Statement of Susan J. Court
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In the Matter of PJM Up-to-Congestion Transactions
Federal Energy Regulatory Commission
Docket No. IN10-5-000

November 8, 2013

Introduction

The Office of Enforcement of the Federal Energy Regulatory Commission (FERC or Commission) is investigating the conduct of, *inter alia*, Powhatan Energy Fund LLC (Powhatan), which the Enforcement staff has accused of violating the Commission's rule prohibiting manipulation of electric energy markets. The Enforcement staff bases its case on the actions of Powhatan's agent, Dr. Houlian "Alan" Chen, who traded in the electric energy market operated by PJM Interconnection, LLC (PJM) during the period under investigation. As former Director of FERC's Office of Enforcement, I have been engaged by Powhatan and the law firm of Drinker Biddle & Reath LLP to advise them on the propriety of Powhatan's activities under investigation.[1] As explained below, Powhatan's participation in the activity under investigation does not constitute a violation of the Commission's rule prohibiting the manipulation of electric energy markets. Simply put, the reason is that the government should not punish people for following rules that the government itself makes.

Qualifications

I am the Principal of SJC Energy Consultants, LLC, located in Arlington, Virginia. Previously, from 2009-2011, I was a partner in the energy practice at Hogan Lovells, LLP, Washington, D.C., and from 1982-2009, I worked at FERC, serving as an advisor to a Commissioner and a senior executive.[2] As relevant here, in 2005, I was appointed Director of FERC's Office of Market Oversight and Investigations, which I soon reorganized to become the first FERC Office of Enforcement. As Director, I oversaw the promulgation of Order No. 670, which codified the currently effective FERC anti-manipulation regulations.[3] I also directed the formation of the strategies and processes to administer those regulations, and managed the initial investigations in which the Commission first imposed penalties under its new authority and prosecuted violations of its anti-manipulation regulations. While I may not reveal non-public details of the market manipulation investigations to which I was privy, the FERC Enforcement staff publicly reported that in 2008-2012, it opened 101investigations, half of which (51) involved allegations of energy market manipulation.[4]

FERC Anti-Manipulation Rules

By way of background, the following is an overview of the Commission's anti-manipulation rule for electric energy transactions. This overview comes verbatim from one of the Commission's recent orders, and is frequently used by the Commission to describe its authority.[5]

Section 222(a) of the FPA makes it unlawful for any entity to use a deceptive or manipulative device in connection with the purchase or sale of electric energy or the transmission of electric

energy subject to the Commission's jurisdiction.[6] Order No. 670 implemented this prohibition, adopting the Anti-Manipulation Rule. That rule, among other things, prohibits any entity from: (1) using a fraudulent device, scheme or artifice, or making a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase, sale or transmission of electric energy subject to the jurisdiction of the Commission.[7]

Challenges of Investigating Market Manipulation Claims in Organized Electric Markets

There is no question that the Commission and its Enforcement staff face considerable challenges in investigating allegations of market manipulation within the organized electric markets administrated by RTOs and ISOs. The main challenge is that such cases trigger the defense by the respondent market participant that it was functioning according to the very rules and tariff provisions that the Commission itself had reviewed, vetted through notice and comment proceedings which routinely attract a wide range of knowledgeable stakeholders, and ultimately approved. Absent deceit, this is a legitimate defense. As explained further below, the reason is straightforward. The organized electric markets in the United States are extraordinarily complex, in large part because of the extensive and comprehensive rules, regulations and tariff provisions that govern those markets. (The RTO and ISO tariffs have always reminded me of a field of mesquite in West Texas—acres of hardened vines twisting and turning around and through each other, making passage next to impossible.) Accordingly, it is unfair to punish a company or an individual who openly and guilelessly participates in those markets according to the rules and the RTO/ISO tariffs approved by the Commission.

The Commission clearly recognizes the complexities of the organized electric markets as indicated by the thoughtful participation of individual Commissioners in a recent day-long technical conference in FERC Docket No. AD13-7-000, which examined how centralized capacity markets in New England, New York, and the PJM region are supporting the procurement and retention of resources necessary to meet future reliability and operational needs.[8] A September 23, 2013 Letter from Members of the Committee on Energy and Commerce of the U.S. House of Representatives, submitted for the record in that proceeding, succinctly captures the current situation, and accurately characterizes what the Commission itself believes, namely that "[w]e support open and competitive markets for commodities." At least, that is what the Commission's landmark open-access decisions—Order No. 636 and Order No. 888—and their progeny aimed to accomplish by restructuring the rules governing transmission of natural gas and electric energy to facilitate competitive markets in those commodities.[9] As germane here, the letter adds, "[t]o this end, we want to work with the Commission to ensure that restructured electricity markets operate pursuant to legitimate market forces and are not becoming mere administrative constructs dependent on an increasing amount of Commission-approved rules and processes."

