



Organization of PJM States, Inc. (OPSI)

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September 14, 2007

Kimberly D. Bose, Secretary
Nathaniel J. Davis, Sr., Acting Deputy Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: **Wholesale Competition in Regions with Organized Electric Markets, Docket Nos. RM07-19-000 and AD07-000;** Comments of the Organization of PJM States, Inc. on Advance Notice of Proposed Rulemaking

Dear Ms. Posey;

Please accept for filing in the above-referenced matter electronically filed Comments of the Organization of PJM States, Inc., regarding the Commission's June 22, 2007 advance notice of proposed rulemaking at the above dockets.

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 717-787-5978.

Sincerely,

s/ John A. Levin
John A. Levin
Assistant Counsel

Enclosures

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

Wholesale Competition in Regions with Organized Electric Markets))	Docket Nos. RM07-19-000 AD07-7-000
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**COMMENTS OF THE ORGANIZATION OF PJM STATES, INC.
ON ADVANCE NOTICE OF PROPOSED RULEMAKING**

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I. INTRODUCTION

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 CFR 385.211, the Organization of PJM States, Inc. (“OPSI”),¹ offers these comments in response to the Commission’s request for comments on proposals set forth in the Advance Notice of Proposed Rulemaking (“ANOPR”) issued by the Commission on June 22, 2007. The ANOPR proposes numerous reforms intended to improve the operation of organized wholesale electric markets in RTO/ISO regions. The ANOPR invites all interested persons to submit comments in response to specific questions set forth in the ANOPR. OPSI appreciates the opportunity to respond.

OPSI supports the Commission’s goal of making “improvements to the operation of organized markets without undoing or upsetting the significant efforts that have already been made in providing demonstrable benefits to wholesale customers.”² OPSI appreciates the Commission’s efforts to improve the functioning of wholesale electric markets. OPSI also appreciates the Commission’s statement that it is not seeking to “appropriate jurisdiction from our state colleagues.”³

OPSI’s comments focus on the following ANOPR proposals and issues: (1) Market Monitoring Unit (MMU) structure, independence, functions, tools and tariff provisions; (2) market power mitigation; (3) a code of ethics for market monitors; (4) market monitoring and the information needs of State Commissions; (5) the release of bid and offer data to interested

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.

² ANOPR, at P 13

stakeholders; (6) referrals to the Commission by a market monitor; (6) demand response and pricing during scarcity conditions; (7) the facilitation of long-term power contracting in organized RTO/ISO markets; (8) improving the responsiveness of RTO/ISO Boards; (9) executive management practices of RTO/ISOs; and (10) RTO/ISO budget practices.

II. DISCUSSION

A. MARKET MONITORING POLICIES

OPSI agrees with the Commission that “market monitors have played an integral role in the organized electric markets” and that they provide “valuable reporting and analysis services not only to the Commission, but also to the RTOs and ISOs, to market participants, and to state commissions.”⁴ However, OPSI argues that definitive reform of current market monitoring policies and practices is warranted in light of recent allegations that PJM has violated certain tariff provisions and FERC policy prescriptions intended to foster an independent market monitoring function. These allegations have resulted in a crisis of confidence in the markets operated by PJM. Restoration of confidence in those markets will require substantial action by the Commission to ensure successful performance of the MMU function within RTO/ISOs.

OPSI’s comments and recommendations detailed herein are substantially informed by its experience litigating the matters before the Commission in Dkt. Nos. AD07-8, EL07-56 and EL07-58, in which OPSI has proffered a variety of specific recommendations designed to foster a robust, independent MMU function within PJM and, thereby, restore confidence in the PJM markets. The recommendations advanced in those dockets by OPSI respond to the evidence of deficiencies in the extant PJM market monitoring structure, including the fact that the market

³ *Id.*, at P 3

⁴ *Id.*, at P 95

monitoring provisions of PJM's tariff as implemented by PJM may have failed to adequately protect the independence and effectiveness of the PJM MMU.

1. Market Monitoring Unit ("MMU") Structure and Independence

a. Internal vs. External MMU

OPSI acknowledges the Commission's observation that there is "no appreciable difference among the performance of the market monitors that can be attributed to whether they are external or internal to their RTO or ISO."⁵ OPSI does not share the unique perspective of the Commission and its oversight of all RTOs; rather, OPSI's experience with practical market monitoring is limited to interactions with the PJM MMU. That experience has provided OPSI with a unique perspective that we believe will be of substantial use to the Commission in considering the proposals advanced in the ANOPR.

OPSI agrees that "the particular structural relationship between the MMU and the RTO or ISO [is] of secondary importance, provided that the ISO/RTO tariff contain[s] provisions ensuring independence on the part of the MMU."⁶ There is certainly nothing intrinsically magical about either an internal or external market monitoring unit model; instead, the critical question that must be addressed in any effort to ensure adequate performance of the market monitoring function is the extent to which the tariff provisions under which the market monitor operates guarantee that the market monitor will be free from interference by market participants or RTO officials, provided with sufficient financial resources, and afforded sufficient access to data and RTO personnel to provide objective and effective market monitoring services. The extent to which a particular RTO tariff provides these assurances does not depend on whether the MMU is an internal component of or external to the RTO. Accordingly, OPSI agrees with the

⁵ ANOPR, at P 110

Commission's conclusion to not impose a "one size fits all" approach to the structure of MMUs.

b. MMU Reporting Structure

The Commission proposes that each RTO/ISO be required to have its MMU "report either directly to the RTO's or ISO's board of directors or directly to a committee of independent board directors."⁷ As a result of its participation in other Commission proceedings in which the adequacy of the PJM market monitoring function has been at issue, OPSI has given considerable thought to the issue of MMU supervision. In those other proceedings, OPSI has advanced two alternative proposals. First, OPSI has suggested the establishment of Federal-State Joint Boards on Market Monitoring and Enforcement for purposes of MMU reporting. Under OPSI's proposal, each Joint Board would consist of at least one FERC Commissioner and a state commissioner from each state in the PJM footprint. OPSI suggested that an appropriate Joint Board for the PJM region could "supplant the role of the PJM Board as regards the accountability of the PJM MMU."⁸ Secondly, OPSI has also proposed that, rather than reporting jointly to the PJM President and the PJM Board, the PJM MMU report directly to the PJM Board or to a subcommittee of the PJM Board that does not include any member of PJM's management.⁹ OPSI's alternative proposal appears to be consistent with the Commission's ANOPR proposal, with the exception of the additional requirement in OPSI's alternative proposal that the Board or Board subcommittee not include any member of RTO/ISO senior management.

Although OPSI does not have a consensus position favoring one or the other of the

⁶*Id.*, at P 109

⁷ ANOPR, at P 113

⁸ OPSI Complaint, Motion for Interim Relief, Request for Fast Track Processing and Shortened Response Time, April 23, 2007, at pp. 34-35.

⁹ *Id.* at p. 35

alternatives that it has previously suggested, it does believe that either of these proposals would help to insulate the market monitoring function from interference by market participants or RTO/ISO management. As a result of the record developed in the complaint proceeding currently pending before the Commission in Dkt. Nos. EL07-57 and 58, OPSI is particularly concerned about ensuring non-interference by RTO/ISO management. The Joint Board construct achieves the desired by placing responsibility for directly supervising the market monitoring function on government regulators, who are not beholden to market participants or RTO/ISO management. The alternative approach suggested by OPSI assures adequately independent supervision by vesting that responsibility in the non-managerial members of the RTO/ISO board.

As OPSI views the situation, there are strengths and weaknesses to each of the approaches that it has previously suggested. The Joint Board approach more thoroughly addresses the Commission's expressed concern for both MMU independence and MMU accountability. Adoption of the Joint Board approach to MMU accountability would also address concerns that the Commission refrain from delegating any of its market oversight responsibility to a non-governmental entity. On the other hand, the proposal that supervision of the market monitoring function be provided by the RTO/ISO Board would avoid the necessity for direct governmental involvement in the operation of the MMU. In the event that the Commission decides not to adopt the Joint Board proposal and proceeds to implement its proposal for MMU reporting to the RTO/ISO Board, the Commission must ensure that such supervision minimizes the risk that any representatives of the RTO/ISO's management serving on the board will be able to use his or her board membership to interfere with the MMU's independence. The only way to achieve this end is to prohibit any member of the RTO/ISO's management serving on the Board from having any role in supervising the operation of the

MMU. As a result, OPSI urges the Commission to suggest the adoption of one or the other of these supervision proposals in the event that it decides to proceed with the issuance of a Notice of Proposed Rulemaking (NOPR) in this proceeding.

c. Focus on MMU Independence

Regardless of any decisions the Commission makes with respect to MMU structure, OPSI urges the Commission to focus primarily on MMU independence. The Midwest ISO's tariff specifically states that:

The IMM [independent market monitor] 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.¹⁰

The Commission should require the insertion of similar language in all RTO/ISO tariffs as a first step toward ensuring adequate independence for the market monitoring function. The inclusion of such a statement of general principles in RTO/ISO tariffs should be supplemented with specific tariff provisions addressing each of the essential elements of operational independence in order to give specific content to this general independence requirement. In addition to the approach to MMU supervision outlined above, OPSI has offered a comprehensive set of proposals intended to ensure MMU independence in other proceedings.¹¹ Those proposals, which should be explicitly included in the RTO/ISO tariff, can be briefly described as follows:

- 1) Neither the market monitor nor MMU shall be disciplined or discharged without a showing of just cause, with any discharge decision subject to

¹⁰ Section 50.2 of the Midwest ISO's tariff.

