

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 14-1297-EL-SSO
Illuminating Company and The Toledo)	
Edison Company for Authority to Provide a)	
Standard Service Offer Pursuant to R.C. §)	
4928.143 in the Form of an Electric Security)	
Plan.)	
)	

**REPLY TO MEMORANDUM CONTRA
OF MONITORING ANALYTICS, LLC**

Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (“Market Monitor”), files this reply to memorandum contra, filed on October 15, 2014 by the Applicants, referred to hereafter as “FirstEnergy,” pursuant to Ohio Admin. Code § 4901-1-12(B)(2).¹ FirstEnergy objects on the basis that the Market Monitor has failed to satisfy the statutory requirements for intervention in this proceeding. The Market Monitor has complied in all material respects with the requirement for seeking leave to intervene set forth in R.C. 4903.221.

¹ On October 16, 2014, AEP Ohio registered its opposition to the Market Monitor’s Motion to Intervene, for the same reasons discussed in FirstEnergy’s memorandum contra.

I. REPLY

A. The Market Monitor Has Standing.

In *Toledo Coalition for Safe Energy*, the Supreme Court of Ohio identified factors which are legally significant in evaluating the Commission's discretionary decisions on permissive intervention. The critical factors include: (1) the nature and extent of the prospective intervenor's interest; (2) the legal position advanced by the prospective intervenor and its probable relation to the merits of the case; (3) whether the prospective intervenor's interests are adequately represented by other parties; (4) whether intervention will prolong or unduly delay the case; and (5) whether the party seeking intervention will significantly contribute to full development and equitable resolution of the underlying factual issues in the case.²

The Market Monitor performs a public interest function that includes monitoring the PJM markets to detect and deter the potential exercise of market power as well as recommending market design changes to increase competition.³ The Market Monitor is frequently involved in state proceedings that raise market power or competition issues.⁴

² See *Toledo Coalition for Safe Energy v. Public Utilities Com.*, 69 Ohio St. 2d 559 (Ohio 1982); see also O.A.C. 4901-1-11(B)(1)-(5); R.C.4903.221(B)(1)-(4).

³ PJM Open Access Transmission Tariff (OATT) Attachment M §§ I, IV.

⁴ See *In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction*, D.C. P.U.C. Formal Case No. 1119, (Filed 6/18/2014); see also *In The Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc.*, NJ BPU Dkt. No. EM14060581 (Filed 6/18/2014); Joint Petition of Pepco Holdings, Inc., Delmarva Power & Light Company, Potomac Electric Power Company, Conectiv LLC, Exelon Corporation, and Exelon Energy Delivery Company LLC For Approval of Transfer of Control Pursuant to the Utility Transfers Act, VA SCC Case No. PUE-2014-00048 (Filed 6/03/2014); *In The Matter of the Application of Delmarva Power & Light Company, Exelon Corporation, Pepco Holdings, Inc., Purple Acquisition Corporation, Exelon Energy Delivery Company, LLC For Approvals Under the Provisions of 26 Del. C. §§ 215 and 1016*, DE PSC Dkt. No. 14-193 (Filed 6/18/2014); *In The Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc.*, MD PSC Case No. 9361 (Filed 8/19/2014).

The Market Monitor's interest in this proceeding is the impact of FirstEnergy's proposed Electric Security Plan ("ESP") on PJM markets, primarily the PJM Capacity Market, and the consequent effects on Ohio retail customers. Anticompetitive conduct in the Capacity Market will of course directly impact retail markets in Ohio as well as other retail markets in PJM. The fact that outcomes in the wholesale power market affect retail markets should come as no surprise. The Market Monitor's interest in this matter is in no way diminished because the ratemaking in question will directly affect Ohio ratepayers. Accordingly, the Market Monitor has a discernible and direct interest in this proceeding.

