UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Generation, LLC	)	**Docket No. EC13-103-000**

MOTION TO INTERVENE, PROTEST AND REQUEST FOR REJECTION OR DEFERRAL OF NESBITT ASSET RECOVERY SERIES P-1, POWERTON TRUST II, NESBITT ASSET RECOVERY SERIES J-1 AND JOLIET TRUST II

Pursuant to Rules 211 and 214 of the Rules of Practice and Procedure 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")[1] hereby move to intervene and protest the Application of Midwest Generation, LLC ("MWG" or the "Applicant") to transfer control of two coal-fired electric generating facilities located in Tazwell County and Will County, Illinois described below (the "Application"). The Applicant filed the Application with FERC in the above-captioned proceeding on May 6, 2013 and seeks expedited consideration thereof.

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[1] Nesbitt Asset Recovery LLC ("Nesbitt") is a wholly owned, indirect subsidiary of Public Service Enterprise Group Incorporated ("PSEG"). The principal and executive offices of PSEG are located at 80 Park Plaza, Newark, New Jersey 07102. PSEG subsidiaries are engaged in, among other things, the generation of electric energy, and the transmission, distribution and sale of electricity and natural gas through its subsidiaries. Nesbitt is a Delaware limited liability company with series. Nesbitt Asset Recovery LLC Series C1, Nesbitt Asset Recovery LLC Series C2, Nesbitt Asset Recovery LLC Series C3, and Nesbitt Asset Recovery LLC Series C4 are, respectively, the sole beneficiaries of Nesbitt Asset Recovery Series C1 (f/k/a Collins Trust 1), Nesbitt Asset Recovery Series C2 (f/k/a Collins Trust 2), Nesbitt Asset Recovery Series C3 (f/k/a Collins Trust 3) and Nesbitt Asset Recovery Series C4 (f/k/a Collins Trust 4), each a Delaware statutory trust formed to act as the owner and lessor with respect to a gas/oil-fired steam generating unit located in Grundy County, Illinois (the "Collins Facility"). Nesbitt Asset Recovery LLC Series P-1 and Nesbitt Asset Recovery LLC Series J-1 are, respectively, the sole beneficiaries of Nesbitt P-1 and Nesbitt J-1, each a Delaware statutory trust formed to act as the owner and lessor with respect to a coal-fired steam generating unit located, respectively in Pekin ("Powerton") and Joliet ("Joliet"), Illinois.

The Applicant, a debtor in an ongoing Chapter 11 bankruptcy proceeding, asks the Commission to authorize its disposal of control over the electric generating facilities in Illinois. The Owner-Lessors protest the Applicant's unwarranted request for expedited action and respectfully request that the Commission reject the Application in its entirety. In the alternative, the Commission should defer consideration on the Application until multiple threshold transactional, operational, and legal issues implicated by the Application, that could negatively affect the public interest, are resolved.

There are no exigent circumstances present that would necessitate expedited consideration of the Application. The Applicant's repeated contention that the subject facility leases "will be deemed rejected ... on July 1, 2013 by operation of law under the Bankruptcy Code" is simply wrong. The questions of *if and when* the leases can be rejected under bankruptcy law will be contested and fully litigated in the Bankruptcy Court. This legal dispute is unlikely to be resolved by July 1, 2013. Until that litigation is finally resolved, no rejection will occur.

Moreover, the Commission cannot resolve the Application on the merits (expedited or otherwise) until the Commission knows whether the proposed counterparty (when finally identified) is qualified and willing to take control of the subject facilities. The Applicant has not identified such a counterparty. In fact, the Applicant acknowledges that it submitted the Application unilaterally and that Applicant "makes no representation with respect to the satisfaction by the Owner-Lessors of any obligations they may have under the FPA."[2] The Applicant also has not cited any case in which the Commission approved a transaction involving a change in operating control of Commission-jurisdictional facilities (like the one the Applicant

[2] Application at 12.

proposes) in which the identity of the transferee was unknown or where the transferee was unprepared or unqualified to take control of generating facilities. As discussed herein, until the Commission knows who would take control of the subject facilities, there is no transaction for the Commission to evaluate or approve.

I. BACKGROUND

A. Owner-Lessors

1. Each of the Owner-Lessors is a Delaware statutory trust holding title to a passive, undivided interest in certain assets for the benefit of an owner participant, as more fully described below. Pursuant to "sale-leaseback" arrangements, the Owner-Lessors are passive owners of certain leased facilities and have no control or operational responsibilities with respect thereto. Each lease is a triple net lease pursuant to which all operational rights and obligations are undertaken by MWG.

