UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

DC Energy, LLC DC Energy Mid-Atlantic, LCC v. PJM Interconnection, L.L.C.	)))))))	Docket No. EL12-8-000, -001

PROTEST OF THE INDEPENDENT MARKET MONITOR FOR PJM

Pursuant to Rules 211 and 602(f) of the Commission's Rules and Regulations,[1] Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM ("Market Monitor"),[2] submits this protest to the Stipulation and Agreement of Settlement Agreement filed in the above captioned proceeding April 28, 2014 ("Settlement") by DC Energy, LLC and DC Energy Mid-Atlantic, LLC (collectively, "the DC Energy"), on behalf of themselves, Scylla Energy LLC ("Scylla"), and PJM Interconnection, L.L.C. ("PJM"). The Commission's final orders in this proceeding satisfactorily resolved the issues raised in this proceeding and helped to restore confidence in the integrity of PJM markets.[3] The Settlement compromises the outcome in the Final Orders, has no merit and should be rejected.

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1 18 CFR §§ 385.211 & 385.602(f) (2012).

2 PJM Interconnection, L.L.C. is a FERC approved Regional Transmission Organization. Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff ("OATT").

3 *D.C. Energy, LLC, et al. v. PJM*, 138 FERC ¶ 61,165 (2012), *reh'g denied*, 144 FERC ¶ 61,024 (2012) ("Final Orders").

The Settlement states (§ 3.1), "As of February 21, 2014, PJM has halted and shall not resettle any remaining amounts arising from or permitted by the Order issued in this case."[4] The Settlement provides (§ 3.3), "there shall be no adjustments to any PJM resettlement invoices paid as of February 21, 2014, relating to the Order, and that PJM shall not resettle or otherwise seek further payments in connection with any amounts not yet resettled, invoiced, or paid in connection with the Order." This means that PJM Members will not receive an estimated $10.2 million to which the Commission has found that they are entitled, and that unspecified persons, apparently DC Energy, would retain an estimated $10.2 million to which the Commission has found that they are not entitled.[5] In exchange, DC Energy and Scylla must "request that their petition for review be withdrawn."[6]

Under the facts and circumstances of this case, and as a consequence of the operation of the PJM market rules, which include a two-year limit on resettlements,[7] the resolution was lenient to DC Energy and Scylla. The Settlement is unjust, unreasonable and discriminatory because it arbitrarily awards $10.2 million to unspecified persons, apparently DC Energy, at the expense of other PJM Members. The Settlement does not include all parties representing the interests implicated in this proceeding. Neither the Commission Office of the Solicitor nor other Commission staff is a party to the settlement. PJM Members are not a party to the settlement. The Market Monitor, which actively

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4 The Settlement does not indicate by what authority PJM determined that PJM or PJM Settlement, Inc. could unilaterally agree to disregard the Final Orders and the billing and settlement provisions of the PJM Operating Agreement.

5 *See* Settlement § 3.1. The Settlement does not explain exactly who would avoid payment of the $10.2 million owed to PJM Members. By email dated May 8, 2014, PJM counsel informed the Market Monitor that PJM was, in turn, informed that "Scylla was getting no economic relief as a result of the proposed settlement." This implies that D.C. Energy is the only party for whom rebilling has not been completed.

6 *See* Settlement § 3.5.

7 *See* PJM Operating Agreement § 15.6.

participated in the proceedings prior to issuance of the Final Orders, is not a party to the settlement.[8]

A contested settlement must be evaluated on the merits, under the standards set forth in the *Trailblazer Pipeline Co.* line of decisions ("*Trailblazer*").[9] The courts have rejected the notion that "any settlement, solely because of its status as such, is reasonable,"[10] and have clearly articulated that contested settlements cannot be accepted simply because certain parties agree to a value.[11] In this case, DC Energy, Scylla and PJM agreed among themselves to a $10.2 million value. This is a black box value that has no record support and defies evaluation on its merits.

More than $10.2 million is at stake in this proceeding. Full enforcement of the Commission's orders is important to discourage inappropriate market behavior. The Final Orders are cause for public confidence in the integrity of PJM markets. Accordingly, the Market Monitor protests and opposes this settlement, requests that it be rejected, and that PJM and PJM Settlement, Inc. be directed to immediately resume compliance with the Final Orders and with the tariff provisions applicable to settlements.

I. PROTEST

The Settlement provides for PJM to discontinue rebilling with $10.2 million still outstanding. Article II of the Settlement states its purpose is "to bring certainty to the marketplace and avoid the costs, risks, and uncertainties of continued litigation." The

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[8] The Market Monitor was not included in settlement discussions or provided an opportunity to review the settle agreement prior to its filing.