The Market Monitor has stated, "subsidies should not be permitted to interfere with the competitiveness of PJM markets and PJM's competition-based market design." FirstEnergy avers that this position is factually inaccurate.⁵ The Market Monitor's statement is not a statement of fact; it is a statement of position. Ohio law provides that when determining a public utility's request for an increase in rates, the burden of proof to show that the proposal in the application is just and reasonable shall be on the public utility.⁶ Thus, FirstEnergy has the burden to demonstrate to the Commission that this adjustment is justified and reasonable and is not in fact a subsidy.

The intended purpose in creating the Market Monitor (also known as the Market Monitoring Unit) was in part to establish an objective expert to assist federal and state agencies in identifying instances of market power and ensuring compliance with market rules to promote a robust electricity market.⁷ Due to its exclusive authority and duty to perform the market monitoring function for PJM, the Market Monitor's interests cannot be represented by any other party. Furthermore, the Market Monitor has independent and

⁵ Memorandum Contra at 4.

⁶ O.A.C. § 4909.18.

⁷ OATT Attachment M § IV(A-B).

unique analytical capabilities and knowledge of the PJM markets and market rules that may assist the Commission in its decision on the proposed ESP.

B. The Market Monitor Shares the Same Confidentiality Concerns As The Objecting Parties.

FirstEnergy states that “[i]t is difficult to see how the IMM would participate in this proceeding without being asked to disclose confidential information of generators in PJM.”⁸ The Market Monitor shares concern about the potential disclosure of confidential or market sensitive information. The Market Monitor trusts that this Commission can and will take steps to discourage and tightly limit discovery directed at the Market Monitor that would seek the disclosure of market sensitive or PJM Member sensitive information. Such concern is not a reasonable basis to prevent the Market Monitor from participating in this proceeding.

Similar issues arose in a Maryland Public Service Commission merger proceeding.⁹ In response to the Market Monitor’s confidentiality concerns, the Maryland Commission established extraordinarily stringent rules to protect confidential documents and sensitive information.¹⁰ A copy of these rules is included as an attachment. The Market Monitor recommends the application of a high bar for allowing any discovery request directed to the Market Monitor. If and when such discovery is allowed, protective rules should be adopted that require strict limits on the number of persons eligible to receive such data, prohibit persons who represent or advise market participants from receiving such data, specify strict rules protecting the security of such information, and rules providing the return of information to the Market Monitor when the proceeding concludes. The rules that

⁸ Memorandum Contra at 5.

⁹ *In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Inc.*, Case No. 9271.

¹⁰ *See Id.*, Market Monitor Protective Agreement (August 8, 2011), included as an attachment hereto.

applied in the Maryland proceeding establish the minimum level of protection that is acceptable. The Market Monitor recommends that the Commission establish more stringent rules if and when they are needed.

C. The Market Monitor's Counsel Will Not Improperly Disclose Confidential Information

FirstEnergy asserts that "it is unclear how one firm could properly represent parties with apparently divergent interests."¹¹ In addition, FirstEnergy is concerned that, "given the shared counsel by these parties, [...] the Sierra Club may obtain confidential information that it is not entitled to have and in violation of PJM's tariffs."¹²

The Ohio Rules of Professional Conduct state that a conflict of interest between current clients exists either when (1) the representation of that client will be directly adverse to another current client, or (2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.¹³ Neither of these conditions are applicable in this proceeding, therefore there is no conflict. The Market Monitor's local counsel, Todd Williams, was retained for the sole purpose of facilitating intervention and will not have any substantive role in the proceeding. Mr. Williams will not have access to any information from the Market Monitor and will therefore not have access to any confidential information from the Market Monitor. Therefore there is zero risk that the Sierra Club will obtain confidential information from the Market Monitor.

¹¹ Memorandum Contra at 5.

¹² *Id.*

¹³ Ohio Prof. Cond. Rule 1.7(A).

FirstEnergy's concerns for Market Monitor's choice of counsel seem to assume Mr. Williams inability to satisfy his obligations under the Ohio Rules of Professional Conduct. FirstEnergy also neglects completely the fact that, even if a conflict of interest does exist, arising from the representation of multiple parties (in the case of the Market Monitor, representation limited to a pro hac vice motion for admission and, only to the extent required by law, activities supporting such admission), those parties have the ability to give informed consent to the representation.¹⁴ It is troubling that FirstEnergy is now objecting to an intervention based on the party's choice of counsel, or their perceived inability to follow the Rules of Professional Conduct.

