

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Wholesale Competition in Regions
With Organized Markets

Docket No. AD-07-7
Docket No. RM07-19

COMMENTS OF THE JOINT CONSUMER ADVOCATES

Ohio Consumers Counsel, District of Columbia Office of the People's Counsel, Pennsylvania Office of Consumer Advocate, Illinois Citizens Utility Board, Maryland Office of People's Counsel, and New Jersey Department of the Public Advocate, Division of Rate Counsel (hereafter "Joint Consumer Advocates" or "JCA") hereby submit the following comments on the Federal Energy Regulatory Commission's ("FERC" or "Commission") Advanced Notice of Proposed Rulemaking ("ANOPR") issued on June 22, 2007 and published in the Federal Register on Monday July 2, 2007. Joint Consumer Advocates represent consumers in the PJM Interconnection, L.L.C. ("PJM") region as well as in the Midwest Independent System Operator ("MISO") region. The Joint Consumer Advocates are very interested in the issues presented for comment and seeks to establish policy that will promote confidence in wholesale markets and help ensure just and reasonable rates.

I. COMMENTS

A. Demand Response

JCA appreciate the Commission's interest in Demand Response ("DR") and agree that it is an important issue facing RTOs. DR is critical in maintaining electric system reliability by reducing the demands on the power supply system during reliability and economic events. This was evidenced most recently when PJM reported that 1,945 megawatts (MW) of consumer use of electricity were voluntarily reduced on Wednesday, August 8, 2007, the day PJM ordered voltage reductions in its Mid-Atlantic Region. PJM indicated that the demand response amount was similar to the amount of power used by a mid-sized city. By comparison, PJM's 5 percent voltage reduction lowered use by about 1,000 MW. As PJM stated in its Press Release:

"This was the largest amount of demand response we've ever had on one day, and it's an encouraging milestone," said Andrew L. Ott, PJM's vice president - Markets. "Participating consumers responded to price signals in the wholesale electricity market and to system needs. We continue working with state regulators and stakeholders to make demand response a larger resource to draw on." ¹

DR also plays an important role in reducing wholesale prices for electricity by eliminating the need to run more expensive generating units and by mitigating potential market power. Savings for consumers can be significant. For example, PJM reported that consumers saved \$650 million as a result of demand response efforts in early August

¹ See PJM press release "DEMAND RESPONSE SETS NEW RECORD IN PJM INTERCONNECTION, Consumers' Voluntary Reductions in Use Help Stretch Power Supplies During Emergency", (Valley Forge, Pa. - Aug. 10, 2007).

2006.² These benefits are just the tip of the iceberg. The optimal implementation of DR can offer a variety of additional benefits, including:

- Reductions in peak demand
- Improvements in utility asset utilization
- Improvements in electric system reliability
- Reductions in capacity expansion and investment risks
- More efficient and competitive wholesale market operations
- More service options for customers
- More ways for customers to control their energy costs
- Reductions in environmental emissions
- Deployment of enabling technologies for grid modernization³

In order to fully capture the above cited benefits, JCA submit that the Commission has identified many key actions in its ANOPR. JCA discuss the Commission's proposals, and others, herein:

1. **The Commission should obligate each RTO or ISO to purchase demand resources in its markets for certain ancillary services, similar to any other resource, if the resource meets the necessary technical requirements and the resource submits a bid under the generally-applicable bidding rules at or below the market-clearing price, unless the seller is not permitted to do so by state retail laws or regulations. (ANOPR ¶59)**

Any different treatment of the DR resource represents a barrier for this resource to compete fairly with supply side resources. The following reflect JCA's responses to some of the Commission's requests for comments.

² See PJM press release: "EARLY AUG. DEMAND RESPONSE PRODUCES \$650 MILLION SAVINGS IN PJM." (Valley Forge, Pa. – Aug 17, 2006).

³ See Energetics Incorporated, "Proceedings, PJM Symposium on Demand Response", June 8, 2007.

- a. **Tariffs should be modified to allow DR to apply for energy imbalance, spinning reserves, and supplemental reserves or their functional equivalents. (ANOPR, ¶¶59, 60)**

Some forms of DR are well suited to provide the above mentioned ancillary services. Specific DR resources can provide a rapid, near time response such as electric-arc steel furnaces and air conditioning cycling programs. In Ohio, First Energy has begun to implement a residential thermostat setback and duty cycle curtailment using Carrier's Comfort Choice 2-way setback. With this system, a broadcast signal is sent to initiate a curtailment event and the thermostats respond within 1-2 minutes.⁴ A similar program is also available in Illinois, where Commonwealth Edison has a voluntary residential air conditioner cycling program.⁵ These types of retail programs can be called on to provide the energy imbalance service, spinning reserves, and supplemental reserves that the Commission has identified.

