

West-Wide Governance Pathways Initiative

Comments of the Colorado Office of the Utility Consumer Advocate October 25, 2024

The Colorado Office of the Utility Consumer Advocate (“COUCA”) respectfully submits these comments further elaborating on our comments of August 29, 2024, to the West-Wide Governance Pathways Initiative Public Interest Working Group and directly addressing questions posed on the Market Monitor function in the Pathways Step 2 proposal. Below the COUCA further outlines our request for the development of an external and independent Market Monitor for the Regional Organization (“RO”) and asks the Launch Committee to continue to develop Market Monitor concepts and a framework for Market Monitor development inclusion in its final proposal. The COUCA requests the opening of a process to allow for a more comprehensive inquiry into Market Monitor development in the Pathways final proposal. The COUCA welcomes the opportunity to continue to engage Pathways in this exploration.

1. Pathways Proposed Approach to Independent Market Monitoring

The Pathways Step 2 proposal identifies a suite of tools that will be used to protect the public interest,¹ including but not limited to creation of an independent market monitor (“IMM”) for the RO. The Step 2 proposed approach to IMM largely leverages the California Independent System Operator’s (“CAISO”) existing approach to market monitoring with some modifications, as explained below.

- CAISO maintains an internal, independent Department of Market Monitoring (“DMM”) that reports to and is overseen by the CAISO Board.
 - The Step 2 proposals suggests that DMM would report to and be overseen by both the CAISO Board and the RO Board. The proposal also suggests that the DMM should continue to be an internal, independent business unit of CAISO.
- CAISO’s DMM Oversight Committee (“OC”) is a committee of the CAISO Board of Governors that includes at least two CAISO Board members (called Governors) and advises the Board on oversight of DMM functions.
 - The Step 2 proposal suggests an equal number of RO Board members should be added to the OC. It also suggests that the CAISO and RO Boards jointly select future DMM leadership.
- CAISO’s Market Surveillance Committee (“MSC”)² is an external advisory committee of experts that provides analysis and recommendations to the CAISO Board and CEO and to the Western Energy Market (“WEM”) Governing Body on market monitoring related issues.
 - The Step 2 proposal recommends expanding the criteria for selecting MSC members to include expertise on consumer issues and public interest, allowing the MSC to provide advice to both the CAISO and the RO Boards, and giving both the CAISO

¹ “Public interest” is defined in the Step 2 proposal around the dual principles of 1) safeguarding consumer interests (including affordability and reliability) through non-discriminatory market design and operations, and 2) how state policy designs are respected in market design.

² <https://www.caiso.com/meetings-events/topics/market-surveillance-committee>

and the RO Boards joint approval of MSC member nominations. This would also mean transitioning the WEM Governing Body role to the RO Board.

- The current WEM Governing Body receives independent market analysis from the Governing Body Market Expert, but the Market Expert is not a market monitor.
 - The Step 2 proposal suggests that the Market Expert maintain its existing duties by transition from the WEM Governing Body to the RO Board.

2. Domestic Market Monitoring

In the U.S., wholesale electricity market monitoring (MM) requirements have been established by FERC in a series of actions. Some, but not all, of these actions are summarized below.

- **FERC Order 2000 of 1999** determined that market monitoring was one of 8 minimum functions of a regional transmission organization (“RTO”).³ FERC determined:

“Market monitoring is an important tool for ensuring that markets within the region covered by an RTO do not result in wholesale transactions or operations that are unduly discriminatory or preferential or provide opportunity for the exercise of market power. In addition, market monitoring will provide information regarding opportunities for efficiency improvements.”⁴

Order 2000 requires RTOs to meet or exceed three MM standards, including:

1. Monitor the behavior of market participants (including transmission owners) to determine if their actions hinder the RTO in providing reliable, efficient, and not unduly discriminatory transmission service,
2. Perform periodic assessments of how actions of others impact RTO markets and how RTO operations impact the efficiency of markets operated by others, and
3. Report on opportunities for efficiency improvements, market power abuses and market design flaws that must be filed with FERC and other affected regulatory authorities.

