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June 8, 2006

Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(by Electronic Filing)

Re: ***PJM Interconnection, L.L.C.*; Docket Nos. ER06-826-000; Comments of the Organization of PJM States, Inc.**

Dear Ms. Salas:

Please accept for filing in the above-referenced matter electronically filed comments of the Organization of PJM States, Inc. Service has been made upon the service list as evidenced by the attached certificate of service.

Thank you for your attention to this matter. If you have any questions in reference to this filing, please contact me at 717-497-4031.

Sincerely,

s/ Dennis J. Buckley

Dennis J. Buckley

Executive Director

For: The Organization of PJM States, Inc.

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each party designated on the official service list compiled by the Secretary in Docket No. ER06-826-000.

. Dated at Washington, D.C. this 8th day of June, 2006.

s/ John A. Levin
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**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PJM Interconnection, L.L.C.)	Docket Nos.	ER06-826-000
)		ER06-826-001

**COMMENTS OF THE
ORGANIZATION OF PJM STATES, INC.**

Pursuant to Rule 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 CFR 385.214, and the Commission’s Notice of Filing issued May 3, 2006, in the above-captioned dockets, the Organization of PJM States, Inc. (“OPSI”)¹ hereby respectfully submits its Comments.

I. BACKGROUND

On March 31, 2006, PJM Interconnection, L.L.C. (“PJM”) filed proposed changes to Attachment M of the PJM OATT. Attachment M sets forth PJM’s market monitoring plan and the protocols for PJM’s Market Monitoring Unit (“MMU”). According to PJM’s filing, the proposed changes are designed to: (1) conform the MMU protocols to the Commission's Policy Statement on Market Monitoring (“Policy Statement”)²; (2) better delineate the MMU's role in the development of specific recommendations for the improvement of PJM's market design; and

¹ The members of OPSI are the: Delaware Public Service Commission; District of Columbia Public Service Commission; Illinois Commerce Commission; Indiana Utility Regulatory Commission; Kentucky Public Service Commission; Maryland Public Service Commission; Michigan Public Service Commission; New Jersey Board of Public Utilities; North Carolina Utilities Commission; Public Utilities Commission of Ohio; Pennsylvania Public Utility Commission; Tennessee Regulatory Authority; Virginia State Corporation Commission; and the Public Service Commission of West Virginia. All of these members support this filing.

² *Market Monitoring in Regional Transmission Organizations and Independent System Operators, Policy Statement on Market Monitoring Units*, 111 FERC ¶ 61,267 (2005).

(3) implement various clarifications to reflect PJM practices and update certain provisions.³ PJM requests that the proposed changes become effective July 17, 2006. On May 3, 2006, the Commission issued an Order granting an extension of time until June 8, 2006 to file comments in this proceeding.

II. SUMMARY OF POSITION

- Attachment M should be modified to specify that the PJM MMU will report to the PJM Board of Managers, rather than to the PJM President.
- Attachment M should be modified to provide the PJM MMU with specifically stated authority to monitor the conduct of PJM as system and market operator.
- An environment must be created where the MMU's inquiries, findings, conclusions, and reports will be conducted and provided independent of PJM management influence.
- The MMU's budget should be developed separately from the rest of the PJM operations budget, should be developed by the PJM MMU (rather than by PJM management), and should be separately approved by the Commission.
- MMU staff should report exclusively to the market monitor, who should retain all human resource decision-making authority for the MMU.
- The market monitor should be afforded substantial job security where removal from the position could only occur for just cause (i.e., substantial failure to execute the MMU monitoring, enforcement and reporting responsibilities prescribed in the PJM tariff).
- The MMU must have authority to select and retain and be represented by its own legal counsel independent of counsel used by PJM.
- The MMU should have the authority to file Comments and testimony in any proceeding at FERC or at any State Commission, without being required to obtain prior approval from PJM management.
- The PJM MMU must be able to obtain the information that it needs to perform its functions.
- Data bases and underlying programs developed by the MMU should remain under exclusive MMU control and should not be appropriated by other PJM organizational units.

³ PJM Filing Letter at 1.

