

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

Constellation Energy Corporation;  
Constellation Energy Generation,  
LLC;  
Calpine Corporation on Behalf of Its  
Public Utility Subsidiaries

Docket No. EC25-43-000

**PROTEST AND REQUEST FOR EVIDENTIARY HEARING  
OF THE MARYLAND OFFICE OF PEOPLE’S COUNSEL**

The Maryland Office of People’s Counsel (“MPC”), pursuant to Rules 211 and 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“the Commission”), 18 C.F.R. §§ 385.211 and 385.212, submits this Protest and Request for Evidentiary Hearing in response to the Joint Application for Authorization under Section 203(a)(1)-(2) of the Federal Power Act (the “Application”) filed by Constellation Energy Corporation and Constellation Energy Generation, LLC (the “Constellation Applicants”) and Calpine Corporation, on behalf of itself and each of its public utility subsidiaries (together, the “Calpine Applicants”) Constellation Energy Group, Inc. (“Constellation”) (jointly, the “Applicants”) on January 24, 2025. MPC filed a timely motion for leave to intervene in this proceeding on March 21, 2025, which the Commission accepted.

**INTRODUCTION**

The Commission should deny the Application outright, or it should grant an evidentiary hearing because (1) the Applicants have not met their burden of proof, and (2)

the transaction harms competition. If approved as proposed, the merger would adversely affect consumers in the region, including Maryland consumers, because it would increase the surviving company's ability to exercise market power. The merger would incentivize and facilitate the surviving company's opportunities for anticompetitive conduct, such as the withholding of supply, given the fleet changes post-merger and the supply and demand conditions in the generation and capacity markets. Such potential exercises of market power are not adequately mitigated by the measures Applicants propose, and the merger would impact wholesale electricity prices and, ultimately, residential retail rates.

## **BACKGROUND**

MPC is the statutory representative of the residential ratepayers of utility services in Maryland. Pursuant to Maryland Public Utility Companies Code Annotated, Section 2-205(b), the People's Counsel "may appear before any federal or state agency as necessary to protect the interests of residential...users of [gas, electricity or other regulated services]."

Constellation and Calpine request Commission approval for Constellation to acquire Calpine in a cash and stock transaction valued at an equity purchase price of approximately \$16.4 billion, composed of 50 million shares of Constellation stock and \$4.5 billion in cash plus the assumption of approximately \$12.7 billion of Calpine net debt. After accounting for cash that is expected to be generated by Calpine between

signing and the expected closing date, as well as the value of tax attributes at Calpine, the net purchase price is \$26.6 billion.<sup>1</sup>

The Calpine Applicants own 5,341 MW of generation capacity in PJM. The Constellation Applicants are currently affiliated with 20,203 MW in PJM.<sup>2</sup> The Applicants' market power analysis, performed by Ms. Julie R. Solomon and Dr. Jeffrey Opgrand, shows repeated Herfindahl-Hirschman Index ("HHI") screen failures. In light of these failures, Applicants propose a mitigation plan to divest four of Calpine's combined-cycle natural gas plants, a total 3,546-megawatt ("MW") divestiture of generation capacity.<sup>3</sup>

Although the Applicants have overlapping generation ownership in PJM, New England, New York, and the Midcontinent Independent System Operator, Inc. ("MISO") markets,<sup>4</sup> this protest focuses on the proposed transaction's impacts on the competitiveness of the PJM markets, which serve Maryland customers and are the markets where the most serious market power concerns lie.

## **PROTEST**

The Commission should deny the Application without conditions or, alternatively, grant an evidentiary hearing because Applicants have not met their burden of proof. The Commission may only approve a proposed merger if it finds that the merger "will be

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<sup>1</sup> "Constellation to Acquire Calpine in Stock and Cash," Constellation Press Release, <https://www.constellationenergy.com/newsroom/2025/constellation-to-acquire-calpine-creates-americas-leading-producer-of-clean-and-reliable-energy-to-meet-growing-demand-for-customers-and-communities.html>.

