UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

GenOn Power Midwest, LP	)	Docket No. ER12-1901-001

REPLY COMMENTS OF THE INDEPENDENT MARKET MONITOR FOR PJM

Pursuant to Rules 211 and 602(f) of the Commission's Rules and Regulations,[1] Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM ("Market Monitor"),[2] submits these comments in reply to the comments filed by GenOn Power Midwest, LP ("GenOn") and Commission Trial Staff ("Staff") in the above captioned proceeding on May 28, 2013. Those comments address, respectively, the settlement and offers of settlement submitted by the Market Monitor on February 28, 2013, ("IMM RMR Settlement"), and by GenOn Power Midwest, LP ("GenOn") on behalf of itself and certain other parties[3] ("GenOn RMR Settlement") on May 8, 2013. GenOn and Staff make a number of arguments, but they fail to raise any that are relevant to the current circumstances. The fundamental issue here is that, as GenOn itself points out (at 19), "the record 'lacks substantial evidence.'" GenOn can provide that evidence but has not done so.

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1 18 CFR §§ 385.211 & 385.602(f) (2012).

2 PJM Interconnection, L.L.C. is a FERC approved Regional Transmission Organization. Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff ("OATT").

3 These other parties include Duquesne Light Company, Duquesne Light Energy, LLC, FirstEnergy Solutions Corp., Duquesne Industrial Intervenors, PJM Industrial Customer Coalition, West Penn Power Industrial Intervenors, and Old Dominion Electric Cooperative.

GenOn completed the RMR service at issue last year, as of September 30, 2012. GenOn knows its actual costs, and could terminate this proceeding and receive its actual operating costs plus a ten adder by accepting the IMM RMR Settlement or by using the formula rate procedure provided in sections 114–115 of Part V of the OATT. GenOn chooses neither approach only because it prefers to obtain through settlement payments that exceed what the PJM tariff permits and higher than what an investigation of its actual costs would support. Because only GenOn knows its costs, no one else knows what the level of GenOn's compensation should be. They know only that the $13,200,000 amount to which GenOn has agreed is higher than what the tariff allows. That black box value, opaque to everyone but GenOn, should be rejected, and GenOn should be required to follow one of the two procedural options available to it for an immediate, fair and efficient resolution, or be required to demonstrate at hearing that the costs included in its RMR rate comply with section 119 of Part V of the OATT.

The New Jersey Board of Public Utilities has reviewed these comments and wholly endorses them, as affirmed by the signature below.

I. REPLY COMMENTS

A. The GenOn RMR Settlement Lacks Substantial Record Evidence.

The GenOn RMR Settlement continues to lack substantial record evidence. This is not because no evidence exists directly relevant to regulatory review. GenOn completed its RMR services as of September 30, 2012, and knows the costs incurred. No party other than GenOn can compare those costs to $13,200,000. What can be deduced is that $13,200,000 exceeds GenOn's actual costs, whatever they are, even after application of a ten percent adder. GenOn could obtain its documented avoidable costs plus a ten percent adder by accepting the IMM RMR Settlement or by using the formula rate provisions of section 114–115. PJM stakeholders collectively have agreed to avoidable costs plus a ten percent adder

for RMR services lasting as long as a year, and have provided a formula rate mechanism to recover that amount without the need for a rate filing with the Commission.[4] The black box settlement value set at $13,200,000 may include a 15 percent, 20 percent, or higher mark up. Only GenOn knows how much it would recover above its avoidable costs under the proposed Settlement. At any of those levels, GenOn would receive an unjustified windfall.

GenOn includes in its comments an Affidavit of John D. Stewart.[5] In this affidavit, Witness Stewart argues that the $13,200,000 is just and reasonable by comparing it to GenOn's initially filed value of $23,982,100.[6] This comparison is meaningless because GenOn has not supported the asserted costs associated with the $23,982,100 value in the first instance. It is also meaningless because GenOn should compare $13,200,000 to its actual costs, not to what it once estimated that those costs could be.