Market Monitor is satisfied that in addition to his limited role, Mr. Williams has taken necessary precautions to ensure that his firm would be able to maintain adherence to its ethical obligations, and would maintain the necessary confidentiality protections required of any representation. While Mr. Williams is a partner in the same firm as the Sierra Club's counsel, Christopher Allwein; however, Mr. Williams is stationed in Toledo, Ohio, and Mr. Allwein works out of the firm's Columbus, Ohio office. In addition, the offices do not share a network, so it is impossible for the two attorneys to access the other's files. The core interest of the Sierra Club in this proceeding concerns environmental matters, whereas the Market Monitor's only concern is competitive issues. Neither party has any incentive or reason to materially interfere with the scope of representation of the other.

¹⁴ Ohio Prof. Cond. Rule 1.7(B).

II. CONCLUSION

For the reasons stated above, the Market Monitor requests that it be permitted to intervene in this proceeding as a party for all purposes.

Respectfully submitted,



/s/ Todd M. Williams

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Dated: October 22, 2014

CERTIFICATE OF SERVICE

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

Dated at Eagleville, Pennsylvania, this 22nd day of October, 2014.



Jeffrey W. Mayes
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ATTACHMENT A

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND**

IN THE MATTER OF THE MERGER OF)	
EXELON CORP. AND CONSTELLATION)	Case No. 9271
ENERGY GROUP, INC.)	

MARKET MONITOR PROTECTIVE AGREEMENT

WHEREAS, certain parties in the above-captioned proceeding have requested data and documents from Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (“Producing Party”), in the above-captioned matter relating to the application by Exelon Corporation (“Exelon”), Exelon Energy Delivery Company, LLC (“EEDC”), Constellation Energy Group, Inc. (“Constellation”), and the Baltimore Gas and Electric Company (“BGE”) (collectively, the “Applicants”). Certain of the requested data and documents or portions thereof contain commercially sensitive information and are confidential and proprietary to the Producing Party or third parties. In addition, certain of the requested information may include materials designated as containing Critical Energy Infrastructure Information (“CEII”), as defined in 18 C.F.R. § 388.113(c)(1). In an effort to provide certain of the requested information while protecting the confidential information of the Producing Party and of CEII material, the Producing Party agrees to release or provide for inspection and review certain materials that shall be treated as confidential or CEII in accordance with this Protective Agreement (“Market Monitor Protective Agreement”).

THEREFORE, IT IS HEREBY AGREED, certain of the requested materials shall only be provided subject to the following conditions:

1. Protected Materials. All confidential or proprietary information and CEII made available subject to the terms of this Market Monitor Protective Agreement hereinafter shall be

referred to as “Protected Materials.” Any such Protected Materials provided by the Producing Party shall be clearly identified as “CONFIDENTIAL,” “CONFIDENTIAL – Attorneys’ Eyes Only,” or “CEII,” as appropriate. Protected Materials shall include any portion of any notes, memoranda, analyses or any other writing (including deposition transcripts), prepared by any person which includes any information from documents provided pursuant to this Market Monitor Protective Agreement or any knowledge derived from such documents (collectively, “Derived Materials”). Protected Materials shall not include any information which now, or prior to these proceedings, is or was public knowledge, or which becomes public knowledge as a result of publication or intentional disclosure by the Interested Parties. Notwithstanding any other provision of this Agreement, market offer data and Derived Materials including market offer data shall constitute CONFIDENTIAL – Attorneys’ Eyes Only Protected Materials (even if unmarked).