Order 2000 included a summary of stakeholder comments regarding who should perform MM and how it should be performed [p.441]. Some of the discussion in the Order may be relevant to Pathways. For example, while some commentors believed that an ISO that is also a non-profit RTO could internally monitor itself, FERC states “*Most commenters, however, would require an ISO (i.e., a not-for-profit RTO) to make its market monitoring function more independent.*” [p.443]. EEI stated that a RTO’s independence may ensure its recommendations do not favor a particular market participant, but do not ensure it will monitor its own performance objectively [p.443]. The Federal Trade Commission believed that internal market monitoring could raise conflict of interest issues that could devolve into re-regulation, for example if enforcement powers were given to the internal MM [p.443].

³ FERC Order 2000 can be found at <https://www.ferc.gov/sites/default/files/2020-06/RM99-2-000.pdf>

⁴ FERC Order 2000, p. 462 (no paragraph numbers on this version)

- **The 2001 Market Behavior Rules** were a set of regulations developed after the western energy crisis that includes blanket prohibitions on market manipulation in electric and natural gas markets.⁵ The prohibition was only on electric sellers with market-based rate authority and FERC lacked the authority to impose significant civil penalties.⁶
- **FERC Order 2001 of 2002** and subsequent revisions⁷ set up certain electronic reporting requirements to the Commission applicable to sellers with market-based rate authority.
- **The 2005 Energy Policy Act** authorized FERC to issue rules prohibiting market manipulation under the Federal Power Act and Natural Gas Act and granted FERC new civil penalty authority.⁸ This authority led to the promulgation of several anti-manipulation rules, including Order 670 of 2006 (Prohibition of Energy Market Manipulation).
- **The 2005 Policy Statement on Market Monitoring Units** (Docket PL05-1) issued by FERC set forth the tasks RTO/ISO market monitoring units (“MMU”s) are expected to perform and established procedures for MMU referrals to FERC for suspected violations.⁹
- **FERC Order 670 of 2006**¹⁰ amended Commission regulations to implement new prohibitions on market manipulation and deceptive practices conferred by the 2005 Energy Policy Act.
- **The 2007 Technical Conference on the “Review of Market Monitoring Policies”** (Docket AD07-8) was a one-day technical conference to examine the role and effectiveness of market monitors. According to FERC, two issues received the most attention at the technical conference included, 1) the need for and methods for achieving independence of the MMU so it can properly perform its functions, and 2) the content and proper recipients of market data and analysis produced by the MMU.¹¹ This technical conference informed the rulemaking that eventually led to Order 719 of 2008.
- **FERC Order 697 of 2007**¹² reformed FERC’s market-based rate authorization program for sale of energy, capacity, and ancillary services to enhance consumer protection against electric power seller’s exercise of market power. This rule adopted new tests and screens for market power, default mitigation protocols, rules governing affiliate sales, and new procures for updating market power studies.
- **The 2008 PJM MMU Settlement Agreement (122 FERC ¶ 61,257)**¹³ required PJM’s internal MMU to be transitioned to an external MMU after a large coalition of consumer advocates, municipal and rural cooperatives, and certain industrial customers filed a complaint at FERC alleging PJM violated tariff obligations with respect to the independence of the MMU.
- **FERC Order 719 of 2008** reformed and enhanced market monitoring functions for RTO/ISOs markets in the areas of independence and functioning of the market monitoring

⁵ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218

⁶ <https://www.ferc.gov/sites/default/files/2020-05/marketmanipulationwhitepaper.pdf>

⁷ Version 2001-E <https://www.ferc.gov/sites/default/files/2020-05/2001-e.pdf>

⁸ 15 U.S.C. § 3414(b)(6) (2000) (as amended by EPAct 2005, § 314).

⁹ https://www.ferc.gov/sites/default/files/2020-04/E-5_16.pdf

¹⁰ <https://www.federalregister.gov/documents/2006/01/26/06-716/prohibition-of-energy-market-manipulation>

¹¹ https://www.ferc.gov/sites/default/files/2020-04/E-3_29.pdf PP 106

¹² <https://www.ferc.gov/sites/default/files/2020-06/OrderNo.697.pdf>

¹³ <https://www.monitoringanalytics.com/company/Orders/20080321-el07-56-000.pdf>

unit (MMU) and on information sharing.¹⁴ The order also made suggestions (not requirements) for RTO/ISOs to consider in the structuring of their MMU tariffs.