<sup>2</sup> Application at 13.

<sup>3</sup> Application at 3.

<sup>4</sup> Application at 3.

consistent with the public interest.”<sup>5</sup> The Commission will generally consider three factors when analyzing proposed mergers and acquisitions: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>6</sup>

When assessing horizontal competition, the Commission must consider whether the proposed transaction incentivizes and facilitates the surviving company’s opportunities for anticompetitive conduct, such as the withholding of supply, given changes in concentration in the generation markets.<sup>7</sup> This proposed transaction between two generation owners does exactly that, raising significant concerns about new opportunities for anticompetitive conduct in both PJM’s energy and capacity markets. Applicants have failed to meet their legal burden in the Application. The data show that market power concerns are present, the Application’s market power analyses are incomplete, and the mitigation proposal does not remedy the market power issues. As a result, the Commission should deny the application or set this matter for full evidentiary hearings.

**I. The proposed transaction creates opportunities and incentives for the surviving company to exercise anticompetitive conduct.**

In energy markets, market manipulation can be exercised through an act of physical or economic withholding of supply.<sup>8</sup> When a firm does not offer available

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<sup>5</sup> *Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act; Policy Statement*, Order No. 592, FERC Stats & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order 592-A, 79 FERC ¶ 61,321 (1997) (“Merger Policy Statement”), P 3.

<sup>6</sup> *Id.*

<sup>7</sup> *FPA Section 203 Suppl. Pol’y Statement*, 120 FERC ¶ 61,060, at P 63 (2007) (“2007 Policy Statement”).

<sup>8</sup> *See, e.g., Exelon Corp. v. FERC*, 911 F.3d 1236, 1238 (D.C. Cir. 2018); *Investigation of Terms & Conditions of Pub. Util. Mkt.-Based Rate Authorizations*, 97 FERC ¶ 61,220, 61,976 (2001).

generation capacity into the market when the capacity's short-run marginal cost is less than or equal to the competitive market price, it engages in physical withholding.<sup>9</sup>

Economic withholding is a *de jure* removal of capacity from the market and occurs when a generation owner offers capacity into the market at a price in excess of both the short-run marginal cost of the capacity and the market clearing price.<sup>10</sup> Both raise market prices because they impermissibly shift the supply curve to the left.

The incentive to withhold supply exists if a generator can withhold supply at a relatively low cost and then recoup the losses incurred from withholding from inframarginal capacity.<sup>11</sup> A merger between generators with inframarginal assets and marginal assets heightens the potential of the exercise of market power because the merged firm now has both “ability assets” and “incentive assets” that enable higher inframarginal revenues, and thus, profitable withholding relative to those owned independently pre-merger.<sup>12</sup> “Ability assets” are those generators which have relatively low profits (i.e., their output is at or near the marginal cost) and whose output is easily withheld. This gives the merged firm the ability to withhold supply. “Incentive assets” are those generators that earn greater profits as a result of the output withheld from ability assets. Stated otherwise, the merged firm offsets losses from the withheld output of its ability assets through the higher profits on the output (i.e., the “inframarginal” output) it

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<sup>9</sup> 97 FERC ¶ 61,220, at 61,976.

<sup>10</sup> See Richard Benjamin, *Consideration of Potential Competition Under FERC's Merger Analysis*, 34 Hamline L. Rev. 1, 25 (2011) (citing Joe Bain, “Barriers to New Competition, Their Character and Consequences in Manufacturing Industries” 22 (Harvard University Press 1956) (stating that if the incumbent's profit-maximizing strategy is to price below the limit price, entry is said to be “blockaded”).).

<sup>11</sup> See e.g., *Theories of Harm*, 1 Antitrust Adviser § 4:24 (5th ed.).

<sup>12</sup> 120 FERC ¶ 61,060, at P 60.

offers with the incentive assets.<sup>13</sup> Thus, the ability and incentive to withhold supply must exist for a profitable withholding to occur.

