

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

Midwest Generation, LLC

)

Docket No. EC13-103-000

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF NESBITT ASSET
RECOVERY SERIES P-1, POWERTON TRUST II,
NESBITT ASSET RECOVERY SERIES J-1 AND JOLIET TRUST II**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure¹ of the Federal Energy Regulatory Commission (the “Commission” or “FERC”), Nesbitt Asset Recovery Series P-1 (f/k/a Powerton Trust I) (“Nesbitt P-1”), Powerton Trust II (“Powerton II”), Nesbitt Asset Recovery Series J-1 (f/k/a Joliet Trust I) (“Nesbitt J-1”), and Joliet Trust II (“Joliet II” and, together with Nesbitt P-1, Powerton II, and Nesbitt J-1, the “Owner-Lessors”)² hereby respectfully move to be allowed to Answer the Motion for Leave to Answer and Answer of Midwest Generation, LLC (“MWG”) submitted on July 1, 2013 in the subject docket (the “Answer”).

I. BACKGROUND

On May 6, 2013, MWG submitted an application (the “Application”) under Section 203(a)(1) of the Federal Power Act (“FPA”),³ seeking expedited consideration to transfer control of two coal-fired electric generating facilities (the “Facilities”) located in Tazwell County and Will County, Illinois. In the Application, MWG, a debtor in ongoing chapter 11 bankruptcy cases pending in the United States Bankruptcy Court for the Northern District of Illinois (the “Bankruptcy Cases”), asked the Commission to authorize its disposal of control over the

¹ 18 C.F.R. §§ 385.212 and 385.213.

² Information about the organization of the Owner-Lessors is provided in their Motion to Intervene, Protest and Request for Rejection or Deferral, filed on Jun. 14, 2013 in the subject docket, at n. 1.

³ 16 U.S.C. § 824b(a)(1).

Facilities. The Application did not identify any entity that is willing and able to accept a transfer of control – or to operate – the Facilities if the Application is approved. On June 14, 2013, the Owner-Lessors protested (the “Protest”)⁴ the Applicant’s unwarranted request for expedited action and respectfully requested that the Commission reject the Application in its entirety, or in the alternative, requested the Commission to defer consideration on the Application until multiple issues that could negatively affect the public interest are resolved.

In its Answer, MWG contends that it was not required to either (a) identify the entity to whom control would be transferred or (b) represent that such entity was willing and able to operate the Facilities. MWG also contends that the Commission’s evaluation of the Application “is limited to analyzing the Merger Policy Statement factors”⁵ as set forth by MWG, and that MWG has provided “more than enough information for Commission to approve the proposed transaction.”⁶ Moreover, MWG claims that “the Protest [is] based on a failure to take action with respect to matters that are largely issues within the Owner-Lessors’ own responsibility and control.”⁷ As set forth herein, the Owner-Lessors disagree with each of these assertions.

II. MOTION FOR LEAVE TO ANSWER

Good cause exists for the Commission to accept this filing because: (i) it provides information the Commission will find useful in rendering a decision on the Application and will ensure a complete record; and (ii) it corrects certain factual misstatements made by MWG in its Answer regarding, among other things, the Owner-Lessors’ ability to assume operational control

⁴ Capitalized terms used but not defined herein have the meanings ascribed to such terms in the Protest.

⁵ Answer at 2.

⁶ Answer at 11.

⁷ Answer at 2.

of the Facilities and the Owner-Lessors' actions to date with respect to the potential transition of the Facilities.

III. ANSWER OF THE OWNER-LESSORS

A. The Owner-Lessors have no obligation to operate the Facilities.

The competition analysis provided by MWG in the Application is founded on the unjustified assumption that the Owner-Lessors will operate the Facilities and sell the electric output into the market identified by MWG. The Application fails to mention that the Owner-Lessors have no obligation to operate the Facilities, whether contractual, statutory or otherwise. The Application's competitive analysis does not evaluate the competitive impact of the transaction proposed by MWG if the Facilities are removed from service, as the Protest explains is the most likely outcome.⁸ For instance, depending on MWG's plans for its other generating facilities in the market, the proposed transaction may (depending on MWG's plan with respect to its Joliet unit 6) contribute to a competitor being removed from the market. None of these matters have been addressed by the Application.

The Answer states that "all of the operational concerns and issues identified . . . can and will be resolved" prior to October 1, 2013 if the Owner-Lessors engage in meaningful transition discussions.⁹ The Owner-Lessors disagree. For the reasons set forth in the Protest, the Owner-Lessors do not believe the Facilities can practically be operated separately and independently from other electric generating units controlled by MWG, including the co-located Joliet unit 6.

⁸ Protest at 20.

⁹ Answer at 14.

B. The uncertainties surrounding the transaction are not within the Owner-Lessors' own control and responsibility.

The Protest noted many uncertainties with respect to the proposed transaction, including who will own and control the Facilities, and whether there will be a transaction at all.¹⁰ The Answer contends that most of the uncertainties surrounding the Facilities' operation are within the Owner-Lessors' responsibility and control.¹¹ The Owner-Lessors disagree. As outlined in the Protest, the Certificate Holders, acting through the Pass-Through Trustee, could assert the right to direct the Lease Indenture Trustee to foreclose on the Owner-Lessors' interests in the Facilities and dispose of the Facilities.¹² Similarly, the necessary filings required by PJM to shut the Facilities down are likewise outside of the Owner-Lessors' control.

