UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

NRG Power Marketing LLC	)))	Docket No. ER22-1539-002
NRG Business Marketing LLC	)))	Docket No. ER23-2688-002

COMMENTS OF THE INDEPENDENT MARKET MONITOR FOR PJM IN OPPOSITION TO OFFER OF SETTLEMENT

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 ("Market Monitor") for PJM Interconnection, L.L.C. ("PJM"),[2] submits these comments in opposition to the Settlement Agreement and Offer of Settlement ("Offer") filed in the above captioned proceeding on May 2, 2024, by NRG Power Marketing LLC on behalf of Indian River Power LLC, Delaware Public Service Commission, Old Dominion Electric Cooperative, Delaware Municipal Electric Corporation, Inc., the City of Dover Delaware, and PJM Interconnection, L.L.C. (collectively, the "Settling Parties). By order issued March 26, 2024, effective August 1, 2023, the Commission accepted a notice that NRG Business Marketing LLC ("NRG") succeeded to all the tariffs filed by NRG Power Marketing LLC, including the rate schedule for Part V service filed in this proceeding.[3]

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[1] 18 CFR §§ 385.211 & 385.602(f) (2023).

[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] *NRG Business Marketing LLC, et al.*, 186 FERC ¶ 61,215.

The Offer proposes that a total of $263,240,000 be paid to NRG for certain reliability services provided to PJM pursuant to Part V of the OATT during the period starting May 31, 2022, and expected to run for 55 months, through December 31, 2026. The total $263,240,000 consists of a black box amount equal to $228,250,000 that has no support in the record plus an estimated $34,990,000 in project investment costs ("PI").The Market Monitor opposes the Offer because there is no evidence that this amount reflects NRG's actual operating costs to provide Part V service, because there is no evidence that the settlement complies with applicable provisions of the PJM OATT and because the settlement does not resolve the issues of fact set for hearing. The Offer is excessive because it continues to include a significant amount of sunk costs that are not costs of operating the unit.

A contested settlement must be evaluated on the merits, including under the standards set forth in the *Trailblazer Pipeline Co.* line of decisions ("*Trailblazer*").[4] The courts also have been clear that contested settlements cannot be accepted simply because certain parties agree to a value.[5] That certain parties have agreed to a black box $228,250,000 plus $34,990,000 in PI is the only basis for the Offer. A black box value having no record support defies evaluation on its merits.

It is particularly important that the Commission uphold the principles set forth in Part V of the PJM OATT because those principles are consistent with the Commission's policies of regulation through competition, which include as a critical element the assignment of investment risk to investors and not to customers. A settlement at a level inconsistent with filed market rules would create a de facto rate that is higher than the rate consistent with the tariff, the filed rate.

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4 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).

5 *See* Laclede Gas Company v. FERC, 997 F.2d 936, 947 (D.C. Cir. 1993).

I. BACKGROUND

When an owner notifies PJM that it intends to deactivate a unit on an identified date, PJM may request and the owner may agree to provide continued service for a defined period after that date in order to allow PJM to address reliability issues on the system created by the deactivation.[6] Part V of the OATT provides that generating units that provide Part V service for PJM may receive compensation under a formula specified in Sections 114–115 of the OATT or file to collect "a cost of service rate to recover the entire cost of operating the generating unit until such time as the generating unit is deactivated" under Section 119 of the OATT. Both options under Part V allow only for recovery of the actual costs incurred to remain in service (incremental expenses and investment), less net operating revenues during the period of Part V service. The formula rate caps recovery of new project investment needed to provide Part V service (APIR) at $2 million, subject to approval of additional amounts to be approved by the Commission.[7] The formula rate also provides for an incentive adder based on the term of Part V service.[8] Neither option in Part V permits the recovery of sunk costs not related to the provision of Part V service.[9]

The goal of the tariff language is to ensure that a generation owner who operates a unit past its intended retirement date for reliability reasons is compensated for all the costs that it incurs in order to provide that service. Part V service has the limited purpose of allowing PJM time to complete transmission upgrades needed to ensure the reliable operation of the system after a unit deactivates. Section 119 allows recovery under a tariff filed at the FERC of operating costs, including a return on and of investment needed to

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6 *See* OATT § 113.2.

7 *See* OATT § 115.

8 *Id*.

9 *Id*.

continue operating during the period of Part V service. The goal of the tariff language is not to provide the generation owner an opportunity to earn windfall profits or recover otherwise unrecoverable costs because the unit retirement causes a reliability problem.

