UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	)	Docket Nos. EL21-91-003, ER21-1635-005

To: Motions Commissioner

MOTION TO PERMIT INTERLOCUTORY APPEAL OF THE INDEPENDENT MARKET MONITOR FOR PJM

Pursuant to Rules 212 and 715(c) of the Commission's Rules and Regulations,[1] Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM[2] ("Market Monitor"), submits this motion to permit interlocutory appeal of the Order Denying Request to Certify Contested Settlement issued by the Presiding Judge on March 13, 2024 ("March 13th Order").[3]

Prompt Commission review of the contested ruling is necessary to prevent detriment to the public interest and irreparable harm to PJM customers paying for black start service under Schedule 6A of the OATT.[4] The 15 month period during which customers have refund protection under Section 206 of the Federal Power Act expired December 17, 2022, and therefore current payments to black start providers are not subject to refund even if they are determined to be unjust and unreasonable. The Market Monitor believes the settlement

---

1 18 CFR §§ 385.212 & 385.715(c) (2023).

2 Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff ("OATT").

3 PJM Interconnection, L.L.C., 186 FERC ¶ 63,019.

4 *See* 18 CFR § 785.715(a).

would not have been filed but for the pressure resulting from nonrefundable charges. The settlement was not about the merits of this case.

The Market Monitor provides an approach for relief that is forward looking and does not require refunds. However, the ability to afford relief depends on the period left for each rate before the recovery of the investment is complete and the rate terminates. Rates for a number of black start providers will terminate before there is an opportunity to obtain full relief.

The Market Monitor also provides an alternative approach for relief that would recognize that CRF values are inputs to formula rates and should be treated consistent with the applicable precedent.[5] This question of law has been presented to the Commission, but it has not been addressed on the merits, and it may not be addressed on the merits.[6]

The Market Monitor seeks interlocutory appeal of the determination of the Presiding Judge that "neither I nor the Commission should grant the IMM's request to resolve summarily the issues set for hearing based on the current paper record," and that "the IMM's request for the Commission to resolve this matter on the paper record in the comments is procedurally infirm."[7]

The Market Monitor appreciates that the Presiding Judge has been willing to afford serious attention to the issues raised in this case and has confidence that an initial decision in this case would thoughtfully and properly resolve the issues raised in this case. However, under the circumstances, meaningful resolution for customers requires immediate action. An initial decision that correctly decides every factual and legal question presented will not do

---

5 *See* Comments of the Independent Market Monitor for PJM, Docket No. ER21-1635-000 (April 28, 2021); Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM, Docket No. ER21-1635-000 (May 19, 2021); Request for Rehearing of the Independent Market Monitor for PJM, Docket No. ER21-1635-001 et al. (September 9, 2021).

6 *Id*.; Notice of Denial of Rehearing by Operation of Law, Docket No. ER21-1635-001 et al. (October 12, 2021).

7 March 13th Order at PP 129–130.

justice to customers to the extent that customers are still required to overpay for black start service and black start service providers retain an unjust windfall simply as a result of the passage of time. Every day that passes results in nonrefundable charges to customers and that compromises the ability to obtain a resolution that serves the public interest and avoids irreparable harm. Even a perfect initial decision would likely be challenged, and, after potentially significant additional delay, be decided by the Commission. The better approach is to return this simple matter to the Commission now, where the Commission can provide the immediate disposition that is needed.

The CRF values included as an input to the formula rates in Schedule 6A are based in significant part on the level of federal tax obligations, including both the federal corporate income tax rate and the applicable depreciation factors. Federal tax rates changed January 1, 2018, and bonus depreciation allowing 100 percent depreciation of capital expenditures was made effective on September 27, 2017. The result was a significant reduction in federal tax obligations and, as a result, a significant reduction in the correctly calculated CRF values. For over six years, action has been needed to (i) acknowledge that the CRF values inputs are based in part on federal tax obligations; (ii) determine that the CRF values must therefore be revised to reflect the objective change in federal tax obligations; and (iii) determine that the CRF values must be adjusted so that black start service providers accurately recover their specific capital investments through the formula designed for that purpose and included in Schedule 6A, but no more and no less.

The Market Monitor disagrees with the Presiding Judge (at P 130) that there are "substantive deficiencies in the IMM's evidence." The evidence provided by the Market Monitor is overwhelming in support of the core and relevant fact that the CRF values were calculated based on the then prevailing federal tax rates. A fair administrative process does not require accommodating bad faith misdirection, confusion and delay, to the unjust and unreasonable detriment of PJM customers.

The Market Monitor has provided sufficient information in its pleadings for the Commission to determine appropriate relief. If necessary, a just and reasonable approach for relief for PJM customers can be determined through paper hearing procedures.

When the objectively defined inputs to formula rates change, the formula must be revised immediately. There is no reasonable counter argument. That it would take four years to correct an arithmetic error to the significant detriment of customers is appalling. Four years ago, PJM should have moved to address the issue immediately. PJM's failure has already significantly compromised the ability to ensure a complete, just and reasonable outcome under the law. There is no reason for continued delay.

The Market Monitor respectfully requests that the Motions Commissioner permit interlocutory appeal as soon as possible.

Respectfully submitted,

Joseph E. Bowring
Independent Market Monitor for PJM
President
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eagleville, Pennsylvania 19403
(610) 271-8051
joseph.bowring@monitoringanalytics.com

Jeffrey W. Mayes

General Counsel
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eagleville, Pennsylvania 19403
(610) 271-8053
jeffrey.mayes@monitoringanalytics.com

Dated: April 1, 2024

cc: Matthew Christiansen, Esq., General Counsel

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 1st day of April, 2024.

Jeffrey W. Mayes
General Counsel
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eagleville, Pennsylvania 19403
(610) 271-8053
jeffrey.mayes@monitoringanalytics.com

Attachment

186 FERC ¶ 63,019

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C. Docket Nos. EL21-91-003
ER21-1635-005

ORDER DENYING REQUEST TO CERTIFY CONTESTED SETTLEMENT

(Issued March 13, 2024)

TABLE OF CONTENTS

I. INTRODUCTION

1. On January 31, 2024, PJM Interconnection, L.L.C. (PJM), on behalf of itself and Settling Parties,[1] submitted an Offer of Settlement and Settlement Agreement (Settlement) in Docket Nos. ER21-91-003 and ER21-1635-005. In this order, I decline to certify the Settlement to the Commission under Rule 602(h)(2) of the Commission's Rules of Practice and Procedure.[2]

2. The Settlement filing includes: (1) a transmittal letter (Transmittal Letter); (2) the Settlement; (3) an explanatory statement (Explanatory Statement); and (4) redlined and clean *pro forma* tariff revisions implementing the Settlement, designated as Attachments A and B, respectively. In addition, PJM filed, concurrently with the Settlement, a motion with the Chief Administrative Law Judge (Chief Judge) to place the Settlement rates into effect on an interim basis.[3] PJM included with the Interim Settlement Rates Motion a revised rate schedule implementing the Settlement rates effective January 1, 2024.

3. According to the Settling Parties, the Settlement resolves all issues set for hearing and settlement judge procedures in Docket Nos. EL21-91-003 and ER21-1635-005.[4]

---

[1] In addition to PJM, Settling Parties include American Municipal Power, Inc. (AMP); Dynegy Marketing and Trade, LLC (Dynegy); Hazelton Generation, LLC (Hazelton); J-POWER USA Development Co., Ltd. (J-POWER); LS Power Development, LLC (LS Power); Old Dominion Electric Cooperative (ODEC); PJM Industrial Customer Coalition (PJM Industrials); and Vistra Corp. (Vistra). Settlement at 1.

[2] 18 C.F.R. § 385 602(h)(2) (2023).

[3] Unopposed Motion to Place Settlement Rates into Effect on an Interim Basis, Waiver of Answer Period, and Expedited Treatment, Docket No. ER21-1635-006 (Jan. 31, 2024) (Interim Settlement Rates Motion).

[4] Although the Settlement filings and comments on the Settlement do not specifically reference Docket Nos. EL21-91-003 and ER21-1635-005, I assume the Settling Parties intend for the Settlement to resolve all issues pending in these dockets as well. *See* Transmittal Letter at 1 (referencing "Docket No. EL21-91-00_" while stating that the Settlement "resolv[es] all issues set for hearing in the above-referenced proceeding."); Settlement at 1 (captioning Settlement as "Docket No. EL21-91-00_" while stating that the Settling Parties filed the Settlement "to resolve all issues set for hearing in the above-captioned docket."); Explanatory Statement at 1 ("The Settlement resolves all issues set for hearing by the Commission in Docket Nos. ER21-91-000, et al."); Initial Comments of Commission Trial Staff in Support of Settlement, at 1 (Feb. 20,

4. As discussed below at PP 56-59 and 92, Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (IMM), filed comments contesting the Settlement. Therefore, the Settlement is contested.

5. In accordance with Rule 602(h)(2) of the Commission's Rules of Practice and Procedure, I may only certify the Settlement as a contested offer of settlement if I determine that "there is no genuine issue of material fact" under Rule 602(h)(2)(ii) or if I waive the initial decision pursuant to Rule 710(d) and determine that "the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues" under Rule 602(h)(2)(iii).[5]

6. As discussed more fully below, based on the Commission's order establishing hearing and settlement procedures in this proceeding,[6] the limited record in this proceeding (which includes the initial and reply comments, one attached affidavit, and several exhibits),[7] and applicable precedent,[8] I find that there exist several genuine issues

---

2024) (Trial Staff Initial Comments) ("If approved, the Settlement would resolve all issues set for hearing and settlement judge procedures in Docket No. EL21-91-000.").

[5] 18 C.F.R. § 385.602(h)(2).

[6] *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,194 (2023) (Hearing Order).

[7] Although, as discussed below at PP 10-14, the Commission had developed a record in response to the Show Cause Order prior to establishing hearing and settlement judge procedures in this case, I did not consider the evidence in that show cause record except to the extent the participants in this proceeding included it in the materials submitted with the comments on the Settlement. At the prehearing conference on October 5, 2023, I inquired about the status of the show cause record, and counsel for Commission Trial Staff (Trial Staff) and ODEC made clear that the evidence in the show cause record would not become part of the hearing record unless the participants in this proceeding formally introduced it in testimony or a pleading. Tr. 37:15-38:19 (colloquy among Janicke, Clair, and Presiding Judge).

[8] In addition to the Commission's regulations in Rule 602(h)(2), my decision is guided primarily by the *Trailblazer* line of cases and Commission decisions applying that line of cases. *See Trailblazer Pipeline Co.*, 83 FERC ¶ 63,018 (certifying contested settlement) (Brenner, J.), *remanded*, 85 FERC ¶ 61,082 (*Trailblazer*-A), *order on reh'g and interlocutory appeal*, 85 FERC ¶ 61,345 (1998) (*Trailblazer*-B), 86 FERC ¶ 63,006 (certifying contested amended settlement) (Brenner, J.), *order on reh'g and contested settlement*, 87 FERC ¶ 61,110 (*Trailblazer*-C), *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*-D).

of material fact, that the Settling Parties failed to request the omission of the initial decision, and that the record does not contain substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues. Therefore, I DENY the request to certify the contested Settlement.[9]

II. BACKGROUND AND PROCEDURAL HISTORY

7. PJM's Open Access Transmission Tariff (Tariff), Schedule 6A requires all transmission customers to take Black Start Service, which is a service necessary to reenergize the transmission system following a system-wide blackout.[10] PJM conducts competitive solicitations to select units to provide Black Start Service.[11] The owners of selected Black Start units receive a Capital Cost Recovery Rate set by either a Commission-approved, unit-specific rate, filed separately under section 205 of the Federal Power Act (FPA), or a generic rate prescribed in Schedule 6A of the PJM Tariff.[12]

---

[9] Although the Settlement does not include a formal request that I certify the Settlement, PJM did ask the Commission Secretary to transmit the settlement to me by operation of Rule 602(b)(2)(i). Settlement, Transmittal Letter at 1 n.1 (citing 18 C.F.R. § 385.602(b)(2)(i)). I take that as an implicit request to certify the Settlement. Moreover, Trial Staff; PJM; a group of customers including AMP, ODEC and PJM Industrials (collectively, Settling Customers); and a group of suppliers including Dynegy, Hazleton, J-POWER, LS Power, and Vistra (collectively, Indicated Suppliers) explicitly requested in their comments on the Settlement that I certify the Settlement. *See* Trial Staff Initial Comments at 8; Reply Comments of Commission Trial Staff, at 1 (Mar. 1, 2024) (Trial Staff Reply Comments); Reply Comments of PJM Interconnection, L.L.C., Docket No. EL21-91-003, at 1 (Mar. 1, 2024) (PJM Reply Comments); Settlement Reply Comments of American Municipal Power, Inc., Old Dominion Electric Cooperative, and the PJM Industrial Customer Coalition, at 1 (Mar. 1, 2024) (Settling Customers Reply Comments); Reply Comments of the Indicated Suppliers, at 2 (Mar. 1, 2024) (Indicated Suppliers Reply Comments).

[10] Black Start Service means "the capability of generating units to start without an outside electrical supply or the demonstrated ability of a generating unit with a high operating factor (subject to Transmission Provider concurrence) to automatically remain operating at reduced levels when disconnected from the grid." Tariff, I. Common Service Provisions, 1. Definitions, Definitions – A-B (18.2.0).

[11] Hearing Order, 182 FERC ¶ 61,194 at P 2.