The proposed transaction in this matter would combine different generating units with different cost structures all under the control of Constellation. That consolidated control creates new market power concerns. Because all generating units selected for dispatch in a given location in PJM receive the market clearing price—which is determined by prices offered by competing generators such as Constellation and Calpine—and the highest price selected generator sets the market price, the units that can set or impact the clearing price are crucial. Constellation is one of the largest competitive wholesale power suppliers in PJM, especially with regard to baseload nuclear generators.<sup>14</sup> Post-transaction and divestiture, Constellation will own 1,795 MW of intermediate and peaker fossil-fuel generators, in addition to its 20,203 MW of existing generation in the PJM supply stack, most of which is nuclear.<sup>15</sup> These figures exclude the 3,546 MW combined capacity of the four gas-burning generators Constellation proposes to divest within a year of closing.<sup>16</sup>

Even with the divestiture, the proposed transaction in this matter poses specific market power concerns because Calpine and Constellation's respective generation assets are complementary rather than identical. The transaction combines Calpine's higher-marginal-cost, fossil fuel-fired generating units, providing Constellation the ability to

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<sup>13</sup> Peter Fox-Penner, Gary Taylor, Romkaew Broehm, James Bohn, *Competition in Wholesale Electric Power Markets*, 23 ENERGY L.J. 281, 304 (2002).

<sup>14</sup> Application Exh. B, at 1-15.

<sup>15</sup> Application at 13.

<sup>16</sup> Application at 24.

withhold power post-merger for relatively little loss in profits (its “ability” units), with Constellation’s lower-marginal-cost nuclear plants, which would benefit from higher clearing prices and therefore increase Constellation’s incentive to withhold power (its “incentive” units). This combination would empower the newly combined Constellation with the ability and incentive to reduce output and raise wholesale electricity prices.

The inelasticity of PJM’s capacity market supply and demand curves exacerbate the risks of anticompetitive conduct for customers.<sup>17</sup> The inelasticity of the supply curve magnifies the profitability of withholding; Constellation could withhold only a small amount of capacity from a marginal generator and still be profitable if a higher cost generator is dispatched to meet demand because it would set the market price.<sup>18</sup>

Withholding from a relatively small, newly acquired unit still yields profits. PJM’s inelastic demand also incentivizes withholding. If demand were elastic, buyers would respond by switching to a cheaper competitor or an alternative; however, in an inelastic market, the quantity demanded remains unchanged despite an increase in price. All sellers benefit from the higher prices that result from withholding, and all consumers are harmed by those higher prices.<sup>19</sup> Constellation is incentivized to withhold without the elastic-demand deterrent of losing quantity sold if it raises prices via withholding. Although the merger will combine the largest provider of nuclear generation and the largest provider of

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<sup>17</sup> Independent Market Monitor, 2024 State of the Market at 222; *see also Commonwealth Edison Co. on Behalf of Itself & Its Pub. Util. Subsidiaries & PECO Energy Co. On Behalf of Itself & Its Pub. Util. Subsidiaries*, 91 FERC ¶ 61,036, 61,133, fn. 42 (2000) (analyzing supply and demand conditions to determine whether a profitable withholding strategy existed).

<sup>18</sup> Peter Fox-Penner, et. al., *supra* note 13.

<sup>19</sup> *Id.*

natural-gas generation in the country<sup>20</sup> in markets where inelastic supply and demand conditions do not discipline potential anticompetitive behavior, the Application fails to acknowledge these risks. Therefore, the Application is deficient and raises material issues of fact because it does not address Constellation’s ability and incentive to withhold its newly acquired units—thus removing existing supply from the market—and impermissibly profit based on its existing baseload fleet.

