

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

Wholesale Competition in Regions : Docket Nos. RM07-19-000  
with Organized Electric Markets : AD07-7-000

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**AMENDED REQUEST FOR REHEARING  
ON BEHALF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**I. INTRODUCTION AND BACKGROUND**

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC), 18 C.F.R. § 385.713, the Public Utilities Commission of Ohio (Ohio Commission) hereby respectfully requests rehearing of Order No. 719, issued by FERC on October 17, 2008, in the above-captioned dockets.<sup>1</sup> FERC's Final Rule intends to improve the operation of organized wholesale electric markets. Specifically, FERC's Final Rule adopts revised regulations for Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) concerning the following four areas: (1) the role of demand response

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<sup>1</sup> *Wholesale Competition in Regions with Organized Electric Markets*, 125 FERC ¶ 61,071 (2008) (Final Rule).

in organized markets, including greater reliance on market prices to elicit demand reductions during power shortages; (2) increasing opportunities for long-term power contracting; (3) strengthening the market monitor function; and (4) enhancing the responsiveness of RTOs and ISOs to stakeholders. FERC's decision acts on its Notice of Proposed Rulemaking (NOPR) issued on February 22, 2008, its Advanced Notice of Proposed Rulemaking (ANOPR) issued on June 22, 2007, and its technical conference regarding market monitoring policies held on April 5, 2007.

On September 14, 2007, the Ohio Commission filed comments in response to the ANOPR.<sup>2</sup> On April 21, 2008, the Ohio Commission filed comments regarding the NOPR.<sup>3</sup> Additionally, the Ohio Commission supported the Organization of MISO States, Inc.'s (OMS) comments filed on that same date.<sup>4</sup>

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<sup>2</sup> Docket Nos. RM07-19-000 and AD07-7-000, Ohio Commission Comments (September 14, 2007).

<sup>3</sup> Docket Nos. RM07-19-000 and AD07-7-000, Ohio Commission Comments (April 21, 2008).

<sup>4</sup> Docket Nos. RM07-19-000 and AD07-7-000, OMS Comments (April 21, 2008) at 18-19.

## **II. SPECIFICATION OF ERRORS**

The Ohio Commission respectfully submits that FERC's Final Rule erred in the following respects:

### **Demand Response**

1. FERC's Final Rule erred in that all contracts by third-party aggregators of demand response should be required to be approved by the relevant state commissions.
2. FERC's Final Rule erred in that it removed generation price caps to allow for scarcity pricing during times of an emergency until such time as demand response is more widespread.

### **Market Monitor**

3. FERC's Final Rule erred in that independent (external) market monitors are prevented from possessing the authority to impose mitigation on both a prospective and retroactive basis, and recommending to FERC sanctions on market participants.
4. FERC's Final Rule erred in that under a market monitor hybrid approach, the internal market monitor is vested with more authority than the independent (external) market monitor.
5. FERC's Final Rule erred in that it failed to clarify that all market monitor rules and enforcement standards, currently identified in the RTO/ISO tariff, that are necessary for the market monitor unit to effectively perform its job function be entrusted and delegated formally to the independent (external) market monitor.

### **RTO/ISO Responsiveness to Stakeholders**

6. FERC's Final Rule erred in that it failed to require each ISO/RTO to include on its board of directors at least one individual with

extensive state regulatory experience, but not current state commissioners or commission staff.

7. FERC's Final Rule erred in that stakeholders now may be placed on the RTOs' or the ISOs' board of directors to the detriment of the board's independence.

### **III. STATEMENT OF ISSUES**

The Ohio Commission states that the following issues are raised in its request for rehearing:

#### **Demand Response**

1. Whether FERC's Final Rule erred in that all contracts by third-party aggregators of demand response should be required to be approved by the relevant state commissions.
2. Whether FERC's Final Rule erred in that it removed generation price caps to allow for scarcity pricing during times of an emergency until such time as demand response is more widespread.

#### **Market Monitor**

3. Whether FERC's Final Rule erred in that independent (external) market monitors are prevented from possessing the authority to impose mitigation on both a prospective and retroactive basis, and recommending to FERC sanctions on market participants.
4. Whether FERC's Final Rule erred in that under a market monitor hybrid approach, the internal market monitor is vested with more authority than the independent (external) market monitor.

