

169 FERC ¶ 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Independent Market Monitor for PJM Interconnection, L.L.C. Docket No. EL19-27-000

v.

PJM Interconnection, L.L.C.

ORDER DENYING COMPLAINT

(Issued December 19, 2019)

1. On December 28, 2018, the Independent Market Monitor for PJM Interconnection, L.L.C. (the Market Monitor)¹ filed a complaint under section 206 of the Federal Power Act (FPA)² asking the Commission to direct PJM Interconnection, L.L.C. (PJM) to find that a Market Seller violated its Fuel Cost Policy and assess the required penalty. For the reasons discussed below, we deny the complaint.

I. Background

A. Fuel Cost Policies

2. Under the PJM Operating Agreement, Schedule 2, each Market Seller in PJM that submits cost-based offers into PJM's energy market must submit a Fuel Cost Policy (FCP)³ to PJM and the Market Monitor for each generation resource that it intends to offer into the PJM Interchange Energy Market, for each fuel type the resource uses.

¹ Monitoring Analytics, LLC is the Independent Market Monitor for PJM Interconnection, L.L.C.

² 16 U.S.C. § 824(e) (2018).

³ A Fuel Cost Policy is the document provided by a Market Seller to PJM and the Market Monitoring Unit in accordance with PJM Manual 15 and Operating Agreement, Schedule 2, which documents the Market Seller's method used to price fuel for calculation of the Market Seller's cost-based offer for a generation resource. *See* Operating Agreement, Definitions E-F.

The FCP must provide sufficient information on the Market Seller's fuel procurement practices for PJM to verify the Market Seller's fuel cost at the time of its cost-based offer to the PJM market. Market Sellers may choose to use indices or other objective measures to develop their costs, but in addition, the Operating Agreement requires that FCPs "[a]ccount for situations where applicable indices or other objective market measures are not sufficiently liquid by documenting the alternative means actually utilized by the Market Seller to price the applicable fuel . . . such as documented quotes for the procurement of natural gas."⁴ While a Market Seller must submit its FCP to both PJM and the Market Monitor for review, PJM ultimately decides whether to approve each Market Seller's FCP.⁵

3. Schedule 2 further provides that if upon review of a Market Seller's cost-based offer, PJM determines that the offer is not in compliance with the Market Seller's PJM-approved Fuel Cost Policy and the Market Monitor agrees with that determination, or the Market Monitor determines that the offer is not in compliance with the seller's FCP and PJM agrees with the Market Monitor's determination, or the seller does not have a PJM-approved Fuel Cost Policy, or PJM determines that any portion of the cost-based offer is not in compliance with Schedule 2, "the Market Seller shall be subject to" a penalty.⁶

4. To aid sellers in drafting their FCPs, the Market Monitor provides an FCP template for various fuel types.⁷ Relevant here, the FCP template for natural gas resources states in the General Overview section that "[u]nder a set of defined market conditions, natural gas costs may be based on independent third party quotes."⁸

⁴ PJM Operating Agreement, Schedule 2, § 2.3(a)(iv).

⁵ *Id.*, § 2.2.

⁶ PJM Operating Agreement, Schedule 2, *Id.*, § 5.1(a).

⁷ The Market Monitor states that it provides this template to aid Market Sellers in the development of fuel cost policies that meet its standards and that modifications to this template can be made in order to meet specific needs. Available at http://www.monitoringanalytics.com/tools/docs/Natural_Gas_Cost_Policy_Template_20170711.docx. Each FCP must be reviewed by PJM and the Market Monitor, but only PJM has the authority to approve the FCP. PJM Operating Agreement, Schedule 2, section 2.3(a).

⁸ Available at Monitoring Analytics, *Natural Gas Cost Policy Template*, <http://www.monitoringanalytics.com/tools/tools.shtml>.

B. Market Monitor's Complaint⁹

5. On December 28, 2018, the Market Monitor filed the instant complaint against PJM, asking the Commission to direct PJM to find that a seller, Tenaska Power Services (Tenaska), violated its FCP and assess the required penalty.¹⁰

6. The Market Monitor alleges that Tenaska submitted an offer for Saturday, January 6, 2018 for the dual-fuel Panda Brandywine unit that included a natural gas cost value based on a method not defined in its FCP.¹¹ The Market Monitor explains that Tenaska's FCP enables it to calculate a reference natural gas-based price for the Panda Brandywine unit using either prices from trades for natural gas delivery the previous gas day or certain same-day Weighted Average Prices on the Intercontinental Exchange (ICE).¹² The Market Monitor explains that Tenaska could not use these fuel cost calculation methodologies to develop prices for January 6, because its unit had not purchased natural gas the previous day, and ICE contained no applicable trades for Transco Zone 5 South or Transco Zone 6 Non-NY North in the time frame required to calculate day-ahead market offers per Tenaska's FCP.¹³ The Market Monitor argues that, absent the ability to use the two fuel cost calculation methodologies specified in its FCP, Tenaska should have simply not submitted a natural gas offer, and instead only offered its plant to run on oil.¹⁴ The Market Monitor alleges that, instead, Tenaska used a gas cost

⁹ The Market Monitor, PJM, and Tenaska all submitted pleadings for which they sought privileged treatment under section 388.112 of the Commission's regulations. 18 C.F.R. § 388.112 (2019). On December 12, 2019, the Commission issued an order finding that disclosure of the Market Monitor's and PJM's privileged pleadings, and the majority of Tenaska's privileged pleadings, is necessary to facilitate the Commission's ability to rule on the complaint, and setting forth the reasons for the Commission's ruling. *See Independent Market Monitor for PJM Interconnection, L.L.C. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,198 (2019). Accordingly, the below summary of filed pleadings discloses the information necessary to support our decision here.

