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

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| Brandon Shores LLC | ) | Docket No. ER24-1787-001 |
| H.A. Wagner LLC | ) | Docket No. ER24-1790-001 |
| | ) | (not consolidated) |

# COMMENTS OF THE INDEPENDENT MARKET MONITOR FOR PJM IN OPPOSITION TO OFFER OF SETTLEMENT

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 ("Market Monitor") for PJM Interconnection, L.LC. ("PJM"),[2] submits these comments in opposition to the Joint Offers of Settlement ("Offers") filed in the above captioned proceedings on January 27, 2025, by the Brandon Shores LLC ("Brandon Shores") and H.A. Wagner LLC ("Wagner") ("Talen Entities") between themselves and certain parties to these proceedings ("Settling Parties).[3] The Market Monitor's comments are supported by an affidavit of Dr. Joseph Bowring ("Bowring Affidavit"), which explains why the rates proposed in the Offers are excessive and identifies unresolved genuine issues of material fact.

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1 18 CFR §§ 385.211 & 385.602(f) (2024).

2 Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff ("OATT").

3 In addition to the Talen Entities, the Settling Parties include: PJM, the Maryland Public Service Commission, Southern Maryland Electric Cooperative, Old Dominion Electric Cooperative, and Exelon Corporation on behalf of its affiliates Atlantic City Electric Company, Baltimore Electric and Gas Company, Commonwealth Edison Company, Delmarva Power & Light Company, PECO Energy Company, and Potomac Electric Power Company.

The Offers propose modifications to the Rate Schedules submitted by the Talen Entities on April 18, 2024.[4] The Talen Entities, indirect wholly owned subsidiaries of Talen Energy Corporation ("Talen"), submitted the filing pursuant to Part V, Section 119, of the OATT ("Part V"), to provide Part V service related to the deactivation requests from the Brandon Shores Generating Station Units 1 and 2 ("Brandon Shores") and the H.A. Wagner Generating Station Units Nos. 3 and 4 ("Wagner").

The Offers propose total payments for the expected 48 month term of $609,900,000, $119,776 Per MW-year or $328 per MW-day for Brandon Shores and $144,515,000, $51,465 per MW-year or $141 per MW-day for Wagner. The total payment for both plants is $754,415,000. Fuel and variable operations and maintenance expense and any net revenue from operations are paid as incurred. The initial filing requested $731,631,544 for Brandon Shores and $165,887,452 for Wagner for the project term. The Market Monitor opposes the Offers because there is no evidence that this amount reflects the Talen Entities' actual operating costs to provide Part V service, because there is no evidence that the settlement complies with applicable provisions of the PJM OATT and because the settlement does not resolve the issues of fact set for hearing.

The settlement establishes a rate for Part V service that is a black box, meaning that it includes no details and therefore has no substantive or quantitative support, and is filed only because the supporting parties agreed to it for reasons that are not explicitly stated. No affidavit was filed in support of the compensation included in the Offer. The record does not show that the rate defined by the Offer is just and reasonable, including when "the overall settlement is treated as package."[5]

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[4] *See* Brandon Shores Part V Filing, Docket No. ER24-1790-000 (April 18, 2024), Wagner Part V Filing, Docket No. ER24-1787-000 (April 18, 2024) ("Part V Filings," with citations to the Brandon Shores Part V Filing).

[5] *See Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 at 61,436 n.5 (1998).

The proposed total compensation is excessive, inconsistent with the stated cost of service rationale, incompatible with the purpose of Part V, and incompatible with regulation through competition. The compensation provides for a significant, excessive markup over the costs that the Talen Entities would incur to provide Part V service.

The settlement does not provide for audit and review of actual costs by the Market Monitor.

The settlement requires PJM to offer the Brandon Shores and Wagner units in the next two capacity market auctions at prices that violate the PJM tariff market power mitigation rules, if PJM's 205 filing from December 9, 2024, is not accepted. This proposal and the contingent link to Commission action on PJM's 205 filing that includes multiple unrelated matters are inconsistent with a competitive market.

A contested settlement must be evaluated on the merits, including under the standards set forth in the *Trailblazer Pipeline Co.* line of decisions ("*Trailblazer*").[6] The courts also have been clear that contested settlements cannot be accepted simply because certain parties agree to a value.[7] That certain parties have agreed to a total black box payment of $754,415,000 is the only basis for the Offers. A black box value having no record support defies evaluation on its merits.

It is particularly important that the Commission uphold the principles set forth in Part V of the PJM OATT because those principles are consistent with the Commission's policies of regulation through competition, which include as a critical element the assignment of investment risk to investors and not to customers. A settlement at a level

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6 *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,082 (1998) ("*Trailblazer I*"); Trailblazer Pipeline Co., 85 FERC ¶ 61,345 at 62,341 ("*Trailblazer II*"), *order on reh'g*, 87 FERC ¶ 61,110 ("*Trailblazer III*"), *aff'd*, 88 FERC ¶ 61,168; *see also Pub. Utils. Comm'n of Cal. v. El Paso Natural Gas Co.*, 105 FERC ¶ 61,201 at P 44 (2003), *reh'g denied*, 106 FERC ¶ 61,315 (2004).

7 *See* Laclede Gas Company v. FERC, 997 F.2d 936, 947 (D.C. Cir. 1993).

inconsistent with filed market rules would create a de facto rate that is higher than the rate consistent with the tariff, the filed rate.

## I. BACKGROUND

When an owner notifies PJM that it intends to deactivate a unit on an identified date, PJM may request and the owner may agree to provide continued service for a defined period after that date in order to allow PJM to address reliability issues on the system created by the deactivation.[8] Part V of the OATT provides that generating units that provide Part V service for PJM may receive compensation under a formula specified in Sections 114–115 of the OATT or file to collect "a cost of service rate to recover the entire cost of operating the generating unit until such time as the generating unit is deactivated" under Section 119 of the OATT. Both options under Part V allow only for recovery of the actual avoidable costs incurred to remain in service (incremental expenses and investment), less net operating revenues during the period of Part V service. The formula rate caps recovery of new project investment needed to provide Part V service (APIR) at $2 million, subject to approval of additional amounts to be approved by the Commission.[9] The formula rate also provides for an incentive adder based on the term of Part V service.[10] Neither option in Part V permits the recovery of sunk costs not related to the provision of Part V service.