[12] Hearing Order, 182 FERC ¶ 61,194 at P 2.

8. The generic rate prescribed in Schedule 6A includes a mechanism for determining the Capital Recovery Factor (CRF) values used in the Capital Cost Recovery Rate, which depends on the date PJM selected the Black Start unit to provide service.[13] For units selected prior to June 6, 2021, the Capital Cost Recovery Rate contains a table for determining the applicable CRF value, which was established in 2009 and filed with the Commission as stated CRF values without cost of service workpapers or support.[14] According to PJM, the CRF values ensure that investment recovery in Black Start units is depreciated in a manner commensurate with unit age and represents a reasonable recovery of the unit owner's capital investment.[15]

9. On April 7, 2021, PJM proposed revisions to the Capital Cost Recovery Rate to apply a formula for setting the CRF value for units selected after June 6, 2021, which would "automatically update the CRF values for federal and state tax rate changes as well as other revisions for new Black Start units."[16] At the same time, PJM retained the table of stated CRF values for units selected prior to June 6, 2021.[17]

10. On August 10, 2021, in Docket Nos. ER21-1635-001 and EL21-91-000, the Commission accepted the formulaic calculation of CRF values for the units selected after June 6, 2021.[18] With respect to PJM's proposal to continue using stated CRF values for units selected before June 6, 2021, however, the Commission initiated a show cause proceeding pursuant to section 206 of the FPA to examine whether the existing CRF values in Schedule 6A for the pre-June 6, 2021 period remain just and reasonable.[19] In particular, the Commission stated that the CRF values for Black Start units currently on the Capital Cost Recovery Rate and recovering investments made prior to June 6, 2021,

---

[13] Hearing Order, 182 FERC ¶ 61,194 at PP 3-4.

[14] Hearing Order, 182 FERC ¶ 61,194 at P 3; *see PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,197, at PP 8, 38-39 (2009) (finding that the formulas for determining the Capital Cost Recovery Rate, including the table of CRF values were just and reasonable).

[15] Hearing Order, 182 FERC ¶ 61,194 at P 3.

[16] *PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,080, at P 1 (2021) (Show Cause Order); Hearing Order, 182 FERC ¶ 61,194 at P 4.

[17] Show Cause Order, 176 FERC ¶ 61,080 at P 9.

[18] Show Cause Order, 176 FERC ¶ 61,080 at PP 1, 42.

[19] Show Cause Order, 176 FERC ¶ 61,080 at PP 46-56.

may no longer be just and reasonable because they relied on a federal corporate income tax rate that pre-dates the Tax Cuts and Jobs Act (TCJA).[20]

11. The Commission directed PJM:

> within 60 days of the date of this order to submit a compliance filing as discussed in this order either: (1) to show cause as to why its Tariff remains just and reasonable and not unduly discriminatory or preferential; or (2) to explain what changes to its Tariff it believes would remedy the identified concerns if the Commission were to determine that the Tariff has in fact become unjust and unreasonable or unduly discriminatory or preferential and, therefore, proceeds to establish a replacement Tariff.[21]

The Commission also directed interested entities to respond within 30 days of PJM's filing, "addressing either or both: (1) whether PJM's existing Tariff remains just and reasonable and not unduly discriminatory or preferential; and (2) if not, what changes to PJM's Tariff should be implemented as a replacement rate."[22]

12. On August 11, 2021, the Commission issued a notice instituting the show cause proceeding under section 206 of the FPA.[23] The August 11 Notice set intervention deadlines, and it established a refund effective date of August 17, 2021.[24]

13. On September 9, 2021, the IMM filed in Docket Nos. EL21-91-001 and ER21-1635-003 a request for rehearing of the Show Cause Order, which the Commission denied by operation of law on October 12, 2021.[25] PJM submitted its response to the Show Cause Order on October 12, 2021, in Docket No. EL21-91-000. Several entities filed timely and late interventions, protests, comments, and additional answers from

---

[20] Show Cause Order, 176 FERC ¶ 61,080 at PP 46-47.

[21] Show Cause Order, 176 FERC ¶ 61,080 at ordering para. (D).

[22] Show Cause Order, 176 FERC ¶ 61,080 at ordering para. (F).

[23] Notice of Institution of Section 206 Proceeding and Refund Effective Date, Docket No. EL21-91-000 (Aug. 11, 2021) (August 11 Notice).

[24] August 11 Notice, 86 Fed. Reg. 45,980 (Aug. 17, 2021).

[25] *See PJM Interconnection, L.L.C.*, 177 FERC ¶ 62,017 (2021).

August to December 2021, and in the Hearing Order on March 24, 2023, the Commission granted all interventions and late interventions and accepted the unauthorized answers.[26]

14. In the Hearing Order, the Commission also established hearing and settlement procedures to determine whether, because of changes from the TCJA, the existing CRF values result in a Capital Cost Recovery Rate that is unjust and unreasonable for units that PJM selected to provide Black Start Service prior to June 6, 2021.[27] Despite all the information submitted in response to the Show Cause Order, the Commission determined that "[t]he import of the tax rate in the determination of the CRF value is a *material fact that cannot be determined based on the existing record*, which *warrants setting the justness and reasonableness of the existing CRF values for hearing and settlement judge procedures*."[28] The Commission was not only interested in what tax rate was used in 2009 to establish the CRF values, but whether the CRF values "remain just and reasonable" and whether they "result in a Capital Cost Recovery Rate that is unjust and unreasonable."[29]

15. On March 31, 2023, the Chief Judge designated Judge Patricia E. Hurt as the Settlement Administrative Law Judge (Settlement Judge) in Docket No. EL21-91-000.[30]

16. On April 21, 2023, Vistra and Dynegy jointly filed a rehearing request of the Hearing Order.[31] On May 22, 2023, the Commission denied the rehearing request by operation of law.[32] On July 17, 2023, Vistra and Dynegy jointly filed a petition for review of the Hearing Order and the Notice of Denial of Rehearing by Operation of Law

---

[26] Hearing Order, 182 FERC ¶ 61,194 at PP 10-12.

[27] Hearing Order, 182 FERC ¶ 61,194 at P 1.

[28] Hearing Order, 182 FERC ¶ 61,194 at P 32 (emphasis added).

[29] Hearing Order, 182 FERC ¶ 61,194 at PP 1, 32, and ordering para. (A).

[30] Order of Chief Judge Designating Settlement Judge, Docket No. EL21-91-000 (Mar. 31, 2023) (Satten, C.J.).

[31] Request for Rehearing of Vistra Corp. and Dynegy Marketing and Trade, LLC, Docket No. EL21-91-002 (Apr. 21, 2023).

[32] *PJM Interconnection, L.L.C.*, 183 FERC ¶ 62,094 (2023) (Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration).

and Providing for Further Consideration in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).[33]

17. On August 4, 2023, the Commission issued an order addressing the arguments that Vistra and Dynegy raised on rehearing and sustained its denial of rehearing.[34] On August 22, 2023, Vistra and Dynegy jointly filed a petition for review of the Order Addressing Arguments Raised on Rehearing in the D.C. Circuit.[35] On August 23, 2024, the D.C. Circuit consolidated this petition for review with the July 17, 2023 petition for review.[36] On August 29, 2023, the D.C. Circuit ordered the consolidated cases to be held in abeyance and directed parties to file motions to govern future proceedings by December 14, 2023.[37] On December 27, 2023, considering Vistra and Dynegy's unopposed motion to hold the appeal in abeyance, the D.C. Circuit ordered the consolidated cases to remain in abeyance and directed parties to file motions to govern future proceedings by March 26, 2024.[38]

18. Judge Hurt convened settlement conferences on April 25, July 18, and August 22, 2023. On August 23, 2023, Judge Hurt declared an impasse and recommended that the Chief Judge terminate settlement judge procedures.[39]

---

[33] Petition for Review, *Vistra Corp. v. FERC*, Case No. 23-1186 (D.C. Cir. July 17, 2023).

[34] *PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,077 (2023) (Order Addressing Arguments Raised on Rehearing).

[35] Petition for Review, *Vistra Corp. v. FERC*, Case No. 23-1228 (D.C. Cir. Aug. 22, 2023).

[36] *Vistra Corp. v. FERC*, Case No. 23-1186 (D.C. Cir. Aug. 23, 2023) (order consolidating Nos. 23-1186 & 23-1228).

[37] *Vistra Corp. v. FERC*, Case No. 23-1186 (D.C. Cir. Aug. 29, 2023) (order granting motion to hold the case in abeyance).

[38] *Vistra Corp. v. FERC*, Case No. 23-1186 (D.C. Cir. Dec. 27, 2023) (order granting motion to hold the case in abeyance).

[39] Order Declaring Impasse, Docket No. EL21-91-000 (Aug. 23, 2023) (Hurt, J.).

19. On August 25, 2023, the Chief Judge terminated settlement judge procedures, designated me as the Presiding Administrative Law Judge (Presiding Judge) in this proceeding, and established Track III procedural time standards for the hearing.[40]

20. On September 1, 2023, the IMM, ODEC, the PJM Industrials, the Delaware Division of the Public Advocate, and AMP, moved for the establishment of paper hearing procedures, or, in the alternative, adoption of Track I hearing procedures in this proceeding.[41] On September 13, 2023, Hazelton, Vistra, Dynegy, J-POWER, LS Power, and Dominion Energy Services, Inc. submitted an answer in opposition to the Paper Hearing Motion.[42]

21. On September 22, 2023, the Chief Judge denied the request for a paper hearing, which he observed "offers more streamlined procedures for cases that primarily involve policy arguments and policy determinations."[43] The Chief Judge based his decision, in part, on the fact that "the Commission expressly set this proceeding for a 'trial-type evidentiary hearing'" based on "the absence of an adequate record to resolve the contested matter," specifically "that the current 'record does not contain conclusive evidence that the existing CRF values include a 35% tax rate … raising a disputed issue of material fact as to whether changes to the tax rate render the existing CRF values unjust and unreasonable."[44] The Chief Judge also denied the Paper Hearing Motion's

---

[40] Order of Chief Judge Terminating Settlement Judge Procedures, Designating Presiding Administrative Law Judge, and Establishing Track III Procedural Time Standards, Docket Nos. EL21-91-000, EL21-91-003 (Aug. 25, 2023) (Satten, C.J.).

[41] Motion for Paper Hearing or, in the Alternative, Revised Time Standards for Hearing, and Request for Expedited Ruling of the Indicated Parties, Docket Nos. EL21-91-000, EL21-91-003 (Sept. 1, 2023) (Paper Hearing Motion).

[42] Answer of the Black Start Providers in Opposition to Motion for Paper Hearing or, in the Alternative, Revised Time Standards for Hearing, and Request for Expedited Ruling of the Indicated Parties, Docket Nos. EL21-91-000, EL21-91-003 (Sept. 13, 2023) (Answer to Paper Hearing Motion).

[43] Order of Chief Judge Denying Motion for Paper Hearing and Denying Motion in the Alternative for Revised Procedural Time Standards, Docket No. EL21-91-003, at PP 7, 9 (Sept. 22, 2023) (first citing *N.Y. Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,024, at P 12 (2007); then citing *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,173, at P 10 (2008)) (Order Denying Paper Hearing).

[44] Order Denying Paper Hearing at P 10 (citing Hearing Order, 182 FERC ¶ 61,194 at PP 32, 33).

request in the alternative to modify the Track III procedural time standards for this hearing.[45]

22. The Chief Judge stated that the "selected track schedule is commensurate with the complexity of the proceeding and provides the requisite time for developing an evidentiary record that is compatible with the matter set for hearing" and that shorter track durations "are foreclosed by the evidentiarily inconclusive and intricate nexus between 1) the tax rate matter, and 2) the Capital Recovery Factor values in the Capital Cost Recovery Rate for Black Start Service."[46] No participant sought reconsideration or interlocutory appeal of the Chief Judge's rulings.

23. On October 5, 2023, I convened a prehearing conference in this proceeding.[47] On October 12, 2023, I issued an order establishing a procedural schedule for this proceeding and confirming that the Protective Order adopted by the Chief Judge for Docket No. EL21-91-000 governs protected materials in this hearing proceeding until I adopt an amended protective order in this proceeding.[48] On October 24, 2023, I held an oral argument regarding PJM's motion for the adoption of a proposed amended protective order, and on October 25, 2023, I adopted a revised protective order.[49]

24. On October 31, 2023, the participants submitted a preliminary joint statement of issues, which I accepted without prejudice to my later ruling on the relevance of certain issues or the scope of this proceeding.[50]

---

[45] Order Denying Paper Hearing at P 13.

[46] Order Denying Paper Hearing at PP 14-15 (first citing Hearing Order, 182 FERC ¶ 61,194 at P 32; then citing Answer to Paper Hearing Motion at 8-9).

[47] *See* Order Scheduling Prehearing Conference and Adopting Hearing Rules, Docket No. EL21-91-003 (Sept. 8, 2023) (Prehearing Conference Order); Tr. 8:3-101:19.

[48] Order Adopting Procedural Schedule and Confirming Bench Ruling Regarding Protective Order, Docket No. EL21-91-003 (Oct. 12, 2023).

[49] *See* Order Denying Request to Shorten Response Period, Establishing Response Period, and Scheduling Oral Argument, Docket No. EL21-91-003 (Oct. 16, 2023); Tr. 105:1-170:2; Protective Order, Docket No. EL21-91-003 (Oct. 25, 2023).