On June 29, 2021, NRG notified PJM that it intended to retire the Indian River Station Unit No. 4 ("Indian River 4" or "IR4") as of May 31, 2022.[10] NRG previously recognized in SEC 10-K filings that the value of Indian River 4 was impaired based on market conditions and therefore should be written down. NRG's 2013 10-K/A Amendment (filed September 10, 2014) explained that Indian River recorded impairment charges in the fourth quarter of 2013 of $459 million. That filing stated: "As a result, the assets are considered to be impaired, and the Company measured the impairment loss as the difference between the carrying amount and the fair value of the assets."[11] NRG's 2017 10-K (filed March 1, 2018) stated: "The Company recognized an impairment loss of $36 million for Indian River as a result of the decrease in the Company's view of long-term power prices in PJM."[12] NRG's 2021 10-K (filed February 24, 2022) stated: "Company recorded impairment losses of $544 million, of which $306 million was recorded in the second quarter related to the decline in capacity prices and the planned retirement of a significant portion of the PJM coal fleet."[13] None of the filings defined the impairment specifically related to Indian River 4, but, based on the three impairments, it is reasonable to conclude Indian River 4 has been written down to a value of zero. Despite this, NRG proposed to reverse the impairments and recover from

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10 *See* Deactivation Filing, Attachment B. NRG previously announced the retirement of Indian River 4 on June 17, 2021 in a call with investors. NRG Energy Inc., Investor Day, Corrected Transcript at 19, which can be accessed at: <*https://investors.nrg.com/static-files/5b7e0190-ec30-478a-8890-1a4851ebec09*>.

11 NRG SEC Filings 2013 10-K/A (September 10, 2014) at 41, <*https://investors.nrg.com/sec-filings/sec-filing/10-ka/0001013871-14-000019*>.

12 NRG SEC Filings 2017 10-K (March 1, 2018) at 108, <*https://investors.nrg.com/sec-filings/sec-filing/10-k/0001013871-18-000011*>.

13 NRG SEC Filings 2021 10-K (February 24, 2022) at 56, <*https://investors.nrg.com/sec-filings/sec-filing/10-k/0001013871-22-000010*>.

PJM customers a return on and of capital that NRG had explicitly declared to the SEC and to its investors to have no value. NRG would have retired the units on May 31, 2022, but for PJM's request that, for reliability reasons, that the unit remain in service for the Defined Period. If the units had retired, the value of the IR4 unit would have been zero.

Part V service is provided if the generation owner agrees, and is, thus, "voluntary."[14] NRG agreed to provide Part V service and filed to receive compensation under Section 119 of the PJM OATT.

NRG proposed that customers pay NRG $356,772,207 for Part V service over the 55 month period identified by PJM. The Market Monitor filed a protest on May 6, 2022, arguing that such recovery was unjust and unreasonable under section 205 of the Federal Power Act because NRG was attempting to shift to ratepayers significant costs associated with investment risk assigned to NRG under the prevailing regulation through competition paradigm by filing to recover sunk costs and fixed operation and maintenance costs calculated under the superseded rate base rate of return paradigm. The unit was retired because it was not economic in a competitive market, had no prospects of being economic and its value had already been entirely written off for that reason. The Market Monitor objected to the attempted change of regulatory paradigm which was based solely on PJM's need for NRG's units for the Defined Period.[15] PJM needed the unit because the notice that NRG provided was not sufficient for PJM to put into place transmission system upgrades needed to accommodate the deactivation. The PJM reliability requirement for these units gives the owner market power. The purpose of the Part V service provision is to ensure that generation owners' costs of providing the service are covered and that customers are protected from the exercise of market power.

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[14] *See* OATT § 113.2 & 113.3.

[15] *See* Protest of the Independent Market Monitor for PJM, Docket No. ER22-1539-000 (May 6, 2022).

By order issued May 31, 2022 ("May 31st Order"), the Commission stated (at P 43): "Our preliminary analysis indicates that the RMR Rate Schedule has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful." The Commission further found (*id*.) that NRG's proposed rate for Part V service "raises issues of material fact … that cannot be resolved based on the record before us."[16]

The parties to this proceeding have been engaged in settlement discussions since issuance of the May 31st Order. NRG is currently providing Part V service, and such service is expected for a period continuing through December 31, 2026 ("Defined Period").

II. COMMENTS

The NRG RMR Settlement would settle this case for a total of $263,240,000 for the term of the Part V service.[17] The NRG RMR Settlement is a black box settlement. The basis for the agreed upon amount, $228,250,000 excluding the project investment, is not explained, and no evidence supports it. The reasons that any party agreed to this total payment are not stated. There is no evidence that any party believes that a $228,250,000 or a total payment of $263,240,000 equals the costs incurred by NRG to provide the Part V service. The evidence shows that this is clearly not the case.

A. The Settlement Should Be Rejected Under *Trailblazer*.

In order to approve a contested settlement, the settlement must be evaluated on its merits.[18] The Commission's decision in *Trailblazer* sets four standards for evaluating the

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16 *NRG Power Marketing LLC*, 179 FERC ⁋ 61,156 at P 43.

17 Offer, Settlement § 5.1.

18 *Trailblazer III* 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

merits of a settlement.[19] Only one approach included in *Trailblazer* is potentially relevant here, Approach No. 2.[20]

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reasoned decision or the Commission determines that there is no genuine issue of material fact. 18 CFR § 602(h)(1)(i).

19 *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."

20 Approach No. 1 is not appropriately applied in these circumstances. Section 77 of the settlement indicates that the Settling Parties view overall "economic balance" as the basis of the settlement and do not ask for a decision of each contested issue on the merits.