The goal of the tariff language is to ensure that a generation owner who operates a unit past its intended retirement date for reliability reasons is compensated for all the costs that it incurs in order to provide that service. Part V service has the limited purpose of allowing PJM time to complete transmission upgrades needed to ensure the reliable

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8 *See* OATT § 113.2.

9 *See* OATT § 115.

10 *See* OATT § 114.

operation of the system after a unit deactivates. Section 119 allows recovery under a tariff filed at the FERC of operating costs, including a return on and of investment needed to continue operating during the period of Part V service. The goal of the tariff language is not to provide the generation owner an opportunity to earn windfall profits or recover otherwise unrecoverable costs because the unit retirement causes a reliability problem.

On April 6, 2023, Talen notified PJM that it would deactivate Brandon Shores on June 1, 2025.[11] On October 16, 2023, Talen notified PJM that would also deactivate Wagner on June 1, 2025.[12] Part V service is provided if the generation owner agrees, and is, thus, "voluntary."[13] The Talen Entities agreed to provide Part V service and filed to receive compensation under Section 119 of the PJM OATT.

The Talen Entities proposed that customers pay them $731,631,544 and $165,887,452 for Part V service over the 48 month period identified by PJM. The Market Monitor filed a protest on May 18, 2024, arguing that such recovery was unjust and unreasonable under section 205 of the Federal Power Act because the Talen Entities are attempting to shift to ratepayers significant costs associated with investment risk assigned to the Talen Entities under the prevailing regulation through competition paradigm by filing to recover sunk costs and fixed operation and maintenance costs calculated under the superseded rate base

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11 Brandon Shores Part V Filing at 8.

12 Wagner Part V Filing at 6.

13 *See* OATT § 113.2 & 113.3. The voluntary basis for continued operations is limited. Generating units are public utilities, and have reliability obligations and other obligations associated with that status. Generating units are not permitted to intentionally exercise market power. *See* 18 CFR § 1c.2. In addition, the Secretary of Energy has the authority under Section 202(c) of the Federal Power Act, 16 U.S.C. § 824a(c), and section 301(b) of the Department of Energy Organization Act, 42 U.S.C. § 7151(b), to require by order temporary connections of facilities, and generation, delivery, interchange, or transmission of electricity as the Secretary determines will best meet the emergency and serve the public interest. 16 U.S.C. § 824a(c).

rate of return paradigm.[14] The unit was retired because it was not economic in a competitive market. PJM needed the unit because the notice that Talen Entities provided was not sufficient for PJM to put into place transmission system upgrades needed to accommodate the deactivation. The PJM reliability requirement for these units gives the owner market power. The purpose of the Part V service provision is to ensure that generation owners' costs of providing the service are covered and that customers are protected from the exercise of market power.

By order issued June 17, 2024 ("June 17th Order"),[15] the Commission stated (at P 56): "Our preliminary analysis indicates that both the Brandon Shores Rate Schedule and Wagner Rate Schedule have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful." The Commission further found (at P 58) that "the Applicants' filings raise issues of material fact that cannot be resolved based on the record before us."

The Talen Entities are currently providing Part V service, and such service is expected for a 48 month period continuing through May 31, 2029 ("Defined Period").

## II. COMMENTS

The Talen Entities' Offers would settle this case for a total of $754,415,000 for the term of the Part V service.[16] The Offers are black box settlements. The basis for the agreed upon amounts is unexplained, and no evidence supports it. The reasons that any party

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[14] The Market Monitor raised similar arguments on sunk costs regarding the Part V filing for Indian River 4. The order issued in that proceeding found "that section 119 of the PJM Tariff permits the recovery of a full cost of service rate, which includes sunk costs." *NRG Business Marketing LLC*, 190 FERC ¶ 61,026 at P 33 (2025). The Market Monitor disagrees with this finding and has filed for rehearing. *See* Request for Rehearing of the Independent Market Monitor for PJM and Maryland Office of the People's Counsel, Docket No. ER22-1539-000, et al. (February 14, 2025).

[15] *See H.A. Wagner LLC, Brandon Shores LLC*, 187 FERC ¶ 61,176.

[16] *See* Bowring Affidavit at 3:4–5.

agreed to this total payment are not stated. There is no evidence that any party believes that a $754,415,000 equals the costs incurred by the Talen Entities to provide the Part V service. The evidence shows that this is clearly not the case.

**A. The Settlement Should Be Rejected Under *Trailblazer*.**

In order to approve a contested settlement, the settlement must be evaluated on its merits.[17] The Commission's decision in *Trailblazer* sets four standards for evaluating the merits of a settlement.[18] Only two approaches included in *Trailblazer* are potentially relevant here, Approach No. 1, where the Commission renders a binding merits decision on each of the contested issues, and Approach No. 2, where approval of the contested settlement is based on a finding that the overall settlement as a package provides a just and reasonable result.[19]

The black box settlement at a total $754,415,000 does not survive an analysis based on its substantive merits.[20] Approach No. 2 does not avoid analysis of the settlement on the

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[17] *Trailblazer III* at 61,438, citing Mobil Oil Corp. v. FERC, 417 U.S. 283, 314 (1974) (*"*the Supreme Court has held that where a settlement is contested, the Commission must make "an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates.'") Rule 602(h)(1)(i) provides that the Commission may decide the merits of contested settlement issues only if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines that there is no genuine issue of material fact. 18 CFR § 602(h)(1)(i).

[18] *See Trailblazer II*, which summarizes (at 61,436 n.5) four approaches for the Commission to approve contested settlements: "Approach No. 1, where the Commission renders a binding merits decision on each of the contested issues; Approach No. 2, where approval of the contested settlement is based on a finding that the overall settlement as a package provides a just and reasonable result; Approach No. 3, where the Commission determines whether the benefits of the settlement out balance the nature of the objections, in light of the limited interest of the contesting party in the outcome of the case; and Approach No. 4, where the Commission approves the settlement as uncontested for the consenting parties, and severs the contesting parties to litigate the issues."