[50] Preliminary Joint Statement of Issues, Docket No. EL21-91-003 (Oct. 31, 2023); Order Accepting Without Prejudice Preliminary Joint Statement of Issues, Docket No. EL21-91-003 (Nov. 2, 2023) (Order on Joint Statement of Issues).

25. On January 10, 2024, a few days before certain participants were to submit a first round of pre-filed testimony, Trial Staff filed a motion to suspend the procedural schedule and shorten the period for answering the motion, stating that it "and other active participants have reached a settlement in principle that would fully resolve all matters set for hearing in this proceeding."[51] On January 11, 2024, the Chief Judge shortened the answer period for the Suspension Motion.[52]

26. On January 11, 2024, the IMM filed an answer opposing the suspension of the procedural schedule arguing that the "proposed settlement cannot and does not resolve the issue set for hearing," therefore, "[t]here is no reason to delay the filing of testimony, briefing and resolution of the factual issue set for hearing."[53] On January 12, 2024, Vistra, Dynegy, J-POWER, LS Power, and Hazelton (collectively, the Black Start Providers) filed an answer in support of the Suspension Motion and a motion for leave to answer and an answer to the IMM Answer.[54] In the Black Start Providers Answer, the Black Start Providers argued that denying the Suspension Motion "would force participants to expend further monies and additional time on litigation" when there was no reason to presume, as the IMM Answer did, that a hearing would be necessary "given the settlement-in-principle that has already been reached and the other active participants' desire to finalize and obtain Commission approval of a settlement."[55]

27. On January 16, 2024, the Chief Judge accepted the Black Start Provider Answer and granted the Suspension Motion.[56] The Chief Judge found good cause to grant the Suspension Motion to permit the settling participants to prioritize preparing the relevant

---

[51] Motion of Commission Trial Staff to Suspend Procedural Schedule and Shorten Answer Period, Docket No. EL21-91-003 (Jan. 10, 2024) (Suspension Motion).

[52] Order of Chief Judge Shortening Answer Period, Docket No. EL21-91-003 (Jan. 11, 2024).

[53] Answer of the Independent Market Monitor for PJM, Docket No. EL21-91-003 (Jan. 11, 2024) (IMM Answer).

[54] Answer of Black Start Providers in Support of Commission Trial Staff and Motion for Leave to Answer and Answer to the Answer of the Independent Market Monitor for PJM, Docket No. EL21-91-003 (Jan. 12, 2024) (Black Start Providers Answer).

[55] Black Start Providers Answer at 4.

[56] Order of Chief Judge Suspending Procedural Schedule, Docket No. EL21-91-003 (Jan. 16, 2024) (Suspension Order).

settlement documents for filing while not prejudging "whether any filed offer of settlement will be certified by the Presiding Judge and ultimately approved by the Commission."[57]

28. On January 31, 2024, PJM filed the Settlement in Docket Nos. ER21-91-003 and ER21-1635-005, along with the Interim Settlement Rates Motion.

29. Initial comments were due on February 20, 2024.[58] Trial Staff timely filed initial comments in support of the Settlement. The IMM timely filed initial comments, along with an affidavit and exhibits, in opposition to the Settlement.[59]

30. Reply comments were due by March 1, 2024.[60] Trial Staff, PJM, the Settling Customers (consisting of AMP, ODEC, and the PJM Industrials), and the Indicated Suppliers (consisting of Dynegy, Hazleton, J-POWER, LS Power, and Vistra) timely filed reply comments in response to the IMM Initial Comments.[61] None of these reply

---

[57] Suspension Order at P 4.

[58] 18 C.F.R. 385.602(f)(2).

[59] Comments of the Independent Market Monitor for PJM in Opposition to Offer of Settlement, Docket Nos. EL21-91-000 and EL21-91-003 (Feb. 20, 2024) (IMM Initial Comments). I note here that the IMM neglected to file its initial comments in Docket No. ER21-1635-005, even though PJM had filed a notice in Docket No. EL21-91-003 that the Settlement would be filed in Docket No. ER21-1635-005. *See* Notification of Offer of Settlement Filed in eTariff under ER21-1635-005, etc.(Feb. 1, 2024) (eLibrary Accession No. 20240201-5045) (Settlement Notice); *see also* Notice to the Public, Procedures Governing Rule 602 Settlement Filings, at P 4 (Oct. 13, 2017) ("In those instances when a settlement relates to more than one docket or the filing of a settlement generates a new root docket number, the filer is required to include all dockets in its filing description in eFiling and file an update in all the related dockets. This update must reference the docket in which the settlement was filed and the settlement's eLibrary accession number.") (Cintron, C.J.).

[60] 18 C.F.R. 385.602(f)(2).

[61] *See*, *generally*, Trial Staff Reply Comments; PJM Reply Comments; Settling Customers Reply Comments; Indicated Suppliers Reply Comments.

I note here that, like the IMM, PJM neglected to file its reply comments in Docket No. ER21-1635-005, even though PJM had issued the Settlement Notice directing the public to the fact that it filed the Settlement in that docket. *See* above n.59.

comments included affidavits or evidence in support of the Settlement pursuant to Rule 602(f)(4).[62] None of the participants supporting the Settlement submitted a motion (whether unopposed or opposed) for the omission of the initial decision pursuant to Rule 602(h)(2)(iii)(A).[63]

III. SUMMARY OF SETTLEMENT TERMS

31. The Settlement includes prefatory language that makes it clear that the Settling Parties intend for the Commission to view the Settlement as a package, precluding evaluation of any particular issue or provision on its individual merits in isolation of all other provisions of the Settlement.[64] . Specifically, the Settlement provides:

I will further note that PJM and the Indicated Suppliers neglected to provide me a courtesy copy of their reply comments. Service of a courtesy copy is a requirement under the Uniform Hearing Rules, which I adopted as the hearing rules for this proceeding. OALJ, Uniform Hearing Rules § 5(b) (Jan. 5, 2022) ("Participants must provide courtesy copies of all filings to the Presiding Judge and law clerk on the same date the filings are made."); Prehearing Conference Order at P 9 ("Finally, by this order, I adopt the Office of Administrative Law Judges (OALJ) Uniform Hearing Rules and the OALJ Electronic Hearing Rules and Procedures, as they may be amended during the course of this proceeding, to govern this proceeding."). While I will not treat this clerical error as dispositive of these participants' positions, I have to call out this procedural sloppiness, especially after repeated warnings to and infractions by counsel of these and other basic courtroom requirements. *See* Order Denying Request to Shorten Response Period, Establishing Response Period, and Scheduling Oral Argument, Docket No. EL21-91-003, at 2 n.8 (Oct. 16, 2023); Order Confirming Bench Rulings Regarding Protective Order, Docket No. EL21-91-003, at P 4 and n.8 (Oct. 25, 2023); Tr. 10:16-11:15, 72:3-83:23 (Presiding Judge and all counsel, discussing hearing rules in general); Tr. 115:5-116:12 (Presiding Judge and Pincus, discussing PJM's failure to provide me a courtesy copy of its motion to amend the protective order).

[62] 18 C.F.R. § 385.602(f)(4) ("Reply comments may include responding affidavits.").

[63] 18 C.F.R. § 385.602(h)(2)(iii)(A); *see* below at PP 75 and 102.

[64] Settlement at 1-2 ("The terms and conditions of this Settlement comprise an interrelated package that reflects negotiated compromises among the Settling Parties to achieve an agreed resolution, thereby avoiding the time, expense, and uncertainty of protracted litigation. The Settlement is subject in every particular respect to the conditions set forth herein, and is made with the understanding that each term, including

> The terms and conditions of this Settlement comprise an interrelated package that reflects negotiated compromises among the Settling Parties to achieve an agreed resolution, thereby avoiding the time, expense, and uncertainty of protracted litigation. The Settlement is subject in every particular respect to the conditions set forth herein, and is made with the understanding that each term, including the attachments to this Settlement, is material and integral to the Settlement as a whole.[65]

32. Article I provides the background and procedural history of the proceeding.

33. Article II sets forth the Settlement rates and provisions regarding the effective date of the Settlement rates, refunds, and surcharges. Section 2.1 sets forth the new reduced CRF values for Schedule 6A of PJM's Tariff for units selected to provide Black Start Service prior to June 6, 2021. Specifically, the redlined tariff pages included in Attachment A of the Settlement filing identify the following changes proposed in the Settlement:

> Effective January 1, 2024, t~~T~~he CRF applicable to Black Start Capital Costs of Black Start Units selected for Black Start Service prior to June 6, 2021, shall continue to be determined in accordance with the following table:

Age of Black Start Unit	Term of Black Start Commitment	Levelized CRF
1 to 5	20	0.1180~~25~~
6 to 10	15	0.1348~~46~~
11 to 15	10	0.1767~~98~~
16+	5	0.3097~~63~~

---

the attachments to this Settlement, is material and integral to the Settlement as a whole. For the avoidance of doubt, any workpapers provided during the process that led to this Settlement have been provided as a courtesy, are not part of this Settlement, and changes to those workpapers will not necessitate amendment to this Settlement or any type of filing with the Commission."). *See also* Settlement §§ 3.1, 5.1 and 5.4.

[65] Settlement at 1.

Section 2.1 also states that PJM is filing the Interim Settlement Rates Motion concurrently with the Settlement.

34. Section 2.2 states that the Settlement rates shall be effective as of January 1, 2024.

35. Section 2.3 provides that there will be no refunds concerning the CRF values in Schedule 6A of PJM's Tariff for Black Start Service rendered prior to January 1, 2024, by units PJM selected for Black Start Service prior to June 6, 2021. In addition, if the Settlement rates become effective after January 1, 2024, due to, for example, the denial of the Interim Settlement Rates Motion, then, provided the Settlement subsequently becomes effective, PJM will refund any amounts collected in excess of the Settlement rates for Black Start Service rendered January 1, 2024, or later, by units PJM selected for Black Start Service prior to June 6, 2021. Section 2.3 also provides when PJM will make such refunds, that such refunds will include interest, and when PJM will file a refund report following refund issuance.

36. Section 2.4 provides that if either the Commission rejects the Settlement or PJM terminates the Settlement in accordance with section 4.1, the Settling Parties will not oppose PJM reinstating the current CRF values in Schedule 6A of PJM's Tariff for units selected prior to June 6, 2021, subject to refund, pending the final outcome of this proceeding, and resettle the amounts collected during the period the Settlement rates were in effect to what PJM would have collected under the current CRF values.[66]

37. Article III sets forth the conditions precedent for the Settlement to become effective. Specifically, section 3.1 provides that the various provisions of the Settlement are not severable. In addition, section 3.1 sets the effective date of the Settlement as the date the Commission issues a final and non-appealable order approving the Settlement without modification or condition (Final Commission Order). For the purposes of the Settlement, such a Commission order becomes a Final Commission Order on one of three dates (Settlement Effective Date): (1) the date all requests for rehearing are denied and the right to petition for review expires; (2) the date the right to request rehearing expires in the absence of such requests; or (3) the date proceedings on review in any federal court of appeals are complete or orders on remand are not subject to further rehearing or review.

[66] While the Settling Parties addressed in Article II circumstances where the Chief Judge may deny the Interim Settlement Rates Motion or the Commission may reject or modify the Settlement, they did not contemplate the current circumstance, in which I may not certify the Settlement to the Commission.

38. Section 3.2 provides that Vistra will withdraw their pending petitions for review from the D.C. Circuit within ten (10) days of the Settlement Effective Date.

39. Article IV sets forth provisions regarding modifications or conditions to the Settlement. Section 4.1 establishes that the Settlement is contingent upon the Commission's approval of all Settlement provisions without modification or condition. If the Commission requires modification or conditions its approval of the Settlement, any Settling Party may notify the other Settling Parties within five (5) business days that it opposes the Settlement so modified or conditioned, and the Settling Parties will meet or confer within ten (10) business days after such notification to evaluate whether the concerns can be addressed through a revision of the Settlement. If the Settling Parties cannot reach such a revision, then the Settlement shall be of no force and effect. In addition, any Settling Party that does not communicate its objections shall be deemed to have waived all objections and may not seek rehearing of the Commission order modifying or conditioning its approval of the Settlement. Furthermore, the Settlement will not bind any Settling Party, and the Settlement shall be null and void, unless it becomes effective pursuant to Articles III and IV of the Settlement.

40. Section 4.2 states that each Settling Party will cooperate with filing the Settlement and efforts to obtain Commission approval without change or condition.

41. Section 4.3 states that the Settling Parties must support and defend the Settlement's terms against any attempt to modify or nullify them at the Commission regulatory agencies or courts. However, the Settlement will not limit any Settling Party's right to respond to any participant that is not a Settling Party, provided that such response is consistent with the Settling Party's obligation to support and defend the Settlement's terms.

42. Article V includes miscellaneous provisions and reservations common to most settlements filed with the Commission.

43. Section 5.1 provides that the Settlement, including any exhibits or attachments, constitutes the entire agreement and implies no right, duties, or other restrictions not expressly set forth in the Settlement. In addition, the Settlement's terms may only be submitted as an integrated whole.

