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April 21, 2008

SENT VIA ELECTRONIC FILING
Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

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

Dear Secretary Bose:

For filing, please find the Comments of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 474-1585.

Very truly yours,

A handwritten signature in cursive script that reads "Kimberly A. Harriman".

Kimberly A. Harriman
Assistant Counsel

Attachment

**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

**COMMENTS OF
THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK**

INTRODUCTION

On June 22, 2007, the Federal Energy Regulatory Commission (FERC or Commission) issued an Advanced Notice of Proposed Rulemaking (ANOPR) with regard to potential reforms to improve the operation of organized wholesale electric markets. Comments were provided by various parties on the ANOPR. In addition, Commission staff held various technical conferences on issues addressed by the ANOPR, including demand response resources and long-term contracting. The Commission, based upon the record developed through the ANOPR and technical conferences held by Commission staff, issued a Notice of Proposed Rulemaking (NOPR) on February 22, 2008.

The New York State Public Service Commission (NYPSC) hereby submits its Comments on the NOPR issued in the above-captioned proceeding pursuant to the NOPR and Rule 214 of the Commission's Rules of Practice and Procedure.

Copies of all correspondence and pleadings should be addressed to:

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SUMMARY OF COMMENTS

The NOPR seeks comments on proposals intended to improve the operation of organized wholesale electric markets. The proposals cover four main areas: 1) the role of demand response; 2) increasing opportunities for long-term power contracts; 3) strengthening market monitoring; and, 4) the responsiveness of Regional Transmission Organizations (RTO) and Independent System Operators (ISO) to consumers and market participants. The NYPSC welcomes the opportunity for further involvement in crafting these proposals.

The NYPSC concurs with the Commission that long-term contracts are consistent with organized markets and are an important part of the market by providing a hedge against price volatility for buyers and sellers. Long-term contracts also have the potential to improve reliability by facilitating additional new entry and to mitigate market power of existing entities. We support the Commission's proposal to not mandate standardized forward products. Mandating particular terms may

be inefficient and unnecessarily raise costs for market participants. Furthermore, the Commission's proposal to facilitate bilateral transactions among market participants by requiring RTOs and ISOs to dedicate a portion of their websites to the posting of offers to purchase and sell provides a foundation upon which long-term contracts can be fostered.

We also support the Commission's proposal that each RTO and ISO have its internal Market Monitoring Unit (MMU) or its external market advisor report directly to the RTO's or ISO's board of directors, which should further ensure the independence of the MMU and external market advisor. We concur with the Commission's decision to allow the internal MMU to report to management under situations where an RTO or ISO maintains an internal MMU and an external market advisor. The NYPSC, however, continues to support allowing internal MMUs, operating in a hybrid paradigm (both an internal MMU and an external market advisor) to assist the RTO or ISO in administering the tariff and mitigating improper behavior, while the external market advisor may concentrate on providing market evaluations, reports, and advice free of the responsibility for tariff administration.

We support the Commission's initiative to establish minimum standards for data access by state commissions, although the Commission should not limit states' access to additional

data where sufficient safeguards are in place to protect against the disclosure of confidential information.

We generally support the Commission's proposals with respect to the topics of Demand Resources and responsiveness of RTOs and ISOs to customers and stakeholders. Because the New York System Operator, Inc.'s (NYISO) current practices comply with the Commission's proposals, we will not offer comments on either topic.

DISCUSSION

I. Increasing Opportunities For Long-Term Power Contracts

The NYPSC agrees with the Commission that long-term power contracts may promote energy price stability, enable buyers and sellers to better manage risks, and entice the entry of new generation. Moreover, we concur with the Commission that transparency in long-term electric energy markets may assist buyers and sellers in navigating the long-term market, thereby encouraging their participation in the market.

The NYPSC is currently exploring the use of long-term contracts to facilitate entry of new resources and advance

public policy goals for the state's electric infrastructure.¹ Long-term power contracts can be useful to facilitate new merchant infrastructure by providing a predictable revenue stream to developers in order to obtain financing. Furthermore, long-term contracts can be an integral component to implementing important public policy objectives, such as the promotion of renewable technologies. Spot markets alone, or coupled with forward markets, may not suffice to address such public policy interests. Long-term contracts can also prove useful to address market power concerns by being structured in a manner that reduces the incentive for generators to exercise market power.

The Commission proposes having a portion of each ISO's or RTO's web site dedicated to the posting of offers to buy or sell power long-term. An ISO or RTO web site dedicated to posting long-term power offers is a low-cost approach to facilitate such transactions and we strongly support such an effort. Therefore, we support the Commission's proposal

¹ See Case 07-E-1507, Long-Range Electric Resource Plan and Infrastructure Planning Process, Order Initiating Electric Reliability and Infrastructure Planning issued December 24, 2007); Case 06-M-1017, Utility Commodity Supply Service To Residential and Small Commercial and Industrial Customers, Order Requiring Development Of Utility-Specific Guidelines For Electric Commodity Supply Portfolios And Instituting A Phase II To Address Longer-Term Issues (issued April 19, 2007).

directing ISOs and RTOs to accommodate the posting of offers to buy or sell power long-term on their web sites.