The relevant MMU requirements for **independence and functions** include:

- **Structure and Tools:** RTO/ISOs should decide the structural relationship (internal/external/hybrid) of the MMU, but the RTO/ISO must include in its tariff provisions for 1) an obligation to provide MMU with access to market data, resources, and personnel needed to carry out its functions, 2) granting MMU full access to RTO/ISO database, and 3) granting MMU exclusive control over any MMU-created data. The MMU is permitted to share data under its exclusive control, subject to confidentiality provisions [¶329].
- **Oversight:** MMU must report directly to the RTO/ISO Board with RTO/ISO management representatives excluded. Internal MMUs are required to report to the Board related to core MMU functions such as identifying ineffective market rules, reviewing market performance, and making referrals to FERC [¶341]. The rule also notes that several RTO/ISOs have agreements in place that voluntarily established a requirement that FERC approve any termination of MMU agreements [¶343].
- **Functions:** Generally expanded and codified the 2005 policy statement on MMU functions and referrals to FERC. These functions include 1) evaluating existing and proposed market rules/tariff provisions/market design elements/etc. and making recommendations to the RTO/ISO and FERC, 2) review and report on the performance of the wholesale market to the RTO/ISO, FERC, and other interested parties such as state commissions and market participants, and 3) identify and notify FERC of instances of market participant or RTO/ISO behavior that may require investigation.
- **Mitigation and Operations:** Requires that MMUs not be involved in tariff administration and identified circumstances under which MMUs can engage in mitigation (without impacting the markets and creating a conflict of interest for the MMU). Internal MMUs or internal hybrid MMU can engage in mitigation, while external or external hybrid can monitor the appropriateness of the mitigation. MMUs (regardless of structure) can engage in retrospective mitigation, but not prospective mitigation.¹⁵
- **Ethics:** FERC requires RTO/ISOs to include minimum ethical standards for MMUs in their tariffs, including: 1) employees can't have material affiliation with a market participant or affiliate, 2) employees can't serve as officer/staff of a market participant, 3) employees can't have financial interest in a market participant, 4) employees can't engage in market transactions, 5) employees can't be paid (other than by RTO/ISO for commercial services), 6) employees can't accept gifts from market participants, and 7) employees must disqualify themselves from matters where there might be a conflict of interest (e.g., expected future job opportunity).

¹⁴ <https://www.ferc.gov/media/order-no-719>

¹⁵ FERC considers prospective mitigation to include only mitigation that can affect market outcomes on a forward-going basis, such as altering the prices of offers or altering the physical parameters of offers (e.g., ramp rates and start-up times) at or before the time they are considered in a market solution. All else is retrospective.

- **Tariff Provisions:** FERC required that RTO/ISO tariffs include MMU provisions in one centralized section and include the MMU mission statement of protecting both consumers and market participants.

Relevant to **information sharing**, Order 719 requires:

- **Enhanced Information Dissemination:** RTO/ISOs must release offer/bid data to MMU within 3 months, and must mask the identity of the market participant when releasing data. MMUs must report quarterly and annually and make staff available for regular calls with FERC, RTO/ISO, and state commissions. FERC declined to require specific standard be put in place that guarantees states have the same access to data as FERC, given that some issues are uniquely under FERC jurisdiction [¶417].
- **Tailored Request for Information:** state commissions can make tailored requests for information from MMUs, limited to general market trends and the performance of the wholesale market [¶446]. MMU cannot become an unpaid consultant for the states [¶446]. RTO/ISO tariffs must contain provisions to protect commercially sensitive data. Must avoid state commissions using MMU-disclosed, confidential data to pursue their own discovery [¶454]. Market participants can contest data. State commissions can petition FERC for release of additional data outside these parameters [¶458].
- **Commission Referrals:** information regarding MMU referrals to FERC and subsequent investigations are to be non-public unless public disclosure is authorized by FERC.

Related to proforma tariffs, Order 719 suggests, but does not require that **MMU tariff section of the RTO/ISO tariff include the following general categories:**

- Introduction and purpose; definitions; independence and oversight; structure; duties of market monitor; duties of RTO or ISO; data access, collection and retention; information sharing; ethics; RTO or ISO specific provisions; protocol on referrals of investigations to FERC; protocol on referrals of perceived market design flaws and recommended tariff changes to FERC.
- **FERC Order 760 of 2012**¹⁶ required RTO/ISOs to electronically submit market data directly to FERC in an effort to enhance the Commission's ability to surveil and analyze markets and detect anti-competitive behavior or wholesale market manipulation.
- **The 2016 Staff White Papers on Anti-Market Manipulation Enforcement**¹⁷ and Energy Trading Compliance¹⁸ highlighted lessons learned by FERC 10 years after the passage of the 2005 Energy Policy Act that gave FERC expanded powers to prohibit and enforce market manipulation.