[19] *Id*.

[20] *Id*.; *Trailblazer III* at 61,440 n.21 ("In *Mobil Oil Corp. v. FPC,* 417 U.S. 283, 314 (1974), the [Supreme] Court explained that the Commission can approve an uncontested settlement if it is in the public interest, and can also approve a contested settlement rate if there is substantial evidence in the

merits, it holds only that a settlement can be approved if the overall settlement has merit and adequate support as a package even if some elements of that package are "problematic."[21] A consideration when applying *Trailblazer* Approach No. 2 is a "balancing of the benefits of the settlement against the costs and potential effects of continued litigation." The Talen Entities could terminate the litigation immediately and obtain full and fair compensation for the Part V service. The decision to continue litigating this matter is the Talen Entities, and the motivation to do so must be a belief that it can obtain through settlement greater compensation than what would be available to it under the methods approved by PJM stakeholders and accepted by the Commission in the PJM tariff.

Although the Commission may consider customers' support as a factor when evaluating a contested settlement, such a finding does not avoid the need for a decision on the merits. [22]

PJM customers rely on Commission approved PJM market rules to protect their interests. The Offers do not provide any evidence that a total $754,415,000 payment is consistent with the requirement in the PJM OATT that funds for Part V service collected under Section 119 of the PJM OATT constitute "a cost of service rate to recover the entire

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record to support an finding that the settlement rate is just and reasonable. Both approvals are decisions on the merits, as opposed to procedural decisions. Thus, there are different types of merits decisions, and approval of the settlement as a whole as reasonable does not involve a merits decision on each issue in the proceeding.").

21 *Trailblazer III* at 61,440.

22 *See NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1164–65 (D.C. Cir. 1998) ("As we have explained before, the Commission is clearly entitled to give weight to the support of customers when deciding whether to approve a settlement offer.[citation omitted] However, customer support is not dispositive, even when a settlement offer is uncontested. Even if Tennessee's customers had unanimously supported the proposed settlement, the Commission would still have the responsibility to make an independent judgment as to whether the settlement is 'fair and reasonable and in the public interest.' 18 C.F.R. § 385.602(g)(3); [additional citation omitted]. Although the Commission may take widespread customer support into account, such support is not an excuse to ignore arguments raised by a competitor who opposes the settlement.").

cost of operating the generating unit until such time as the generating unit is deactivated." Whether the Offers are consistent with the applicable law cannot be evaluated. This amount clearly exceeds what Part V and Section 119 of the OATT would allow.

Part V, Section 119 also states: "A generating resource owner shall direct all inquiries regarding *avoidable expenses* to the Market Monitoring Unit" [emphasis added]. Section 119 plainly contemplates recovery of avoidable expenses.

**B. The Offers Are Excessive, Have No Merit and Should Be Rejected.**

The Bowring Affidavit explains that the record does not show that the Offers are just and reasonable. He explains that the proposed total compensation is excessive, incompatible with the purpose of Part V, and incompatible with regulation through competition. The costs included in the Offers far exceeds the range of an Offer that could be approved as a just and reasonable package under *Trailblazer* Approach No. 2.

Comparing the total payments to Talen under the settlement to the estimated actual costs included by Talen in their filing, the total margin paid by customers under the agreement will be 205 percent for Brandon Shores and 134 percent for Wagner.[23] If a 50 percent reduction in actual A&G and a 33 percent reduction in O&M is included, the total margin paid by customers under the agreement would be 319 percent for Brandon Shores and 215 percent for Wagner.[24]

**1. The Talen Entities Should Be Permitted to Recover the Costs of Providing Part V Service Plus an Incentive But No More.**

PJM ensures reliability at least cost through a regulatory regime based on competitive markets. In a competitive market, suppliers bear the risks associated with their assets and receive market revenues for their assets. This is in contrast to the traditional cost of service regime, which was replaced by markets.

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[23] *See* Bowring Affidavit at 3:16–18.

[24] *See id.* at 3:18–21.

Part V does not require generation owners to provide Part V service.[25] Because the PJM approach is voluntary, the PJM rules are materially distinct from the rules in other markets that require post deactivation service.

Section 119 provides for filing a cost of service rate to recover the entire cost of operating the generating unit for reliability at PJM's request. The Talen Entities conflate cost of operating the generating units with an old fashioned cost of service rate case as if Brandon Shores and Wagner had always been a cost of service regulated unit rather than a merchant unit operating in the PJM markets. But Talen Entities' filing fails to meet even that irrelevant standard.

There is no basis in the tariff for the assertion that the entire cost of operating the unit can be defined by a quasi rate case approach, complete with a test year and going forward adjustments. There is no basis in the tariff for the assertion that the cost of operating the unit includes the sunk costs of the asset. The same is true, but more so, for the inflated portion of the book value of the resources. There is no basis in the tariff for asserting that customers should pay for anything more or less than the actual costs of operating the unit to provide reliability to the PJM market, subject to a thorough review of the need for the expenditures and verification that the costs were actually incurred.

The definition of "a cost of service rate to recover the entire cost of operating the generating unit until such time as the generating unit is deactivated" includes all the costs incurred to provide the service.

Generation owners should receive just and reasonable compensation for continuing to operate, as provided for under the OATT.

The Talen Entities have acted consistent with their responsibilities in agreeing to continue to operate.[26] This is not a reason to overlook the Talen Entities' market power in

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25 *See* OATT § 113.2 & 113.3.

26 *See* OA Schedule 1 § 1.7.4(a).

these circumstances. PJM has no alternative to keeping these units in service until it has implemented the transmission upgrades necessary to accommodate the proposed retirements. Any real or perceived ability for a generation owner to decide not to continue to operate does not mean that customers should be forced to pay an unjust and unreasonable rate.

The Talen Entities should receive full compensation for all of the costs they incur to provide Part V service, but no more.