¹¹ See, OPSI Comments in Docket Nos. ER06-826 and EL07-58, June 8, 2006 and OPSI Complaint, Motion for Interim Relief, Request for Fast Track Processing and Shortened Response Time, April 23, 2007

- review by the Commission.
- 2) MMU staff shall report exclusively to the market monitor, who will retain all human resource decision-making authority for the MMU, including hiring, promotion, and termination of MMU staff.
 - 3) The MMU shall have the unencumbered ability to collect, synthesize and store data necessary to the execution of its functions.
 - 4) MMU data and databases shall remain under the exclusive control of the MMU.
 - 5) All market participants should have a duty to respond to reasonable MMU requests for information relevant to the monitoring of RTO/ISO markets, subject to a market participant's right to challenge a request claimed to be unreasonable before the Commission.
 - 6) The MMU budget shall be sufficient to ensure the proper execution of all duties and responsibilities assigned to the MMU pursuant to the Commission-approved tariff.
 - 7) The MMU shall have authority to select, retain and be represented by legal counsel independent of counsel used by the RTO/ISO and to engage in appropriate communications with the Commission and state regulatory agencies without the necessity for prior RTO/ISO review or approval.

OPSI urges the Commission to include these elements in any rules that it ultimately chooses to propose in this proceeding.

2. MMU Tools

In light of the recommendations that it has advanced in other proceedings, OPSI agrees with the Commission that MMUs must have “adequate tools with which to perform their job.”¹² OPSI strongly supports the Commission's proposal to require “each RTO and ISO to include in its tariff a provision imposing upon itself the obligation to provide its MMU with access to market data, resources, and personnel sufficient to enable the MMU to carry out its functions.”¹³ However, as footnote 94 of the ANOPR notes, PJM's Attachment M contains Commission approved tariff language that details the provision of resources and access to market data for PJM's MMU. Despite that fact, substantial controversy still exists within the PJM footprint over

¹² ANOPR, at P 111

¹³ *Ibid.*

these very issues.¹⁴ As a result, OPSI believes that merely having in place a tariff provision requiring an RTO/ISO to “provide its MMU with access to market data, resources, and personnel sufficient to enable the MMU to carry out its functions” will not, in and of itself, suffice to eliminate all RTO/ISO-MMU problems regarding these issues.

The Commission’s proposal to require each RTO/ISO to adopt a tariff provision “directing the MMU to report to the Commission any concerns it has with inadequate access to market data, resources, or personnel” will be of undoubted benefit.¹⁵ However, without specific tariff provisions ensuring that the MMU is sufficiently independent from the RTO/ISO, concern about retaliation and retribution could still constrain an MMU’s enthusiasm for communicating with the Commission or the public about important market-related issues. The specific recommendations that OPSI has made in other proceedings and outlined here should, for that reason, be included in RTO/ISO tariffs in addition to the general protection suggested by the Commission in the ANOPR.

3. MMU Functions

a. MMU Advice on Rule and Tariff Changes

OPSI supports the Commission’s proposal to require each MMU to continue to advise its RTO/ISO about “any recommendations for rule or tariff changes.”¹⁶ OPSI also supports the Commission’s proposal to require MMUs to advise the Commission and other interested entities, including state commissions, about any recommendations for rule or tariff changes.¹⁷ The MMU has critical expertise in identifying market design elements that will facilitate appropriate market participant behavior and the development and operation of workably competitive markets.

¹⁴ See, e.g., OPSI Comments in Docket Nos. ER06-826 and EL07-58, June 8, 2006.

¹⁵ ANOPR, at P 111

¹⁶ ANOPR, at P 115

However, the Commission's proposed requirements for the MMU should be more specific than the proposals discussed in the ANOPR. The exact contents of these requirements will, of necessity have to be worked out by either the Commission or the stakeholders of the individual RTO/ISOs, subject to Commission review and approval.

The mere provision of MMU advice as proposed in the ANOPR is not, however, sufficient. As has been made abundantly clear during the PJM market monitor's testimony at the April 5, 2007, technical conference and in his subsequent filings with the Commission,¹⁸ RTO/ISOs are not obligated to follow MMU recommendations for remedying defective market designs or outcomes under current Commission rules and approved tariff provisions. As a result, OPSI has proposed the adoption of a requirement that PJM be required to explain any failure to follow or adopt MMU recommendations concerning market design changes and other aspects of RTO operations. More specifically, OPSI recommended that the Commission require PJM to:

Revise the existing Market Monitoring Plan to require PJM to report in detail to the Commission and State Agencies when and why it fails or refuses to follow the recommendation of the MMU with regard to any existing or proposed aspect of the MMU structure or operation, the existing or proposed design or operation of the transmission facilities operated by PJM, the behavior or actions of any market participant or any aspect of PJM markets, either existing or proposed.¹⁹

The inclusion of such a requirement in any rules ultimately adopted in this proceeding, in conjunction with the other proposals outlined above, should facilitate achievement of the Commission's goal of improving the operation of the market monitoring function.

b. MMU Referrals

OPSI supports the Commission's proposal to retain the requirement from its *Policy*

¹⁷ *Ibid.*

¹⁸ Affidavit of Dr. Joseph E. Bowring, Dkt. Nos. EL07-56 and EL07-58, June 12, 2007, at pp. 3, 27-34.

¹⁹ OPSI Complaint, Motion for Interim Relief, Request for Fast Track Processing and Shortened Response Time, April 23, 2007, at p. 36

Statement on Market Monitoring Units that the MMU “make a referral to the Commission in all instances where the MMU has reason to believe that a market violation may have occurred.”²⁰

OPSI also supports the Commission’s proposal to specifically require MMUs to refer suspected violations of the Anti-Manipulation Rules that were adopted in the Commission’s *Prohibition of Energy Market Manipulation Order*²¹ for Commission consideration. OPSI notes that PJM’s market monitoring plan already requires the PJM MMU to monitor for violations of the Commission’s Anti-Manipulation Rules and to refer suspected violations to the Commission.²²

OPSI notes the Commission’s new proposal to require each MMU to “refer any suspected violations of other Commission-approved rules and regulations, such as Codes of Conduct and Standards of Conduct.”²³ While some MMUs may already be performing this function, PJM’s tariffed Market Monitoring Plan does not specifically require the MMU to monitor and report such suspected violations of other Commission-approved rules and regulations. Thus, the proposal advanced in the ANOPR would require a significant expansion of functions and duties for PJM’s MMU. OPSI supports the Commission’s proposal to expand the MMU’s reporting and referral obligations as outlined in the ANOPR. However, such an expansion of MMU duties will require the commitment of additional resources to the market monitoring function, so the Commission will need to act to ensure that the MMUs have access to adequate resources as part of the adoption of this proposal.

Finally, OPSI notes the absence of a requirement for MMU’s to report the required Commission referrals to the relevant state commissions. State commissions have an obvious interest in detecting and remedying anti-competitive market behavior because of the potentially

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

²¹ ANOPR, at P 116, citing *Prohibition of Energy Market Manipulation*, FERC Stats. & Regs. ¶ 31,202 (2006).

serious effects of such behavior on the retail electric prices paid by end-user customers. Furthermore, remedying such anti-competitive behavior may require action by one or more of the affected state commissions, a fact that has been acknowledged by the Commission in approving the PJM tariff.²⁴ State commissions will be unable to take appropriate action if they lack information about the reported violation. For that reason, as OPSI has previously recommended,²⁵ RTO/ISO tariffs should require MMUs to inform state commissions of such referrals to allow state commissions to take appropriate action on behalf of their citizens.

c. MMU Analyses, Studies and Reports

As discussed elsewhere in these comments, MMU tariffs should be revised to the extent needed to clarify that the MMU will conduct analyses and provide studies or reports when reasonably requested to do so by a state commission or regional state committee. The Midwest ISO tariff contains language that could serve as a model for such a provision. The language in question states that:

The IMM [independent market monitor] will also respond to requests from FERC or State Regulatory Commissions for additional analysis or data the IMM has in its possession, subject to its obligation to protect the confidentiality of the data.²⁶

[Emphasis added]. The Midwest ISO's tariff also requires the MMU to provide reports of such analyses to state commissions.²⁷ Similarly, an earlier version of PJM's tariff provided that "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

²² PJM OATT, Attachment M, Section II.C.