¹⁶ <https://www.ferc.gov/sites/default/files/2020-06/OrderNo.760.pdf>

¹⁷ <https://www.ferc.gov/sites/default/files/2020-05/marketmanipulationwhitepaper.pdf>

¹⁸ <https://www.ferc.gov/sites/default/files/2020-07/EffectiveEnergyTradingCompliancePractices-November17-2016.pdf>

- **FERC Order 861 of 2019¹⁹** removed the obligation to submit indicative market power screens to FERC prior to obtaining or retaining market-based rate authority for sale of energy, capacity, or ancillary services.

3. Analysis of Pathways Step 2 IMM Proposal

The Pathways initiative has requested input on the Step 2 IMM proposals.²⁰ Specifically, Pathways Step 2 has asked:

“The Draft Proposal recommended a joint reporting structure for DMM and RO shared decision making in DMM upper management hiring. Would this change enable sufficient independence? If you think that the proposed approach does not achieve sufficient independence, please provide an alternative approach that would better address stakeholder needs, including any cost implications.”

The Pathways Step 2 proposal rightly recognizes the importance of independent market monitoring to ensure competitive markets yield outcomes that are beneficial to consumers and the public interest. However, the public interest would benefit from increasing the independence of the MM functions for the RO, and increasing the level of detail of proposed MM functions.

Pathways Question #1: The joint reporting structure and shared hiring input over the DMM may be insufficient to ensure the market monitor is independent from CAISO or the RO because: 1) evidence suggests CAISO’s governance is insufficiently independent from the state, 2) the DMM is not independent from CAISO (and hence not independent from the state), 3) an internal market monitor is not best practice, and 4) lack of detail on the functions and activities of the RO’s MM reinforces concerns about dependence on CAISO. These four reasons are detailed below.

- 1) **Insufficient Independence of CAISO’s Board:** CAISO’s current governance structure does not meet the criteria of independence as originally envisioned by FERC in Orders 888 and 2000. As explored by Ari Peskoe, FERC established certain independent governance principles for RTO/ISOs, which have been undermined by subsequent court decisions.²¹ In FERC Order 888 of 1996, the commission encouraged utilities to join RTOs and required that RTOs maintain a fair and non-discriminatory governance structure that is independent of any individual market participant or any one class of participants (i.e., the independence governance principle). In FERC Order 2000 of 1999, the commission established certain criteria to demonstrate compliance with the independent governance principle.²² To demonstrate independence, the RTO (or ISO) must demonstrate that: the RTO and its employees do not have financial interests in market participants, the RTO’s decision making process is independent from control by any market participant or class of market participants, and that the RTO retains exclusive and independent authority under Section 205 of the

¹⁹ <https://www.ferc.gov/media/order-no-861-1>

²⁰ https://www.westernenergyboard.org/wp-content/uploads/Stakeholder-Comment-Template_Step-2-Draft-Proposal_Final.pdf

²¹ Ari Peskoe, “*Replacing the Utility Transmission Syndicate’s Control*”, Energy Bar Association, November 2023, <https://www.eba-net.org/wp-content/uploads/2023/11/8-Peskoe547-618.pdf>

²² <https://www.ferc.gov/sites/default/files/2020-06/RM99-2-000.pdf>

Federal Power Act to propose rates and terms and conditions over the transmission facilities it operates (with transmission owners maintaining certain 205 authority).

On December 15, 2000, FERC issued an Order directing changes to California's electricity market that included replacing the ISO's state-appointed Board with an independent, non-stakeholder Board after finding the existing Board had become ineffective and perceived to be subject to influence.²³ On July 17, 2002, after performing an audit of CAISO and identifying areas of non-compliance, FERC again directed CAISO to replace its state governor-appointed Board with a new independent board.^{24,25} FERC reiterated that "...the State-controlled Governing Board of the CAISO (Board) is not capable of operating its interstate transmission facilities on a non-discriminatory basis" and that the ISO is not in compliance with the independence requirements in Orders 888 and 2000.²⁶

CAISO subsequently petitioned the D.C. Circuit to review FERC's orders. The D.C. Circuit eventually ruled in favor of CAISO solely on jurisdictional grounds, ignoring the arguments of substance and stating that FERC has authority over rates, but not broader practices such as governance.²⁷ As such, CAISO was not required to establish a new independent board and continues to maintain the state-appointed Board structure. This means the current governance structure in place in CAISO that was found to be out of compliance with FERC's independent governance principles requirement is still in place today. To avoid any doubt, CAISO's existing Board does not meet FERC's principle or criteria for independent governance.