2. Each of the Owner-Lessors is an "exempt wholesale generator" within the meaning of Section 1262 of the Public Utility Holding Company Act of 2005[3] and the Commission's implementing regulations.[4] None of the Owner-Lessors has any tariffs or rate schedules on file with the Commission.[5] Furthermore, none of the Owner-Lessors has applied for or received authorization from the Commission to engage in wholesale sales of electric energy, capacity or ancillary services at market-based rates, and the associated regulatory

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[3] *See* 42 U.S.C. § 16451(6).

[4] *See* 18 C.F.R. § 366.1. *See also Powerton Trust I*, Letter Order, 92 FERC ¶ 62,049 (2000); *Notice of Change in Corporate Name from Powerton Trust I to Nesbitt Asset Recovery, Series P-1*, Docket No. EG00-164-000 (Nov. 13, 2003); *Powerton Trust II*, Letter Order, 92 FERC ¶ 62,048 (2000); *Joliet Trust I*, Letter Order, 92 FERC ¶ 62,053 (2000); *Notice of Change in Corporate Name from Joliet Trust I to Nesbitt Asset Recovery, Series J-1*, Docket No. EG00-160-000 (Nov. 13, 2003); *Joliet Trust II*, Letter Order, 92 FERC ¶ 62,052 (2000).

[5] Applicant has stated that following the proposed transaction, it will retain its market-based rate tariffs. Application at 4.

waivers and blanket authorizations that are customarily granted by the Commission in connection with such market-based sales (collectively, "MBR Authority").[6]

B. The Sale-Leaseback Transaction

3. On June 26, 2000, pursuant to Section 203 of the Federal Power Act (the "FPA") and Part 33 of the Commission's regulations,[7] the Commission authorized, among other things: (i) the sale by the Applicant to the Owner-Lessors of certain FERC-jurisdictional facilities associated with the Powerton Station, a 1,538 MW coal-fired electric generating facility located in Tazwell County, Illinois (the "Powerton Facility"), and Units 7 and 8, comprising 1,036 MW, of the Joliet Station, a 1,358 MW coal-fired electric generating facility located Will County, Illinois ("Joliet 7 and 8" and, together with the Powerton Facility, the "PoJo Facilities"); and (ii) the lease of the PoJo Facilities back to the Applicant (the "Sale-Leaseback").[8] In the Sale-Leaseback, the Applicant sold the PoJo Facilities, but not the land, to the Owner-Lessors. The Owner-Lessors leased the PoJo Facilities back to the Applicant pursuant to four facility leases (collectively, the "PoJo Leases"). The leases for the Powerton Facility expire on May 24, 2034, and the leases for Joliet 7 and 8 expire on August 24, 2030.

4. The Owner-Lessors funded the purchase of the PoJo Facilities with (i) an equity contribution from the Owner Participants (as defined below) and (ii) proceeds from the issuance and sale of promissory notes (the "Lessor Notes") to pass-through trusts, which in turn issued pass-through trust certificates (the "Certificates") to investor-certificate holders (such holders,

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6 The Applicant suggests that the Commission can ignore these facts because "the Commission has the authority to impose such conditions as it may determine are needed to ensure that such assumption [by Owner-Lessors] is consistent with the public interest." Application at 12.

7 *See* 18 C.F.R. Part 33.

8 91 FERC ¶ 62,223 (2000). The explanation of the Sale-Leaseback is a simplified description of the transaction for background purposes only. The Owner-Lessors reserve all rights they have with respect to the transaction.

the "Certificate Holders") to fund the purchase of the Lessor Notes. The Lessor Notes are held for the benefit of the Certificate Holders in pass-through trusts for which the trustee is The Bank of New York Mellon (f/k/a The Bank of New York), as successor to the United States Trust Company of New York (in such capacity, the "Pass-Through Trustee"). In addition, in order to secure its obligations under the Lessor Notes issued by it, each Owner-Lessor has pledged and mortgaged all of its assets (including its interest in the Facilities) to The Bank of New York Mellon (f/k/a The Bank of New York), as successor to the United States Trust Company of New York, as trustee for the benefit of the holders of the Lessor Notes (in such capacity, the "Lease Indenture Trustee").

