



Federal Energy Regulatory Commission  
April 5, 2007  
Technical Conference AD07-8  
Review of Market Monitoring Policies  
Statement of  
Commissioner Suedeen G. Kelly

"What we are doing today is one of the most important things we will be doing all year. We will be talking about the efficient and fair functioning of the market and that is one of the key objectives of the Federal Power Act. Key to the efficient and fair functioning of markets is the market monitoring unit. I thank you all for coming here today; it is very valuable to have you all here and to have you give us your advice.

Market monitoring has evolved from a mere task, as it was envisioned in Order No. 2000, to a profession, a profession of great importance to the electric industry and to the public. It's a profession because it has all the hallmarks of a profession. A profession is the organization of a body of knowledge that is difficult to acquire and important to the public. That is what we are talking about here. Market monitors acquire information that only market monitors can acquire by being on the ground in the complex marketplaces of our country. That information is very difficult to acquire, and we depend on it to ensure the integrity and appropriate functioning of our markets. While the profession has evolved, however, our policies and regulations have lagged behind.

Today, our goal is to determine what the objectives of market monitoring units are. Our staff has done a review of what market monitors do across the country. I think that what they do is what they should do and I think that what we should do today is arrive at a consensus on that.

So, what do market monitors do?

They protect. They detect and respond to questionable actions by market participants.

They mitigate. They take action designed to change market behavior that appears to be problematic and that needs to be halted immediately.

They provide advice. Both real-time advice and strategic advice. They are neutral actors who recommend actions and policy changes based on immediate observations and/or based on market research.

These are important tasks and I think we should enshrine them, not only in policy directives, but also in tariffs and regulations.

In general, delegation of decision-making authority from Congress to the Executive is permissible as long as the delegation is accompanied by an "intelligible principle." Although it is not exactly the same, the congressional delegation cases form the predicate for evaluating subdelegation, that is, Executive Branch agency delegation to a subordinate agency or a non-federal entity. The decision from the United States Court of Appeals for the D.C. Circuit, *U.S. Telecom Ass'n v. FERC*, 359 F.3d 554 (D.C. Cir. 2004) (*U.S. Telecom*), examined the subdelegation doctrine in a situation, like that found in the Federal Power Act, in which the agency statute is silent about permissible delegations to non-federal entities. The court in *U.S. Telecom* held that executive agencies are prohibited from subdelegating their decision-making authority to non-federal entities when the agency's enabling statute does not specifically provide for subdelegation, *except* in three limited circumstances. The one exception

to the subdelegation rule established in *U.S. Telecom*, which is relevant here, allows for permissible delegations where agencies provide a reasonable basis for granting *limited* discretion to a non-federal entity. Another decision in the D.C. Circuit, *Perot v. FERC*, 97 F.3d 553 (D.C. Cir. 1996) (*Perot*), set the standard for evaluating agency subdelegations to regulated entities charged with implementation of agency regulations and tariffs. In *Perot*, the court found that agencies regularly leave some discretion to those entities regulated by the agency and that, as long as the agency's regulations establish objective criteria for application of discretion, and there is review by the agency of a regulated entity's compliance with the agency's regulation, the agency has not impermissibly subdelegated its authority.

That's a valuable lesson for us here. Market monitors are our first line of market protection. Market monitors are necessary to ensure that the market behaves efficiently in real-time and to the extent that requires them to perform some "enforcement," it is not only permissible, but in my view, very important to give them the ability to do that. The law supports it. My experience being at the California ISO in 2000 also drives me to this conclusion. Being there and watching the inability of the market monitors to do anything to stop the decline of the market was exceedingly frustrating. Those market monitors had no authority to do anything. The result was disastrous.

In allowing market monitors to exercise discretion, it is important, however, to ensure that the Commission has provided objective criteria in the tariff for implementation of the tariff provision; that the tariff or the Commission has provided a reasonable basis for giving the entity discretion in applying the tariff provision; and that discretionary actions by non-federal entities are subject to review by the Commission.

I am not here to be a proponent of massive sub-delegation of authority to market monitors. But I am here to be an advocate for giving market monitors the authority to nip in the bud behavior that may need to be stopped to keep the market from functioning properly (if we call it "enforcement," so be it). Having to delay and call FERC—sometimes-- presents a problem. And in emergency situations, I think we should set up tariffs, policies and rules that allow the market monitors to do what we need them to do. The other actions that market monitors have taken on—providing advice—real-time advice and strategic advice-- is also of paramount importance. The kind of knowledge that market monitors obtain is not knowledge that others can obtain. That expertise shouldn't go to waste. It should be used to help the RTOs, the stakeholders, and the public to make sure that the markets are functioning as fairly and efficiently as possible.

So how do we achieve these objectives? How do we ensure both the independence and the appropriate professional responsibilities of market monitors?

One model that seems likely to be helpful to this effort, in my view, is codes of professional responsibility. Codes of professional responsibility spell out the professionals' responsibilities and also tell professionals how to deal with potential conflicts among their responsibilities—their responsibility to clients, non-clients, the public, and the institution they serve. Those codes underscore the importance of professional independence, but also affirm the importance of professional responsibilities. I think that codes of professional responsibility can help us as we

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work to define the market monitors' professional responsibilities to their employer, the ISO/RTO, which is responsible for establishing the fair and efficient functioning of the market; to the board of the ISO/RTO, which is responsible for establishing the rules to produce a fair and efficient market; to FERC, which is ultimately responsible for ensuring that the market rules are followed; to the participants in the marketplace, who depend on a fair and efficient market; to the public in general; and, finally, to the institution, that is, a fair and efficient market.

There are potential conflicts of interest that market monitors face as they work to carry out their professional responsibilities, particularly in the acquisition and communication of information. In order to do that, market monitors, like doctors, lawyers and accountants, need to have enshrined in their code of professional responsibility some level of independence to allow them to apply their expertise even when they deliver news that is unwelcome to one of the interests they serve.

Today, as we talk about market monitoring, it is important to keep in mind the bigger picture that market monitoring is part of—a fair and efficient market. Market monitoring is the profession that helps us maintain a fair and efficient market. But a fair and efficient market is not created by market monitors, just like law is not created by lawyers. Bid-based, organized markets are created by the RTOs and ISOs—and they have the responsibility to create, and maintain, fair and efficient ones. They need market monitors to accomplish this.

I think we need RTO and ISO tariff provisions that provide rules and further policies that, first, spell out the RTO's and ISO's responsibilities for advancing fair and efficient markets, and, then, spell out how market monitors should be used to help meet these responsibilities. In doing so, we need a structure to ensure that market monitors have the information necessary to do their jobs, but at the same time, the independence necessary to do their jobs. We need also to ensure that market monitors, like other professionals, have the knowledge, the character and integrity to do their jobs. And finally, we need to find ways to maximize the benefit of the expertise that market monitors develop so that it can redound to the benefit of the public."