Because the nature of the recovery allowed under the law for Part V service is the core issue of this proceeding, the objections cannot be found "limited" under Approach No. 3and

As the Presiding Judge recently found when rejecting application of Approach No. 3 to a settlement contested by the Market Monitor:

> Although the IMM is neither a Black Start generator nor a ratepayer in PJM, the IMM's interest in this proceeding is not attenuated, but is substantial. The IMM's interest is no more attenuated than the interest of PJM, which is also neither a Black Start generator nor a customer. … [I]t is plain to me that the IMM has a direct stake in ensuring that the CRF values and the resulting Capital Cost Recovery Rates do not allow for the over-recovery (or under-recovery) of Black Start generators' capital costs,[footnote omitted] which may distort competition in other markets in which these generators participate.

PJM Interconnection, L.L.C., 186 FERC ¶ 63,019 at P 109 (2024), motion for interlocutory appeal denied, *PJM Interconnection, L.L.C.*, Notice of Determination by the Chairman, Docket No. ER21-1635-003 (April 12, 2024).

The issue cannot be severed under Approach No. 4. The Presiding Judge found when rejecting application of Approach No. 4, "it is impossible to allow the IMM to litigate its concerns without affecting the settling customers' rates." *Id*. at P 114.

Accordingly, the Market Monitor will not further address approaches one, three or four unless another party asserts that one or more apply.

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."[21] The black box settlement at a $263,240,000 does not survive an analysis based on its substantive merits.[22] 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."[23] 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." NRG could terminate the litigation immediately and obtain full and fair compensation for the RMR Services. The decision to continue litigating this matter is NRG's, and the motivation to do so must be a belief that it can obtain through settlement greater compensation that what would be available to it under the methods approved by PJM stakeholders and accepted by the Commission in the PJM tariff.

Although the Commission may consider customers' support as a factor when evaluating a contested settlement, such a finding does not avoid the need for a decision on the merits.[24]

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21 *Id*.

22 *Id*.; *Trailblazer III* 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 an 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.").

23 *Trailblazer III* at 61,440.

24 *See NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1164–65 (D.C. Cir. 1998) ("As we have explained before, the Commission is clearly entitled to give weight to the support of customers when deciding whether to approve a settlement offer.[citation omitted] However, customer support is not dispositive, even when a settlement offer is uncontested. Even if Tennessee's customers had unanimously supported the proposed settlement, the Commission would still have

PJM customers rely on Commission approved PJM market rules to protect their interests. The Offer does not provide any evidence that a $263,240,000 payment is consistent with the requirement in the PJM OATT that funds for RMR Services collected under Section 119 of the PJM OATT constitute "a cost of service rate to recover the entire cost of operating the generating unit until such time as the generating unit is deactivated." Whether the Offer is consistent with the applicable law cannot be evaluated. This amount clearly exceeds what Part V and section 119 of the OATT would allow.

B. The Settlement Is Excessive, Has No Merit and Should Be Rejected.

In the attached Affidavit, Dr. Joseph Bowring explains that the record does not show that the Offer is just and reasonable. He explains that the proposed total compensation is excessive, incompatible with the purpose of Part V, and incompatible with regulation through competition. Table 1 in the Affidavit (at 5) shows that the Offer inappropriately includes $115,862,358 in sunk costs. The amount of sunk costs included in the Offer far exceeds the range of an Offer that could be approved as a just and reasonable package under *Trailblazer* Approach No. 2.

1. NRG Should Be Permitted to Recover the Costs of Providing Part V Service But No More.

PJM ensures reliability at least cost through a regulatory regime based on competitive markets. In a competitive market, suppliers bear the risks associated with their assets and receive market revenues for their assets. This is in contrast to the traditional cost of service regime, which was replaced by markets.

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the responsibility to make an independent judgment as to whether the settlement is 'fair and reasonable and in the public interest.' 18 C.F.R. § 385.602(g)(3); [additional citation omitted]. Although the Commission may take widespread customer support into account, such support is not an excuse to ignore arguments raised by a competitor who opposes the settlement.").

Part V does not require generation owners to provide Part V service.[25] Because the PJM approach is voluntary, the PJM rules are materially distinct from the rules in other markets that require post deactivation service.

Section 119 provides for filing a cost of service rate to recover the entire cost of operating the generating unit for reliability at PJM's request. NRG conflates cost of operating the generating units with an old fashioned cost of service rate case as if the Indian River 4 unit had always been a cost of service regulated unit rather than a merchant unit operating in the PJM markets. But NRG's filing fails to meet even that irrelevant standard. If NRG had written off the value of IR4, it would not be entitled to recover any part of that sunk cost under pre market ratemaking. NRG proposes to ignore the actual market results for Indian River 4 and to pretend that the impairments of the asset did not occur and to require customers to pay for the sunk costs of an asset that has no market value.

There is no basis in the tariff for the assertion that the entire cost of operating the unit can be defined by a quasi rate case approach, complete with a test year and going forward adjustments. There is no basis in the tariff for the assertion that the cost of operating the unit includes the sunk costs of the asset. There is no basis in the tariff for asserting that customers should pay estimated costs based on a test year, which NRG relied on (at 11–12) in its initial filing. There is no basis in the tariff for asserting that customers should pay for anything more or less than the actual costs of operating the unit to provide reliability to the PJM market, subject to a thorough review of the need for the expenditures and verification that the costs were actually incurred.