5. Whether FERC's Final Rule erred in that it failed to clarify that all market monitor rules and enforcement standards, currently identified in the RTO/ISO tariff, that are necessary for the market monitor unit to effectively perform its job function be entrusted and delegated formally to the independent (external) market monitor.

#### **RTO/ISO Responsiveness to Stakeholders**

6. Whether FERC's Final Rule erred in that it failed to require each ISO/RTO to include on its board of directors at least one individual with extensive state regulatory experience, but not current state commissioners or commission staff.
7. Whether FERC's Final Rule erred in that stakeholders now may be placed on the RTOs' or the ISOs' board of directors to the detriment of the board's independence.

### **IV. DISCUSSION**

#### **A. Demand Response**

##### **1. Aggregation of Retail Customers**

FERC's Final Rule requires RTOs/ISOs to amend their market rules as necessary to permit an aggregation of retail customers (ARC) to bid demand response directly into the RTO's or ISO's organized markets, unless the laws or regulations of the relevant electric retail regulatory

authority do not permit a retail customer to participate.<sup>5</sup> FERC clarified that it will not require a retail electric regulatory authority to make any showing or take any action in compliance with this rule.<sup>6</sup> FERC directed RTOs and ISOs to submit compliance filings proposing amendments to their tariffs or otherwise demonstrating how their existing tariffs and market rules comply with the rule.<sup>7</sup>

Consistent with our previous remarks in this proceeding, the Ohio Commission observes that retail customers or their representatives should not be classified as wholesale customers subject to FERC's jurisdiction simply because they provide demand response to the wholesale market. The Ohio Commission submits that FERC has erred by not acknowledging that all contracts by third-party aggregators of demand response subject to state retail jurisdiction should be required to be approved by that state commission prior to providing demand resources to an RTO.

The Ohio Commission supports FERC's belief that ARCs should be permitted to aggregate smaller customer loads; however, such third-party

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<sup>5</sup> Final Rule at ¶ 154.

<sup>6</sup> *Id.* at ¶ 155.

<sup>7</sup> *Id.* at ¶ 163.

activity should be predicated on state regulatory authority or approval. The reason for this state approval is not simply a jurisdictional debate in that there may be additional factors that must be taken into account before allowing these types of transactions to go forward. The Ohio Commission notes that Ohio is pursuing its own investigation regarding the cost-effectiveness of deploying advanced metering infrastructure in conjunction with dynamic pricing for its jurisdictional retail customers. It is the prerogative of each individual state commission to decide to what extent it will expose its retail customers to the wholesale market, and what, if any, advanced technology (*i.e.*, smart meters) its retail customers desire and wish to purchase. Currently, retail consumers provide demand response via retail tariffs and other retail contracts with their load serving entities (*e.g.*, direct load control and interruptible tariffs). As noted in our prior comments, the Ohio Commission questions whether FERC is drawing the conclusion that states are constructing barriers to demand response programs.

## **2. Price Formation During Periods of Operating Reserve Shortages**

In its Final Rule, FERC adopts the proposed rule to remove bid caps for generation and demand response during times of operating reserve

shortage.<sup>8</sup> FERC's decision reflects that it continues to find that existing rules that do not allow for prices to rise sufficiently during an operating reserve shortage in order to allow supply to meet demand are unjust, unreasonable, and may be unduly discriminatory.<sup>9</sup> FERC submits that these constraints may not produce prices that accurately reflect the value of energy and, by failing to do so, may harm reliability, inhibit demand response, deter entry of demand response and generation resources, and thwart innovation.<sup>10</sup> FERC's Final Rule also contends that when bid caps are in place, it is not possible to elicit the optimal level of demand or generator response, thereby forgoing the additional resources that are needed to maintain reliability and mitigate market power.<sup>11</sup> This, in turn, increases the likelihood of involuntary curtailments and contributes to price volatility and market uncertainty.<sup>12</sup> Further, by artificially capping prices, price signals needed to attract new market entry by both supply- and

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<sup>8</sup> *Id.* at ¶ 192.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at ¶ 193.