5. Pursuant to the Sale-Leaseback, the Owner-Lessors are passive owners of the PoJo Facilities and have no control or operational responsibilities for the PoJo Facilities. Nesbitt P-1 holds its passive, undivided interests for the benefit of Nesbitt Asset Recovery Series P-1 LLC; Powerton II holds its passive, undivided interests for the benefit of Powerton Generation II, LLC; Nesbitt J-1 holds its passive, undivided interests for the benefit of Nesbitt Asset Recovery Series J-1 LLC; and Joliet II holds its passive, undivided interests for the benefit of Joliet Generation II, LLC (such beneficiaries collectively, the "Owner Participants"). Rent is presently used by the Owner-Lessors to support principal and interest payments on the Lessor Notes, which payments are passed through to the Certificate Holders. If the Owner-Lessors do not receive rent payments (and thus are unable to remit such payments to the Certificate Holders), the Certificate Holders have the contractual ability, under certain circumstances, to direct the Pass-Through Trustee to direct the Lease Indenture Trustee to foreclose on and dispose of, or take control of, the PoJo Facilities.

C. The Bankruptcy Cases

6. On December 17, 2012 (the "Petition Date"), Edison Mission Energy ("EME") and the Applicant commenced voluntary chapter 11 bankruptcy cases, captioned as *In re Edison Mission Energy et al.*, Chapter 11 Case No. 12-49219 (JPC) (Jointly Administered) (Bankr. N.D. Ill. Dec. 17, 2012) (the "Bankruptcy Cases"). The Bankruptcy Cases are pending before Judge Cox, of the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division (the "Bankruptcy Court").

7. On April 10, 2013, upon the request of EME and its debtor affiliates (collectively, the "Debtors"), the Bankruptcy Court entered an order (the "Real Property Lease Extension Order") extending the time for the Debtors to assume or reject their unexpired leases of nonresidential real property related to the PoJo Facilities to July 1, 2013.[9] The Real Property Lease Extension Order does not impose any deadline for the Debtors to assume or reject leases other than nonresidential real property leases. But it also expressly preserves the parties' ability to litigate whether the PoJo Leases are "nonresidential real property." In particular, the Real Property Lease Extension Order provides that "[n]othing in the [] Order shall be deemed or construed as [] an admission with respect to whether any of the Debtors' contracts or leases is an unexpired lease of nonresidential ***real property*** within the meaning of section 365(d) of the Bankruptcy Code." (emphasis added).[10]

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[9] *See* Order Extending the Time Within Which the Debtors Must Assume or Reject Unexpired Leases of Nonresidential Real Property, *In re Edison Mission Energy*, Case No. 12-49219 (JPC) (Bankr. N.D. Ill. Apr. 10, 2013). The Owner-Lessors continue to reserve all rights with respect to the characterization of the PoJo Leases as leases of real property or personal property.

[10] Id. at ¶ 5.

8. On June 10, 2013, the Debtors filed a motion (the "Conditional Rejection Motion")[11] with the Bankruptcy Court seeking, among other things, (i) a conditional extension of the deadline to assume or reject the PoJo Leases on specific terms and conditions, or (ii) in the alternative, authority to reject the PoJo Leases. A hearing before the Bankruptcy Court to consider the relief sought in the Conditional Rejection Motion is scheduled on June 27, 2013, and the Debtors established an objection deadline of June 25, 2013.

9. As set forth below, the Bankruptcy Court has not yet ruled on the Conditional Rejection Motion and, to the extent the Debtors seek to reject the PoJo Leases, it is unlikely such motion will be resolved in an expeditious matter. Rather, the Owner-Lessors believe that such a contested matter would necessarily be the subject of extensive litigation. Thus, the Applicant was incorrect and misleading when it represented to the Commission that the leases "will be deemed rejected on July 1, 2013 by operation of law."[12]

II. MOTION TO INTERVENE

10. The Owner-Lessors hereby move to intervene and obtain party status in the above-captioned proceeding. The Owner-Lessors hold legal title to the jurisdictional facilities at issue in this proceeding, will be directly affected by the outcome of this proceeding, and have unique interests that cannot be adequately represented by any other party. Accordingly, consistent with FERC Rule 214, it is in the public interest for the Owner-Lessors to be permitted to intervene in this proceeding with the full rights of a party.

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[11] *See* Debtors' Motion for Entry of Order (I) Extending Time to Assume or Reject Powerton and Joliet Facility Leases and Related Agreements or, Alternatively, (II) Authorizing Rejection of Powerton and Joliet Facility Leases and Related Agreements, *In re Edison Mission Energy*, Case No. 12-49219 (JPC) (Bankr. N.D. Ill. June 10, 2013).

[12] Application at 2.