Continuing to operate does not reverse the Talen Entities' retirement decision. It accommodates it. The payment to the Talen Entities comes within the framework of the PJM market rules and under the FERC approved PJM regulatory framework. Continuing to operate does not create a special alternative cost of service regulatory paradigm applicable to Brandon Shores and Wagner. Continuing to operate is not an opportunity to exercise market power, to reverse market based outcomes or a new profit opportunity. Continuing to operate addresses locational reliability issues. The Talen Entities propose to include costs that are not costs to continue operating. The Deactivation Filing should be evaluated solely on the basis of the requirements and purposes of Section 119 and the Part V of the OATT.

Part V of the OATT is designed to retain in service units that want to retire with compensation to the owner for all the costs associated with remaining in service, until the retirement can be accommodated consistent with the reliable operation of the system. Section 114 states that deactivation avoidable cost credits support "continued operations" after the desired deactivation date. The design of Section 114 is indicative of the purpose and function of the whole of Part V.

Section 119 of Part V provides for recovery of the "a cost of service rate to recover the entire cost of operating the generating unit until such time as the generating unit is deactivated" for the limited need defined by PJM. Section 119 provides an opportunity for a unit to receive a rate based on the cost of operating the unit when an owner determines that the formula rate provisions in Section 114 are not adequate for its circumstances. Sections 114 and 119 provide different approaches to recovering the cost of operating the unit during

the Defined Period. Section 119 does not allow for an entirely different definition of recoverable costs than is allowed under the parallel and alternative provision in Section 114. Sections 119 and 114 are intended to serve the same purpose, and these provisions should be interpreted and applied consistently.

**2. Like Talen Entities' Filing, the Offers Would Impose Excessive Charges on Customers.**

In its filing, the Talen Entities explained that it seeks payment for continuing to operate, based on traditional cost of service principles.[27] The Talen Entities confuse the tariff defined "a cost of service rate to recover the entire cost of operating the generating unit until such time as the generating unit is deactivated" with a traditional rate case for a regulated utility company with continuing obligations. The Talen Entities originally requested guaranteed payments of $731,631,544 for Brandon Shores and $165,887,452 for Wagner for the project term. Nowhere did the Talen Entities in their filing explain how it transformed the cost of operating the unit into recovery of sunk costs.

The Offers are black box value unsupported by any evidence or ratemaking principles.

**3. Issues with Claimed Estimated Costs.**

The Market Monitor supports full recovery for the Talen Entities of all costs spent to continue to operate during the Defined Period, including maintenance costs, fuel costs and investment costs. The Talen Entities argue that they are entitle to file a traditional cost of service rate filing. The Talen Entities failed to correctly calculate the cost of providing service even under their own theory.[28]

Talen valued the plant based on a study rather than the actual market value of the plant based on an actual market transaction. Talen also added a payment for what it termed

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[27] *See* Part V Filings at 11 ("Dr. Schatzki prepared a traditional cost of service analysis…").

[28] *See* Bowring Affidavit at 10:6–11:12.

the opportunity cost of delaying the retirement of the units and the associated opportunity to sell or develop the land. Such a payment is not appropriately included in a regulated cost of service approach.

The most significant flaw is the determination of the level of sunk costs based on an appraisal conducted in 2015, which Talen Entities Witness Schatzki understands to be $648 million ("2015 Appraisal").[29] Put simply, the 2015 Appraisal is a made up number used to justify charging PJM customers more than is reasonable even under Talen's interpretation of Part V.

The Talen Entities argue that the 2015 Appraisal provides a factual basis to support the level of the compensation it filed for and then somewhat discounted compensation included in the Offer.[30] In fact, the 2015 Appraisal does not provide any support for the value of the assets at issue in this proceeding. The value of the assets is a significant and core unresolved issue of material fact.

The 2015 Appraisal contradicts the actual facts in the record about the book value of the assets that is significantly lower than Talen asserts. The predecessor company to Talen, Riverstone, acquired the Brandon Shores and Wagner stations, and the Crane station for a total $371 million in a 2012 arms length transaction. That transaction was an actual market transaction. Witness Schatzki's conclusion that the restriction on eligible buyers in that 2012 transaction means that the transaction does not reflect fair market value is incorrect on its face. Neither the seller nor the buyer at the time asserted that the transaction was not a market transaction or that the value was incorrect. The 2012 sale is an objective valuation determined in an exchange between sophisticated market participants at arm's length. Whether the 2012 transaction represents the best basis for determining the value of Brandon Shores and Wagner is a disputed issue of material fact.

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[29] *See* BSH-001 at 18:14–16.

[30] *Id*. at 8:21–9:6.

The value of plant that Talen wants to recover includes an adder for asserted opportunity costs for delaying redevelopment of the power plants' sites.[31] This approach is not consistent with any interpretation of Part V of the PJM tariff. The inclusion of opportunity costs associated with the timing of speculative alternative uses of the land is not part of cost of service ratemaking.

The Offers include provision for fixed operation and maintenance ("O&M") costs that have not been supported and are unnecessary because PJM could be billed actual verified O&M costs on a pass through basis. The Offers include inflated overhead costs (A&G costs). The proper treatment of O&M and A&G are a genuine issue of material fact.

But all of the costs recoverable for continued operation for reliability should be subject to review for need and actuals, regardless of whether they are higher or lower than the initial estimates. That is the only way to ensure that both the Talen Entities and the customers are treated fairly. The O&M costs should be paid as incurred and not based on estimates using a rate case model with a test year and adjustments.

**C. The Settlement Fails to Address the Issues Set for Hearing.**

The Offers do not resolve the issues that the Commission set for hearing. The June 17th Order found (at P 56) that the record failed to support the costs included in the Talen Entities' proposed rate for Part V Services. The Offers include no additional information or analysis about the costs on which the initial filed total payments of $731,631,544 for Brandon Shores and $165,887,452 for Wagner for the project term are based. Unlike the settlement offer in the *Genon* case, which included an affidavit showing the level of the offer in that case was comparable to a the rate supported by the Market Monitor excluding sunk costs and impairments, the Offers have no supporting affidavit.[32] The Settling Parties do not

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31 *Id*. at 27–31.