¹⁰ Complaint at 4.

¹¹ The Panda Brandywine unit is owned by KMC Thermo, LLC (KMC). Tenaska is the energy manager of the unit, and therefore acts as the unit's Market Seller in PJM and is responsible for submitting offers and ensuring compliance with the unit's FCP.

¹² This process is described in detail in the Complaint, Confidential Attachment at 1-2.

¹³ *Id.* at 3.

¹⁴ *Id.* at 3.

based on gas quotes from ICE provided to it by its marketing affiliate, Tenaska Marketing Ventures (Tenaska Marketing), in violation of its FCP.¹⁵

7. The Market Monitor explains that Tenaska provided PJM and the Market Monitor with its cost-based offer calculation and the quotes provided by Tenaska Marketing in response to a PJM data request.¹⁶ According to the Market Monitor, Tenaska's response explains that it submitted a gas offer based on its good faith estimate of market prices.¹⁷ Furthermore, the Market Monitor states that Tenaska noted in its response that the General Overview section of its FCP allows that "under a set of defined conditions, the natural gas cost may be based on independent third party quotes."¹⁸ According to the Market Monitor, Tenaska acknowledged that the policy did not define the set of conditions necessary for the use of independent third party quotes, but argued that it "gave [the language] a reasonable interpretation in light of the factual circumstances it faced at the time."¹⁹ The Market Monitor asserts that while the Market Monitor template includes sections that define those conditions, Tenaska's FCP does not.²⁰

8. The Market Monitor explains that PJM requested additional information from Tenaska to support the assertion that the fuel cost used was an independent third-party quote despite the fact that it was provided by Tenaska Marketing, a Tenaska affiliate.²¹ According to the Market Monitor, Tenaska explained that the quotes were executable offers on ICE viewed by employees of Tenaska Marketing,²² and Tenaska provided the

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 4 (citing Monitoring Analytics, *Natural Gas Cost Policy Template*, <http://www.monitoringanalytics.com/tools/tools.shtml>).

¹⁹ *Id.* at 4.

²⁰ *Id.* at 4 ("The [General Overview] section in the [Market Monitor] template and in the Panda Brandywine fuel cost policy states that 'under a set of defined conditions' Market Sellers may use independent third party quotes in the development of their cost-based offers. The [Market Monitor's] template includes sections that define those conditions. [Tenaska] removed those conditions from this fuel cost policy. . . . There are no defined conditions in this actual fuel cost policy under which quotes could be used").

²¹ *Id.* at 4.

²² *Id.* at 4.

Market Monitor and PJM with a graph of offers on ICE that were recorded by Tenaska Marketing. The Market Monitor argues that this graph is insufficient to support Tenaska's gas costs, since the graph does not identify whether the offers it contains are for next day or same day gas, and the title of the figure refers to a vague "Friday or Saturday strip" without a clear definition. The Market Monitor states that the figure does not provide the type of documentation required to validate a cost-based offer.²³ Additionally, the Market Monitor states that it does not accept fuel cost policies that include the use of quotes from affiliated entities, or fuel cost policies with gas costs based solely on ICE offers.²⁴

9. The Market Monitor further states that even under Tenaska's approach, the offers it developed were not consistent with market data for the relevant time periods. The Market Monitor states that it:

identified the data provided by [Tenaska] as next day gas data, trading on January 5, 2018, for the January 6 through January 8 weekend package. The data did not include same day gas trading data, which, under the fuel cost policy, had the gas cost otherwise complied with the fuel cost policy, would be the value applicable for [Hours 1 through 10] of the Friday January 6, 2018 gas day.

[Tenaska's] natural gas cost for [Hours 1 through 10] was \$130 per MMBtu. Between 9:00 AM and 10:25 AM EPT on January 5, 2018, same day gas offers on ICE ranged from \$115 to at least \$999 per MMBtu.²⁵

²³ *Id.* at 6 ("Defined documentation includes invoices, contracts, screenshots, instant messages, text messages, emails or recorded phone calls. This figure does not qualify as the documentation described in the fuel cost policy and would not qualify as defined documentation even if the fuel cost policy had included the asserted approach").

²⁴ *Id.* at 3 ("PJM and the [Market Monitor] routinely reject fuel cost policies that include the use of fuel costs provided by affiliate companies because they are not arm's length and not verifiably market based"); *see id.* at 5 ("[A]n offer on ICE does not qualify as an independent third party quote. . . . Independent third party quotes are not anonymous and they require a direct interaction between two parties (potential buyer and potential seller). An offer on ICE does not meet that definition.").

²⁵ *Id.* at 6.