44. Section 5.2 provides that the Settling Parties agree to refrain from making any FPA section 205 or 206 filings to modify the Settlement Rates for two years following the Settlement Effective Date (Keep-Out Period). After the Keep-Out Period, PJM or

any Settling Party may make a section 205 or 206 filing, respectively, for a prospective change in PJM's rates, terms, or conditions of service.[67]

45. Section 5.3 states that all settlement communications and discussions are privileged, and not to be used except to enforce the terms of the Settlement. In addition, in the event the Commission rejects the Settlement, Rule 602(e) will apply to bar the admissibility of this Settlement and of any data submissions, document submissions, and negotiations leading up to the Settlement.[68]

46. Section 5.4 states that the Settlement is an integrated, negotiated agreement and that no Settling Party shall be considered to have approved, accepted, agreed to, or consented to any principle or position advanced by any other participant, nor to have prejudiced positions taken by such Settling Party in this or any other proceeding.

47. Section 5.5 states that the Settlement shall not constitute precedent or prejudice and shall not be used as evidence that a particular method is a "long standing practice" as that term is used in *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578 (D.C. Cir. 1979), or a "settled practice" as that term is used in *Public Service Commission of New York v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980).

48. Section 5.6 provides that the standard of review for any proposed changes to the terms of the Settlement sought by any party to this proceeding shall be the "public interest" standard of review. Furthermore, the standard of review for any modifications to the Settlement proposed by any other person or entity, including the Commission acting *sua sponte*, will be the ordinary just and reasonable standard.

---

[67] This provision is not a "comeback" provision (providing for a new section 205 filing to revisit the CRF values in the future), nor does it allow the IMM's re-litigation of its current interest in the CRF values used for Black Start units selected prior to June 6, 2021, at a future date because it only contemplates changes prospective from the end of the Keep-Out Period.

[68] Similar to the Settlement's prefatory statement, this provision appears to preclude my consideration of contemporaneous documents as parole evidence in supporting my certifying the Settlement. *See* Settlement at 1-2 ("For the avoidance of doubt, any workpapers provided during the process that led to this Settlement have been provided as a courtesy, are not part of this Settlement, and changes to those workpapers will not necessitate amendment to this Settlement or any type of filing with the Commission.").

49. Section 5.7 establishes that no provision of the Settlement may be waived if it would cause financial injury to any other Settling Party unless the injured Settling Party consents in writing. In addition, waiver of any one provision shall not waive any other provision.

50. Section 5.8 makes the Settlement binding on and for the benefit of the Settling Parties and their successors and assigns.

51. Section 5.9 provides that the Commission's approval of the Settlement shall constitute the requisite grant of waivers necessary to permit the Settlement's implementation.

52. Section 5.10 establishes that no ambiguity will be construed in favor of or against any Settling Party based on that party being the drafter.

53. Section 5.11 states that the section headings of the Settlement are for reference purposes only and are not to be used to interpret or modify the terms of this Settlement.

54. As an additional observation, I note that the prefatory language of the Settlement makes clear that the Settling Parties anticipated that the IMM would contest the Settlement.[69] Despite that anticipation, the Settlement package does not include any evidence explaining how Settling Parties derived the updated CRF values proposed in the Settlement or otherwise supporting the new CRF values as just and reasonable.

IV. COMMENTS FILED ON THE SETTLEMENT

A. Initial Comments

1. Trial Staff

55. On February 20, 2024, Trial Staff submitted the Trial Staff Initial Comments in support of the Settlement. Trial Staff asserts that the Settlement, if approved, "would resolve all issues set for hearing and settlement judge procedures in Docket No. EL21-91-

[69] Settlement at 1 ("The Settling Parties are not aware of any opposition to the Settlement, except by Monitoring Analytics, LLC in its capacity as the Independent Market Monitor for PJM."); *see also* Interim Settlement Rates Motion at 2 ("Although *PJM anticipates that one intervenor, Monitoring Analytics, LLC, in its capacity as the PJM independent market monitor ('IMM'), may oppose the Settlement*, PJM is authorized to state that the IMM does not oppose the implementation of interim rates.") (emphasis added).

000" and "is fair, reasonable, and in the public interest."[70] In support of this conclusion, Trial Staff comments that the Settlement provides significant benefits to ratepayers, including material rate reductions, immediate rate relief, rate certainty, and appeal termination.[71] Lastly, in response to the four questions that the Chief Judge specified in the December 15, 2016, notice to the public,[72] Trial Staff states that the Settlement does not impact any other cases pending before the Commission; does not involve issues of first impression; does not depart from Commission precedent; and does not seek to impose a standard of review other than the ordinary just and reasonable standard with respect to changes to the Settlement sought by either a third party or the Commission acting *sua sponte*.[73]

2. The IMM

56. On February 20, 2024, the IMM, as a party in this proceeding, submitted the IMM Initial Comments in opposition to the Settlement. The IMM asserts that the Settlement does not serve the public interest and that the Commission should reject it.[74]

57. The IMM argues that the Commission cannot approve the contested Settlement on its merits under any of the four approaches set forth in *Trailblazer*.[75] The IMM contends that the Settlement does not resolve the single issue raised in the order setting this matter for hearing; "[t]here is no record supporting the [Settlement's] CRF values as just and reasonable, including as a 'package;'" the Settlement cannot be analyzed under the fair and reasonable standard because the Settlement "allows unjust and unreasonable overrecovery of investment costs, contrary to efficient and competitive markets;" and there is no possibility of severing the issues in the manner contemplated under the *Trailblazer* approaches.[76]

---

[70] Trial Staff Initial Comments at 1-2.

[71] Trial Staff Initial Comments at 6-7.

[72] Amended Notice to the Public on Information to be Provided with Settlement Agreements and Guidance on the Role of Settlement Judges, at P 2 (Dec. 15, 2016).

[73] Trial Staff Initial Comments at 7.

[74] IMM Initial Comments at 1.

[75] IMM Initial Comments at 2-3 (discussing *Trailblazer*-B, 85 FERC ¶ 61,345).

[76] IMM Initial Comments at 2-3.

58. The IMM also argues that a hearing is not necessary and requests that the Commission summarily resolve the issues set for hearing based on the paper record.[77] The IMM does not explain why it believes that the Commission should reconsider its decision to require a trial-type evidentiary hearing if this case is not settled. The IMM merely asserts that "[t]his case presents a straightforward issue" and complains about the delays resulting from continuing with litigation in a trial-type evidentiary hearing.[78]

59. The IMM included fourteen exhibits with the IMM Initial Comments, including the Affidavit of Joseph E. Bowring on Behalf of the Independent Market Monitor for PJM, which is designated as Exhibit IMM-0001 (Bowring Affidavit). As discussed in detail below in part V.B.2, Dr. Bowring raises myriad factual issues in support of his conclusion that the CRF values that are currently in the PJM Tariff and the revised CRF values proposed in the Settlement are not just and reasonable and result in Capital Cost Recovery Rates that are unjust and unreasonable. In fact, Dr. Bowring concludes that the existing and proposed CRF values would lead to over-recoveries of the Black Start providers' capital costs by $89.7 million and $74.1 million, respectively.[79]

B. Reply Comments

1. PJM

60. On March 1, 2024, PJM submitted reply comments in response to the IMM Initial Comments. PJM argues that I should certify the Settlement to the Commission because the IMM fails to raise a genuine issue of material fact and that the Commission should approve the Settlement pursuant to *Trailblazer* Approach No. 2.[80] PJM asserts that "the IMM agrees that the Settlement properly calculates the CRF with respect to the corporate tax rate."[81] Accordingly, PJM argues that the Settlement resolves all issues set for hearing, since the "only questions the Commission set for hearing in this proceeding were whether the CRF was calculated using the pre-TCJA tax rate and whether the CRF remained just and reasonable in light of the TCJA's reduction in the corporate tax rate."[82]

---

[77] IMM Initial Comments at 3-4.

[78] IMM Initial Comments at 1.

[79] Ex. IMM-0001 at 17:16-17.

[80] PJM Reply Comments at 1.

[81] PJM Reply Comments at 4.

[82] PJM Reply Comments at 4.

PJM further argues that the remainder of the IMM's arguments are beyond the scope of this proceeding.[83]

61. PJM argues that the Commission should approve the Settlement pursuant to *Trailblazer* Approach No. 2. PJM argues that the Settlement is just and reasonable overall because the IMM will be "no worse off" as a result of the Commission's approval of the Settlement.[84] PJM bases this argument on the fact that, regardless of the IMM's stated interest to represent the public interest in efficient and competitive markets, the IMM does not pay the CRF rates and, therefore, will not be harmed by the Commission's approval of the Settlement.[85] In addition, according to PJM, the Settlement is just and reasonable overall because the Settlement resolves all of the issues set for hearing in this proceeding by reducing the CRF values and avoiding protracted litigation.[86]

2. Settling Customers

62. On March 1, 2024, the Settling Customers submitted reply comments in response to the IMM Initial Comments. The Settling Customers also argue that I should certify and the Commission should approve the Settlement pursuant to *Trailblazer* Approach No. 2.[87] The Settling Customers support the Settlement as just and reasonable overall because it enjoys broad support from Black Start generators and customers, "provides rate certainty; provides immediate and material rate relief; and avoids the time, expense, and uncertainty associated with protracted litigation of the complex issues raised in this proceeding."[88]

63. While recognizing the IMM's important role and significant interest in ensuring that CRF values are properly calculated, the Settling Customers assert that "the IMM is

[83] PJM Reply Comments at 4.

[84] PJM Reply Comments at 5.

[85] PJM Reply Comments at 5.

[86] PJM Reply Comments at 5.

[87] Settling Customers Reply Comments at 1-2.

[88] Settling Customers Reply Comments at 2, 4.

not a customer responsible for paying the costs of Black Start Service" and that the Settlement has no economic impact on the IMM.[89]

64. The Settling Customers also cite to the Commission's strong policy in favor of settlements and its routine approval of black-box settlements.[90] Citing this precedent, the Settling Customers argue that the Commission can approve the Settlement as just and reasonable overall pursuant to *Trailblazer* Approach No. 2 without evaluating the details or merits of the IMM's arguments or justifying the individual elements of the Settlement.[91]

3. Indicated Suppliers

65. On March 1, 2024, the Indicated Suppliers submitted reply comments in support of the Settlement and in response to the IMM Initial Comments. The Indicated Suppliers also argue that I should certify the Settlement to the Commission because the IMM fails to raise a genuine issue of material fact and that the Commission should approve the Settlement pursuant to *Trailblazer* Approach No. 2.[92] The Indicated Suppliers indicate that they continue to believe that the existing CRF values for units selected to provide Black Start Service prior to June 6, 2021, remain just and reasonable and that the IMM has not met its burden of proof under FPA section 206 to demonstrate that these CRF values are unjust and unreasonable or demonstrated that the Settlement is unfair, unreasonable, or against the public interest.[93]

66. The Indicated Suppliers argue that the IMM misunderstands the fact that the Settlement CRF values are black-box calculations without the need for cost support evidence.[94] The Indicated Suppliers assert that the mere fact that the Settlement CRFs

---

[89] Settling Customers Reply Comments at 4-5.

[90] Settling Customers Reply Comments at 3 (citing *Sw. Power Pool, Inc.*, 160 FERC ¶ 61,026, P 8 (2017) and *State of Maine*, 91 FERC ¶ 61,213, at 61,772 (2000)).

[91] Settling Customers Reply Comments at 5 (citing *El Paso Nat. Gas Co.*, 132 FERC ¶ 61,139, P 82 (2010) and *GenOn Power Midwest, LP*, 149 FERC ¶ 61,218, at P 33 (2014)).

[92] Indicated Suppliers Reply Comments at 4, 5.

[93] Indicated Suppliers Reply Comments at 3-5, 9-18.

[94] Indicated Suppliers Reply Comments at 4-5 (citing *El Paso Nat. Gas Co.*, 132 FERC ¶ 61,139 at P 82 (2010)), 13-14.

may be in excess of the IMM's preferred rate is not sufficient to raise a genuine issue of material fact that would prevent me from certifying the Settlement.[95]

67. Citing *Hunlock Energy, LLC*,[96] the Indicated Suppliers argue that the Commission should approve the Settlement pursuant to *Trailblazer* Approach No. 2.[97] The Indicated Suppliers contend that the Settlement provides rate certainty, results in a reduction in rates, eliminates the cost and burden of litigation, is supported or not opposed by parties representing a wide range of interests, and is only opposed by the IMM, which has no financial interest in the proceeding.[98]

68. The Indicated Suppliers also take issue with the IMM's objections, which they submit are based on a flawed assumption that the IMM's preferred rate is the only just and reasonable rate.[99] The Indicated Suppliers argue that the Commission should not adopt the IMM's preferred rate summarily on the basis of the IMM Initial Comments alone.[100] They argue that the IMM has the burden under FPA section 206 of showing that the existing and Settlement CRF values are unjust and unreasonable and that the IMM has not made such a demonstration.[101] In addition, the Indicated Suppliers argue that the IMM undervalues the Settlement's benefits by calculating overpayments under the Settlement retroactively in violation of FPA section 206 and not appreciating the

[95] Indicated Suppliers Reply Comments at 5.

[96] 170 FERC ¶ 61,090 at P 29 (2020).

[97] Indicated Suppliers Reply Comments at 5-7.

[98] Indicated Suppliers Reply Comments at 3, 5-7. The Indicated Suppliers also argue in the alternative that the IMM's lack of a direct financial interest could be a reason for the Commission to approve the Settlement under *Trailblazer* Approach No. 3. Indicated Suppliers Reply Comments at 7 n.29 (citing *Holloman Lessee, LLC*, 182 FERC ¶ 63,018, at P 71 (2023) and *Virginia Elec. & Power Co.*, 162 FERC ¶ 61,029, at P 16 (2018)).