GenOn's willingness to settle at $13,200,000 indicates nothing more than GenOn's assessment of how well it could support $23,982,100 if its actual costs incurred were reviewed at hearing.

It is equally meaningless to compare the $13,200,000 settlement value to $12,540,980, the value that Witness Stewart states would result from the removal of the return on and of net plant component from the initially filed $23,982,100 value.[7] Neither the filed value nor any of its components have been supported or verified. Even if these values were credible, Witness Stewart explains that the settlement value comes in 5.25 percent higher than the

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4 *See* FirstEnergy Generation Corporation, Informational Filing regarding Deactivation Avoidable Cost (DAC) Rate under Section 116 of the PJM Interconnection, L.L.C.'s Open Access Transmission Tariff for Ashtabula generating unit no. 5, etc. (July 10, 2012).

5 GenOn Attachment 1 at 4.

6 *See Id*.

7 *See Id.* at 4–6.

value that he calculates.[8] By GenOn's own unverified reckoning, $12,540,980 is the maximum value consistent with section 119 of the PJM tariff.[9] If GenOn wants to receive an adder, it should accept the IMM RMR Settlement or proceed under the formula rate at sections 114–115.

GenOn includes this unhelpful affidavit instead of providing the relevant information exclusively in its possession: verifiable information on its actual costs. If the Commission and other parties had this information, they could compare the settlement value to the entire cost of service of operating the RMR units. As the record now stands, the GenOn RMR Settlement cannot be evaluated on the merits and should be rejected.

B. The GenOn RMR Settlement Cannot Be Accepted Simply Because Some Parties Have Agreed to It for Non-Public Reasons and Because It Would Terminate Litigation.

GenOn argues (at 2) that its settlement offer should be approved because it has support from "parties in the proceeding responsible for payment of the revenue requirement." GenOn complains (at 12–13) that continuing to litigate this case will cost it more than the $659,020 difference between the $13,200,000 black box settlement and the $12,540,980 value that GenOn purports is its costs excluding embedded costs. Staff files in support of the GenOn RMR Settlement, explaining (at 6–7) "[i]t is signed and supported or unopposed by all of the affected load-serving entities and by GenOn" and would "conserve the resources of the Parties."

That the GenOn RMR Settlement is contested and therefore cannot be approved merely because some parties have agreed to it for non-public reasons has been addressed in

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[8] *See Id.* at 5.

[9] *See* OATT § 119 ("a Generation Owner with a generating unit proposed for Deactivation that continues operating beyond its proposed Deactivation Date may file with the Commission a cost of service rate to recover the entire cost of operating the generating unit until such time as the generating unit is deactivated pursuant to this Part V").

the Market Monitor's earlier comments.[10] But setting aside the law, which requires that the GenOn RMR Settlement be rejected, the suggestions that the GenOn RMR Settlement represents some kind of bargain between buyers and sellers fundamentally misrepresents its nature.

Load-serving entities are not the ultimate customers, they are pass through entities. These parties have an interest in keeping their customers satisfied by reducing costs incurred to serve them and that do not result in any profit to them, but load serving entities are not properly characterized as the ones ultimately responsible to pay for RMR service and cannot accurately claim an identity of interest with the actual customers. In some cases, these settling entities own and operate generating plants, and one settling entity is affiliated with an entity providing RMR service under Part V. Retail electric customers pay the bill for RMR services, and no retail customer or party directly responsible for protecting retail customers is party to the GenOn RMR Settlement. The Maryland Public Service Commission, the New Jersey Board of Public Utilities, the Ohio Consumers Council and the Pennsylvania Office of Consumer Advocate, parties who do represent the ultimate retail consumers of RMR service, all oppose the GenOn RMR Settlement and, instead, support the IMM RMR Settlement.

As far as the costs of litigation are concerned, the GenOn RMR Settlement is about avoiding scrutiny of GenOn's costs, not avoiding continued litigation.