<sup>12</sup> *Id.*



demand-side resources are muted and long-term resource adequacy may be harmed.<sup>13</sup> RTOs/ISOs are required to reform or demonstrate the adequacy of their existing market rules in their respective compliance filings.<sup>14</sup>

As a starting place, the Ohio Commission continues to support lifting price caps for demand resources during operating reserve shortages while retaining those for generation supply. FERC's Final Rule fails to acknowledge that supply is likely to be the dominant resource in providing any extra generation in emergency situations. We note that the assumption that demand resources can alleviate all of the operating reserve shortages that may occur in the present may not always be sufficient. For example, the demand response resource may not be located in a constrained area where the operational shortage is occurring, or it may not perform when called upon. Consequently, until demand resources are on par with generation, and to the extent there are pivotal generators and insufficient demand response to check the exercise of supply market power, it may be reasonable to lift the caps on demand bids without lifting the caps on supply resources. The Ohio Commission believes that it will be timely to

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at ¶ 194.

lift the caps for supply resources in system emergencies only when and where there are a sufficient number of suppliers and enough demand response in the market to check the exercise of market power.

In sum, the Ohio Commission contends that caps for demand only bids during system emergencies may represent a reasonable approach to creating transparent price signals in shortage situations and may protect consumers from the abuse of supplier market power. Such an undertaking will also incent investment in demand resources and technologies. Where there are a sufficient number of suppliers or enough demand response to prevent the exercise of market power, the Ohio Commission would agree that it would be appropriate to lift caps for both supply and demand resources.

## **B. Market-Monitoring Policies**

### **1. Structure, Operations, and Mitigation**

FERC's Final Rule allows RTOs/ISOs to adopt a hybrid structure to market monitor deployment: one internal located within the RTO/ISO and one external, which is not an affiliate of the company. For those RTOs that adopt this approach, FERC's Final Rule separates the duties of internal and external market monitor units (MMUs) and provides that for non-hybrid

MMUs, mitigation by the *external* MMU should center on retrospective mitigation and the calculation of inputs required for the RTO or ISO to conduct prospective mitigation.<sup>15</sup> FERC maintains that there is an inherent conflict of interest in an MMU conducting mitigation and also opining on the state of the market, the health of which may in part reflect the results of its mitigation.<sup>16</sup> FERC believes that by supporting RTOs and ISOs in tariff administration, MMUs become subordinate to the RTO or ISO, thus weakening their independence.<sup>17</sup> FERC's Final Rule authorizes RTOs or ISOs that employ a hybrid MMU structure to allow the internal market monitor to conduct both prospective and retroactive mitigation via the internal function.<sup>18</sup> FERC observes that an internal MMU is a part of the RTO or ISO, and allowing it to conduct mitigation adequately separates it from the monitoring duties of the external market monitor and places mitigation within the RTO or ISO itself.<sup>19</sup> FERC's Final Rule also requires

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<sup>15</sup> *Id.* at ¶ 312.

<sup>16</sup> *Id.* at ¶ 371.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at ¶¶ 374-375.

<sup>19</sup> *Id.* at ¶ 374.

that in the event an RTO or ISO with a hybrid MMU structure permits its internal market monitor to conduct mitigation, it must assign its external market monitor the responsibility, and give it adequate tools, to monitor the quality and appropriateness of that mitigation.<sup>20</sup>

FERC's Final Rule remarks that it believes that it is only prospective mitigation that affects the operation of the market, and therefore it is only prospective mitigation that creates a potential conflict of interest for an MMU.<sup>21</sup> Consequently, FERC notes that an RTO or ISO may allow its MMU, regardless of whether it uses a hybrid structure, to conduct retrospective mitigation.<sup>22</sup> FERC also determined that the MMU may provide the inputs required by the RTO or ISO to conduct prospective mitigation, including determining reference levels, identifying system constraints, cost calculations, and the like.<sup>23</sup> FERC maintains that this will enable the RTOs and ISOs to utilize the considerable expertise and software capabilities developed by their MMUs, and reduce wasteful

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at ¶ 375.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

duplication.<sup>24</sup>

As noted in our previous remarks to FERC in this proceeding, the Ohio Commission questions the efficacy of an RTO employing both an external and internal market monitor. To the extent a duplicative structure is adopted, however, the Ohio Commission maintains that the external (independent) market monitor's evaluations and recommendations must prevail over those of the internal market monitor. Moreover, FERC should endeavor to ensure that the internal market monitor is not employed to refute and compromise the evaluations of the external monitor. FERC should ensure that the external monitor's access to market data and RTO personnel is equal to or surpasses that of any internal market monitor. The Ohio Commission also recommends that the responsibilities for data collection, analysis, and all market mitigation and referrals should take place at the external (or independent) MMU level for each ISO/RTO. The independent MMU should also possess the authority to recommend FERC sanctions, penalties and/or monetary fines upon those manipulating or attempting to manipulate the market. FERC's Final Rule erred in that it falls short in accomplishing these Ohio Commission proposed safeguards.

