Market Services to control access to the data.⁴⁰ This is the “putative harm” to the MMU, described in Dr. Bowring’s affidavit.⁴¹

In its most recent response, PJM says this threat no longer exists.⁴² Were it so, it would be contrary to PJM’s past filings with this Commission in the above captioned matters and would contradict a letter of May 4, 2007 PJM sent to its members and other stakeholders.⁴³

PJM management has asserted no rational basis for its desire to control the MMU data, its collection and maintenance or the process by which the MMU evaluates and refines that data and information. Independence is not an “ethereal notion,” and the data issue is the concrete representation of the practical meaning of independence.

3. PJM Barred the MMU from Presenting Its Full Views on Exempting Interfaces from Mitigation to the Markets Implementation Committee on January 31, 2007.

PJM does not deny that its Chief Operating Officer, Audrey Zibelman, ordered Dr. Bowring not to present the MMU slides, regarding the exemption of certain interfaces from mitigation, to the Markets Implementation Committee (“MIC”) on January 31, 2007 and does not deny that Ms. Zibelman labeled the slides “inflammatory.”⁴⁴ Nor does PJM deny that it refused to post the MMU slides after the meeting unless Dr. Bowring agreed to remove the material on mark up.⁴⁵ PJM’s refusal to let the MMU present its analysis of this matter is clear evidence of PJM’s interference with the MMU’s independence.

40 PJM Response, June 12, 2007, at 19 (“The only effect of this proposed change would be that Mr. Ott would have the responsibility to establish or modify an individual’s user’s ability to create, read, update or delete the subject data.”).

41 Affidavit of Joseph E. Bowring, June 12, 2007, at 13. PJM incorrectly states that Dr. Bowring “never describes the putative harm to be visited upon him if he did not accept management proposals regarding data administration, and indeed cannot, because there never was any ‘threat.’” PJM Supplemental Response, July 2, 2007, at 6.

42 PJM Supplemental Response, July 12, 2007, at 6. PJM also states that “there never was any ‘threat,’” but then contradicts that statement in the next paragraph, explaining that “PJM abandoned the proposal due to Bowring’s lack of support for it.” *Id.*

43 Letter from PJM to members and stakeholders, May 4, 2007, at 1 (quoting Board statement: “The MMU’s ongoing processes for collecting and maintaining data will not be modified by PJM until these matters are resolved.”) (emphasis added). SMM-2091-92; PJM Answer, May 3, 2007, at 3 (“The MMU’s access to data is unchanged....and will remain unchanged pending the submission to the Commission of the results of the Board’s investigation”) (emphasis added), at 7 (stating that “as this change has not yet been implemented, PJM will defer any change”) (emphasis added); PJM Answer April 30, 2007, at 3 (“pending any change to PJM’s market monitoring structure”) (emphasis added), at 15 (“PJM will defer any change, pending submission of the results of the Board’s investigation to the Commission.”).

44 Dr. Bowring stated in his affidavit that on January 29, 2007, Ms. Zibelman told him that PJM would not present his material to the MIC for the meeting of January 31, 2007, because the material, particularly the discussion of the mark up analysis, was “inflammatory.” Affidavit of Joseph E. Bowring, at. 30.

45 Affidavit of Joseph E. Bowring, June 12, 2007, at 30.

In its most recent submission, PJM states that it had “big problems” with Dr. Bowring’s slides.⁴⁶ But rather than have a fully informed, open, public discussion of the issues, including the so-called “big problems,” in front of the MIC, PJM opted to limit the debate by barring Dr. Bowring from presenting his slides or even discussing the MMU’s mark up analysis. This is consistent with PJM management’s overall view, expressed in their July 2 filing, that it is management’s right to prevent the MMU from presenting the results of its independent analysis to market participants and to prevent a full and open discussion of analytical differences.⁴⁷