32 149 FERC ¶ 61,218 at P 36 ("The settlement rate of $13,200,000 is substantially below the initially calculated cost-of-service recovery rate of $23,982,100 for the Locked-in RMR Term. Moreover, the

provide and cannot provide any valid metric for evaluating the level of the Offers. Here, the Bowring Affidavit demonstrates (at 6) that the Offers include $429,727,574 in total sunk costs. The Commission relied on such information in *Genon* in order for it to determine that the proposed settlement value is just and reasonable under the second *Trailblazer* approach because it is "within the range of just and reasonable outcomes."[33] Under the second *Trailblazer* approach, "even if some individual aspects of a settlement may be problematic, the Commission may still approve a contested settlement as a package." Under the second *Trailblazer* approach, consideration of whether the standard set forth in Section 119 of the PJM OATT has been satisfied and whether the compensation for Part V Service is consistent with restructuring through competition, particular the principle that Talen Entities' shareholders and not PJM customers should bear the risk of unrecovered competitive investment in generation assets, could be avoided.

The Offers should be rejected. Instead, the matter should be set for hearing and decided on the basis of a complete record and the applicable law.

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Stewart Affidavit calculated the rate that would apply with no return of, or return on, net plant and determined that this would result in a cost-of-service recovery rate of $12,540,098,[footnote omitted] which supports the rate of $13,200,000 in the settlement.").

[33] *See Trailblazer II* at 61,436 n.5.

## III. CONCLUSION

The Market Monitor respectfully requests that the Commission afford due consideration to these comments, reject the Offers, and order the resumption of hearing procedures.

Respectfully submitted,

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Dated: February 18, 2025

**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 18th day of February, 2025.

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# Attachment

**UNITED STATES OF AMERICA**
**BEFORE THE**
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| Brandon Shores LLC | ) | Docket No. ER24-1787-001 |
| H.A. Wagner LLC | ) | Docket No. ER24-1790-001 |
| | ) | (not consolidated) |

# AFFIDAVIT OF JOSEPH E. BOWRING
# ON BEHALF OF THE INDEPENDENT MARKET MONITOR FOR PJM

**Q 1. PLEASE STATE YOUR NAME AND POSITION.**

A. My name is Joseph E. Bowring. I am the Market Monitor for PJM. I am the President of Monitoring Analytics, LLC. My business address is 2621 Van Buren Avenue, Suite 160, Eagleville, Pennsylvania. Monitoring Analytics serves as the Independent Market Monitor (IMM) for PJM, also known as the Market Monitoring Unit (Market Monitor). Since March 8, 1999, I have been responsible for all the market monitoring activities of PJM, first as the head of the internal PJM Market Monitoring Unit and, since August 1, 2008, as President of Monitoring Analytics. The market monitoring activities of PJM are defined in the PJM Market Monitoring Plan, Attachment M and Attachment M-Appendix to PJM Open Access Transmission Tariff (OATT).[1]

**Q 2. WHAT IS THE PURPOSE OF YOUR AFFIDAVIT?**

A. The purpose of my affidavit is to explain the Market Monitor's opposition to the offer of settlement ("Offer") defining the total compensation for Part V service filed in this proceeding on January 27, 2025, by the Brandon Shores LLC ("Brandon Shores") and H.A. Wagner LLC ("Wagner") ("Talen Entities") and certain parties to these proceedings ("Settling Parties). Brandon Shores owns and operates Brandon Shores Unit 1, a 635 MW coal-fired unit commissioned in 1984, and Brandon Shores Unit 2, a 638 MW coal-fired unit commissioned in 1991, located in Maryland. Wagner owns and operates Wagner Unit 3, a 305 MW oil-fired unit,

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[1] *See PJM Interconnection, L.L.C.*, 86 FERC ¶ 61,247 (1999); 18 CFR § 35.34(k)(6).

commissioned in 1966, and Unit 4, a 397 MW oil-fired unit commissioned in 1972, located in Maryland.

**Q 3. HAVE YOU PARTICIPATED IN PROCEEDINGS ON COMPENSATION FOR PART V SERVICE BEFORE THE FERC?**

A. Yes. I have sponsored pleadings and actively participated in prior proceedings involving filings pursuant to OATT Part V § 119, including *NRG Energy Power Marketing, LLC, et al.*, Docket No. ER22-1539-000 et al.; *Exelon Generation Company, LLC*, Docket No. ER10-1418-000; *GenOn Power Midwest, LP*, ER12-1901; and *RC Cape May Holdings, LLC*, ER17-1083-000.

**Q 4. WHY DOES THE MARKET MONITOR OPPOSE THE SETTLEMENT?**

A. The settlement establishes a rate for Part V service that is a black box, meaning that it includes no details and therefore has no substantive or quantitative support, and is filed only because the supporting parties agreed to it for reasons that are not explicitly stated. No affidavit was filed in support of the compensation included in the Offer. The record does not show that the rate defined by the Offer is just and reasonable, including when "the overall settlement is treated as package."[2]

The proposed total compensation is excessive, inconsistent with the stated cost of service rationale, incompatible with the purpose of Part V, and incompatible with regulation through competition. The compensation provides for a significant, excessive markup over the costs that the Talen Entities would incur to provide Part V service.

The settlement does not provide for audit and review of actual costs by the Market Monitor.

The settlement requires PJM to offer the Brandon Shores and Wagner units in the next two capacity market auctions at prices that violate the PJM tariff market power mitigation rules, if PJM's 205 filing from December 9, 2024, is not accepted. This proposal and the contingent link to Commission action on PJM's 205 filing that includes multiple unrelated matters are inconsistent with a competitive market.

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[2] *See Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 at 61,436 n.5 (1998).

**Q 5. WHAT COMPENSATION DOES THE OFFER PROVIDE?**

A. The proposed total payment for the expected 48 month term of the agreement is $609,900,000, $119,776 per MW-year or $328 per MW-day for Brandon Shores and $144,515,000, $51,465 per MW-year or $141 per MW-day for Wagner. The total payment for both plants is $754,415,000. Fuel and variable operations and maintenance expense and any net revenue from operations are paid as incurred. The initial filing requested $731,631,544 for Brandon Shores and $165,887,452 for Wagner for the project term. The total compensation in the settlement is 17 percent less than the total compensation requested in the initial filing for Brandon Shores, and 13 percent less than the total compensation requested in the initial filing for Wagner.