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25 The voluntary basis for continued operations is limited. The Market Monitor does not agree with NRG's assertion in its Part V filing (at 4) of an "unconditional right to deactivate units." Generating units are public utilities, and have reliability obligations and other obligations associated with that status. But generating units are not permitted to intentionally exercise market power. See 18 CFR § 1c.2.

The definition of "a cost of service rate to recover the entire cost of operating the generating unit until such time as the generating unit is deactivated" includes all the costs incurred to provide the service. There is no logical reading of the cost of operating the generating unit that includes payment of a windfall based on assets with zero value or based on unverified estimates.

Generation owners should receive just and reasonable compensation for continuing to operate, as provided for under the OATT.

NRG has acted consistent with its responsibilities in agreeing to continue to operate.[26] This is not a reason to overlook NRG's market power in these circumstances. PJM has no alternative to keeping these units in service until it has implemented the transmission upgrades necessary to accommodate the proposed retirements. Any real or perceived ability for a generation owner to decide not to continue to operate does not mean that customers should be forced to pay an unjust and unreasonable rate.

NRG should receive full compensation for all of the costs it incurs to provide Part V service, but no more.

Continuing to operate does not reverse NRG's retirement decision. It accommodates it. The payment to NRG comes within the framework of the PJM market rules and under the FERC approved PJM regulatory framework. Continuing to operate does not create a special alternative cost of service regulatory paradigm applicable to Indian River 4. Continuing to operate is not an opportunity to exercise market power, to reverse market based outcomes or a new profit opportunity. Continuing to operate addresses locational reliability issues. NRG proposes to include costs that are not costs to continue operating. The Deactivation Filing should be evaluated solely on the basis of the requirements and purposes of Section 119 and the Part V of the OATT.

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26 *See* OA Schedule 1 § 1.7.4(a).

Part V of the OATT is designed to retain in service units that want to retire, with minimal operational commitments and with compensation to the owner for all the costs associated with remaining in service, until the retirement can be accommodated consistent with the reliable operation of the system. Section 114 states that deactivation avoidable cost credits support "continued operations" after the desired deactivation date. The design of Section 114 is indicative of the purpose and function of the whole of Part V.

Section 119 of Part V provides for recovery of the "a cost of service rate to recover the entire cost of operating the generating unit until such time as the generating unit is deactivated" for the limited need defined by PJM. Section 119 provides an opportunity for a unit to receive a rate based on the cost of operating the unit when an owner determines that the formula rate provisions in Section 114 are not adequate for its circumstances. Sections 114 and 119 provide different approaches to recovering the cost of operating the unit during the Defined Period. Section 119 does not allow for an entirely different definition of recoverable costs than is allowed under the parallel and alternative provision in Section 114. Sections 119 and 114 are intended to serve the same purpose, and these provisions should be interpreted and applied consistently.

The costs of operating the unit during the Defined Period do not include reversing an owner's prior losses in competitive markets or reversing an owner's decision to write down the value of its assets or failing to recognize that the assets have no market value. The tariff does not provide an option to exploit the need for the unit to operate to extract a windfall.

2. Like NRG's Filing, the Offer Would Impose Excessive Charges on Customers.

In its filing, NRG explained that it seeks payment for continuing to operate, based on traditional cost of service principles.[27] NRG confused the tariff defined "a cost of service

[27] *Id*. at 9–12.

rate to recover the entire cost of operating the generating unit until such time as the generating unit is deactivated" with a traditional rate case for a regulated utility company with continuing obligations. NRG originally requested a guaranteed payment of $356,772,207 for the period. Nowhere did NRG in its filing explain how it transformed the cost of operating the unit into recovery of sunk costs.

The Offer is a black box value unsupported by any evidence or ratemaking principles.

3. NRG Would Require Customers to Pay for Failed Investment.

NRG includes in the requested fixed monthly payment a return on and a return of the investment in Indian River 4 that has zero market value. Customers should not be required to make investors whole for their losses. Customer payments for the return on and of the sunk costs in Indian River 4 should be set to zero. Indian River 4 participated in PJM markets and made a decision to deactivate.

4. Issues with Claimed Estimated Costs.

The Market Monitor supports full recovery for NRG of all costs spent to continue to operate during the Defined Period, including maintenance costs, fuel costs and investment costs.

But all of the costs recoverable for continued operation for reliability should be subject to review for need and actuals, regardless of whether they are higher or lower than the initial estimates. That is the only way to ensure that both NRG and the customers are treated fairly. There should be no payment for written off or sunk costs. The O&M costs should be paid as incurred and not based on estimates using a rate case model with a test year and adjustments.