## **II. The Applicants fail to meet their burden to prove the acquisition will not have anticompetitive effects.**

The Applicants bear the burden to affirmatively demonstrate the proposed transaction is in the public interest.<sup>21</sup> In determining if the public interest standard is met when there are HHI screen failures in the Appendix A analysis, the Commission analyzes the surviving company’s ability and incentive to withhold output in order to increase the market price if a proposed transaction does not meet the HHI screens.<sup>22</sup> Where the relevant market HHI is over 1,000, thus in the moderately concentrated range, and the HHI changes exceed 100 points, a screen failure occurs.<sup>23</sup> To promote robust competition, the Commission “encourages applicants to identify market power problems and to propose remedies for such problems in their merger proposals.”<sup>24</sup> The Commission

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<sup>20</sup> *Constellation to Acquire Calpine in Stock and Cash*,” Constellation Press Release, <https://www.constellationenergy.com/newsroom/2025/constellation-to-acquire-calpine-creates-americas-leading-producer-of-clean-and-reliable-energy-to-meet-growing-demand-for-customers-and-communities.html>.

<sup>21</sup> *See, e.g., Pacific Power & Light Co. v. Federal Power Commission*, 111 F.2d 1014, 1017 (1940).

<sup>22</sup> 120 FERC ¶ 61,060, at P 60.

<sup>23</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission’s use of the thresholds adopted in the Merger Policy Statement).

<sup>24</sup> *Id.*



has further emphasized that when generation assets, such as those of the Applicants, are concentrated, these asset owners can exert market power and weaken competition.<sup>25</sup>

Even if there are no screen failures, however, the Commission must consider evidence and arguments of anticompetitive effects beyond HHI.<sup>26</sup> The Commission has a statutory duty under section 203 to conduct an inquiry into transaction-specific factors and consider industry conditions, including, *inter alia*, resource mix and supply and demand conditions.<sup>27</sup>

Applicants present the traditional Appendix A analysis, which calculates changes in the HHI. The most critical areas of concern in this merger arise in PJM markets where there are screen failures in each of the relevant energy submarkets. Applicants overlap primarily in the eastern portion of PJM, which includes areas the Commission has historically treated as submarkets. Applicants similarly fail the HHI screen in the PJM Reliability Pricing Model (“RPM”) capacity Eastern-Mid Atlantic Area Council (“EMAAC”) submarket which has a post-merger HHI of 1,197 and an HHI change of 348.<sup>28</sup> Applicants fail the following PJM energy market HHI screens:<sup>29</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *See, e.g.*, 138 FERC ¶ 61,109, at P 34–38.

<sup>27</sup> 1996 Policy Statement, 61 Fed. Reg. at 68,598 (“[I]f the Commission is to fulfill its statutory responsibilities, it must determine what is consistent with the public interest in light of conditions in the electric industry in general as well as the specific circumstances presented by a proposed merger.”).

<sup>28</sup> Application, Exh. J at 30–33.

<sup>29</sup> Application, Exh. J at 40.

| Period                               | Market HHI | HHI Change |
|--------------------------------------|------------|------------|
| <b><i>PJM East</i></b>               |            |            |
| SF_OP (Economic Capacity)            | 1,281      | 285        |
| SF_P (Available Economic Capacity)   | 1,006      | 175        |
| SF_OP (Available Economic Capacity)  | 1,423      | 292        |
| SUM_OP (Available Economic Capacity) | 1,079      | 198        |
| <b><i>5004/5005</i></b>              |            |            |
| SF_OP (Economic Capacity)            | 1,176      | 269        |
| SUM_OP (Economic Capacity)           | 1,050      | 263        |
| SF_OP (Available Economic Capacity)  | 1,236      | 226        |
| SUM_OP (Available Economic Capacity) | 1,123      | 219        |
| <b><i>AP South</i></b>               |            |            |
| SF_OP (Available Economic Capacity)  | 1,007      | 175        |
| SUM_OP (Available Economic Capacity) | 1,069      | 194        |

Despite the repeated HHI screen violations across multiple seasons/load periods in Applicant's Appendix A analysis, Applicants fail to address any limiting factors regarding their ability to withhold supply. The primary element of the Applicants' mitigation proposal is the divestiture of 3,546 MW of summer capacity generation via the sale of four out of five of Calpine's combined cycle natural gas plants in eastern PJM within a year of the transaction.<sup>30</sup> Applicants contend such divestiture is not needed, but if it is, the