Each of the Applicants, the Maryland Energy Administration, and the Maryland Office of People’s Counsel shall become a Reviewing Party upon its execution of this Market Monitor Protective Agreement. If a Reviewing Party is a Maryland agency subject to the Maryland Public Information Act (“Act”) as set forth in Maryland Code, Sections 10-611 *et seq.* of the State Government Article, Protected Materials shall not include public records, as defined in the Act, for which disclosure is required under the Act. Any other person that seeks to become a Reviewing Party will provide to the Producing Party, which may be circulated to third party beneficiaries, a statement describing its position in the market (e.g., whether such person is a competitive supplier or affiliated with competitive suppliers) and demonstrating that such person has a need to access Protected Materials that includes a material interest in market power issues. Such person may become a reviewing party if the Producing Party agrees in writing or, if the Producing Party does not agree, the Maryland Public Service Commission so orders.

2. Authorized Representatives. Persons who may access the Protected Materials shall be limited for the purpose of ensuring that dissemination does not impact the integrity of the PJM markets, results in the least possible risk to ratepayers, and does not impact the business interest of participants in the PJM markets. Notwithstanding the following sentence, neither this provision nor any other provision of this agreement precludes expert witnesses who are providing testimony on the subjects of wholesale or retail markets, market concentration, or market power to (1) the Maryland Public Service Commission in Case No. 9271; (2) Federal Energy Regulatory Commission Docket No. EC11-83-000; and (3) the review of the Applicants' proposed merger that is being conducted by the U.S. Department of Justice under the Hart-Scott-Rodino Act; from relying on or including Protected Materials or Derived Materials in their testimony or responses to requests from the regulatory bodies; provided, that, such expert witnesses and the Reviewing Parties shall fully invoke and fully cooperate with the regulatory bodies' filing and hearing procedures designed to protect the confidentiality of the materials. Communications by an Authorized Representative to a person not also an Authorized Representative, including oral communications, that disclose Protected Materials, in whole or in part, directly or indirectly, shall constitute a violation of this agreement.

a. Protected Materials are available only to the "Authorized Representatives" of a Reviewing Party. Authorized Representatives of a Reviewing Party include the Reviewing Party's counsel of record and associated attorneys, paralegals, economists, statisticians, accountants, consultants, or, subject to the agreement of the Producing Party providing the Protected Materials, other persons retained by a Reviewing Party and directly assisting a Reviewing Party; provided no such person are "competitive personnel," and can so demonstrate, upon request, to the satisfaction of the Producing Party. Competitive personnel shall include the

following: (I) any employee of the Reviewing Party or any affiliate of the Reviewing Party whose scope of employment includes, but is not limited to (i) the sale, purchase, scheduling or marketing of energy, capacity or ancillary services in MISO, PJM, NYISO, or ISO-NE or (ii) the direct supervision of, or routine and close interaction with, any employee or employees of the Reviewing Party or any affiliate of the Reviewing Party whose duties include, but are not limited to, the sale, purchase, scheduling or marketing of energy, capacity or ancillary services in MISO, PJM, NYISO, or ISO-NE or (iii) the direct supervision of, or interaction with, any outside consultant to the Reviewing Party whose duties include, but are not limited to, the sale, purchase, scheduling or marketing of energy, capacity or ancillary services for the Reviewing Party or affiliate of the Reviewing Party in MISO, PJM, NYISO, or ISO- NE; (II) in-house attorneys that work directly for competitive personnel and/or competitive business unit of a Reviewing Party or any affiliate of a Reviewing Party, or provide significant substantive services to competitive personnel and/or a competitive business unit of a Reviewing Party or any affiliate of a Reviewing Party related to the sale, purchase, scheduling or marketing of energy, capacity or ancillary services in MISO, PJM, NYISO, or ISO-NE, unless authorization to review is specifically approved by the Market Monitor in writing; and (III) individuals who provide the following consulting services: advising clients on business strategy for the bidding, offering, scheduling, or marketing of energy, capacity or ancillary services into markets and auctions operated by MISO, PJM, NYISO or ISO-NE. For purposes of this Protective Order, the term “competitive personnel” shall be broadly construed to ensure any risk to the competitive PJM market is minimized.

b. Each person who inspects the Protected Materials, including all Authorized Representatives, shall first agree in writing to the following Certification:

