

169 FERC ¶ 61,198
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 ON REQUESTS FOR PRIVILEGED TREATMENT

(Issued December 12, 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. The Market Monitor filed material to support its complaint, and PJM and Tenaska Power Services (Tenaska) filed responsive pleadings, record evidence for which they all seek either full or limited privileged treatment. Pursuant to section 388.112(c)(1)(i) of the Commission's regulations,³ we find that release of the majority of the material for which the above-named parties seek privileged treatment is necessary for the Commission to carry out our responsibilities and set forth the reasons for our ruling. As discussed below, we deny the Market Monitor's and PJM's requests for privileged treatment and grant Tenaska's request for limited privileged treatment.⁴

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

² 16 U.S.C. § 824e (2018).

³ 18 C.F.R. § 388.112(c)(1)(i) (2019).

⁴ We will address the merits of the Market Monitor's complaint in a separate order.

I. Background

2. In its complaint, the Market Monitor asks the Commission to direct PJM to find that a Market Seller violated its Fuel Cost Policy⁵ and assess the required penalty.⁶ The Market Monitor filed evidence, for which it seeks privileged treatment, pointing to language in the PJM Markets Protective Order allowing the Market Monitor to designate as privileged “any material which customarily is treated by [a Market] Participant as market sensitive, commercially sensitive or proprietary or material subject to a legal privilege.”⁷ On January 25, 2019, PJM and Tenaska filed public and privileged versions of their responses to the Market Monitor’s complaint. Tenaska attached its January 2018 Fuel Cost Policy (January 2018 FCP) to the privileged version of its response.

3. On November 27, 2019, pursuant to section 388.112(e) of the Commission’s regulations, the Director of the Office of External Affairs issued a letter (November 27, 2019 Letter) providing notice to the Market Monitor, PJM, and Tenaska that the Commission proposes to release the documents for which the above-referenced parties sought privileged treatment.⁸

4. That same day, the Market Monitor filed an objection asserting that the information in the privileged version of its complaint includes details about Tenaska’s Fuel Cost Policy, which explains how Tenaska develops its energy market offers. The Market Monitor contends that such information should not be released because “[t]he confidentiality of offers is core to maintaining competitive markets” and “[r]elease of such information could damage the efficient and competitive operation of PJM markets by facilitating tacit collusion and disseminating substandard fuel cost policy provisions.”⁹ The Market Monitor also maintains the Commission has not explained why releasing the privileged information “is necessary to facilitate the Commission’s ability to rule on the

⁵ The 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(s) for a generation resource. See Operating Agreement, Definitions E-F.

⁶ Complaint at 4.

⁷ *Id.* at 1-2 (citing Attachment B to Complaint, PJM Markets Protective Order, at 1).

⁸ 18 C.F.R. § 388.112(e) (2019).

⁹ Market Monitor Response to November 27, 2019 Letter at 1.

complaint and set forth the reasons for its ruling.”¹⁰ The Market Monitor further states that the Market Seller’s consent to release the documents would not change the harm to the public interest.

5. PJM did not file an objection to release of the information.

6. On December 4, 2019, Tenaska submitted public and privileged versions of its comments on the November 27, 2019 Letter. Tenaska supports the release of all documents in this proceeding, including the majority of the information in its January 2018 FCP.¹¹ Tenaska agrees that public discussion of the information filed as privileged is necessary to facilitate the Commission’s ability to rule on the complaint, and that disclosure will not be prejudicial to any party.¹² Tenaska notes that the dispute in this case revolves around differing interpretations of language in the Market Monitor’s standard Fuel Cost Policy template, which is publicly available on the Market Monitor’s website.¹³

7. Tenaska further states that most of the market information designated as privileged has become stale since the events of this complaint, which took place in January 2018, and it believes that release of the majority of Tenaska’s now-superseded January 2018 FCP will not allow competitors to recreate Tenaska’s offers. However, Tenaska asks the Commission to treat as privileged one section in its January 2018 FCP. That section contains a cost component relating to gas transportation costs, which Tenaska states is still in use in its current Fuel Cost Policy. It asserts that the gas transportation cost component is not relevant to the dispute at issue in the Market Monitor’s complaint, and that its disclosure is not necessary for public understanding of the complaint. Thus, Tenaska supports release of the privileged versions of its pleadings and release of its January 2018 FCP, but with the section regarding its transportation costs redacted.¹⁴

II. Commission Determination

8. We deny the Market Monitor’s and PJM’s request for privileged treatment and grant Tenaska’s request for limited privileged treatment. In order to balance the need for public disclosure for information against the harm that that disclosure could cause, we

¹⁰ Market Monitor Response to November 27, 2019 Letter at 1-2.

¹¹ Tenaska Response to November 27, 2019 Letter (public version) at 1.

¹² *Id.* at 2 (referring to November 27, 2019 Letter at 2).

¹³ *Id.* at 2-3.

¹⁴ *Id.* at 4.

have considered the arguments made by the Market Monitor that such information must remain confidential to prevent anti-competitive behavior and the arguments by Tenaska that the information is stale and no longer being used by Tenaska in its business decisions. Specifically, Tenaska supports the release of all documents filed as privileged in this proceeding, with one exception, including the release of its January 2018 FCP.

9. In this case, the Market Monitor did not redact any specific cost or other data, but instead classified as privileged the entirety of its report detailing the alleged Fuel Cost Policy violation. In support of its request for privileged treatment, the Market Monitor asserts only a general interest in maintaining competitive markets.

10. We disagree with the Market Monitor's claim that release of information filed in this proceeding regarding the Market Seller's Fuel Cost Policy will endanger market competition.¹⁵ While the Fuel Cost Policy details how the Market Seller develops its fuel cost, the Fuel Cost Policy lacks specific information that would be necessary for other competitors to estimate its actual energy offer. The majority of the relevant cost data at issue here is not competitively sensitive information, but information available from a publicly available source. Moreover, these data are no longer current, as the data relate to a specific event that occurred nearly two years ago on January 6, 2018. The Market Monitor has failed to show that disclosure of a Fuel Cost Policy involving public information relating to a two-year old event would reveal competitive information currently useful to competitors.

11. As described above, Tenaska asks the Commission to treat as privileged one section in its January 2018 FCP, relating to gas transportation costs, which Tenaska states is still in use in its current Fuel Cost Policy. We do not decide whether that section would be considered privileged on its merits, but we agree with Tenaska that the information does not relate to the issues in the complaint.

12. We therefore grant Tenaska's request for limited privileged treatment as to the section in its January 2018 FCP regarding gas transportation costs and deny the requests for privileged treatment for the Market Monitor's and PJM's pleadings, for the reasons stated above. Accordingly, we require Tenaska to file, on or before December 16, 2019, a public version of its January 25, 2019 protest including its January 2018 FCP with the relevant section redacted. Pursuant to section 388.112(e) of the Commission's regulations, those documents, as well as Tenaska's December 4, 2019 filing, which Tenaska agrees to release, will be made public no less than five calendar days from the date of this order.

¹⁵ Market Monitor Response to November 27, 2019 Letter at 1.

The Commission orders:

(A) The Market Monitor's and PJM's requests for privileged treatment are hereby denied, and Tenaska's request for limited privileged treatment is hereby granted, as discussed in the body of this order. The relevant documents for which privileged treatment was sought will be placed in the public record of this proceeding no sooner than five calendar days following the issuance of this order, as discussed in the body of this order.

(B) Tenaska is required to file, on or before December 16, 2019, a public version of its January 25, 2019 protest with a redacted version of its January 2018 FCP, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.