

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

Allegheny Electric Cooperative, Inc.)	
Borough of Chambersburg, Pennsylvania;)	Docket No. ER98-1440-000
City and Town of Hagerstown, Thurmont)	
and Williamsport, Maryland; District of Columbia)	
Office of the People’s Counsel; Illinois Citizens)	
Utility Board; Indiana Office of Utility Consumer)	
Counsel; Maryland Office of People’s Counsel;)	
New Jersey Division of Rate Counsel;)	
Office of the Attorney General of Virginia,)	
Division of Consumer Counsel; Office of the Ohio)	
Consumers’ Counsel; Old Dominion Electric)	
Cooperative; Pennsylvania Office of Consumer)	
Advocate; PJM Industrial Customer Coalition;)	
Southern Maryland Electric Cooperative, Inc.;)	
State of Delaware, Division of the Public Advocate)	
)	
)	Docket No. EL07-56
)	
PJM Interconnection LLC)	

**COMMENTS OF THE
ELECTRICITY CONSUMERS RESOURCE COUNCIL**

The Electricity Consumers Resource Council (ELCON) offers the following comments concerning the Joint Petition filed by numerous state consumer advocate, electric cooperatives and industrial groups requesting assurances that PJM Interconnection L.L.C. (PJM) has not violated, and will not violate, its tariff requirements pertaining to market monitoring.

The Joint Petition urgently seeks Commission action in light of statements by PJM that it is considering abandoning its current internal market monitor and statements by the PJM Market

Monitor (MMU) that its independence is being compromised by PJM management and that the MMU is being starved of the resources and personnel need to do its job.

ELCON urges the Commission to give its most careful consideration to the serious issues raised by this petition. Joseph Bowring's testimony that PJM management has made it clear that the MMU must "obey[] management orders" and "follow the chain of command" suggest a total erosion of the independence of the MMU.¹ At this early stage, ELCON cannot express a definitive view on the merits of the allegations which require intensive investigation and thorough process. However, the Joint Petition is filed at a time when the Commission's organized markets are under challenge and criticism. It is obvious that inattention by the Commission to the integrity of the PJM market monitor could undermine confidence in PJM and other RTOs at a time when the efficiency and independence of these markets is under growing public scrutiny.

A. Relationship Between Allegations Of The Complaint And Problems In Organized Markets

ELCON has outlined its concerns with the current state of the organized markets in a separate white paper² and in connection with the Commission's recent Conference on Competition in Wholesale Power Markets (Docket AD07-8-000). Among the deficiencies that ELCON has pointed out are:

- Over-reliance on spot markets as opposed to forward contracting;
- Administratively-determined capacity payments;
- Lack of active participation of demand side resources in price discovery;
- Disincentive to invest in transmission infrastructure under an LMP regime

¹ Comments of J. Bowring April 5, 2007 Technical Conference, Docket No. AD07-8.

² ELCON: "Today's Organized Markets: A Step Towards Competition or An Exercise in Re-Regulation". www.elcon.org/Documents/Publications/12-4piom.pdf.

- Ability of suppliers to “game” the system because the large number of nodes in an LMP environment allows exercise of local market power.

Unfortunately these deficiencies are prevalent in PJM. The weakening of the market monitor watchdog will only exacerbate these problems. It is evident that the market monitor is the primary bulwark against the exercise of market power in LMP pricing. The independence of the market monitor is key to pointing out market failures and illegal behavior, and recommending changes that can correct these problems and make organized markets more competitive.

The Joint Petitioners, from their perspective as state consumer advocates and consumers, have pointed out that the PJM experiment has resulted in exorbitant rate hikes. ELCON presented similar evidence in its March 8, 2007 Supplemental Comments in Docket AD07-7-000.