III. PROTEST AND REQUEST FOR REJECTION OR, IN THE ALTERNATIVE, DEFERRAL OF THE APPLICATION

11. The Commission should reject outright or, at a minimum, defer consideration of the Application because of the multiple uncertainties identified herein, concerning the proposed transaction, including – most significantly – the Applicant's failure to identify who will be qualified and willing to assume control of the PoJo Facilities.

12. Section 203(a)(4) of the FPA expressly provides that the Commission will approve a proposed disposition, only if it finds that the proposed transaction "will be consistent with the public interest."[13] The proposed transaction here is not consistent with the public interest because, among other things, such transaction: (i) fails to identify a counter-party who is both qualified and willing to assume the role of owner and operator of the PoJo Facilities; (ii) leaves uncertain the continued ability of the PoJo Facilities to operate; and (iii) may raise concerns relating to compliance with the rules and protocols of the PJM Interconnection, L.L.C. regional transmission organization ("PJM") and the North American Electric Reliability Corporation ("NERC").[14]

A. The Commission Should Reject Applicant's Request for Expedited Review

i. The Applicant's Request for Expedited Review of the Application is Not Appropriate

13. Section 33.11 of FERC's Rules of Practice and Procedure[15] provides for expedited consideration of applications under FPA Section 203 in limited circumstances that are not present here. *First*, proposed transactions that are contested are not subject to expedited

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13 16 U.S.C. § 824b(a)(4).

14 Notably, the independent market monitor for PJM has filed a motion seeking to intervene with respect to the Application. *See* Motion to Intervene of Monitoring Analytics, LLC, Docket No. EC13-103-000 (May 16, 2013).

15 18 C.F.R. § 33.11.

review.[16] The Owner-Lessors hereby contest the proposed transaction set forth in the Application. *Second*, proposed transactions that require an Appendix A analysis (*i.e.*, the anti-competition analysis required by FERC)[17] generally are not subject to expedited review.[18] Here, the Applicant submitted an extensive (although deficient) Appendix A analysis with the Application.[19]

14. Expedited review is also inappropriate here because (i) the Applicant's assertion that the PoJo Leases will be "automatically rejected" on July 1, 2013 is simply wrong, and (ii) the Application describes a proposed transaction that would, among other things: (A) transfer control of jurisdictional facilities to transferees that either do not wish to exercise, or may not have the right or ability to exercise, control and operating authority over the facilities; (B) raise potential operational and reliability issues; and (C) raise uncertainty over whether the proposed transferees (*i.e.*, the Owner-Lessors) will ultimately become the actual transferees, in light of the Certificate Holders' potential ability to foreclose upon the Owner-Lessors' interest in the PoJo Facilities. Expedited review of the Application in all of these circumstances is inappropriate and unjustified.

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16 18 C.F.R. §§ 33.11(b) and (c).

17 Specifically, FERC's Appendix A horizontal competition analysis outlines the following five-step analysis: (1) assess whether the merger would significantly increase concentration; (2) assess whether the merger could result in adverse competitive effects; (3) assess whether market entry could mitigate the adverse effects of the merger; (4) assess whether the merger will result in efficiency gains not achievable by other means; and (5) assess whether, absent the merger, either party would likely fail, causing its assets to exit the market. *See Inquiry Concerning the Comm'n's Merger Policy Statement Under the Federal Power Act*, FERC Stats. & Regs. ¶ 31,044 (1996), *reh'g denied*, 79 FERC ¶ 61,321 (1997); Order No. 642.

18 18 C.F.R. § 33.11(c)(2).

19 *See* Affidavit and Exhibits of Julie R. Solomon, submitted with the Application as Attachment 3.

ii. Expedited Review is Unnecessary and Premature

15. The Applicant's request for expedited consideration of the Application is also inappropriate in light of the multiple threshold legal questions the Bankruptcy Court must decide with respect to the PoJo Facilities before consideration of the Application becomes appropriate.