²³ ANOPR, at P 116

²⁴ PJM OATT, Attachment M, IV. A.

²⁵ WE NEED A CITE FROM A PRIOR OPSI FILING HERE

²⁶ Midwest ISO tariff, Section 50.1.

²⁷ See, e.g., Section 52.3.1 of the Midwest ISO tariff.

requested by such Agencies, or as may be deemed appropriate under Section IV. B.5.”²⁸ In view of the MMUs’ unique access to and ability to evaluate market data and the inability of many state commissions to conduct equivalent analyses due to resource and data access limitations, a similar provision should be included in the tariffs of all RTO/ISOs as a result of this proceeding

d. MMU Reports on RTO/ISO Performance

In her separate statement concurring in part and dissenting in part, Commissioner Kelly indicated that she “would have proposed requiring the MMU to make recommendations related to its reports on RTO/ISO performance.”²⁹ OPSI supports Commissioner Kelly’s proposal with respect to this issue.

4. Market Power Mitigation by the MMU

a. MMU Authority to Administer Market Power Mitigation

The ANOPR proposes to strip MMUs of mitigation responsibilities and place those critical functions under the auspices of the RTO itself.³⁰ Under the proposal advanced in the ANOPR, RTO/ISO management would be required to both design market rules and implement mitigation measures when those rules fail to produce competitive outcomes. The Commission describes the problem its proposal is intended to address as follows:

[The] MMU’s performance of these mitigation functions can compromise its independence in evaluating and reporting on market performance. In order for the MMU to support the RTO or ISO in tariff administration, it must be subordinate to RTO and ISO management. The operations and mitigation functions performed by MMUs directly affect market outcomes and performance. Because of this, there is an inherent conflict between an MMU reporting on market outcomes that the MMU itself has influenced.... There is significant potential for conflict between an MMU maintaining independence of RTO and ISO management and supporting tariff administration in a subordinate capacity. It may not be possible for MMUs to maintain independence while supporting

²⁸ Comments of the Organization of PJM States, Inc., FERC Docket No. ER06-826, June 8, 2006, at pp. 14-15.

²⁹ Kelly Dissent, at 1.

³⁰ ANOPR, at P 117-119

tariff administration.³¹

...
For the foregoing reasons, the Commission believes operational activities affecting the market, including mitigation, are more properly performed by the RTOs and ISOs themselves as part of their responsibility to administer their Commission-approved tariffs.³²

Stripping MMUs any ability to participate in the implementation of mitigation measures and transferring that authority to RTO/ISO management would represent a significant shift in federal policy that would further impair consumer confidence in the efficacy of the competitive market model. As a result, OPSI strongly opposes this proposal.

The ANOPR is not the first occasion on which the Commission has addressed the mitigation issue. In its November 17, 2003, Order, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, the Commission authorized MMUs to engage in market power mitigation. In particular, the Commission stated,

We believe it is appropriate to authorize MMUs to enforce certain ISO/RTO tariff matters if those matters are: (i) expressly set forth in the tariff; (ii) involve objectively-identifiable behavior; and (iii) do not subject the seller to sanctions or other consequences other than those expressly approved by the Commission and set forth in the tariff.³³

The Commission further stated that, to the degree its market behavior rules overlap with “a clearly stated tariff provision for which the Commission has assigned the first-line enforcement authority with associated sanctions to a MMU subject to appeal to the Commission, we will defer in the first instance to the MMU, subject to possible review.”³⁴ As a result, the Commission’s 2003 Order gave MMUs market power mitigation authority in the event that the RTO/ISO’s

³¹ *Id.* at P 118

³² *Id.*, at P 119

³³ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, at P 182, underlining added

³⁴ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, at P 185, underlining added

Commission-approved tariff provided for such a result.

The Commission also addressed this issue in the 2005 Policy Statement on Market Monitoring Units, which states as follows:

ISOs/RTOs may administer compliance with tariff provisions only if they are expressly set forth in the tariff; involve objectively identifiable behavior; and do not subject the seller to sanctions or consequences other than those expressly approved by the Commission and set forth in the tariff, with the right of appeal to the Commission.³⁵

In a similar vein, Paragraph 6 of the MMU Policy Statement refers to “Commission-approved tariff provisions that are administered by the ISO/RTO.”³⁶ As a result, the Commission’s most recent pronouncement on this issue assigns responsibility for tariff administration to the RTO/ISO.

The PJM Market Monitoring Plan, which has been revised to conform with the 2005 Policy Statement on Market Monitoring Units, clearly states that PJM is primarily responsible for administering market power mitigation where such authority has been approved by the Commission and incorporated into the tariff. More particularly, PJM’s Market Monitoring Plan states that “[t]he foregoing 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 provisions of this section IV.B.”³⁷ Thus, existing Commission policy and the provisions of PJM’s tariff place primary responsibility for the actual implementation of market mitigation measures on the RTO/ISO rather than the MMU. According to OPSI’s understanding, any physical actions necessary to implement required mitigation measures in PJM are currently being taken by RTO

³⁵ *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267 at P 5, underlining added

³⁶ *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC

personnel rather than by the MMU, although MMU personnel certainly express opinions about whether mitigation measures should be imposed in specific instances. OPSI would be very concerned in the event that the ability of the MMU to participate in the implementation of mitigation measures was reduced even further.

The need for the implementation of mitigation measures can arise in a number of different contexts, including in real time. Despite the Commission's understandable preference for clear, objective market mitigation rules that can be implemented without the necessity for the exercise of subjective human judgment, that outcome is simply unattainable given the complexities inherent in the operation of modern organized wholesale electricity markets. Although the implementation of market mitigation measures requires the electronic analysis of vast amounts of market data and the use of highly sophisticated computer programs, market mitigation cannot be reduced to an exact science. For better or worse, it will inevitably be necessary for someone on occasion to exercise human judgment in order to determine whether market mitigation should be implemented in particular cases. Thus, the real question that the Commission's proposal raises is who should participate in making the required subjective judgments. OPSI fears that the effect of the adoption of the proposal advanced in the ANOPR would be to strip market monitors of any ability to participate in the decision as to whether to implement market mitigation measures in real time, effectively turning that function over to non-MMU RTO/ISO personnel exclusively despite the fact that non-MMU RTO/ISO personnel are unlikely to be as focused on the necessity for preventing harm to customers through the exercise of market power or market manipulation as MMU personnel.

The essential thrust of the argument advanced in support of the proposal set forth in the

¶ 61,267 at P 6, underlining added

ANOPR is that allowing MMU involvement in the implementation of mitigation measures would effectively require the MMU to be subservient to the RTO/ISO, thereby compromising its independence, and would require the MMU to critique the RTO/ISO's market rules and practices while participating in their implementation. These arguments, however, lack merit.

The first argument advanced in the ANOPR rests on the premise that participation in market mitigation necessarily implies subservience to the RTO/ISO. Assuming that adequate measures of the type suggested elsewhere in these comments are taken, OPSI sees no reason why MMU participation in the mitigation implementation process necessarily implies MMU subservience to RTO/ISO management. On the contrary, as long as the relative roles of the MMU and non-MMU RTO/ISO personnel are clearly defined in the relevant tariff provisions, there is no reason for concern that the MMU's independence will be compromised by involvement in the mitigation process.

The "conflict of interest" argument advanced in the ANOPR is equally without merit. As OPSI understands this argument, MMU involvement in both market rule design and implementation creates a "conflict of interest" that should be avoided. Unfortunately, however, the manner in which the Commission proposes to address this perceived problem in the ANOPR creates an even more troubling "conflict of interest" on the part of RTO/ISO management. Assuming for purposes of discussion that the ANOPR proposal was to be adopted, the RTO/ISO would find itself in the position of having sole responsibility for implementing market mitigation measures, including making the subjective judgment calls that mitigation activities necessarily require. In addition, the RTO/ISO will also oversee the stakeholder process through which market rules, including implementation protocols, are developed. In the course of the market

³⁷ PJM OATT, Attachment M, Section IV.B.

rule development process, the RTO/ISO has been known to make filings with the Commission proposing market rule changes (such as PJM's RPM proposal) that did not achieve consensus support in the stakeholder process. In the event that sole responsibility for the implementation of market mitigation was placed on the RTO/ISO, that entity would have a role in both rule development and rule implementation. In other words, adoption of the ANOPR proposal would place the RTO/ISO in the same sort of "conflicted" position that the Commission wishes to avoid for the MMU. As a result, the ANOPR proposal cannot be justified on the basis of the "conflict of interest" argument posited in the ANOPR.