The Commission's recognition of the complexities of organized electric markets is also reflected in Order No. 719, which codified protocols for referrals by RTO and ISO market monitors to Commission staff.[10] Specifically, Order No. 719 directed RTO and ISO market monitors to evaluate existing and proposed market rules, tariff provisions, and market design elements, and

recommend proposed rule and tariff changes not only to the RTO or ISO, but also to the Commission's Office of Energy Market Regulation staff and to other interested entities such as state commissions and market participants.[11] As is (or should be) true for any economic regulator, the Commission is always receptive to suggestions for improving the regulation of the companies under its jurisdiction; however, that openness does not need to be codified, as was the case in Order No. 719. The codification of the protocols underscored the magnitude of the issue of complexity of the rules and tariff provisions applicable to the organized electric markets, and also demonstrated the Commission's objective to keep an open mind to ways to improve the operation of those markets for the benefit of electric energy customers.

As can be gleaned from FERC orders, the Commission has conducted several investigations in the implementation of the anti-manipulation rules where the respondents operated within the confines of the RTO/ISO tariffs, and argued in their defense that their actions were allowed by those tariffs or that the tariffs failed to provide sufficient guidance on how to operate under them. Significantly, most of the investigations where the Commission has rendered an opinion or adopted its Enforcement staff's findings to resolve a matter, as opposed to approving a settlement with no precedential value, have involved such situations, and the Commission has accepted the respondents' defense in a majority of those cases. That undoubtedly is directly related to the complexity of the rules and regulations of the organized electric markets, and the Commission's appreciation of that complexity and the corresponding need to constantly monitor those markets to ensure that the tariff provisions and market rules are not counter-productive and do not impede the very markets that they are intended to advance. A brief review of the relevant cases is instructive.

In 2008, the Commission addressed two different sets of allegations in the New York ISO (NYISO). First, after ordering its Enforcement staff to investigate the conduct of certain sellers in the New York City Installed Capacity (ICAP) market, the Commission made public the staff's report that found that the sellers' behavior was consistent with and even anticipated by the NYISO tariff, did not constitute a fraud or fraudulent practice, and was done pursuant to a legitimate business purpose.[12] Importantly, the Commission then proceeded to approve proposals to strengthen the mitigation of market power in that market.[13] Second, the Commission denied a complaint by DC Energy, LLC against H.Q. Energy Services (U.S.), Inc., which the complainant accused of exercising market power to unlawfully affect congestion and energy pricing in the NYISO Energy and Transmission Congestion Credit (TCC) markets.[14] The Commission based its decision on the Enforcement staff's report that found that H.Q. Energy Services' actions were explicitly contemplated by the Commission-approved rules and regulations and were consistent with a "rational actor executing a legitimate commercial strategy."[15]

In 2009, the Commission again publicly addressed allegations of market manipulation by companies operating under the tariffs governing the organized electric markets. The Commission first denied a complaint by PJM Interconnection, L.L.C. against Accord Energy, LLC and others, on the basis of an Enforcement staff report that found, among other things, that the orchestration of coordinated offsetting positions in regard to PJM's Financial Transmission Rights did not necessarily evidence intent to defraud.[16] This complaint, a companion one filed against PJM, and the activity surrounding both proceedings, helped focus the Commission's

attention on PJM's collateral credit rules, which PJM revised with the Commission's approval.[17] The Commission next adopted the Enforcement staff's report that there was neither market manipulation nor tariff violations on the part of entities placing circuitous schedules (loop flows) in the Lake Erie region, and that the respondents were openly responding to price signals and had no reason to believe that the RTOs might object to these transactions.[18] Again, with greater knowledge about the functioning of the organized electric markets as a result of the staff's investigation, the Commission later addressed the underlying issue of loop flows and approved changes to the relevant tariffs.[19]

Subsequently, the Commission affirmed an administrative law judge's initial decision to dismiss a complaint by the Connecticut Attorney General and other public entities against ISO New England (ISO NE), and certain participants in the ISO NE Forward Capacity Market, finding among other things that the respondents acted exactly as the tariff, accepted by the Commission, allowed.[20] Notably, the Enforcement staff served as trial staff, and sided with the respondents in the case.

