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

PSEG Fossil LLC; Yards Creek Energy, LLC)	Docket No. EC20-49-000
)	
)	
Panda Hummel Station LLC; Hummel Generation, LLC)	Docket No. EC20-55-000
)	
)	
Jersey Central Power & Light Company and Yards Creek Energy, LLC)	Docket No. EC20-65-000
)	(not consolidated)
)	

**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 ("Market Monitor") for PJM Interconnection, L.L.C. ("PJM"), submits this answer to the answers submitted on June 16, 2020, separately, by PSEG Fossil LLC and Yards Creek Energy, LLC in Docket No. EC20-49-000 ("JCPL Answer"); by Hummel Generation, LLC and Panda Hummel Station LLC, in Docket No. EC20-55-000 ("Hummel Answer"); and by Jersey Central Power & Light Company and Yards Creek Energy, LLC, in Docket No. EC20-65-000 ("JCPL Answer") (collectively, "June 16th Answers").² The answers are directed at

¹ 18 CFR §§ 385.212 & 385.213 (2019).

² Essentially the same answer was filed in Docket Nos. EC20-49, -55 and -65. 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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the report filed on June 1, 2020, by the Market Monitor (“IMM Report”) jointly analyzing the transactions in the three referenced proceedings, each of which involves an acquisition by LS Power Development, LLC (“LS Power”).

I. ANSWER

A. The Market Monitor’s Analysis is Relevant.

1. The Applicants Rely on PJM’s Flawed Market Power Mitigation.

The applicants rely on PJM market power mitigation to ensure competitive outcomes where the acquisitions increase local market power.³ Unfortunately, PJM’s offer capping process is not sufficient to ensure that there will not be no harm to competition based on the acquisitions. There are known flaws in PJM’s application of offer capping for units that fail the TPS test that allow units, {BEGIN CUI//PRIV} [REDACTED] {END CUI//PRIV} to set price with positive markup. The applicants’ assertions regarding the status of these issues in the PJM stakeholder process are irrelevant. The only relevant issue is that the market power related to the LS Power acquisitions is not adequately mitigated by the PJM tariff and that LS Power could commit to additional behavioral mitigation practices that would ensure that no competitive harm occurs.

2. The Commission has Relied on the Market Monitor’s Analysis for Previous Applications.

Applicants complain (at 2–6) that the Market Monitor should attempt to address issues created by the proposed transactions through the stakeholder process or Section 206 complaints. The Applicants complain (at *id.*) that the Market Monitor raises concerns in these proceedings that echo concerns raised elsewhere.

It is the responsibility of the Market Monitor to be consistent and seek to address market power and improve market design in every available forum. Section 203 provides

³ June 16th Answers at 21.

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for the Commission to review transactions under a public interest standard, including consideration of the effects on market power. The Commission may impose conditions consistent with the public interest.⁴ The Act provides for review of transactions and the potential inclusion of conditions, as they come before the Commission.⁵ Arguments critical of the statutory approach to the review of acquisitions are properly directed to Congress.

The Commission has previously approved settlements or included conditions that address issues identified by the Market Monitor.⁶ The Commission can impose similar conditions in this proceeding. Applicants suggest that they are being unfairly treated. To the contrary, the Market Monitor's analysis reveals essential facts about the impact of the proposed transactions on market power and proposes behavioral mitigation measures to address the market power impacts while not opposing the transactions. Applicants seek to rush the proceedings to a premature conclusion and evade reasonable and proportionate behavioral mitigation measures. Applicants fail to provide sufficient justification for engaging in the behaviors addressed by the proposed mitigation measures.

Applicants claim that the Market Monitor's protest is defective because the Market Monitor did not file the underlying data necessary to confirm its analysis. No precedent imposes the requirement that highly confidential PJM market data must be submitted in comments. The Commission and the Commission staff already have the same data.

Applicants claim (at 7-8) that "adopting the "IMM's approach would leave entities considering transactions involving assets in the PJM market with no way of evaluating, in advance, whether those transactions would be deemed to present competitive issues, which

⁴ 16 U.S. Code § 824b.

⁵ *Id.*

⁶ *See, e.g., PPL Corporation, RJS Power Holdings LLC*, 149 FERC ¶ 61,260 (2014); *Dynegy, Inc., et al.*, 150 FERC ¶ 61,231 (March 27, 2015); *Dynegy Resource I, LLC, Duke Energy Commercial Asset Management, LLC et al.*, 150 FERC ¶ 61,232 (March 27, 2015); *Exelon Corporation, Constellation Energy Group, Inc.*, 138 FERC ¶ 61,167 (2012).

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will create significant regulatory uncertainty.” If prospective applicants want information on the Market Monitor’s position, they can discuss potential transactions prior to filing. There is no specific issue about regulatory uncertainty raised in this proceeding. It should not have surprised LS Power that the Market Monitor reviewed these transactions, and the proposed behavioral remedies are consistent with the impact of the transactions and pose no threat to completing the transactions.

