

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

Panda Stonewall LLC)
) Docket No. ER17-1821-002
)

To: The Honorable Suzanne Krolikowski
Presiding Administrative Law Judge

ANSWER OF THE INDEPENDENT MARKET MONITOR FOR PJM

Pursuant to Rule 213 of the Commission’s Rules and Regulations,¹ Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM² (“Market Monitor”), submits this answer to the motion for reconsideration filed by Panda Stonewall, LLC (“Panda”) to the order issued by the Presiding Judge granting the Market Monitor’s motion to intervene out of time on May 15, 2018 (“May 15th Order”). Panda fails to provide any reason for reconsideration of the May 15th Order. The motion should be denied.

I. ANSWER

A. ODEC Addresses Standing Only Before the D.C. Circuit in a Particular Court Case, Is Dicta, and Does Not Apply to Standing Before FERC or Federal Agencies.

The sole basis for Panda’s motion is a decision of the U.S. Circuit Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) denying a contested motion to intervene as a matter of right,³ holding that “a market monitor does not have standing to

¹ 18 CFR § 385.213 (2017).

² Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff (“OATT”) or the PJM Operating Agreement (“OA”).

³ See F.R.A.P. 15(d); F.R.C.P. 25(a).

intervene in a proceeding on judicial review of Commission orders.”⁴ Panda argues (at 5) that “the D.C. Circuit’s reasoning regarding *why* the IMM lacked standing bears directly on the IMM’s motion” [emphasis in original]. On the contrary, *ODEC* decides a particular motion for intervention as a matter of right in an Article III court case applying Article III standards and has no bearing on any aspect of Panda’s opposition to the Market Monitor’s last intervention.

Standing before the D.C. Circuit as a matter of right is subject to the requirements of Article III of the U.S. Constitution. The D.C. Circuit and other courts have held that those requirements do not apply to proceedings before federal agencies.⁵ *ODEC* does not bear upon standing in matters before regulatory agencies. FERC can continue to make such determinations based on its authority and discretion, based on its own expertise, as the law plainly allows.

ODEC concerns the Market Monitor’s assertion of a right to intervene in a court proceeding under F.R.A.P. 15(d). Unlike the Commission, federal courts do not allow full participation in a case as a matter of right because it is in the public interest. Standing in a

⁴ *Old Dominion Elec. Coop. v FERC*, 2018 U.S. App. LEXIS 16105 (D.C. Cir. 2018) (“*ODEC*”).

⁵ *See, e.g.*, *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 897 (2006) (“administrative agencies, unlike federal courts, are not jurisdictionally constrained by the case-and-controversy limitation in Article III”); *Envirocare, Inc. v. NRC*, 194 F.3d 72, 74 (1999) (“Agencies, of course, are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to the federal courts. The criteria for establishing ‘administrative standing’ therefore may permissibly be less demanding than the criteria for ‘judicial standing,’” citing, e.g., *Pittsburgh & W.Va. Ry. v. United States*, 281 U.S. 479, 486 (1930); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249 (1930)); *see also*, *Yates v. Charles County Bd. of Educ.*, 212 F. Supp. 2d 470, 472 (2002) (“it is a “familiar rule that an administrative agency is not bound by Article III or prudential judicial tests of standing”); *Gardner v. FCC*, 234, 530 F.2d 1086, 1090–91 (D.C. Cir. 1976) (“Administrative adjudications ... are not an article III proceeding to which either the “case or controversy” or prudential standing requirements apply; within their legislative mandates, agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court,” citing *Ecee, Inc. v. Federal Energy Regulatory Com.*, 645 F.2d 339, 349 (1981).

Federal Court requires that a showing of an “injury-in-fact.”⁶ *ODEC* directly applies only to the D.C. Circuit.

ODEC explicitly insulates its holding from consideration of whether the Market Monitor or MMUs may intervene in proceedings before federal agencies. *ODEC* acknowledges, even in its incorrectly narrow description of the Market Monitor’s and an MMU’s role, that “its function” includes “regulatory filings.” *ODEC* explained (at 18) that the scope of the Market Monitor’s and MMUs’ functions “are not at stake in this case.”

The PJM Tariff authorizes the Market Monitor to file complaints and petitions and make appropriate regulatory filings.⁷ The Commission approved tariff also constitutes a “right to participate ... conferred by ... Commission ... action” that is a basis for demonstrating an interest in a proceeding sufficient to support an intervention under Rule

⁶ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized”).