- b. **Demand resources must be allowed to provide spinning and supplemental reserves without also being required to sell into the energy market.**

Market rules that do not allow a DR provider to limit the frequency and duration of interruption (such as requiring that bids be made into a joint energy-plus reserves market) create a disincentive for DR to bid into the operating reserves market and should be discouraged. Allowing DR providers to make bids with provisions for minimum duration and price limits makes participation by such customers in the energy market more attractive.

⁴ See product specifications for the Carrier Comfort Choice Two-way Communicating Thermostat.

⁵ See: Commonwealth Edison and Comverge press release: "COMED, COMVERGE INTRODUCE LOAD GUARD AUTOMATED PRICE RESPONSE SYSTEM." (Chicago – June 20, 2007).

- c. **The Size of the Minimum Bid should be one megawatt and FERC should incorporate DR baseline protocols as part of the International Performance Measurement and Verification Protocols (IPMVP).**

DR providers should be allowed to bid into RTO markets in increments of one megawatt as this appears to be the size in which most curtailment service providers transact. The baseline calculation of the demand response should be consistent with the International Performance Measurement and Verification Protocols (IPMVP). The desired baseline features should include practicality for operators and participants (easy to understand, don't add excessive costs, allow for easy graphical display by customer), fair (reflect load that would have occurred absent the program and event),⁶ reliable (have low variance, rely on recent data and be verifiable), and when appropriate, adjust for weather sensitivity.

- d. **The Commission should not change the existing bid caps and price caps in response to a perceived concern that demand response resources may be stymied by the presence of these caps (¶ 76.).**

As shown by the recent record-setting performance of demand resource provision in PJM, the current caps do not represent a limiting factor. Increasing the cap and possibly allowing for higher prices during emergency periods will serve only to transfer more wealth to resource providers during these periods, without a concomitant benefit to load. There is no evidence that untapped demand response resources are available only by allowing these caps to increase.

⁶ It should also limit "gaming" opportunities, limit windfall opportunities, and be unbiased and appropriate to the load type.

2. **The Commission should modify RTO and ISO tariffs to eliminate, during a system emergency, a charge to a buyer in the energy market for taking less electric energy in the real-time market than purchased in the day-ahead market. (ANOPR, ¶62)**

Organized markets need to have mechanisms in place that encourage load serving entities to accurately forecast and schedule their loads in the day ahead market. However, “uplift” costs or other deviation charges serve to discourage curtailment resources and should be eliminated for a day-ahead to real-time load reduction when there is a system emergency. DR providers require market rules that allow bids to be flexible and accommodate bidders’ willingness to offer various levels of service depending on the market pricing.

3. **The Commission should require RTOs and ISOs to amend their market rules as necessary to permit an aggregator of retail customers (ARC), a curtailment service provider, to bid a demand reduction on behalf of retail customers directly into the RTO’s or ISO’s organized markets. (ANOPR, ¶69)**

In order for the ARC business model to work and provide DR benefits to customers, the law of large numbers is key. The more customers the ARC can aggregate, the better the economics of this business proposition and the greater the amount of megawatts that can be provided to an RTO/ISO as a resource. Currently, only PJM, ISO-NE and NYISO have allowed ARCs to become market participants. Therefore, FERC should assure that:

- a. market rules not exclude a demand response bid from a third-party ARC that is not a LSE unless state retail electric laws or regulations do not permit this.

- b. market rules for ARCs not differ from the rules for LSEs, except as needed to comply with state retail service laws and regulation.
- c. Market rules allow for a wide range of “demand resources” (including energy efficiency resources) to be aggregated to participate in energy, capacity, and ancillary services markets.

4. One appropriate compensation scheme for DR is paying them the market-clearing price. Other pricing schemes that pay the market-clearing price less the generation and transmission component of each retail customer’s retail rate (this price reduction is sometimes called the generation offset) may also be effective. (ANOPR, ¶74)

JCA do not agree with those parties that consider a payment for DR a double payment. Instead, we agree more with those arguing that the price reduction received by the curtailing customer does not fully reflect the social benefits produced by the demand reduction.⁷ Generally speaking, if the price of the interruption offered is above the market clearing price, the load should not be interrupted and conversely, if the price offered is less than the interruptible load it should be interrupted.⁸ A PJM-type generation offset⁹ encourages demand response more so during a period of high prices when it is needed most. A bid floor of \$75/MWH as used by PJM and the NYISO is a viable way to reduce any incentive for gaming behavior.