An additional problem with the ANOPR proposal lies in the form in which market mitigation is implemented in PJM. As OPSI understands it, one aspect of the market monitoring function performed by the PJM MMU is to compare generator bids with the marginal cost of production. Such an approach seems fully consistent with the standard test for determining when inappropriate market power exists. In order to perform that function, the PJM MMU necessarily accumulates information concerning generator costs and compares those costs to generator bids. The implementation of market mitigation measures necessarily involves such a bid/cost comparison, which is most effectively performed by the MMU. To prohibit the MMU from even attempting to persuade the RTO/ISO to implement mitigation measures based on real-time developments that have come to the MMU's attention effectively removes the most knowledgeable entity in the discussion from the mitigation process. The benefits of that result are difficult for OPSI to understand.

At bottom, OPSI believes that the goals that the Commission seeks to achieve by the ANOPR proposal to remove the MMU from any role in tariff implementation are unattainable. Market mitigation, at least in the PJM footprint, cannot be reduced to an automatic, computer-

driven exercise that is completely devoid of the exercise of human judgment. The real effect of adopting the position advanced in the ANOPR would be to remove the entity with principal responsibility for and the greatest amount of expertise in detecting and preventing the exercise of market power and market manipulation from the mitigation process and give that responsibility to an entity that has, at best, a less market-power focused set of concerns. In view of the substantial questions raised in certain quarters about the competitiveness of PJM's markets and the responsiveness of PJM management to load interests and in view of the substantive harm that could result from the removal of the MMU from the implementation of market mitigation measures, OPSI strongly urges the Commission not to adopt the approach proposed in the ANOPR.

b. Allegations of MMU Over-Mitigation

The Commission noted that certain unnamed "commenters" have expressed concern regarding possible over-mitigation by MMUs. According to the Commission, "[c]ertain commenters were concerned that such mitigation is being conducted without an adequate theoretical or empirical basis and is having a deleterious effect on the electric power market."³⁸ The fact that no citation or other record support is provided for such assertions should cause the Commission to hesitate to give them any credence. Although it has not scientifically surveyed all PJM stakeholders, OPSI is reasonably confident that market participants that believe that PJM's markets are insufficiently mitigated can be found too. Although OPSI recognizes that the extent to which RTO/ISO markets either are or are not appropriately mitigated is a significant issue worthy of serious examination, the Commission should only address that issue in a separate proceeding convened for the express purpose of addressing the substantive rules that should be

³⁸ ANOPR, at P 117

used in determining whether market power exists or market manipulation has occurred. Such a proceeding will inherently involve a sharply contested factual issue that should only be resolved after all relevant facts have been carefully examined and all parties have been given a full and fair opportunity to be heard. As the Commission has already noted, this rulemaking is not “the appropriate forum to address issues of market power and mitigation.”³⁹ Until such a separate proceeding is conducted, the FERC should disregard contentions concerning the alleged “over-mitigation” of RTO/ISO markets and refrain from acting on such contentions in addressing the market monitoring issues posed in the ANOPR.

c. The MMU and Tariff Administration

The Commission ends its discussion of market power mitigation by stating:

“Therefore, the Commission proposes requiring that MMUs refrain from assisting the RTO or ISO in tariff administration, from participating in ISO/RTO market operations, and from taking direct actions to influence the market, and instead concentrate on their role of providing market evaluation, reports, and advice.”⁴⁰

This statement is quite broad in nature, does not follow from the preceding discussion, and is of considerable concern to OPSI. As a result, OPSI seeks clarification of the Commission’s intent in making this statement in a number of respects.

First, the manner in which the Commission interprets the phrase “assisting in tariff administration” is not clear. In the ANOPR, the Commission seems to equate tariff administration with market power mitigation. For example, the Commission states that “[t]he function in question is that of providing support to the RTO or ISO in the administration of its tariff, which usually takes the form of MMU-conducted market power mitigation.”⁴¹ As explained above, the 2005 Policy Statement already assigned responsibility for market power

³⁹ *Id.* at P 118

⁴⁰ *Id.*, at P 119

mitigation to the RTO/ISO.⁴² However, in the same document, the Commission specifically required MMUs to “provide support to the ISO/RTO in the administration of Commission-approved tariff provisions related to markets administered by the ISO/RTO.”⁴³ As a result, while existing Commission policy assigns responsibility for the implementation of market mitigation measures to the RTO/ISO, it still allows a place for MMU input into the decisionmaking process. Read literally, the ANOPR is now proposing a significant change in existing policy that would involve prohibiting the MMUs from having any role in tariff administration whatsoever. If the Commission intends to expand the range of “tariff administration” activities in which the MMU is forbidden to participate, then the Commission should clearly explain in detail the tariff activities in which it believes MMUs to be involved at the present time, the nature of the tariff activities in which it does not believe MMUs should be involved, and the reason for the establishment of such a prohibition. In the absence of such additional explanation, the proposals advanced in the ANOPR cannot be properly evaluated. The ANOPR fails to provide such explanatory material.

Moreover, it is not clear what the Commission has in mind with respect to its proposal to prohibit MMUs from “participating in ISO/RTO market operations.” OPSI does not believe that PJM’s MMU participates in PJM market operations as OPSI understands that term. However, the term “market operations” does not have a standard meaning. As a result, the Commission should clarify what it means by the term “market operations” as used in the ANOPR and what actions it intends to prohibit MMUs from engaging in with respect to such operations prior to soliciting thoughtful comments on this point.

⁴¹ *Id.*, at P 117, (emphasis supplied)

⁴² [NEED TO FILL IN PARAGRAPH REFERENCE FROM PRIOR FERC ORDER]

⁴³ *Policy Statement on Market Monitoring Units*, 111 FERC ¶61,267, at P 2 (2005)

Finally, the Commission proposes to prohibit MMUs from “taking direct actions to influence the market.” It is not clear what the Commission means by “direct actions to influence the market.” For that reason, it is not clear what current actions of the PJM MMU would be prohibited by the Commission’s proposal. Once again, OPSI cannot substantively comment on the Commission’s proposal in the absence of a more detailed proposal.

As a result of the lack of specific information contained in the ANOPR with respect to the Commission’s proposal to prevent any MMU involvement in “tariff administration,” “market operations,” and “direct actions to influence the market,” OPSI cannot comment effectively on the substance of the Commission’s proposal at this time. Given this need for additional clarity, OPSI will refrain from commenting on the substantive aspects of the Commission’s proposal at this stage of the proceeding. As a general matter, however, OPSI would have serious concerns about any proposal that would have the effect of transferring key market monitoring functions from the MMU to RTO/ISO management for the reasons given above with respect to the proposal that the MMU be prohibited from participation in the implementation of market mitigation measures. Thus, OPSI seeks clarification from the Commission in order to permit the submission of more detailed, substantive comments concerning this ANOPR proposal at a later stage in this proceeding.

5. MMU Code of Ethics

OPSI supports the Commission’s proposal to develop a standardized MMU Code of Ethics that would impose certain minimum ethical standards on all MMUs. Such minimum standards should include, among other things: (1) requiring the MMU to collectively have the appropriate experience and expertise necessary to properly analyze competitive conditions in ISO/RTO markets; (2) prohibiting all MMU personnel from having equity or other financial interests in any market participant or any affiliate of a market participant affected by the market

monitored by the particular MMU; (3) requiring the MMU to certify that it has no current engagements and will not undertake any new engagements that involve any conflict of interest with the performance of its MMU function during the period for which it is acting as the MMU; (4) prohibiting the MMU from using any non-public information to which the MMU has access in the course of performing its MMU function for any purposes other than performing its assigned market monitoring responsibilities; and (5) prohibiting the MMU from undertaking any separate project or business that could benefit from use of the non-public information to which the MMU has access in the course of performing its market monitoring function.

6. MMU Information

a. Information Needs of State Commissions

OPSI agrees with the Commission that there is a clear relationship between wholesale markets and the provision of retail service.⁴⁴ OPSI appreciates the Commission's recognition that, because of that relationship, state commissions have an "interest in the performance of wholesale power markets."⁴⁵ OPSI agrees with the Commission that state commissions are not mere stakeholders, but have significant regulatory responsibilities under state law.⁴⁶ OPSI appreciates the Commission's recognition that state commissions need information from the MMU "to assist them in performing their regulatory functions, given the integral relationship between wholesale and retail rates."⁴⁷ However, the Commission's current policies addressing state commission informational needs are completely inadequate. Unfortunately, the Commission's ANOPR proposals are also insufficient and would, in some cases, reverse

⁴⁴ ANOPR, at P 122

⁴⁵ *Ibid*

⁴⁶ *Id.*, at P 123

⁴⁷ *Ibid.*

progress that has already been made.