PJM provides a litany of irrelevant justifications for this interference with the independence of the MMU and cites no authority for its censorship of the MMU presentation. It claims that Dr. Bowring did not give PJM enough time to analyze and respond to his slides, but the documents do not support this claim. There was an explicit agreement among Mr. Ott, Ms. Zibelman and Dr. Bowring that final slides would be shared on Sunday evening, January 28, 2007. PJM’s Vice President of Markets, Andrew Ott, sent the final version of his slides to Dr. Bowring and others via e-mail on Sunday evening, January 28, 2007 (three days before the scheduled MIC presentation) and asked Dr. Bowring in the same e-mail to forward his slides to Mr. Ott “as soon as you can.”⁴⁸ Four minutes later, Dr. Bowring sent his slides to Mr. Ott via e-mail.⁴⁹ The slides incorporated the MMU analysis, including the mark up analysis, that Dr. Bowring had previously told Mr. Ott would be incorporated into the MMU slides. Dr. Bowring’s slides were *not* voluminous, consisting of only 15 slides, one of which summarized the Markets Division analysis and did not require days or weeks to review. Indeed, it was precisely because PJM had time to review them that it banned Dr. Bowring from presenting them, as PJM does not deny that its Chief Operating Officer told Dr. Bowring the slides were “inflammatory.”⁵⁰ Moreover, at no time did PJM advise Dr. Bowring that he would forfeit an opportunity to make a full presentation to the MIC, should he not submit his slides to PJM by a certain date.

Dr. Bowring submitted the slides to PJM management as requested, and Dr. Bowring agreed. There is no subsequent email saying that Dr. Bowring’s submission was untimely or requesting discussions of the details of the mark up analysis. The next communication to Dr. Bowring regarding the MMU material was from Ms. Zibelman, who informed Dr. Bowring that his slides were inflammatory and would neither be presented to the MIC nor posted on the MIC web page.⁵¹ Ms. Zibelman did not focus on the timeliness of Dr. Bowring’s submission, but rather on its content. Ms. Zibelman did

⁴⁶ PJM Supplemental Response of July 2, 2007, at 24 (citing SMM-0143-0144).

⁴⁷ PJM Supplemental Response of July 2, 2007, at 14, 21, 23-24.

⁴⁸ *Id.* at 30 & n.59; SMM00128 (Mr. Ott e-mailed Dr. Bowring and others, stating, “As we discussed on Friday [Jan. 26] afternoon, I have created a draft version of the slides that I propose to post tomorrow for the MIC discussion of this topic on Wednesday [Jan 31]. These slides are similar to those we reviewed on Friday but I removed the specific dates/hours and revised the comments in prep. for public posting. I would like to have any comments of discussion on these completed by noon tomorrow. Joe, please forward any slides you may have as soon as you can.”).

⁴⁹ *Id.*; SMM00129

⁵⁰ Affidavit of Joseph E. Bowring, June 12, 2007, at 30 & n.60; SMM00140.

⁵¹ Affidavit of Joseph E. Bowring, June 12, 2007, at 30.

not question the accuracy of the mark up analysis but focused on concerns about members' perception of the results. This point is reinforced by the fact that at no time thereafter did PJM offer any substantive challenge to the accuracy of the mark up analysis. PJM refused to post the slides at Dr. Bowring's request even weeks later, despite having had additional time to examine the analysis.⁵² This chain of events and supporting documentation demonstrate that PJM did not refuse to post or present the MMU material because it was untimely or even based on a dispute about the merits of the analysis, but rather because PJM did not agree with the content and wished to prevent the MMU from presenting its independent analysis and conclusions to the members.

PJM's reliance on the Procedures for the Implementation of the Market Monitoring Plan as authority for its action is misplaced. Those Procedures did not require the MMU to present management with its slides at a different time and did not authorize PJM to penalize what they defined to be an "untimely" submission by preventing its posting for public review and discussion.⁵³

To minimize the significance of its actions, PJM gives the false impression that Dr. Bowring was allowed orally to present the views contained in his slides at the January 31 MIC meeting,⁵⁴ and inaccurately states that he "reported his complete views on this subject in his State of the Market report to the PJM Board and Commission."⁵⁵ But, in fact, PJM directed Dr. Bowring not to discuss the MMU's mark up analysis at the January 31 MIC meeting, and that analysis was not included in the MMU's State of the Market Report.