I certify my understanding that the Protected Materials are

provided to me pursuant to the terms and restrictions of the Market Monitor Protective Agreement in Case No. 9271 dated _____, 2011, and I have read and understand the Market Monitor Protective Agreement, I confirm that I am not and have no plans to become “competitive personnel” as defined in the Agreement, and I agree to be bound by that Market Monitor Protective Agreement. I understand that the contents of the Protected Materials, including any portion of any notes, memoranda, analyses or any other writing (including deposition transcripts), prepared by any person which includes information from the Protected Materials, either taken directly or derived in some other form, and any knowledge derived from the Protected Materials, shall not be disclosed to anyone other than in accordance with the Market Monitor Protective Agreement and shall be used only for the purpose of the proceedings in: (1) Maryland Public Service Commission Case No. 9271; (2) Federal Energy Regulatory Commission Docket No. EC11-83-000; and (3) the review of the Applicants' proposed merger that is being conducted by the U.S. Department of Justice under the Hart-Scott-Rodino Act. I understand that the obligations in the Market Monitor Protective Agreement and this Certification are ongoing in nature and shall continue in full force and effect, and that to the extent I retain knowledge of the information contained in Protected Materials, I will not use or divulge such information in any other proceeding or for any other purpose. By signing this Certification I represent that I am not a Restricted Person, as that term is defined in the Market Monitor Protective Agreement and/or 18 C.F.R. § 388.113, and that I will not disclose any information designated as CEII to a Restricted Person.

I understand that the restrictions in the Market Monitor Protective Agreement and in this Certification will not apply to any Protected Materials other than market offer data, if, subsequent to the time, if any, such Protected Materials are intentionally disseminated publicly by the Producing Party who has declared the material to be confidential or are disclosed pursuant to lawful order of the Public Service Commission of Maryland, its designated Discovery Judge, or a court of competent jurisdiction; subpoena; or an agreement of the parties.

I agree to comply with this Market Monitor Protective Agreement and understand that a Producing Party or third party beneficiaries will enforce their rights under the Market Monitor Protective Agreement and will pursue any available legal or equitable remedies to address violations, including, but not limited to, pecuniary damages, attorneys' fees and injunctive relief.

d. A copy of each executed, written Certification shall be provided to counsel

for the Producing Party. Any Authorized Representative may disclose materials only to any other person who is an Authorized Representative, provided that if the person to whom disclosure is to be made has not executed and provided for delivery of a written Certification to the Producing Party, that written Certification shall be executed prior to any disclosure. In the event that any person to whom such Protected Materials are disclosed ceases to be an Authorized Representative, access to such materials by such person shall be terminated and he or she immediately shall return any Protected Materials, including any Derived Materials, in his or her possession in accordance with Paragraph 11. Any person who has agreed to the foregoing Certification shall continue to be bound by the provisions of this Market Monitor Protective Agreement, even if no longer so engaged.

e. Upon execution of this Market Monitor Protective Agreement and the Certification by the person receiving the documents, any and all requested materials will be provided to the Reviewing Party, without delay, in the ordinary course of discovery and pursuant to any Orders or rulings, if any, of the Maryland Public Service Commission (“PSC”).

f. If the Reviewing Party, or its Authorized Representative(s), makes notes containing Protected Materials or the information contained therein, any portion of those notes and the portion of any copies of those notes that contain Protected Materials shall all be considered “Protected Materials” as defined in Paragraph 1 herein.

g. All Protected Materials shall be made available to the Reviewing Party solely for the purposes of the proceedings in: (1) Maryland Public Service Commission Case No. 9271; (2) Federal Energy Regulatory Commission Docket No. EC11-83-000; and (3) the review of the Applicants' proposed merger that is being conducted by the U.S. Department of Justice under the Hart-Scott-Rodino Act. The Protected Materials, including any Derived Materials, are to be treated confidentially by the Reviewing Party and shall not be disclosed or used by the

Reviewing Party except as permitted and provided in this Market Monitor Protective Agreement. A Reviewing Party must take all reasonable precautions to ensure that Protected Materials, including Derived Materials are not viewed, taken by, or communicated to any person other than an Authorized Representative of the Reviewing Party.