Therefore, the Market Monitor states, based on Tenaska's and PJM's interpretation, any value between \$115 and \$999 per MMBtu would be compliant with the fuel cost policy.²⁶

10. The Market Monitor argues that a method of calculating gas costs in an FCP must be “verifiable”—namely, any reviewer checking the calculation by applying the fuel cost policy, given the same set of facts available to the seller, would have calculated exactly the same gas cost used by the seller. The Market Monitor asserts that because Tenaska's argument supports a wide range of gas costs, Tenaska's suggested interpretation of its FCP does not result in verifiable methods of calculating gas costs, and thus is not correct.²⁷ The Market Monitor further states that an offer on ICE does not qualify as an “independent third party quote” because independent third-party quotes are not anonymous and require direct interaction between a potential buyer and a potential seller, whereas Tenaska relied simply on offers to sell gas.

11. The Market Monitor acknowledges that the gas costs used by Tenaska had no direct financial impact on the market, because Panda Brandywine's oil-based offer was less than its gas-based offer for the relevant period, and it ultimately operated on oil on January 6. Nevertheless, the Market Monitor contends that the only way in which Tenaska could have complied with its FCP would have been “to not offer the unit[] on gas by making the natural gas cost-based offers unavailable,” i.e., to only offer the resource based on oil.²⁸

12. The Market Monitor additionally argues that, if PJM's determination that Tenaska did not violate its FCP is allowed to stand, that determination will undermine the “rule based” approach to fuel cost policies ordered by the Commission, and that “[f]uel cost policies require a clear, verifiable and systematic definition of units' cost-based offers and are a critical bulwark against the exercise of market power in PJM markets.”²⁹

13. The Market Monitor further states that on August 31, 2018, PJM approved a new FCP filed by Tenaska which (a) described an ICE offer as an independent third-party

²⁶ *Id.* at 6. The Market Monitor further notes that Tenaska's natural gas cost for Hours 11 through 24 was \$125 per MMBtu, and it observed an offer at that exact value between 10:22 AM and 10:26 AM EPT for Transco Zone 5 South for next day gas. Other offers between 09:00 AM and 10:25 AM EPT ranged from \$125 to at least \$175 per MMBtu. *Id.* at 7.

²⁷ *Id.* at 7.

²⁸ *Id.* at 7.

²⁹ *Id.* at 7 (citing *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,133 at P 57 (2017) (2017 Hourly Offers Order)).

quote, (b) included the use of the ICE offer when there were no trades on ICE for the applicable hub, and (c) included the use of the most recent absolute high published by Platts in the Gas Daily report. The Market Monitor views this new FCP as inconsistent with its requirements because the FCP does not correctly define an independent third-party quote.

II. Notice of Filing and Responsive Pleadings

14. Notice of the complaint was published in the *Federal Register*, 84 Fed. Reg. 102-01 (2019), with interventions and protests due on or before January 25, 2019.

15. Tenaska; Vistra Energy Corp.; EDF Trading North America, LLC; PJM Power Providers Group; Public Citizen, Inc.; KMC Thermo, LLC (KMC); East Kentucky Power Cooperative, Inc.; Dayton Power and Light Company; Organization of PJM States, Inc. (OPSI); American Municipal Power, Inc.; Electric Power Supply Association; New Jersey Division of Rate Counsel; New Jersey Board of Public Utilities; Maryland Office of People's Counsel; Delaware Division of the Public Advocate; North Carolina Electric Membership Corporation; Panda Power Generation Infrastructure Fund, LLC; Office of the People's Counsel for the District of Columbia; Old Dominion Electric Cooperative; West Virginia Consumer Advocate; American Electric Power Service Corporation; Southern Maryland Electric Cooperative, Inc.; and Boston Energy Trading and Marketing LLC filed timely motions to intervene. The Maryland Public Service Commission filed a timely notice of intervention. Calpine Corporation, Citizens Utility Board of Illinois, the Illinois Attorney General's Office, Potomac Economics, Ltd., in its capacity as the Independent Market Monitor for the Midcontinent Independent System Operator, Inc. (MISO Independent Market Monitor), the Energy Trading Institute, the Edison Electric Institute (EEI) and Exelon Corporation moved to intervene out of time.

16. PJM filed a motion to dismiss the complaint or, in the alternative, an answer. Tenaska filed a protest. EEI, East Kentucky Power Cooperative, Inc. and the Dayton Power and Light Company filed comments.

17. PJM Power Providers Group, the Energy Trading Institute and the MISO Independent Market Monitor each filed a motion for leave to answer and answer to the complaint. The Market Monitor, Joint Consumer Advocates (the New Jersey Division of Rate Counsel, the Delaware Division of the Public Advocate, Office of the People's Counsel for the District of Columbia, Maryland's Office of People's Counsel, Illinois Citizens Utility Board, and Office of the Ohio Consumers Counsel), the West Virginia Consumer Advocate, the New Jersey Board of Public Utilities, and OPSI filed answers to PJM's motion to dismiss. Midcontinent Independent System Operator, Inc. (MISO) filed comments in response to PJM's motion to dismiss.