Conceding that it barred the MMU from presenting its full presentation to the MIC, PJM attempts to justify its conduct:

- PJM argues that it has the authority to determine when it should make a filing with the Commission on a subject. That point is irrelevant here because PJM

⁵² Affidavit of Joseph E. Bowring, at 30; SMM00142-00144.

⁵³ Section III of the Procedures, cited by PJM, requires the MMU to provide the President with copies of reports to the Commission "reasonably in advance of their submission," provide the President and General Counsel with an "advance copy" of proposed testimony in regulatory proceedings, and provide the President with an "advance copy" of any "separate detailed public annual report about the Market Monitoring Unit's activities. PJM Document A-2. In fact, Section VII.B of the Procedures, also cited by PJM, states: "Pursuant to Section V.C of the Plan, the Market Monitoring Unit shall be accountable solely to the President and the Board regarding the implementation of this Plan. Where these procedures provide for the Market Monitoring Unit to inform, consult or otherwise coordinate with the President . . . , the following procedures shall apply: 1. Communications. Communications or confirmations of communications shall be in writing, including by e-mail. The Market Monitoring Unit shall *endeavor* to provide such communications with sufficient time for the President to accord them due attention." (emphasis added).

Id. By contrast, the Procedures *do* authorize the MMU to raise a matter directly with the Board in the event of "an untimely delay by the President." Procedures at VII.B., PJM Document A-2.

⁵⁴ PJM Response, June 12, 2007, at. 30 ("Nonetheless, Mr. Bowring participated in the MIC meeting and, as reflected in the attached minutes, 'provided additional details on the analysis performed by the MMU.'")

⁵⁵ PJM Response, June 12, 2007, at. 30.

prevented Dr. Bowring from making a written presentation on the issue to a committee of PJM members and not a filing to the Commission.

- PJM also asserts that MMU responsibilities regarding the matter of exempting certain interfaces from mitigation terminated in December 2006, when PJM posted the MMU's second quarterly report (submitted by Dr. Bowring to PJM on October 18, 2006). But that is not correct. The MMU has the ongoing responsibility to evaluate the competitiveness of PJM markets and the efficacy of market power mitigation measures. In addition, the MMU is explicitly required by the tariff to provide quarterly reports on this subject, which required ongoing analysis. PJM did not respond to the first MMU quarterly report and after the MMU submitted the second quarterly report, PJM took nearly two months to respond on December 14, 2006 with a critique of the MMU report. PJM management does not have the authority to prevent an MMU reply to PJM's criticisms and does not cite any such authority. Moreover, Dr. Bowring, Ms. Zibelman and Mr. Ott agreed that Dr. Bowring would submit a reply.⁵⁶

Finally, contrary to PJM's assertion that Dr. Bowring did not exercise his right to complain about the failure to post the material, Dr. Bowring stated clearly in his affidavit that he complained to Mr. Ott.⁵⁷ He complained to Ms. Zibelman, when she told him that he would not be permitted to present his slides at the January 31 MIC meeting, and he also complained to Mr. Harris.

Just as PJM and the members disagree at times and just as PJM and the Commission disagree at times, PJM and the MMU are going to disagree at times. When there is substantive disagreement, both sides of the argument should be presented. If PJM management, for example, believes that the MMU's analysis is incorrect,⁵⁸ then they should be willing to have an open public discussion. Anything less conflicts with the Commission's recently restated goal of "safeguarding MMU independence and ensuring useful and transparent market analysis by the MMUs."⁵⁹

It should also be noted that both the tariff and PJM's confidential, internal procedures authorize the MMU to make recommendations and report to PJM Committees, such as the MIC, whenever the MMU deems necessary.⁶⁰

⁵⁶ PJM Response, June 12, 2007, at 28.

