

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

Heritage Power, LLC, on Behalf of its)
Public Utility Subsidiaries)
J. Aron & Company) Docket No. EC23-117-000

**COMMENTS OF
PJM INTERCONNECTION, L.L.C.**

Pursuant to Rule 213(a)(3) of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(3) and the Combined Notice of Filings #1 issued by the Commission on August 11, 2023, PJM Interconnection, L.L.C. (“PJM”) respectfully files these comments in the above captioned proceeding.¹

I. BACKGROUND AND INTRODUCTION

On August 9, 2023, pursuant to Section 203 of the Federal Power Act (“FPA”)² and Part 33 of the regulations of the Commission,³ Heritage Power, LLC (“Heritage”), on behalf of, and together with, its subsidiaries that are “public utilities” under FPA Section 201(e)⁴ - the “Heritage Public Utilities” - which includes Heritage Power Marketing, LLC (“Heritage Marketing”) who is a PJM Member, (and collectively with Heritage, the “Heritage Applicants”), and J. Aron & Company LLC (“J. Aron” and collectively with the Heritage Applicants, “Applicants”) submitted an application (“Application”) requesting approvals of a transaction (the “Transaction”) involving certain distributions

¹ On August 11, 2023, PJM filed a doc less Motion to Intervene in this docket.

² 16 U.S.C. § 824b (2018).

³ 18 C.F.R. Pt. 33 (2022).

⁴ 16 U.S.C. § 824(e) (2018).

of voting securities of a reorganized direct or indirect parent entity of Heritage and the Heritage Public Utilities (“Reorganized Heritage”) pursuant to a joint plan of reorganization (the “Plan”)⁵ of Heritage and its affiliated debtors (the “Heritage Debtors”) subject to confirmation by the Bankruptcy Court. On August 22, 2023, the Bankruptcy Court entered an order scheduling an October 4, 2023 hearing to consider confirmation of the Heritage Debtors’ Plan. Objections to confirmation of the Plan may be filed with the Bankruptcy Court on or before September 25, 2023.

At present, the Plan still represents Heritage Debtors’ non-binding proposal to their creditors, including PJM, of how the Heritage Debtors intend to reorganize and satisfy (or not satisfy, as the case may be) their obligations. The Plan, in its current form, contains several defects and therefore cannot be confirmed by the Bankruptcy Court in its current form. Among these defects, Heritage Marketing purports under the Plan to be able to assume its PJM agreements and maintain good standing within PJM without curing existing defaults, in violation of the PJM Open Access Transmission Tariff (“PJM Tariff”) and the United States Bankruptcy Code. PJM rejects Heritage Marketing’s professed ability to leave behind its unfulfilled obligations under the PJM Operating Agreement and Tariff without consequence to its continued standing as a PJM Member and Market Participant.

The confirmation of the Plan by the Bankruptcy Court in October will depend on whether the Heritage Debtors satisfy numerous requirements of Plan confirmation under the United States Bankruptcy Code, including but not limited to acceptance by creditors and that the plan be confirmed in good faith and not by any means forbidden by law. In

⁵ A copy of the Plan, as filed with the United States Bankruptcy Court for the Southern District of Texas (the “Bankruptcy Court”) on July 17, 2023, is in Exhibit I to the Application.

its current form, the Plan is not confirmable. Unless and until the Plan is confirmed by the Bankruptcy Court, it is premature for the Commission to consider authorizing the Transaction.

Substantial capacity performance resource Non-Performance Charges were assessed to Heritage Marketing by PJM during Performance Assessment Intervals (“PAIs”) in connection with the Winter Storm Elliott Emergency Action taken in December 2022 pursuant to the Tariff, Attachment DD, section 10A(c). On April 20, 2023, PJM filed a proof of claim in the bankruptcy case of Heritage Marketing (the “Proof of Claim”). The Proof of Claim asserts PJM’s claim against Heritage Marketing, consisting of: (i) the PAI Non-Performance Charges assessed against Heritage Marketing arising from Winter Storm Elliott plus various other pre-petition charges and adjustments, minus (ii) the amount of PAI bonus credit (which is subject to change) payable to Heritage Marketing.

PJM submits that the Commission should withhold authorization for the Transaction at this time because the Applicants cannot meet their burden of showing that the Transaction is consistent with the “public interest” so long as the Plan is pending before the Bankruptcy Court and such Plan proposes that Heritage Marketing will assume its PJM agreements without curing its defaults under such agreements. To be clear, PJM does not suggest that the Commission should inject itself into the Bankruptcy Court’s determination as to whether to confirm the Plan. However, until there is clarity as to Heritage Marketing’s assumption of its responsibilities consistent with the PJM Governing Agreement, there remain substantial questions concerning whether the Transaction is in the public interest. For this reason, PJM urges that the Commission not

move forward at this time but seek additional information from Heritage as outlined below.

II. COMMENTS

A. *The Commission Lacks Sufficient Information on which to Find that the Transaction is in the Public Interest While Applicants' Plan of Reorganization Remains Pending Before the Bankruptcy Court.*

1. *The Commission's regulations make it clear that other factors may be considered in determining whether the Transaction is in the public interest.*

FPA section 203(a)(4) requires that the Commission approve a transaction if it finds that it is in the public interest.⁶ The Applicants argue that the Transaction satisfies the requirements of FPA section 203 “because it will not have any adverse impact on competition, rates or regulations and will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of any associate company.”⁷

However, the Commission's Rules of Practice and Procedure, 18 C.F.R. § 2.26(b), state that when the Commission determines whether a proposed transaction subject to section 203 is consistent with the public interest, “the Commission will generally consider” those factors set forth above, but “it may also consider other factors.”⁸

As discussed below, the manner by which the Heritage Debtors' bankruptcy is ultimately resolved, including whether there in fact will be a Bankruptcy Court confirmation of the Plan which is giving rise to the Transaction at issue here, is such a factor. The current version of the Plan contemplates that Heritage Marketing shall continue as a Member of PJM but contains no provision for satisfaction of the

⁶ 16 U.S.C. § 824b(a)(4) (2018).