A. PJM's Answer and Motion to Dismiss

18. PJM first moves to dismiss the Market Monitor's complaint on the basis that a complaint by the Market Monitor against PJM is not permitted under the PJM Open Access Transmission Tariff (PJM Tariff), Commission rule or precedent, or judicial precedent. PJM acknowledges that the 2017 Hourly Offers Order provides that a complaint can be filed to address "disputes between PJM and [the Market Monitor] relating to PJM's approval of a generator's [FCP]," but argues that the 2017 Hourly Offers Order neither provides for the filing of a complaint when there is disagreement as to the implementation of an FCP, nor permits a complaint to be directed against PJM.³⁰ PJM additionally argues that filing a complaint with the Commission is an inappropriate way for the Market Monitor to resolve a dispute with PJM and creates a conflict in that the Market Monitor is accountable to the PJM Board of Managers (PJM Board). PJM further argues that such an action is not authorized by Order No. 719 or the PJM Tariff, and that such a matter requires referral to the Commission's Office of Enforcement.³¹

19. Substantively, PJM argues that Tenaska complied with its FCP. PJM acknowledges that while Tenaska's FCP does not explicitly spell out the defined conditions under which Tenaska can use third-party quotes, the language of the FCP should be read flexibly as long as the FCP continues to be verifiable and systematic. PJM asserts that such conditions would reasonably include "extenuating circumstances," such as on January 5, when Tenaska was unable to obtain natural gas costs under the specific methods in its FCP due to lack of market liquidity. In response to the Market Monitor's argument that FCPs require a "clear, verifiable and systematic definition" of units' cost-based offers, PJM argues that Tenaska's natural gas costs are verifiable and systematic since they were based on executable offers available on ICE in the morning of January 5. PJM additionally argues that the natural gas costs used by Tenaska were reasonable since they were on the low end of all posted offers from ICE on the morning of January 5,³² and those quotes were verifiable since they were derived from posted executable offers that were the same, irrespective of which entity (Tenaska or Tenaska

³⁰ PJM Answer at 6 (citing 2017 Hourly Offers Order, 158 FERC ¶ 61,133 at P 86).

³¹ *Id.* at 4-12.

³² PJM states that the fact that Tenaska's natural gas cost for Gas Day 1 was \$130/MMBtu and \$125/MMBtu for Gas Day 2, while same day gas offers on ICE ranged from \$115/MMBtu to at least \$999/MMBtu between 9:00AM and 10:25AM EPT on January 5, demonstrates the reasonableness and good faith of the independent third party price estimates obtained by the Market Seller. *Id.* at 19.

Marketing) reviewed them.³³ PJM further notes that Tenaska's action caused no harm to the market.³⁴

20. PJM asserts that the FCP should be read based on the principle that all language contained in contracts or statutes should be given full effect.³⁵ Because Tenaska could not use the other natural gas cost estimation procedures in its FCP, PJM asserts, it was acceptable for Tenaska to default to the provision in the General Overview section of its FCP, which provides that under defined conditions, the natural gas cost could be based on independent third-party quotes. PJM argues that Tenaska had reasonably intended those "defined" conditions to refer to periods of market disruption such as those on January 5.³⁶

21. PJM states that the Market Monitor's argument that Tenaska should not have submitted a gas-based offer, and only submitted an oil-based offer, would have placed Tenaska in an untenable situation. PJM explains that if Tenaska had followed this approach and had run out of oil, it could either have been forced to operate on natural gas yet use its (lower) oil-cost-based offer, or else risk penalties.³⁷ PJM further states that the reason to require sellers to submit FCPs is to prevent the exercise of market power, and here, given the low natural gas cost estimates used by Tenaska compared with actual natural gas offers on ICE, and the fact that Tenaska's unit operated on oil rather than natural gas during this time, Tenaska was not exercising market power.³⁸

B. Tenaska's Protest

22. Tenaska similarly asserts that it complied with its FCP.³⁹ Tenaska argues that it was reasonable for it to use independent third-party quotes to establish its natural gas

³³ *Id.* at 18.

³⁴ *Id.* at 13.

³⁵ *Id.* at 16, 16 n.36 (citing *Washington Metro. Area Transit Auth. v. Mergentime Corp.*, 626 F.2d 959, 960-61 (D.C. Cir. 1980) (court should construe contract as a whole "to give meaning to all of the express terms") and *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6, (2000) (if statute's language is plain, "the sole function of the courts . . . is to enforce it according to its terms"))).

³⁶ *Id.* at 17.

³⁷ *Id.* at 16-18.

³⁸ *Id.* at 20.

³⁹ Tenaska notes that it is not the owner of the Panda Brandywine unit – rather, KMC Thermo, LLC (KMC) is the owner, and Tenaska is the energy manager of the unit

costs given the “difficult market conditions” of January 5-6, 2018, and the unavailability of pricing information for Transco Zone 5 South or Transco Zone 6 Non-NY North.⁴⁰ Tenaska states that at the time it submitted its offers for January 6, it anticipated that the resource would run on oil, but it also submitted a natural gas offer because, while resources are only required to submit one cost-based schedule, PJM recommends that dual-fuel units submit schedules for both fuels. Tenaska also argues that the Market Monitor’s position that Tenaska should not have submitted natural gas cost-based offers fails to recognize that the resource could have been subject to non-performance penalties if there had been a fuel oil disruption and the facility was deemed unavailable because no natural gas cost-based offers had been submitted.⁴¹ Alternatively, if the facility had been forced to operate on natural gas but had not submitted offers based on natural gas costs (so that its offers cleared based on lower oil-based costs), Tenaska argues that it could have incurred unrecoverable costs.⁴² Tenaska asserts that the Market Monitor’s position would have prohibited Tenaska from submitting natural gas cost-based offers, to the detriment of reliability in the PJM region.⁴³