⁷ OATT Attachment M § IV.D-1 (“If the Market Monitoring Unit detects a compliance issue and determines that there is an issue about the proper and lawful application of a rule, and the Market Monitoring Unit makes a preliminary determination that no misconduct is evident and the issue involves a difference about the appropriate calculation of the level of an input, the Market Monitoring Unit may file a petition or initiate other regulatory proceedings addressing the issue.”) E-1 (“In the event that a market participant determines to use an offer or cost input at a level or value that the Market Monitoring Unit has found to involve a potential exercise of market power, the Market Monitoring Unit may file a petition or initiate other regulatory proceedings addressing the issue. If the potential exercise of market power is related to a Sell Offer submitted in an RPM Auction, the Market Monitoring Unit may file a complaint with the Commission addressing the issue.”); V.B.2 (“If an information request recipient does not provide requested information within a reasonable time, the Market Monitoring Unit may initiate such regulatory or judicial proceedings to compel the production of such information as may be available and deemed appropriate by the Market Monitoring Unit, including petitioning the Commission for an order that the information is necessary and directing its production;” J.2 (“Excepting matters governed by Section IV.I, file reports and make appropriate regulatory filings with Authorized Government Agencies to address design flaws, structural problems, compliance, market power, or other issues, and seek such appropriate action or make such recommendations as the Market Monitoring Unit shall deem appropriate.”); see also, *PJM Interconnection, L.L.C.*, 86 FERC ¶ 61,247 (1999) (“The MMU... has the authority under the Plan to pursue corrective actions. They include ...complaints to state and federal agencies...”).

214(b).⁸ *ODEC* does not require the Commission to change or clarify its administrative procedures. *ODEC* does not require the Commission to change its policies on MMUs or RTOs. *ODEC* applies solely to interventions as a matter of right in matters before the D.C. Circuit.

ODEC specifically provides for the Market Monitor to participate in that case as an amicus curiae. This practice, and many other rules governing court proceedings, does not apply in FERC proceedings. Commission rules allow a person to demonstrate an interest in a proceeding because such “participation is in the public interest.”⁹ The adoption of this approach to intervention means that, unlike courts, the Commission does not need and does not have rules for participation by amicus curiae. The point of reference for a determination of the public interest is the public’s interest, not the movant’s interest. Many entities today who routinely intervene in FERC proceedings may be denied intervention if FERC were to begin using the standards applied in *ODEC* by the D.C. Circuit.¹⁰

⁸ 18 CFR § 385.214(b)(i). Panda argues (at 3), “The IMM did not assert any rights to intervene ‘expressly conferred by statute or by Commission rule, order, other action. For nearly ten years the Market Monitor has actively participated in hundreds of proceedings based on the public interest, but Rule 385.214(b)(i) in conjunction with OATT Attachment M § IV.J.2 etc. is an additional basis for intervention in Commission proceedings.

⁹ See 18 CFR § 385.214(b)(iii).

¹⁰ See, e.g., *PJM Interconnection, LLC*, 137 FERC ¶ 61,251 (2011) (“The regulations recognize that consumers that are not direct wholesale customers may have a sufficient direct interest in proceedings that affects their retail rates. Protesters are retail consumers in an area whose rates may be affected by the rates charged under the PJM OATT. As such they have a sufficient direct interest in the proceeding under Rule 214 and their interventions are granted,” citing *Dominion Transmission, Inc.*, 106 FERC ¶ 61,029 at P 10 (2004) (“indirect customer” has shown sufficient interest in this proceeding to warrant a grant of his motion to intervene); *United Gas Pipe Line Company*, 49 FERC ¶ 61,005 at 61,017 (1989) (indirect customers have an interest in the outcome of a proceeding); *Panhandle Eastern Pipe Line Co.*, 35 FERC ¶ 61,146 at 61,344 (1986) (intervention granted when it is in the public interest), *American Electric Power Service Corporation*, 28 FERC ¶ 61,072 at 61,140 (1984) (indirect interest is sufficient for intervention); *Texas Eastern Transmission Corporation*, 21 FERC ¶ 61,281 at 61,761 (1982) (“even an indirect interest can be sufficient to warrant intervention in the public interest where, as here, the petitioner represents consumers of natural gas”).

Panda argues (at 6), “The IMM should not be permitted to become a party to attempt to accomplish indirectly through litigation that which is has no authority to do directly.” Panda cites no authority for that proposition and can cite no authority. Given that most proceedings involve persuading the Commission about what is or is not just, reasonable, or unduly discriminatory, no person passes that test.

A concern limited to the precedent a case would set is usually not a basis for standing in a court or generally for intervention in cases before the Commission. However, the Commission makes an exception where a case raises issues that affect the entire industry.¹¹

Panda ignores Commission policy on the market monitoring function to argue that the function is essentially fact gathering (at 5) and then questions (at 7) whether the Market Monitor will make “any contribution” to the “gather[ing] of facts about Panda Stonewall’s application.” Although all parties have the opportunity to engage in discovery, and the Market Monitor has submitted a data request in this proceeding, doing so is not a requirement to intervene in Commission proceedings. Similarly, persons who primarily gather facts are not prohibited from intervening under Rule 214(b)(iii). Many persons routinely intervene in proceedings and are then inactive. What Panda’s arguments have to do with *ODEC* is a mystery. *ODEC* concerned appellate review and does not bear upon fact gathering proceedings. Panda’s arguments only confirm *ODEC*’s inapplicability to this case.