⁷ R.N. Bosivert and B.F. Neenan, “Social Welfare Implications of Demand Response Programs in Competitive Electricity Markets”, August 2003.

⁸ Even if the interruptible price offered is above the market clearing price, the system operator could still interrupt anyway, pay the cost, and lower the market price, thereby saving much more for all customers than the cost of interrupting the load.

⁹ The generation offset is difference between the market clearing price and the customer’s retail rate.

B. Long Term Contracting

In the ANOPR's discussion of long-term power contracting, the Commission clearly acknowledges the value and importance of long-term contracts to wholesale electricity markets. The Commission states:

Long-term contracts are an important tool to achieve and maintain a strong power infrastructure, particularly for new entrants into the generation sector and especially for many renewable energy developers. Long-term contracts are important to effective competition both in regions with wholesale markets and in regions without organized markets. ANOPR ¶ 83.

It is important that wholesale sellers and buyers have adequate opportunities to sell and buy electric power through long-term power contracts to allow them to manage their exposure to uncertain future spot market prices.... The Commission believes it is important for buyers and sellers in organized markets to be able to choose a portfolio of short-term, intermediate-term, and long-term power supplies. Having portfolio choice allows market participants to manage the risk that comes from uncertainty. ANOPR ¶ 85.

The Commission sees its role as one of facilitating long-term power contracting to the greatest extent possible, particularly in organized power markets. JCA agree with this perspective. The Commission specifically cites a number of actions it has already taken in this regard. The Commission points to: (1) its final rule on long-term transmission rights in Order No. 681, (2) the reforms made to the transmission planning process under Order No. 890, (3) the interconnection rules for large, small and wind-powered generators that lowered barriers to entry for new generation capable of supporting long-term contracts, and (4) the reform of capacity markets in several regions

to create forward markets with delivery years set sufficiently in advance to reflect the time needed to construct new generation.

While recognizing the actions it has already taken, the Commission, through this ANOPR, seeks comment on additional steps it is considering in order to further facilitate long-term contracting. Specifically, the Commission seeks comment on the following proposals: (1) providing greater transparency by requiring RTOs and ISOs to post information that could facilitate long-term contracting, including aggregating and posting information on long-term contract prices and quantities on a periodic basis; (2) requiring or encouraging the development of new standardized forward products; (3) dedicating a portion of an RTO or ISO website for market participants to post buy and sell offers for long-term power; and (4) modifying the data requirements of the Electric Quarterly Report (EQR) to include information that would make transparent the average prices of long-term power contracts of various terms and vintages.

There is no question that the existence of long-term contracts in the wholesale markets provides benefits to customers in the retail markets. Chief among these benefits is the ability of Load Serving Entities (LSEs) to utilize long-term contracts as a hedge against volatility in shorter-term wholesale market prices. In jurisdictions with retail competition, default or standard offer service providers can beneficially stabilize the price of that service by incorporating long-term contracts into the mix of supply options they utilize. Long-term contracts also aid in securing financing for conventional and alternative generating facilities, thereby having a positive impact on resource development that can improve reliability and improve energy security through greater fuel diversity.

Given the benefits that accrue to retail customers through the availability of long-term wholesale contracts, JCA submit that the Commission should take all steps within its authority to facilitate the availability and the viability of such contracts. Confidence in the markets is waning and facilitating long-term wholesale contracts may help to restore confidence that the market will produce the best outcomes for customers over the long-term.

The Commission acknowledges the various benefits of long-term contracting when it states: “The Commission fully supports reliance on long-term contracts to provide price stability, hedge risk, and support financing for new investments.” ANOPR ¶ 88. As noted above, the Commission seeks now to do even more to facilitate long-term wholesale power contracting.

JCA find merit in all of the additional proposals the Commission has put forth for comment and encourage the Commission to pursue each of them. JCA submit that there may be particular value in requiring RTOs and ISOs to maintain a specific “bulletin board” on their website. One portion of the website could accommodate aggregate information on long-term contract prices and quantities. A separate section could be dedicated to postings for buy and sell offers for long-term power. These are exactly the types of informational services that market participants should be able to expect from their RTO or ISO. This posted information would be particularly helpful for parties that negotiate prospective contracts for franchise customers or for competitive bids for default or standard offer service.