23. Tenaska also states that its natural gas costs were verifiable, as the information came from ICE, which Tenaska contends is a legitimate source for such data. Tenaska maintains that its offers were consistent with market data for the relevant time periods, given that “market prices for natural gas ranged from \$115/MMBtu to \$999/MMBtu, while [Tenaska] used a price of \$130/MMBtu” for Gas Day 1.⁴⁴ Tenaska also notes that while it used a natural gas cost of \$125/MMBtu for Gas Day 2,⁴⁵ the Market Monitor “observed an offer at that exact value between 10:22 AM and 10:26 PM . . . for Transco Zone 5 South for next day gas,” and that other offers “ranged from \$125 to at least \$175

and therefore responsible for submitting offers and ensuring compliance with the unit’s FCP. Tenaska also states that the FCP in issue here was originally developed and submitted by KMC. Tenaska Protest, Confidential Attachment A, at 2-3.

⁴⁰ *Id.* at 4-6.

⁴¹ *Id.* at 9.

⁴² *Id.* at 10.

⁴³ *Id.* at 1.

⁴⁴ Gas Day 1 refers to the period from midnight to 10:00 AM.

⁴⁵ Gas Day 2 refers to the period from 10:00 AM to midnight.

per MMBtu.”⁴⁶ Tenaska asserts that these data show that Tenaska used prices at the lower end of observed offers, and thus was not seeking to exercise market power.

24. Tenaska also asserts that when KMC developed its FCP, it sought to use additional methods (beyond data from Transco Zone 5 South or Transco Zone 6 Non-NY North) to develop its natural gas costs, but the Market Monitor rejected that proposal, and thus the FCP (which was accepted by PJM and reviewed by the Market Monitor) only included the broad third-party quote language.⁴⁷ Tenaska argues that to the extent that the Market Monitor had concerns regarding that FCP, or believed that specific language in that FCP was ambiguous or invalid, it should have raised such concerns during that review.⁴⁸

25. Tenaska further takes issue with the Market Monitor’s view that its use of data provided by its affiliate, Tenaska Marketing, is inappropriate. Tenaska points out that the agreement between Tenaska and KMC provides for Tenaska to act as the PJM market participant with respect to energy and ancillary services sales by the unit, but the parties could just as easily have agreed for KMC to remain the market participant for these products, in which case the Market Monitor would apparently have accepted the natural gas quotes from Tenaska or Tenaska Marketing. Tenaska also notes that the natural gas costs used in its offers were not offers by Tenaska Marketing – rather, Tenaska Marketing simply collected offer data from ICE and provided that information to Tenaska.⁴⁹

26. Tenaska additionally states that there is no basis for the Market Monitor’s assertion that data from ICE does not represent a valid third-party quote. It states:

ICE is a liquid market that consistently provides reliable price information. . . . [I]t is consistent with . . . today’s increasingly automated trading practices, for a gas purchaser to rely on ICE to determine what sell offers are available, particularly when the purchaser is only seeking to purchase one day of fuel supply for the immediate day ahead deliveries on volatile trading days like January 5-6, 2018. Increasingly, market price discovery is happening online through ICE and

⁴⁶ Tenaska Protest, Confidential Attachment A, at 10, 10 n.29 (citing Tariff, Attachment DD, § 10A and Attachment K – Appendix, § 1.10(d) (requiring Generation Capacity Resources to submit day-ahead offers)) and at 11-12 (footnotes omitted).

⁴⁷ *Id.* at 1, 7.

⁴⁸ *Id.* at 8.

⁴⁹ *Id.* at 10-11.

other platforms where the source of the price offer is anonymous, and trades are being entered on these platforms with little, if any, personal interface. The use of ICE offer data is not only more efficient, but also avoids signaling that a purchaser is searching for supplies, which could cause potential sellers to increase their prices.⁵⁰

C. Market Monitor's Answer to PJM's Motion to Dismiss

27. In its answer to PJM's motion to dismiss, the Market Monitor states that PJM concedes that Tenaska's FCP does not contain language providing the conditions under which Tenaska can use third-party quotes to develop natural gas costs.⁵¹ The Market Monitor states:

Fuel cost policies cannot be read flexibly. . . . There is no such thing as an extenuating circumstance in a fuel cost policy. All conditions that the participant wishes to cover are addressed explicitly and unambiguously. *Ex ante* identification of all such conditions is the point of having fuel cost policies.⁵²

28. The Market Monitor asserts that PJM's position would render FCPs unverifiable, in that the flexibility that PJM urges would make it impossible for PJM or the Market Monitor, after the fact, to take the defined inputs that were available to the Market Seller in real time, use the fuel cost policy rules that were defined prior to the events, and calculate the same fuel cost that the Market Seller calculated in real time.⁵³

29. The Market Monitor further states that while ICE data is normally a sound benchmark to estimate the cost of natural gas, in some circumstances, activity on ICE could be unreliable (e.g., when there is a large spread between the bid to buy and the offer to sell). The Market Monitor states that it does not accept FCPs that base natural

⁵⁰ *Id.* at 11-12.

⁵¹ Market Monitor Answer at 1-2 (citing PJM Answer at 16 ("Although it is true that the Fuel Cost Policy does not explicitly spell out the defined conditions, the language should be read flexibly so long as it continues to be verifiable and systematic. . . . Here, it is reasonable to infer that the [defined] conditions should include extenuating circumstances.")).