Panda argues (at 7) that the Market Monitor will not be “able to appeal any result of this proceeding.” Article III standing is not required in order for a person to intervene in FERC proceedings. The dicta in *ODEC* does not foreclose the Market Monitor from

¹¹ See *Tex-La Electric Cooperative of Texas, Inc.*, 64 FERC ¶ 61,162 (1993) (“We also are sensitive to the concern, ably articulated in several motions to intervene, that our order in this proceeding could have the effect of establishing binding precedent on broad issues affecting the entire industry. Accordingly, in these circumstances we find it in the public interest to grant all of the contested interventions.”).

participating in future federal proceedings, including an appeal of a decision in this case. *ODEC* does not prevent a market monitor from becoming a party to future court proceedings in federal court, including the D.C. Circuit. The D.C. Circuit retains the ability to grant permissive intervention.¹² Unlike *ODEC*, future cases may concern matters more core to the operation of PJM markets and not a particular claim for equitable relief. Because the case is dicta and rooted in incorrect facts, it does not bind future D.C. Circuit's determination on the Market Monitor's or MMUs' standing.

B. ODEC Relies on Incorrect Facts About the Market Monitor and MMUs.

ODEC primarily relies (at 18) on its finding that the Market Monitor “is not a creature of statute and operates under no affirmative duty imposed by public law,” and that “its existence is a matter entirely within PJM's discretion.”

ODEC correctly determined (*id.*) that “the market monitor is not a creature of statute.” But that fact alone cannot be a basis to deny standing. Although the Market Monitor and MMUs were not created directly by the Federal Power Act or other statute, many entities routinely granted standing as a matter of right in court proceedings are not creatures of statute either.

ODEC stated (*id.*) incorrectly that the Market Monitor “operates under no affirmative duty imposed by public law.” MMUs are required by FERC rules and have duties imposed by FERC rules.¹³ Administrative law is a branch of public law.¹⁴

¹² See F.R.A.P. 15(d); F.R.C.P. 24(b).

¹³ See 18 CFR §§ 35.34(k)(6), 35.28(g)(3)(v)(A); ; see also, *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) (“Order No. 2000”), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (“Order No. 2000-A”), *aff'd sub nom.* Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001); *Wholesale Competition in Regions with Organized Markets*, Order No. 719, 125 FERC ¶ 61,071 (2008) (“Order No. 719”), *order on reh'g*, Order No. 719-A, 128 FERC ¶ 61,059 (2009).

¹⁴ See *Northwest Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 679 (2007) (“Public law is the body of law regulating relations between private parties and the government and regulating

ODEC's determination (*id.*) that the Market Monitor's "existence is a matter entirely within PJM's discretion" is also false. The Commission rule that created RTOs requires RTOs to have an MMU function (one of eight required functions).¹⁵ PJM had an MMU prior to the rule, but PJM did not propose it. PJM was required to create the Market Monitor by order issued November 10, 1997.¹⁶ ODEC also falsely stated (*id.*) that an MMU exists "as an outside service provider (like an auditor) to the ISO." Order No. 2000 permits an MMU to be organized in different ways, including internal to the RTO.¹⁷ Market monitors are not analogous to any other outside service provider (e.g. software vendors or auditors or legal counsel). FERC imposes requirements on entities seeking RTO status, one of which is to have an independent MMU.¹⁸ Market Monitors are effectively part of and integral to the RTO, regardless of their particular role in the organizational structure of the RTO. The Commission has determined that the Market Monitor has the independent responsibility to administer and implement the Market Monitoring Plan, even though the Plan is in the PJM Tariff. Market monitors have a direct relationship with the RTO board of directors that is insulated from interference by PJM management.¹⁹

the structure and operation of the government itself. See Black's Law Dictionary 1267 (8th ed. 2004). Public law consists of the fields of constitutional law, criminal law, and administrative law. *Id.*").

¹⁵ Order No. 2000 slip. op. at 461–466.

¹⁶ See *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257, 62,282.

¹⁷ *Id.*; Order No. 719 at PP 326–344.