**Q 6. WHAT MARK UP OVER COSTS IS PROVIDED IN THE COMPENSATION PROPOSED IN THE OFFER?**

A. The Market Monitor's view of Part V is that it requires compensation for all the costs actually incurred in order to provide Part V service plus an incentive margin. Comparing the total payments to Talen under the settlement to the estimated actual costs included by Talen in their filing, the total margin paid by customers under the agreement will be 205 percent for Brandon Shores and 134 percent for Wagner. If a 50 percent reduction in actual A&G and a 33 percent reduction in O&M is included, the total margin paid by customers under the agreement would be 319 percent for Brandon Shores and 215 percent for Wagner.

**Q 7. IS THE COMPENSATION REQUESTED IN TALEN'S FILINGS SUPPORTED AS JUST AND REASONABLE, CONSISTENT WITH COST OF SERVICE PRINCIPLES?**

A. No. Talen treats the filing as equivalent to a cost of service rate case for a utility providing ongoing service under a regulated regime.[3] Talen asserts that the filing is therefore consistent with PJM's Part V tariff. However, Talen has not shown that the requested compensation in the Offer is just and reasonable or consistent with traditional cost of service principles.

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[3] Talen Filing, ER24-1790-000, et al. (April 18, 2024) at 11 ("Dr. Schatzki prepared a traditional cost of service analysis…").

In addition, the Offer is not consistent with the Market Monitor's view of Part V which requires that the revenue requirement be the cost of providing service plus an incentive markup.

**Q 8. IS THE COMPENSATION REQUESTED IN TALEN'S FILING CONSISTENT WITH THE PURPOSE OF PART V?**

A. No. The purpose of Part V of the PJM tariff is to ensure that units that want to retire but PJM needs for reliability are paid the costs of providing that service. Under the tariff, a unit remaining in service at PJM's request has two options to recover its costs of continuing to operate: the Section 114 deactivation avoidable cost rate (DACR), which is a formula rate; and the Section 119 cost of service recovery rate.

The deactivation avoidable cost rate option is designed to permit the recovery of the costs of the unit's "continued operation," termed "avoidable costs," plus an incentive markup.[4] Avoidable costs are defined to mean "incremental expenses directly required for the operation of a generating unit" and the components of avoidable costs are defined in the tariff. [5] Recoverable project investment under the DACR option is capped at $2 million, above which FERC approval is required.[6]

Part V states for Section 114: "For the purpose of determining Deactivation Avoidable Cost Rate, avoidable expenses are incremental expenses directly required for the operation of a generating unit proposed for Deactivation that a Generation Owner would not incur if such generating unit deactivated on its proposed Deactivation Date rather than continuing to operate beyond its proposed Deactivation Date. A generating unit owner shall direct all inquiries regarding avoidable expenses to the Market Monitoring Unit."

The cost of service rate option is designed to permit the recovery of the unit's "entire cost of operating the generating unit until such time as the generating unit is deactivated" if the generation owner files a separate rate schedule at FERC.[7] The cost of service rate option was not designed to permit an entirely different theory of

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4 OATT § 114 (Deactivation Avoidable Credit = ((Deactivation Avoidable Cost Rate + Applicable Adder) * MW capability of the unit * Number of days in the month) – Actual Net Revenues).

5 OATT § 115.

6 OATT §§ 115, 117.

7 OATT § 119.

cost recovery compared to the DACR option. The "entire cost of operating the generating unit" is nowhere defined to mean an artificial rate case calculation, or recovery of sunk costs. The cost of service rate option provides an alternative means for compensation for Part V service if the costs in the DACR formula are too narrowly defined or the need for recovery of project investment is greater than $2 million.

Part V, Section 119, states: "Notwithstanding anything to the contrary in Part V of this Tariff, 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 ("Cost of Service Recovery Rate")."

Part V, Section 119 also states: "A generating resource owner shall direct all inquiries regarding avoidable expenses to the Market Monitoring Unit. If a generating resource owner includes a cost component inconsistent with its agreement or inconsistent with the Market Monitoring Unit's determination regarding such cost components, the Market Monitoring Unit may petition the Commission for an order that would require the generating resource owner to include an appropriate cost component. This provision is duplicated in section IV.2 of Attachment M–Appendix."

The Talen Entities chose the cost of service rate option under Part V. The Talen Entities interpreted this second tariff option (Part V, Section 119) as permitting the Talen Entities to file an artificial rate case as if they had been and are now owners of assets regulated under the rate base rate of return regulation paradigm that was superseded by reliance on competitive wholesale power markets in PJM. The immediate result of the Talen Entities' interpretation of the tariff was that the Talen Entities filed to recover a return on and a return of an inflated version of the book value of the Brandon Shores and Wagner assets despite the fact that the value of the assets was a sunk cost, was inflated over the book value, and did not change as a result of providing Part V service. The sunk costs are not "a cost of operating the generating unit" and should not be included in the costs that customers are required to pay for Part V service. The same is true, but more so, for the inflated portion of the book value of the resources. Whether sunk costs are "operating costs" within the meaning of Section 119 is a genuine issue of material fact. Whether the book value

of the resources is inflated and, thus, are not sunk costs or "operating costs" within the meaning of Section 119 is a genuine issue of material fact.

Talen failed to correctly calculate the cost of providing service even under their own theory. Talen valued the plant based on a study rather than the actual market value of the plant based on an actual market transaction. Talen also added a payment for what it termed the opportunity cost of delaying the retirement of the units and the associated opportunity to sell or develop the land. Such a payment is not appropriately included in a regulated cost of service approach.

In addition to requesting the payment by customers of $429,727,574 in total sunk costs, and $327,300,192 in excess and unsupported sunk costs, the Talen Entities' filing also requested payment of $64,512,926 as a fixed operation and maintenance (O&M) charge, which was estimated based on the artificial rate case approach, and which would not be subject to review or modification based on actual incurred costs.

The Talen Entities' filing also requested payment of $27,201,504 as a fixed corporate overhead (A&G) charge that was not demonstrated to be a cost of providing Part V service.

