UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

NRG Business Marketing LLC	Docket Nos.	ER23-2688-002
NRG Power Marketing LLC		ER23-2688-000
NRG Business Marketing LLC		ER22-1539-002
NRG Power Marketing LLC		ER22-1539-000
		(consolidated)

REQUEST FOR REHEARING OF THE INDEPENDENT MARKET MONITOR FOR PJM AND MARYLAND OFFICE OF THE PEOPLE'S COUNSEL

Pursuant to Rule 713 of the Commission's Rules and Regulations,[1] Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor ("Market Monitor" or "IMM") for PJM Interconnection, L.L.C. ("PJM"),[2] and Maryland Office of the People's Counsel ("Maryland OPC") submit this request for rehearing of the order on contested settlement issued in this proceeding January 16, 2025 ("January 16th Order").[3]

The January 16th Order approved a settlement filed in these proceedings that established rates pursuant to which the Indian River Power Station Unit No. 4 ("Indian River 4"),[4] a coal-fired generation facility indirectly wholly owned by NRG Energy, Inc.

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1 18 CFR § 385.713 (2024).

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

3 190 FERC ¶ 61,026.

4 Indian River 4 is indirectly owned by NRG Energy, Inc.

("NRG"), provides service under Part V of the PJM OATT ("Part V Service"). PJM relies on Part V Service to protect system reliability while PJM builds transmission upgrades needed to accommodate the requested deactivation. Indian River requested to deactivate on June 29, 2021, but then agreed to provide Part V Service for a period that ended December 31, 2024.

The January 16th Order explains (at P 32) that "the contested issues here relate to the IMM and Maryland OPC's contentions that the rate approved in the Settlement Agreement improperly includes return on and of plant investment in rate base that preceded the deactivation notice." The January 16th Order further explains (*id*.) that the Market Monitor "characterizes the costs that were incurred prior to the decision to deactivate as sunk costs, noting that they were written off for accounting purposes as impaired assets," and "maintains that there is no basis in the deactivation provisions of the Tariff that permits companies to recover sunk costs."

The January 16th Order finds (at P 33): "the IMM and Maryland OPC misstate Commission policy, which permits generating units seeking deactivation and that are needed for reliability to recover sunk costs,[footnote omitted] and find that section 119 of the PJM Tariff permits the recovery of a full cost of service rate, which includes sunk costs."

The January 16th Order fails to adequately explain its findings. The inclusion of sunk costs in Part V Service is inconsistent with regulation through competition, is not supported by the precedent relied upon, is illogical and fails to reasonably interpret Part V.

Rehearing of the January 6th Order should be granted, the contested settlement should be rejected and hearing procedures should be instituted to determine a just and reasonable rate for Part V Service.

I. REQUEST FOR REHEARING

A. The January 16th Order Incorrectly Interprets Part V of the OATT.

The January 16th Order cites to language in the OATT (at P 33) that defines cost recovery under Section 119:

> [S]ection 119 provides in pertinent part that '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 Recovery Rate to *recover the entire cost of operating the generating unit* until such time as the generating unit is deactivated.'[emphasis in original]

In addition, the January 16th Order relies on PJM's incorrect explanation of Section 119's purpose, which it summarizes: "[W]hile the Deactivation Avoided Cost Credit formula of section 114 enables compensation to generation owners that must operate a generating unit for reliability without the added time and expense of a rate filing, the Cost of Service Recovery Rate of section 119 ensures that a generation owner, at any time, is free to pursue compensation through a 'traditional rate filing' with the Commission."[5] PJM used the term "traditional rate filing," but Section 119 does not include that language. "Traditional rate filing" appears to imply a cost of service filing of the type made by utilities operating under traditional cost of service regulation. Nothing in Section 119 supports that interpretation.

The January 16th Order interprets Section 119 to permit the recovery of sunk costs. The interpretation is not supported by a careful reading of Section 119 and is not supported when reading Section 119 in context.

Section 119 specifically refers to the "entire" costs of "operating" the unit. The January 16th Order does not address the meaning of the term "operating" and how this term limits the scope of the costs eligible for recovery. Section 119 provides for a "Cost of Service Recovery Rate," which is limited to the "entire cost of operating the generating unit." Section 119 makes no provision for the recovery of sunk costs, nor does Part V's alternative provision for cost recovery through a formula rate, Section 114. The PJM market rules and its rule for deactivation in Part V are specific to PJM and its specific market design.

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5 *Id*., citing *PJM*, Transmittal, Docket No. EL03-236-003 (November 2, 2004) at 20.

Contrary to PJM's assertion in their filing letter, Part V Service is not analogous to the electric service provided under a "traditional rate filing." Part V Service is only provided by existing market units that would otherwise deactivate based on market conditions. The decision to deactivate reflects the desire to exit the markets because participation in the markets is no longer profitable. Part V Service is not the equivalent of converting a market unit into a traditionally regulated unit. PJM needs the unit to be operational in order to address contingencies that could impact the reliable operation of the system.