5. The Offer Is Excessive Under the Logic Applied in the *GenOn* Case.

In its initial filing, NRG cites the order approving a settlement in the *GenOn* deactivation case as precedent for its position that it is not limited to going forward costs.[28] But the case actually means exactly the opposite of what NRG asserts it to mean. The rate was approved in *GenOn* based on a determination that the approved rate was approximately equal to "going forward" costs.[29] The Commission accepted a rate excluding net plant and based on going forward costs as the standard of reasonableness.[30] NRG's filing includes a very significant level of claimed revenue based on the sunk and written off net plant and does not meet the standard of reasonableness accepted by the Commission in *GenOn*. NRG's filing requests that customers pay revenues significantly in excess of that standard. The Market Monitor did not argue in the *GenOn* case and does not argue here that a unit owner must use the formula rates under Section 114 and cannot file a rate under Section 119. Part V offers a choice between Section 114 and Section 119. But Part V is not properly interpreted to offer a choice of entirely different regulatory paradigms. It should not be a matter in dispute that Section 119 is properly interpreted consistent with the nature and purpose of Part V of the OATT.

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28 Deactivation Filing at 6, citing *GenOn Power Midwest, LP*, 149 FERC ¶ 61,218 at P 34 (2014). NRG also cites to the order approving a deactivation filing for RC Cape May, LLC, but this matter was resolved in an order approving the settlement that does not establish precedent, and so is not properly relied upon to resolve any issue raised here. *See RC Cape May Holdings, LLC*, 162 FERC ¶ 61,194 (2018).

29 *See* 149 FERC ¶ 61,218 at P 33–34. The settlement was approved as a just and reasonable package under *Trailblazer*, and did not include findings on the merits for individual issues.

30 *Id*. at P 34.

6. The *Mystic* Case Does Not Support the Offer.

In its initial filing, NRG asserted that its proposed MFCC should be evaluated based on orders issued in the *Constellation Mystic Power* case.[31] NRG's reliance on the *Mystic* case is misplaced. The *Mystic* case was not decided within the framework of the PJM market rules. The case was not initiated under the ISO-NE market rules. The function of the *Mystic* units in ISO-NE is not the function of Indian River 4 in PJM.

The *Mystic* case involved whether the Mystic Generating Station Units Nos. 8 and 9, located in New England, should receive subsidies in order to address winter fuel supply conditions unique to New England.[32] As a result of flawed capacity market rules, the *Mystic* units, which were proposed to be de-listed under the ISO-NE capacity market rules, were determined to be needed to ensure resource adequacy.[33] The units filed for cost of service rates under Section 205 of the Federal Power Act, outside of the then existing ISO-NE market rules.[34]

In approving interim rules in connection with the *Mystic* case, the Commission noted: "…fuel security resources may not necessarily need to be treated the same way in the FCM as reliability resources due to potentially 'material differences' between cost-of-service agreements for local reliability needs and regional fuel security concerns."[35] The Commission noted that it had addressed the differences between fuel security and transmission reliability resources in a prior order and recognized that there are material

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31 *See* Deactivation Filing at 10, citing *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018) ("*Mystic*"), *order on clarification*, 172 FERC ¶ 61,044 (2020).

32 *See* Deactivation Filing at 10, citing *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018) ("*Mystic*"), *order on clarification*, 172 FERC ¶ 61,044 (2020).

33 *See id.* at PP 7–8.

34 *See id.* at P 10.

35 *See id.* at P 86.

differences between cost of service agreements for local reliability needs and regional fuel security concerns.[36] In his dissent, Commission Chatterjee emphasized that "RMR resources are distinguishable from resources retained for fuel security."[37] RMR resources are needed "to address local reliability needs" while transmission upgrades are made.[38] Resources retained for fuel security "are intended to address regional fuel security issues that may be more difficult to solve."[39]

The issue in *Mystic* was whether the precedent providing that RMR generators could offer as price takers in the ISO-NE capacity market should be extended to the *Mystic* fuel security generators.[40] On that limited issue, the Commission approved the inclusion of fuel security generators in the ISO-NE capacity market as price takers.[41]

The issue of allowing the fuel security units to participate as price takers in the ISO-NE capacity market is not relevant to Indian River 4. Under the Deactivation Filing, Indian River 4 will not participate in the PJM Capacity Market and will not provide capacity to PJM.[42] Indian River 4 is not participating in the energy or ancillary services markets or otherwise contributing to the competitiveness of the PJM markets or even useful output to consumers. Indian River 4 is not a capacity resource, was not offered in the capacity market auctions following its deactivation date, does not participate in the PJM energy market and serves solely as a potential reliability resource should PJM operations need it to operate.

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36 *Id.*, citing *ISO New England Inc.*, 164 FERC ¶ 61,003 at P 57 (2018).

37 *Id*.

38 *Id*.

39 *Id*.

40 *See id*. at P 85, citing *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 (2015), *order on reh'g & compliance*, 155 FERC ¶ 61,076 (2016), *order on reh'g & compliance*, 161 FERC P 61,189 (2017).

41 See id.

42 Deactivation Filing at 7 ("NRG-PML is not obligated to offer Unit 4 into the PJM capacity market.").

The sole reason to extend Indian River 4's ability to operate beyond the Deactivation Date is in order to guard against potential system contingencies and thereby help ensure that the PJM system remains reliable.

In contrast, the *Mystic* units entered service in 2003 and are useful for capacity, energy and ancillary services. The role of the *Mystic* units is not the same as the role or IR4.

Indian River 4 is fully distinguishable in law and fact from the *Mystic* case, and *Mystic* is not properly relied upon to support any aspect of the Deactivation Filing.