[99] Indicated Suppliers Reply Comments at 9-18.

[100] Indicated Suppliers Reply Comments at 9.

[101] Indicated Suppliers Reply Comments at 9-18.

Settlement's immediate rate relief given that the delay of protracted litigation would offset any potential refund benefit resulting from such litigation.[102]

4. Trial Staff

69. On March 1, 2024, Trial Staff submitted reply comments in response to the IMM Initial Comments. As with the other reply commenters, Trial Staff also argues that I should certify the Settlement to the Commission because the IMM failed to establish a genuine issue of material fact and that the Commission should approve the Settlement pursuant to *Trailblazer* Approach No. 2.[103] Trial Staff reasons that by materially reducing all relevant CRF values, the Settlement resolves the issue of the import of the tax rate in the determination of the CRF values, leaving no remaining genuine issue of material fact.[104] Trial Staff characterizes the IMM's opposition as a policy preference for a different result.[105]

70. In addition, Trial Staff asserts that it conducted an "independent analysis," but it fails to provide any documentation of that analysis for the record.[106] However, based on that undocumented independent analysis, Trial Staff concludes that "the overall result of the Settlement is a just and reasonable resolution of the issues set for hearing."[107] In support of the Settlement, Trial Staff refers to the Settlement's material reduction in all stated CRF values, immediate rate relief, rate certainty, and the offset of any potential refund benefit by the delay in the effectiveness of any new rates resulting from litigation.[108]

71. In response to the IMM's opposition to the Settlement, Trial Staff argues that the Commission has made clear that cost support is not necessary to approve a black-box

---

[102] Indicated Suppliers Reply Comments at 7-8, 14-18.

[103] Trial Staff Reply Comments at 1-4.

[104] Trial Staff Reply Comments at 2-3.

[105] Trial Staff Reply Comments at 3.

[106] Trial Staff Reply Comments at 3.

[107] Trial Staff Reply Comments at 3-4.

[108] Trial Staff Reply Comments at 4, 8.

settlement as just and reasonable.[109] Next, Trial Staff responds to the IMM's argument about the Settlement's "depreciation assumption" and reliance on the "weighted average cost of capital" by again observing that, as a black-box settlement, those elements are not part of the Settlement.[110] In addition, Trial Staff argues that the IMM's proposal to reflect the return of capital already received in the CRF calculations violates the rule against retroactive ratemaking, which "prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods."[111] Furthermore, Trial Staff asserts that the CRF values for units selected prior to June 6, 2021, to provide Black Start Service, are stated values, not formula rates.[112] Finally, countering the IMM's assertion that the Settlement results in "a wide disparity in the actual achieved returns on equity by unit," Trial Staff points out that this is a function of the fact that rate relief under FPA section 206 is prospective.[113]

V. DISCUSSION

72. As discussed in detail below and considering the record compiled to date, which consists of the comments and evidence summarized above, I have determined that I cannot certify the Settlement to the Commission under Rule 602(h)(2).[114]

A. Legal Framework for Determining Whether to Certify a Settlement

1. The Applicable Standards

73. I recognize that the Commission has a longstanding policy of promoting settlements as a way of providing rate certainty, reducing litigation costs, and facilitating reasonable compromise in resolving complex issues.[115] On the other hand, even when

---

[109] Trial Staff Reply Comments at 5 (citing *GenOn Power Midwest, LP*, 149 FERC ¶ 61,218, at P 35 (2014)).

[110] Trial Staff Reply Comments at 5.

[111] Trial Staff Reply Comments at 6.

[112] Trial Staff Reply Comments at 7.

[113] Trial Staff Reply Comments at 7-8.

[114] 18 C.F.R. § 385.602(h)(2).

[115] *See Off. of the Ohio Consumers' Couns. v. Am. Elec. Power Serv. Corp., et al.*, 183 FERC ¶ 61,034, at P 29 (2023) (declining to adjust settlement rates on a piecemeal basis because it would "undermine the certainty provided to settling parties and would be

nearly all the participants support a settlement, the Commission must nevertheless independently discharge its statutory responsibility to ensure that rates are just and reasonable.[116]

74. There are two standards for Commission approval of a settlement depending on whether it is contested or uncontested. The fair and reasonable standard applies to uncontested settlements.[117] I must certify any uncontested settlement to the Commission for its review under that standard.[118] If a settlement is contested, however, then the just and reasonable standard applies, and I may only certify a settlement if the Settlement meets certain procedural and substantive requirements.[119] In either case, the Settling

---

inconsistent with the Commission's longstanding policy of promoting settlements."); *Fla. Power & Light Co.*, 175 FERC ¶ 61,024, at P 6 (2021) ("Commission policy favors settlements, as they provide parties with certainty, reduce litigation costs, and permit parties to reach reasonable compromise in resolving difficult issues.") (citations omitted); *San Diego Gas & Elec. Co.*, 122 FERC ¶ 61,009, at P 13 (2008) ("The Commission strongly favors settlements, particularly in cases that are highly contested and complex.") (citations omitted).

[116] *Tri-State Generation and Transmission Ass'n, Inc.*, 181 FERC ¶ 61,255, at P 68 ("The U.S. 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.'") (quoting *Mobile Oil Corp v. FPC*, 417 U.S. 283, 314 (1974) and *Placid Oil Co. v. FPC*, 483 F.2d 880, 893 (5th Cir. 1973)), modified, *Tri-State Generation and Transmission Ass'n, Inc.*, 183 FERC ¶ 61,054 (2023) (Tri-State Rehearing Order).

[117] 18 C.F.R. § 385.602(g)(3). *See also Trailblazer*-D, 88 FERC ¶ 61,168 at 61,563-64 (citing *United Mun. Distributors Grp. v. FERC*, 732 F.2d 202, 209 (D.C. Cir. 1984) (affirming that the Commission can approve an uncontested settlement "under the general public interest standard without a finding on the merits that the proposed rates are just and reasonable.").

[118] 18 C.F.R. § 385.602(g)(1) ("If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer *is not contested* by any participant, the presiding officer *will* certify to the Commission the offer of settlement ….") (emphasis added).

[119] 18 C.F.R. § 385.602(h)(2); *Trailblazer*-D, 88 FERC ¶ 61,168 at 61,563.

Parties have the burden of supporting the Settlement under the applicable standard for approving the Settlement.[120]

2. Procedural Requirements

75. The regulations in Rule 602(h)(2) set forth the procedural requirements for me to certify a contested settlement. Under Rule 602(h)(2)(i), I may certify a settlement to the Commission only if one of two different sets of conditions apply. First, under Rule 602(h)(2)(ii), I may certify a contested settlement if I determine "there is no genuine issue of material fact."[121] Alternatively, if I find that the record presents a genuine issue of material fact, I may still certify a settlement under Rule 602(h)(2)(iii) if I can make two determinations: (A) the parties concur on a motion for omission of the initial decision per Rule 710, or if all parties do not concur on such motion, I determine that omission of the initial decision is appropriate under Rule 710(d),[122] and (B) I determine "that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues."[123]

76. In addition, under Rule 602(h)(2)(iv), if the contesting party or contested issue is severable, I must certify the uncontested portions of the settlement immediately as an

---

[120] *See* Tri-State Rehearing Order, 183 FERC ¶ 61,054 at P 17 and n.43 (2023) (citing *Kern River Gas Transmission Co.*, 89 FERC ¶ 61,144, at 61,422 (1999)) (observing that the offeror of settlement has the "burden of supporting its settlement proposal, including providing information to enable the Commission to make the necessary findings to approve the settlement ….")).

[121] 18 C.F.R. § 385.602(h)(2)(ii).

[122] Rule 710(d) does not establish a standard governing my decision whether to waive the initial decision if the motion is opposed. 18 C.F.R. § 385.710(d). In the absence of an explicit standard, I would apply the good cause standard. *See* 18 C.F.R. § 385.101(e); *Ne. Utils. Serv. Co.*, 124 FERC ¶ 61,044, at P 58 (2008); *Transcontinental Gas Pipe Line Corp.*, 38 FERC ¶ 61,168, at 61,532-33 (1987) (citing 18 C.F.R. § 385.101(d) (1986), predecessor to Rule 101(e)). In this case, however, the Settling Parties did not submit a motion for omission of the initial decision at all. *See* below part V.B.3.

[123] 18 C.F.R. §§ 385.602(h)(2)(iii)(A) and (B).

uncontested settlement pursuant to Rule 602(g).[124] In such case, I would continue to hold a hearing to develop a record on the severed portion of the case.

3. *Trailblazer* and Substantive Requirements

77. The *Trailblazer* decisions comprehensively explain the substantive requirements for me to apply in deciding whether to certify a contested settlement.[125] Technically, the *Trailblazer* decisions deal with various approaches under which the Commission may approve a contested settlement, but these approaches inform how I may apply Rule 602(h)(2)(iii)(B). Specifically, the various *Trailblazer* approaches identify the "reasoned decision on the merits of the contested issues" the Commission may make in approving the settlement for which I must find "substantial evidence" in the record under Rule 602(h)(2)(iii)(B).

78. In fact, ample precedent supports my evaluation of a contested settlement under the line of *Trailblazer* decisions in determining whether to certify it.[126] These cases indicate that the Commission expects a presiding judge to identify substantial evidence in the record by reference to the specific *Trailblazer* approaches on which the Commission could base its decision to approve the settlement. I do not view my substantial evidence determination under Rule 602(h)(2)(iii)(B) to entail merely counting the number of affidavits or exhibits in support of or in opposition to a contested settlement. Rather, in certifying a settlement to the Commission, a presiding judge should ensure that the record substantially supports a Commission decision to approve a contested settlement under one or more of the *Trailblazer* approaches.

79. The four *Trailblazer* approaches for approving a contested settlement are as follows:

---

[124] 18 C.F.R. § 385.602(h)(2)(iv).

[125] *See* above n.8.

[126] *N. Nat. Gas Co., Div. of Enron Corp.*, 48 FERC ¶ 61,274, at 61,923-924 (1989) (finding that presiding judge should not have certified the settlement without determining that the record was sufficiently developed on the merits or that the contesting party could be severed); *see also Wyoming Interstate Co., Ltd.*, 91 FERC ¶ 63,014, at 65,137-142 (2000) (Harfield, J.) (analyzing the four *Trailblazer* approaches and then ordering severance of contesting party and certifying settlement as uncontested under Approach No. 4); *New England Power Co.*, 47 FERC ¶ 63,003, at 65,007-008 (1989) (Benkin, J.) (denying certifying a settlement after assessing that contesting party's rate design issues could not be severed under *Trailblazer* Approach No. 4 for separate litigation).

a. Approach No. 1: Merits Decision on Each Contested Issue

80. Under the first *Trailblazer* approach, the Commission will approve a settlement if the record contains sufficient evidence for the Commission to determine each of the contested issues on the merits.[127] However, the settling parties must agree that they would be willing to live with any modifications or conditions to the settlement based on the Commission's rulings on the merits.[128] The Commission has declined to apply this approach where the settling parties ask that the Commission approve the settlement as a whole package or provide that the settlement will not be effective if the Commission modifies any part of the settlement.[129]

81. If the participants seek to have the Commission consider the Settlement under this approach and are willing to live with whatever the Commission's ultimate ruling is, then I must determine whether there is substantial evidence in the record to make a reasoned decision on the merits of each contested issue.

b. Approach No. 2: Where the Settlement Provides an Overall Just and Reasonable Result

82. Under the second *Trailblazer* approach, even if some aspects of a settlement are problematic, the Commission may approve a contested settlement as a package on the grounds that the overall result of the settlement is just and reasonable.[130]

83. When taking this approach, the Commission does not need to find that the settlement rate is precisely the rate it would establish on the merits after litigation.[131] Instead, recognizing that a just and reasonable rate is a rate "within a broad ambit of various rates which may be just and reasonable," the Commission only needs substantial

---

[127] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,342.

[128] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,342, 62,345.

[129] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,345; *Trailblazer*-C, 87 FERC ¶ 61,110 at 61,440 ("Moreover, as the Commission explained in the December 16, 1998 order, if the parties make clear, as they have in this case, that they want their settlement considered only as a package, and do not want a merits determination on the issues at this stage of the proceeding, the Commission will try to honor the parties' intent.").

[130] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,342-343.

[131] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,343.

evidence showing that the overall package falls within this range.[132] This is a merits decision, but it does not require individual determinations on each contested issue.[133]

84. If the participants seek to have the Commission consider the Settlement under this approach, then I must determine whether there is substantial evidence in the record to make a reasoned decision that the settlement is just and reasonable overall. This involves a determination that the contesting party would be in no worse position under the settlement than if the case were litigated and a balancing of the benefits of the settlement against the costs and potential effect of continued litigation.[134]

85. In *Trailblazer*-C, after reviewing considerable evidence of settlement benefits that could not be obtained in litigation and concluding that the settlement was reasonable,[135] the Commission ultimately determined that it still could not approve the settlement over the objections of the contesting party under Approach No. 2. The Commission reasoned that while the record was complete on some issues, it was "more problematic" on other issues and, therefore, it could not "determine the likely outcome of litigation."[136] As the Commission reaffirmed on rehearing in *Trailblazer*-D,

> Thus, after a review of the record, the Commission could not conclude that the record supported a finding on the merits of the contested issues that the Settlement was just and reasonable. Further, the Commission concluded that the record did not support a finding that the Settlement was just and reasonable as a package based on the likely outcome of litigation….[137]

---

[132] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,343.