⁵² *Id.* at 3.

⁵³ *Id.* at 3.

gas costs solely on ICE offers rather than on both offers and bids on ICE, or on cleared transactions on ICE, since “[b]asing the gas cost on the offer alone without having a buyer would be like valuing a house based on its listed price rather than on the price actually paid.”⁵⁴ The Market Monitor also states that contrary to PJM’s understanding, an “independent third party quote” requires a bilateral conversation with a natural gas marketer who is unaffiliated with the unit owner (or power marketer) calculating the cost-based energy offer.⁵⁵

30. Further, the Market Monitor argues that the lack of harm to the market from Tenaska’s actions on January 6 is not a reason to excuse Tenaska’s noncompliance with its FCP, because allowing PJM to excuse such noncompliance based on after-the-fact reinterpretations of the FCP undermines the integrity of the cost-based offer verification process. The Market Monitor states that, without consistent application of penalties and consistent interpretation of all FCPs, Market Sellers would have the ability to exercise market power in PJM.⁵⁶

D. Other Protests, Comments and Answers

1. Market Monitor’s Authority to File Complaint Against PJM

31. Several parties support PJM’s position that the Market Monitor should not be permitted to file a section 206 complaint against PJM to resolve a difference regarding the interpretation of the FCP or any other rule.⁵⁷ East Kentucky Power Cooperative, Inc. and the Dayton Power and Light Company state that, based on Schedule 2 of the PJM Operating Agreement, it is PJM’s role to oversee and determine whether a violation of an FCP has occurred.⁵⁸ They argue that PJM should have the discretion to evaluate alleged FCP violations on a case-by-case basis. They state that Schedule 2 of the Operating Agreement does not authorize the Market Monitor to file a complaint if it disagrees with PJM’s determination, but rather authorizes the Market Monitor to refer the alleged

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 4.

⁵⁶ *Id.* at 4.

⁵⁷ East Kentucky Power Cooperative, Inc. and the Dayton Power and Light Company Comments at 4; PJM Power Providers Group Answer at 2-3; the Energy Trading Institute Answer at 4.

⁵⁸ East Kentucky Power Cooperative, Inc. and the Dayton Power and Light Company Comments at 3-5.

violation to the Commission's Office of Enforcement.⁵⁹ Therefore, they request that the Commission dismiss the Market Monitor's complaint without prejudice to filing a new complaint that more precisely sets forth the basis for the complaint.⁶⁰

32. PJM Power Providers Group similarly states that the Commission has already clarified that the Market Monitor's role is to advise PJM and the market participant, but PJM makes the final decision on an FCP's approval.⁶¹ PJM Power Providers Group also argues that a market participant should rely on one entity to administer the Tariff and agrees with PJM that the Market Monitor's complaint should be denied if the market participant's offer was developed in accordance with its PJM-approved FCP and there was no harm to the market.⁶² Energy Trading Institute agrees that the Market Monitor should function independently, but asserts that the complaint should be dismissed with prejudice because it is not authorized by the PJM Tariff.⁶³ Energy Trading Institute also notes that the Commission should, in a separate proceeding, revisit Order No. 719 to, among other things, clarify the Market Monitor's permissible conduct and find that the PJM Board should make the final determination when there is a dispute between PJM and the Market Monitor.⁶⁴

33. On the other hand, OPSI, NJBPU, the MISO Independent Market Monitor, Joint Consumer Advocates, and the West Virginia Consumer Advocate take no position on the instant complaint, but oppose PJM's motion to dismiss the complaint and support the Market Monitor's standing to file an FPA section 206 complaint.⁶⁵ These parties explain

⁵⁹ *Id.* at 3-4.

⁶⁰ *Id.* at 5.

⁶¹ PJM Power Providers Group Answer at 3 (citing, 2017 Hourly Offers Order, 158 FERC ¶ 61,133, at P 69).

⁶² *Id.* at 4-6.

⁶³ Energy Trading Institute Answer at 3-4.

⁶⁴ *Id.* at 4-5. Energy Trading Institute also requests that the Commission revisit Order No. 719 to "build in checks and balances to better protect both the Board and the Market Monitor, such as a mandatory request for proposal when a Market Monitor's contract is approaching expiration." *Id.* at 5.

⁶⁵ OPSI Answer at 2-4; NJBPU Answer at 1-2; West Virginia Consumer Advocate Answer at 1-4.

that the Market Monitor's standing has been litigated in recent proceedings,⁶⁶ and that PJM's motion to dismiss introduces the new argument that the Market Monitor's complaint against PJM causes a conflict of interest because the Market Monitor "is accountable and reports to the PJM Board," and the Board "must oversee *and direct* the Market Monitor."⁶⁷ NJBPU and the West Virginia Consumer Advocate argue that Order No. 719 and the PJM Tariff clearly indicate that the Market Monitor is sufficiently independent from the PJM Board, and that it is disingenuous for PJM to now argue that the Board's role in overseeing the Market Monitor's functions would pose a conflict in any complaint proceeding.⁶⁸ The MISO Independent Market Monitor argues that PJM's call to "revisit" Order No. 719 is unjustified,⁶⁹ and that market monitors are clearly authorized to file complaints under the FPA, the Commission's procedural rules, and relevant Commission precedent.⁷⁰ Similarly, Joint Consumer Advocates argue that the PJM Tariff, Commission precedent, and federal case law provide the Market Monitor with the authority to file a complaint against PJM.⁷¹