The development of standardized contract forms may or may not properly be the responsibility of the RTO or ISO. For informational purposes, however, the same

bulletin board that provides information on bids and offers could post sample contracts for parties to consider. Over time, the contracting process could evolve into the use of several “standard” contracts based on the marketplace experience that is gained by the market participants. Certainly, the evolution of standardized products would promote efficiency and ease of contracting.

At this time, JCA have no specific recommendations on modifications to the data requirements of the Electric Quarterly Reports (EQR). To the extent that the inclusion of new data in the EQR can assist market participants in developing long term contractual arrangements, JCA would support the addition of such data to the quarterly reports. We look forward to reviewing the comments of other parties to this ANOPR who have specific suggestions regarding the EQR.

The Commission properly recognizes that there are limits to its ability to promote voluntary long-term power contracting. It states: “The Commission cannot compel buyers and sellers to enter into long-term contracts, and the purchasing practices of LSEs are often dictated by state policies, not those of this Commission.” ANOPR ¶ 92. JCA fully agree with this observation. For those states that have implemented retail competition, perhaps the single strongest impetus to long-term contracting can come from their state legislatures or state commissions either encouraging or mandating the use of long-term contracts as one element of a balanced supply procurement plan for default or standard offer service provided by LSEs. One such example is the state of Maryland, which, in 2006, enacted legislation to ameliorate the effect of a Standard Offer Service procurement process that relied heavily on short-term contracts and resulted in proposed residential rate increases of 72% for customers of Baltimore Gas and Electric, 38% for

customers of Potomac Electric Power and 35% for customers of Delmarva Power and Light. In reaction to these steep increases, the Maryland Legislature passed a law that, among other things, sought to revise the procurement process as follows:

As the Commission directs, the competitive process shall include a series of competitive wholesale bids in which the investor-owned electric company solicits bids to supply anticipated Standard Offer Service load for residential and small commercial customers as part of a *portfolio of blended wholesale supply contracts of short, medium, or long terms*, and other appropriate electricity products and strategies, as needed to meet demand in a cost-effective manner. (Emphasis added). Maryland Code (2007) § 7-510(c)(4)(ii)(2)(A) of the Public Utilities Companies Article.

It should be pointed out that Maryland is not the only state that has legislatively mandated that default or standard offer service procurement processes incorporate long-term contracts for a portion of the supply portfolio. The state of Delaware has issued an RFP for long-term resources as a component of its portfolio management approach. The District of Columbia has ordered an investigation into its standard offer procurement practices and is considering purchasing a portion of its standard offer service through long-term commitments. Other states, including Connecticut and New Jersey are considering state power authorities or are considering authorizing distribution utilities to purchase specific quantities of their requirements under long-term contracts.

Recently, on August 28, Illinois enacted legislation that established the Illinois Power Agency to oversee the procurement of electricity by the state's electric distribution utilities.¹⁰ Under the new law, each utility procurement plan must analyze the projected balance of supply and demand for retail customers for a period of five years into the

¹⁰ Illinois Public Act 95-0481, effective August 28, 2007.

future. Notwithstanding this planning horizon, the new statute specifically provides that “Nothing [in the law] precludes the consideration of contracts longer than five years and related forecast data.” 220 ILCS 5/16-111.5(b). It should be noted that the Illinois legislation, like that of Maryland, was enacted in reaction to steep increases in retail electric rates that occurred upon the expiration of retail rate caps.

JCA recognize that policies regarding default or standard offer service rests with the states, but the Commission does have the ability to remove impediments and facilitate parties entering into such contracts when state legislatures and commissions adopt their use as a means of securing stable and reasonably priced electricity for consumers. This is one of the key reasons JCA support the additional steps for facilitating long-term contracting that the Commission has identified in the ANOPR.

JCA observe one disconcerting aspect of the current markets. In RTOs and ISOs, there is an increasing reliance on short-term markets (the day-ahead and real-time markets) for substantial quantities of load obligations. Most economic models had assumed that the bulk of LSE resources would be under long-term bilateral contracts and that the short term markets would be residual markets for small true-ups to the bilateral transactions. This may reflect, in part, the different financial situations of existing resources and new resources. An existing resource, particularly a resource that has substantially recovered most of its capital costs, may see advantages to selling in the more volatile short-term markets. In contrast, many new resources may see advantages to long-term contracts as a way of reducing risk and providing greater assurances to financial markets that the development of a particular resource is a sound investment.

This may be particularly true for resources that have uncontrollable, variable output (such as wind resources) and will generally participate as price takers in the short-term markets.