The definition of when it is economic to retire rather than to continue operation is whether a resource is covering its avoidable costs. If a resource is covering its avoidable costs, it is better off continuing to operate. If a resource is not covering its avoidable costs, it is better off retiring

Avoidable costs do not include prior investment costs. The point of Part V is to change the economic calculus for a resource that wants to retire for economic reasons because it is not covering its avoidable costs. Part V ensures that the resource will cover at least its avoidable costs. It is not the intent of Part V to make, and Part V cannot be interpreted to provide for making, a resource better off under Part V than it would have been in the market had it decided not to retire. PJM's and the Commission's interpretation would make the resource better off under Part V than the resource would have been had it not reached the economic decision to retire. PJM's and the Commission's interpretation would result in creating a very substantial and arbitrary margin above the unit's avoidable costs. A margin is appropriate but it should be clearly defined and with a rational basis. Neither is true under the PJM and the Commission approach that imputes a traditional regulation rate base and the associated returns on and of capital.

The PJM and Commission approach would create a perverse incentive to become a Part V resource rather than continuing to operate in the market under normal market incentives. Under the PJM and Commission approach a unit that is covering its avoidable costs would have an incentive to retire if it would be given Part V status because its profits

would increase significantly under the Part V status. Those perverse incentives have an adverse real world effect.

Section 119 allows a generator to recover the costs to provide Part V Service and no other costs, such as failed investments related to participation in wholesale power markets.

Part V of the OATT cannot and does not affect the rights of suppliers of wholesale power under Section 205 the Federal Power Act. Section 119 of Part V is not needed to protect the statutory rights of electric utilities. Section 119 should not be interpreted in an overly broad and general manner, when Section 119 plainly serves the specific purpose of providing compensation for Part V Service.

Contrary to PJM's description, Section 119 says nothing about filing a "traditional rate filing." PJM forgets that neither it nor its Members, insofar as federal regulations are concerned, are traditional cost of service utilities with franchise customers. The need for Part V Service does not reverse the prevailing regulatory paradigm in PJM, which is regulation through competition.

Section 119 permits recovery of exactly the same costs as Section 114's Deactivation Avoided Cost Credit formula. Section 114 permits only the recovery of avoidable costs. The purposes of Section 119 and 114 are the same. Section 114 defines very specific categories of avoidable costs, limits the amount of project investment costs and provides defined margins over costs. The formula rate in Section 114 is meant to provide an administratively convenient approach to recovering the costs of providing Part V Service. Section 119 permits the generation owner to define its categories of avoidable costs and does not limit the amount of project investment costs. It is illogical to interpret those provisions as providing fundamentally different and inconsistent theories for cost recovery. There is no basis in the tariff language for such an interpretation.

The same principles should apply regardless of whether Part V Service is provided under Section 114 or Section 119.

Sunk costs refers to investments in the unit during its participation in PJM markets when it received market based compensation. The unit would not recover these costs if it

retired rather than receiving Part V status. The point of regulation through competition is to place the risks associated with such investment on suppliers, who are best positioned to manage them, and to remove them from customers. Section 119 does not represent an opportunity for suppliers to transfer responsibility for failed investments to customers. Allowing units to recover sunk costs through Part V Service violates fundamental principles of regulation through competition. The public interest in competition depends upon the protection of its benefits for both customers and suppliers.

The interpretation of Section 119 is not adequately or reasonably explained in the January 16th Order and should be reversed on rehearing.

B. The January 16th Order Is Not Consistent with Commission Policy or the Precedent Relied Upon.

The January 16th Order cites to *GenOn* and other cases to state that Section 119 filings for Part V Service may include fixed costs.[6] But neither the Market Monitor nor Maryland OPC object to the inclusion of fixed cost in Section 119 filings. The inclusion of fixed costs needed to operate the unit is undisputed.

The Market Monitor and Maryland OPC agree that additional fixed costs required to provide Part V Service are includable in Part V costs. An important component of the Deactivation Cost Credit is Project Investment ("PI"), which refers to additional fixed costs that must be incurred in order to keep the unit operating. Section 119 filings may appropriately include PI needed to keep the unit operating. Section 119 provides for the

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[6] *See* January 16th Order at P 34, citing *GenOn*, 149 FERC ¶ 61,218 at P 34 (2014); *Mystic*, 165 FERC ¶ 61,267 at P 133 (2018); *PJM Interconnection, LLC*, 112 FERC ¶ 61,031, at PP 18–19 (2005) ("The Commission disagrees with Mirant that it is unreasonable to require a generator to make a filing under section 205 of the FPA to recover fixed costs."); *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,057 at P 84 (2014) ("While the Commission has accepted a range of reasonable compensation methodologies for RMR units in RTOs/ISOs, we find that it is unjust and unreasonable to not allow [System Support Resources] to receive compensation for the fixed costs of existing plant.").

recovery of "the entire cost of operating the generating unit," including PI, which may be significant.