2. Attorneys' Eyes Only Protected Materials. Protected Materials that are market offer data shall be automatically designated Attorney's Eyes Only Protected Materials without exception. The Producing Party may designate other Protected Materials as "Attorneys' Eyes Only" when the Producing Party reasonably believes that the disclosure of the Protected Materials to anyone other than counsel or a designated Authorized Representative for a Reviewing Party could be especially detrimental or harmful to the Producing Party. Counsel for the Reviewing Party shall be subject to the restrictions regarding Protected Materials described in this Market Monitor Protective Agreement and further shall not disclose or permit the disclosure of any Protected Materials designated as "Attorneys' Eyes Only" to any other person or entity except:

a. disclosure may be made to employees of counsel for the Reviewing Party who are involved in providing service to the Reviewing Party,

b. disclosure may be made to a designated Authorized Representative and his/her employees who are involved in providing consulting service to the Reviewing Party, provided

i. the Producing Party is first informed of the identity of the designated Authorized Representative so as to ensure that the designated Authorized Representative is not or may not become a competitor or affiliated with a competitor of the Producing Party or the third parties referenced in the first paragraph of this Market Monitor Protective Agreement;

ii. if the Producing Party determines that a designated Authorized Representative designated under this paragraph is or may become a competitor or affiliated with a competitor of the Producing Party, the Producing Party and the Reviewing Parties shall work together to put in place additional confidentiality protections so as to allow the designated Authorized Representative access to the Attorneys' Eyes Only information; and

iii. the designated Authorized Representative and his/her employees sign the Certification described above and shall be subject to the restrictions regarding Protected Materials described in this Market Monitor Protective Agreement and further shall not disclose or permit the disclosure of any Protected Materials except as set forth in this Market Monitor Protective Agreement.

3. Critical Energy Infrastructure Information – CEII. Intervenor and interested persons may also seek information that includes CEII, as defined in 18 C.F.R. §388.113(c)(1).¹ An Authorized Representative shall be subject to the restrictions regarding Protected Materials described in this Market Monitor Protective Agreement with respect to CEII and, additionally, to the restrictions set forth in paragraphs 3 and 4 of this Market Monitor Protective Agreement. Information deemed as “CEII” may be made available for inspection and review by an Authorized Representative at a location to be agreed upon by the Producing Party and the Reviewing Party. Provided, further, the Producing Party or third party beneficiary may, by subsequent objection or motion, seek further protection with respect to CEII, including, but not limited to, total prohibition of disclosure to a Restricted Person or

limitation of disclosure only to particular Authorized Representatives. A “Restricted Person” is any person who poses a security risk, including, but not limited to, a person identified as potentially misusing information in planning an attack on critical infrastructure or a person who has been denied access to CEII by the Federal Energy Regulatory Commission. The burden to establish a Reviewing Party or Authorized Representative as a “Restricted Person” shall be on the Producing Party.

4. CEII may be made available to an Authorized Representative for inspection and review but not copied, except as specified herein. The Producing Party producing the materials may, but is not required to, permit other Reviewing Parties’ counsel to take custody of CEII; the information shall not be copied except that Authorized Representatives who are independent consultants and who are assisting counsel with the preparation or presentation of the Reviewing Party’s case in these proceedings may, if authorized by the Producing Party, make copies. Notwithstanding the immediately preceding sentence, CEII may be copied by an Authorized Representative when agreed to by the Parties. All copies of CEII shall also be deemed to be CEII.