Part V of the OATT provides GenOn a means to recover the avoidable costs of providing RMR service plus a ten percent adder that would have required no party to expend significant resources to resolve this matter. If that amount is $13,794,088 (GenOn's $12,540,080 value, if verified, adjusted with a ten percent adder), so be it. It should not escape notice that this amount is higher than the "black box" value to which GenOn would

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[10] *See* Comments of the Independent Market Monitor for PJM, ER12-1901 (May 28, 2013).

agree to settle. This discrepancy implies that GenOn could not support recovery at $12,540,080 based on its actual operating costs.

Only GenOn knows why it continues to pursue recovery under section 119 rather than use the formula provided in sections 114–115. GenOn has a right under section 119 to continue to litigate this matter. Other parties have a right to respond, including for the purpose of protecting the public interest in the administration of Part V in a manner that is lawful, proper and consistent with competitive markets. GenOn ought to terminate this proceeding and agree to collect its actual costs to provide RMR Service plus a ten percent adder. Why would they not do so, if the facts are what GenOn claims? The decision to litigate is GenOn's.

C. The IMM RMR Settlement Is Properly Offered, and Provides for a Just, Reasonable and Efficient Outcome.

The IMM submits its offer of settlement under Rule 602 of the Commission's regulations. Rule 602 does not require a counter party to accept an offer of settlement. It only requires that other parties submit comments explaining their objections or waive them.[11] GenOn has not attempted to explain why an outcome to this case that allows for its recovery of its actual operating costs plus a ten percent adder is not a just and reasonable outcome. GenOn objects to the proposed procedure, but raises no valid objections to the substance of the IMM's proposal.[12] Specifically, GenOn does not explain why the rate for RMR services should have a basis other than the "entire cost of service of operating the generating unit" until deactivated, the standard specified in section 119; how the IMM RMR Settlement offer is inconsistent with that standard, or could be modified to become consistent; nor why a ten percent adder for four months of RMR service is not just and reasonable. Those are the substantive matters at issue here.

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[11] 18 CFR § 602(f)(3).

[12] GenOn at 13–22.

The Commission has accepted and ruled on unilateral offers of settlement.[13] Rule 602 plainly states that "[a]ny participant in a proceeding may submit an offer of settlement at any time,"[14] and this remains the law until the rule changes.[15] Nevertheless, GenOn argues that this approach is improper, citing to cases rejecting settlement offers that had not been proposed for discussion or were the same as their litigation positions.[16] Those circumstances do not apply here.

GenOn asserts (at 16) that the IMM RMR Settlement "was not shared with GenOn Midwest for discussion prior to its filing." On the contrary, the IMM did propose the terms included in the IMM RMR Settlement in settlement discussions, with the support of the New Jersey BPU and the Maryland PSC. GenOn rejected the proposal. If GenOn is now going to disclose the content of confidential settlement discussions, it should include the substantive statements that it made confidentially in response to the terms of the IMM RMR Settlement so that they can be evaluated.

GenOn states (at 8) that the "IMM imposes its interpretation of section 119 of the PJM Tariff at issue in this proceeding." Although PJM has specifically refrained from taking a position on either of the offers of settlement submitted in this proceeding, at the Market Monitor's request, PJM has authorized the Market Monitor to state that the Market Monitor's reading of section 119 of Part V of the PJM Tariff is consistent with PJM's interpretation of this section as communicated to the parties and to the settlement judge

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13 *Organization of PJM States, Inc., et al. v. PJM*, 120 FERC ¶ 61,254 at P 59 (2007) (*OPSI v. PJM*).

14 *See* 18 CFR § 602(b).

15 *See, e.g.*, Atchison, Topeka & Santa Fe Railway Co. v. Witchita Board of Trade, 412 U.S. 800, 808 (1973); Basic Media Ltd. v. FCC, 559 F.2d 830, 833 (D.C. Cir. 1977).