**Q 9. PLEASE EXPLAIN THE IMPACT OF THESE ISSUES ON COMPENSATION FOR PART V SERVICE.**

A. Table 1 shows the components of the Talen Entities' proposed payments by customers for the Part V service under the settlement in columns 3 and 4. The Talen Entities' proposed Part V charges include O&M, corporate overhead, taxes other than income taxes, the recovery of project investment costs (PI), return on and of sunk costs and associated taxes. The recovery of fuel and variable operation and maintenance expenses are paid as incurred. Columns 1 and 2 includes the Talen Entities' filed level of O&M expense because actual operation and maintenance expenses will not be known until they are incurred. The actual costs include the Talen Entities' filed level of taxes other than income taxes.

Columns 7 and 8 show the Market Monitor position. The Market Monitor position is that only the actual costs of providing Part V service by the Talen Entities should be paid by customers plus an incentive markup. The actual costs that should be paid include only actual verified O&M expenses and any overheads that directly result from the continued operation of the units for providing Part V service.

The Market Monitor position includes estimated actual O&M equal to 67 percent of the filed O&M and 50 percent of the filed A&G. The Market Monitor position also includes incremental project investment costs (PI), as filed, equal to $34,415,000, in column 1 and 2. The Talen Entities' estimate of PI is included in the Market Monitor position as an estimate subject to verification of need and amount.

Column 3 and 4 of Table 1 includes the settlement amount, $180,000,000 in fixed black box revenues.

The Talen Entities should not be paid any level of sunk costs for providing Part V service. Sunk costs are not a cost of providing Part V service. As a result of Talen's inclusion of sunk costs, the settlement provides excess compensation to Brandon Shores of $74,425,244 to Wagner of $8,800,525, or a total of $83,225,769 per year.

In general, the Talen Entities should be paid only the actual costs of providing Part V service that have a defined and verified need and that have been reviewed by PJM and the Market Monitor, including O&M, A&G, taxes other than income taxes and Project Investment costs.

The Talen initial filing and the settlement both exceed the revenue requirement that would result from the application of the cost of service approach based on the Commission's interpretation of Part V in the NRG Indian River 4 case. Talen included plant valued based on a fictitious transaction rather than the book value of the plant. [8] In addition, Talen added the value of an asserted opportunity cost of the land rather than book value.[9]

If those two unsupported elements are removed from the filing and everything else were the same, the revenue requirement of the original filing would have been reduced from $175,432,886 to $100,565,558 annually for Brandon Shores and from $40,343,113 to $34,287,693 annually for Wagner. (See columns 5 and 6.) The total for both plants would have been reduced from $215,775,999 to $134,856,251 annually which represents a $80,919,748 annual difference or a $323,678,992 difference for the term of the Part V service.

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[8] Part V Filing, ER24-1787-000, et al. (April 18, 2024) at 11–12, Attachment E: Exhibit No. BSH-001 (Prepared Direct Testimony of Todd Schatzki) at 8:21–9:6.

[9] *Id*. at 13–15, BSH-001 at 20:27–21:24.

If, in addition, the level of corporate A&G were lower by 50 percent and the level of maintenance expense were lower by 33 percent, the revenue requirement would have been reduced from $215,775,999 to $99,751,190 annually. This would be a reduction of $116,024,809 annually or $464,099,235 for the term of the Part V service.

**Table 1 Comparison of Part V Charges**

| | Category | (1) Brandon Talen Initial Filing | (2) Wagner Talen Initial Filing | (3) Brandon Settlement | (4) Wagner | (5) Brandon Plant Based On Sale Price | (6) Wagner Plant Based on Wagner 3&4 | (7) Brandon IMM Position | (8) Wagner IMM Position |
|---|---|---|---|---|---|---|---|---|---|
| A | Total O&M | 46,942,563 | 17,570,363 | | | 46,942,563 | 17,570,363 | 31,295,042 | 11,713,575 |
| B | Corporate A&G | 19,008,045 | 8,193,459 | | | 19,008,045 | 8,193,459 | 9,504,023 | 4,096,730 |
| C | Depreciation | 29,491,502 | 2,088,769 | | | 7,802,871 | 1,502,373 | 0 | 0 |
| D | Taxes other than Income Taxes | 4,624,148 | 435,653 | | | 4,624,175 | 435,653 | 4,624,175 | 435,653 |
| E | Federal and State Income Taxes | 16,076,125 | 2,783,546 | | | 4,573,679 | 1,357,382 | 1,250,048 | 447,089 |
| F | Return/Markup | 59,290,503 | 9,271,323 | | | 17,617,225 | 5,228,463 | 4,542,324 | 1,624,596 |
| | | | | | | | | | |
| G | Annual Charge | 175,432,886 | 40,343,113 | 145,000,000 | 35,000,000 | 100,568,558 | 34,287,693 | 51,215,611 | 18,317,642 |
| H | Monthly Charge | 14,619,407 | 3,361,926 | 12,083,333 | 2,916,667 | 8,380,713 | 2,857,308 | 4,267,968 | 1,526,470 |
| | | | | | | | | | |
| I | Term of Project Charge | 701,731,544 | 161,372,452 | 580,000,000 | 140,000,000 | 402,274,230 | 137,150,773 | 204,862,444 | 73,270,570 |
| J | Project Investment (PI) Term | 29,900,000 | 4,515,000 | 29,900,000 | 4,515,000 | 29,900,000 | 4,515,000 | 29,900,000 | 4,515,000 |
| | | | | | | | | | |
| K | Total Cost of Project Term | 731,631,544 | 165,887,452 | 609,900,000 | 144,515,000 | 432,174,230 | 141,665,773 | 234,762,444 | 77,785,570 |
| | | | | | | | | | |
| L | Fixed Charge Per MW Yr | 137,811 | 57,469 | 113,904 | 49,858 | 79,001 | 48,843 | 40,232 | 26,094 |
| M | Fixed Charge Per MW Day | 378 | 157 | 312 | 137 | 216 | 134 | 110 | 71 |
| | | | | | | | | | |
| N | Total Cost Per MW Yr | 143,683 | 59,077 | 119,776 | 51,465 | 84,873 | 50,451 | 46,104 | 27,701 |
| O | Total Cost Per MW Day | 394 | 162 | 328 | 141 | 233 | 138 | 126 | 76 |