Every transaction is different, and the appropriate regulatory response should account for such differences. Comparison with other transactions in other contexts is no substitute for analyzing the transactions proposed in these proceedings in detail. Nothing requires the Commission to prejudge applications.

Applicants also make arguments directed at specific aspects of the Market Monitor’s analysis. Applicants claim that the Market Monitor has not demonstrated frequently binding constraints necessary to define a geographic market. Applicants point to *PPL Corp.*; *RJS Power Holdings LLC*,⁷ and *NRG Wholesale Generation LP; Entergy Mississippi, LLC*⁸ as cases contrary to the Market Monitor’s position.

In the *PPL Corp.* decision, the Commission disagreed with the Market Monitor that 100 hours over an 18 month period constituted a frequently binding constraint. In this case, the Market Monitor evaluated constraints with over 100 hours of congestion in a 12 month period. Most of the identified constraints have significantly more than 100 constrained hours in 2019. In fact, the constraints that do not meet the 100 hour threshold are the constraints defining the submarkets used by the Applicants, AP South, PJM East, and 5004/5005.

⁷ June 16th Answers at 9, citing *PPL Corp.*, 149 FERC ¶ 61,260 at P 97 (2014).

⁸ June 16th Answers at 9, citing *NRG Wholesale Generation LP*, 168 FERC ¶ 61,166 at P 25 (2019) ((finding that MISO South is no longer a relevant sub-market given that the relevant constraint was binding 1.5-2.0 percent of the time).)

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Applicants have not shown that the facts and circumstances of the transaction in *NRG/Entergy Mississippi* are sufficiently similar to the facts and circumstances of transactions in PJM markets. *NRG/Entergy Mississippi* did not involve an analysis reasonably comparable to the Market Monitor's TPS analysis, and it did not involve a request for mitigation in the form of behavioral measures consistent with competitive behavior.

Applicants claim that the "hypothetical future harms of the type alleged in the IMM comments do not justify the imposition of these conditions," citing *Dominion Energy Brayton Point, et al.*⁹ In the cited case, the Commission did not consider concerns about whether the acquired facility would deactivate under new ownership. The intervenor did not explain how its concerns related to the transaction and did not recommend solutions. The Market Monitor's concerns involve whether Applicants would gain market power that could be exercised in operating the facility, concerns plainly within the proper scope of a Section 203 analysis.¹⁰ The behavioral guidelines recommended by the Market Monitor are a proportionate response to the identified concerns.

Applicants argue that the Market Monitor does not show a significant increase in market power, including in its TPS analysis. Additionally, Applicants assert (at 9) that the Market Monitor "provides no standard for judging the materiality of the changes, wrongly implying that any change, no matter how small, is competitively significant."

⁹ Hummel Answer at 9, citing *See Dominion Energy Brayton Point, et al.*, 144 FERC ¶ 61,139 (2013).

¹⁰ 18 CFR § 33.3; see also Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000) ("Order No. 642"); Transactions Subject to FPA Section 203, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005) ("Order No. 669"), order on reh'g, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 ("Order No. 669-A"), order on reh'g, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006) ("Order No. 669-B"); Inquiry Concerning the Commission's Merger Policy Under the . Power Act: Policy Statement, Order No. 592, 77 FERC ¶ 61,263 (mimeo), FERC Stats. & Regs. ¶ 31,044 (1996), reconsideration denied, Order No. 592-A, 79 FERC ¶ 61,321 (1997) ("Merger Policy Statement"); FPA Section 203 Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 (2007).

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The mitigation recommended by the Market Monitor is proportionate to the identified market power concerns. Applicants do not provide bright lines for determining what is “significant.” Applicants do not demonstrate where Section 203 allows market power concerns and adverse impacts on the public interest to be ignored based on an assessment of significance. When the regulatory approach relies on competition or mitigation to produce just and reasonable rates, the potential for a participant to exercise market power is significant.

3. The Issues Identified in the Fast Start and PLS Proceedings are Not the Same as the Issues Identified by the Market Monitor.

The Applicants identify (at 25) the Market Monitor’s filings exposing the flaws in PJM’s parameter mitigation process and in PJM’s proposed fast start pricing TPS test. These flaws mean that local market power created by the LS Power acquisitions may not be adequately mitigated under the PJM tariff. The issues raised in those dockets are not the same issues raised by the Market Monitor with respect to the LS Power acquisitions.

{CUI//PRIV BEGIN} [REDACTED]

[REDACTED].{CUI//PRIV END} The Delivered Price Test does not capture market power that may exist in the real-time energy market based on rapid load changes or loss of supply in PJM. Aggregate, not local, market power is the reason for the need for mitigation of time based parameters to prevent withholding of fast start units.