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<sup>24</sup> *Id.*

The Ohio Commission maintains that FERC has erred in setting forth the parameters for hybrid MMUs and the imposition of mitigation by not fully considering the various comments in this proceeding regarding these issues. The Ohio Commission further maintains that FERC's Final Rule has resulted in a dysfunctional MMU hierarchy that will result in the existing MMU being subordinate to any new internal MMU and the RTO. The Ohio Commission is confused by FERC's decision. In those instances where the RTO elects to adopt a hybrid market monitor structure, FERC has vested more authority with the internal monitor to curb abuses than it has with the existing, external independent market monitor because only the internal market monitor (or RTO) is permitted to apply mitigation on both a prospective and retroactive basis. Consequently, the external market monitor is relegated to applying mitigation on a retroactive basis and observing how well the internal market monitor applies prospective mitigation.

The Ohio Commission is confused as to how and why this determination was made and what goal it was designed to accomplish. In particular, the Ohio Commission questions how this determination will result, as FERC contends, in a stronger external or independent market

monitor. This rule will ensure that some MMUs will not have all the necessary tools available to accomplish their job function, limiting their ability to impose prospective mitigation on those with market power or those attempting to manipulate the market.<sup>25</sup>

The Ohio Commission also notes that FERC's decision is deficient in that it failed to address adequately valid arguments against vesting the RTO's internal market monitor with mitigation authority. Specifically, FERC's decision accomplished little to address valid concerns by commenters regarding the inherent conflict of interest that RTOs have in imposing mitigation upon their own member companies, whose membership and participation are optional. In addition, FERC has not addressed adequately the allegations of needless duplication of efforts involved with the adoption of the hybrid approach. Finally, FERC's Final

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<sup>25</sup> The Ohio Commission notes that, on December 19, 2007, it joined as a signatory party to a stipulation between the Organization of PJM States, Inc. and PJM intended to ensure more independence of the market monitor from RTO oversight. Among other things, the stipulation provides for an external market monitor reporting to the RTO's board of directors. The Ohio Commission entered this stipulation as a package agreement intended to ensure more independence of the market monitor over its previous working relationship with the RTO. FERC issued an order approving the stipulation on March 21, 2008. *Allegheny Electric Cooperative*, 122 FERC ¶ 61,257 (2008) (Order Approving Uncontested Settlement and Denying Rehearing). The Ohio Commission submits that FERC should endeavor not to disturb the approved stipulation, and should clarify that the Final Rule is not intended to disturb it.

Rule does not explain well why it is limiting the non-internal MMU's ability to impose prospective mitigation, which could ultimately be deleterious to consumers.

We further note that FERC has not addressed thoroughly what problem it is attempting to fix through these rules in that there is no empirical evidence of an existing problem. The Ohio Commission maintains that FERC's Final Rule concerning market monitor structure and mitigation authority essentially compromises the purpose of any external market monitor who currently mitigates on a prospective basis. If FERC is genuinely interested in making organized markets work, it will allow such objective mitigation and resulting critiques to continue for the overall welfare of the markets and the best interest of consumers.

## **2. Tariff Administration and Revisions**

FERC's Final Rule also directs RTOs/ISOs to modify their tariffs to clearly state which functions are to be performed by MMUs, and which by the RTO or ISO.<sup>26</sup> FERC contends that this separation of functions will serve to eliminate RTO or ISO influence over the MMUs, and remove the

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<sup>26</sup> Final Rule at ¶ 378.



concern that MMU assistance in mitigation makes it subordinate to the RTO or ISO.<sup>27</sup>

The Ohio Commission maintains that FERC's decision on this matter calls for clarification. Specifically, the Ohio Commission requests that FERC require that RTOs/ISOs be responsible to identify all MMU functions in their tariffs that are essential to the effective operations of the MMU and to delegate formally in their compliance filings all such functions to the external or independent market monitor.