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<sup>30</sup> Application at 3.

plan “fully addresses even theoretical competitive concerns.”<sup>31</sup> Nevertheless, the application does not address the likelihood of market manipulation if the merger is not conditioned on this divestiture or explain how the divestiture ameliorates the incentive and ability to withhold supply among the fleet remaining after a divestiture.<sup>32</sup>

Applicants primarily rely on the HHI screens, PJM mitigation measures, and a contention that the precedential PJM submarkets need not be used for HHI screening.<sup>33</sup> This reliance is flawed. HHI is not a definitive indicator of structural market power because market conditions are dynamic, and a supplier can become pivotal at any time.<sup>34</sup> PJM’s execution of the Commission’s structural mitigation measures, such as offer caps and other procedures involved in capacity market mitigation, rely on the assumption that the total demand for energy can be met without the supply from any individual supplier or without the supply from a small group of suppliers (i.e., “pivotal suppliers”).<sup>35</sup> Because this assumption can be false, HHI cannot effectively screen for and structural mitigation cannot effectively address the exercise of market power without further intervention.<sup>36</sup> Furthermore, as discussed, *supra*, the proposed transaction likely increases the combined company’s ability to withhold supply because it will add intermediate and peaking fossil-fuel generators to its supply stack.<sup>37</sup> Applicants thus have not met their burden of proof because the application fails to address the increased ability and

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<sup>31</sup> Application at 3.

<sup>32</sup> *See Pub. Serv. Co. of New Mexico PNMR Dev. & Mgmt. Corp.*, 153 FERC ¶ 61,377, P 24,29 (2015).

<sup>33</sup> Application, Exh. J at 18.

<sup>34</sup> Independent Market Monitor, 2024 State of the Market at 224.

<sup>35</sup> *Id.* at 224.

<sup>36</sup> *Id.* at 224–225.

<sup>37</sup> Application at 3.

incentive to withhold supply. The Commission should therefore find the application deficient and reject it, or, alternatively, set the proceeding for an evidentiary hearing.

Short of rejection, to more fully address the evidentiary deficiencies, the Commission should have in the record a full analysis of the merger, including possible mitigation schemes, performed by the PJM Independent Market Monitor (“IMM”). The IMM is uniquely qualified to present a full analysis of the impacts of the merger on the PJM market. The IMM has access to data to which no other party in the case has access. Although the Applicants have access to data on their own plants, such as plant performance information and bidding history, the IMM has access to that confidential information for all participants in the PJM market. Even without the benefit of a full analysis by the IMM, the evidence provided with this protest shows that the Applicants have not met their burden of proving the proposed merger would not create a company that can exert market power to manipulate wholesale prices—thus having the ability to harm customers—even with the proposed mitigation plan in the Application.

## **CONCLUSION**

The Commission should deny the Application as filed because the merger substantially increases market concentration in PJM—as shown in the HHI screens—and the opportunities for the exercise of market power. The opportunities are exacerbated by the combination of peaker and base generation assets that would result under the merger. Based on those facts, the Commission should reject the Application. Alternatively, the Commission should set the matter for an evidentiary hearing. The application fails to demonstrate the likelihood of absence of competitive harm. Because of the ability and

incentive for Constellation to exercise unilateral market power post-merger, absent denial, the Commission should conduct additional evidentiary hearings to determine adequate mitigation before the proposed merger can be approved. In particular, additional evidentiary proceedings in this matter would provide the Commission with a full analysis of the impacts of this merger performed by the PJM IMM. Therefore, MPC submits that, unless the Commission denies the Application, further evidentiary proceedings in this case are warranted.

Respectfully submitted,

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Dated: March 25, 2025

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 25th day of March 2025, the foregoing “Protest and Request for Evidentiary Hearing of the Maryland Office of People’s Counsel” was either hand-delivered, e-mailed or mailed first-class, postage prepaid to all parties of record to this proceeding.

Respectfully submitted,

**/electronic signature/**

Alexis H. Lewis

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