⁵⁷ Affidavit of Joseph E. Bowring, June 12, 2007, at 30.

⁵⁸ PJM Supplemental Response of July 2, 2007, at 24.

⁵⁹ Advance Notice of Proposed Rulemaking issued June 22, 2007, at ¶ 107, 19 FERC ¶ 61,306

⁶⁰ Section IV.C.2 of Attachment M states that "the Market Monitoring Unit may take the following additional actions, to the extent it deems necessary, as a result of its monitoring activities.... Recommend to the appropriate entity (including, if and as appropriate, PJM Committees, the PJM Board, or the Commission) modifications to the PJM Market Rules. This recommendation may be made in the form of a written or oral report to the appropriate entity." Section V.A.5 of the confidential internal procedures states with regard the MMU's proposal to modify a market rule that "if the Market Monitoring Unit is dissatisfied with the approach taken, it may report to the appropriate PJM committee or the Board, or to the Commission in accordance with section III.A hereof."

4. PJM Sought Changes to, Prevented the Issuance of, or Delayed the Release of Five MMU Reports on Regulation Markets.

PJM does not deny management's efforts to compel the MMU to change the substance of its reports on regulation markets. Nor does it deny that these efforts resulted in delays in the release of the reports. Dr. Bowring provided a detailed account with respect to PJM's interference with *five* such reports.⁶¹

PJM's citation to an order issued on July 14, 2006 by the Commission, stating that "PJM may prohibit the MMU 'as an employee of PJM' from filing any statements in contested regulatory proceedings without the approval of the PJM Board."⁶² But that order was issued after four of the five reports on regulation markets cited by Dr. Bowring and is therefore irrelevant to the fifth report. Indeed, the order is not relevant to any of the cited reports about the regulation market because the one report released after the issuance of the order was not filed in a docketed, contested proceeding.

PJM states: "It is true PJM disagreed in part with the MMU's analysis. But, PJM was entirely free to disregard the MMU's views if it disagreed with them in prosecuting a PJM-initiated regulatory proceeding about proposed market rules."⁶³ Regarding the first four reports on regulation markets, PJM requested that the MMU issue reports but sought to modify the MMU's conclusions to echo the predetermined conclusions of PJM management about the competitiveness of the regulation markets. Regarding the fifth report on regulation, the issue is not that PJM disagreed with the analysis, but that PJM prevented the MMU from issuing a report about the competitiveness of the combined regulation market that it was obligated by PJM members to provide. The report was not in the context of a regulatory proceeding.

As to the October 2006 report, PJM dismisses its interference with the MMU's report as a mere "two-month delay."⁶⁴ But PJM does not deny that the delay was due to PJM's ongoing effort to prevent the MMU from presenting its conclusions, even though those conclusions had already been under discussion for four months.⁶⁵ PJM further fails to acknowledge that in the August 15, 2006 e-mail in which Dr. Bowring requests that the report be released, he points out that the conclusions with which Mr. Ott took exception had already been under discussion with PJM for four months.

PJM also tries to paint this episode as an innocuous one because Dr. Bowring's position that PJM disputed "remains in place today, without change."⁶⁶ If his position is what PJM has maintained as the status quo and is seemingly innocuous, it makes no sense why PJM would have interfered with the recommendation's inclusion in the report, resulting in an unnecessary delay of its release.

⁶¹ See also additional e-mails. SMM-2105-2141. Per a standing agreement with PJM counsel to redact any market-sensitive material from documents we submit to FERC, we have redacted portions of these e-mails.

⁶² PJM Supplemental Response, July 2, 2007, at 25.

⁶³ PJM Supplemental Response, July 2, 2007, at 25.

⁶⁴ PJM Supplemental Response, July 2, 2007, at 25.

⁶⁵ Affidavit of Joseph E. Bowring, June 12, 2007, at 33-34.

⁶⁶ PJM Supplemental Response, July 2, 2007, at 25.