- 2) **DMM is not Independent from CAISO:** The Step 2 document suggests that "The DMM is structured as an internal, yet fully independent, business unit of the CAISO." [p.69] However, there are no specific details provided about what an "internal, yet fully independent, business unit of the CAISO" means, and how this distinction enables the DMM to be independent and insulated from the pressures of the CAISO management or Board. A look into available CAISO documentations provides further concerns that claims of DMM independence are unsubstantiated.
 - The DMM Appendix P to the CAISO Tariff includes Section 3 on Independence and Oversight, which relies on three provisions to ensure independence of the DMM.²⁸ First, that the DMM can report exclusively to the CAISO Board. Second, that CAISO cannot alter reports or conclusions of the DMM. And third, that the Director of the DMM cannot be fired without approval of the CAISO Board. The appendix further stipulates the DMM is staffed by full-time CAISO employees. The first and third provisions clearly rely upon CAISO Board oversight to ensure DMM independence

²³ San Diego Gas & Electric Company, *et al.*, 93 FERC ¶ 61,294 (2000)

²⁴ FERC News Release, "Commission Orders Overhaul of California ISO Governing Board, Stresses Need for Independence," July 17, 2002, Docket EL01-35-000,

https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20020718-3000

²⁵ https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20020718-3004

²⁶ IBID

²⁷ *Cal. Indep. Sys. Indep. Operator*, 372 F.3d at 400.

²⁸ Appendix P of the CAISO Tariff

https://www.caiso.com/documents/appendixp_caisodepartmentofmarketmonitoring_asof_apr1_2017.pdf

from CAISO management. Yet, we have demonstrated the CAISO Board construct does not meet FERC’s independent governance principle. Furthermore, staffing the DMM with CAISO employees clearly ties the DMM’s employees to the overall CAISO management regime.

- The CAISO Board and DMM Oversight Committee, have significant influence over the DMM including personnel and staffing issues, performance reviews, compensation and raises, annual DMM departmental performance goals and evaluation metrics, hiring and firing, etc.²⁹ As such, the CAISO Board, which does not meet FERC’s independent governance principle, has significant influence over evaluating the performance of the DMM, extending to staff compensation.
- In CAISO’s 2024 Budget and Grid Management Charge Rates book, CAISO reports the DMM as a division within its Corporate Services functions and does not separately report the DMM budget. Rather, the rates book states, “the DMM Oversight Committee and the Board of Governors separately review and approve the DMM budget (which is included in the CEO division).”³⁰ Including the DMM budget within the CEO’s budget line item further raises doubts about the independence of the DMM. To the contrary, this suggests the DMM’s budget is closely overseen by the CEO and therefore may be subject to influence by the CEO.
- The DMM budget was not separately disclosed or mentioned in CAISO’s FY 2023 audited financial statement,³¹ nor was it separately mentioned in its continuing disclosure Annual Report.³² The DMM budget does not seem to be separately reported in CAISO’s 5-year financial statements,³³ or its quarterly financial reports.³⁴ In fact, the only place we could locate where the DMM’s budget was separately reported is on CAISO’s FERC Form 1 submission.³⁵
- The DMM’s annual reports do not include information on how the department maintains independence from CAISO’s management or Board.³⁶

3) **Inconsistent with Best Practices:** Current best practice to ensure independence of the MMU in most RTO/ISOs is to employ an external MMU. PJM,³⁷ MISO,³⁸ ERCOT,³⁹ and NY-ISO⁴⁰ all have external market monitoring units, with NY-ISO maintaining an internal market mitigation and analysis department.⁴¹ ISO-NE has an internal MMU,⁴² but

²⁹ CAISO Charter of the DMM Oversight Committee <https://www.caiso.com/documents/department-marketmonitoringoversightcommitteecharter.pdf> (3/15/2017)

³⁰ <https://www.caiso.com/documents/final2024budgetandgridmanagementchargeratesbook.pdf> [page 23]

³¹ <https://www.caiso.com/documents/caiso2023auditedfs.pdf>

³² <https://www.caiso.com/documents/2023-continuing-disclosures-annual-report.pdf>

