

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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|---------------------------------------|---|------------------|
| PJM Power Providers Group,            | ) |                  |
|                                       | ) | Case No. 23-1778 |
| Petitioner,                           | ) |                  |
|                                       | ) |                  |
| vs.                                   | ) |                  |
|                                       | ) |                  |
| Federal Energy Regulatory Commission, | ) |                  |
|                                       | ) |                  |
| Respondent.                           | ) |                  |
|                                       | ) |                  |

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|---------------------------------------|---|------------------|
| Constellation Energy Generation LLC,  | ) |                  |
|                                       | ) | Case No. 23-1790 |
| Petitioner,                           | ) |                  |
|                                       | ) |                  |
| vs.                                   | ) |                  |
|                                       | ) |                  |
| Federal Energy Regulatory Commission, | ) |                  |
|                                       | ) |                  |
| Respondent.                           | ) |                  |
|                                       | ) |                  |

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|---------------------------------------|---|------------------|
| Electric Power Supply Association,    | ) |                  |
|                                       | ) | Case No. 23-1808 |
| Petitioner,                           | ) |                  |
|                                       | ) |                  |
| vs.                                   | ) |                  |
|                                       | ) |                  |
| Federal Energy Regulatory Commission, | ) |                  |
|                                       | ) |                  |
| Respondent.                           | ) |                  |
|                                       | ) |                  |

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**REPLY OF THE  
INDEPENDENT MARKET MONITOR FOR PJM**

Pursuant to Section 27(a)(4) of the Federal Rules of Appellate Procedure and the Circuit Rules of this Court, Monitoring Analytics, LLC, acting in its capacity as

the Independent Market Monitor for PJM<sup>1</sup> (“Market Monitor”), submits this reply to the response filed on May 30, 2023, by Constellation Energy Generation LLC (“Constellation”) opposing the Market Monitor’s motion to intervene in this proceeding.

Constellation opposes the Market Monitor’s intervention on two grounds. First, Constellation argues (at para. 2) that the Market Monitor “has not identified any legally protected interest, much less one that is affected by the disposition of this matter.” Second, Constellation argues (at para. 3) that the Market Monitor has not shown “why [FERC] cannot adequately represent its purported interests.” Neither argument is grounded in fact or has legal merit. The Market Monitor’s motion to intervene and to participate as a party to this proceeding should be granted.

## **I. RESPONSE**

### **A. Constellation’s Interpretation of “a Legally Protected Interest” Is Unduly Narrow.**

The Market Monitor has a legally protected interest in this proceeding. Consistent with the Market Monitor’s responsibilities defined in the PJM tariff and FERC rules, the Market Monitor intervened and actively participated in the proceeding at FERC that produced the orders here on appeal. The orders largely adopt the position taken by the Market Monitor, rely on arguments raised by Market Monitor and produce an efficient and competitive outcome for PJM markets.<sup>2</sup> The

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<sup>1</sup> PJM Interconnection, L.L.C. (“PJM”) is a Regional Transmission Organization approved by the Federal Energy Regulatory Commission (“FERC”).

<sup>2</sup> See Comments of the Independent Market Monitor for PJM, FERC Dockets Nos. ER23-729-000, EL23-19-000 (January 20, 2023); Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM, Dockets Nos.

Market Monitor’s interest does not terminate on appeal of decisions in those FERC proceedings. Court review is an important stage in the process that determines PJM’s market design. The Supreme Court has long recognized that participation in an agency proceeding supports standing to intervene in court review of an order issued in that proceeding.<sup>3</sup>

The Market Monitor has an interest in protecting the orders for the same reasons that it participated in the FERC proceedings.

The Market Monitor intervenes in and becomes party to FERC administrative proceedings before the Commission when its participation is in the public interest. FERC has recognized that “the public interest,” provides sufficient basis for the Market Monitor’s intervention in FERC proceedings.<sup>4</sup> Courts in the Third Circuit and other courts have recognized the public interest is a valid basis for intervening in court proceedings.<sup>5</sup>

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ER23-729-000, EL23-19-000 (February 16, 2023); *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109 (2023), *passim*.

<sup>3</sup> See *Chicago Junction Case*, 264 U.S. 258 (1924) (“the terminal companies, and the stockholders affected, were entitled to intervene as parties in the proceedings before the Commission; and they appeared by counsel. If they became parties to the proceeding before the Commission, they were entitled, under § 212 of the Judicial Code, to become parties, also, to any suit brought to set aside the order.”). Subsequent cases distinguished application of holding to standing for intervention in an existing proceeding, as is the case here, from standing to file the petition initiating the proceeding. See, e.g., *Pittsburgh & W. v. R. Co. v. United States*, 281 U.S. 479, 488 (1930).