- Attachment M should be modified to require the MMU to notify affected State Commissions when the MMU identifies a significant market problem that may require State Commission action.
- The MMU should have an obligation to inform all State Commissions in the PJM region whenever a referral is made to the Commission under Section IV.B of Attachment M.
- The MMU should be required to make available to a requesting State Commission any report that the MMU provides to the PJM Board.
- Attachment M should be modified to include a provision authorizing the MMU, upon request by a State Commission, to conduct specific inquiries and provide the requesting State Commission with a report on the results of such inquiries.
- State Commissions should be informed when PJM does not follow the MMU's recommendations.
- Attachment M should be modified so as to not impair important communications by the MMU to the Commission, and to permit the MMU to make formal filings or engage in formal communications with the Commission on any matter touching on competitive markets or market design.
- The provision of Section IV.B of Attachment M that prohibits the MMU from continued inquiry into a significant market problem or potential rule violation once that matter has been referred to the Commission is counter-productive and should be deleted from Attachment M.
- The MMU's role in crafting PJM Market Rules should not be overly constrained, and the MMU should be authorized to advocate and formally or informally propose changes to PJM market rules which in the opinion of the MMU are necessary to improve competitive markets or to remedy specific or structural problems related to competitive markets.
- Attachment M should be modified to identify the specific references to the PJM Market Rules and Sections in the PJM Tariff that provide PJM with specific market power mitigation authority and thereby make the referral provisions of Section IV.B of Attachment M inapplicable in those instances.

III. DISCUSSION

A. MMU Independence

MMU independence is critical to ongoing confidence in the MMU's performance and conclusions. At the outset, OPSI recognizes that the work undertaken by the PJM MMU serves

to benefit all of our markets. OPSI emphasizes that the proposed suggestions contained herein in no way reflect negatively towards PJM's current MMU. In fact, OPSI supports and commends the current market monitor and his staff. The suggestions contained herein are limited to process issues and the current internal reporting structure and relationship between PJM Management, PJM's Board and the PJM MMU. Hopefully, these modifications will improve the MMU's ability to aid our market.

On May 1, 2006, the OPSI Board of Directors adopted the following recommendation from the OPSI Market Monitoring Working Group:

The OPSI Board should pass an appropriate resolution stating its support for the principle that the PJM MMU should be independent of PJM management and should make information, recommendations and market analyses available to OPSI members on an independent basis. An appropriate organizational structural change should be implemented to ensure the independence of the PJM MMU.

We also note the statement in the PJM MMU's "2005 State of the Market Report" that,

Based on the experience of the MMU during its seventh year and its analysis of the PJM Markets, the MMU recognizes the need to continue to make the market monitoring function *independent*, well-organized, well-defined, clear to market participants and consistent with the policy of the United States Federal Energy Regulatory Commission (FERC). The MMU recommends that the Market Monitoring Plan be modified consistent with these objectives.⁴

We would like to reiterate OPSI's concern about the level of independence that PJM's MMU has from PJM management. We also agree with the MMU's 2005 State of the Market Report recommendation that the Market Monitoring Plan ("Attachment M") be modified to continue to make the market monitoring function independent of PJM Management. Our recommendations in this Section A are designed to improve MMU independence.

⁴ PJM MMU 2005 *State of the Market Report*, at 25 (emphasis supplied).

1. Attachment M Should be Modified to Specify That the PJM MMU Will Report to the PJM Board of Managers, Rather than to the PJM President.

Section V of Attachment M describes the reporting relationship of the MMU within the PJM organization. In particular, Section V.C states that the MMU “shall be accountable to the President and the PJM Board” and Section V.D specifies that the President shall ensure that the MMU has adequate resources and cooperation from PJM.

A reporting relationship that makes the MMU accountable to the President of PJM is problematic, given that one of the primary functions of the MMU, as specified in Section III.B of Attachment M, is to monitor for “actual or potential design flaws in the PJM Market.” It is PJM management, and ultimately, the PJM President, who is responsible for the design of the PJM markets and any flaws that design may contain.

A reporting relationship that makes the MMU’s employment and resources subject to the oversight of the PJM President does not provide the MMU with the degree of independence from PJM management that is needed for the MMU to thoroughly and effectively monitor and report on the performance of PJM management and of PJM market operations in general.

OPSI recommends that the Commission direct PJM to modify the MMU reporting relationship to have the MMU report to the PJM Board of Managers (or to a subcommittee of the Board that does not include any member of PJM management), rather than to the PJM President as currently structured.⁵

At a minimum, OPSI recommends that the following changes be made to Section V of Attachment M in this regard:

- Delete the words “the President and/or” from Section V.B.
- Delete the words “the President and” from Section V.C.

⁵ We note by way of comparison that, under the Midwest ISO’s tariff, the Midwest ISO IMM reports directly to the Midwest ISO Board, rather than to the Midwest ISO President. See Section 50.1(2) of the Midwest ISO’s Transmission and Energy Markets Tariff.

- Delete the word “President” from Section V.D and replace it with “PJM Board.”

2. Attachment M Should be Modified to Provide the PJM MMU With Specifically Stated Authority to Monitor the Conduct of PJM as System and Market Operator.