The *Mystic* case addressed the issue of impairments. The Commission excused the *Mystic* units from taking into account previously recognized GAAP impairments because "the claimed impairments do not represent a write-off that was previously authorized by the Commission."[43] Indian River 4 is an Exempt Wholesale Generator ("EWG"), not subject to the Commission's regulation of books and records under Part 366.[44] NRG has market based rates authorization, including waivers from the Commission's accounting rules.[45] The rationale relied on in *Mystic* does not apply to Indian River 4, and does not excuse the improper treatment of impairments in the Deactivation Filing. Regardless, the rationale in *Mystic* could not be applied to this case because the Commission did not have authority over the treatment of impairments on the books of NRG.

C. The Settlement Fails to Address the Issues Set for Hearing.

The Offer does not resolve the issues that the Commission set for hearing. The May 31st Order found that the record failed to support the costs included in NRG's proposed rate for RMR Services.[46] The Offer includes no additional information or analysis about the costs

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43 *Id*., Attachment E at 17:1–12.

44 *Id*. at 4; 18 CFR Part 366.

45 *Id*. at 3, citing *NRG Power Mktg. Inc.*, 81 FERC ¶ 61,185 (1997).

46 179 FERC ¶ 61,156 at P 43.

on which the $263,240,000 is based. Unlike the settlement offer in the *Genon* case, which included an affidavit showing the level of the offer in that case was comparable to a the rate supported by the Market Monitor excluding sunk costs and impairments, the Offer has no supporting affidavit.[47] The Settling Parties do not provide and cannot provide any valid metric for evaluating the $263,240,000. Here, the affidavit of Dr. Bowring demonstrates that the Offer includes $115,862,358 in sunk costs. The Commission relied on such information in *Genon* in order for it to determine that the proposed settlement value is just and reasonable under the second *Trailblazer* approach because it is "within the range of just and reasonable outcomes."[48] Under the second *Trailblazer* approach, "even if some individual aspects of a settlement may be problematic, the Commission may still approve a contested settlement as a package." Under the second *Trailblazer* approach, consideration of whether the standard set forth in Section 119 of the PJM OATT has been satisfied and whether the compensation for RMR Services is consistent with restructuring through competition, particular the principle that NRG's shareholders and not PJM customers should bear the risk of unrecovered competitive investment in generation assets, could be avoided.

The Offer should be rejected. Instead, the matter should be set for hearing and decided on the basis of a complete record and the applicable law.

III. CONCLUSION

The Market Monitor respectfully requests that the Commission afford due consideration to these comments, reject the Offer, and order the resumption of hearing procedures.

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47 149 FERC ¶ 61,218 at P 36 ("The settlement rate of $13,200,000 is substantially below the initially calculated cost-of-service recovery rate of $23,982,100 for the Locked-in RMR Term. Moreover, the Stewart Affidavit calculated the rate that would apply with no return of, or return on, net plant and determined that this would result in a cost-of-service recovery rate of $12,540,098,[footnote omitted] which supports the rate of $13,200,000 in the settlement.").

48 149 FERC ¶ 61,218 at PP 33–34.

Respectfully submitted,

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Dated: April 22, 2024

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 April, 2024.

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Attachment

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

NRG Power Marketing LLC	)))	Docket No. ER22-1539-002
NRG Business Marketing LLC	)))	Docket No. ER23-2688-002

AFFIDAVIT OF JOSEPH E. BOWRING ON BEHALF OF THE INDEPENDENT MARKET MONITOR FOR PJM

Q 1. PLEASE STATE YOUR NAME AND POSITION.

A. My name is Joseph E. Bowring. I am the Market Monitor for PJM. I am the President of Monitoring Analytics, LLC. My business address is 2621 Van Buren Avenue, Suite 160, Eagleville, Pennsylvania. Monitoring Analytics serves as the Independent Market Monitor (IMM) for PJM, also known as the Market Monitoring Unit (Market Monitor). Since March 8, 1999, I have been responsible for all the market monitoring activities of PJM, first as the head of the internal PJM Market Monitoring Unit and, since August 1, 2008, as President of Monitoring Analytics. The market monitoring activities of PJM are defined in the PJM Market Monitoring Plan, Attachment M and Attachment M-Appendix to PJM Open Access Transmission Tariff (OATT).[1]

Q 2. WHAT IS THE PURPOSE OF YOUR AFFIDAVIT?

A. The purpose of my affidavit is to explain the Market Monitor’s opposition to the offer of settlement (“Offer”) defining the total compensation for Part V service filed in this proceeding by NRG Power Marketing LCC, succeeded by NRG Business Marketing LLC (“NRG-BML”), on behalf of Indian River Power LLC, Delaware Public Service Commission, Old Dominion Electric Cooperative, Delaware Municipal Electric Corporation, Inc., the City of Dover Delaware, and PJM

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[1] *See PJM Interconnection, L.L.C.*, 86 FERC ¶ 61,247 (1999); 18 CFR § 35.34(k)(6).

