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**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Energy Harbor Corp. on behalf of certain public utility subsidiaries)
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Docket No. EC23-74-001
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Vistra Corp. on behalf of certain public subsidiaries)
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COMMENTS OF THE INDEPENDENT MARKET MONITOR FOR PJM

Pursuant to Rules 211 of the Commission’s Rules and Regulations,¹ Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor (“Market Monitor”) for PJM Interconnection, L.L.C. (“PJM”),² submits these comments on the filing submitted by Energy Harbor Corp. (“Energy Harbor”) and Vistra Corp. (“Vistra”) collectively (“Applicants”) on September 15, 2023 (“Deficiency Response”) in response to the deficiency notice issued in this proceeding August 17, 2023 (“Deficiency Notice”).

The proceeding concerns Applicants’ request for approval of a proposed transaction pursuant to Section 203 of the Federal Power Act. Vistra proposes to purchase the Energy Harbor nuclear units, Beaver Valley, Perry, and Davis-Besse. In the proposed transaction, Vistra will create a subsidiary holding company to be known as “Vistra Vision.” Vistra will be the majority owner of Vistra Vision.

¹ 18 CFR § 385.211 (2023).

² Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff (“OATT”), the PJM Operating Agreement (“OA”) or the PJM Reliability Assurance Agreement (“RAA”).

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In comments filed July 6, 2023, the Market Monitor provided its analysis of the proposed transaction in a report (“IMM Report”), including both a public and confidential version.

The Deficiency Notice recognizes that local market power within the PJM region due to transmission constraints cannot be ignored in analyzing the proposed transaction. Applicants responded to the deficiency letter with analysis of the tie line constraints into the ATSI Zone, price correlations, Delivered Price Tests for the ATSI Zone and the West of Central Interface area of PJM, and a proposal to divest Vistra’s Richland and Stryker units in ATSI.

The Market Monitor provides results from the three pivotal supplier test showing that the divestiture of Richland and Stryker reduces Vistra’s market power by only a small amount, even with respect to constraints into the ATSI Zone.

I. COMMENTS

A. Three Pivotal Supplier Test

The Market Monitor uses the three pivotal supplier test as the key measure of market structure and structural market power. The three pivotal supplier test is used in PJM markets to define the existence of local market power and as a trigger for market power mitigation. A test for local market power based on the number of pivotal suppliers has a solid basis in economics and is clear and unambiguous to apply in practice. There is no perfect test, but the three pivotal supplier test for local market power strikes a reasonable balance between the requirement to limit extreme structural market power and the goal of limiting intervention in markets when competitive forces are adequate.

The three pivotal supplier test, as implemented in PJM markets, is consistent with the Commission’s market power tests, encompassed in the Delivered Price Test. The three pivotal supplier test is an application of the Delivered Price Test to the real-time energy market, the day-ahead energy market, the regulation market and the Reliability Pricing

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Model (RPM) capacity market. The three pivotal supplier test is also consistent with the Delivered Price Test in that it tests for the interaction between individual participant attributes and features of the relevant market structure. The three pivotal supplier test is an explicit test for the ability to exercise unilateral market power as well as market power via coordinated action which accounts for market shares and the supply-demand balance in the market.

The results of the three pivotal supplier test can differ from the results of the HHI and market share tests. The three pivotal supplier test can show the existence of structural market power when the HHI is less than 2500 and the maximum market share is less than 20 percent. The three pivotal supplier test can also show the absence of market power when the HHI is greater than 2500 and the maximum market share is greater than 20 percent. The three pivotal supplier test is more accurate than the HHI and market share tests because it focuses on the relationship between demand and the most significant aspect of the ownership structure of supply available to meet it. A market share in excess of 20 percent of supply does not indicate market power if the holder of that market share is not jointly pivotal to meet demand, and is unlikely to be able to affect the market price. A market share less than 20 percent of supply does not indicate the absence of market power if the holder of that market share is jointly pivotal to meet demand and is likely to be able to affect the market price. Similarly, an HHI in excess of 2500 does not indicate market power if the relevant owners are not jointly pivotal and are unlikely to be able to affect the market price. An HHI less than 2500 does not indicate the absence of market power if the relevant owners are jointly pivotal and are likely to be able to affect the market price.³

³ For detailed examples, see Joseph E. Bowring, PJM Market Monitor, "IMM Analysis of Combined Regulation Market," PJM Market Implementation Committee Meeting (December 20, 2006).

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The three pivotal supplier test was designed in light of actual elasticity conditions in load pockets in wholesale power markets in PJM. The price elasticity of demand is a critical variable in determining whether a particular market structure is likely to result in a competitive outcome. A market with a specific set of market structure features is likely to have a competitive outcome under one range of demand elasticity conditions and a noncompetitive outcome under another set of elasticity conditions. It is essential that market power tests account for actual elasticity conditions and that evaluation of market power tests neither ignore elasticity nor make counterfactual elasticity assumptions. As the Commission stated, “In markets with very little demand elasticity, a pivotal supplier could extract significant monopoly rents during peak periods because customers have few, if any, alternatives.”⁴ The Commission also stated:

In both of these models, the lower the demand elasticity, the higher the mark-up over marginal costs. It must be recognized that demand elasticity is extremely small in electricity markets; in other words, because electricity is considered an essential service, the demand for it is not very responsive to price increases. These models illustrate the need for a conservative approach in order to ensure competitive outcomes for customers because many customers lack one of the key protections against market power: demand response.⁵

B. Three Pivotal Supplier Test results for Richland and Stryker Divestiture

The Market Monitor uses the real-time TPS test results for April 2022 through March 2023 to analyze the change in market power resulting from the divestiture of Richland and Stryker to a new hypothetical owner who does not own any other supply resources in PJM. This provides a best case scenario for a reduction in market power created by the divestiture. If any existing owner in PJM purchases the Richland and Stryker units, the

⁴ AEP Order at P 72.

⁵ *Id.* at P 103.

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reductions in the TPS test failures will be smaller. It is possible that some potential purchasers of Richland and Stryker could result in more TPS test failures.

Table 1 shows the number of hours with Vistra TPS test failures in the PJM real-time market from April 1, 2022, through March 31, 2023, for the same constraints identified in the Market Monitor’s market power report, filed July 6, 2023.⁶ It also shows the number of hours with TPS test failures that Vistra would have if Richland and Stryker were owned by an independent supplier.

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[REDACTED]

Table 1 Vistra TPS Test failures pre and post divestiture: April 2022 through March 2023

[REDACTED]

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The proposed divestiture would reduce Vistra’s market power, as measured by the TPS test, in some local markets created by transmission constraints. But the reduction in the number of hours that Vistra fails the TPS test is not large enough to conclude that the proposed divestiture of the Richland and Stryker units would resolve the market power concerns. Even with the divestiture, Vistra would have market power with respect to local constraints in the PJM market. Exercise of that market power to raise prices would raise energy market revenues for the Energy Harbor nuclear units. The divestiture does not resolve the withholding issue raised by the Department of Justice.⁷ The Market Monitor’s behavioral recommendations would prevent Vistra from exercising market power. The proposed divestiture of the Richland and Stryker units does not alter this recommendation.

⁶ See IMM Report at Table 4.

⁷ See Comment of the United States Department of Justice Antitrust Division, Docket No. EC23-74 (August 22, 2023) at 1-2.

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II. CONCLUSION

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

Respectfully submitted,



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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 10th day of October, 2023.



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