Section III.B of Attachment M describes the MMU’s responsibility to monitor for “actual or potential design flaws in the PJM Market.” However, OPSI notes that there is no language in Attachment M that specifically directs the MMU to monitor and report on PJM’s conduct in operating energy markets or controlling transmission operations. This is a serious shortcoming of Attachment M. We note by way of contrast, that the Midwest ISO’s Independent Market Monitor (“IMM”) is specifically charged with monitoring and reporting on the Midwest ISO’s conduct.⁶

The Commission should expect the MMU to monitor and assess how well PJM is fulfilling its responsibilities under the PJM tariff. Accordingly, OPSI recommends that Attachment M be modified to include specific language requiring the MMU to monitor PJM’s performance of PJM’s responsibilities (including transmission system control and market operations), and report its findings to the Commission.

3. An Environment Must Be Created Where the MMU’s Inquiries, Findings, Conclusions, and Reports Will be Conducted and Provided Independent of PJM Management and Other Sources of External Influence.

OPSI is concerned that, without a sufficient level of independence, the MMU’s inquiries, findings, reports and conclusions could be unduly influenced by PJM management or PJM members. In particular, the MMU must be able to initiate inquiries, make findings, and issue reports without prior review or approval from PJM management, or the PJM President. The goal

⁶ See Section 50.1(2) of the Midwest ISO’s Transmission and Energy Markets Tariff.

of MMU independence in these areas is to ensure the integrity of the MMU work product and to prevent the withholding or dilution of findings that might be critical of PJM or PJM market participants.

OPSI notes that in the case of the Midwest ISO, the Midwest ISO's tariff includes specific language to prevent the negative effects of all sources of external influence.

Specifically, the Midwest ISO tariff states,

The IMM shall be granted complete independence to perform those activities necessary to provide impartial and effective market monitoring within the scope of the 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.⁷

OPSI notes that PJM's Attachment M does not contain an analogous paragraph.

Accordingly, OPSI recommends that Attachment M be modified to include a paragraph containing language equivalent to that found in Section 50.2 of the Midwest ISO's tariff that would ensure that the MMU has appropriate independence from PJM management and PJM members so that it can perform its functions without any undue external influence. Operational independence of the MMU to perform its monitoring and reporting mandates is the only guarantee that the work products generated by the MMU earn the full confidence of all interested stakeholders and regulatory entities.

⁷ Section 50.2 of the Midwest ISO's tariff.

4. The MMU's Budget Should be Developed Separately From the Rest of the PJM Operations Budget, Should be Developed by the PJM MMU (Rather than PJM Management), and Should be Separately Approved by the Commission.

Concerning MMU budget matters, Attachment M states only that the President of PJM shall ensure that the MMU has adequate resources.⁸ Such language is deficient in that it neither assures adequate MMU resources nor contributes to an environment where the MMU can act independently of PJM management.

Given the potential for undue influence by PJM management that the current budgeting arrangement provides, OPSI recommends that the MMU's budget be developed by the MMU, separately from the rest of the PJM operations budget, and separately approved by the Commission. The MMU budget development process should involve a sufficient level of transparency so that all interested stakeholders and State Commissions can assure themselves that the MMU is being provided with adequate resources to perform its functions.

5. The MMU Staff Should Report Exclusively to the Market Monitor, Who Shall Have Authority Over All Human Resource Management Decisions for the Unit.

In order to ensure that the MMU is insulated from pressure by PJM management, PJM members, or other parties with an interest in the direction or outcome of the MMU's work, the MMU staff should report directly and exclusively to the market monitor. Additionally, all human resource decision-making authority applicable to the unit, including the hiring, termination, and promotion of MMU staff, should reside with the market monitor. Such organizational structure would facilitate an efficient, unencumbered execution of the MMU's responsibilities and enhance the accountability of the market monitor.

⁸ Section V.C of Attachment M.

6. The Market Monitor Should Be Afforded Substantial Job Security as a Necessary Feature of an Independent MMU.

A necessary feature of a functionally independent MMU is a market monitor who is impervious to external influence and is protected from arbitrary removal from the position. As head of the MMU, the market monitor directs the work of the unit and publicly represents that work product to PJM, various PJM stakeholders, and the Commission and State Commissions. Conscientious market monitoring activities will inevitably generate MMU work products and actions that are at odds with the interests of any number of these parties. Without adequate job security, the market monitor would be exposed to efforts to circumscribe MMU activities or achieve his removal. This potential has a chilling effect upon the quality of the MMU work product, notwithstanding the implementation of other positive measures designed to impart genuine independence to the unit. Accordingly, it is recommended that the market monitor be afforded necessary job security. Specifically, termination of the market monitor should only occur for demonstrable just cause: that is, a substantial failure to execute monitoring, enforcement or reporting responsibilities specified in the PJM tariff.