Interconnection, L.L.C. (collectively, the "Settling Parties). NRG owns and operates Indian River Unit No. 4 ("Indian River 4" or "IR4"), an approximately 410.0 MW (summer rating) coal-fired generation unit, commissioned in 1980 ("Unit 4"), located at the Indian River Power Plant in Millsboro, Delaware.

Q 3. HAVE YOU PARTICIPATED IN PROCEEDINGS ON COMPENSATION FOR PART V SERVICE BEFORE THE FERC?

A. Yes. I have sponsored pleadings and actively participated in prior proceedings involving filings pursuant to OATT Part V § 119, including *Exelon Generation Company*, *LLC*, Docket No. ER10-1418-000; *GenOn Power Midwest*, *LP*, ER12-1901; and *RC Cape May Holdings*, *LLC*, ER17-1083-000.

Q 4. WHY DO YOU OPPOSE THE SETTLEMENT?

The settlement establishes a rate for Part V service that is a black box, meaning that it has no substantive support, and is filed only because the supporting parties prefer the rate in comparison to their perceptions of the range of potential rates that may result from the Commission's determination based on the implementation of the Federal Power Act, including the just and reasonable standard.

The record does not show that the rate is just and reasonable. The proposed total compensation is excessive, incompatible with the purpose of Part V, and incompatible with regulation through competition.

Q 5. HOW IS THE RATE EXCESSIVE?

The proposed total compensation for the expected 55 month term of the RMR agreement is $263,240,000, which is comprised of what the settlement terms a fixed cost charge and project investment costs. The project investment costs are subject to change. Fuel and variable operations and maintenance expense and any net revenue from operations are recovered separately. The initial filing requested $356,772,207 for the project term, including $191,297,120 in costs for assets that had been written off by NRG on its SEC (Securities and Exchange Commission) books. The proposed settlement includes $115,862,355 in such sunk costs. Any recovery of costs previously written off by NRG is not a cost of providing Part V service, is excessive, and is not just and reasonable.

Q 6. HOW IS THE RATE INCOMPATIBLE WITH THE PURPOSE OF THE PART V?

The purpose of Part V of the PJM tariff is to ensure that units that want to retire but PJM needs for reliability are paid the costs of providing that service. The tariff defines two options for a generator in this situation. Under the tariff, a unit remaining in service at PJM's request has two options to recover its costs of continuing to operate: the deactivation avoidable cost rate (DACR), which is a formula rate; and the cost of service recovery rate.

The deactivation avoidable cost rate option is designed to permit the recovery of the costs of the unit's "continued operation," termed "avoidable costs," plus an incentive adder.[2] Avoidable costs are defined to mean "incremental expenses directly required for the operation of a generating unit" and the components of avoidable costs are defined in the tariff. [3] Recoverable project investment under the DACR option is capped at $2 million, above which FERC approval is required.[4]

The cost of service rate option is designed to permit the recovery of the unit's "entire cost of operating the generating unit until such time as the generating unit is deactivated" if the generation owner files a separate rate schedule at FERC.[5] The cost of service rate option was not designed to permit an entirely different theory of cost recovery compared to the DACR option. The "entire cost of operating the generating unit" is nowhere defined to mean a quasi rate case calculation, or recovery of sunk costs. The cost of service rate option provides an alternative means for compensation for Part V service if the costs in the DACR formula are too narrowly defined or the need for recovery of project investment is greater than $2 million.

NRG chose the cost of service rate option under Part V. NRG interpreted this second tariff option (Part V, section 119) as permitting NRG to file a quasi rate case as if the Indian River 4 had been and is now an asset of a company regulated under

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[2] OATT § 114 (Deactivation Avoidable Credit = ((Deactivation Avoidable Cost Rate + Applicable Adder) * MW capability of the unit * Number of days in the month) – Actual Net Revenues).

[3] OATT § 115.

[4] OATT §§ 115, 117.

[5] OATT § 119.

the rate base rate of return regulation paradigm that was superseded by reliance on competitive wholesale power markets in PJM. The immediate result of NRG's interpretation of the tariff was that NRG filed to recover a return on and a return of the Indian River 4 asset despite the fact that the value of the asset was both written off on its SEC books and was a sunk cost. If NRG had retired IR4 on its stated desired date, it would have received nothing for the IR4 asset from PJM customers. The sunk costs are not "a cost of operating the generating unit" and should not be included in the costs that customers are required to pay for Part V service from IR4.

In addition to requesting the payment by customers of $41,737,553 in sunk costs, NRG's filing also requested $21,814,198 as a fixed maintenance payment, which was estimated based on the quasi rate case approach, and which was not subject to review or modification based on actual incurred costs.

Table 1 shows the components of NRG's filed RMR charges to customers for the RMR service. NRG's filed RMR charges also included corporate A&G, or general corporate overheads, taxes other than incomes taxes, and the recovery of project investment costs (PI). The recovery of fuel and variable operation and maintenance expenses were treated separately.

Table 1 shows the total sunk costs requested in the filing in column 3. These include depreciation, return and associated federal and state income taxes.