2. Comments on PJM and Market Monitoring Unit Governance Generally

34. Although MISO and EEI take no position on the dispute between the PJM Market Monitor and PJM over Tenaska's FCP, they provide comments and some suggestions on the current governance structure between regional transmission organizations (RTOs) and independent system operators (ISO) and their market monitoring units in general. MISO states that the primary market monitoring unit governance principle established in Order No. 719 – that the market monitoring unit reports to the RTO/ISO board, not to management – has provided both flexibility and independence for the market monitor to

⁶⁶ Specifically, these parties note that issues related to Market Monitor complaints are being considered in *PJM Interconnection, L.L.C.*, Docket No. ER16-372-000, and *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, Docket No. EL17-82-000.

⁶⁷ NJBPU Answer at 2 (quoting Motion to Dismiss at 6, emphasis added); West Virginia Consumer Advocate Answer at 2-3; MISO Independent Market Monitor Answer at 1-5.

⁶⁸ NJBPU Answer at 2-4, West Virginia Consumer Advocate Answer at 7-10.

⁶⁹ MISO Independent Market Monitor Answer at 5-7 (citing PJM Motion to Dismiss at 7).

⁷⁰ MISO Independent Market Monitor Answer at 8-12.

⁷¹ Joint Consumer Advocates Answer at 3-9.

be effectively monitoring the market.⁷² Therefore, MISO argues that the Commission does not need to evaluate the market monitoring governance policies established in Order No. 719 in this disputed proceeding.⁷³ EEI also supports the role of market monitors as outlined in the related Commission issuances, including Order No. 2000, a 2005 Policy Statement, and Order No. 719. EEI suggests, however, that, as it has been ten years since the Commission outlined market monitors' role in Order No. 719, "it would be appropriate to begin a dialogue on this issue to ensure that [market monitors are] independently and effectively monitoring the markets."⁷⁴

III. Discussion

A. Procedural Matters

35. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, given their interest in the proceedings, the early stage of the proceedings, and the absence of undue prejudice or delay, we grant the unopposed, late-filed interventions listed above.

36. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept the aforementioned answers because they have provided information that assisted us in our decision-making process.

37. With regard to the Market Monitor's authority to file a complaint against PJM under FPA section 206, the pleadings in this case were filed prior to the Commission's April 2019 Hourly Offers Order, in which the Commission considered and ruled on the position that PJM urges here in its motion to dismiss. In the April 2019 Hourly Offers Order, the Commission explicitly stated that "Attachment M [of the PJM Tariff] permits the [Market Monitor] to file a complaint against PJM regarding a Market Seller's Fuel Cost Policy."⁷⁵ The Commission further explained that:

Attachment M provides that "the Market Monitoring Unit shall review all proposed sell offers for a determination of whether they raise market power

⁷² MISO Comments at 2 and 4.

⁷³ *Id* at 9.

⁷⁴ Attachment A of EEI Comments at 1.

⁷⁵ *PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,084, at P 72 (2019) (April 2019 Hourly Offers Order).

concerns” and “determine whether the level of offer or cost inputs raises market power concerns.”^{76]} The Fuel Cost Policy is closely related to the responsibilities that Attachment M explicitly assigns to the [Market Monitor] because the Fuel Cost Policy is integral to the determination of whether generators have submitted reasonable cost-based offers in the event market power mitigation is required.

Attachment M further provides that “[i]n the event that a market participant determines to use an offer or cost input at a level or value that the Market Monitoring Unit has found to involve a potential exercise of market power, the Market Monitoring Unit *may file a petition or initiate other regulatory proceedings* addressing the issue.”^{77]} Filing a complaint on the Fuel Cost Policy with the Commission is a method of initiating a regulatory proceeding that falls within the language of this provision.⁷⁸

38. The Commission reiterated that finding on rehearing and affirmed that it “interpreted Attachment M to permit the Market Monitor to file a complaint regarding PJM’s acceptance of a Fuel Cost Policy with which the Market Monitor disagrees or a Market Seller’s possible non-compliance with its Fuel Cost Policy, and related penalty assessments by PJM.”⁷⁹

39. Consistent with the April 2019 Hourly Offers Order, we deny PJM’s motion to dismiss because the Market Monitor’s complaint centers on a possible non-compliance with a Market Seller’s Fuel Cost Policy. Further, as the Commission stated in the Order on Rehearing, “[w]e remain unconvinced that the PJM Board’s oversight of the Market Monitor’s budget presents a conflict of interest that could serve as a bar to the Market Monitor’s filing a complaint.”⁸⁰ We find Energy Trading Institute’s request that the Commission revisit Order No. 719 in a separate proceeding and EEI’s request that the

⁷⁶ PJM Tariff, Attachment M, Article IV, section E-1.

⁷⁷ *Id.* (emphasis added).

⁷⁸ April 2019 Hourly Offers Order, 167 FERC ¶ 61,084 at PP 73-74 (footnotes omitted).