7. The MMU Must Have Authority to Select, Retain and be Represented by its Own Legal Counsel Independent of Counsel Used by PJM.

It is important for the PJM MMU to have the option of being represented by separate legal counsel from that used by PJM. Attachment M should be modified to allow the MMU to select separate counsel.

OPSI notes that in the case of the Midwest ISO, the tariff provides that, “The IMM may consult legal counsel for advice on antitrust, regulatory or other legal issues pertinent to this Plan.”⁹

We recommend that a similar provision be added to PJM’s attachment M specifying the MMU’s authority to retain legal counsel separate from that used by PJM.

8. The MMU Should Have the Authority to File Comments and Testimony in Any Proceeding at FERC or at any State Commission, Without Being Required to Obtain Prior Approval From PJM Management.

The MMU has significant expertise and plays a key role in the PJM markets. As such, the views of the MMU should be especially informative on those issues. However, OPSI notes that Attachment M does not provide the MMU with the authority to file comments and testimony in any proceeding at FERC or at any State Commission, as the MMU sees fit, without receiving prior approval from PJM management. Attachment M should be modified to ensure that the MMU does have such authority.

B. MMU Access to Information

1. The PJM MMU Must be Able to Obtain the Information that it Needs to Perform its Functions.

Section VI.B.1 of Attachment M outlines the procedures by which the MMU may request needed information from “entities possessing such information.” In making such a request for information, the MMU must explain its need for the information and its “inability to acquire the information from alternative sources.” Even if the MMU makes the showing of need and the showing of inability to acquire the information from alternative sources, Section VI.B.1 still

⁹ Section 53.2 of the Midwest ISO’s tariff.

makes the provision of such information to the MMU voluntary, even by PJM market participants.¹⁰ Section VI.B.2 of Attachment M provides that the MMU may initiate regulatory or judicial proceedings to compel the provision of reasonably requested information.

These constraints on the MMU's ability to access needed information are unreasonable. Indeed, these constraints are in conflict with the Commission's "Policy Statement on Market Monitoring Units" which makes clear that, "MMUs should have access to data and other resources to evaluate participant behavior and responses in these markets."¹¹

In contrast with PJM's Attachment M, Section 54.2.2(c) of the Midwest ISO's tariff requires market participants to respond to the Midwest ISO IMM's data requests, provided that the information requested reasonably falls within the bounds of a list of information types specified in the Midwest ISO tariff. A market participant receiving such an information request from the Midwest ISO IMM has the right to challenge the request, but only on the basis that the information requested does not reasonably fall within one of the information types specified on the list in the tariff. The Midwest ISO tariff provides a process similar to that in PJM's Attachment M for IMM requests for information that does not reasonably fall within the bounds of the pre-specified information types.

Accordingly, Attachment M should be modified to require PJM market participants to provide the MMU with information that is reasonably requested and that is not readily available from some other source, provided that the information requested falls within the bounds of a

¹⁰ The only exception to the voluntary provision is in Section VI.B.3, which states that "Transmission Owners and their affiliates" must provide information to the MMU when the MMU "requests information relating to possible undue preference between Transmission Owners and their affiliates." In all other cases where the MMU seeks additional information from "entities possessing such information," Section VI.B.1 provides that those entities may provide the information on a "voluntary basis."

¹¹ *Market Monitoring in Regional Transmission Organizations and Independent System Operators*, Policy Statement on Market Monitoring Units, 111 FERC ¶61,267 at P 3.

specified list of information types like that contained in Section 61.1 of the Midwest ISO's tariff. Market participants that receive such an information request should be provided with appeal rights similar to those in Section 54.2.2(c) of the Midwest ISO's tariff. The current procedures in Section VI.B.1 of Attachment M are adequate for MMU requests for information that are not of the type on the pre-specified list as well as for MMU requests for information from entities that are not PJM market participants.

2. Data Bases and Underlying Programs Developed by the MMU Should Remain Within the Sole Control of the MMU.

The extensive data bases and related programs developed by the MMU over the course of a number of years should remain under the exclusive control of the MMU and should not be subject to appropriation by any other organizational unit within PJM. The maintenance of and control over said data bases by the MMU is essential to the ongoing effectiveness of the MMU in executing its specified monitoring activities. The MMU should have the unencumbered ability to collect, synthesize and store data necessary to the execution of its functions and should not be required to rely upon outside sources for this essential element of market monitoring infrastructure.