5. **PJM 's Confidential Internal Procedures Authorized PJM Management's Prior Review of MMU Reports.**

PJM's confidential, internal procedures interfere with the independence of the MMU.

PJM defends its internal procedures generally and completely misses Dr. Bowring's objections to them. Dr. Bowring does not oppose the adoption of internal procedures to the extent that they do not represent inappropriate modifications of the MMU's tariff-defined functions. However, he questions the process used to develop and implement the procedures because they were developed without members' knowledge and without the approval of the Commission. But Dr. Bowring opposed parts of the content of those procedures because, if adopted, they would have, among other things, given PJM the authority to exercise prior review over MMU reports.

Dr. Bowring's objection to these procedures does not stem from an aversion to substantive disagreements, as PJM erroneously contends,⁶⁷ but from an interest in having the MMU release independently produced reports. Dr. Bowring, for example, would not object to PJM releasing a report that criticizes the MMU reports, so long as both sides of the debate are presented to the intended audience. It is PJM management that has consistently attempted to prevent the MMU from presenting its views and consistently refused to engage in open debate about market issues, preferring to modify the MMU's reports prior to publication or prevent their publication entirely.

6. **PJM Removed the MMU from the Cost Development Task Force Chairmanship.**

PJM does not deny that it removed the MMU from its role as facilitator of the Cost Development Task Force ("CDTF") or that it removed Dr. Bowring as chair of the CDTF in each case without following a public procedure like that used in 2003 to approve the MMU's role with the CDTF.

PJM offers an implausible rationale for its decision to remove the MMU from the CDTF.

Specifically, PJM explains that it put the Markets Services division in control of the CDTF, in March 2007, based on a recommendation of the PJM Board of Managers made in November 2003.⁶⁸ PJM transferred responsibility for the CDTF to the MMU around the time of the Board's November 2003 recommendation. When PJM more recently put Markets in control of the CDTF, that Board recommendation, misinterpreted by PJM in March 2007, was over three years old.

⁶⁷ PJM Supplemental Response, July 2, 2007, at 22 (mischaracterizing Dr. Bowring's affidavit by claiming "the Market Monitor has equated substantive disagreements with attacks on his independence").

⁶⁸ PJM Response to FERC May 18, 2007 Data Requests, pp. 22-23.

PJM incorrectly states that the Board's 2003 report directed that "Market Services, and not MMU, should chair any working groups charged with market rules development."⁶⁹ But that is incorrect. The Board's report "determined that working groups charged *with setting rules to solve structural problems* should be led by the Market Services division with close support and consultation from the MMU."⁷⁰ However, the CDTF does not "set rules to solve structural problems;" it "recommends" to PJM members and ultimately to the PJM Board of Managers Markets standard procedures for calculating the marginal cost of energy, ancillary services and other products that may be required to be provided to PJM at a cost-based rate.⁷¹ Such marginal costs are relevant in PJM only when applied as a market power mitigation measure or as a benchmark for the exercise of market power, both of which fall under the purview of the MMU. The CDTF is therefore not one of the working groups to which the Board referred in its foregoing November 2003 statement.

Moreover, and quite to the contrary of PJM's interpretation, the Board concluded in its November 2003 report that the MMU "should have a significant role in the formulation of PJM market rules to ensure, at the outset, that the rules best prevent the creation or exercise of market power."⁷² The Board qualified that statement by adding that "the MMU should not be the responsible PJM party for actually designing and implementing revised market rules." But that statement cannot be used as PJM's authority for removing the MMU from the CDTF because the MMU was neither designing nor implementing rules in its role as chair of the CDTF.