³³ <https://www.caiso.com/documents/caiso-2023-5-year-summary-final.pdf>

³⁴ <https://www.caiso.com/documents/quarterly-financial-report-q2-2024.pdf>

³⁵ https://www.caiso.com/documents/fercform12023_final.pdf

³⁶ <https://www.caiso.com/documents/2023-annual-report-on-market-issues-and-performance.pdf>

³⁷ <https://www.monitoringanalytics.com/home/index.shtml>

³⁸ <https://www.misoenergy.org/markets-and-operations/independent-market-monitor2/#t=10&p=0&s=&sd=>

³⁹ <https://www.potomaceconomics.com/markets-monitored/ercot/>

⁴⁰ <https://www.potomaceconomics.com/markets-monitored/new-york-iso/>

⁴¹ <https://www.nyiso.com/market-monitoring>

⁴² <https://www.iso-ne.com/markets-operations/market-monitoring-mitigation/internal-monitor>

supplements with an external market monitoring consultant.⁴³ SPP has a fully internal MMU,⁴⁴ while CAISO has an internal MMU with an external advisory committee (MSC). Although internal market monitoring is permitted by FERC, issues with internal market monitoring have arisen. One example includes a 2008 FERC settlement agreement with PJM that required PJM to convert from an internal MMU to an external MMU.⁴⁵ In 2007, the DC People’s Counsel (Docket EL07-56-000) and the Organization of PJM States (Docket EL07-58-000) alleged that PJM violated its tariff obligation to maintain an independent market monitoring unit. On September 20, 2007, FERC found that although PJM did not violate its tariff, tension between PJM management and its internal market monitoring unit could compromise the ability for the market monitor to perform its tariff-defined function.⁴⁶ FERC initiated a settlement proceeding which led to the parties agreeing to specific changes to the PJM tariff and operating agreement to facilitate changes to the market monitoring plan, functions, and reporting structure, including moving market monitoring operations external to PJM.

- 4) **Insufficient MM Details Reinforced Notion of Dependence:** The Pathways Step 2 proposal is silent on many of the details of the RO’s approach to MM. This could indicate dependence on CAISO’s approach to MM activities and functions, or simply be a lack of early-stage focus on developing the unique MM functions and actions required by the RO. Dependence on the CAISO DMM’s functions and actions would not be appropriate for the RO, for a variety of reasons. The RO’s MM would be tasked with surveilling potential market manipulations and failures across many different states (not just within California) and across far more transactions and activities than the multi-state imbalance market (“WEIM”).

It is unclear if the RO’s MM would have access to transmission data (for example to identify capacity withholding), calling into question the unique challenges associated with a real-time and day-ahead market construct without independent transmission operations. In other words, the MM functions over the RO will be different from the MM functions over WEIM or over CAISO. Taken a step further, there may be biases incorporated into utility integrated resource planning through generation and transmission capacity expansion planning that could negatively impact the markets. It is unclear how the RO’s IMM would interact and oversee planning activities under state jurisdiction. This could extend to a variety of topics including but not limited to resource adequacy decisions, price markups, withholding, transmission planning that benefits certain resources, or other issues.

State policy goals related to carbon emissions or renewable energy may require market mechanisms or separate attribute markets to integrate and it is unclear what role the RO’s IMM would have over these mechanisms and markets. Transmission issues that impact markets such as seams issues or loop flows also raise jurisdictional and procedural questions

⁴³ <https://www.potomaceconomics.com/markets-monitored/iso-new-england/>

⁴⁴ <https://www.spp.org/markets-operations/market-monitoring/>

⁴⁵ <https://www.monitoringanalytics.com/company/Orders/20080321-el07-56-000.pdf>

⁴⁶ https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20070920-3050

that deserve further exploration in the context of the RO's IMM. The interaction of the RO's IMM with states and FERC should be further explored in specific detail.

Reliance upon the DMM's processes and procedures over CAISO and WEIM are insufficient in these unique contexts and raise further concerns about dependence or lack of independence. These dependency concerns are also exacerbated by the limited details that are included in the Step 2 proposal, which seem to rely heavily on CAISO. For example, initial reliance upon the CAISO tariff and market operations with an unidentified process to classify portions of the tariff under RO, CAISO, or share authority; the presumption that CAISO will continue to operate the RO via contract in Option 2.5; the recommendation to locate the RO headquarters in Folsom, CA near or in CAISO market operations, and other details that indicate a strong and continued reliance on CAISO.

Pathways Question #2: Pathways request an alternative approach to independent market monitoring that might better meet stakeholder needs. The following are potential characteristics to consider for an IMM for the Western RO. These characteristics were selected with the goals of increasing MMU independence in protection of the public interest. The wording of these characteristics uses language such as "should" and "must" in order to structure them as principles. These should not be perceived as complete recommendations from COUCA, nor should these principles be seen as an all-of-the-above portfolio. Rather these are potential options to consider in response to Pathway's request for alternative approaches to achieve independent market monitoring. These options are grouped by topic area to provide multiple potential strategies to consider.

Options to Increase the Independence of the RO's MMU

A. The RO's MMU Should Not Rely Upon the CAISO DMM

- **What:** CAISO's DMM reports to the CAISO Board, the structure of which is not compliant with FERC's independent governance principle and therefore should be avoided as an option for the RO's MMU.
- **Why:** Given the concerns related to CAISO's governing structure not meeting the independent governance requirements of FERC Orders 888 and 2000, reliance upon CAISO's approach to independent market monitoring is inappropriate. The RO's approach to market monitoring should instead rely upon the intent of regulatory requirements and best practices to promote and ensure independence.

B. The MMU Must be External to the RO to Ensure Independence

- **What:** The RO's MMU must be external to the RO to ensure its independence from the RO's Board, management, and staff.
- **Why:** Maintaining an external MMU will help avoid situations where the RO's leadership or management attempts to suppress, pressure, or otherwise influence the actions or conclusions of the MMU.

C. The MMU Should Be its Own Institution

- **What:** The MMU should be its own institution with long-term operating plans, succession plans, and tariff-based funding to support its mission and functions.
- **Why:** Typically, external MMUs operate by executing service contracts with the RTO/ISO for a predetermined term with opportunities for extension. This creates the potential for RTO/ISO management or the Board to seek to terminate, threaten to terminate, or fail to renew a contract if they are unhappy with the conclusions or findings of the MMU. Terminating a contract for cause, such as poor or inadequate performance is acceptable. Terminating a contract because of displeasure with the nature of the MMU's findings is not appropriate. The situation may arise where an unhappy market participant or class of market participants pressure the RTO/ISO management or Board to select a new MMU due to displeasure with the MMU's findings. The RTO/ISO/RO's Board, management, or market participants should not be able to pressure MMU organization or staff by threats of contracting with new provider just because they are unhappy with the conclusions of the MMU.⁴⁷ RTO/ISO/RO's Board or management should not be able to terminate a MMU contract when they don't like the monitor's analysis or conclusions.

On the other hand, the MMU should not be "above the law", so to speak. One potential institutional model could include permanent line staff positions with upper management subject to change based on the performance evaluations, contract terms, etc. Institutionalizing the RO's MMU would provide long-term certainty for MMU staff; development of intellectual capacity; collection, management and security of data; procurement of buildings and equipment; and other potential benefits.

D. The RO's MMU Should Have an Independent Board

- **What:** The RO's MMU should have its own Board that is made up of non-RO, non-market participant interests. The MMU Board should represent consumer interests and interests of the states.
- **Why:** The RO's Board, management, or market participants should not be able to influence the work of the MMU in a manner that would undermine independent oversight of the markets. Representatives from the RO's Board could join certain MMU Board meetings to ensure coordination. In turn, the MMU would be required to report to the RO Board and be responsive to their requests for information.

⁴⁷ An example of this can be found in the PJM Board's mid-term review of the Monitoring Analytics LLC service contract, an action was separate from the Board's established process for MMU performance and contract review. There were generally two perspectives expressed in these contentious Board proceedings, some market participants that were unhappy with the actions of the MMU and other that were concerned about the nature of the process. More information can be found at <https://pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20230526-summary-of-comments-received-regarding-imm-contract.ashx>

Options to Inform the Functioning of the RO's MMU

E. The RO MMU's Functions Should Meet or Exceed Order 719 and Other FERC Requirements for RTO/ISO MMUs

- **What:** The RO's MMU should meet or exceed the FERC Order 719 requirements for RTO/ISO MMUs with respect to independence and function, information sharing, and suggested tariff documentation.
- **Why:** To give confidence to consumers, market participants, and participating states, the RO's MMU should comport with no less than the minimum market monitoring requirements applicable to RTO/ISOs. This demonstrates a good faith effort to address skepticism of market development in the West expressed by consumer advocates and other state and private interests.

F. The RO MMU's Functions Should be Tailored to its Markets

- **What:** The markets and functions of the real-time and day-ahead markets and functions of the Western RO are not the same as the markets and functions of CAISO or WEIM. The markets and functions of the proposed Western RO, even if expanded to a RTO/ISO, may require different MMU capabilities. As such, the monitoring functions of the MMU need to be tailored to existing markets/functions, with the opportunity to evolve over time.
- **Why:** Currently, states in the western interconnection use integrated resource planning for capacity and transmission system expansion, with some regional transmission expansion efforts occurring through RTO/ISO and non-RTO/ISO transmission planning regions. The RO's MMU will need to understand if there are biases in these planning processes - such as how/where transmission is built or through the establishment of resource adequacy requirements - that could negatively impact the markets. Given the predominant trading regime in the west, the RO MMU would need some evaluation ability over bilateral contract markets. If the RO is not operating the transmission system, the MMU may need to understand balancing authority area or transmission system operator-level actions such as transmission capacity withholding, price markups, etc., that impact economic dispatch under the MMU's purview. The MMU will also need to understand issues between transmission systems (i.e., seams) and associated operational issues such as loop flows, for example that can result from the mismatch between scheduled interchange point and actual flows. There may also be state level policies, such as emissions reduction policies, that can impact markets and market dispatch order, as well as the costs and demonstration of compliance. Oversight of these regional functions may overlap with state jurisdiction; therefore, it is critical that the RO's MMU and state regulators work collaboratively.

G. The RO's MMU Should Provide State-Funded Technical Assistance

- **What:** Facilitate a cooperative relationship between the states and the RO's MMU by establishing a state-funded, MMU-executed technical assistance program.

- **Why:** This technical assistance program would expand upon Order 719's intent to enhance information dissemination to states without making the MMU an unpaid consultant of the states. Per Order 719, the MMU has access to the RTO/ISO's data and is required to give states information about general trends and reports. Beyond these requirements, which should be extended to the Western RO's MMU, the RO's MMU should have provisions in place for a state-funded technical assistance program. The states should work in advance with the MMU to plan annual technical assistance budgets and scope with sufficient time to ensure staffing needs can be fulfilled. There should also be sufficient flexibility to allow funds and scope to respond to the dynamic oversight needs of the developing markets.

H. Clear and Enforceable Rules Should Be Established Upfront

- **What:** Ensure that all RO MMU rules and practice manuals are established and codified upfront, prior to the operation of the Western RO.
- **Why:** Order 719 requires that MMU provisions be centrally located in the RTO/ISO tariff, which should apply to the Western RO. Furthermore, all practice manuals implementing these rules should be established prior to operations. Negotiating and identifying functions, responsibilities, processes, and other details upfront - before periods of stress – will increase the ability of the RO to handle stress periods and avoid the need to simultaneously deal with stressors and establishing the details of the RO MMU's roles and responsibilities.

I. The RO's MMU Should Have Outreach and Market Administration Oversight Responsibilities

- **What:** The RO's MMU should have the authority to intervene at FERC, at state commission, and communicate with other stakeholders at the MMU's discretion. Furthermore, the MMU should have authority to investigate matters associated with potentially unduly discriminatory practices by the RO's administration.
- **Why:** The MMU plays an important role in at least three critical functions, including 1) collection and analysis of data for the purpose of identifying market manipulation and anti-competitive behaviors, 2) recommending mitigation or solution options to identified issues and behaviors (including market design issues), and 3) communicating the importance of addressing identified issues through suggested solutions.

To be clear, an independent MMU should not be limited to passive number-crunching and surveillance. The MMU's knowledge of market data and participant behaviors gives it unique insight into solution proposals that are most likely to be effective. This ensures the market operates efficiently and in the public interest. There is the potential that MMU recommendations are ignored by RTO/ISO management or Boards, or that market participants attempt to block implementation of MMU-proposed solutions that would reduce anti-competitive behaviors.

It is for these reasons that the MMU should be empowered to communicate widely about the importance of certain potential reforms, including intervention authority at

FERC (beyond the existing authority to refer issues to FERC). The MMU should also be empowered to monitor the behavior of the RO management and Board, and refer or communicate potential discriminatory behaviors to FERC.