C. The Relationship Between the PJM MMU and State Commissions

1. Attachment M Should be Modified to Require the MMU to Notify Affected State Commissions When the MMU Identifies a Significant Market Problem That May Require State Commission Action.

Section IV.A of Attachment M contemplates that the MMU may identify a "significant market problem" or potential rule violation that "may require" "action" by "one or more state commissions." However, if the MMU does identify a significant market problem or potential rule violation that may require action by one or more State Commissions, notification under

Section IV.A is not made to the affected State Commissions. Rather, Section IV.A states that, under such circumstances, the MMU is required to make notification only to the Commission. This provision of Attachment M is incomplete and unreasonable. Whenever the MMU identifies a market problem, the solution of which might reasonably involve one or more State Commissions, those affected State Commissions should immediately be notified. By way of contrast, we note that Section 52.3 of the Midwest ISO's tariff requires the Midwest ISO IMM to:

...notify the FERC and the affected State Regulatory Commissions immediately in the event the IMM identifies a significant market problem that may require (i) further investigation; (ii) a change in the Transmission Provider's Tariffs or market rules; or (iii) action by the FERC and/or one or more State Regulatory Commissions.¹²

Section IV.C.5 of Attachment M states that the MMU "may" consult with Authorized Government Agencies "concerning the need for specific investigations or monitoring activities." However, nothing currently in Attachment M requires the MMU to notify a State Commission, even if the MMU identifies a "significant market problem" or potential rule violation that would require action by that State Commission. Accordingly, Attachment M should be modified to provide notice to all affected State Commissions at the same time notice is provided to the Commission under Section IV.A of Attachment M.

2. The MMU Should Have an Obligation to Inform All State Commissions in the PJM Region Whenever a Referral is Made to the Commission Under Section IV.B of Attachment M.

Section IV.B of Attachment M describes the MMU's proposed new referral procedures. The paragraph provides for the MMU to make a referral to the Commission whenever the MMU

¹² Section 52.3 of the Midwest ISO's tariff (underlining added).

has reason to believe, based on sufficient credible information, that a market participant has violated a PJM market rule or FERC market rule.

In most, if not all cases, State Commissions will have an interest in matters referred to the Commission under Section IV.B. Indeed, as described above, Section IV.A envisions that, in some cases, the matter under referral “may require” “action” by “one or more state commissions.” Section IV.B, however, does not even provide for notification of State Commissions when a referral is made to the Commission. It is unreasonable to expect State Commissions to take action when they are not notified about the MMU findings and not informed about the MMU’s referrals to the Commission. Accordingly, Attachment M should be modified to require the MMU to inform all State Commissions in the PJM Region whenever a referral is made by the MMU to the Commission under Section IV.B.

3. The MMU Should be Required to Make Available to a Requesting State Commission Any Report that the MMU Provides to the PJM Board.

Section VII.A explains that the MMU shall provide reports to the PJM Board. Section VII.B explains that, upon request of a State Commission, the MMU may provide the State Commission with a report that it provides to the PJM Board unless one of the following conditions holds: (1) restrictions of applicable law; (2) restrictions of applicable regulations; (3) restrictions in applicable provisions of the PJM Operating Agreement; (4) restrictions in applicable provisions of the PJM Tariff; (5) it is not “practicable”; or (6) the request for the report is not “reasonable.”

Given State Commissions’ responsibilities, these restrictions on State Commissions’ legitimate access, upon request, for copies of reports provided by the MMU to the PJM Board are not reasonable. We note by way of contrast that the Midwest ISO’s tariff Section 50.1(2)

specifically requires the Midwest ISO's IMM to report its findings to the State Commissions. Accordingly, Section VII.B of Attachment M should be modified to make clear that State Commissions shall be provided, upon request and with appropriate conditions for any needed confidentiality, with any report that the MMU provides to the PJM Board.

4. Attachment M Should Be Modified to Include a Provision Authorizing the MMU, Upon Request by a State Commission, to Conduct Specific Inquiries and Provide the Requesting State Commission with a Report on the Results of Such Inquiries.

The existing PJM MMU Plan includes in Section VII.B an obligation by the MMU to prepare and provide reports requested by State Commissions. This obligation has been deleted by PJM in its proposed filing. The existing language reads:

B. Reports to Government Agencies: The Marketing Monitoring Unit shall contemporaneously submit to the Commission the reports provided to the PJM Board, subject to protection of confidential, proprietary and commercially sensitive information and the protection of the confidentiality of ongoing investigations and monitoring activities. Subject to the same provision regarding confidentiality, the Market Monitoring Unit also shall submit to other Authorized Government Agencies the reports provided to the PJM Board pursuant to Section VII.A. *and other such reports, either as may be requested by such Agencies, or as may be deemed appropriate under Section IV.B.5.*¹³

There is no description of or explanation for this deletion in PJM's Filing Letter describing the filing. The deletion is of great concern to the State Commissions, which have relied in the past on the tariff provision to obtain information about wholesale market activities of special concern.