FERC recognized in its Policy Statement on Market Monitoring Units, 111 FERC ¶61,267 (2005), that it is the duty of the MMU to “monitor and report on the performance and structure of the electricity market” within a given RTO “[s]ince these markets ultimately exist for the benefit of customers.” The MMU “should focus” on whether the markets are delivering reliable electricity “at the lowest long run cost to customers.” The MMU should evaluate pricing including the day ahead and real time energy prices, locational marginal prices, and ancillary services to be sure that the prices reflect “competitive outcomes, not market power abuses.”

The allegations by the PJM MMU and the concerns expressed in the Joint Petition could not have come at a worse possible time. The conventional wisdom in the popular press is that electricity deregulation—at either the retail or wholesale level—has been a failure. ELCON has

repeatedly reaffirmed its commitment to creating real competition in the wholesale electricity market. But that commitment is predicated on the continued independence of the MMUs.

B. FERC Should Exercise Special Vigilance As To Process

Regulatory agencies must exercise special vigilance when regulated entities propose to discontinue reliance on entities that have served as independent monitors of their activities. For example, the Securities and Exchange Commission has long required detailed explanations if an independent public accounting firm that has audited a company's financial statements resigns or is discharged.³

PJM filed comments in this docket shortly after the Complaint was filed promising an "independent investigation." In fact, PJM's initial response has been to hire an outside counsel who appears not to qualify as independent because they have previously represented PJM.⁴ The

³ Item 304 of Regulation S-K, 17 C.F.R. 229.304

⁴ An independent counsel as that term is recognized in the context of internal investigations and response to shareholder derivative claims is necessarily a firm without financial ties to the investigated corporation. E.g., W. Desmond, "Independence of Outside Counsel-White Paper of the Corporate Governance Committee," <http://www.abanet.org/pubutil/corpgovwhitepaper.pdf>.

The criteria for determining whether counsel is independent are well-established in the case law:

In the special litigation committee setting, the question of the committee members' independence is directly linked to the relative independence of its counsel. Einhorn v. Culea [612 N.W. 2d 78 Wis. 2000] best summarizes how the committee's counsel fits into the equation for assessing the committee's overall independence: "Courts should be more likely to find a special litigation committee independent if the committee retains counsel who has not represented [the suit's] individual defendants or the corporation in the past." Thus, the committee's recommendation is entitled to more deference when it is represented by counsel who has not previously represented the corporation. Such earlier, and particularly on-going, representation of the corporation raises questions regarding independence and, hence, possible biasing of the information and advice counsel may provide the committee. Certainly there is cause for pause when there is reason to believe that the committee's counsel's ability to retain future corporate business is dependent upon the decisions of the very executives the committee, through its counsel, is investigating. Because past is so predictive of prologue, an attorney who has previously enjoyed a professional relationship with the corporation poses just such a risk. The attorney's close scrutiny of, for example, the CEO and any resulting stinging condemnations or insinuations embodied in the committee's report are unlikely to place the attorney's firm in good standing with the CEO when the executive may later be required to choose who should represent the company in future matters. For this reason, and as reflected in Einhorn, courts minimally recognize that independence of counsel is a desideratum and is best achieved when the committee's counsel has not previously represented the corporation.

vehicle of the independent investigation is frequently applied in the context of a reviewing court's determination that the actions of management pass muster under the Business Judgment Rule. It is not appropriate for the Commission to defer to an independent investigation, even if it were carefully structured to avoid conflicts of interest, when the very issue to be investigated is the independence of the MMU.

The Commission must in the first instance adjudicate the merits of the claims raised by Joint Petitioners and give no deference to a review process administered by the RTO that has been charged with improperly undermining its MMU.

Agency review is critical to the legality of the MMU regime. Subdelegation of authorities by agencies to outside parties must be carefully circumscribed or the delegation is unlawful. As stated in the lead case, United States Telecom. Ass'n. v. FCC, 359 F.3d 554 (D.C. Cir. 2004):

...[T]he cases recognize an important distinction between subdelegation to a *subordinate* and subdelegation to an *outside party*... The presumption that subdelegations are valid absent a showing of contrary congressional intent applies only to the former. There is no such presumption covering subdelegations to outside parties. Indeed, if anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization... This distinction is entirely sensible. When an agency delegates authority to its subordinate, responsibility -- and thus accountability -- clearly remain with the federal agency. But when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making... Also, delegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective," [cit. omit.] and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship.