Most recently, in proceedings that are still pending, the Commission assessed penalties totaling $13,750,000 against three participants in the Day-Ahead Load Response Program (DALRP) in ISO NE.[21] Briefly, the Commission found that the respondents had artificially inflated their customer baselines by curtailing their normal use of on-site generation to receive compensation for demand response without ever intending to provide the service or actually having to reduce load. The respondents argued, among other things, that there was insufficient guidance on how the tariff worked. In all three cases, the Commission stated, "even assuming, *arguendo*, that certain features of the DALRP … left the DALRP vulnerable to certain manipulation, that does not excuse the manipulation itself."[22] Previously, around the time that the respondents' activities were originally brought to the Commission's attention, the Commission accepted changes to the DALRP as proposed by the ISO NE.[23]

These eight cases demonstrate the difficulty that the Commission and its enforcement staff have in pursuing allegations of manipulation where the alleged perpetrators of the fraud were or claimed to be acting according to the intricate and complicated provisions of an RTO or ISO tariff. In all of the cases, the activity under investigation or review seemed egregious on its face, namely that someone or some company was benefitting or significantly profiting relative to what it was contributing to the market or was acting to the serious detriment of the market. The complainants, market monitors, or other market participants demanded that the activity be stopped and appropriate changes be made to the market rules. In most of the cases, regardless of the outcome of the investigation, the Commission decided to modify those rules.

The major difference between the five cases where the Commission found no manipulation and the three cases where it did is the alleged presence of deceit, the linchpin of a claim of manipulation under 18 C.F.R. Part 1c. Indeed, the Commission has stressed that its anti-manipulation rules are meant to prevent a market participant from perpetrating a fraud on the market.[24] They are not intended to regulate negligent practices or corporate mismanagement.[25] They are not designed to ensure just and reasonable rates or prevent the abuse of market power.[26] They are about deceit, and, accordingly, the first element of a claim of market manipulation is, in the Commission's words, "using a fraudulent device, scheme or artifice, or making a material

misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity."

Powhatan's Culpability under FERC's Anti-Manipulation Rules

Against this backdrop, Powhatan is not culpable under the Commission's rule prohibiting manipulation of the electric energy markets. The company and the personnel named by the FERC investigators did not act in a deceitful way, and they had reason to believe that they were participating in the PJM market in a way allowed by PJM's tariff. Granted, they thought the market structure approved by the Commission was not necessarily rational, and could be highly profitable, and, indeed, the Commission soon after the period at issue revised the tariff provisions under which their agent Dr. Chen had acted.[27] That, as should be clearly evident by now, is not dispositive. The Commission approved amendments to NYISO's, PJM's, and ISO NE's tariffs when it became apparent, through its Enforcement staff's investigations, bolstered by market monitors' recommendations and stakeholders' concerns, that changes to those tariffs were necessary to enable the markets to function more efficiently.

Let me be more specific about what I understand took place here, an understanding which I have developed on the basis of the Enforcement Staff's Findings and Supporting Evidence contained in their August 9, 2013 Letter to Powhatan's counsel. What follows does not reply to the staff's legal analyses. I leave that to Powhatan's attorneys. Rather, what follows is how I interpret the facts, as laid out by Staff, in the context of the overarching issue, prosecution of market manipulation claims by market participants acting, without deceit, within the four corners of an RTO or ISO tariff.

- To start with, Powhatan personnel had a long-term and legitimate business relationship with Dr. Chen, who in Staff's view (at p. 6) was a highly qualified and well educated trader in electric energy markets. So, this is not a fly-by-night operation that raises suspicions about an individual's or a company's motives. These are responsible people, who are engaged in earning their livings by trading and investing in the electric energy markets. This is good for those markets—the more players, the more liquidity.[28]

- During 2008-2009, according to staff (at pp. 7-8), Dr. Chen was engaged in a "low-risk, low-reward" trading strategy, and only became aware of the Marginal Loss Surplus Allocation (MLSA) aspects of PJM's tariff in November 2009, at which time he called PJM to make sure he understood how the MLSA worked.[29] From staff's account, he apparently spoke to someone with knowledge of the MLSA. PJM was thus aware of Dr. Chen's interest in the MLSA, and, conversely, Dr. Chen did not try to hide his interest from the market administrator.