[133] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,345-346.

[134] *Trailblazer*-C, 87 FERC ¶ 61,110 at 61,439 ("This approach does not necessarily result in a binding merits determination on the individual issues in the proceeding, but it may involve some analysis of the specific issues raised by the settlement in order to determine whether the result under the settlement is no worse for the contesting party than the likely result of continued litigation.").

[135] *Trailblazer-C*, 87 FERC ¶ 61,110 at 61,439-441 and 61,443-447.

[136] *Trailblazer*-C, 87 FERC ¶ 61,110 at 61,446-447.

[137] *Trailblazer*-D, 88 FERC ¶ 61,168 at 61,566.

In short, while the Commission does not require evidence showing the precise calculation of the settlement rates under Approach No. 2, that approach still requires some evidence demonstrating the likely outcome of litigation.

c. Approach No. 3: The Benefits of the Settlement Outweigh the Nature of the Objections, and the Contesting Parties' Interest is Too Attenuated

86. Under the third *Trailblazer* approach, "[e]ven where the Commission has not found that the settlement satisfied the just and reasonable standard applicable to contested settlements," it can nevertheless approve a contested settlement where it (1) "determines that the contesting party's interest is sufficiently attenuated that the settlement can be analyzed under the fair and reasonable standard applicable to uncontested settlements," (2) "satisfies its [] obligation to make an independent finding that the settlement benefits the directly affected settling parties," and (3) finds that the contesting party has another forum to raise its contentions.[138]

87. If the participants seek to have the Commission consider the Settlement under this approach, then I must determine whether: (1) the IMM's interests in this proceeding are sufficiently attenuated; (2) the Settlement benefits the directly affected Settling Parties; and (3) the IMM has another forum in which to raise its contentions. In applying the analysis for the first requirement, the Commission has determined that while the interests of future customers may be attenuated,[139] the interests of indirect parties are not necessarily so.[140] Furthermore, the Commission has recently reiterated that for it "to approve a contested settlement under the third *Trailblazer* approach, all three

[138] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,343-344.

[139] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,343 (citing *Arctic Slope Reg'l Corp. v. FERC*, 832 F.2d 158 (D.C. Cir. 1987).

[140] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,343-344 (citing *S. Cal. Edison Co. v. FERC*, Case No. 97-1450 (D.C. Cir. Dec. 14, 1998)). In addition, the Commission has not precluded, in the appropriate circumstances, a "congruence of interest" analysis in determining whether the interests of the participant contesting the settlement are sufficiently similar to those of other participants who support the settlement. *Trailblazer*-C, 87 FERC ¶ 61,110 at 61,441 and n.33 (citing *Tejas Power Corp. v. FERC*, 908 F.2d 998 (D.C. Cir. 1990)).

requirements noted above must be met."[141] If all three requirements are met, then I must certify the Settlement as if it were an uncontested settlement.[142]

d. Approach No. 4: Severance of Contesting Parties

88. Similar to Approach No. 3, Approach No. 4 allows the Commission to approve a contested settlement as if it were uncontested. Under the fourth *Trailblazer* approach, the Commission severs the contested party or issue, permitting the contesting parties to obtain a litigated result on the merits while approving the settlement for the settling parties as uncontested.[143]

89. The Commission, however, has described severance as "the option of last resort" and inappropriate in certain circumstances, such as where the Settlement does not permit severance of its terms[144] or the contesting parties would not have another opportunity to litigate the very issues that the settling parties seek to settle.[145]

90. If the participants seek to have the Commission consider the Settlement under this approach, then I must, at the very least, determine whether the Settlement permits severance and whether the Commission can allow the settling parties to benefit from their bargain while simultaneously allowing the contesting participants to benefit from a fully

---

[141] Tri-State Rehearing Order, 183 FERC ¶ 61,054, at P 15.

[142] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,346 ("Under [Approach No. 3], the Commission may approve a settlement under the fair and reasonable standard used in ruling on uncontested settlements based on a conclusion that the interests of the contesting party are too small and attenuated to warrant revision of the settlement in light of the settlement's overall benefits.")

[143] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,344; *Trailblazer*-D, 88 FERC ¶ 61,168 at 61,564.

[144] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,344; *Equitrans, L.P.*, 85 FERC ¶ 61,395 at 62,527-28 (1998).

[145] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,345 ("But if the contesting party is, for example, a competing pipeline, a downstream customer of one of the pipeline's direct customers, or a state commission, it is almost impossible to give the contesting party an opportunity to litigate its concerns without also affecting the rates of settling customers. This is because the contesting party is complaining about the rates the settling parties will pay, not any rates the contesting party itself will pay."). *See also Trailblazer*-D, 88 FERC ¶ 61,168 at 61,568-69.

litigated result. If I find that severance is appropriate, then I must certify the unsevered portion of the Settlement as if it were an uncontested settlement.

4. Key Considerations

91. Based on the foregoing, to act on the Settlement, I must answer the following questions based on the record of this proceeding:

(1) Is the Settlement contested?

(2) Does the contesting party raise genuine issues of material fact?

(3) Did the participants move for omission of the initial decision pursuant to Rule 710(d)?

(3a) Did all participants join in the motion?

(3b) If all participants do not concur in such motion, do I have good cause to waive the initial decision?

(4) Do the settling parties consent to a ruling on the merits of each contested issue? If so, is there substantial evidence in the record to make a reasoned decision on the merits of each contested issue?

(5) Do the settling parties wish for approval of the Settlement as a package overall without addressing each contested issue on the merits? If so, is there substantial evidence in the record to make a reasoned decision that the Settlement is just and reasonable overall?

(6) Is the contesting party's interest "sufficiently attenuated," does the settlement benefit the settling parties, and does the contesting party have another forum in which to litigate its objections to warrant considering the settlement as an uncontested settlement?

(7) Would it be appropriate to sever either the contesting party or the contested issues?

B. Applying the Legal Framework to the Settlement in this Case

1. Contested Settlement

92. I find that the IMM contested the Settlement by virtue of its comments opposing the Settlement.[146]

2. Genuine Issues of Material Fact

93. In a single paragraph in the Hearing Order, the Commission set out the scope of the trial-type evidentiary hearing over which the Chief Judge designated me to serve as Presiding Judge:

> We set for hearing and settlement judge procedures the determination of whether, as a result of changes from the TCJA, the existing CRF values result in a Capital Cost Recovery Rate for generating units that were selected to provide Black Start Service prior to June 6, 2021 that is unjust and unreasonable. While the record does not contain conclusive evidence that the existing CRF values include a 35% tax rate, the Market Monitor has introduced sufficient evidence that those values may include a 35% tax rate, raising a disputed issue of material fact as to whether changes to the tax rate render the existing CRF values unjust and unreasonable. The import of the tax rate in the determination of the CRF value is a material fact that cannot be determined based on the existing record, which warrants setting the

[146] *See* IMM Initial Comments at 1 ("The Offer does not serve the public interest and should be rejected.").

I note that, while the Trial Staff and the Indicated Suppliers rely on *Hunlock Energy, LLC*, 170 FERC ¶ 61,090 (2020), I find this decision inapplicable in this case. *See* Trial Staff Reply Comments at 3 n.13; Indicated Suppliers Reply Comments at 6-7. In *Hunlock*, the Commission addressed certifications by settlement judges of two uncontested settlements and a report by a settlement judge of one other contested settlement. That decision bears little relevance to my application of Rule 602(h)(2) as a presiding judge, and in any event, the Commission's decision was based on the arguments raised by the IMM in those cases, which are specific to the reactive power rates at issue there and inapplicable here.

> justness and reasonableness of the existing CRF values for hearing and settlement judge procedures.[147]

94. Although the IMM asserts that "[t]his case presents a straightforward issue"[148] and suggests that there is a "single issue, an issue of material fact, identified in the order setting this matter for hearing,"[149] I find the Hearing Order actually sets two broad issues for hearing. The first sentence of paragraph 32 sets for hearing the issue of whether "the existing CRF values result in a Capital Cost Recovery Rate for generating units that were selected to provide Black Start Service prior to June 6, 2021 that is unjust and unreasonable." The last sentence of the paragraph separately indicates that the hearing should address the "justness and reasonableness of the existing CRF values." Contrary to the IMM's assertion, I do not find the justness and reasonableness of the CRF values or the resulting Capital Cost Recovery Rate to be a "single issue" nor "an issue of material fact." But I do agree with the IMM's assessment that the Settlement does not fully address the reasons that the Commission set this case for hearing.[150]

95. As to the specific determination I must make under Rule 602(h)(2)(ii), I find that the issues of the justness and reasonableness of the CRF values and the resulting Capital Cost Recovery Rate present a multitude of genuine issues of material fact. That is, in order to answer the broad issues set for hearing, the Commission will need a record on a number of factual issues. In paragraph 32 of the Hearing Order, the Commission explicitly held that the "tax rate in the determination of the CRF value is a material fact that cannot be determined based on the existing record" and that single material issue of fact warranted a hearing.[151] I, however, do not read paragraph 32 to restrict the hearing to that single issue.[152]

---

[147] Hearing Order, 182 FERC ¶ 61,194 at P 32.

[148] IMM Initial Comments at 1.

[149] IMM Initial Comments at 2.

[150] IMM Initial Comments at 2.

[151] Hearing Order, 182 FERC ¶ 61,194 at P 32.

[152] If the Commission had intended to restrict the hearing to the single issue of the tax rate used in calculating the CRF values, the Commission had ample record of the tax rate change in the TCJA or could have taken official notice of the TCJA and could have ordered the CRF values to be revised based on the current tax rate. There would have been no need to order hearing and settlement judge procedures. When it adopted those procedures for this case, the Commission must have intended a broader review of the

96. Although it is possible to contest a settlement on policy grounds only,[153] I find that the IMM Initial Comments and the Bowring Affidavit raise several contentions, many of which Trial Staff and the Indicated Suppliers dispute in their reply comments. These contentions raise additional genuine issues of material fact.[154] Among these issues are:

1) Whether the CRF values reflect a formula rate or a stated rate for the purposes of Black Start units selected prior to June 6, 2021;[155]

2) Whether the inputs to the formula rate for Black Start capital cost recovery changed as a result of tax law changes that became effective on January 1, 2018, and if so, do those changes result in the CRFs becoming unjust and reasonable;[156]

---

justness and reasonableness of the CRF values (and the resulting Capital Cost Recovery Rate).

[153] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 149 FERC ¶ 61,115, at P 29 (2014) (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 133 FERC ¶ 61,249, at PP 24-27 (2010) (treating a settlement as contested where a commenter had raised policy concerns)).

[154] The comments also include disputes about legal issues, such as whether the CRF values can be revised retroactively. *See* Ex. IMM-0001 at 4:4-15; Indicated Suppliers Reply Comments at 14-16; Trial Staff Reply Comments at 6.

[155] Ex. IMM-0001 at 4:26-29, 7:5-14, 9:28-10:4; Indicated Suppliers Reply Comments at 7 ("The IMM erroneously suggests that this matter can be resolved simply by identifying the components that supposedly went into the original calculation of the CRFs."). At first blush, this appears to be a purely legal issue, but since the IMM's assertion appears inconsistent with the language of Schedule 6A of the PJM Tariff, which sets out fixed CRF values for Black Start units selected prior to June 6, 2021, and does not provide for a method for updating these CRF values (as PJM provides for updating CRF values annually for Black Start units selected after June 6, 2021), there also seems to be a factual issue about how to read the PJM Tariff.

[156] Ex. IMM-0001 at 2:6-9; Indicated Suppliers Reply Comments at 4 ("Contrary to the IMM's claims, the Settlement CRFs were not calculated based on a specific methodology or inputs."); *id*. at 10 ("Even assuming that the IMM is correct that the existing CRFs were calculated using a 36 percent tax rate – which has not been established – the IMM fails to demonstrate that the subsequent decrease in the tax rate

3) What is the purpose of the CRF values, and do the existing CRF values or those proposed in the Settlement serve that purpose;[157]

4) Whether the CRF values for Black Start Service are the same as the CRF values "addressed in the capacity market," and, if so, whether they should be;[158]

5) What is the proper approach to define the CRF formula, if any?[159]

---

has resulted in those CRFs becoming unjust and unreasonable."); *id*. at 11 ("Contrary to the IMM's assumptions, even if the Commission previously approved CRFs with the understanding that those CRFs were based on a 36 percent tax rate, this does not mean that a change in the tax rate then makes those existing CRFs *de facto* unjust or unreasonable.").

[157] Ex. IMM-0001 at 2:15-18, 6:9-11, 6:22-25.

[158] Ex. IMM-0001 at 6:19-25, 7:5-12, 9:7-19 ("One important difference between the two applications of CRF is that the CRF is intended to pay black start owners the exact amount of the CRF revenue requirement while in the capacity market, the CRF/APIR calculation changes the market seller offer cap and provides the opportunity to receive the full annual revenue requirement in the capacity market."); Indicated Suppliers Reply Comments at 12-13 (comparing the process for determining the cost of new entry (CONE) and after-tax weighted-average cost of capital (ATWACC) with the CRF analysis).