### **C. Responsiveness of RTOs to Stakeholders**

#### **1. Hybrid Boards**

FERC's Final Rule reflects that it will not require RTOs or ISOs to adopt a specific form of board structure – whether board advisory committee, hybrid board, or other.<sup>28</sup> FERC's decision states that it will not require, as proposed by the Ohio Commission, that at least one member of RTO or ISO boards have state regulatory experience.<sup>29</sup> FERC's Final Rule also will not require, as proposed by NARUC, that board advisory

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at ¶ 534.

<sup>29</sup> *Id.* at ¶ 535.

committees have open positions for state commissions and state consumer advocates.<sup>30</sup> However, these suggestions may be considered by RTOs and ISOs during their own deliberations on compliance with the rule.<sup>31</sup> FERC's Final Rule also indicates that it believes that a hybrid governance structure may be constructed in a way that allows for the expertise of various groups to inform the decision-making process, while still remaining independent such that no individual market participant is given undue influence over the decisions of the board.<sup>32</sup> RTOs/ISOs wishing to adopt a hybrid board will have to show in their compliance filings that their proposals are consistent with the principles of Order No. 2000 and other relevant precedent.<sup>33</sup>

The Ohio Commission maintains that FERC erred by not preventing stakeholders from participating on RTO/ISO boards. This decision will encourage the erosion of confidence in these boards because they will be perceived to be biased and to lack independence. FERC also erred by not

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at ¶ 537.

<sup>33</sup> *Id.*

ensuring that states' interests are adequately represented on the RTO/ISO boards. Allowing stakeholders to participate on hybrid boards will skew the independence of these boards. Moreover, we observe that it is unworkable for the RTO/ISO to ensure that all stakeholder interests are fairly represented without seating each and every stakeholder on the board. This situation is further exacerbated by the fact that not one person with a state commission background is required to be seated.

As mentioned in our previous comments in this proceeding, the Ohio Commission recommends that FERC require each ISO/RTO to include on its board of directors at least one individual with extensive state regulatory experience. The Ohio Commission is not recommending, however, that current state commissioners or commission staff be seated on these boards. Moreover, the RTOs' boards of directors should be compelled by FERC to work with advisory committees of state regional organizations responsible for working with RTOs/ISOs. In support of our recommendation to require board members with state regulatory experience, the Ohio Commission observes that states with electric distribution utilities (EDUs) participating in organized markets hold a vested interest in the efficient operations of the ISO because they have millions of customers who ultimately pay for

generation, transmission, and ISO administration charges. This responsibility to the states' customers vests with the states an interest in the efficient operations of the market that transcends that of market participants or ISO customers. Given our significant role and responsibility to end-user customers for safe, affordable, and reliable energy services and products, the states must be viewed by FERC as entities that transcend market participants or stakeholders. It is the states' end-user customers that ultimately pay for generation and transmission services. Moreover, it is usually the states who take the brunt of the blame for decisions made at the RTO and federal level. For these reasons, state interests must be thoroughly represented at the RTO level through seating on RTO boards.

As noted previously in this proceeding, the Ohio Commission maintains that there is considerable need for cooperation between the state and federal jurisdictions regarding the administration of organized electric markets. Specifically, we observe that not all of the transactions occurring in these markets are wholesale transactions. That is, many of the transactions in the organized markets consist of retail services including, for example, virtual bids, bilateral contracts, and demand bids. The Ohio Commission, therefore, maintains that states hold a vested, substantial, and

legitimate role in the administration of organized markets. We also note that as opposed to pursuing a counter-productive debate regarding jurisdictional issues, FERC should focus its efforts in working with states on pursuing a dialog to resolve the problems presented by organized markets. State regulators have a vital and complementary role in protecting consumers from the abuse of market power and other market deficiencies.

## **V. CONCLUSION**

WHEREFORE, for all the forgoing reasons, the Public Utilities Commission of Ohio hereby respectfully requests that Federal Energy Regulatory Commission grant rehearing as described above.

Respectfully submitted,

Filed Electronically w/ FERC

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## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. § 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

Filed Electronically w/ FERC  
**Sarah J. Parrot**  
Assistant Attorney General

Dated at Columbus, Ohio this November 17, 2008.

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Summary: Motion Amended Request for Rehearing on behalf of the Public Utilities Commission of Ohio submitted to the FERC in Docket Nos. RM07-19-000 and AD07-7-000, Wholesale Competition in Regions with Organized Electric Markets. electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio