UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Exelon Corporation and Pepco Holdings, Inc.	))))	Docket No. EC14-96-000

ANSWER AND MOTION FOR LEAVE TO ANSWER OF THE INDEPENDENT MARKET MONITOR FOR PJM

Pursuant to Rules 212 and 213 of the Commission's Rules and Regulations,[1] Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM ("Market Monitor"), submits this answer to, and moves for leave to answer, the answer filed by Exelon Corporation and Pepco Holdings, Inc. (collectively, "the Companies") on July 30, 2014. Contrary to the Companies' assertions, the Companies have not shown under the Commission's analytic framework that the proposed merger does not raise concerns about market power issues. The proposed transaction is significant, and has the potential to affect PJM markets in the short and long term. The merger should not be approved unless and until the Companies have either made an adequate showing and/or have proposed steps sufficient to alleviate market power concerns.

I. ANSWER

The Companies claim that application of an analytic screen to horizontal competition among generation supply is sufficient to make a prima facie case that the merger raises no market power concerns, and that the Market Monitor now has the burden to prove that the merger would not harm competition. Order No. 642 provides that if the Commission finds

---

[1] 18 CFR § 385.212 & 213 (2014).

that the Companies have passed the analytic screen for horizontal competition issues, then the burden shifts to intervenors to show "anticompetitive effects."[2] Order No. 642, however, does not provide for any shift of burden pertaining to issues not analyzed in the screen. The issues raised by the Market Monitor were not addressed in the analytic screen or otherwise in the Companies' application. The Companies cannot rely on an analytic screen that does not analyze the specific market power issues that have been raised.

The Market Monitor raised issues about the combination of demand resources in the energy market and competition to develop transmission projects in PJM. These are horizontal competition issues that do not concern generation supply. The Companies' analytic screen did not address these issues. The Companies claim (at 5) to have analyzed the impact of the Companies' combined Demand Resources in capacity markets, but they did not analyze the impact of these same combined Demand Resources on the energy markets. The Market Monitor agrees that there is no issue regarding horizontal competition among generation assets in either the capacity or energy market, but no information has been provided regarding the combination of the Companies' capacity market based demand side response assets on the energy market. The effect of combining the Companies' capacity based demand response resources on the energy market should not be ignored. Demand Respond resources are subject to a significantly higher offer caps than generation resources ($1,800 versus $1,000) in the energy market, and are eligible to set energy market prices in periods when all asset owners are pivotal. The burden remains on the Companies to address these issues or to propose appropriate mitigation measures.

The Market Monitor identified vertical market power issues related to the significant consolidation of transmission, electric distribution and gas distribution assets under the control of a single owner. The Companies' analysis did not address these concerns. The

[2] *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111, *mimeo* at 2–3 (2000) ("Order No. 642").

Companies' horizontal analytic screen does not apply to vertical market power issues. The Companies assert that vertical market power issues do not exist. The companies ignore significant consolations of upstream and downstream assets. The burden remains on the Companies to address these issues, either through analysis that alleviates the concern or by proposing appropriate mitigation measures.

The Companies claim that the Companies' participation in PJM, a Regional Transmission Organization, "adequately mitigates vertical market power concerns arising from a merger."[3] Membership in PJM alleviates market power concerns only if the Companies remain in PJM and are not able to exert undue influence on PJM based on the ability to withdraw. In the first case cited by the Companies, the Commission found, "Applicants' transmission facilities will continue to be under the operational control of PJM."[4] In that proceeding, the applicants also agreed to behavioral mitigation in PJM markets for ten years.[5] The behavioral conditions imply a commitment to remain in PJM, and the commitment was made explicit in the order of the Maryland Public Service Commission approving the same transaction.[6] The Companies rely heavily on PJM membership to alleviate the greater vertical market power concerns raised in this transaction. Accordingly, approval of the transaction should be conditioned on the Companies' agreement to remain a member of PJM.

Such a commitment would reduce the leverage that the very large transmission owner created by the merger can exert on PJM. It is appropriate to condition approval of a

---

3 *See* Companies at 5–6, citing, *e.g.*, *Exelon Corp.*, 138 FERC ¶ 61,167 at P 113 (2012).

4 138 FERC ¶ 61,167 at P 113.

5 *Id*. at P 86.

6 *See In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Inc.*, Public Service Commission of Maryland, Case No. 9271 (February 17, 2012) at 104 ("Given that the Applicants' membership in PJM is an implied commitment in the IMM Settlement, continued membership in PJM is a condition of Merger approval.")

merger that relies heavily on the independent administration of the tariff by an RTO on steps that protect such independence.

The Companies fail to acknowledge significant developments in the Commission's policies for competitive transmission development that took place after the cited decisions. With Order No. 1000, the Commission has embarked on a significant initiative aimed at increasing competition in the development of the grid. Order No. 1000 and the policy goals it represents provide ample justification for the Commission to continue to refine the details of its merger analysis and to enhance its review of vertical market power issues in section 203 transactions. Such enhanced analysis and review should include the application of stronger analytical requirements and the inclusion of conditions aimed at preserving competitive access and competitive opportunities for non-incumbent transmission developers.

Stronger analytical requirements and conditions should also apply in order to preserve competitive access to the transmission system by non affiliated generation because the merger will make what is now an independent transmission and distribution company part of vertically integrated utility.

The Companies cite some instances where a number of independent companies (along with incumbents) submitted proposals to build transmission projects to fix identified issues/market needs.[7] The Companies do not show where any of these proposals were taken instead of an incumbent's proposal. These examples do not confirm that competitive transmission development is now a reality in PJM. These examples raise concerns that such competition may not be a reality.

The Companies do not support (at 11–12) reasonable inquiry into access to natural gas pipelines in areas where the Companies will combine ownership of natural gas

---

[7] *See* Companies at 8–9.

distribution assets. The Market Monitor does not contest Companies Witness Solomon's statement that "generation facilities can directly connect."[8] The issue is whether they Companies can impose significant terms and conditions on such access, particularly under the rules applicable to bypassing gas distribution facilities. The Companies have the burden to properly analyze the terms and conditions for access and explain why the rules would prevent the companies from erecting barriers to entry. The Companies have not met that burden.

The assertions made by the Companies in their application should not be accepted as sufficient to establish a prima facie case that there are no vertical market power concerns. The Companies should be required to provide more information about how RTO membership will operate to alleviate those concerns. A superficial claim that PJM's rules are sufficient to offset the companies influence is not sufficient. The Companies agreement to specific measures to ensure competitive access to the portion of the system under its control, a significantly expanded area in a congested area of the PJM footprint, also could address these concerns.

Vertical market issues deserve attention in section 203 proceedings. In Order No. 642, the Commission made it plain the importance of vertical competition issues even in cases where concerns about generation competition are absent.[9] The Companies proposed merger is particularly unusual in its size and scope, and it will permanently affect PJM markets going forward. The proposed merger returns a significant portion of the grid now operating under the independent network model back to the vertically integrated model.

---

[8] *See* Companies at 12.

[9] Order No. 642 *mimeo* at 73 ("[T]he Commission has demonstrated that it is concerned about cases that involve a vertical combination of generation and transmission assets even if there is little or no overlap between generation activities"), citing, e.g., *American Electric Power Co. and Central and South West Corp.*, 85 FERC ¶ 61,201, *reh'g denied*, 87 FERC ¶ 61,274 (1999).

Review for vertical market power issues should not be relaxed simply because quantitative analysis is less easily applied to them.