We note that some of the participants on the Long-term contracting panel at FERC's Technical Conference on Competitive Markets directly linked stability in the short-term markets as a pre-condition to long-term contracts.¹¹ Such stability in short-term market prices is not being seen in the wholesale markets. In PJM for example, since 2003, activity in the real-time and day-ahead markets has increased. While greater volumes and instability in short-term markets may drive load interests to seek to enter into long-term contracts, the opposite impact or incentive seems to drive supply interests. The overall impacts of high-volume, short-term transactions may be more detrimental than helpful to the future of competitive wholesale markets.

In response to the Commission's observation in the ANOPR that forward capacity markets (such as those recently adopted for New England and PJM) will facilitate more long-term bilateral contracts, JCA note that three-year forward capacity markets, by themselves, do very little to address the barriers to long-term contracts. Resource developers who desire long-term contracts as a means of demonstrating financial viability to the investment community usually talk about ten-year or longer contracts for their energy **and** capacity output. Three-year forward capacity obligations for a single year are only a small help to these resource developers.¹² In addition, JCA believe that some evidence of the ability of these capacity market mechanisms to produce actual new

¹¹ Docket AD07-7-000, Technical Conference on Competition in Wholesale Power Markets, May 8, 2007, Tr. 114-118.

¹² New England does provide a five-year term option to new resources that clear in its Forward Capacity Market (FCM). PJM offers a three-year term option for resources in its Reliability Pricing Model (RPM) to address the inherent lumpiness of new capacity additions.

resource investment needs to be established. The record to date is nearly blank based on the information currently available.

In summary, JCA support the Commission's recognition of the need to encourage long-term contracts as a means of providing more stable prices to end users of electricity. The Commission should continue to use all means at its disposal and within its authority to facilitate the formation of long-term contracts among participants in the wholesale power markets.

C. Strengthening Market Monitoring

In the ANOPR, the Commission recognizes the integral role that Market Monitors play in the organized electric markets. As far back as 1999, when the Commission created the current PJM Market Monitoring Unit, the Commission recognized the significant roles and responsibilities of Market Monitors:

Within the MMU's ambit of monitoring responsibilities are the duty to monitor matters relating to transmission congestion pricing, exercise of market power, structural problems in the PJM Market, design flaws in the operating rules, and compliance with the standards, procedures or practices as set forth in the PJM OATT, Operating Agreement, Reliability Agreement, PJM Manuals, and the PJM Regional Practices Document. The MMU will monitor and report on these issues consistent with safe and reliable operations within the PJM control area, creation and operation of a robust, competitive and non-discriminatory electric power market, and the principle that no member of PJM will have undue influence over the PJM Market.

86 FERC ¶61,247 (Order at 2). The Commission further explained the importance of the independence of Market Monitors stating:

In view of our contemporaneous decision to approve market-based pricing authority in a related proceeding, the MMU's ability to effectively and broadly monitor and investigate the PJM Market is essential.

Id. at 2 (footnote 4).

JCA submit that the Commission's assessment of the need for effective and broad Market Monitor authority and independence is as valid today as it was in 1999. At a time when retail electric rates are dramatically increasing in states that are part of RTO-administered markets and those states are questioning the reasonableness of setting retail rates based on wholesale market prices, the Commission's focus on ensuring the independence and objectivity of Market Monitors in the ANOPR, as well as ensuring that Market Monitors have full authority, tools and resources to monitor the markets, is welcomed.

JCA would support revisions that clarify and strengthen the existing obligations, functions and operations of the market monitors and ensure that the MMUs are able to independently and impartially evaluate and monitor the markets.

1. Structure, Tools, Oversight (ANOPR, ¶¶108-113)

In the ANOPR, the Commission first identifies the different structures of the market monitoring units and concludes that it will not impose a "one size fits all" approach to the structure of MMUs. JCA strongly agree with the Commission in this regard. As the Commission recognizes, the historical structures of the various MMUs have developed within each RTO based on many factors. What may be appropriate in one RTO may not be workable in another RTO. When reviewing proposals to change

MMU structure, the Commission should be mindful of the history of market monitoring in the region and require that the level of knowledge and ability of the unit carrying out that function be improved or at least, maintained with the proposed changes. Wholesale electricity markets are still evolving and consumers and their representatives around the country have had their confidence in those markets shaken. Now is not the time to make changes to MMU structure that may create the appearance of greater independence but do so at the expense of the competency of the unit doing the market monitoring.