The Commission's Order approving the 2006 changes to PJM's Market Monitoring Plan,⁷³ cited elsewhere by PJM, is not relevant to the question of whether PJM should have put Market Services in charge of the CDTF because that order refers to the process for recommending changes to "market rules," which are not the subject of CDTF recommendations.⁷⁴

In a proposed rulemaking dated June 22, 2007, the Commission gave further indication of the importance it attaches to the MMU's role in recommending changes to market rules. In that proposed rulemaking, the Commission concluded that MMUs should advise the Commission and interested parties, such as relevant state commissions and market participants, of any recommendations for rule changes.⁷⁵

69 PJM Response to FERC May 18, 2007 Data Requests, pp. 22-23.

70 Document A-1 at 11, referenced in PJM Response, June 12, 2007, at 22 (emphasis added).

71 Affidavit of Joseph E. Bowring, June 12, 2007, at 10 & n.8.

72 PJM Response to FERC May 18, 2007 Data Requests, Document A-1 at p.4.

73 PJM Interconnection, LLC, 116 FERC ¶ 61,038, reh'g denied, 117 FERC ¶ 61,263 (2006).

74 116 FERC ¶ 61,038 at ¶ 21. Interestingly, however, this order states that the MMU shall "have a collaborative and consulting role in market design" and should continue "to have full authority to recommend changes to the PJM market rules." *Id.*

75 19 FERC ¶ 61,306 at ¶ 115 (June 22, 2007). The Commission also noted that the goal of the PJM revisions approved in its 2006 Order was to conform the PJM tariff to the Commission's Policy Statement issued in May 2005. ¶ 104. The Policy Statement identified four tasks which MMUs perform, including recommendation of proposed rule and tariff changes that promote wholesale competition and efficient market behavior. *Id.* at ¶ 102.

Although PJM argues that its president has the authority, under the PJM Operating Agreement, to appoint committee chairs, giving management the authority “unilaterally to change the CDTF chair and move the support of this function to the Market Services Division,”⁷⁶ PJM should not use this authority to undermine the ability of the MMU to fulfill its mandated tasks under the tariff. If PJM believed that it had a reasonable basis for removing the MMU from its role on the CDTF, then it should have made the changes after an open membership process as it did when the MMU was given its CDTF role. PJM does not explain why an open membership process was not followed.

PJM’s claim that transfer of the CDTF to Market Services necessitated the transfer of two MMU employees to Market Services because of their purported CDTF experience is simply false. In fact, while at the MMU, one of those employees spent a very small percentage of time on CDTF support, and the other employee did not perform any CDTF functions. The latter employee attended meetings to observe and learn how the CDTF functioned. Thus, the reasonable conclusion is that PJM’s claim that Market Services needed MMU staff because of their CDTF experience is not and cannot be correct.

7. PJM Prevented the MMU from Analyzing the BGS Auction for the New Jersey BPU.

PJM does not deny that it prevented the MMU from analyzing the BGS auction for the New Jersey BPU, but argues that it was correct to prevent the MMU from conducting this analysis.

Despite its attempt to justify its conduct, PJM was wrong. It refers to a FERC order that bars the MMU from issuing a report at the request of a state, unless the MMU or the state receives approval from the Board or the Commission. But that order was issued *after* PJM prevented the MMU from assisting the New Jersey BPU with its analysis of the BGS auction. The New Jersey BPU first requested Dr. Bowring’s assistance with the analysis of the BGS auction in the context of the merger proceeding on March 29, 2005.⁷⁷ PJM barred Dr. Bowring from providing that assistance to the state of New Jersey via a letter of August 19, 2005.⁷⁸ The New Jersey BPU reiterated its request to the MMU on August 30, 2005,⁷⁹ and again on November 15, 2006.⁸⁰ FERC issued the foregoing order on December 5, 2006. Therefore, when PJM prevented the MMU from helping New Jersey, neither the MMU nor the New Jersey BPU was under any obligation to obtain the approval of the Board or the Commission.

The cited FERC order is now in force, requiring the requesting state to seek such approval from the Board or the Commission. If either were to approve the request, the

⁷⁶ PJM Response to FERC May 18, 2007 Data Requests, p. 23.

⁷⁷ Letter from the Jeanne M. Fox, Frederick F. Butler, Connie O. Hughes, and Jack Alter of the NJ BPU to Dr. Joseph E. Bowring, March 29, 2005. SMM-2093-95.