16 GenOn at 20 n.39–43, citing *Appalachian Power Co.*, 132 FERC § 61,236 (2010), et al.

during settlement discussions.[17] Specifically, the Market Monitor reads section 119 to limit recovery to operating costs and to not allow the recovery of investment costs other than new investment made for the sole purpose of providing RMR service. Accordingly, it is incorrect to characterize the IMM's position on how section 119 is interpreted as merely the Market Monitor's and other parties' opinion. Rather, GenOn is the party attempting to impose its interpretation of section 119 in this proceeding.

GenOn's claim that the Market Monitor has merely repackaged its litigation position as a settlement offer is also incorrect. The terms of the IMM RMR Settlement do not state the position that the IMM will take at hearing, nor that of those parties supporting it. The IMM RMR Settlement provides for a resolution consistent with Part V considered overall, but not one strictly in accord with section 119, the provision that is the basis for this proceeding, and not necessarily the solution that is most equitable under the circumstances here.

Because GenOn's filing is submitted under section 119 of the PJM tariff, and section 119 states nothing about recovery of an incentive adder, the Market Monitor's litigation position is that GenOn should recover its actual costs to provide RMR service. The Market Monitor's proposed ten percent adder is a significant incentive to settlement.

Although the ten percent incentive level is not consistent with section 119, it is included in sections 114–115 of Part V, and GenOn could obtain access to this incentive by withdrawing its filing in this proceeding and recovering its costs of RMR service under the formula rate. GenOn could also avoid the costs of an independent audit for its costs to operate by proceeding under the formula rate. Because GenOn can still avail itself of the formula rate, its argument (at 23–24) that it would be worse off under the IMM RMR Settlement can be avoided simply by making a rational choice between those options.

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[17] PJM further advised the Market Monitor to note in this reply that PJM is not expressing a position as to whether or how its interpretation applies to the circumstances of this case, including those costs in dispute here. As the Commission is aware, PJM is not, and has no plans to become, an active litigant in this proceeding.

GenOn will be much worse off if, after months of additional litigation, the standard in section 119 is strictly and correctly applied.

GenOn cannot presume some entitlement to a rate higher than what it could obtain under the formula rate.[18] The opposite presumption should apply. Otherwise, there is an incentive for all RMR service providers to pursue wasteful litigation at the Commission rather than use the formula rate. Avoiding such wasteful litigation is the rationale for including a formula rate in the tariff in the first place. The purpose of the formula rate is not to establish a floor for RMR service cost recovery.

The IMM RMR Settlement goes as far as it can without itself becoming inconsistent with the framework of the PJM market rules. The need to comply with the law limits the scope of what the parties can properly agree to. If the Commission determines that including a ten percent adder goes too far in stretching the proper applications of Part V, then the Commission should remove that provision from the settlement.

No party other than GenOn has argued that the IMM RMR Settlement was improperly submitted or that it does not substantively provide for a just and reasonable outcome to this proceeding. No party could do so in good faith when the IMM RMR Settlement does not impose any value on GenOn but instead provides a streamlined process for GenOn to recover its actual costs, plus a ten percent adder, that is consistent with Part V. Approval of this settlement avoids the need for litigation that is unnecessary because the most likely outcome is the correct application of the applicable PJM market rules.

If GenOn believes that it cannot accept settlement on reasonable terms because it places some value on the prospect that it will be allowed to incorrectly apply the terms of the PJM tariff, then settlement would best be promoted by removing that incentive to continue to hearing.

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[18] *See* GenOn at 20–21.

II. CONCLUSION

The Market Monitor respectfully requests that the Commission afford due consideration to these reply comments as the Commission resolves the issues raised in this proceeding.

Respectfully submitted,

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The New Jersey Board of Public Utilities has reviewed these comments and wholly endorses them:
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By: 

Brian O. Lipman
Deputy Attorney General
State of New Jersey
Office of the Attorney General

Dated: June 7, 2013

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 7th day of June, 2013.

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