<sup>4</sup> See *PA Solar Park, LLC*, 164 FERC ¶ 61,118 (2018); 18 CFR § 385.214(b)(2).

<sup>5</sup> See, e.g., *United States Trustee v. Columbia Gas Sys.*, 33 F.3d 294, 296–299 (3<sup>rd</sup> Cir. 1994) (trustee has standing based on role protecting the public interest); *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell*

The Market Monitor has a legal interest to protect in this proceeding based on its function and purpose.<sup>6</sup> FERC rules require that Regional Transmission Organizations have a market monitoring function that “must provide for objective monitoring of markets it operates or administers to identify market design flaws,

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Laboratories, 617 F. Supp. 1190, 1200 (USDC Dist. N.J. 1985) (“We hold that plaintiffs have standing to sue because the general public interest will benefit.”); *Carstens v. NRC*, 742 F.2d 1546, 1548 (D.C. Cir. 1984); *National Wildlife Federation v. U.S.*, 626 F.2d 917, 918 (D.C. Cir. 1980); *NAACP v. FPC*, 520 F.2d 432, 433 (D.C. Cir. 1975); *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1974) (“We uphold Petitioners' standing to vindicate the public's interest. That interest is underscored by the likelihood that the licensee who is directly governed by the order in the forfeiture proceeding will, as here, find the burden too great, in terms of its own interest, to warrant its undertaking the risk and expense involved in contesting the Commission's action.[footnote omitted] In comparable situations we have allowed interested parties to intervene where the party that would ordinarily be expected to press the public interest has failed to appeal an initial decision. *E.g.*, *Smuck v. Hobson*, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969); *Wolpe v. Poretsky*, 79 U.S.App.D.C. 141, 144 F.2d 505, *cert. denied*, 323 U.S. 777, 89 L. Ed. 621, 65 S. Ct. 190 (1944).”).

<sup>6</sup> See *Nuesse v. Camp*, 385 F.2d 694, 699–700 (D.C. Cir. 1967) (“We should not be niggardly in gauging the interest of a state administrative officer in the validity of what his federal counterpart has done in an area of overlapping fact and intertwined law. We not only have the greater impetus to intervention that inheres in administrative cases, but in addition the “interest” of the state commissioner is underlined by the circumstance that the regulation of national banking is an area in which Congress, in the exercise of delegated federal power, has for various policy reasons decided to adopt and incorporate state law on issues of common concern. This admixture of national and state policies, attaching national legal force to the state policy, yields the corollary that a state official directly concerned in effectuating the state policy has an “interest” in a legal controversy [\*\*10] involving the Comptroller which concerns the nature and protection of the state policy.”).

market power abuses and opportunities for efficiency improvements, and propose appropriate actions.” The PJM market rules under review in this proceeding are “appropriate actions” to address market design flaws.<sup>7</sup> The PJM tariff rules chartering the Market Monitor and its functions provide that the Market Monitor “may initiate and propose... changes to the PJM Market Rules and PJM Tariff,” and, further, that “[i]n support of this function, the [Market Monitor] may ... make filings with the Commission on market design issues.”<sup>8</sup> The Market Monitor’s role is not that of a passive observer. Granting Constellation’s petition for review would reverse corrections to market design flaws and undo the results of the Market Monitor’s efforts to support competitive markets in this case. Courts routinely permit public interest organizations to become a party to cases, recognizing that outcomes that damage an organization’s public interest mission confer standing.<sup>9</sup> The Market Monitor’s mission is a basis for standing to intervene in this proceeding.

Constellation cites to dicta (at para. 2) in another Circuit’s order mischaracterizing the market monitoring role as limited to activities “in the nature of an auditor” and “largely confined to observing the market’s operations and then

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<sup>7</sup> 18 CFR § 35.34(j)(6).

<sup>8</sup> PJM Open Access Transmission Tariff, Attachment M (PJM Market Monitoring Plan) § IV.D.

<sup>9</sup> *See* Natural Resources Defense Council v. Costle, 561 F.2d 904, 911 (D.C. Cir. 1977) (“[W]e find that the practical accommodation would be to admit appellants as parties. As has been shown, their involvement may lessen the need for future litigation to protect their interests”); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (“there is no question that the task of reestablishing the status quo if the Fund succeeds in this case will be difficult and burdensome.”).

offering recommendations.” The language cited by Constellation does not recognize, acknowledge or discuss the Market Monitor’s tariff defined role in market design. Constellation is a major market seller, and its goals do not necessarily align with the Market Monitor’s purpose. Constellation’s limited conception of the Market Monitor’s role is inaccurate, self-serving, and does not provide a valid basis for a decision on the Market Monitor’s motion to intervene.