Proponents of the transaction that created Pepco Holdings, Inc. in its current independent form, asked for expedited review based in part on the divestment of generation and the proposed new business focus for Pepco Holdings, Inc.[10] That status will prove short lived if this merger is approved. Just over four years later, the transaction that created Pepco Holdings, Inc. as an entity divested of generation assets may accomplish little more than facilitate the consolidation of a larger portion of the grid under the control of a vertically integrated entity. Nothing prevents the combined vertically integrated entity from building new generation anywhere in PJM, including regions where it controls the network. In analyzing the public interest in mergers' effect on competition, it is time to consider how individual mergers will contribute to the ultimate end state market structure in regional markets such as PJM. The public interest in competition will not be protected if the review of proposed mergers considers only its short term effects.[11]

The transaction should not be approved based on an incomplete record, or without taking steps necessary to protect the public interest in competition. It is entirely appropriate

---

[10] *See* New Development Holdings, LLC, et al., Joint Application for Approval Under Section 203 of the Federal Power Act and Request for Expedited Treatment and Shortened Comment Period, Docket No. EC10-64-000, (May 6, 2010) at 27 ("The usual practice of granting 60 days for comments on FPA Section 203 Applications that include Appendix A analyses reflects the complexity often associated with such applications and a desire to allow time for potential intervenors to perform their own analyses. Here, that complexity is demonstrably absent, and the Appendix A analysis serves to simplify matters by confirming the lack of any horizontal market power concerns and illustrating that, in PJM East, the effect of the Transaction is actually deconcentrating. With respect to the commercial need for a timely close, the parties have targeted a June 30, 2010 closing, because PHI is effectively exiting the independent power generation business and is eager to re-deploy its resources to focus on its other business units as soon as reasonably possible.").

[11] PPL Corporation now has a transaction pending before the Commission that would result in PPL becoming a new independent transmission company. *See* PPL Corporation and RJS Power Holdings, LLC, Application Pursuant to Section 203 of the Federal Power Act, Docket No. EC14-112 (July 15, 2014).

to account for how potential and foreseeable future developments post merger may affect the public interest in competition, and to include enhanced commitments on the Companies to provide network access on a non-discriminatory basis. Because membership in PJM has been relied upon to secure approval for the merger, it is also appropriate to condition approval of the merger on a commitment to remain in PJM.

II. MOTION FOR LEAVE TO ANSWER

The Commission's Rules of Practice and Procedure, 18 CFR § 385.213(a)(2), do not permit answers to answers or protests unless otherwise ordered by the decisional authority. The Commission has made exceptions, however, where an answer clarifies the issues or assists in creating a complete record.[12] In this answer, the Market Monitor provides the Commission with information useful to the Commission's decision-making process and which provides a more complete record. Accordingly, the Market Monitor respectfully requests that this answer be permitted.

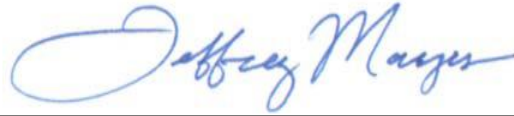
III. CONCLUSION

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

---

[12] *See, e.g.*, *PJM Interconnection, L.L.C.*, 119 FERC ¶61,318 at P 36 (2007) (accepted answer to answer that "provided information that assisted … decision-making process"); *California Independent System Operator Corporation*, 110 FERC ¶ 61,007 (2005) (answer to answer permitted to assist Commission in decision-making process); *New Power Company v. PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,208 (2002) (answer accepted to provide new factual and legal material to assist the Commission in decision-making process); *N.Y. Indep. Sys. Operator, Inc.*, 121 FERC ¶61,112 at P 4 (2007) (answer to protest accepted because it provided information that assisted the Commission in its decision-making process).

Respectfully submitted,



Jeffrey W. Mayes

Joseph E. Bowring
Independent Market Monitor for PJM
President
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, Pennsylvania 19403
(610) 271-8051
joseph.bowring@monitoringanalytics.com

General Counsel
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, Pennsylvania 19403
(610) 271-8053
jeffrey.mayes@monitoringanalytics.com

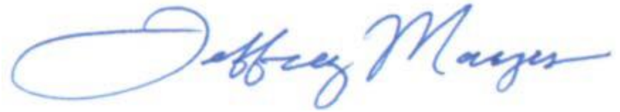
Howard J. Haas
Chief Economist
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, Pennsylvania 19403
(610) 271-8054
howard.haas@monitoringanalytics.com

Dated: September 4, 2014

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 4th day of September, 2014.



Jeffrey W. Mayes
General Counsel
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, Pennsylvania 19403
(610) 271-8053
jeffrey.mayes@monitoringanalytics.com