[9] *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,082 (1998) ("*Trailblazer I*"); *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 at 62,341 ("*Trailblazer II*"), *order on reh'g*, 87 FERC ¶ 61,110 ("*Trailblazer III*"), *aff'd*, 88 FERC ¶ 61,168; *see also Pub. Utils. Comm'n of Cal. v. El Paso Natural Gas Co.*, 105 FERC ¶ 61,201 at P 44 (2003), *reh'g denied*, 106 FERC ¶ 61,315 (2004).

[10] *Laclede Gas Company v. FERC*, 997 F.2d 936, 945 (D.C. Cir. 1993).

[11] *Id*. at 947.

argument that the Settlement brings certainty to the marketplace is nonsense. The argument that litigation would be avoided does not support this particular settlement. All Settlements avoid continued litigation. No reasonable basis for approving the particular terms of this Settlement have been offered.

The Settlement is a black box settlement because the parties agreed to a dollar amount with no support in the record and have offered no explanation for why that dollar amount is appropriate. The reason to excuse rebilling of an estimated $10.2 million portion of an estimated total $50 million is unexplained. No evidence supports a decision to settle at this particular value. The reasons that any party agreed to settle at this level are unknown.

Assuming that D.C. Energy and Scylla acted rationally, they apparently concluded that avoiding rebilling of $10.2 million dollars from the Settlement served their interests better than their chances of winning an estimated $50 million on appeal. This suggests an assessment that the odds of prevailing were low. The interests of PJM's Members, who are exposed to the opposite side of D.C. Energy's and Scylla's calculation, were not represented. What interest the Settlement serves PJM is a mystery, as PJM has agreed to unilaterally surrender the result that it sought and obtained in the Final Orders. PJM has no obligation to continue to litigate, and PJM has no direct pecuniary interest in the result.

The settlement is extraordinarily one-sided. This case is on appeal, but the principal counter party to that appeal, the Commission Office of the Solicitor, has not agreed to the Settlement. The Market Monitor was an active party to this proceeding in FERC Docket No. EL12-8, but was not consulted on the terms of settlement. The Market Monitor objects to terms that would, with no explanation, alter the satisfactory outcome obtained in the Final Orders.

In order to approve a contested settlement, the settlement must be evaluated on its merits.[12] The Commission's decision in *Trailblazer* sets forth standards in four approaches for evaluating the merits of a settlement.[13]

Under "Approach No. 1," the Commission renders a binding merits decision on each of the contested issues.[14] Under "Approach No. 2," the Commission may approve the contested settlement "based on a finding that the overall settlement as a package provides a just and reasonable result."[15] Whether considered issue by issue (Approach No. 1) or as a package (Approach No. 2), the Settlement does not survive an analysis based on its substantive merits.[16]

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12 *Trailblazer II* at 61,438, citing *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974) (*"*the Supreme Court has held that where a settlement is contested, the Commission must make "an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates.'") Rule 602(h)(1)(i) provides that the Commission may decide the merits of contested settlement issues only if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines that there is no genuine issue of material fact. 18 CFR § 602(h)(1)(i).

13 *See Trailblazer II*, which summarizes (at 61,436 n.5) four approaches for the Commission to approve contested settlements: "Approach No. 1, where the Commission renders a binding merits decision on each of the contested issues; Approach No. 2, where approval of the contested settlement is based on a finding that the overall settlement as a package provides a just and reasonable result; Approach No. 3, where the Commission determines whether the benefits of the settlement out balance the nature of the objections, in light of the limited interest of the contesting party in the outcome of the case; and Approach No. 4, where the Commission approves the settlement as uncontested for the consenting parties, and severs the contesting parties to litigate the issues."

14 *See Trailblazer II,* at 61,436 n.5.

15 *Id.*

16 *Id.*; *Trailblazer II* at 61,440 n.21 ("In *Mobil Oil Corp. v. FPC, 417 U.S. 283, 314 (1974),* the [Supreme] Court explained that the Commission can approve an uncontested settlement if it is in the public interest, and can also approve a contested settlement rate if there is substantial evidence in the record to support a finding that the settlement rate is just and reasonable. Both approvals are decisions on the merits, as opposed to procedural decisions. Thus, there are different types of merits decisions, and approval of the settlement as a whole as reasonable does not involve a merits decision on each issue in the proceeding.").

Because the Settlement explains neither the basis for agreement nor the basis for the particular $10.2 million value, it defies substantive analysis on the merits under Approach No. 1.