In *GenOn*, the Commission approved a contested settlement as just and reasonable that included fixed costs but reasoned that it excluded sunk costs. In the January 16th Order the Commission suggests (at P 35) that it could have approved a rate in *GenOn* that included all sunk costs as just and reasonable. But both rates cannot be just and reasonable under a consistent theory of what is appropriately included in a Part V Service rate. A policy that would allow any rate within a range defined by the inclusion (high end) and exclusion (low end) of sunk costs has no controlling principle and is inherently arbitrary and capricious. What is the principle that limits the costs a generation unit can recover under Part V when PJM must keep the unit operational for reliability, even when the sunk costs are high and the expected service period is short?

Although the January 16th Order approved a settlement, the filing is not a negotiated rate. First, the parties to the proceedings have not agreed to the rate. The rate is contested. Under the *Trailblazer* line of cases and the circumstances of this case, a decision on the merits is required.[7] Second, settlement discussions about Part V Service do not reflect arm's length bargaining. PJM needs the specific unit in question, making the unit owner a pivotal supplier that results in market power. Clear and consistent rules on what costs can and

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[7] *See Trailblazer Pipeline Co.*, 85 FERC ¶ 61,082 (1998); *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 at 62,341 ("*Trailblazer II*"), *order on reh'g*, 87 FERC ¶ 61,110, *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). *Trailblazer II* 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.".

cannot be included in Part V are necessary to ensure that the rates do not reflect the exercise of market power.

Relying on the *Mystic* case, the January 16th Order rejects the Market Monitor and the Maryland OPC's challenge to the "investment of net plant because the parties took an investment loss for tax purposes after the installation of the investments to address environmental issues."[8] The Commission relies on *Mystic* to state a policy that it "does not take into account impairment losses in determining cost of service rates for RMR units."[9] The January 16th Order finds that "the same logic applies here where the parties took the impairment loss based on the decreased value of the asset in the competitive market but now are providing service using these assets under the RMR." The Commission states (*id.*): "Because PJM subsequently requested that NRG-PML continue operations for reliability reasons, these assets are needed to provide service during the short time period of the RMR contract and we find including those assets in rates for that period just and reasonable."

The January 16th Order fails to articulate a reasonable explanation of its finding on impairments. The impairments occurred in PJM markets, which are regulated through competition and not traditional cost of service. Indian River 4 should not be permitted to pretend that the impairments of the asset did not occur and to require customers to pay for the sunk costs of an asset that has no market value. Because Indian River 4 is an Exempt Wholesale Generator ("EWG"), not subject to the Commission's regulation of books and records under Part 366, and because NRG has market based rates authorization, including

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[8] January 16th Order at P 34, citing *Mystic*, 165 FERC ¶ 61,267 at P 71 ("As a general matter, we disagree with arguments that impairments taken for GAAP accounting purposes must necessarily be reflected in accumulated depreciation for USofA purposes.").

[9] *Id.* ("As a general matter, we disagree with arguments that impairments taken for GAAP accounting purposes must necessarily be reflected in accumulated depreciation for USofA purposes.").

waivers from the Commission's accounting rules, the rationale relied on in *Mystic* does not apply to Indian River 4, and does not excuse the improper treatment of impairments.[10]

II. STATEMENT OF ISSUES

This request for rehearing presents the following issues:

Whether the interpretation of Section 119 that is inconsistent with the nature and purpose of Part V Service is adequately or reasonably explained in the January 16th Order.

Whether Commission precedent concerning the inclusion of fixed costs in cost of service rates necessarily or reasonably extends to the inclusion of sunk costs in a Part V rate for a unit previously participating in competitive markets that is needed to operate for a period after its deactivation date.

Whether the cost of impaired assets for a unit participating in competitive markets can be just and reasonably included in rates for Part V Service.

III. CONCLUSION

For the reasons provided above, the Market Monitor and the Maryland OPC respectfully request that the Commission grant rehearing.

Respectfully submitted,

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

Jeffrey W. Mayes

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

[10] *See* January 16th Order, citing 165 FERC ¶ 61,267 at P 71.

David S. Lapp
People's Counsel

____/s/ David S. Lapp ____

William Fields
Deputy People's Counsel
William.fields@maryland.gov

Philip L. Sussler
Assistant People's Counsel Email addresses:
Philip.Sussler@maryland.gov

Office of People's Counsel
6 St. Paul Street, Suite 2102
Baltimore, Maryland 21202
(410) 767-8150

Dated: February 14, 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 14th day of February, 2025.

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