The Market Monitor has exclusive responsibility to monitor the PJM markets. The Market Monitor is the only organization legally charged to “objectively monitor, investigate, evaluate and report on the PJM Markets.”<sup>10</sup> Granting intervention to the Market Monitor for the reasons it provides does not open the door to a single additional entity.

Constellation’s argument on standing, on the other hand, is unbounded. If accepted, its argument would also exclude other entities that should be parties to this proceeding. PJM has also motioned to intervene in this case, but PJM could not pass any reasonable test for standing that the Market Monitor would fail.<sup>11</sup> PJM does not have pecuniary interests in this proceeding. Like the Market Monitor, denying PJM’s

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<sup>10</sup> PJM Open Access Transmission Tariff Attachment M § I.

<sup>11</sup> *Cf. Barnes v. Kline*, 759 F.2d 21, 67 n.1 (D.C. Cir. 1984) (“The Executive Branch conceded at oral argument that the Senate has standing to sue in this suit. Similarly, ... , the Executive Branch conceded that either House of Congress would have standing to sue based on injury to its lawmaking powers. ... No reason appears why the Executive should oppose standing for individual legislators but concede as to a House. The constitutional problems would seem to be identical.”).

petition to intervene would harm PJM’s ability to serve its organizational purpose.<sup>12</sup> The same is true for state ratepayer advocates.

Constellation opposed the Market Monitor’s motion to intervene but did not oppose PJM’s motion. Whether a party has standing is a matter of law that should not turn on whether the Appellant agrees with a party’s substantive position or fears its potential ability to persuade.

**B. The Market Monitor Is Independent of FERC and Cannot Be Represented by FERC.**

Constellation claims (at para. 3) that the Market Monitor has not shown “why [FERC] cannot adequately represent its purported interests.”

Constellation has not shown why, based on its logic, any intervenor supporting FERC would be permitted to intervene. Both the Market Monitor and PJM urged the Commission to approve the orders on appeal.<sup>13</sup> The Market Monitor and PJM are the true proponents of corrective action on a market issue.<sup>14</sup> FERC’s role was to review the market design changes under the Federal Power Act.<sup>15</sup> The Market Monitor supports FERC largely because the FERC accepted and relied upon arguments made by the Market Monitor.

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<sup>12</sup> See Uncontested Motion for Leave to Intervene of PJM Interconnection, L.L.C., Case No. 23-1778 (May 23, 2023) at 3 (“This case concerns amendments submitted by PJM under Section 205 of the Federal Power Act to modify the capacity market auction rules set forth in PJM’s Open Access Transmission Tariff.”).

<sup>13</sup> See 182 FERC ¶ 61,109 at P 26.

<sup>14</sup> *Id.*

<sup>15</sup> See 16 U.S.C. §§ 824d & 824e.

The Market Monitor and PJM share with FERC an interest in protecting competition policy and PJM's competitive markets, but the FERC is a governmental and political entity with diverse responsibilities. The Market Monitor exists to protect and promote competitive markets in PJM

The Market Monitor has intervened and participated in cases involving petitions of review of FERC orders affecting PJM market design.<sup>16</sup> In some cases, the Market Monitor was among the petitioners.<sup>17</sup> In some of these cases, the Market Monitor is an intervening party generally aligned with and cooperating with the petitioners in this proceeding.<sup>18</sup>

The Market Monitor should have the opportunity to protect its interests as an intervenor in this proceeding.

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<sup>16</sup> See, e.g., USCA Case No. 16-1234, et al. (D.C. Cir.); USCA Case No. 21-3205, et al. (3<sup>rd</sup> Cir.); USCA Case No. 21-1214, et al. (D.C. Cir.); USCA Case No. 22-1090 (D.C. Cir.); USCA Case No. 22-3176, et al. (6<sup>th</sup> Cir.); USCA Case No. 22-1096 (D.C. Cir.); USCA Case No. 16-1333 (D.C. Cir.).

<sup>17</sup> See USCA Case No. 17-1101 (D.C. Cir.); USCA Case No. 20-1372 (D.C. Cir.).

<sup>18</sup> See 16-1234, et al. (D.C. Cir.); USCA Case No. 21-3205, et al. (3<sup>rd</sup> Cir.).



## CONCLUSION

The Market Monitor respectfully requests that the Court grant its motion to intervene.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), I hereby certify that I have this 5<sup>th</sup> day of June, 2023, caused the foregoing document to be served on all parties or their counsel of record through the CM/ECF system:



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Jeffrey W. Mayes  
General Counsel  
Monitoring Analytics, LLC