We also support the Commission's determination not to mandate the development of new standardized forward products. The development of mandatory standardized forward products requires great care because poorly defined products may fail to achieve the intended results, or may do so at an unnecessarily high cost. Consequently, if forward products are to be developed they should be developed through each RTO's or ISO's stakeholder process to ensure that the proposal receives full vetting and takes shape under the unique circumstances of each RTO's or ISO's market structure.

II. Strengthening Market Monitoring

The Commission makes several proposals that are designed to provide market monitors with the tools and independence necessary to enhance the performance and transparency of organized markets.

A. Under Specific Circumstances Internal MMUs Should be Allowed to Participate in Tariff Administration.

The Commission proposes that each RTO and ISO be required to have its MMU, either internal or external, or the external market advisor, report directly to the RTO's or ISO's board of directors. Moreover, the Commission intends to

preserve the independence of the MMUs (including external market advisors) by eliminating MMU responsibility for tariff administration, including responsibility for directing the application of mitigation measures. The Commission found that removal of tariff administration, including mitigation, would allow MMUs to concentrate on their core job of monitoring markets. In addition, the Commission determined that by removing the MMU's responsibility to both mitigate and monitor the market, any potential conflict of interest for the MMU would be eliminated.

Assuming the presence of an internal and an external MMU or external market advisors, internal MMUs should be allowed to mitigate improper market behavior. Because mitigation of such behavior may be interpreted as tariff administration, participation in market operations, and influencing the market, the NOPR would prohibit internal MMUs from performing this critical function. However, internal MMUs are best equipped with the real-time data necessary to monitor the markets and to take steps to address actions that are in violation of the tariff. The external MMU or market advisor should instead concentrate on providing market evaluations, advice, and reporting objectively on whether the RTO or ISO has done an appropriate job in designing and administering wholesale power markets.

The Commission's concerns with respect to MMU involvement in tariff administration - independence and elimination of conflicts of interest - are not present when the RTO or ISO has both an internal MMU and an external MMU or external market advisor. Under such circumstances the external MMU or external market advisor is free to monitor the market without concern about the lack of independence or conflicts of interest while the internal MMU is free to participate in tariff administration. Moreover, the internal MMU, free to participate in tariff administration, offers tangible efficiencies for the RTO or ISO. These benefits are not outweighed by the minimal gains in the internal MMU's appearance of independence and elimination of potential conflicts of interest. Therefore, the Commission should limit its proposal with respect to prohibiting MMU involvement in tariff administration to only those instances where there is solely an internal or external MMU or market advisor.

B. State Regulatory Commissions Should Be Provided Access To Information Possessed By RTOs and ISOs.

The Commission proposes to provide on a regular basis to state commissions MMU reports on market and RTO or ISO performance. In addition, the Commission proposes to allow state commissions to request additional information, so long as the MMU determines, on a case-by-case basis, that such

information is of the type that is "regularly gathered by the MMUs in the course of business and is subject to confidentiality considerations."²

We interpret the Commission's proposal as primarily concerned with opening access to information for state commissions that do not currently have access to such data. By permitting the MMU to decide whether or not to respond to specific information requests from state commissions, the Commission appears to be allowing for the continuation of procedures in place between some MMUs and state commissions for the regular sharing of information.

As the Commission has acknowledged, this information is needed by state commissions "to assist them in performing their regulatory functions, given the integral relationship between wholesale and retail rates."³ Maintaining the current access to such information is critical to the NYPSC so that we may fulfill our regulatory responsibilities. In particular, New York's Public Service Law assigns the NYPSC the responsibility to ensure that electric corporations, such as the NYISO, furnish safe and adequate service at just and reasonable rates.⁴

Moreover, we observed that access to market

² NOPR at ¶¶ 202 and 226.

³ ANOPR at ¶123.

⁴ N.Y. PUB. SERV. LAW §65 (McKinney 2000).

information will support both the NYPSC's interest in reliability, as well as its interest in just and reasonable rates. As we have acknowledged in the past "the manner in which bids are made, generators are committed, and the performance of generators in meeting those commitments, can and often do have profound impacts on the reliability of electric service in New York State and, ultimately, on retail rates."⁵

Consequently, the Commission should clarify that its proposed rule is the minimum standard for the dissemination of information and that MMUs that currently provide information to state commissions under working procedures will not be limited by the proposal.

1. State commissions should have access to information, even if such information is sought for state enforcement or state actions.

The Commission proposes to limit the MMU's provision of information to state commissions when such commission is seeking the information for enforcement purposes.⁶ As stated

⁵ Case 00-E-1380, Provision By The New York Independent System Operator, Inc., of Information and Data to Department Staff, Order Directing Provision of Data and Information (issued August 14, 2000). Attachment A-2 of the NYISO's Market Administration and Control Area Services Tariff lists dozens of sub-transmission facilities secured by the NYISO, but part of the Transmission Owners' retail distribution systems.