⁷⁹ *PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,141, at PP 10, 12 (2019) (Order on Rehearing). In the rehearing order, the Commission also required PJM to remove from its Operating Agreement language that enabled PJM and/or the Market Monitor to refer the question as to whether penalties should be assessed for noncompliance with an FCP to the Commission’s Office of Enforcement “for resolution and determination.” *Id.* P 17.

⁸⁰ Order on Rehearing, 168 FERC ¶ 61,141 at P 14.

Commission begin a dialogue on market monitors' role are beyond the scope of this proceeding.

B. Substantive Matters

40. We deny the complaint and find that PJM acted reasonably in finding that Tenaska acted in accordance with its FCP.

41. PJM's Operating Agreement requires that in "situations where applicable indices or other objective market measures are not sufficiently liquid," FCPs must include alternative measures to the detailed FCP methodology "such as documented quotes for the procurement of natural gas."⁸¹ Tenaska's FCP contained two specific fuel cost calculation methodologies, as noted above, but neither method could be applied on January 6 because the data required for those calculations did not exist. The General Overview section of Tenaska's FCP states that "[u]nder a set of defined market conditions, natural gas costs may be based on independent third-party quotes."⁸² The FCP does not further explain under which "defined market conditions" independent third-party quotes may be used. We find that PJM's interpretation of that phrase to include periods of market disruption with a lack of liquidity, such as those encountered by Tenaska, is reasonable. That is, PJM reasonably found that Tenaska did not violate its FCP by using third-party quotes to develop natural gas costs when a lack of liquidity prevented the use of its more specific fuel cost methodologies. The language in the Operating Agreement further supports the reasonableness of PJM's conclusion that no violation of the FCP took place,⁸³ as the lack of market liquidity is a market condition that permits the use of third-party quotes such as the ICE data provided by Tenaska.

42. The Market Monitor argues that the data provided by Tenaska does not meet the definition of third-party quotes, which the Market Monitor asserts requires a direct interaction between two unaffiliated parties (potential buyer and potential seller). We disagree. The Market Monitor cites no authority for its position, and its interpretation is not supported by the text of either Tenaska's FCP or the Market Monitor's FCP template

⁸¹ PJM Operating Agreement, Schedule 2, section 2.3(a)(iv) ("A Fuel Cost Policy must ... (iv) Account for situations where applicable indices or other objective market measures are not sufficiently liquid by documenting the alternative means actually utilized by the Market Seller to price the applicable fuel used in the determination of its cost-based offers, such as documented quotes for the procurement of natural gas.").

⁸² Tenaska Protest, Exhibit 1 at 1. Of note, neither PJM nor the Market Monitor objected to this provision as being insufficient to satisfy the tariff requirement when they both reviewed, and PJM approved, the FCP. PJM Answer at 14.

⁸³ See *supra* note 81.

for natural gas resources, which say nothing about interaction between buyers and sellers. We agree with PJM and Tenaska that the quotes obtained from ICE represented independent third-party quotes, as contemplated in the FCP that was in place for Tenaska's unit in January 2018 and the PJM Operating Agreement.⁸⁴ We further disagree with the Market Monitor's argument that the ICE quotes used cannot be considered independent third-party quotes simply because the data was obtained by Tenaska's affiliate, Tenaska Marketing. The Market Monitor failed to demonstrate that the offers to sell natural gas provided by Tenaska were made by its affiliate or offered on preferential terms. The ICE quotes supplied by Tenaska would have been available to any market participant on ICE and were verifiable.

43. Finally, Tenaska had a range of potential third-party quotes from which to choose and opted to rely on those on the lower end of the range. The Market Monitor provides no basis for establishing this was an unreasonable choice under the circumstances presented in this case. Thus we conclude that PJM acted reasonably in finding that Tenaska acted in accordance with its FCP. We recognize that illiquid market conditions can present challenges in calculating accurate fuel costs. For this reason, and to prevent future disputes, we encourage Market Sellers, PJM, and the Market Monitor to continue to refine FCPs (including the Market Monitor's template) to clarify processes for determining how a seller will develop its cost to address a wide array of market conditions, including illiquid conditions, consistent with PJM's Operating Agreement requirements.⁸⁵

⁸⁴ As the Market Monitor notes, Tenaska's proposed fuel costs corresponded to a third-party quote available on ICE at the time. Complaint, Confidential Attachment at 7 (“[Tenaska’s] natural gas cost for [Hour 11 through Hour 24] was \$125 per MMBtu. The [Market Monitor] observed an offer at that exact value between 10:22 AM and 10:26 AM EPT for Transco Zone 5 South for next day gas. Other offers between 09:00 AM and 10:25 AM EPT ranged from \$125 to at least \$175 per MMBtu”).

⁸⁵ PJM Operating Agreement, Schedule 2, § 2.3(a)(iv) (FCPs must “[a]ccount for situations where applicable indices or other objective market measures are not sufficiently liquid by documenting the alternative means actually utilized by the Market Seller to price the applicable fuel . . . such as documented quotes for the procurement of natural gas”). We note, as stated above at P 13, that in August 2018 PJM approved a new FCP for Tenaska that (a) described an ICE offer as an independent third-party quote, (b) included the use of the ICE offer when there were no trades on ICE for the applicable hub, and (c) included the use of the most recent absolute high published by Platts in the Gas Daily report.

The Commission orders:

The complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.