OPSI is fully cognizant of the argument that “[p]ublic disclosure of certain information, such as participant-specific offers or cost data, could harm market participants or could facilitate collusion under some circumstances.”⁴⁸ However, OPSI vigorously disputes any suggestion that state regulator access to such data would result jeopardize “the need for confidentiality on the part of market participants.”⁴⁹ The Commission should distinguish between disclosure of information to state commissions and disclosure of information to the public. The record demonstrates that, over many years, state commissions have been able to protect confidential information. Any concern that state commissions cannot be trusted to maintain data confidentiality lacks adequate foundation. State commissions are no less capable of protecting confidential data and information than the Commission. Accordingly, OPSI recommends that state commissions be granted access to MMU data and information upon request in the absence of a demonstration by the party whose information is being disclosed that the state commission lacks adequate ability under federal and state law to protect the confidentiality of the information being provided.

b. MMU Conference Calls

OPSI supports the Commission’s proposal to impose on each MMU a requirement to hold quarterly conference calls to report on aggregate market and ISO/RTO performance.⁵⁰ PJM’s MMU routinely makes its members available to OPSI to report on market information and MMU market analysis. The Commission’s proposal in this regard would not appear to add much to what OPSI is already receiving from PJM’s MMU; however, the adoption of a uniform,

⁴⁸ *Ibid*

⁴⁹ *Id.*, at P 124

⁵⁰ *Id.*, at P 125

nationwide rule requiring MMUs to participate in such calls would institutionalize an arrangement that OPSI has found to be very beneficial.

OPSI is intrigued by the Commission's proposal that such informational conference calls be provided collectively to "the Commission staff, the staff of interested state commissions, and the management and board of directors of the RTOs and ISOs."⁵¹ The Commission envisions that such combined reporting and conference calls "would permit targeted requests for information and encourage a fuller exchange of relevant data."⁵² OPSI sees potential value in having such combined conference calls, in which the MMU can discuss issues jointly with Commission personnel, state commission personnel, and RTO/ISO representatives. Accordingly, the Commission should pursue this ANOPR proposal further. However, such an arrangement should not result in the elimination of the current arrangement, under which the PJM MMU makes presentations directly to OPSI, subgroups of OPSI, or individual state commissions.

c. State Commission Requests for MMU Data

The Commission proposes that "state commissions may make requests for additional information from the MMUs."⁵³ The Commission states that its proposal for allowing state commissions to request such tailored information "should be for information regarding general market trends and performance, not information designed to aid state enforcement or related actions against individual companies."⁵⁴ OPSI believes that it would be useful for state commissions to continue to receive information concerning general market performance and market trends from the MMU and supports the Commission's proposal to that extent.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Id.*, at P 128

In addition, however, many state commissions need to be able to receive specific data and information about the behavior and activities of particular market participants and the status of particular markets from the MMU. For example, many state commissions need timely access to unmasked market participant offer, bid, and unit cost data in order to assure the justness and reasonableness of retail rates. In many cases, the MMU is the only source of needed data, information and expert analysis. Under traditional regulatory arrangements, state commissions would have had ready access to similar data from their jurisdictional utilities. In view of the changes that have occurred to regulatory relationships following the establishment of Order 2000-compliant RTO/ISOs, new procedures are needed to assure that state commissions are able to obtain data of equivalent value. OPSI does not believe that development of workable procedures to enable state commissions to access such MMU data and information would unduly burden the MMU or jeopardize the confidentiality of sensitive market information.

OPSI notes that PJM's tariff and operating agreement already contain Section 18.17.4 and Schedule 10, which are ostensibly intended to enable state commission access to confidential MMU data and information. However, many OPSI states have found the procedures prescribed in Section 18.17.4 and Schedule 10 to be completely unworkable because they require state commissions to make declarations and demonstrations that go well beyond what is reasonably necessary to protect data confidentiality without serving any other legitimate purpose. Therefore, if the Commission decides not to address this issue in the present proceeding by adopting OPSI's earlier proposal concerning the provision of MMU data to state commissions, OPSI recommends that the Commission convene a separate proceeding to re-examine Section 18.17.4 and Schedule 10 so that they can be made just, reasonable, and workable for all OPSI

⁵⁴ *Id.*, at P 129

members.

d. Commission Pre-Screening of State Commission Information Requests

OPSI strenuously objects to the ANOPR proposal which would place the Commission in the position of pre-screening data requests submitted to the MMU by state commissions. The Commission describes its proposal as follows:

...a state commission would remain free, on a case-by-case basis, to request that the Commission authorize the release of otherwise proscribed data. The Commission would evaluate any such request to determine if it demonstrates a compelling need for the requested information, and decide whether adequate protections can be fashioned for commercially sensitive material.⁵⁵

Given the differing regulatory responsibilities assigned to state commissions and the Commission, the Commission should not put itself in the position of judging whether a state commissions seeking information from the MMU has demonstrated “compelling need” for such material. State commissions have demonstrated their capability to maintain the integrity of commercially sensitive material and provisions should be established, as described above, for state commissions to access such material in the possession of the MMU at the time of the state commission’s choosing, subject to the right of any entity to question the state commission’s ability to preserve the confidentiality of commercially sensitive information. The Commission’s proposal to make state commission requests for, and access to, confidential MMU data and information subject to individualized pre-screening and approval by the Commission should be rejected.

e. State Commission Requests for the MMU to Conduct Inquiries and Analyses

Although this subject is not addressed in the ANOPR, OPSI recommends that each

RTO/ISO tariff be amended to include appropriate provisions requiring the MMU to conduct specific inquiries or analyses at the request of a state commission or regional state committee. As the Commission is aware, OPSI has raised this issue in other forums.⁵⁶ The tariff provisions implementing this arrangement can be modeled on the Midwest ISO tariff provision quoted earlier in these comments⁵⁷ and should ensure that any requests for the performance of such inquiries or analyses are properly bounded so as to not burden the MMU.

f. MMU Notifications of State Commissions

In addition, OPSI recommends that each ISO/RTO tariff be modified to include appropriate provisions requiring the MMU to notify affected state commissions when the MMU identifies a significant market problem that may require state commission action. State commissions cannot be expected to help solve a market problem if they are not informed of its existence by the entity that has been specifically established to monitor and identify such problems.

The policy that OPSI is recommending here is consistent with past Commission policy pronouncements. For example, in a White Paper issued in 2003, the Commission stated,

The Final Rule would identify the reporting process that would be used if the market monitor thinks the markets are not resulting in just and reasonable prices or providing appropriate incentives for investment in needed infrastructure. This would include notification of the Commission, the regional state committee, and other appropriate state regulatory authorities of the nature of the problem and recommended solutions.⁵⁸

Similarly, the Midwest ISO tariff contains language that provides a useful model for such a

⁵⁵ ANOPR, at P 129.

⁵⁶ See, e.g., OPSI pleadings in Docket No. ER06-826.

⁵⁷ [NEED TO FILL IN REFERENCE TO PRIOR PAGE WHERE MISO TARIFF PROVISION IS CITED]

⁵⁸ Docket No. RM01-12-000 *White Paper Wholesale Power Market Platform Appendix A* (April 28, 2003), at p. 13.

generic notification requirement. The Midwest ISO tariff requires its MMU to notify “the affected State Regulatory Commissions immediately in the event the IMM [independent market monitor] identifies a significant market problem” that may require action by “one or more State Regulatory Commissions.”⁵⁹ As a result, OPSI urges the Commission to require the inclusion of a similar provision in the RTO/ISOs’ market monitoring tariffs in any rule adopted in this proceeding.

7. Release of Bid and Offer Data

The Commission proposes to require, on a three month lagged basis, that “offer and bid data, without identification of the relevant market participants, be posted on the RTO/ISO’s website, where it will be available to the Commission, to interested state commissions and to stakeholders.”⁶⁰

First, OPSI generally supports the Commission’s proposal to require RTO/ISOs to make bid and offer data available to the public in reasonably short order.⁶¹ However, OPSI suggests that a four-month lag would be preferable to the three-month period proposed in the ANOPR, since the use of a four-month period would not result in the release of data to the public until after the end of the current season of the year, thereby ensuring that generators will not be able to make effective use of the released information to affect market outcomes.

Secondly, with respect to the Commission’s proposal to maintain the masking of market participant identities, OPSI recommends a more nuanced approach. OPSI urges the Commission

⁵⁹ Midwest ISO tariff Section 52.3.b

⁶⁰ ANOPR, at P 127

⁶¹ Throughout this discussion, OPSI urges the Commission to keep in mind the distinction between proper policies and procedures applicable to public access to MMU data and information and proper policies and procedures applicable to state commission access to MMU data and information. As explained elsewhere in these Comments, different policies and procedures are in order for the release of market information to state commissions and to the public. As was set forth in more detail above, state commissions should be given access to confidential market data at any time upon request given their state law responsibilities for regulating the provision of retail service.

to consider the effect of maintaining perpetual confidentiality of individual market participants' identities such that particular bids/offers can never be matched up with particular market participants with reasonable assurance by outside analysts. For example, masking market participants' identities obscures units' geographic location, which may be a critical part of certain analyses. Masked data dramatically reduces the certainty with which independent analysts can draw market conclusions. Consequently, masking of market participant identities should be lifted at some point.