⁷⁸ Letter from F. John Hagele, PJM, to Jeanne M. Fox, NJ BPU, Aug. 19, 2005. SMM-2096-2097.

⁷⁹ Letter from Jeanne M. Fox, NJ BPU, to Dr. Joseph E. Bowring, Aug. 30, 2005. SMM-2098-2099.

⁸⁰ Letter from Jeanne M. Fox, NJ BPU, to Dr. Joseph E. Bowring, Nov. 15, 2005. SMM-2100-2101.

MMU would be authorized to assist the New Jersey BPU with its analysis of the interaction between wholesale markets and the BGS auction. Nevertheless, PJM argues that under no circumstances would the MMU be authorized to assist New Jersey with its analysis of the interaction between the wholesale market and the BGS auction because “PJM operates wholesale electric markets, and the PJM market monitor is charged with monitoring those markets alone.”⁸¹ But the Commission’s order of December 5, 2006 referred to by PJM makes no distinction about retail markets or wholesale markets, or the interaction between the two. If the Board or the Commission were to approve the state’s request, nothing in that order appears to indicate that the PJM MMU would not be authorized to assist New Jersey with an analysis of the interaction between the wholesale market and the BGS auction.

Before FERC issued the foregoing order, the controlling authority was the PJM tariff in the absence of a ruling by the Commission. In that time, the tariff would have authorized the New Jersey BPU to ask the MMU for assistance with its analysis of the BGS auction.⁸²

The issue is not about the topic of the analysis. PJM management has stated that analysis of the interaction between wholesale and retail power markets should be undertaken, but that it should be the Market Services Division (and not the MMU) that conducts the examination.⁸³

8. PJM Pressured the MMU to Modify Its Positions on the Implementation of the RPM Market Power Mitigation Rules.

In addition to the foregoing, PJM does not deny that its management:

- Pressured the MMU to modify the avoidable cost template based on complaints from generators;
- Pressured the MMU to increase the proxy costs that the MMU developed for optional use by market participants;
- Ordered the transfer of the MMU’s decisions on the implementation of avoidable costs to the PJM Markets division;

⁸¹ PJM Supplemental Response, July 2, 2007, at 15.

⁸² Section VI.C of Attachment M to the PJM tariff states that “[a]ny Market Participant or other interested entity” to “request the Market Monitoring Unit to make inquiry or take any action contemplated by the Plan.” Since the MMU “shall be responsible for monitoring ... [c]ompliance with PJM Market Rules,” “[a]ctual or potential design flaws in the PJM Market Rules,” “[s]tructural problems in the PJM Market that may inhibit a robust and competitive market,” and “[t]he potential for a Market Participant to exercise market power or violate any of the FERC Market Rules,” under Section III of Attachment M to the PJM tariff, New Jersey would have been permitted to ask the MMU for assistance analyzing the BGS auction to the extent that such analysis was within the scope of the MMU’s responsibilities.

⁸³ Letter from Jeanne M. Fox, NJ BPU, to Dr. Joseph E. Bowring, May 30, 2007. SMM-2103-2104.

- Barred the MMU from speaking with PJM's outside RPM lawyers about the RPM tariff;
- Informed the MMU that any MMU requests for interpretations of the tariff were to go through the PJM VP of Markets, who would have the opportunity to deny such requests, even if they originated from members and other stakeholders; and
- Refused PJM's request to include avoidable cost data in the PJM computer system constructed for RPM.

Some of these events demonstrate PJM's interference with the independence of the MMU, while others show that the PJM President has failed to "ensure" the "cooperation of PJM for the effective functioning of the Market Monitoring Unit," as he is required to do under Section V.D. of Attachment M of the PJM tariff.