Section VII.B purports to be about "Reports to Government Agencies." However, as described above, Section VII.B only covers the conditions under which an Authorized Government Agency, other than the Commission, may get access to a report that the MMU

¹³ Emphasis supplied.

provides to the PJM Board. Attachment M should be modified to provide that, where reasonable and practicable, the MMU will, at the request of a State Commission, undertake an inquiry and provide a report to the requesting State Commissions (and other State Commissions, if applicable) on the inquiry. Inclusion of such a provision in PJM's Attachment M would not be unreasonable. For example, the Midwest ISO's tariff contains such a provision, stating, "The IMM will also respond to requests from FERC or State Regulatory Commissions for additional analysis . . . subject to its obligation to protect the confidentiality of the data."¹⁴ The Midwest ISO has the following detailed provision in Section 56.1 of its tariff:

Any Interested Government Agency may, at any time, submit information to the IMM concerning any matter relevant to the responsibilities of the IMM under the Plan, or may submit a request to the IMM for it to conduct an investigation. Such submissions or requests may be made on a confidential basis. Acting in a timely manner, the IMM shall carry out the requested investigation to the extent deemed reasonably necessary by the IMM. Subject to redaction or other measures necessary for the protection of Confidential Information, the IMM shall report the results of these investigations to the Transmission Provider, the agency requesting the investigation, and as appropriate to the FERC and other Interested Government Agencies.¹⁵

The Commission should direct PJM to include a similar provision in Attachment M.

5. State Commissions Should be Informed When PJM Does Not Follow the MMU's Recommendations.

Section IV.C.4 of Attachment M states, "If PJM does not follow the Market Monitoring Unit's recommendations by filing requested rule changes or complaints with the Commission, the Market Monitoring Unit shall make its views known to the Commission staff and the PJM Members, either orally or in writing."

¹⁴ Section 50.1(2) of the Midwest ISO's Tariff.

¹⁵ Section 56.1 of the Midwest ISO Tariff.

Because of the concern for MMU independence and otherwise, State Commissions also have an interest in being informed about the circumstances where PJM does not follow the MMU's recommendations. Accordingly, Attachment M should be modified to insert the words "State Commissions" between the words "Commission staff" and "the PJM Members" in Section IV.C.4.

D. The Relationship Between the PJM MMU and the Commission

1. Attachment M Should Be Modified So As To Not Impair Important Communications by the MMU to the Commission

In several places in Attachment M—notably, Sections IV.C.4 and IV.C.7—the MMU is restricted to reporting to the *Commission staff*, rather than to the Commission. PJM's March 31 Filing Letter explains that the reason for this restriction is to make clear that MMU recommendations under those sections of Attachment M "do not come under the purview of Sections 205 or 206 of the Federal Power Act, even though they may take the form of detailed proposals to revise the Tariff."¹⁶ PJM states that it "does not intend this clarifying language to interfere with the Market Monitoring Unit's critical ability to communicate with the Commission."¹⁷

Despite PJM's stated intention, the restrictions in Sections IV.C.4 and IV.C.7 would interfere with the MMU's ability to communicate with the Commission. PJM's stated concern that MMU communications to the Commission might be confused as formal Section 205 or 206 filings is unfounded. The Commission often accepts "informational" filings and other such submittals without treating them as formal Section 205 or 206 filings. Such practices could be followed concerning the MMU communications covered by Sections IV.C.4 and IV.C.7 of

¹⁶ PJM Filing Letter at 6.

¹⁷ PJM Filing Letter at 6.

Attachment M. Accordingly, OPSI recommends that the following modifications be made to Attachment M:

- Insert the words “Commission or the” between the words “known to the” and “Commission staff” in Section IV.C.4.
- Insert the words “Commission or” between the words “directly to the” and “Commission staff” in Section IV.C.7.

E. Restrictions on the MMU in the Post-Referral Period

1. The Provision of Section IV.B of Attachment M That Prohibits the MMU From Continued Inquiry Into a Significant Market Problem or Potential Rule Violation Once that Matter has been Referred to the Commission is Counter-Productive and Should be Deleted from Attachment M.