- Dr. Chen then, as staff relates (at pp.8-9), began to develop a model for executing trades within the parameters of the MLSA provisions in PJM's tariff, and also began to experiment with his model to see how it would reduce risk. The question is, why wouldn't someone with his knowledge and experience do just that? Such conduct does not evidence a devious person, but rather a practical one. Indeed, if he had not proceeded

in this way, would he have breached his fiduciary duty to his clients, and they in turn to their investors?

- In March 2010, according to staff (at pp. 9-10), Dr. Chen outlined a new trading strategy to his clients, including personnel at Powhatan, and talked about "taking advantage" of what appeared to be a low-risk situation, or at least a situation where the risks were lower than before. In this regard, whose fault is it that there was a situation to take advantage of? Dr. Chen? His clients? His clients' investors? As there is no claim that any of them urged or was responsible for crafting the relevant tariff provision, the answer seemed clear, the fault lay with those who had structured the tariff.

- At this time, I need to digress from the Staff's August 9, 2013 Letter, and turn to the September 2010 order, in Docket No. ER10-2280-000, in which the Commission accepted revisions to PJM's tariff to eliminate the requirement to reserve transmission service for Up-To-Congestion bids in the Day-ahead Energy Market.[30] As is apparent from the background section of that order, PJM's Up-to-Congestion market rules, which until then included MSLA, had been the subject of extensive debate and stakeholder concern and interest for many years.[31] Thus, activity under those rules was no secret, and traders and others playing by those rules were not doing so in some clandestine or devious way.

- Staff points out next (at pp. 12-13) that, after suffering some losses, Dr. Chen experimented and then adjusted his strategy, with the objective to reduce risk, and only started to see positive results in June 2010. Staff states (at p. 12) that "Chen learn[ed] his scheme [was] not fail-proof." Again, his clients and their investors might have faulted Dr. Chen if he had not tried to improve his trading strategy, which staff unfairly calls a "scheme." Granted, they ultimately view what he did as a "scheme," but at this point in the narrative, the use of the statutory term associated with prohibited manipulation is unnecessarily pejorative.

- As Staff relates (at pp. 13-16), Dr. Chen advised his clients, including personnel at Powhatan, of what he was doing. As Staff notes (at p. 15), they were skeptical, and not necessarily excited because it appeared that what Dr. Chen was attempting to do was based on a flawed or at minimum a poorly designed market structure. They were concerned that if that were the case, and the Commission retroactively changed the rules, they could suffer severe losses. Notwithstanding the limits on FERC's ability to change tariffs retroactively, the situation appearing too good to be true to Powhatan personnel does not mean they had a deceitful animus or intended to deceive the market. More likely, as can be gleaned from staff's description, they were astonished that knowledgeable, well-meaning people came up with the structure to begin with, and a Federal agency approved it.[32] Importantly, in this regard, they commented that the flaw was so obvious, transparent and significant that "a monkey could have made trades in the market." This is not an admission of wrongdoing by any stretch of the imagination. Rather, it is an exclamation of astonishment by market participants about the structure of the market, not about the naiveté of other market participants or the ultimate consumer.

- Finally, Powhatan personnel had no obligation to advise the Commission of the seeming market flaw. Any obligation to do that lay with PJM's market monitor or with PJM itself. Both in fact apparently did that. PJM's FERC-approved market monitor in at least three previous years (2007, 2008, and 2009) described the Up-to Congestion Market as providing for a "gaming opportunity."[33] PJM ultimately proposed to change its tariff, in Docket No. ER10-2280-000, a proposal the Commission accepted in September 2010.

At bottom, Powhatan personnel did not act in any way deceitful or devious in investing in the market strategies of Dr. Chen. They may have wondered about the market structure in which Dr. Chen was trading, but that wonderment does not constitute, in any way, shape, or form, prohibited conduct. Moreover, as mentioned, the Commission eventually recognized and changed the particular flaw in the market structure.[34] That is the way that the system should work. Through investigations, market monitoring, and the stakeholder process, the Commission should find and correct flaws in the market structure. It should not punish someone because he acted without deceit in that imperfect structure.

Endnotes

[1] Even though I do not represent Powhatan here as its counsel, but rather as its consultant on FERC enforcement matters, I am licensed to practice law in the Commonwealth of Kentucky and the District of Columbia. Besides my J.D. (from Chase College of Law, Northern Kentucky University), I also received an M.A. and a B.A. (*summa cum laude*) in History from the University of Cincinnati and Thomas More College, respectively. I was a recipient of numerous scholastic scholarships and fellowships, and assisted the Hon. Arthur Goldberg, former Associate Justice of the Supreme Court of the United States, when he was a visiting professor at my law school. After law school and shortly before I joined FERC, I clerked for the Hon. Robert O. Lukowsky, Justice, Supreme Court of Kentucky. I am a frequent speaker at energy conferences and programs for continuing legal education.

[2] Specifically, at FERC, I served as Associate General Counsel for Gas and Oil (1986-1993), Special Counsel and Deputy Solicitor (1993-2001), Associate General Counsel for General and Administrative Law and Designated Agency Ethics Official (2001-2004), and Chief of Staff (2004-2005). In 2005, I also worked at the Irish Commission for Energy Regulation, on assignment from FERC, at which time I became active in the International Gas Union (IGU). Eventually, I participated in three IGU world gas conferences (2006, 2009, and 2012), and, in March 2012, the IGU published my paper comparing FERC with the European Union's Agency for the Cooperation of Energy Regulators.

[3] *See Prohibition of Energy Market Manipulation*, Order No 670, FERC Stats. & Regs. ¶ 31,202, *order on reh'g*, 114 FERC ¶ 61,300 (2006) (promulgating the rules at 18 C.F.R. Part 1c).

[4] See http://ferc.gov/enforcement/enforce-res.asp (last accessed on Sept. 30, 2013).

[5] *See, e.g., Lincoln Paper and Tissue, LLC*, 144 FERC ¶ 61,162 (2013), at P 7.

[6] 16 U.S.C. § 824v(a) (2006).

[7] 18 C.F.R. § 1c.2(a) (2013); *see Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 49, *reh'g denied*, 114 FERC ¶ 61,300 (2006).

[8] See Centralized Capacity Markets in Regional Transmission Organizations and Independent System Operators, Technical Conference in FERC Docket No. AD13-7-000 (September 25, 2013). Before the conference, on August 23, 2013, FERC staff issued a report that also examined the challenges facing the organized electric markets in the Northeast. See http://www.ferc.gov/CalendarFiles/20130826142258-Staff%20Paper.pdf.

[9] *See Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs., Regulations Preambles Jan. 1991 – June 1996 ¶ 30,939, *on reh'g*, Order No. 636-A, FERC Stats. & Regs., Regulations Preambles Jan. 1991 - June 1996 ¶ 30,950, *on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part, vacated and remanded in part, United Dist. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997); *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*,76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048,

order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part*, *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd*, *New York v. FERC*, 535 U.S. 1 (2002).

[10] *See Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071 (2008), at PP 353-354. *See also* 18 C.F.R. § 35.28(g)(3)(ii)(A) and (v) (2013).

[11] Order No. 719 also codified the protocol of market monitors' referring instances of Market Violations to the Commission's Office of Enforcement. *See* 18 C.F.R. § 35.28(g)(3)(ii)(C) and (iv) (2013).

[12] *See generally* Enforcement Staff Report, Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the New York City Capacity Market (Feb. 28, 2008), available in Docket Nos. IN08-2-000 and EL07-39-000.

[13] *See New York Independent System Operator, Inc*., 122 FERC ¶ 61,211, *order on reh'g*, 124 FERC ¶ 61,301 (2008), order on clarification, reh'g, and compliance filing, 131 FERC ¶ 61,170 (2010), *appeal pending sub nom. Public Service Commission of New York v. FERC*, No. 08-1366 (D.C. Cir. Nov. 21, 2008).

[14] *See DC Energy, LLC v. H.Q. Energy Services (U.S.), Inc*., Order Denying Complaint, 124 FERC ¶ 61,295 (2008).

[15] *Id.* Attachment 1 (Enforcement Staff Report on Non-Public Investigation into DC Energy's Allegations of Market Manipulation by HQ Energy in the New York Independent System Operator Energy and Transmission Congestion Contract Markets (Sept. 29, 2008), at p. 23.

[16]*See PJM Interconnection, L.L.C. v. Accord Energy, LLC, et al*., 127 FERC ¶ 61,007, *order on reh'g*, 129 ¶ 61,010 (2009). Attached to the first order is the Enforcement Staff Report on Non-Public Investigation into Possible Market Manipulation by Tower Research Capital Affiliates in the Financial Transmission Rights Markets Operated by PJM: Alleged Wrongful Coordination of FTRE Strategies and Affiliate Risk-Shifting (March 11, 2009).

[17] *See PJM Interconnection, L.L.C*., 122 FERC ¶ 61,279 (2008).

[18] *See New York Independent System Operator, Inc*., 128 FERC ¶ 61,049 (2009), Attachment Enforcement Staff Report on Non-Public Investigation into Allegations of Market Manipulation in Connection with Lake Erie Loop Flows (June 10, 2009), at pp. 4, 28.

[19] *See New York Independent System Operator, Inc.* 132 FERC ¶ 61,031, *order on reh'g*, 133 FERC ¶ 61,276 (2010), *order on further reh'g*, 136 FERC ¶ 61,011 (2011), *order on compliance filing*, 138 FERC ¶ 61,195*, order on reh'g*, 140 FERC ¶ 61,140 (2012).

[20] *See Richard Blumenthal, Attorney General for the State of Connecticut, et al., v. ISO New England, Inc., et al.*, Opinion No. 513, Order Affirming Initial Decision, 135 FERC ¶ 61,117 , at P 15, *order on reh'g,* 138 FERC ¶ 61,013 (2012).

[21] *See Lincoln Paper and Tissue, LLC*, 144 FERC ¶ 61,162 (2013) (Commissioner LaFleur dissenting in part), *Competitive Energy Services, LLC*, 144 FERC ¶ 61,163(2013) Commissioner LaFleur dissenting in part), and *Richard Silkman*, 144 FERC ¶ 61,164 (2013) (Commissioners LaFleur and Norris dissenting in part).

[22] *See* 144 FERC ¶ 61,162, at P 35; 144 FERC ¶ 61,163, at P 48; 144 FERC ¶ 61,164, at P 48.

[23] *See ISO New England Inc*., 123 FERC ¶ 61,021, *order on reh'g*, 124 FERC ¶ 61,235 (2008).

[24] *See, e.g.*, Order No. 670, at P 5.

[25] *Id.*

[26] *See Richard Blumenthal*, 135 FERC ¶ 61,117, at PP 37-38.

[27] *See PJM Interconnection*, Order Accepting Tariff Revisions, LLC, 132 FERC ¶ 61,244 (2010).

[28] Along these lines, the U.S. Court of Appeals for the D.C. Circuit recently pointed out: "From FERC's policy perspective, the virtual marketers serve a useful purpose: they spot and exploit inefficiencies, driving prices closer to an accurate reflection of fundamental value." *Black Oak Energy, LLC, et al. v. FERC*, No. 08-1386, *et al.* slip op. at 16 (D.C. Cir. Aug. 6, 2013).

[29] Staff described MLSA as follows (at p. 5): "Transmission line loss charges are a component of the per-MWh price of electricity in the PJM market. PJM uses the marginal loss method to calculate the charges to cover these line losses, which over-collects the cost of the losses. Pursuant to section 5.5 of the appendix to Attachment K of PJM's tariff, MWhs of successfully scheduled trades associated with paid-for transmission in a given hour receive a proportionate share of the surplus collected throughout the entire PJM market for the hour. This distribution is known as the Marginal Loss Surplus Allocation, or MLSA." (Footnote omitted.)

[30] *See PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,244 (2010).

[31] *Id.* PP 2-11.

[32] *See Black Oak Energy, L.L.C., et al. v. PJM Interconnection, L.L.C.,* Order Denying Complaint, 122 FERC ¶ 61,208 (2008), *order on reh'g*, 125 FERC ¶ 61,042 (2008), Order Accepting Compliance Filing, 128 FERC ¶ 61,262 (2009), *order on reh'g,* 131 FERC ¶ 61,024 (2010), *aff'd in relevant part*, *Black Oak Energy, L.L.C., et al. v. FERC*, No. 08-1386, *et al*. (D.C. Cir. Aug. 6, 2013).

[33] See: http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2009/2009-som-pjm-volume1.pdf, at p. 40;
http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2008.shtml, at p. 239;
http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2007.shtml, at p. 225.

[34] Notably, as can be inferred from Staff's report at p. 19, Dr. Chen stopped his paired trading in up-to congestion contracts on August 3, 2010. Although the Staff's report does not say why, it is my understanding that Dr. Chen stopped immediately after PJM's market monitor contacted him.