Approach No. 2 does not avoid analysis of the Settlement on the merits, it holds only that a settlement can be approved if the overall settlement has merit and adequate support as a package even if some elements of that package are "problematic."[17] This path further provides for "a balancing of the benefits of the settlement against the costs and potential effects of continued litigation."[18]

Because the Settlement features a single substantive element, an end to resettlement with $10.2 million still outstanding to the detriment of other PJM Members, the Settlement is not a package settlement. Application of Approach No. 2 is therefore inappropriate. Even if the Settlement were nonetheless found to constitute a package, because the Settlement specifically does not explain any reasonable basis for agreement or the basis for the proposed black box value ($10.2 million), it is impossible to evaluate the Settlement under Approach No. 2 element by element to determine whether it is just and reasonable as a package.

A consideration when applying *Trailblazer* Approach No. 2 is a "balancing of the benefits of the settlement against the costs and potential effects of continued litigation."[19] The only parties to the Settlement who will avoid the cost of litigation are DC Energy and Scylla, the parties who receive the entire benefit of the Settlement. The Commission, who is the respondent, is not a party to the Settlement. PJM has no obligation to continue litigating, and it has no pecuniary interest at stake. The Settlement means that the Market Monitor must resume litigating in order to protect a result that serves the public interest.

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17 *Trailblazer II* at 61,439.

18 *Id.*

19 *Id*.

Trailblazer expressly recognizes that the Commission must reject the "rationale that the settlement was appropriate because it was in the mid-range of the parties' various proposals."[20] The courts have squarely rejected settlements that attempt to split the difference.[21] The Settlement should be rejected as an invalid attempt to split the difference. The facts and circumstances of the Settlement are even more egregious when one considers that PJM Members who would split the difference as a result of an approval of the Settlement are not parties to the Settlement.

Failing to continue to litigate this proceeding has significant non-pecuniary costs. Full enforcement of the Commission's order is important to discourage inappropriate market behavior. The Final Orders are cause for public confidence in the integrity of PJM markets. Weakening the Final Orders sends the wrong message and invites meritless appeals of final Commission orders.

Approach No. 3 does not apply here because the Market Monitor's objections do not concern a limited issue. The Market Monitor objects because the Settlement materially alters the outcomes of the overall proceeding. The Settlement nullifies rebilling for $10.2 million

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[20] *Trailblazer II mimeo* at 44, citing *Laclede Gas Company v. FERC*, 997 F.2d 936 (D.C. Cir. 1993). The *Laclede* court stated (at 946): "FERC's confidence in the reasonableness of the settlement amount appears to rest primarily on the observations that (1) the $ 19 million refund 'is much less than what [the] Enforcement Staff argues for, but much more than United has conceded it owes,' [citation omitted]; and (2) Enforcement's high-end estimate, which was based on the ALJ's proposed methodology, would prove accurate only if all of the outstanding issues were resolved against United, [citation omitted] Turning to the first of these two rationales, the mere fact that the settlement figure fell somewhere within the vast gulf between United's estimate of its own liability (approximately $ 1 million) and the alternative advanced by Enforcement (approximately $ 53 million by the time of the order denying rehearing) provides scant support for the Commission's decision. As an initial matter, it is entirely possible that the preliminary liability estimate of a party in United's position might reflect a strategy designed to strengthen its position in the ensuing settlement negotiations or litigation. More importantly, relying solely on such estimates would lead to the untenable result that if United initially estimated its liability at one dollar, a settlement of a penny more would be "within the expected range of recovery."

[21] *Id*.

of a total estimated $50 million amount subject to rebilling, and discontinued rebilling broadly impacts all PJM Members. The Settlement undermines an outcome that reasonably protects the public interest in deterring inappropriate market behavior.

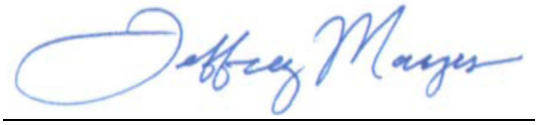
Approach No. 4 does not apply because no issue exists that could be severed. The issue is preserving the satisfactory outcome in the Final Orders. No issue has been identified that could be severed. The pecuniary interests of PJM Members are adversely affected. The broader public interest is adversely affected.

Accordingly, the Market Monitor protests and opposes this settlement, requests that it be rejected, and that PJM and PJM Settlement, Inc. be directed to immediately resume compliance with the Final Orders.

II. CONCLUSION

The Market Monitor respectfully requests that the Commission afford due consideration to this protest as the Commission resolves the issues raised in this proceeding.

Respectfully submitted,



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Dated: May 16, 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 16th day of May, 2014.

/s/ Maeve Tibbetts

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