The Commission seeks comment on how the independence of the MMUs can best be achieved. ANOPR, ¶113. Throughout the various proceedings regarding MMUs, JCA have supported the following set of principles for enhancing the structural independence of Market Monitors:

- The Market Monitor should be hired by a subcommittee of the RTO Board that does not include RTO managers.
- Once in place, the Market Monitor should only be dismissed for just cause, such as incompetence, failure to perform, or illegal acts, with the consent of the FERC.
- Members of RTO management who are members of the Board should not vote on matters of Market Monitor hiring and termination.
- RTO management should have no direct or indirect authority over the MMU. RTO management should not control Market Monitor employment decisions or have input into Market Monitor performance appraisals. RTO management should not control decisions on MMU staffing, budget, job function, substantive positions, IT resources, legal counsel, and/or written product (*e.g.*, testimony, reports, recommendations).
- MMU should control staffing and HR functions under the authority of the Market Monitor.

- Market Monitor should develop MMU budget, which is subject to Board approval.
- MMU should control IT functions including its databases, but with full access to other RTO data as required.
- MMU should have different legal counsel than the RTO.
- The MMU should independently prepare and release testimony and reports.
- MMU should execute monitoring and other duties independent of RTO management.

Requiring all RTOs/ISOs to adopt these structural principles will greatly enhance MMU independence and better provide both market oversight for the Commission and for the protection of consumers.

As to the necessary tools that will enable an MMU to carry out its functions, JCA strongly agree with the Commission that each RTO or ISO must include in its tariff provisions that obligate the RTO or ISO to provide the MMU with access to market data, resources, and personnel sufficient to enable the MMU to carry out its functions and that the tariff include provisions directing the MMU to report to the Commission if it has not been provided adequate tools. ANOPR, ¶111. Such access must also include physical access to operations and market areas as well as the ability to interact with markets and operations personnel. It is only with full access and complete tools that the MMU can adequately perform its functions.

All other things being equal, the MMU is only as effective as the data and tools available to it. This point was made at the recent FERC Technical Conference as follows:

“The markets have become so complex and intertwined that the MMU needs access not only to the bid

information but also to the information about bids and positions in markets for other products – such as FTRs – in order to be in a position to identify the full range of potential market power abuses. Without complete unfettered access to bidding information, market clearing prices, models used by the RTOs/ISOs, internal RTO/ISO procedures, planning information and operational practices, the MMU will not be able to perform its function properly. . . . ***when the MMU needs data, it should be able to access that data over the same systems used by the RTO/ISO operators without the confidentiality concerns that may be presented when an outside entity with other clients seeks the same information.***”

Comments of Gary Sorenson on behalf of Public Service Electric and Gas, p. 3-4, FERC Technical Conference, April 5, 2006 (emphasis added).

Finally, as to oversight of the MMU, the Commission correctly recognizes the tension that can develop between RTO/ISO management and the MMU. ANOPR, ¶112. The ANOPR contains a proposal that “each RTO and ISO, in addition to maintaining a market monitoring function, 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 of directors.” *Id.* The option in the Commission’s proposal to have a committee of board directors that are independent of the RTO’s or ISO board of directors could be very useful in establishing a knowledgeable and effective market monitoring unit that has the necessary independence to carryout its function. JCA support the Commission adopting this proposal in its rule. As recent events in PJM have demonstrated, the tensions that can arise between RTO/ISO management and MMUs can be significant and can raise serious questions. An independent oversight structure should greatly assist in reducing this natural tension.

2. Mitigation and Operations (ANOPR, ¶¶117-119)

In the ANOPR, the Commission expresses concern about an MMU participating in aspects of operations and mitigation functions because of concerns over a possible conflict between participating in such operations and mitigation functions and monitoring those functions. ANOPR, ¶118. Based on this concern, the Commission proposes to require MMUs to refrain from “assisting the RTO or ISO in tariff administration, from participating in RT/ISO market operations, and from taking direct actions to influence the market...” ANOPR, ¶119.