16. *First*, actual rejection of the PoJo leases in the Bankruptcy Court is a prerequisite for the proposed transaction. A chapter 11 debtor's decision to assume or reject an unexpired lease is subject to Bankruptcy Court approval, following scrutiny by the debtor's creditors and other parties in interest. *See* 11 U.S.C. § 365(a) (providing that a debtor-in-possession may, "***subject to the court's approval***," assume or reject an unexpired lease) (emphasis added). Courts apply a "business judgment" standard to determine the propriety of a debtor in possession's decision to assume or reject a lease. *See*, *e.g.*, *In re UAL Corp.*, 635 F.3d 312, 319 (7th Cir. 2011) (stating that a bankruptcy court is charged with reviewing a debtor's business judgment with respect to a proposed assumption or rejection); *see also Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993) (finding that a bankruptcy court should examine the contract and surrounding circumstances and apply the business judgment test to determine if assumption or rejection would be beneficial to the estate); *In re Gucci*, 193 B.R. 411, 415 (S.D.N.Y. 1996) (applying business judgment test in approving debtors' assumption of a contract); *In re Old Car Co LLC*, 406 B.R. 180, 193 (Bankr. S.D.N.Y. 2009) (applying business judgment test to debtors' decision to reject certain contracts). Notwithstanding the Debtors' filing of the Conditional Rejection Motion, it is far from certain that the Bankruptcy Court will approve MWG's request to reject the PoJo Leases under the business judgment rule. Indeed, various parties in interest in the Bankruptcy Cases, including the Owner-Lessors, may object to the Conditional Rejection Motion.

17. *Second*, contrary to the Applicant's statements in the Application, the deadline for the Debtors to assume or reject the PoJo Leases may change. The Applicant is misleading when it represents that the PoJo Leases will be automatically rejected by operation of law on July 1, 2013. The Bankruptcy Court set that deadline in connection with a hearing on a request to extend the deadline for unexpired leases of nonresidential real property, but the Bankruptcy Court has not yet determined whether the PoJo Leases are, in fact, leases of *real property* (as opposed to personal property). The Bankruptcy Court's order expressly preserved parties' ability to litigate whether the PoJo Leases are in fact, leases of real property. This issue will be contested in the Bankruptcy Court and certainly will not be resolved within the expedited timeframe requested in the Application. Determination of whether the PoJo Leases are leases of real property, and thereby subject to section 365(d)(4) of the Bankruptcy Code, is a threshold legal issue that must be resolved by the Bankruptcy Court.

18. Indeed, in nearly every bankruptcy case involving a leveraged lease structure similar to the Sale Leaseback transaction (some of which the Commission may be familiar with), the complex issue of whether the subject leases were leases of real property was the subject of extensive and protracted litigation. *See*, *e.g.*, Complaint, *U.S. Bank National Association. v. Dynegy Holdings, LLC*, *Dynegy Roseton, L.L.C., and Dynegy Danskammer, L.L.C. (In re Dynegy Holdings, LLC)*, Adv. No. 11-09083 (CGM) (Bankr. S.D.N.Y. Nov. 11, 2011) (indenture trustee for pass-through certificates commenced adversary proceeding seeking, among other things, declaratory judgment that the subject leases were not leases of real property; following eight months of extensive litigation, adversary proceeding was ultimately resolved consensually); *USGen New England, Inc. v. Bear Swamp Generating Trust No. 1 LLC, et al. (In re USGen New England, Inc.)*, Adv. No. 04-01001 (PM) (Bankr. D. Md. Jan. 2, 2004) (debtor

commenced adversary proceeding seeking, among other things, declaratory judgment that the subject leases were leases of real property; following eighteen months of extensive litigation, adversary proceeding was ultimately resolved consensually as part of chapter 11 plan negotiations).

19. The July 1, 2013 deadline also may be subject to further extensions by the Bankruptcy Court upon the consent of the Owner-Lessors.[20] In fact, as described above, the Debtors have requested such an extension, and that request will be the subject of a hearing before the Bankruptcy Court that commences on June 27, 2013, and may be continued from time to time.

20. In sum, there are ongoing proceedings before the Bankruptcy Court with respect to the Debtors' decision to assume or reject the PoJo Leases, and the Applicant's statement that the PoJo Leases are automatically rejected on July 1, 2013 by operation of law is incorrect. As a result, the Applicant's request for expedited review of the Application should be denied.

B. The Commission Should Reject Outright or, at a Minimum, Defer Consideration of the Application

21. Although the Applicant portrays the proposed transaction as a simple rejection of the four PoJo Leases by operation of law, resulting in possession of the PoJo Facilities automatically reverting to the respective Owner-Lessor,[21] the situation is, in reality, anything but simple. As discussed below, the proposed transaction is subject to multiple uncertainties. The Applicant has identified the transferee as the Owner-Lessors, but this may not be the case. In addition, the Applicant fails to identify who will have operational control of the PoJo Facilities

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[20] *See* 11 U.S.C. § 365(d)(4)(B)(ii) ("If the court grants an extension under clause (i) [applicable here], the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.")