Instead of refuting these charges, PJM seeks to justify its actions with what appears to be a misreading of the MMU's obligations and authorities under the tariff. As an overarching matter, PJM incorrectly asserts that it was "adher[ing] to the policy of the Commission and the PJM Board," noting that "[w]hile the market monitor is charged with collecting cost information under RPM, he is not free to determine what costs the tariff directs be collected."⁸⁴ According to the tariff, however, the MMU has the authority to determine avoidable costs and proxy costs.⁸⁵

9. PJM Interfered with the MMU's Role as Chair of the Market Monitoring Advisory Committee.

PJM acknowledges that, in 2005, it ordered the MMU not to post the minutes of the recent Market Monitoring Advisory Committee ("MMAC") meeting about proposed changes to the Market Monitoring Plan when the Members Committee was considering a PJM filing to modify the Plan. PJM also acknowledges that, in 2006, management ordered the MMU not to discuss a recent FERC Order regarding market monitoring at the MMAC meeting and to remove it from the agenda.

To justify this interference, PJM appears to make a new argument that Dr. Bowring should not administer the MMAC at all. The market monitor has been administering the MMAC since its creation with the explicit agreement of PJM management. Now PJM states that "administering the stakeholder process is not a market monitor function," which justified their orders that he not post MMAC minutes or

⁸⁴ PJM Supplemental Response, July 2, 2007, at 20.

⁸⁵ Contrary to PJM's mischaracterization and commensurate conduct, Sections 6.7(c)-(d) of Attachment DD to the PJM tariff state that the MMU "shall determine" both avoidable costs (or, as referred to in the tariff, the "Market Seller Offer Cap for generation resources") and proxy costs (or, as referred to in the tariff, the "price level identified for relevant resource class by the Market Monitoring Unit"). SMM-2045-46.

discuss issues of substance at the MMAC meetings he chairs.⁸⁶ PJM also states that the MMAC “is designed only to provide member input on the MMU’s analysis plans.”⁸⁷

But if the MMAC is to provide the MMU with feedback, only the market monitor can administer that process if he is to receive unfiltered feedback from the members. Without open discussions with the MMAC membership, the market monitor is unable to gain valuable information and is hampered in his ability to address concerns.

10. PJM Reduced the MMU Staff.

PJM acknowledges that it has reduced the MMU staff by two full-time employees.⁸⁸

Despite PJM’s assertions about the budget, the MMU is not the fastest growing part of PJM by any rational measure. In order to avoid reflecting only the transfer of funds between expense budgets and project budgets, either total budget or total employees are a reasonable measure of size and growth. By the employee measure, the MMU has not grown and by the total budget measure the MMU has grown less rapidly than the Market Services division. The MMU continues to need additional resources and cooperation from PJM’s management.

Conclusion

The MMU’s independence is not an ethereal notion, but the single attribute of the MMU that will permit it to play its defined role in supporting competitive markets. Dr. Bowring has set forth examples of PJM’s interference with the independence of the MMU in his affidavit and supporting documents, and PJM has not refuted them because they are grounded in fact. Dr. Bowring is willing to appear before the Commission for further questioning on the affidavits and documents that he and PJM have submitted to the Commission in response to its May 18 order.

⁸⁶ PJM Supplemental Response, July 2, 2007, at 19 n.33.

⁸⁷ PJM Supplemental Response, July 2, 2007, at 19 n.33.

⁸⁸ PJM does not deny, since the announced transfer of these employees, that it has taken the consistent position that the MMU should hire consultants rather than replace experienced staff with new hires, as Dr. Bowring stated before the Commission on April 5, 2007. In its July 2 supplemental response, PJM announces that it “has recently decided to authorize hiring of two additional full-time [MMU] employees to address the remaining vacancies [at the MMU].” PJM Supplemental Response, July 2, 2007, at 9-10. This step was taken only at the explicit and repeated request of Dr. Bowring. Those jobs have been posted, and Dr. Bowring urges PJM to act quickly to provide support to the MMU in the filling of those posts.

STEIN, MITCHELL & MEZINES

Respectfully submitted,



Robert F. Muse
Joshua A. Levy
Stein, Mitchell & Mezines LLP
1100 Connecticut Avenue, NW
Washington, D.C. 20036

Date: July 10, 2007