**Q 10. WHY IS IT INAPPROPRIATE TO INCLUDE SUNK COSTS FOR PART V SERVICE?**

A. Brandon Shores and Wagner have participated in PJM's competitive energy, capacity, and ancillary services markets since the markets were implemented effective April 1, 1999. In PJM's markets, investors invest funds, pay the costs, and bear the risk of owning and operating power plants and receive market revenues from PJM markets as compensation. FERC explicitly adopted regulation through competition as a replacement for cost of service regulation, also known as rate base rate of return regulation, choosing to rely on competitive markets with appropriate market power mitigation to provide just and reasonable rates to customers rather than cost of service regulation.

Part V service was not intended to and nowhere states that it substitutes cost of service regulation for regulation through competition when Part V service is needed to maintain reliability in PJM.

Because Part V units are needed by PJM to maintain system reliability, and the provision of the service is voluntary in PJM, owners of units that PJM needs to remain in service after the desired retirement date have significant market power in establishing the terms of this reliability service which have generally been set through settlements. Part V units can threaten to retire, leaving PJM reliability at risk. Excessive payments to Part V units also create an incentive to retire earlier than otherwise when Part V payments are in excess of market net revenues.

Part V reliability service should be provided to PJM customers at reasonable rates, which reflect the relatively low risk nature of providing such service to owners, the reliability need for such service and the opportunity for owners to be guaranteed recovery of 100 percent of the actual costs required to operate to provide the service, plus an incentive.

The Market Monitor recommends that units recover all and only the costs, including incremental project investment costs without a cap, required to provide Part V reliability service (RMR service) that the unit owner would not have incurred if the unit owner had deactivated its unit as it proposed, plus a defined incentive payment. Customers should bear no responsibility for paying previously incurred (sunk) costs, including a return on or of prior investments.

Customers should pay all the actual costs of providing Part V service, subject to verification of need and verification of actual expenditures.

**Q 11. HAS THE COMMISSION ACCEPTED YOUR POSITION ON SUNK COSTS?**

A. No. The Market Monitor raised similar arguments on sunk costs regarding the Part V filing for Indian River 4. The order issued in that proceeding found "that section 119 of the PJM Tariff permits the recovery of a full cost of service rate, which

includes sunk costs."[10] The Market Monitor disagrees with this finding and has filed for rehearing.[11]

**Q 12. DO YOU OBJECT TO THE SETTLEMENT ON GROUNDS OTHER THAN THE INCLUSION OF SUNK COSTS?**

A. Yes.

The most significant flaw is the Talen's use of a level of sunk costs based on an appraisal conducted in 2015, which Talen Entities Witness Schatzki understands to be $648 million ("2015 Appraisal").[12] Put simply, the 2015 Appraisal is a made up number used to justify charging PJM customers more than is reasonable even under Talen's interpretation of Part V.

The Talen Entities argue that the 2015 Appraisal provides a factual basis to support the level of the compensation it filed for and therefore the compensation included in the Offer.[13] In fact, the 2015 Appraisal does not provide any support for the value of the assets at issue in this proceeding. The value of the assets is a significant and core unresolved genuine issue of material fact.

The 2015 Appraisal contradicts the actual facts in the record about the book value of the assets that is significantly lower than Talen asserts. The predecessor company to Talen, Riverstone, acquired the Brandon Shores and Wagner plants, and the Crane plant for a total of $371 million in a 2012 arm's length transaction. That transaction was an actual market transaction. Witness Schatzki's conclusion that the restriction on eligible buyers in that 2012 transaction means that the transaction does not reflect fair market value is incorrect on its face. Neither the seller nor the buyer at the time asserted that the transaction was not a market transaction or that the value was incorrect. The 2012 sale is an objective valuation determined in an exchange between sophisticated market participants at arm's length. Whether the 2012

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10 *NRG Business Marketing LLC*, 190 FERC ¶ 61,026 at P 33 (2025).

11 Request for Rehearing of the Independent Market Monitor for PJM and Maryland Office of the People's Counsel, Docket No. ER22-1539-000, et al. (February 14, 2025).

12 BSH-001 at 18:14–16.

13 *Id*. at 8:21–9:6.

transaction represents the best basis for determining the value of Brandon Shores and Wagner is a genuine issue of material fact.

The value of plant that Talen wants to recover includes an adder for asserted opportunity costs for delaying redevelopment of the power plants' sites.[14] This approach is not consistent with any reasonable interpretation of Part V of the PJM tariff. The inclusion of opportunity costs associated with the timing of speculative alternative uses of the land is not part of cost of service ratemaking,

The Offer includes fixed operation and maintenance ("O&M") costs based on estimates rather than a provision to pay the actual O&M costs. The Offer includes fixed corporate overhead (A&G) costs that were not demonstrated to be a cost of providing Part V service, rather than a provision to pay actual A&G costs, if any.

The proper treatments of O&M and A&G are genuine issues of material fact.

**Q 13. DOES THIS CONCLUDE YOUR AFFIDAVIT?**

A. Yes.

[14] *Id*. at 27–31.

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

| | | |
|---|---|---|
| Brandon Shores LLC | ) | Docket No. ER24-1787-001 |
| H.A. Wagner LLC | ) | Docket No. ER24-1790-001 |
| | ) | (not consolidated) |

## DECLARATION

JOSEPH E. BOWRING states that I prepared the affidavit to which this declaration is attached with the assistance of the staff of Monitoring Analytics, LLC, and that the statements contained therein are true and correct to the best of my knowledge and belief. Monitoring Analytics, LLC, is acting in its capacity as the Independent Market Monitor for PJM.

Pursuant to Rule 2005(b)(3) (18 CFR § 385.2005(b)(3), citing 28 U.S.C. § 1746), I further state under penalty of perjury that the foregoing is true and correct.

Executed on February 18, 2025.

Joseph E. Bowring