Finally, OPSI agrees with the Commission that “[p]ublic disclosure of certain information, such as participant-specific offers *or cost data*, could harm market participants or could facilitate collusion under some circumstances.”⁶² In particular, OPSI supports the current policy under which the generating unit specific cost data (i.e., reference price or unit estimated cost data) that is maintained by the MMU is never released in un-aggregated form to the general public.⁶³

OPSI urges the Commission to carefully assess market participants' behavior in the current RTO/ISO markets before reaching final conclusions on the information lagging and market participant identity masking issues. If the RTO/ISO markets are working relatively well, then requiring a four-month lag before public release of the unmasked data would protect the competitive integrity of those markets while enabling timely public analyses of the markets. On the other hand, if the RTO/ISO markets are not currently working well and disclose the presence of implicit collusion, then immediate release of unmasked bid and offer data would do no harm, and may do some good by allowing immediate third party analyses of the RTO/ISO markets.

⁶² ANOPR, at P. 123 [Emphasis supplied].

⁶³ As explained in this document, some state commissions need access to some market participants' unit cost data that is kept by the MMU and they should be permitted to access this data under appropriate confidentiality terms.

Given the absence of consensus within OPSI over the competitive status of RTO/ISO markets and the possibility that additional information relevant to this issue may arise, OPSI offers the comments it has made in this section on a tentative basis and reserves the right to advocate different positions with respect to these positions during a later stage in this proceeding.

8. MMU Referrals to the Commission

a. Notifying State Commissions of MMU Referrals

The Commission proposes to maintain its current policy of not informing state commissions or any other entities when an MMU makes a referral to the Commission as provided in the Commission's Market Monitoring Policy Statement and Market Monitoring Protocols.⁶⁴ Similarly, the Commission proposes to retain its current policy of not providing information to any party about any actions or investigations that the Commission may or may not undertake pursuant to an MMU referral.⁶⁵ The Commission indicates, however, that Commission staff "does give MMUs generic feedback regarding enforcement issues, and we intend to continue this practice in order to provide guidance in matters relating to their referral function."⁶⁶

OPSI urges the Commission to inform affected state commissions or to direct the MMU to inform affected state commissions whenever the MMU makes an official referral concerning market participant behavior to the Commission. Indeed, affected state commissions should be promptly served with a copy of the MMU's referral in the absence of a showing that the relevant state commission is unable to assure the confidentiality of sensitive information. In addition, the Commission should provide affected state commissions with information about the

⁶⁴ ANOPR, at P 130.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

Commission's actions following such an MMU referral. In situations leading to MMU referrals, state commissions could be effective allies with the Commission in remedying any inappropriate market participant behavior that led the MMU to make the referral. However, in order to provide such assistance, the affected state commission has to be informed of the existence of the referral in a timely manner.

The arguments advanced in opposition to providing state commissions with information concerning MMU referrals have no merit. Any concern about the protection of commercially sensitive nature of information in the absence of a showing that a specific state commission lacks the ability to protect such information is misplaced given that state commissions have a demonstrated track record of successfully protecting the confidentiality of such information. Similarly, concerns that informing state commissions of MMU referrals might somehow discourage market participants from self-reporting objectionable behavior are inapplicable given that MMU referrals only occur in the event that a market participant fails to self report. Finally, concerns about harm to the reputations of potentially innocent parties that are the subject of an MMU referral are unfounded light of the state commissions' demonstrated track record of successfully protecting the confidentiality of sensitive information. In sum, there are many good reasons for the Commission to inform affected state commissions of MMU referrals, and no good reason not to do so.

b. Informing the MMU of Post-Referral Activity by the Commission

OPSI appreciates the Commission's current practice of having the Commission staff provide the MMU with generic feedback regarding enforcement issues. As should be obvious, the MMU needs feedback in order to continually improve market monitoring and the referral process. However, providing generic feedback regarding enforcement is not enough to achieve

this goal. As a result, OPSI urges the Commission to expand, standardize, and formalize the current limited and informal feedback practice. The Commission should also require the Commission staff to provide the MMU with specific, detailed post-referral information, rather than continuing a voluntary system of generic feedback. OPSI notes Commissioner Kelly's position on this issue, which is that "the Commission should generally provide information to the MMUs on the referrals they have made to the Commission, subject to appropriate confidentiality restrictions."⁶⁷ OPSI agrees with Commissioner Kelly on this point.

c. Policy on MMU Post-Referral Activity

Finally, OPSI urges the Commission to revisit the provisions of its 2005 Market Monitoring Policy Statement that require the MMU, after it has made a referral to the Commission, to: (1) "desist from independent action related to the alleged Market Violation[s]"; and (2) "not undertake any investigative steps regarding the referral except at the express direction of the Commission Staff."⁶⁸ These provisions are overly restrictive and prevent the MMU from engaging in proper monitoring of market participant conduct which could assist the Commission in its investigation of referrals. OPSI urges the Commission to eliminate these restrictions on the activities of the MMU.

9. MMU Tariff Provisions

OPSI supports the Commission's proposal to centralize all of the market monitoring provisions applicable to each particular MMU in the relevant RTO/ISO's Commission tariff.⁶⁹ Placing all market monitoring provisions together into a single section of the RTO/ISO's tariff will aid review of those provisions and facilitate comparison of MMU provisions across

⁶⁷ Kelly Dissent, at 1.

⁶⁸ *Market Monitoring in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267, Appendix A, at P 4 and P 8

RTO/ISOs. Such centralization will also facilitate identification of overlapping and inconsistent market monitoring provisions within an individual RTO/ISO's tariff. However, OPSI is more concerned that all of the appropriate MMU tariff provisions appear in the RTO/ISO's tariff than it is about whether those provisions are located in a single tariff section.

10. Pro Forma MMU Tariff

The Commission states that it intends to include in its subsequent NOPR a proposed pro forma MMU section for the RTO/ISOs' Open Access Transmission Tariffs.⁷⁰ The Commission states its expectation that each RTO/ISO "may wish to modify certain provisions, or add others, to such pro forma tariff to suit its particular needs."⁷¹ OPSI supports this proposal.

Establishment of some core market monitoring provisions that are standardized across the RTO/ISOs would be useful, provided that customization to suit particular, more regional needs is still permitted. Adoption of the ANOPR proposal would achieve precisely this result.

B. DEMAND RESPONSE AND PRICING DURING POWER SHORTAGES IN ORGANIZED MARKETS

In this portion of the ANOPR, the Commission focuses on exploring market rules that allow both wholesale and qualifying retail customers to offer demand response (DR) into the day-ahead energy, real-time energy and ancillary services markets. Market design and market rules are the linchpins that enable DR resources to compete on equal footing with generation resources. While OPSI fully supports the development of sound DR programs, such programs should contribute to the provision of reliable, cost-effective service for end-user customers.

1. Demand Response Participation

The ANOPR proposes to obligate each RTO/ISO to purchase DR in its energy imbalance,

⁶⁹ ANOPR, at P 121

⁷⁰ Id., at P 131

spinning reserve and supplemental reserve markets, as long as (1) the DR resource, like all generation resources, meets the necessary technical requirements and (2) the DR resource submits an offer under the generally-applicable bidding rules at or below the market-clearing price.⁷² Subject to these limitations and to compliance with state laws and rules, OPSI supports the concept of allowing DR resources to compete with generation resources for the ability to provide ancillary services.

2. Eliminating Demand Response Disincentives

The ANOPR also proposes to eliminate the charge that RTO/ISOs typically assess buyers when real-time consumption deviates from day-ahead schedules to avoid creating a disincentive for load reduction during system emergencies.⁷³ Clearly, it does not make sense to charge market participants for not taking delivery of energy during periods of system emergency. Indeed, it would be problematic for an RTO/ISO to call for demand reductions during a system emergency and then assess penalties for schedule deviations or general uplift charges to parties that comply with such a request. As such, the Commission should eliminate such charges and consider developing programs that appropriately compensate parties willing to reduce demand in a beneficial way during such emergencies.

Furthermore, the Commission requests comment as to whether the deviation charge should be eliminated for a day-ahead to a real-time load reduction when there is no system emergency. OPSI generally agrees with the Commission that eliminating the deviation charge beyond system emergencies might result in greater levels of customer demand response. OPSI is mindful of the Commission's legitimate concern that implementing such a market rule change

⁷¹ Ibid.