¹⁸ See Order No. 2000 slip op. at 462 ("the Commission will require that RTO proposals contain a market monitoring plan that identifies what the RTO participants believe are the appropriate monitoring activities the RTO, or an independent monitor, if appropriate, will perform. We believe that such approach will provide those proposing an RTO sufficient flexibility to design a monitoring plan that fits the corporate form of the RTO as well as the types of markets the RTO will operate or administer."), *reh'g denied*, Order No. 2000-A slip. op. 67–68; 18 CFR § 35.34(k)(6).

¹⁹ Order No. 719 at P 310 ("The Final Rule requires tariff provisions that will remove the MMU from the direct supervision of RTO or ISO management, and requires, in most instances, that the MMU report directly to the RTO or ISO board of directors."); OATT Attachment M § III.

Panda argues (at 7) that taking sides in litigation is inconsistent with impartial monitoring. MMUs fulfill a FERC required and FERC defined role under the RTO tariff. FERC requires that MMUs include market design and market behavior monitoring in addition to the reporting function.²⁰ An MMU must be independent and objective, but it is expected to take and advocate a position on market design, compliance and market behavior.²¹ The D.C. Circuit recognized only the reporting function. Panda repeats the error.

ODEC offers no useful guidance to the Commission on the role of market monitors because its legal conclusions primarily rely on false premises about the Commission's policies for market monitoring. Also, because the Market Monitor's position in the *ODEC* matter in support of FERC prevailed and the Market Monitor's arguments are included in the record, the determination on standing is not decisive to the outcome of the *ODEC* proceeding. An attempt by the Market Monitor to appeal the *ODEC* determination despite its reliance on incorrect facts would be moot. The D.C. Circuit's holding is merely irrelevant dicta.

²⁰ Order No. 719 at P 353 ("The revised functions should provide MMUs with ample authority to evaluate any needed changes to the markets and bring them to the attention of concerned entities,..."); 18 CFR § 35.28(g)(3)(ii).

²¹ OATT Attachment M § IV; Market Monitoring Services Agreement by and between PJM Interconnection, L.L.C. and Monitoring Analytics, LLC § 27 ("The PJM Board expects that the IMM will be a vigorous and competent advocate for competitive and efficient PJM markets, and that it will protect the integrity of PJM markets. In evaluating whether the IMM performs adequately, the Board shall consider, among other things, the level and quality of the IMM's efforts to promote (i) efficient and accurate pricing; (ii) a competitive market structure, or, to the extent that the structure is not competitive, effective mitigation rules and the proper application of such rules; (iii) market rules that promote competition and efficiency and that are transparent and non-discriminatory; and (iv) compliance with market rules and their purpose and proper implementation of such rules. The Board shall also consider whether the IMM has taken adequate steps to detect and call attention to actual or attempted market manipulation, the exercise of market power, physical and economic withholding, and faulty operation of the markets.").

C. Reliance on an Order Denying Late Intervention Based Solely on *ODEC* Is Misplaced.

On July 12, 2018, Panda filed a notice of supplemental authority in this proceeding, attaching an order issued July 10, 2018 (“July 10th Order”), that denied a late filed intervention by the Market Monitor in another reactive proceeding.²² The July 10th Order relies solely on *ODEC* to find (at P 7) that the Market Monitor did not demonstrate that its “participation is in the public interest.” The July 10th Order stated: “The D.C. Circuit’s characterization and findings as to the role played by the Market Monitor demonstrate that its participation in the proceeding at hand is not required by the public interest.”

The July 10th Order relies solely on *ODEC* to define the nature and role of the Market Monitor. The July 10th Order misconstrues *ODEC*, which recognized (at 18) that the Market Monitor would continue to “make regulatory filings.” Pleadings under the Commission’s Rules of Practice and Procedure are regulatory filings.

The July 10th Order’s reliance on *ODEC* is also misplaced for the same reasons that Panda’s reliance on *ODEC* is misplaced. If it holds, the misapplication of *ODEC* in the July 10th Order would deny the Market Monitor the ability to intervene in and become party to FERC proceedings. The Market Monitor’s motion to intervene in Docket No. ER18-1226 was unopposed. The July 10th Order relied solely on a misreading of *ODEC*. The Market Monitor will file a motion for reconsideration, which will provide for the first time, necessary context for the Presiding Judge to reevaluate the relevance of *ODEC* to the Market Monitor’s motion to intervene. The July 10th Order provides no reason for the Presiding Judge to reverse the determination to grant the Market Monitor’s late motion to intervene.

²² See PA Solar Park, LLC, 164 FERC ¶ 63,003 (2018).

II. CONCLUSION

The Market Monitor respectfully requests that the Presiding Judge afford due consideration to this answer as your Honor resolves the issues raised in this proceeding.

Respectfully submitted,



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Dated: July 20, 2018

CERTIFICATE OF SERVICE

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

Dated at Eagleville, Pennsylvania,
this 20th day of July, 2018.



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