As discussed elsewhere in these Comments, Section IV.B of Attachment M includes a provision for MMU referrals to the Commission. The final paragraph in Section IV.B of Attachment M states:

Following the submission of such a referral, the Market Monitoring Unit will continue to inform the Commission of any information relating to the referral that it discovers within the scope of its regular monitoring function, *but it shall not directly question any Market Participant with regard to the specific occurrence or activity that was the subject matter of the referral* except at the express direction of Commission staff.¹⁸

This sentence in proposed Attachment M appears designed to implement the direction provided in Protocol Nos. 1 and 5 of Appendix A to the Commission’s Policy Statement on Market Monitoring Units. The relevant provisions of those Protocols state:

Once the MMU has obtained sufficient credible information to warrant referral to the Commission, the MMU should immediately refer the matter to the Commission *and desist from independent action related to the alleged Market Violation[s]*.¹⁹

and,

¹⁸ Emphasis supplied.

¹⁹ *Market Monitoring in Regional Transmission Organizations and Independent System Operators*, Policy Statement on Market Monitoring Units, 111 FERC ¶61,267, Appendix A at 2 (emphasis supplied).

Following referral to the Commission, the MMU should continue to notify and inform the Commission of any information that the MMU learns of that may be related to the referral, *but the MMU should not undertake any investigative steps regarding the referral* except at the express direction of the Commission Staff.²⁰

[emphasis supplied]

Without arguing whether or not the language in the last sentence of Section IV.B of proposed Attachment M faithfully implements the direction provided in the two Commission protocols quoted above, OPSI believes that the process proposed in the last sentence of Section IV.B of Attachment M unnecessarily restricts the MMU and would prove to be counter-productive if implemented.

When a referral is made to the Commission, the MMU is in the best position to continue to examine the issue and to conduct follow-up inquiries in the same manner as was conducted by the MMU prior to the referral. Such continued questioning and information gathering can likely best be conducted by the MMU in a timely and thorough manner. Such continued MMU inquiries need not interfere with any other questioning or information gathering that the Commission staff may wish to undertake, either independently of the MMU or in conjunction with the MMU.

In short, there is no apparent reason for the Commission to prohibit the MMU from making further inquiries into a matter even though the matter has been formally referred to the Commission. Furthermore, the MMU may well be in the best position to conduct such further inquiries.

In addition to those reasons, restricting the MMU from inquiring into a matter once that matter has been referred to the Commission could inadvertently hamstring the MMU from

²⁰ *Market Monitoring in Regional Transmission Organizations and Independent System Operators*, Policy Statement on Market Monitoring Units, 111 FERC ¶61,267, Appendix A at 4 (underlining added).

looking into related, but separate matters. Similarly, it could hamstring the MMU from looking into additional violations of the same type by the same party. Accordingly, the restrictions in Protocols 1 and 5 and the restrictions in the last sentence of Section IV.B of Attachment M could well prove to be counter-productive to the shared objective of effective market monitoring.

Accordingly, we recommend that the last sentence of Section IV.B of Attachment M be deleted.

F. MMU Role in Crafting PJM Market Rules

1. The MMU's Role in Crafting PJM Market Rules Should Not be Overly Constrained

PJM's Filing Letter expresses a concern about the MMU's role in crafting PJM Market Rules. PJM states,

the Market Monitoring Unit often has taken a direct role in crafting specific tariff amendments and in leading them through the stakeholder process. The Market Monitoring Unit will continue to have a collaborative and consulting role in market design. However, having a lead or sponsoring role in designing the very market rules that one must then critique, blurs the respective roles of the RTO to design market rules and the Market Monitor to critique them. Consistent with the Policy Statement's guidance, PJM believes that organizational transparency and administrative coordination would benefit from greater clarity in defining the responsibilities of those whose purpose it is to design and administer the markets from those charged with subjecting the market design to continual and impartial scrutiny.²¹

PJM does not provide any evidence supporting its concern about the MMU's role in crafting market rules. Nevertheless, PJM states in its Filing Letter that its concern about the MMU's role in this regard is addressed through use of the term "recommend" in Section IV.C.2. PJM states that the MMU will continue to have "full authority to recommend changes to the PJM Market Rules."²² However, PJM states, "The term 'recommend' contemplates that such

²¹ PJM Filing Letter at 5.