⁷² ANOPR, at P 59

⁷³ ANOPR, at P 62

could have unintended consequences, such as the development of new market manipulation methods and less accurate market scheduling practices. On the other hand, effective DR is a critical component of a competitive energy market. For that reason, OPSI believes that further consideration of this issue is warranted. As a result, OPSI suggests that the Commission direct the RTO/ISOs to explore this issue in more detail and to submit their recommendations concerning whether such deviation charges could be reduced or eliminated in both day-ahead and real-time markets and, if so, the nature of any other rule or market design changes that should be implemented in conjunction with the reduction or elimination of such deviation charges, during later phases of this proceeding.

3. Co-Optimizing Energy and Operating Reserves

The ANOPR proposes to modify RTO/ISO tariffs to provide that DR resources must be allowed to provide spinning and supplemental reserves without also being required to sell into the energy market.⁷⁴ This change to market rules is intended to address the disincentive for DR resources to act as operating reserves. The Commission states that, without this modification, customers may hesitate to offer demand reductions as operating reserves due to concerns about disruptions to their businesses. OPSI urges the Commission to reconsider its proposal to prohibit RTO/ISO programs that co-optimize the offering of energy and ancillary services.⁷⁵ Such co-optimization programs can produce large efficiency improvements. To ameliorate any concern about the effect of co-optimization on DR providers, the Commission could allow for such providers to submit offers with features such as duration and frequency of permitted interruption. Such offer elements would be analogous to such features such as ramp rates, run times, and start/stops that are regular components of generator offers.

⁷⁴ ANOPR, at P 60

4. Demand Response Aggregators

The ANOPR proposes to require each RTO/ISO to include provisions in its tariff to allow DR offers from third-party aggregators of retail customers that are not load serving entities “unless state retail electric laws or regulations do not permit this.”⁷⁶ OPSI supports this proposal. Aggregators can provide a convenient option to direct end-user participation. As long as any limitations on the activities of aggregators contained in state statutes or rules are respected, OPSI supports the ANOPR’s proposal with respect to this issue.

5. Pricing Under Scarcity Conditions

The ANOPR seeks comment on ways to modify mitigation rules to allow the market price to better reflect the value of lost load in an emergency situation. The ANOPR describes four possible proposals: (1) allowing RTO/ISOs to increase both energy bid caps and market-wide price caps above current levels; (2) allowing RTO/ISOs to raise bid caps solely for demand bids; (3) requiring RTO/ISOs to implement an operating reserve demand curve; and (4) allowing the market-clearing price to rise to the level of the payment made to participants in an emergency demand response program.⁷⁷

While raising caps in an emergency could better allow each customer to act on its value of lost load, the Commission is correct that RTO/ISOs would have to establish procedures for vigorously monitoring and preventing the exercise of market power during a system shortage. If the Commission is suggesting that mitigation needed to prevent market power abuse would be dispensed with in order to enable the raising of bid caps, OPSI opposes the Commission’s proposal. Allowing the exercise of market power can never be a correct solution to any identified market design problem.

⁷⁵ OPSI notes that the Midwest ISO has submitted such a co-optimization proposal in Docket No. ER07-550.

OPSI is concerned that the Commission's proposal to relax offer capping during system emergencies will lead to higher, not lower, electric costs for consumers. A significant portion of OPSI's concern about this proposal is clearly stated in the last sentence of ANOPR ¶ 76: "RTO and ISO markets would have to establish procedures for vigorous oversight and monitoring for the exercise of market power during a system shortage." Given the current situation regarding the PJM MMU, OPSI is not comfortable with relaxing offer caps during a period when the potential for undetected market power abuse appears to have been heightened.

In addition, the market's demand response capability (including metering and communications) would need to be adequately developed and sufficiently active to restrain sellers' market power opportunities before such a proposal could be safely implemented. OPSI agrees with Commissioner Kelly's statement that,

Before the Commission considers whether to pursue such market rule modifications, I think it is important to address other barriers that may significantly restrict demand response participation. For example, the *FERC Staff Demand Response Assessment* concluded that the technologies needed to support significant deployment of demand resources, such as advanced metering, have little market penetration. [footnote omitted] Without the necessary technology already in place that would allow demand resources to respond to price signals in wholesale or retail markets, it is unclear how quickly they could develop the ability to respond after energy bid caps or market-wide caps are raised or eliminated. In other words, the technology and associated demand response capability must be in place before we consider raising or eliminating these price caps. Otherwise these higher energy prices may not elicit any demand reduction in a fashion capable of disciplining those prices and keeping them just and reasonable. In addition, rather than asking questions in this ANOPR on how to value demand response, I think the Commission should have proposed a compensation method and postponed consideration of modifying market power mitigation rules until after the valuation issue had been addressed.⁷⁸

As a result, implementing cap-raising programs at the present time could lead to higher, not

⁷⁶ ANOPR, at P 70

⁷⁷ ANOPR, at PP 76-80

⁷⁸ Kelly Dissent, at 1-2

lower, electric costs for consumers.

OPSI believes qualified DR offers ought to be allowed to set the market-clearing price. Substantial market design changes may be needed to implement this provision.

Regarding the remaining market design options suggested in the ANOPR, OPSI urges the Commission to remain flexible and open to considering various possible RTO/ISO proposals. Although OPSI believes that qualified DR offers should be allowed to set the market-clearing price, substantial market design changes may be needed to implement such a proposal. Similarly, the development of a detailed program of scarcity pricing for the purpose of ensuring the availability of efficient levels of DR is a complex undertaking. RTO/ISO markets are developing at different paces in different regions, and this fact should be taken into account in the development of proposed rules. As a result, while OPSI agrees that the Commission should act to optimize the ability of DR resources to meet customer needs, a deliberate and thoughtful pace of reform in this area is warranted.

C. LONG-TERM POWER CONTRACTING IN ORGANIZED MARKETS

The ANOPR seeks comments on concrete steps the Commission can take to facilitate voluntary long-term power contracting in organized market regions. In particular, the ANOPR discusses ideas such as: (1) requiring RTO/ISOs to post information that could facilitate long-term contracts, such as by aggregating and posting information on long-term contract prices and quantities on a periodic basis; (2) requiring or encouraging efforts to develop new standardized forward products; and (3) having a dedicated portion of the RTO/ISO's website serve as a bulletin board on which market participants can post offers to buy or sell power long-term.⁷⁹

OPSI supports steps which permit increased reliance on long-term contracts of the type

⁷⁹ ANOPR, at P 93

that the ANOPR seeks to facilitate. The proposals in the ANOPR may be worthy of implementation. On the other hand, OPSI is not prepared at this point to strongly endorse the ANOPR proposals on the basis of the present record, which lacks significant information from knowledgeable parties concerning the likely effectiveness of the proposed measures, the costs which would have to be incurred to implement the proposed measures, and the extent to which the participants in existing RTO/ISO stakeholder processes have examined such proposals in the past. At this stage in the proceeding, given the possibility that RTO/ISOs operating organized markets may be able to materially support the formation of long-term contracts by providing a centralized source of information concerning long-term contract activity and a means by which potential buyers and sellers interested in entering into such long-term contractual arrangements can make contact with each other, OPSI does support seeking further comment concerning whether RTO/ISOs should be required to (1) obtain and post aggregate, non-specific data relating to long-term market activity and prices and (2) provide an electronic forum (either on OASIS or in some other fashion) for buyers and sellers to post offers to enter into long-term contractual arrangements. Additionally, in order to promote long-term contracting and reduce transaction costs, OPSI believes that the Commission should request comment on the development by RTO/ISOs, through the use of their stakeholder processes, of standardized forward contracts for the provision of energy and ancillary services. Among the benefits that might arise from the development of such standardized contracts is the formation of secondary markets in long-term products for use by those entities seeking increased ability to hedge their positions and cope with unanticipated changes in supply or demand. After receiving such comments, the Commission will be in a better position to judge the potential efficacy of these proposals for facilitating increased reliance on long-term contracts.

Furthermore, OPSI believes that the Commission can take other actions to increase the extent to which market participants actually rely on long-term contracts in RTO/ISO regions. In particular, OPSI would urge the Commission to focus on getting the prices and market design rules in the day-ahead and real-time energy and ancillary services markets “right.” A reliable, competitive, well-functioning day-ahead and real-time market that reflects actual system operating conditions and is operated in a stable, predictable regulatory environment may well provide the best foundation for hedging through long term bilateral contracting. As a result, OPSI urges the Commission to continue to strive for improvements in RTO/ISO day-ahead and real-time markets as an effective way to ensure an appropriate degree of reliance on long-term contracts.