[21] *See* Application at 2.

and how numerous issues relating to the operation of the PoJo Facilities will be resolved if a transfer actually occurs.

i. Failure to Identify Transferee

22. As described above and by the Applicant (*see* Application at 8), the Sale-Leaseback was financed in large part through funds obtained from the Certificate Holders. To protect their interests, the Certificate Holders have the right, under certain circumstances and subject to the provisions and limitations of the applicable transaction documents, to take control of the PoJo Facilities. In such circumstances, the Certificate Holders, and not the Owner-Lessors, could be the parties that assume control of the PoJo Facilities if the PoJo Leases are rejected, and the Certificate Holders, rather than the Owner-Lessors, could be the parties that would decide whether to dispose of the PoJo Facilities or to operate them. The Application includes no analysis, as is required by Part 33 of the Commission's regulations,[22] of the Certificate Holders' assumption of control of the PoJo Facilities. The Application's Appendix A analysis pertains only to the Owner-Lessors – the energy holdings of the Certificate Holders and their affiliates are never discussed.

23. The Application states that:

> The Owner-Lessors have not agreed to join in the Application and therefore the Application is being submitted unilaterally. The unilateral submission of this Application does not alter the Commission's analysis of the Transaction. The Commission has previously processed (and approved) FPA section 203 applications for approval of similar transactions under its normal procedures without making any changes or allowances for the fact that there was no agreement among the applicant and other relevant entities governing the proposed transfer of control.

Application at 11.

[22] 18 C.F.R. Part 33.

24. However, this proceeding is complicated by more than a lack of agreement among the admittedly relevant entities. The two cases cited by the Applicant (*Exelon Corp* and *Kansas City Power & Light Co*.) in which the Commission approved unilateral FPA Section 203 applications are inapposite. These cases involved hostile corporate takeovers and not an ongoing bankruptcy case with many unresolved issues. Neither case involved: (i) uncertainty regarding who (among potential transferees) ultimately would be found (by the court) to be entitled to take control; or (ii) potential transferees who were then unwilling or unqualified to assume control of the facilities. In the cited cases, although there was uncertainty on the issue of whether the proposed transaction would actually occur, the parties to the proposed transaction were known and the proposed acquirer was willing to assume the necessary responsibilities. Moreover, unlike these cases, the approval requested by the Applicant here would involve transfer of operational control over jurisdictional facilities to passive owners that are not prepared to assume such control. The transaction may well not occur as the Applicant has described; instead, to the extent the transaction occurs at all, it could, depending on decisions in the bankruptcy case, involve other parties that are not even identified in the Application (either the Certificate Holders or some other entity chosen by the Certificate Holders).

25. In sum, there is too much uncertainty concerning who will own and control the PoJo Facilities (if the PoJo Leases are rejected) to allow the Commission to make an informed decision on the transaction. Given the high level of uncertainty surrounding the transaction (not only whether a transaction will actually occur but also regarding its final form), the Commission should not waste its limited resources providing an advisory opinion on a transaction that is not ripe for analysis.

ii. The Application Fails to Identify Who Will Operate the Facilities

26. Approval of the transaction would require the Commission to consider the ability of the identified transferee to operate the jurisdictional facilities consistent with the public interest. But the Application states that "Applicant makes no representation with respect to the satisfaction by the [Owner-Lessors] of any obligations they may have under the FPA . . . ."[23] As noted, the Owner-Lessors have not applied for, much less received, MBR Authority. The Application obliquely suggests that the Commission can somehow resolve this problem by imposing whatever conditions upon the recipient "as it may determine are needed to ensure that [the assumption of control over the PoJo Facilities by the Owner-Lessors] is consistent with the public interest."[24]

27. It is unclear what the Applicant is contemplating in respect of the Commission imposing conditions. The Owner-Lessors have reached no understanding – formal or informal – with the Applicant about who will assume operational control of the PoJo Facilities in the event of a Bankruptcy Court-approved lease rejection. The Owner-Lessors themselves lack the required authorization under Section 205 of the FPA to sell the electric output of the PoJo Facilities into wholesale markets, and lack the technical expertise to operate them. The Commission cannot impose conditions that would change those facts. Moreover, a transfer of operational control by the Owner-Lessors to another party likely would require a separate Section 203 analysis and approval.

28. Additionally, as described above, under certain circumstances the Certificate Holders may exercise certain foreclosure rights against the PoJo Facilities. In that scenario, the Owner-Lessors may not be the entities responsible for the PoJo Facilities.

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[23] Application at 12.

[24] *Id*.