²² PJM Filing Letter at 5.

communications will identify the issue and proposed solutions, but will not constitute actionable submittals.”²³

PJM’s proposal to prohibit the MMU from crafting “actionable submittals” in the form of new PJM Market Rules is not consistent with previous Commission guidance on this issue. For example, in its “Guidance Order on Expedited Tariff Revisions for Regional Transmission Organizations and Independent System Operators, the Commission stated, “where an RTO MMU identifies a flawed tariff provision or rule meeting the criteria above, it should: *develop a proposal to remedy the tariff or rule flaw*; advise the RTO of its finding; and request that the RTO make a section 205 filing proposing a revision.”²⁴

The Commission’s Order directs the MMU to develop a proposal to remedy the tariff or rule flaw. The Commission’s Order does not make a distinction between actionable submittals and non-actionable submittals as PJM proposes. Accordingly, OPSI recommends that the Commission make clear in its Order on PJM’s Attachment M filing that the MMU’s role in crafting market rules and tariff language is not limited to non-actionable submittals.

G. PJM Market Power Mitigation Authority

1. Attachment M Should be Modified to Identify the Specific References to the PJM Market Rules and Sections in the PJM Tariff that Provide PJM with Specific Market Power Mitigation Authority and Thereby Make the Referral Provisions of Section IV.B of Attachment M Inapplicable in Those Instances.

In the Policy Statement on Market Monitoring Units, the Commission stated,

. . . it is appropriate for ISOs/RTOs to administer certain matters that concern market behavior (with appeal rights to the Commission) if the behavior is objectively identifiable and set forth in the ISO/RTO tariff and for which the

²³ PJM Filing Letter at 5.

²⁴ 111 FERC ¶ 61,009 (2005), [emphasis supplied].

violations have clear Commission-approved sanctions that are set forth in the tariff.²⁵

Section IV.B of Attachment M reflects this provision of the Commission's Policy Statement. In this regard, Section IV.B states,

The foregoing [referral provisions] notwithstanding, a clear, objectively identifiable violation of a PJM Market Rule, where such rule provides for an explicit remedy that has been accepted by the Commission and can be administered by PJM, shall not be subject to the [referral] provisions of this section IV.B.

When there is such a PJM Market Rule that provides for an explicit remedy that has been accepted by the Commission and can be administered by PJM, then the provisions of Section IV.B that would require the MMU to refer a violation of PJM Market Rules to the Commission will *not* apply. Rather, in such circumstances, PJM would simply implement the remedy that is specified in that particular PJM Market Rule and previously approved by the Commission.

OPSI is not protesting that proposed process. However, the language of Attachment M requires some fine-tuning and bolstering in this area. In particular, proposed Attachment M does not provide cross-reference to the specific PJM Market Rules and the specific sections of the PJM tariff that provide PJM with the clear Commission-approved market power mitigation authority that would lead to the inapplicability of the normal referral process in Section IV.B of Attachment M in those instances. A casual reader of Attachment M should be able to easily discern the specific circumstances in which the referral procedures of Section IV.B will apply and the specific circumstances in which those circumstances will not apply. Attachment M does not currently allow for that level of discernment.

²⁵ *Market Monitoring in Regional Transmission Organizations and Independent System Operators*, Policy Statement on Market Monitoring Units, 111 FERC ¶61,267 Appendix A at 1.

Accordingly, the Commission should direct PJM to modify Attachment M to provide cross-references to the specific PJM Market Rules for which the referral procedure of Section IV.B will not apply.

H. Miscellaneous Recommended Modifications to Attachment M

- Delete the words “With the approval of the PJM Board” from the beginning of Section IV.C.3.

This introductory phrase in Section IV.C.3 of Attachment M implies that the MMU must obtain formal approval from the PJM Board in each instance before it can proceed with any of the activities listed in Section IV.C.3. Codifying this kind of mandatory obligation in the tariff could unduly delay or restrict the MMU from taking needed timely action in some cases.

We would also point out that, in Section III.A.1 above, we recommend that the MMU report to the PJM Board, rather than the PJM President. If the PJM Board believes it necessary for the MMU to obtain specific approval from the PJM Board before undertaking any of the actions listed in Section IV.C.3 of Attachment M, the PJM Board can adopt such a requirement as an internal measure. The requirement need not be codified in the tariff to accomplish the result, and doing so could prevent timely MMU action.

- Delete the words “within its purview” from the second sentence in Section VII.A.

This phrase is overly restrictive. Attachment M should reflect and respect the professionalism of the PJM MMU. There is no reason to expect that the MMU would include recommendations to the PJM Board that are not relevant. Accordingly, the restrictive phrase at the end of the second sentence in Section VII.A is not needed and should be deleted.

IV. CONCLUSION

WHEREFORE, for all of the reasons explained above, OPSI urges the Commission to direct PJM to modify Attachment M in the manner described herein.

Respectfully submitted,

/s Dennis J Buckley
Dennis J. Buckley
Executive Director
Organization of PJM States, Inc.

Dated: June 8, 2006

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