JCA do not support the Commission’s proposal because it could result in the removal of MMU oversight of mitigation measures that currently occurs. JCA regard the MMU’s role in carrying out certain aspects of the market mitigation function as an important protection for consumers that has been in place, at least in the PJM region, for some time. The Commission’s proposal could lead to a revamping of mitigation oversight in PJM that would transfer functions away from the MMU and to the Market Services division. JCA believe that it provides more consumer protection for certain mitigation functions to be carried out in the first instance by the MMU as opposed to a group whose task is to provide services to the “market,” which is primarily made up of suppliers and affiliates of suppliers. Moreover, mitigation itself is sometimes viewed as an interference with the market’s rules. These rules have been developed in large part by RTO or ISO employees, which can negatively influence their perspective in applying mitigation

An example of the type of function that is appropriate for MMU participation in the mitigation function is the development of guidelines for cost-based bids that are used

when mitigation is applied by the RTO pursuant to its tariff, the review of cost-based bids for adherence to such guidelines, and the review of attempts by sellers to vary from those guidelines. These functions all occur prior to the RTO or ISO running the market and the Commission should not preclude the MMU from participating in those functions. While these functions could be performed by the ISO or RTO and evaluated, after-the-fact, by the MMU, MMU objections in this scenario could only lead to relief in terms of changing behavior in the future and, possibly, return of ill-gotten gains by the market participant who submitted an inappropriate cost bid. This would be insufficient because it would not provide relief to consumers for the excess payments made to all sellers in the market clearing based on the inappropriate bid. When the MMU participates in this function in the first instance, these decisions are “monitored” by the ISO or RTO as well as all the affected sellers. The affected sellers who object to limits placed on cost-based bids by the MMU would have the possibility of a complete remedy in the form of an uplift payment for sales made at a price that was unreasonably low because of an unreasonable decision by an MMU. Thus, MMU participation in this function provides important consumer protections and can be a reasonable policy choice for an RTO or ISO.

For these reasons, JCA oppose the ANOPR proposal to remove MMUs from any role in the market mitigation function. Each proposal for a market mitigation regime should be examined on its own merits. The Commission should certainly insist that the respective roles of the ISO or RTO and the MMU in carrying the mitigation function should be explicitly defined and that the mitigation be conducted as openly as possible with publication of as much information as possible on the actions taken by both the RTO or ISO and the MMU as part of the mitigation function.

3. State Commission Requests (ANOPR Sec. 128-129)

Section V of the ANOPR addresses Market Monitoring policies, and (C) (3) specifically addresses tailored requests by the state commissions for information from the MMUs. JCA submit that MMUs should be required to provide information and analyses requested by state commissions, subject to reasonable confidentiality provisions. Furthermore, RTOs must provide MMUs with sufficient resources to respond to such requests. Among other responsibilities, state commissions are generally tasked with assessing the reasonableness of retail rates for electric service in their jurisdictions. States that have unbundled their electric utility industry rely to a large measure on RTOs and MMUs to ensure that the basis of the energy component of retail rates, wholesale prices, is the product of a robust, competitive market, free from market manipulation. MMUs should be required to respond to state commission requests for information, special reports, and analyses relating to the RTO's wholesale markets so that they may more effectively carry out their role in ultimately assessing the reasonableness of retail rates and the general regulation of electric utilities. Furthermore, RTOs should be required to provide MMUs with sufficient resources to respond to state commission requests.

D. Responsiveness Of RTOS And ISOS

JCA appreciate the opportunity to comment on this important issue and recognize the balance that the Commission has tried to reach between maintaining the independence of the RTO and still having the RTO be responsive to its members. As the Commission

notes in its ANOPR, it is important for an RTO or ISO Board to communicate with its members and not become isolated. ANOPR at 85.

JCA agree with the Commission that “representatives of customers and other stakeholders must have some form of effective direct access to the board of directors.” (*Id.* at 89). In addition, the majority and minority opinions on all issues must be presented to the board so that the board can take all positions into consideration in making its decisions. Historically, for example, PJM stakeholders have communicated with its Board at the Annual Meeting or other PJM meetings or by direct correspondence, which is posted for all stakeholders to see. For the most part, stakeholders in PJM have relied upon PJM’s Management and Staff to communicate the stakeholders’ majority and minority positions to the Board. Unfortunately, recent events at PJM have raised concerns as to whether the Board is aware of the concerns and positions of all its stakeholder groups. This impression erodes the trust that needs to be present between the stakeholders and the board in order for the RTO to be effective and for the stakeholders to trust that decisions are being made in an independent manner based on all available information. Because of this the Commission should review the governance process employed by each ISO or RTO.