5. All copies containing CEII shall be maintained by the Reviewing Party and Authorized Representative in a secure place. CEII information is on loan to the Reviewing Party and Authorized Representative and shall either be returned to the Producing Parties or destroyed in accordance with Paragraph 11 of the Market Monitor Protective Agreement. The parties intend that Paragraphs 3, 4, and 5 of the Market Monitor Protective Agreement are consistent

¹ 18 C.F.R. §388.113(c)(1) defines “Critical Energy Infrastructure Information” as specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that: (i) Relates details about the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person in planning an attack on critical infrastructure; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and (iv) Does not simply give the general location of the critical infrastructure. Moreover, 18 C.F.R. §388.113(c)(2) defines “Critical Infrastructure” as existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic

with the regulations and practices of the Federal Energy Regulatory Commission, 18 C.F.R. §§ 388 *et seq.*, and that any challenge under Paragraphs 3, 4, or 5 of the Market Monitor Protective Agreement shall be governed by those rules and regulations.

6. The Producing Party shall bear the burden of proof in connection with any challenge to the designation of Protected Materials as such, provided that such challenge is received within five business days, in which case, the burden shall shift to the Reviewing Party. Material shall be designated as “CONFIDENTIAL,” “CONFIDENTIAL – Attorneys’ Eyes Only,” or “CEII,” and thereby attain the status of Protected Material only if the Producing Party reasonably believes there is a legally recognized basis in law supporting the “CONFIDENTIAL,” “CONFIDENTIAL – Attorneys’ Eyes Only,” or “CEII” designation. If only a portion of the material includes such Protected Material, then the Producing Party will make reasonable efforts to designate only such portion as Protected Material and the remainder of the material shall not be designated Protected Material. Disputes over the designation of materials as “Confidential,” “Confidential – Attorneys’ Eyes Only,” or “CEII” shall be treated as a discovery dispute in Case No. 9271. This section 6 shall not apply to market offer data, which shall without exception constitute CONFIDENTIAL Attorney’ Eyes Only Protected Materials.

7. After completion of the discovery phase of the Maryland Public Service Commission proceeding, this Market Monitor Protective Agreement shall continue in full force and effect, and Protected Materials shall remain protected indefinitely.

8. Unless otherwise ordered by the PSC or Discovery Judge, or any court of competent jurisdiction, or otherwise agreed upon by the parties, Protected Materials shall only be used or disclosed in hearings or other proceedings which may occur in accordance with this Paragraph. In any phase of any of the proceedings in which Protected Materials may be used

security, public health or safety, or any combination of those matters.

pursuant to this Market Monitor Protective Agreement, including the filing of pleadings or testimony, the conduct of a hearing or the submission of initial or reply briefs or memoranda on appeal or replies thereto, any filing containing Protected Materials shall be made by submission of a public, non-confidential copy with any Protected Materials excised and a confidential copy kept under seal by the PSC and only available to persons bound by this Market Monitor Protective Agreement or by a similar protective agreement executed in this proceeding. Any hearings or other proceedings in which Protected Materials will be discussed will be *in camera* unless otherwise ordered by the PSC or the Discovery Judge, or any court of competent jurisdiction, or otherwise agreed upon by the parties. Transcripts of those hearings or other proceedings will be made to provide for public, non-confidential copies and confidential copies kept in a manner set forth above, unless otherwise ordered by the PSC or the Discovery Judge, or any court of competent jurisdiction, or otherwise agreed upon by the parties.

9. Notwithstanding any other provision in this Market Monitor Protective Agreement, a Reviewing Party or its Authorized Representatives may disclose Protected Materials if necessary to comply with any applicable law, order, ruling, or subpoena of a governmental authority or tribunal with competent jurisdiction. In the event that a Reviewing Party or its Authorized Representative(s) is so requested or required to disclose any Protected Materials, the Reviewing Party or its Authorized Representative(s) shall, to the extent permitted by law, promptly notify the Producing Party of such request or requirement prior to disclosure so that the Producing Party or a Third Party Beneficiary may, if it so elects, seek an appropriate protective order or otherwise seek to contest, limit, or protect the confidentiality of the Protected Materials. With respect to any disclosure made by a Reviewing Party pursuant to this Paragraph, the Reviewing Party and its Authorized Representative(s) agree to furnish only that portion of the Protected Materials that is reasonably determined to be consistent with the scope of the

subpoena or demand.