The Answer cites *Lake Road Trust* as a relevant example where the Commission has approved a transfer when the structure of the transaction was not yet finalized.¹³ Although, in that case, the structure of the transaction was not yet fully identified, the application filed in *Lake Road Trust* (1) identified the creditors as the owners who were willing to take control of the facilities subsequent to the transfer, and (2) stated that operations would be managed by a third party service provider.¹⁴ Neither of those circumstances is present in MWG's Application. Tellingly, MWG cites to no case where the Commission approved a transfer in the absence of the identification of a transferee who was willing and able to take control of and operate the facility in question.

¹⁰ Protest at 14.

¹¹ Answer at 2 and 7.

¹² Protest at 5

¹³ Answer at 15.

¹⁴ Answer at 15; footnote 25.

C. The uncertainties surrounding the transaction will lead to administrative inefficiency for the Commission.

Despite the uncertainties described above that are outside the control of the Owner-Lessors, the Answer suggests that the Commission should nevertheless approve the Application and simply wait for another Section 203 application to be filed by a yet to be determined entity – *i.e.*, either of the Lease Indenture Trustee, the Pass-Through Trustee and/or the Certificate Holders.¹⁵ It is likely that, even if such subsequent application were approved, another application may have to be filed to allow the Certificate Holders to “dispose of” the Facilities. Indeed, the transaction proposed in the Application is either a hypothetical transaction, which may or may not occur, or the first in a chain of transactions, each of which will be subject to the Commission’s jurisdiction under Section 203. The Commission’s resources would best be served by waiting until a comprehensive transaction with an identified counter-party and a reasonable likelihood of consummation emerges. At the present time, there are no exigent circumstances present that would necessitate consideration, especially not expedited consideration, of the Application. The Answer argues that the Bankruptcy Court’s extension of time “does not render the issue of the potential transfer of the Facilities in any way moot.”¹⁶ The Owner-Lessors are not arguing that the matter is moot; they simply believe it is unripe for decision at the present time.

D. The Answer contains various factual misrepresentations and inaccuracies.

The Answer contains various factual misrepresentations and inaccuracies regarding the actions of the Owner-Lessors, including the bald assertion that the Owner-Lessors have “failed to

¹⁵ Answer at 17.

¹⁶ Answer at 9.

take reasonable steps to prepare for the rejection of the leases.”¹⁷ MWG cannot legitimately dispute that the Owner-Lessors have no obligation to operate the Facilities, nor do they have any obligations to the Commission, PJM, the employees of MWG or any other stakeholders. Despite the fact that the Owner-Lessors have no such obligations, and in contrast to the assertions made in the Answer, the Owner-Lessors have, in fact, engaged in meaningful discussions regarding the potential future operations of the Facilities. More precisely, the Owner-Lessors’ efforts with respect to transition have been frustrated by MWG as follows:

MWG’s Misstatement	Owner-Lessors’ Response
<p>“The lack of any such information is due to the Protestors’ knowing refusal to engage in any meaningful transition/transfer discussions with Midwest Generation – despite its repeated requests.”¹⁸</p>	<p>On April 29, 2013, the Owner-Lessors and their advisors participated on a lengthy call with MWG and its advisors regarding transition issues.</p> <p>On May 10, 2013, on its own accord, the Owner-Lessors’ financial advisor sent an email to MWG’s financial advisor requesting a number of diligence items to be provided by MWG to assist in a potential transition of the Facilities. This email was followed up with a subsequent email on May 14, 2013, including an offer to discuss the requests on a conference call with all parties.</p> <p>On June 3, 2013, the Owner-Lessors and their advisors participated on lengthy calls with MWG and its advisors regarding transition issues.</p>
<p>“Midwest Generation has made repeated and consistent efforts to coordinate a turnover of the Facilities. These efforts have been largely ignored.”¹⁹</p>	<p>On or around May 23, 2013, MWG’s financial advisor provided a timeline for turnover to the advisors for the Owner-Lessors, which timeline indicated a draft of a proposed Management Agreement would be delivered to the Owner-Lessors during the week of May 31, as well as information related to insurance and regulatory agreements.</p> <p>On the June 3, 2013 call, the Owner-Lessors again requested a draft of the proposed Management Agreement. <i>To date, this draft Management Agreement has still not been provided by MWG.</i></p>

¹⁷ Answer at 7.

¹⁸ Answer at 10.

¹⁹ *Id.*

MWG's Misstatement	Owner-Lessors' Response
<p>“Midwest Generation and its advisors have engaged in extensive attempts to open meaningful discussions concerning a potential operational turnover...However, no substantive response to these and other outreach efforts by Midwest Generation has been received.”²⁰</p>	<p>In fact, the Owner-Lessors' advisors contacted MWG's advisors to propose an in-person meeting to be held in Chicago during the week of June 10, 2013 to discuss transition issues. <i>To date, the Owner-Lessors have not heard from MWG or its advisors or received any other outreach efforts.</i></p>
<p>“neither the Owner Lessors not the Indenture Trustee have taken any steps in the bankruptcy case to seek a declaration or other relief with respect to the Facility leases.”²¹</p>	<p>The Owner-Lessors do not bear the burden to seek rulings in the Bankruptcy Court. In any event, the Owner-Lessors may still seek such declaratory relief at any time during the pendency of the Bankruptcy Cases.</p>

IV. CONCLUSION

Accordingly, the Owner-Lessors respectfully request that that the Commission accept this filing in answer to MWG's Answer of July 1, 2013, and grant the relief requested in their Protest of June 14, 2013.

²⁰ Answer at 11, footnote 14.

²¹ Answer at 9.

Respectfully submitted,

Wilmington Trust Company, not in its individual capacity but solely as Trustee for each of Powerton Trust II and Joliet Trust II

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July 22, 2013

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 the subject docket.

Dated this 22nd day of July, 2013.

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