As outlined in the ANOPR, the RTO plays the integral role in maintaining the reliability of the transmission grid. *Id.* at 83-84. In order for the voluntary RTO process to work, stakeholders must have confidence in the independence and decision making ability of the board. Open transparent communications between stakeholders and the board is essential to this process. The board has an obligation to treat the interests of all stakeholders equally as all stakeholders have an important stake in the process. Any hint

of favoritism, undue influence or preferential treatment to any stakeholder on important issues affecting all stakeholders affects this tenuous balance and erodes stakeholder confidence. Communication is a two way street and both the stakeholders and the board have responsibilities in this process. The stakeholders have the responsibility to participate in an RTO's stakeholder process and to communicate any concerns to the board. The board has the responsibility to be responsive to stakeholders by, at a minimum, acknowledging receipt of concerns. Communicating through management or saying one thing and doing another do not bode well if there is to be effective communication.

The Commission seeks comment on whether a hybrid board or a board advisory committee could provide adequate access to the board. JCA are not supportive of a hybrid board at this time. However, JCA are supportive of the board advisory committee concept, similar to the MISO process. In order to be effective, the board advisory committee must have equal representation from all sectors and representation must change on a regular basis so that stakeholders do not feel that one stakeholder or group of stakeholders is having an undue influence on the board. All stakeholders should be able to listen to the meetings to ensure that inappropriate lobbying does not occur. A board advisory committee has the potential of ensuring that the board is aware of all stakeholder positions on an issue.

In order to ensure that all stakeholders have access to the board, board members should have some open meetings and regularly attend stakeholder meetings. Attending stakeholder meetings will ensure that all stakeholders have the ability to communicate

with board members and will provide them with an opportunity to view the dynamics in the stakeholder process.

The Commission also seeks comment on what reforms are needed to improve RTO responsiveness to its stakeholders. *Id.* at 93. Responsiveness to stakeholders should be an integral function of the RTO at the highest levels and there should be frank open discussion regarding any concerns. Responsiveness to stakeholders should be a component of the strategic plan and should be a top criteria for executive managers. Responsiveness to stakeholders begins in the stakeholder process. At this level, it is important that minority positions are noted and discussed with the board. In its filings to FERC, the RTO should note if there is a significant minority position and if no consensus is reached at the stakeholder level then the RTO should report this to FERC as well.

On many levels, both the PJM and MISO systems have worked to give all stakeholders a voice in the system. As RTOs expand, and as the markets become more complex, differences will occur. It is imperative that all stakeholders have a voice in the process, which the current system provides. This system should be evaluated on a regular basis to ensure that the process is meeting the needs of the participants.

II. CONCLUSION

JCA appreciate the opportunity to participate in the Commission's review of issues which are critical to the functioning of the wholesale markets. JCA look forward to participating in subsequent phases of this review.

WHEREFORE, JCA submit the foregoing comments for the Commission's consideration.

Respectfully submitted,

/s/ filed electronically

Sandra Mattavous-Frye
Deputy People's Counsel
Lopa Parikh
Assistant People's Counsel
D.C. Office of the People's Counsel
1133 15th St., N.W., Suite 500
Washington, D.C. 20005
(202) 727-3071
(202) 727-1014 (facsimile)
E-mail: smfrye@opc-dc.gov
lparikh@opc-dc.gov

/s/ filed electronically

Julie Soderna
Director of Litigation
Citizens Utility Board
208 S. LaSalle St., Ste. 1760
Chicago, IL 60604
312-263-4282 (voice)
312-263-4329 (fax)
jsoderna@citizensutilityboard.org

/s/ filed electronically

Felicia Thomas-Friel, Esq.
Deputy Public Advocate
Henry M. Ogden, Esq.
Assistant Deputy Public Advocate
New Jersey Division of Rate Counsel
31 Clinton Street
P.O. Box 46005
Newark, New Jersey 07101
(973) 648-2690
(973) 624-1047 (facsimile)

E-mail: fthomas@rpa.state.nj.us
hogden@rpa.state.nj.us

/s/ filed electronically

Tanya J. McCloskey
Senior Assistant Consumer Advocate
Counsel for:
Irwin A. Popowsky, Consumer Advocate
Pennsylvania Office of Consumer Advocate
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
(717) 783-7152 (facsimile)

/s/ filed electronically

Paula M. Carmody
People's Counsel
William F. Fields
Senior Assistant People's Counsel
Maryland Office of People's Counsel
6 St. Paul Street, Suite 2102
Baltimore, Maryland 21202
(410) 767-8150
(410) 333-3616 (facsimile)
E-mail: BillF@opc.state.md.us

/s/ filed electronically

Consumers' Counsel
Janine L. Migden-Ostrander
Jacqueline Lake Roberts
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Ohio Consumers' Counsel
Columbus, Ohio 43215-3485
614-466-8574
614-466-9475 (facsimile)
E-mail: roberts@occ.state.oh.us