⁷ Application at pages 29-30.

⁸ 18 C.F.R. § 2.26(b)

outstanding pre-petition obligations of Heritage Marketing to PJM, including specifically the PAI Non-Performance Charges.

The Commission does not need to inject itself into the Heritage Debtors' bankruptcy cases, but it must have information as to how – if at all – Heritage Marketing is satisfying its outstanding obligations under the PJM Tariff and other PJM agreements before the Commission can determine whether the proposed Transaction is in the public interest. Otherwise, Heritage Marketing is affirming that it will remain a member of PJM while at the same time not providing any information on its plan for satisfying its pre-petition obligations and indeed the Plan does not contain such details. The amount at issue is significant enough that it could have material impact on other Market Participants, thus potentially impacting the Commission's consideration of the proposed transaction. Among the factors the Commission should understand in determining whether the Transaction is in the public interest is the impact on competitive markets when a market participant maintains its relationship with PJM, retaining all of the rights and benefits therefrom, without satisfying its prior obligations. At this time, the Commission should not approve this transaction based on what has been filed by Heritage to date in this proceeding.

2. Precedent supports considering the resolution of Heritage's bankruptcy as a factor in determining whether the Transaction is consistent with the public interest under FPA Section 203(a)(4).

The Commission has considered other factors such as the resolution of an applicant's bankruptcy to determine whether a transfer is in the public interest under FPA section 203(a)(4).⁹

⁹ See, *North East Utilities Service Company v. Federal Energy Regulatory Commission*, 993 F.2d 937 (1993) (the United States Court of Appeals for the First Circuit held that the Commission properly

Therefore, the resolution of the bankruptcy proceeding is relevant to a determination as to whether the proposed FPA section 203 request is consistent with the public interest and whether it would aid or be harmful to competition and costs to ultimate consumers. *The Commission lacks sufficient information based on the application to determine that the Transaction is consistent with the public interest and should condition acceptance of the Applicant's Application on approval of the Plan by the Bankruptcy Court.*

The Applicants state that commencing on January 24, 2023, the Heritage Debtors, including Heritage, the Heritage Public Utilities, and Heritage Marketing filed voluntary petitions for relief in the Bankruptcy Court pursuant to Chapter 11 of title 11 of the United States Code.¹⁰ The Applicants explain as follows:

If the Bankruptcy Court denies confirmation of a plan of reorganization involving the distribution of the equity interests in Reorganized Heritage described above, the RSA contemplates the consummation of an alternative transaction (the "Sale Transaction"). Under the Sale Transaction, substantially all of the Heritage Debtors' assets would be sold to a special purpose vehicle to be formed by the collateral agent at the direction of certain secured lenders, subject to an overbid process. The Applicants asks the Commission to approve the Transaction before conformation of the reorganization plan by the Bankruptcy Court.¹¹

PJM submits that the Commission should, at this point in time, withhold or condition authorization for the Transaction because, while the Plan is pending before the Bankruptcy Court, the Commission does not possess sufficient information on which to determine that the Transaction is in the public interest. Indeed, the Heritage Debtors have not shown that proposed Transaction is in the public interest because of the outstanding issues regarding Heritage Marketing's asserted ability to maintain participation in the

considered the resolution of a bankruptcy as a factor in the public interest standard under a FPA section 203 application).

¹⁰ Application at pages 14-15.

¹¹ Application at pages 1 and 2.

PJM region while not providing for satisfaction of the pre-petition amounts owed to PJM which are material.

The Commission has authority to impose conditions on a proposed transaction under FPA section 203. In *Utah Power & Light Company, et.al*,¹² the Commission stated that “[t]he Commission has broad authority under section 203(a) to condition approval of a merger that would not, but for such conditions, be consistent with the public interest...”¹³

The uncertainty of the outcome of the Plan, including specifically the outcome of the PAI Non-Performance Charges due to PJM, denies the Commission a sufficient basis on which it can determine that the proposed Transaction is in the public interest. The Commission should condition acceptance of the Applicants’ Application on approval of the Plan by the Bankruptcy Court. The Commission must have information as to how – if at all – Heritage Marketing is satisfying its outstanding obligations under the PJM Tariff and other PJM agreements before the Commission can determine whether the proposed Transaction is in the public interest.

III. CONCLUSION

PJM respectfully requests the Commission consider PJM’s comments and withhold authorization for the Transaction while the Plan is pending before the Bankruptcy Court and the issues identified herein remain unresolved.

¹² *Utah Power & Light Company, et al.*, 45 FERC 61,095 (1988) (“*Utah*”).

¹³ *Id* at p. 61,282 (footnotes omitted).

Respectfully submitted,

By: /s/ Steven R. Pincus

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Dated: August 30, 2023

CERTIFICATE OF SERVICE

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

Dated at Audubon, PA this 30th day of August 2023.

/s/ Steven R. Pincus

Steven R. Pincus

Managing Counsel, Sr. Director