D. RESPONSIVENESS OF RTOs AND ISOs

OPSI supports proposals to increase the responsiveness of RTO/ISOs. Responsiveness, however, means different things to different observers. Responsiveness cannot be judged based on the percentage of time that an RTO/ISO does what a particular sector or member wants. RTO/ISOs must be able to, and are expected to, act independently in the best collective interests of system reliability and appropriate market operations. As a result, RTO/ISO responsiveness and RTO/ISO independence must be pursued and maintained simultaneously.

1. RTO/ISO Board Responsiveness

OPSI agrees with the Commission that “[a] well-functioning and responsible board of directors is necessary for establishing the strategic direction of the RTO/ISO, including customer orientation.”⁸⁰ OPSI further agrees that RTO/ISO board members must have “the expertise

⁸⁰ ANOPR, at P 147

needed to set such direction and assess whether it is being followed successfully”⁸¹ and that “representatives of customers and other stakeholders must have some form of effective direct access to the board of directors.”⁸² As a result, OPSI supports the Commission’s proposal to require each RTO/ISO to develop and implement a mechanism for such direct access to the RTO/ISO board of directors.⁸³ OPSI also supports the Commission’s proposal to allow flexibility in the development of such proposals and to avoid being overly prescriptive in dictating the form that such mechanisms should take.⁸⁴

a. Hybrid Boards

OPSI strongly urges the Commission to reconsider its proposal to allow hybrid RTO/ISO boards. A hybrid RTO/ISO board has all of the flaws described in Commissioner Kelly’s separate opinion accompanying the issuance of the ANOPR. As Commissioner Kelly stated, “a hybrid board would jeopardize the fundamental principle of independence upon which ISOs and RTOs are based.”⁸⁵ OPSI further agrees with Commissioner Kelly that simply directing stakeholder board members “not to serve their own interests inappropriately” is doomed to failure.⁸⁶ It is simply unrealistic to expect stakeholder board members to refrain from acting in the best interests of the entity with which they are affiliated. It will also be impossible to detect all of the ways that an interested board member may inappropriately attempt to advance the particular interests of the entity with which he or she is affiliated. These are fatal flaws that should cause the Commission to reject the hybrid board idea.

⁸¹ ANOPR, at P 147

⁸² ANOPR, at P 148

⁸³ ANOPR, at P 148

⁸⁴ ANOPR, at P 148

⁸⁵ Kelly Dissent, at 2

⁸⁶ Kelly Dissent, at 2

b. Board Advisory Committee

A better method for improving RTO/ISO board responsiveness would be to adopt a refined board advisory committee approach. As the Commission indicates, such an advisory committee must have authority to “make recommendations directly to the board on matters before the board and on matters it believes the board should address.”⁸⁷ The board advisory committee must also be required to allow for the communication of minority views to the board.⁸⁸ Membership on the board advisory committee should be limited to a reasonable number of individuals. OPSI strongly recommends that state commissions and state consumer advocates be entitled to representation on the board advisory committee. PJM’s Members’ Committee is not the type of advisory board contemplated in the ANOPR as OPSI understands that document, because the Members Committee does not provide for meaningful participation by entities that are not official PJM members.

c. Board/Stakeholder Communication and Interaction

It is reasonable for the Commission to expect RTO/ISO boards to establish procedures through the use of which board members are able to gather information directly from stakeholders (i.e., unfiltered by RTO/ISO management) and to directly interact with stakeholders. Two-way communication is a critical component of both perceived and actual responsiveness. Such interaction can be accomplished, for example, by board member attendance at major stakeholder meetings and by board solicitation of stakeholder position papers on relevant issues.⁸⁹ RTO/ISO boards should also establish a procedure by which any stakeholder can submit written correspondence to the board. Finally, RTO/ISO boards should

⁸⁷ ANOPR, at P 153

⁸⁸ ANOPR, at P 153

⁸⁹ All such position papers should be publicly posted on the RTO/ISO web-site so that interested parties with

establish procedures allowing interested parties to directly address the board as a whole. Providing an “open-mike” period at each open board meeting could serve this purpose. OPSI urges the Commission to formally express these kinds of expectations of RTO/ISO boards in this proceeding.

2. RTO/ISO Executive Management Practices

OPSI agrees with the Commission that RTO/ISO managers “should be responsive to stakeholders but cannot be beholden to any particular stakeholder group.”⁹⁰ In the ANOPR, the Commission seeks comment on whether any reforms are necessary to improve management responsiveness to the concerns of interested parties. In particular, the Commission asks whether it should encourage or require RTOs or ISOs to:

- Publish a strategic plan that includes plans for assuring responsiveness to customers and other stakeholders.
- Measure or otherwise assess customer satisfaction periodically, through a survey or other means.
- Have a formal process for gathering and evaluating recommendations for improving services to customers.
- Set performance criteria for executive managers based in part on responsiveness to stakeholders.
- Relate executive compensation to a measure of responsiveness to stakeholders.⁹¹

While these suggestions may be good ideas, OPSI recommends that the Commission not impose these mandates on RTO/ISO management, but, rather, simply express an intention to hold RTO/ISO boards responsible for ensuring that management is properly responsive to the needs and concerns of interested parties and allow RTO/ISO boards to develop ways to ensure such responsiveness, at least in the first instance.

contrary views can respond.

⁹⁰ ANOPR, at P 158

⁹¹ ANOPR, at P 159

a. The Commission's Role in Assessing RTO/ISO Responsiveness

The Commission will be able to measure and assess the degree to which RTO/ISO boards are succeeding in ensuring responsiveness to interested parties by the volume and range of negative comments and complaints submitted to the Commission in the ordinary course of business. If the Commission finds itself routinely over-turning or rejecting proposals that are advocated by RTO/ISO management, approved by the RTO/ISO board, and filed with the Commission, then the RTO/ISO may have a responsiveness problem. The Commission informally uses this sort of approach in assessing its own performance when it evaluates the percentage of its decisions that are appealed to the Courts or its success in defending its orders against such appellate challenges. In essence, OPSI proposes that the Commission use its own rulings on RTO/ISO filings as a measure of RTO responsiveness.

OPSI also urges the Commission to establish an annual opportunity for interested parties to submit an assessment of the RTO/ISO's performance in the preceding year to the Commission and to express any other opinions or concerns that such parties may have about the RTO/ISO. The Commission should coordinate the annual opportunity to submit such comments with the RTO/ISO's scheduled annual meeting.⁹² The Commission should send a Commissioner or senior staff member to each RTO/ISO's annual meeting for the purpose of making a presentation summarizing the comments submitted to the Commission by interested parties for the preceding year.

b. Particular Attention Must Be Given to Load Interests

OPSI is concerned that certain stakeholders not be treated by the RTO/ISO as "more equal than others" in the decision making process. In particular, an RTO/ISO may have

⁹² The Commission should require each RTO/ISO to hold an annual stakeholders meeting.

organizational or structural incentives to hear and act on the advocacy of some sectors and members to a greater extent than others. For example, without transmission-owning members, the RTO/ISO would not exist. Similarly, RTO/ISO decisions often have a significant effect on investments made by generators. These factors may have a tendency to drive RTO/ISO responsiveness to these sectors.

The owners of transmission and generation facilities are relatively small in number and have relatively homogenous interests that are aggressively brought to the attention of the RTO/ISO. Load interests, by contrast, are diffuse and diluted. Although there are very large numbers of electric customers, individual electric customer participation in RTO/ISO processes is minimal (with the exception of certain large electricity consumers). Furthermore, some of those who presume to speak or act on behalf of load have other interests as well. OPSI urges the Commission to keep in mind that participation in RTO/ISO processes is not uniform across all sectors and that an RTO/ISO may have an incentive to be more responsive to some sectors than others. Load interests are in danger of being overlooked in such an environment.

3. RTO/ISO Budget Processes

The Commission discusses RTO/ISO budget processes and asks for feedback on how to improve the transparency of the budget process.⁹³ The Commission, in particular, discusses budget issues for RTO/ISOs that have formula rates.⁹⁴ PJM does not have formula rates and so, OPSI is not commenting on these RTO/ISO budget process issues.

III. CONCLUSION

OPSI supports the Commission's efforts to improve the operation of organized markets without undoing or upsetting the significant efforts that have already been made in providing

demonstrable benefits to electricity customers. To that end, OPSI respectfully requests that the Commission consider these comments as it develops its proposals for submission at a later stage in this rulemaking proceeding.

IV. CONCLUSION

OPSI appreciates this opportunity to comment on the proposals contained in the Commission's ANOPR and respectfully requests that the Commission consider the recommendations contained in these comments in promulgating a Notice of Proposed Rulemaking on these matters.

Respectfully Submitted,

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Dated: September 14, 2007

⁹³ ANOPR, at P 162-163

⁹⁴ ANOPR, at P 162

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 in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Harrisburg, Pennsylvania this 14th day of September, 2007.

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