[159] Ex. IMM-0001 at 8:11-9:6 (identifying the "flow to equity (FTE) approach" and the "weighted average cost of capital (WACC) approach"); 15:13-20 (asserting that the settlement CRF values in the Settlement rely on the WACC model, but that the FTE model should be used instead); Indicated Suppliers Reply Comments at 13 ("Critically, the Settlement CRFs are black box values without any accompanying calculation or methodology."); Trial Staff Reply Comments at 5 ("First, the IMM asserts that the Settlement's 'depreciation assumption' and its reliance on the 'weighted average cost of capital' are inappropriate. These elements, however, are simply not part of the Settlement.") (footnotes omitted).

6) What is the correct methodology for calculating the CRF values for Black Start units selected prior to June 6, 2021;[160]

7) What are the correct inputs to use in determining the CRF values for Black Start units selected prior to June 6, 2021;[161]

8) What depreciation assumption should be used in deriving CRF values;[162]

9) What return on equity should be used in deriving the CRF values;[163]

10) What capital recovery period should be used in deriving CRF values;[164]

---

[160] Ex. IMM-0001 at 3:18-25 (alleging that the CRF rates "are calculated incorrectly even on their own terms …."), 7:5-12, 12:1-15, 12:27-32; Indicated Suppliers Reply Comments at 7 ("The IMM erroneously suggests that this matter can be resolved simply by identifying the components that supposedly went into the original calculation of the CRFs.").

[161] Ex. IMM-0001 at 3:5-17, 7:15-23, 13:12-15:20; Indicated Suppliers Reply Comments at 13 ("Critically, the Settlement CRFs are black box values without any accompanying calculation or methodology.").

[162] Ex. IMM-0001 at 11:12-31, 13:11-14:2; Trial Staff Reply Comments at 5 ("First, the IMM asserts that the Settlement's 'depreciation assumption' and its reliance on the 'weighted average cost of capital' are inappropriate. These elements, however, are simply not part of the Settlement.") (footnotes omitted).

[163] Ex. IMM-0001 at 14:2-15; Indicated Suppliers Reply Comments at 14 ("Even if the Commission approved the existing CRFs based on the assumption that they would provide a 12 percent ROE (which has not been demonstrated), there is no basis to assume that a different ROE would be unjust and unreasonable."); Trial Staff Reply Comments at 7-8 (criticizing the IMM's assessment of realized returns based on the Settlement CRF values).

[164] Ex. IMM-0001 at 15:1-3.

11) What capital investment amount should be used in deriving CRF values;[165]

12) Whether the existing CRF values and the Settlement CRF values result in an over-recovery for Black Start units selected prior to June 6, 2021;[166]

13) Whether the IMM's proposed alternative to the Settlement results in just and reasonable CRF values;[167] and

14) When should the revised CRF values become effective?[168]

97. In reply comments, PJM, the Indicated Suppliers, and Trial Staff assert that there are no genuine issues of material fact, but I find that their assertion is founded on a fundamental misreading of the Hearing Order. Specifically, PJM asserts that "the only questions the Commission set for hearing in this proceeding were whether the CRF was

---

[165] Ex. IMM-0001 at 15:4-12.

[166] IMM Initial Comments at 2, 3; Ex. IMM-0001 at 9:20-27, 10:5-11:31, 12:16-16:2; Indicated Suppliers Reply Comments at 8 ("[T]he IMM also calculates supposed 'overpayments' under the Settlement based on its assumption that its preferred rate is the only lawful rate, and ignores the limitations imposed by Section 206 of the FPA with respect to the effectiveness of a replacement rate and availability of refund relief."); *id.* at 14 ("[t]o make matters worse, the yardstick by which the IMM measures the Settlement CRFs is not merely flawed but patently unlawful. In calculating purported 'overpayments,' the IMM compares capital recovery payments under the Settlement CRFs to the payments that would have resulted '[h]ad CRFs been updated on ***January 1, 2018***.'") (emphasis in original).

[167] Ex. IMM-0001 at 16:13-17:17; Indicated Suppliers Reply Comments at 9 ("The IMM erroneously assumes that any rate other than its preferred rate cannot be just and reasonable.…").

[168] *See* Settlement § 2.2 ("Subject to this Settlement becoming effective in accordance with Article III below, the Settlement Rates shall be effective on a permanent basis as of January 1, 2024."); Ex. IMM-0001 at 11:1-2 (arguing that "PJM should have reduced CRF rates immediately, effective January 1, 2018, for all existing and new black start resources."); Ex. IMM-0001 at 16:13-17:17 (proposing an effective date of January 1, 2025, for the IMM's alternative to the Settlement).

calculated using the pre-TCJA tax rate and whether the CRF remained just and reasonable in light of the TCJA's reduction in the corporate tax rate."[169] PJM further asserts that the IMM's other allegations "are beyond the scope of this proceeding."[170] As noted above, based on the express language in paragraph 32 of the Hearing Order, the actual issues set for hearing are much broader than PJM asserts and encompass the justness and reasonableness of both the CRF values and the resulting Capital Cost Recovery Rates. While the Commission identified the tax rate issue as "*a* material fact that cannot be determined based on the existing record," the Commission did not mean, and clearly did not say, that it was "*the only* material fact that cannot be determined based on the existing record."

98. Similarly, Trial Staff asserts that "[t]he Settlement, however, fully resolves this issue by materially reducing all relevant CRF values."[171] Nevertheless, Trial Staff devotes several pages of its reply comments disputing the arguments and evidence raised by the IMM,[172] and this causes me to question Trial Staff's assertion that the Settlement resolves the matters to be addressed at hearing. Moreover, Trial Staff does not explain how the reductions in the CRF values proposed in the Settlement make either the CRF values or the resulting Capital Cost Recovery Rates just and reasonable. To establish that point, we will need evidence that none of the proponents of the Settlement provide in their comments.

99. More fundamentally, while Trial Staff and the Indicated Suppliers rely on the IMM's assertion that a hearing is unnecessary and its failure to raise any specific factual issue about the Settlement,[173] it is impossible to reconcile their conclusion that the IMM has not raised any genuine issue of material fact with Dr. Bowring's conclusion that even the reduced CRF values proposed in the Settlement allegedly lead to an overpayment of $74.1 million.[174] Either Trial Staff and the Indicated Suppliers must admit that the Settlement does not propose CRF values that are just and reasonable themselves (or result in just and reasonable Capital Cost Recovery Rates) or they must admit that they dispute

---

[169] PJM Reply Comments at 4.

[170] PJM Reply Comments at 4.

[171] Trial Staff Reply Comments at 2-3.

[172] Trial Staff Reply Comments at 5-8.

[173] Trial Staff Reply Comments at 3; Indicated Suppliers Reply Comments at 4-5.

[174] Ex. IMM-0001 at 16:1-2.

the material facts, such as the correct method and inputs used for calculating CRF values, that led Dr. Bowring to his conclusion.

100. I find it disingenuous for PJM, the Indicated Suppliers, and Trial Staff to maintain such myopic views about the scope of the record. Early on in this proceeding, I raised concerns that the participants may not all agree about the scope of this proceeding, and expressed my view about the breadth of the issues to be addressed.[175] At the very first prehearing conference in this matter, counsel for one of the Indicated Suppliers agreed that "this is not simply a matter of adjusting the tax rate, or trying to apply a formula that was adopted after we made an investment to find it here."[176] Moreover, after ordering the participants to provide a preliminary joint statement of issues and receiving one that merely paraphrased paragraph 32 of the Hearing Order, I described at length my expectation about the detailed sub-issues that had to be answered in this hearing.[177] In fact, I listed out many of the same issues that I identify above at P 96 from Dr. Bowring's affidavit.[178] If, after that, the participants really believed that this hearing was limited to the narrow issue of applying the proper tax rate, they could have asked me to reconsider my ruling, to certify a question to the Commission, or to permit an interlocutory appeal. Because they did not take such actions, there was simply no reason to suspend the hearing process and structure a Settlement around a rejected, overly narrow reading of the Hearing Order.

101. The arguments that the Settlement leaves no genuine issue of material fact are specious. Accordingly, I have no basis to certify the Settlement under Rule 602(h)(2)(ii).

3. Omission of the Initial Decision

102. Under Rule 602(h)(2)(iii)(A), I may not certify a contested settlement without granting a motion for the omission of the initial decision under Rule 710. No one filed such a motion. To the extent the participants supporting the Settlement were confident that they would convince me that there is no genuine issue of material fact, their failure to file such a motion makes some sense.[179] Because I find above that this case is replete

---

[175] Tr. 26:4-45:19; 46:17-49:13 (Presiding Judge, various participants).

[176] Tr. 29:4-23 (Presiding Judge and Hug discussing whether the scope of the hearing includes demonstrating that the CRF values are just and reasonable today).

[177] Order on Joint Statement of Issues at PP 7-9.

[178] Order on Joint Statement of Issues at P 8.

[179] Despite any such confidence, each of these participants hedged their bets by arguing that I could certify the Settlement and that the Commission could approve it

with genuine issues of material fact that prevent me from certifying the Settlement under Rule 602(h)(2)(ii), however, the Settling Parties' failure to submit a motion for omission of the initial decision under Rule 602(h)(2)(iii)(A) precludes me from certifying the Settlement under Rule 602(h)(2)(iii).

103. Nevertheless, for completeness, I will address below whether "the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues" under Rule 602(h)(2)(iii)(B).

4. Applicability of the *Trailblazer* Approaches

104. As discussed above at PP 77-78, I assess whether "the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues" by reference to the four *Trailblazer* approaches for approving a contested settlement . The *Trailblazer* decisions make clear that not every approach to approving a contested settlement applies in every case. To a significant extent, the approach to apply depends on the desires of the Settling Parties and the position of the contesting party.

105. As discussed below, I find that Approach Nos. 1, 3, and 4 are inapplicable in this case. I note that the supporters of the Settlement argue that the Commission should approve it under Approach No. 2.[180]

---

under *Trailblazer* Approach No. 2. *See* PJM Reply Comments at 1, 4-5 ("Moreover, the Commission should approve the Settlement pursuant to *Trailblazer Pipeline Co.* as consistent with the public interest.") (footnote omitted); Settling Customers Reply Comments at 1-2 ("As demonstrated below, the Presiding Judge should certify the Settlement and the Commission should approve the Settlement under *Trailblazer's* second approach to provide customers with the immediate and material rate relief that results from the bargained-for exchange.") (footnote omitted); Trial Staff Reply Comments at 2, 3-8 ("The Settlement should therefore be certified to the Commission, and the Commission should approve the Settlement pursuant to *Trailblazer Pipeline Company* because the overall result is just and reasonable.").

[180] Trial Staff Reply Comments at 4 ("The Commission should therefore approve the Settlement pursuant to the second *Trailblazer* approach."); PJM Reply Comments at 4 ("The Commission should approve the Settlement under the second *Trailblazer* approach because it provides a just and reasonable overall result."); Settling Customers Reply Comments at 6 ("[T]he Settling Customers respectfully ask the Presiding Judge to certify the Settlement and the Federal Energy Regulatory Commission to approve the Settlement as just and reasonable under *Trailblazer*'s second approach."); Indicated Suppliers Reply

a. Approach No. 1: Merits Decision on Each Contested Issue

106. The prefatory statement in the Settlement, and sections 3.1, 4.1, 4.3, 5.1, and 5.4 of the Settlement make clear that the Settling Parties do not intend for the Commission to approve the Settlement based on Approach No. 1. The Settling Parties have indicated in no uncertain terms that they desire for the Settlement to be certified as a package and do not want the Commission to decide each contested issue on the merits. Therefore, based on *Trailblazer*-B and *Trailblazer*-C, it would be inappropriate to evaluate the Settlement on an issue-by-issue basis on the merits under Approach No. 1.[181]

107. As it stands, the supporters of the Settlement have failed to provide any evidence that the Commission could use in deciding the contested issues in favor of approving the Settlement.

b. Approach No. 3: The Benefits of the Settlement Outweigh the Nature of the Objections, and the Contesting Parties' Interest is Too Attenuated

108. I find that Approach No. 3 is not applicable. The IMM's interest is not so attenuated that the Commission could assess the Settlement under the fair and reasonable standard as if the Settlement were uncontested. Nor would the Settlement offer the IMM an alternate forum to press its case.

109. 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. The IMM asserts that it "represents the public interest in efficient and competitive markets."[182] As such, it 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,[183] which may distort competition in other markets in which these generators participate.

Comments at 5 ("Contrary to the IMM's assertions, the Settlement can and should be approved under the second *Trailblazer* approach….") (footnote omitted).

[181] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,345; *Trailblazer*-C, 87 FERC ¶ 61,110 at 61,440.

[182] IMM Initial Comments at 3.

[183] *See* IMM-0001 at 3:25-4:2 ("In addition, the settlement fails, without

110. While the proponents of the Settlement assert that the IMM does not have a financial interest in the proceeding,[184] I do not find this fact requires me to find that the IMM's interest is sufficiently attenuated to disregard the IMM's opposition to the Settlement or to certify it as if it were uncontested.[185] In fact, the Settling Customers admit, "[t]hough the IMM does not directly pay the costs of Black Start Service, the

---

explanation, to address the fact that the CRF rate is designed to ensure full recovery of a return on and of capital over the defined term, *no more and no less*.") (emphasis added).

[184] *See* Indicated Suppliers Reply Comments at 7 ("Notably, the IMM is the only party objecting to the Settlement but it does not have ***any*** financial interest in the proceeding.") (emphasis in original); *see also* below P 123.