J. Cox, "Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors with Corporate Counsel," 48 Vill. L. Rev. 1077 (2003). Although the law firm which PJM has selected is highly-regarded and has extensive experience at FERC, it may not qualify as an "independent counsel" because it has previously acted on behalf of PJM (e.g., Dockets ER04-375-017, EL06-20-000, RM06-16-000 and EL06-49-000).

Id. at 565-566 (citations omitted). Telecom recognized exceptions to the outside party non-delegation rule—for example, for “fact gathering” and “provision of advice and policy recommendations”⁵—but ruled that the Federal Communication Commission’s unbundling order was improper because it delegated important duties to an outside party. Even though the outside party at issue in Telecom was a state commission, the delegation was improper.

Commissioner Suede Kelly has written a law review article applying the subdelegation doctrine in the context of market monitoring units. Commissioner Kelly emphasizes that careful agency review is required to sustain the validity of the subdelegation:

The U.S. Telecom and Perot decisions apply some similar elements in determining whether exercises of discretion by non-federal entities are permissible. Both decisions focus on the ability of an agency to review discretionary decisions made by non-federal entities as one element to review in determining whether the agency has inappropriately delegated its statutory authority. When agency review represents more than just a "rubber stamp" of a non-federal entity's decision and is "assured" and "timely," this weighs in favor of granting an exception to the U.S. Telecom rule.

S. G. Kelly et al., “The Subdelegation Doctrine and the Application of Reference Prices,” 26 Energy L.J. 297, 318, citing Telecom, 359 F.3d 567.

C. FERC Must Provide Further Guidance On The Independence Requirement

The independence of RTO MMUs is essential to market confidence as well as a legal requirement. As Commissioner Kelly observed:

An RTO or its external market monitoring unit does not meet the Commission’s independence requirement if it has incentives to negotiate reference prices in a way that benefits certain market participants or its own business interests...[T]he independence issue plays a pivotal role in determining permissible exercises of discretion by non-federal agencies under the subdelegation doctrine.⁶

⁵ Id. at 566-67.

⁶ 26 Energy L.J. at 303.

The Joint Petition illustrates the need for the Commission to revisit its 2005 Policy Statement on Market Monitoring and correct the current state of uncertainty over implementation of MMU independence. FERC declined to address concerns over PJM MMU independence when this important issues was raised by consumer advocates in Docket No. ER06-826-000.⁷ FERC stated that this issue was outside the scope of that docket. The instant docket and Docket No. AD07-8-000 provide FERC with the opportunity to squarely address concerns over MMU independence.

D. Conclusion

ELCON urges FERC to reject any attempt by PJM to investigate its own conduct for reasons stated herein. ELCON urges FERC to conduct a probing investigation into the charges in the Joint Petition: public confidence in the integrity of the organized markets and the merits of electric industry restructuring is at stake.

PROCEDURAL MATTERS

Description and Standing of ELCON

ELCON is a national association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable and efficient electricity supply for all users at competitive rates. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. The member companies of ELCON consumer approximately five

⁷ PJM Interconnection, L.L.C., 116 FERC ¶61,038 (2006).

percent of all electricity in the United States. Many ELCON members operate major facilities in the footprint of PJM who will be directly affected by the outcome of this proceeding.

Notices and Communications

Notices and communications with regard to these proceedings should be addressed to:

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Respectfully submitted,

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Dated: April 30, 2007

Certificate of Service

I hereby certify that I have this day served the foregoing documents upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: April 30, 2007

/s/ JENNIFER A. MORRISSEY
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