29. Operational control cannot transfer into a vacuum. Yet, as a practical matter, that is precisely what the Application proposes. The Applicant ignores the many uncertainties created by the Bankruptcy Cases, including the uncertainty regarding who will have post-transaction operational control of the PoJo Facilities, and instead blithely, and incorrectly, states that such control will "revert" to the Owner-Lessors, who have never had such control, who are not in a position to assume operational responsibility, and who are not obligated by any agreement or understanding to do so.

30. The Applicant has failed to provide the Commission with critical information that is necessary for consideration of the Application. To approve the proposed transaction, the Commission would need information regarding the putative operator of the PoJo Facilities. The Applicant concedes that it does not have such information. Indeed, without any certainty about who the transferee would be, there can be no certainty about who the putative operator would be. Nonetheless, even under the Applicant's erroneous assumption that the PoJo Facilities would in all circumstances be transferred to the Owner-Lessors, the Applicant admittedly has failed to provide any information about the Owner-Lessor's ability to operate the PoJo Facilities.

31. This lack of information is fatal to the Application. In *Central Mississippi Generating Co., LLC*,[25] passive owners, acting through a trustee and exercising rights similar to those of the Certificate Holders here, formed Central Mississippi Generating Company, LLC ("Central Mississippi") to take ownership of generation and related facilities after the lessees under a sale/leaseback arrangement defaulted on their leases. In response, the Commission staff requested further information, in order to determine whether a transfer of ownership and/or

[25] *Central Mississippi Generating Co., LLC*, Application for Authorization Under Section 203 of the Federal Power Act and Disclaimer of Jurisdiction; Docket Nos. EC04-16-000 and EL04-17-000 (Nov. 7, 2003).

operational control was consistent with the public interest and which entities would (and would not) become public utilities as a result of the transaction.

32. In its deficiency letter, the Commission staff in *Central Mississippi* noted that the agreements provided with the application appeared to be only the original sale and leaseback agreements and did not include agreements regarding the relationships and contractual responsibilities between the passive owners, the trustee, Central Mississippi, and the putative manager and operator of the facilities. Such agreements also are absent from the instant Application. Specifically, the *Central Mississippi* staff required: (i) descriptions of the responsibilities and functions of the putative manager; (ii) a copy of a draft or executed agreement with the manager; (iii) a description of the services to be provided by the putative operator, the post-transaction role of the owner-lessors and the owner-participants; (iv) an explanation of the relationship between the trustee, on the one hand, and each of the passive owners and Central Mississippi, on the other, and how such relationships might affect operation of the facilities and performance of jurisdictional activities; and (v) copies of any executed or draft agreements between the trustee, on the one hand, and each of the passive owners and Central Mississippi, on the other. The staff letter cautioned that "before . . . operational control may be transferred, information responsive to Part 33 filing requirements must be provided for [the putative operator], or any other entity to which Central Mississippi may transfer operational control of the facilities."[26]

33. The Applicant has provided none of this information here. Indeed, because of the state of the Bankruptcy Cases, the Applicant cannot even identify the transferee, much less

[26] Staff Letter, *Central Mississippi Generating Co., LLC* at 3.

provide the requisite information regarding post-transfer operation of the facilities. Therefore, the Commission should reject the Application.

iii. The Application Fails to Address Crucial Operational and Permitting Issues, Including How Joliet Units 7 & 8 Will Be Able to Operate Separately from Facilities with Which They Are Currently Jointly Operated

34. There are numerous operational difficulties that could result from the proposed transaction, none of which have been addressed in the Application. First, the PoJo Leases under the Sale-Leaseback cover only two of the generating units at the Joliet facility (i.e., Joliet 7 and 8). In the Application, the Applicant states that it will retain ownership and control of a third unit at such facility (unit 6). *See* Application at 4. At the present time, the Joliet 7 and 8 units, which are the subjects of the Application, cannot be segregated and operated separately (from unit 6) without the involvement of the Applicant. By way of example, all coal deliveries and coal handling occur at unit 6, and the Applicant's ash disposal runs through unit 6 as well. Without alternative arrangements for coal deliveries and ash disposal, Joliet 7 and 8 cannot operate. The Applicant has not addressed this issue at all.

35. For reliable operation of Joliet 7 and 8 to continue, the Applicant and any future operator of those units must agree on how to jointly maintain and use the facilities' integrated systems, or, alternatively, to separate these systems so that the units can be separately operated. To accomplish this, the parties must perform due diligence regarding operating procedures, processes, and personnel expertise and reach an understanding about how separation of facilities would work.