⁶ NOPR at ¶ 234. The Commission does not define the term "state enforcement" or "state actions". Given this lack of specificity it is difficult to understand the full reach of the Commission's proposed restriction of the MMU's provision of information to state commissions.

above, the NYPSC has the statutory responsibility to ensure the safe and reliable provision of electric service at just and reasonable rates. Limiting the ability of the NYPSC to obtain such information in performing its statutory obligation is unnecessary and unsupported by the record in this proceeding. The Commission has not demonstrated that the provision of information by the MMU to state commissions in instances of state enforcement or state action situations violates any provision of law or policy. Furthermore, the Commission's blanket restriction in this regard is contrary to its statement that the MMUs should respond to state commissions' specific requests for information based upon the MMU's budgetary and time limitations.⁷ Even in the event that the MMU is concerned about budgetary and time limitations the MMU could simply provide the state commission with the raw data and allow the state commission to employ its resources to derive the information or analysis sought.

Moreover, it may not be readily apparent to the MMU, RTO or ISO and the state commission that the information being sought is for state enforcement purposes. It may well be the case that a state enforcement or state action grows out of receipt of certain information, but that prior to receipt of such information, the state commission has no knowledge that

⁷ NOPR at ¶ 233.

such action was necessary. Consequently, it may not be readily apparent to any party involved that the information is sought for a state enforcement action.

Therefore, we request that the Commission not impose a blanket restriction on the dissemination of information, but instead, in instances where such information is sought by the state commission for state enforcement or state action purposes, and is able to maintain the information on a confidential basis, to allow the MMU to determine whether to provide the requested information.

2. State commissions should be provided referral and investigative information by the MMU.

The Commission also seeks to restrict the release of referral and investigative information to state commissions because such release could hamper FERC staff's ability to conduct the investigation by reducing the willingness of the market participants to participate in the investigation. Furthermore, the Commission is concerned that release of the information could also chill the market participant's desire to self-report.⁸ The Commission is also concerned that provision of this information to state commissions could lead to the states determining that the market participant is guilty of the alleged activity and thus adversely affect the participant prior to

⁸ NOPR at ¶ 240.

conclusion of the investigation. In addition, the Commission expressed concern that the state commissions may not be able to hold such information confidential given legal requirements imposed on the state to comply with public requests for disclosure.

The Commission's concern regarding confidentiality of the information is shared by the NYPSC. However, the Commission has articulated no basis to limit access to information in states, such as New York, which maintain sufficient safeguards against public disclosure of the information.⁹ The Commission acknowledges that none of the commentors on the ANOPR addressed the legal and policy arguments against release of such information to state commissions.¹⁰ Without an articulated basis for its fear that such information will be released to the public and in light of the NYPSC ability to treat such information as trade secret or confidential commercial information, the Commission should not apply a blanket restriction to the provision of referral and investigative information to state commissions. Thus, where the state

⁹ For instance, New York's Public Service Law specifically prohibits "any employee or agent" of the NYPSC or Department of Public Service (DPS) from "divulg[ing] any confidential information." Unauthorized disclosure of confidential information is a misdemeanor. N.Y. PUB. SERV. LAW §15 (McKinney 2000).

¹⁰ NOPR at ¶ 240.

commission can demonstrate that it is able to maintain sufficient safeguards against public disclosure of the information, the Commission should not restrict disclosure of the referral and investigative information.

The release of referral and investigative information to state commissions should not hamper the ability of Commission staff to conduct the investigation. More likely than not, the unwillingness of a market participant to cooperate in such investigation will not be caused by the state commission's receipt of such information but rather some other self-motivated reason. Furthermore, the Commission has ample authority to encourage the market participant's cooperation in the investigation independent of its promise to not release the referral or investigative information to state commissions.

In addition, the Commission's fear that state commissions will assume that the market participant, who is the subject of the referral or investigative information, is guilty before being proved innocent is without basis. State commissions, like FERC, are bound by the rule of law and thus must possess evidence sufficient to conclude that the market participant is guilty of some infraction of the state's laws, rules or regulations.

Federal and state governments should be working in partnership to ensure that markets are working effectively. By

refusing to allow state commissions' access to this information, the cloud of suspicion by consumers and politicians of the competitive market may continue to grow. In some states, like New York, there have been calls by legislative leaders for the reversal of the competitive market. Consequently, it is vital that state commissions be able to demonstrate that the presence of a competitive market does not disable the state from protecting retail ratepayers and that the state commission is capable of carrying out its statutory obligations in a competitive market.

Therefore, if the state commission can provide confidential treatment for referral and investigative information, the Commission should harbor no fear that innocent persons will be "adversely affected by being associated with an investigation."¹¹ The Commission should reverse its restriction of the provision of referral and investigative information to state commissions.

¹¹ Id.

CONCLUSION

The Commission should issue a Final Rule in accordance with the above discussion.

Respectfully submitted,



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of the State of New York

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Dated: April 21, 2008
Albany, New York

CERTIFICATE OF SERVICE

I, Ellen Jeffers, do hereby certify that I will serve on April 21, 2008, the foregoing Notice of Intervention and Comments of the New York State Public Service Commission upon each of the parties of record indicated on the official service list compiled by the Secretary in this proceeding.

Dated: April 21, 2008
Albany, New York


Ellen Jeffers