B. Evidence Shows that the Application Raises Market Power Concerns Requiring Additional Mitigation.

1. Relevant Constraint Markets

To consider only AP South, PJM East, and 5004/5005 as relevant PJM submarkets for market power analysis would be to ignore actual market results. The data on binding transmission constraints, the hours, the marginal values are all readily available on PJM’s

website.¹¹ The applicants and the supporting expert's affidavit made no effort to evaluate the relevance of the asserted submarkets and compare with the actual congestion results in PJM. All the constraint markets evaluated by the Market Monitor have more constraint hours in 2019 than AP South, PJM East, and 5004/5005. If the three historic submarkets are relevant, then the markets evaluated by the Market Monitor are relevant. In particular, the Conastone-Peach Bottom market, with 2,947 real-time market constraint hours in 2019, cannot be ignored.

The Applicants assert (at 4) that the Market Monitor did not address whether the constraint markets identified in the IMM Report meet the Commission's standard for identifying whether the constraints "are frequently binding transmission constraints during historical seasonal peaks and at other competitively significant times that prevent competing supply from reaching within the proposed alternative geographic market." For Conastone-Peach Bottom and related constraints, this is clearly not the case. The IMM Report states (at 22):

In 2019, the constraints in the area of the Pennsylvania/Maryland border, Conastone – Peach Bottom, Conastone, Graceton – Safe Harbor, and Bagley – Graceton, defined the most significant limiting elements on the economic flow of energy in PJM. These binding constraints occurred throughout the year, and especially at competitively significant times during the summer peak hours of 2019 and on October 1-2, 2019.

The Market Monitor provides further discussion of the October event in the State of the Market Report.¹² Prices reached well over \$1,000 per MWh for an extended period of time on October 1, 2019, due to violation of multiple constraints in the Conastone-Peach Bottom area. When PJM could not maintain ACE, reserves deployed north of the

¹¹ See PJM.com, DataMiner2, Constraints, Real-Time Marginal Value, accessed at <https://dataminer2.pjm.com/feed/rt_marginal_value/definition>.

¹² See Monitoring Analytics, LLC. 2019 State of the Market Report for PJM, Vol. II, Section 3: Energy Market at 177-178.

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constraints were not deliverable south of the constraints. PJM data also show that the constraints were an issue throughout the summer peak period.¹³

The Applicants note (at 7-8) that the average HHI changes for the constraint markets identified by the Market Monitor do not all exceed Commission thresholds. However, an increase in average HHI is not a definitive measure of competitive harm. The Market Monitor's results show that the frequency with which LS Power is a pivotal supplier increases and that there are significant HHI increases in a number of hours for all the identified constraint markets.¹⁴

Most importantly, the Market Monitor's analysis shows that static definitions of PJM submarkets based on out of date information are inadequate for analysis of local market power. Relevant submarkets based on evolving congestion must be analyzed. The energy markets are dynamic. The constraints defined based on current conditions will change as new resources come online, old resources retire, fuel costs change, that patterns of generation change, and transmission upgrades take place. The LS Power Section 203 applications for Yards Creek and Hummel show no attempt to analyze readily available PJM market data to evaluate the current reality of PJM energy markets and to identify the corresponding actual submarkets for consideration.

2. Recommended Local Market Power Mitigation is Necessary and Reasonable.

The LS Power acquisitions of Yards Creek and Hummel create local market power that is not adequately mitigated by the PJM Tariff. The Market Monitor's recommendations to prevent competitive harm are reasonable and consistent with competitive market behavior. No form of competitive market behavior would be prohibited by adhering to the

¹³ See PJM.com, DataMiner2, Constraints, Real-Time Marginal Value, accessed at <https://dataminer2.pjm.com/feed/rt_marginal_value/definition>.

¹⁴ See IMM Report at Tables 4, 6, and 10.

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recommendation to not include both positive and negative markup in incremental energy offer curves.

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[REDACTED]

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3. Recommended Fast Start Parameter Mitigation is Necessary and Reasonable

The LS Power acquisitions of Yards Creek and Hummel create market power for fast start units that is not adequately mitigated by the PJM Tariff. The Market Monitor's recommendations to prevent competitive harm are reasonable and consistent with competitive market behavior. Any competitive market behavior can be accommodated while adhering to the recommendation to submit flexible parameters in both price-based offers and cost-based offers.

¹⁵ June 16th Answers at 26.

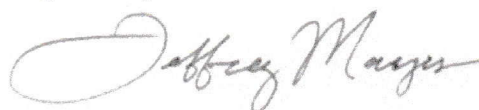
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Commission with information useful to the Commission's decision making process and which provides a more complete record. Accordingly, the Market Monitor respectfully requests that this answer be permitted.

III. CONCLUSION

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

Respectfully submitted,



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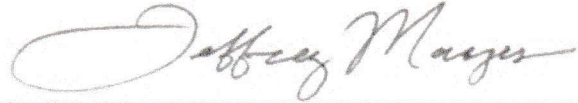
Dated: June 24, 2020

FERC ¶ 61,208 (2002) (answer accepted to provide new factual and legal material to assist the Commission in decision-making process); *N.Y. Independent System 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).

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 24th day of June, 2020.



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