36. Second, the Applicant is the permittee on all major operating permits for the PoJo Facilities. The Owner-Lessors hold no operating permits. Pursuant to Illinois law, the transfer of certain of those permits, including the Title V Operating Permits for the PoJo Facilities,

requires the consent of the Illinois Environmental Protection Agency ("IEPA"). The Owner-Lessors are not aware of any filing having been made with the IEPA to transfer such permits to the Owner-Lessors to permit the lawful operation of the PoJo Facilities. Given that the IEPA has up to sixty (60) days to respond to a request for a transfer of a Title V Operating Permit, it would appear highly unlikely that any transferee would be in a position to operate the PoJo Facilities within the period requested for Commission action by the Applicant.

37. Third, the Applicant is subject to the Illinois Combined Pollutant Standard ("CPS"), 35 Ill. Adm, Code 225.291-299. Pursuant to the CPS, the Applicant's emission limits for sulfur dioxide and nitrogen oxide are measured on a "fleet-wide" basis – i.e., the PoJo Facilities are aggregated with other Applicant-owned and controlled entities within the State of Illinois for the purpose of determining compliance. There have been no meaningful discussions between the Applicant and the Owner-Lessors, or, to the Owner-Lessors' knowledge, any other potential transferee or the Illinois Pollution Control Board, to disaggregate the emissions limits among the various assets that form part of the Applicant's fleet. Absent such an arrangement, no transferred asset could securely operate without potentially being in violation of emissions limits because the transferee would have no control over the operation of other assets in the Applicant's fleet. The Applicant and whomever takes over the PoJo Facilities will need to address the foregoing permit transfers and emissions limits. This will require additional due diligence on behalf of a potential transferee as well as cooperation from the appropriate regulatory agencies – none of which, as a practical matter, can be assumed to occur within the time of the requested Commission action.

38. Finally, because the Owner-Lessors likely would not be able to obtain all necessary permits and governmental authorizations to operate the PoJo Facilities, if the

Applicant were permitted to "toss the keys" to the Owner-Lessors on July 1, the Owner-Lessors likely would have to shut down operations at the PoJo Facilities during the summer peak load period which could inure to the Applicant's benefit through the removal of some 2,500 MW from the grid while the Applicant would be free to continue to operate its remaining fleet. Such a shut down also would appear to conflict with the PJM rules applicable to "Generator Deactivations," which require no less than 90 days advance notice, in writing, to the PJM Generation Manager.[27] Upon information and belief, the Applicant has not submitted any such generator deactivation notice to PJM.

39. The Commission cannot approve the Application without resolution of these operational and permitting issues. Such resolution is obviously important to the public interest, because, without an agreement on such issues, the Applicant (which would remain under the jurisdiction of the Bankruptcy Court) could control key inputs to Joliet 7 and 8 (*e.g.*, fuel supplies) and could cut off the future operator of the units from those inputs. This would prevent the reliable operation of the units and deprive the public of power generated by them. Further, the Applicant could operate its other fleet assets in a manner which would make use of the fleet-wide emission limits and, in turn, limit the operations of the PoJo Facilities. Finally, because the applicable permits necessary for operations have not yet been transferred, the PoJo Facilities may need to shut down during the peak summer period to the detriment of consumers while potentially providing additional opportunities to the Applicant. Prior to approving any transfer of the PoJo Facilities, the Commission should allow sufficient time for the parties to perform due diligence and attempt to reach mutually acceptable agreements on operational and permitting issues. In the absence of such resolution, the Application cannot be approved.

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[27] *See* PJM Manual 14D: Generator Operational Requirements, Revision 23, April 1, 2013, at Section 9.1.1, "Generator Deactivation Request."

CONCLUSION

40. The significant uncertainties regarding the identity of the transferee and the putative post-transfer operator of the PoJo Facilities, in addition to the uncertainties regarding the ability of any such operator to operate the PoJo Facilities reliably and consistent with the public interest, support rejection of the Application at this time. Accordingly, The Owner-Lessors respectfully request that that the Commission: (a) permit their intervention with full party status; (b) reject the Applicant's request for expedited action; and (c) deny the Application entirely. The Owner-Lessors further request that, should the Commission allow the Application to be re-submitted in the future, the Applicant be required to submit sufficient information for the Commission and all interested parties to evaluate it. In the alternative, the Owner-Lessors request that the Commission defer consideration of the Application until multiple threshold transactional, operational, and legal issues implicated by the Application, that could negatively affect the public interest, are resolved.

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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing document upon each party person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 14th day of June, 2013.

By: /s/ James C. Liles

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