Column 2 presents an estimate of the IMM's position that only the actual costs of providing RMR service by IR4 should be paid by customers. The actual costs that should be paid by customers should include only actual, verified operation and maintenance expenses. Column 2 includes the NRG filed level of O&M expense as an estimate of the actual expense because actual operation and maintenance expenses will not be known until they are incurred. The actual costs include NRG's filed level of taxes other than income taxes, e.g. property taxes which also need to be verified. Column 2 also includes a proposed incentive payment to NRG of $2,229,176, which is equal to 10 percent of the estimated actual costs.

Table 1 also includes project investment costs (PI), as filed and then modified by NRG in the proposed Offer, equal to $34,990,000, in column 1, column 2 and column 4. NRG's estimate of PI is included in the IMM position as an estimate subject to verification of need and amount.

Column 4 includes the proposed settlement amount, comprised of $228,250,000 in black box revenues that correspond to the components of the filing in rows A through G of Table 1. The difference between the settlement amount and the requested amount is assumed to be a reduction in the recovery of sunk costs (Column 5) because the other components of cost are actual costs. The result is that the settlement includes $115,862,358 in sunk costs. The components of total sunk costs (rows C, E and F) included in the settlement are each reduced proportionately.

NRG should not be paid any level of sunk costs for providing Part V service. Sunk costs are not a cost of providing Part V service. As a result, the settlement provides excessive compensation to NRG of approximately $115,862,358.

In general, NRG should be paid only the actual costs of providing Part V service that have a defined and verified need and that have been reviewed by PJM and the Market Monitor, including O&M, taxes other than income taxes and Project Investment costs.

Table 1 Summary of positions

	Category	(1) NRG 4/1/20222 Filing	(2) IMM Position	(3) Sunk Costs in Filing	(4) Proposed Settlement	(5) Sunk Cost in Settlement
A	O&M	21,814,198	21,814,198			
B	Corporate A&G	5,868,704	0			
C	Depreciation	17,012,503	0	17,012,503		10,303,912
D	Taxes other than Income	519,299	477,567			
E	Fed & State Income Taxes	5,298,147	0	5,298,147		3,208,913
F	Return	19,426,904	0	19,426,904		11,766,235
G	Incentive Payment		2,229,176			
H	TOTAL (Annual)	69,939,754	24,520,941	41,737,553	49,800,000	25,279,060
I	Monthly	5,828,313	2,043,412	3,478,129	4,150,000	2,106,588
J	Term of Project	320,557,207	112,387,645	191,297,120	228,250,000	115,862,358
K	Project Investment (PI) Term	36,215,000	34,990,000		34,990,000	
L	Total Cost Term of Project	356,772,207	147,377,645		263,240,000	

Q 7. HOW IS THE OFFER RATE INCOMPATIBLE WITH REGULATION THROUGH COMPETITION?

NRG and Indian River 4 have participated in PJM's competitive energy, capacity, and ancillary services markets since 2001. In PJM's markets, investors invest funds, pay the costs, and bear the risk of owning and operating power plants and receive market revenues from PJM markets as compensation. FERC explicitly adopted regulation through competition as a replacement for rate base rate of return regulation, choosing to rely on competitive markets with appropriate market power mitigation to provide just and reasonable rates to customers rather than cost of service regulation. The PJM markets with LMP began operation on April 1, 1999.

Part V service was not intended to and nowhere states that it substitutes rate base rate of return regulation for regulation through competition when Part V service is needed to maintain reliability in PJM.

Because Part V units are needed by PJM to maintain system reliability, and the provision of the service is voluntary in PJM, owners of units that PJM needs to remain in service after the desired retirement date have significant market power in establishing the terms of this reliability service which have generally been set through settlements. Part V units can threaten to retire, leaving PJM reliability at risk. Excessive payments to Part V units also create an incentive to retire earlier than otherwise when Part V payments are in excess of market net revenues.

Part V reliability service should be provided to PJM customers at reasonable rates, which reflect the relatively low risk nature of providing such service to owners, the reliability need for such service and the opportunity for owners to be guaranteed recovery of 100 percent of the actual costs required to operate to provide the service, plus an incentive.

The Market Monitor recommends that units recover all and only the costs, including incremental project investment costs without a cap, required to provide Part V reliability service (RMR service) that the unit owner would not have incurred if the unit owner had deactivated its unit as it proposed, plus a defined incentive payment. Customers should bear no responsibility for paying previously incurred (sunk) costs, including a return on or of prior investments.

Customers should pay all the actual costs of providing Part V service, subject to verification of need and verification of actual expenditures.

Q 8. DOES THIS CONCLUDE YOUR AFFIDAVIT?

A. Yes.

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NRG Power Marketing LLC	)))	Docket No. ER22-1539-002
NRG Business Marketing LLC	)))	Docket No. ER23-2688-002

DECLARATION

JOSEPH E. BOWRING states that I prepared the affidavit to which this declaration is attached with the assistance of the staff of Monitoring Analytics, LLC, and that the statements contained therein are true and correct to the best of my knowledge and belief. Monitoring Analytics, LLC, is acting in its capacity as the Independent Market Monitor for PJM.

Pursuant to Rule 2005(b)(3) (18 CFR § 385.2005(b)(3), citing 28 U.S.C. § 1746), I further state under penalty of perjury that the foregoing is true and correct.

Executed on April 22, 2024.

Joseph E. Bowring