10. Nothing in this Market Monitor Protective Agreement shall be construed as precluding any Producing Party or Third Party Beneficiary from objecting to the use of the Protected Materials on any legal ground other than confidentiality or the CEII nature of the materials.

11. Within thirty (30) days after a final, PSC Order in this proceeding, the Reviewing Party shall return all Protected Materials to the Producing Party, including Derived Materials. However, to the extent that any testimony, hearing transcripts, briefs, memoranda on appeal or any other documents containing Protected Material other than market data, which must be returned, are submitted into the record in this proceeding as prescribed in Paragraph 8, such documents need not be returned to the Producing Party.

12. The Producing Party may enforce its rights under the Market Monitor Protective Agreement. Members of PJM Interconnection, L.L.C. shall be third party beneficiaries of this agreement without regard to whether they are a party to the above referenced proceedings and may also enforce their rights individually or collectively. Such enforcement rights of Producing Party and third party beneficiaries shall include pursuit of any legal or equitable remedies to address violations, including, but not limited to, pecuniary damages, attorneys' fees and injunctive relief.

IN WITNESS WHEREOF, the parties hereto, by their undersigned counsel, have executed the foregoing Market Monitor Protective Agreement this 8th day of August, 2011.

Signature: _____

Printed Name: _____

Company/
Organization: _____

Address: _____

Phone: _____

Counsel for: _____



Jeffrey W. Mayes, General Counsel
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Force Corporate Center
Eagleville, Pennsylvania 19403
(610) 271-8053
Attorney for Monitoring Analytics, LLC

MARKET MONITOR PROTECTIVE AGREEMENT CERTIFICATION

I certify my understanding that the Protected Materials are provided to me pursuant to the terms and restrictions of the Market Monitor Protective Agreement in Case No. 9271 dated August 8, 2011, and I have read and understand the Market Monitor Protective Agreement, I confirm that I am not and have no plans to become “competitive personnel” as defined in the Agreement, and I agree to be bound by that Market Monitor Protective Agreement. I understand that the contents of the Protected Materials, including any portion of any notes, memoranda, analyses or any other writing (including deposition transcripts), prepared by any person which includes information from the Protected Materials, either taken directly or derived in some other form, and any knowledge derived from the Protected Materials, shall not be disclosed to anyone other than in accordance with the Market Monitor Protective Agreement and shall be used only for the purpose of the proceedings in: (1) Maryland Public Service Commission Case No. 9271; (2) Federal Energy Regulatory Commission Docket No. EC11-83-000; and (3) the review of the Applicants' proposed merger that is being conducted by the U.S. Department of Justice under the Hart-Scott-Rodino Act. I understand that the obligations in the Market Monitor Protective Agreement and this Certification are ongoing in nature and shall continue in full force and effect, and that to the extent I retain knowledge of the information contained in Protected Materials, I will not use or divulge such information in any other proceeding or for any other purpose. By signing this Certification I represent that I am not a Restricted Person, as that term is defined in the Market Monitor Protective Agreement and/or 18 C.F.R. § 388.113, and that I will not disclose any information designated as CEII to a Restricted Person.

I understand that the restrictions in the Market Monitor Protective Agreement and in this Certification will not apply to any Protected Materials other than market offer data, if, subsequent to the time, if any, such Protected Materials are intentionally disseminated publicly by the Producing Party who has declared the material to be confidential or are disclosed pursuant to lawful order of the Public Service Commission of Maryland, its designated Discovery Judge, or a court of competent jurisdiction; subpoena; or an agreement of the parties.

I agree to comply with this Market Monitor Protective Agreement and understand that a Producing Party or third party beneficiaries will enforce their rights under the Market Monitor Protective Agreement and will pursue any available legal or equitable remedies to address violations, including, but not limited to, pecuniary damages, attorneys' fees and injunctive relief.

Printed Name:

Signature:

Company/Organization:

Date:

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Case No(s). 14-1297-EL-SSO

Summary: Memorandum Reply to Memorandum Contra Motion to Intervene electronically filed by Mr. Todd M Williams on behalf of MONITORING ANALYTICS LLC