[185] In a footnote, the Indicated Suppliers argue that the Commission could approve the Settlement under *Trailblazer* Approach No. 3. Indicated Suppliers Reply Comments at 7 n.29. I disagree. To accept the Indicated Suppliers' arguments would mean that the IMM or any other entity that lacks a financial interest in rates in dispute (such as a regulatory agency, RTO, a trade association, or even an indirect customer) would not have standing to challenge a proposed settlement rate. Although the Indicated Suppliers cite two reactive power cases in which a presiding judge and the Commission found the IMM's interest to be attenuated, those decisions are distinguishable from this case and are not binding precedent in any event. As discussed below at n.188, in *Holloman Lessee*, Judge Nagel based her decision to certify a settlement on the fact that the IMM did not raise a genuine issue of material fact and any comments about the IMM's interest were *dicta* and based on the IMM's stated interest in that case. Similarly, the Commission in *Virginia Electric and Power Company* based its decision to approve the settlement at issue in that proceeding on the fact that the IMM's opposition in that case was based on concerns "outside the scope of this proceeding." *Virginia Elec. and Power Co.*, 162 FERC ¶ 61,029, at P 26 (2018). Neither case addresses whether the IMM's interests in this case are so attenuated as to deprive it of standing to oppose the Settlement in this case. On the contrary, I find that the IMM's interests in this case, while not necessarily "financial," are direct and substantial, and its opposition to the Settlement warrants consideration.

I also note that none of the commenters in support of the Settlement assert that the Settling Parties have a sufficient congruence of interest with the IMM to discount the IMM's opposition under this Approach No. 3 (*see* above n.140). I nevertheless find that there is no basis to discount the IMM's opposition on the basis of congruence of interests. As the only participant whose sole interest is in protecting efficient and competitive markets, the IMM's interest is unique and not adequately represented by any participant supporting the Settlement.

Settling Customers recognize the IMM's significant interest in ensuring that CRF values are properly calculated."[186] Moreover, in the Hearing Order, the Commission granted the IMM's late intervention based specifically on a finding of the IMM's "interest in this proceeding."[187] The Commission has also regularly recognized the IMM's interest in matters where the IMM has no financial stake but that directly relate to "PJM and its markets at a macro level."[188]

---

[186] Settling Customers Reply Comments at 5.

[187] Hearing Order, 182 FERC ¶ 61,194 at P 11.

[188] *See PA Solar Park, LLC*, 164 FERC ¶ 61,118, at PP 11, 13-14 (2018).

I recognize that other administrative law judges have questioned the nature of the IMM's interest in opposing other settlements. *See Albermarle Beach Solar, LLC*, 182 FERC ¶ 63,014, at P 104(8) (2023) (finding Market Monitor has direct interest in the Commission's rate policies that affect the PJM market, but "no direct financial interest in the outcome of this proceeding ….") (French, J.); *Holloman Lessee, LLC*, 182 FERC ¶ 63,018, at PP 68-73 (2023) (finding the Market Monitor's interest in the settlement is attenuated) (Nagel, J.); *Hawtree Creek Farm Solar, LLC*, 182 FERC ¶ 63,004, at 7 n.34 (2023) ("Though I must report this Settlement as contested, the IMM's attenuated position in this Settlement likely permits the Commission to approve the Settlement under the third *Trailblazer* prong. Under this prong, the Commission may approve a contested settlement if the Commission finds the contesting party's interest is sufficiently attenuated and if the settlement benefits the directly affected settling parties. The IMM purports to represent the public interest but simply files blanket, repetitive testimony in individual reactive power cases.") (Hurt, J.). These statements appear inconsistent with the Commission's rulings that non-customers can nevertheless have direct, non-attenuated interests in settlements of a utility's rates. *See* below P 111 and n.189. Moreover, these administrative law judge pronouncements appear to be *dicta* and do not influence my analysis of the IMM's interest in this proceeding. In *Albermarle* and *Holloman*, Judges French and Nagel, respectively, certified contested settlements based on a finding that the IMM failed to raise any genuine issue of material fact and did not base their rulings on *Trailblazer* Approach No. 3. In addition, I cannot read the footnote in *Hawtree* and similar statements made by settlement judges reporting contested settlements to be "substantive determinations" that warrant precedential status. *See Cities of Anaheim, Azusa, Banning, Colton & Riverside, Cal.*, 101 FERC ¶ 61,392, at P 12 (2002). In any event, the *Albermarle* and *Holloman* orders and the *Hawtree* report (and similar settlement judge reports of contested settlements) are still pending the Commission's consideration.

111. A finding that the IMM's interest is attenuated would also be inconsistent with Commission precedent. As noted above, the Commission has found that indirect customers and state commissions possess sufficient interest in contesting settlement rates they do not pay, thus precluding approval under Approach No. 3.[189]

112. I further find Approach No. 3 inapplicable because if the Commission approved the Settlement, the IMM would have no alternate forum to litigate its issues concerning the CRF values used for Black Start units selected prior to June 6, 2021. The Settlement only allows changes prospective from the end of the Keep-Out Period.[190] As a result, the Settlement does not provide a vehicle for the IMM to re-litigate the CRF values for such units. The Commission has held that even a true "comeback" provision is not a sufficient alternative venue to allow a contesting participant to continue litigating a contested issue.[191]

113. The Commission has made clear that it will not approve a contested settlement under Approach No. 3 unless all three requirements noted above in part V.A.3.c are supported by substantial evidence in the record.[192] Pursuant to Approach No. 3, since the IMM's interests are not attenuated and the IMM does not have another forum to litigate its objections, I may not certify, and the Commission may not approve, the Settlement as if the Settlement were uncontested.

---

[189] *See Trailblazer*-B, 85 FERC ¶ 61,345 at 62,345; *Sw. Gas Transmission, Co.,* 180 FERC ¶ 61,018, at P 14 (2022) ("We find that the [Bureau of Consumer Protection (BCP)] and the [Public Utilities Commission of Nevada (PUCN)] have a sufficient interest in this proceeding as state entities that represent the interests of indirect customers of [Southwest Gas Transmission Company, A Limited Partnership]. Because the BCP and the PUCN are contesting parties with a sufficient interest in the Settlement, we are unable to approve the Settlement under the third *Trailblazer* approach").

[190] Settlement § 5.2.

[191] *See Trailblazer*-C, 87 FERC ¶ 61,110 at 61,443 ("The provision in the Settlement that provides for Trailblazer to file a new rate case to be effective January 1, 2003 does not provide Amoco a forum to litigate its current interest in Trailblazer's rates ….").

[192] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,343-44; Tri-State Rehearing Order, 183 FERC ¶ 61,054, at P 15.

c. Approach No. 4: Severance of Contesting Parties

114. Severance of the IMM or its issues is inappropriate in this proceeding. Like competitors, indirect customers, and state commissions in other contested settlements,[193] it is impossible to allow the IMM to litigate its concerns without affecting the settling customers' rates. The IMM is complaining about the rates that some of the Settling Parties will pay, not the rates that it will pay. Furthermore, because of the Settlement's non-severance provision, it would not be appropriate to sever the IMM's issues for separate litigation.[194]

5. Substantial Evidence to Make a Reasoned Decision on the Merits of the Contested Issues

115. Having concluded that I need not consider the Settlement under *Trailblazer* Approach Nos. 1, 3, or 4, I must determine whether the record contains substantial evidence for the Commission to make a reasoned decision under Approach No. 2. As discussed below, I find that the Settling Parties have not developed a record that contains substantial evidence from which the Commission may reach a reasoned decision that the Settlement is just and reasonable overall. Given that, the Settling Parties have not sustained their burden of supporting my certifying the Settlement to the Commission under Rule 602(h)(2)(iii)(B) or the Commission's approval of the Settlement under *Trailblazer* Approach No. 2.[195]

116. Under Approach No. 2, the Commission only needs to find that the overall package falls within a range of just and reasonable rates.[196] This entails providing an assessment that the Settlement rates are no worse than the range of just and reasonable

---

[193] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,345; *Trailblazer*-D, 88 FERC ¶ 61,168 at 61,568-69.

[194] Settlement § 3.1 ("The various provisions of this Settlement are not severable …."); *Equitrans, L.P.*, 85 FERC ¶ 61,395, at 62,527-28.

[195] The Indicated Suppliers assert that the IMM has the burden of proof under section 206 of the Federal Power Act to demonstrate that the existing CRFs are unjust and unreasonable. Indicated Suppliers Reply Comments at 3-4. That may well be true if this case goes to a trial-type evidentiary hearing, but as noted above at P 74 n.120, the Settling Parties bear the burden of demonstrating that the Settlement is just and reasonable since they are asking the Commission to adopt new CRF values without a hearing over the opposition of the IMM.

[196] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,343.

rates the Commission would have approved based on a fully litigated resolution of all the contested issues in this proceeding.[197] This does not require a merits determination of each issue as in Approach No. 1, but it does require some analysis of the issues raised by the Settlement to determine whether the Settlement is no worse for the contesting party than the likely outcome of litigation.[198] In addition, there must be some quantification and balancing of the settlement's benefits against the costs and likely result of litigation.[199]

117. In the case of the instant Settlement, the only evidence in the record is the Bowring Affidavit and the exhibits Dr. Bowring relies upon to conclude that the CRF values proposed in the Settlement will lead to an alleged over-recovery of $74.1 million.[200] As noted above at P 54, the Settlement itself provides no cost support for the proposed revised CRF values. Moreover, as discussed above at P 30, PJM, the Settling Customers, the Indicated Suppliers, and Trial Staff offer no affidavits or other evidence to rebut the IMM's conclusion or to demonstrate that the Settlement CRF values fall within a range of just and reasonable rates.[201]

---

[197] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,345; *Trailblazer*-C, 87 FERC ¶ 61,110 at 61,439.

[198] *Trailblazer*-C, 87 FERC ¶ 61,110 at 61,439.

[199] *Trailblazer*-B, 85 FERC ¶ 61,345 at 62,346 ("For example, if it were shown that even if a litigated rate might be lower than the Settlement rate, but the costs of obtaining that lower rate would offset its benefits, this could provide a basis for concluding that an overall settlement package is just and reasonable under Approach 2.").

[200] Ex. IMM-0001 at 17:16-17.

[201] Interestingly, PJM appears to admit that the CRF values proposed in the Settlement resulted from an adjustment to the tax rate assumptions used in calculating the CRF values, but it did so by reference to statements made by the IMM. PJM Reply Comments at 5 ("According to the IMM's affidavit, the CRF values proposed in the Settlement represent CRF values that have been updated to reflect the changes in the corporate tax rate that resulted from the TCJA"). PJM does not provide its own evidence showing the derivation of the Settlement CRF values or demonstrating that they are just and reasonable. Indeed, the Settlement appears to preclude PJM from offering this evidence. *See* Settlement § 5.3 ("The discussions that produced this Settlement have been conducted with the explicit understanding that all such discussions and documents, including offers of settlement, are and shall remain privileged ….''), *see also* Settlement at 1-2 ("For the avoidance of doubt, any workpapers provided during the process that led to this Settlement have been provided as a courtesy, are not part of this Settlement, and

118. Trial Staff "affirms based on its independent analysis that the overall result of the Settlement is a just and reasonable resolution of the issues set for hearing,"[202] but Trial Staff fails to offer any documentation of that analysis for the record. Without more, therefore, the conclusory statement of Trial Staff counsel can hardly be viewed as evidence,[203] let alone substantial evidence from which the Commission may reach a reasoned decision that the Settlement is just and reasonable overall. Given the state of the record, the Settling Parties have not satisfied the threshold requirement for certifying the Settlement under Rule 602(h)(2)(iii)(B), and I am not able to certify this Settlement under Rule 602(h)(2)(iii).[204]

119. The proponents make various arguments for why the Commission should approve the Settlement, notwithstanding the paucity of evidence that prevents me from certifying the Settlement to the Commission, but none of these arguments is compelling.

120. First, Trial Staff, the Settling Customers, and the Indicated Suppliers rely on the Commission's longstanding policies favoring Settlements and approval of black-box settlements to claim that the Commission does not require cost support evidence.[205] As I

---

changes to those workpapers will not necessitate amendment to this Settlement or any type of filing with the Commission."). As a result, the gaps in the record that preclude me from certifying and the Commission from approving the Settlement are the direct result of concessions made by the participants in reaching the Settlement.

[202] Trail Staff Reply Comments at 3-4.

[203] *See La. Pub. Serv. Comm'n, et al. v. Sys. Energy Res., Inc., et al.*, 183 FERC ¶ 63,020 at PP 757-762 (2023) (relying on 18 C.F.R. § 385.506 for the proposition that attorney assertions are not evidence unless they are presented in writing and the attorney is available for cross-examination).

[204] As discussed above at PP 102-103, the Settling Parties also have not satisfied the other threshold requirement for certifying the Settlement by failing to present a motion for omission of the initial decision under Rule 602(h)(2)(iii)(A).

[205] Trial Staff Reply Comments at 5 (citing, *inter alia*, *GenOn Power Midwest, LP*, 149 FERC ¶ 61,218, at P 35 (2014)); Settling Customers Reply Comments at 5 (citing *El Paso Nat. Gas Co.*, 132 FERC ¶ 61,139, P 82 (2010) and *GenOn*, 149 FERC ¶ 61,218, at P 33 (2014)); Indicated Suppliers Reply Comments at 4-5 ("Contrary to the IMM's claims, the Settlement CRFs were not calculated based on a specific methodology or inputs. Instead, the Settlement CRFs are 'black box' values that represent a just and reasonable compromise among the parties that will confer benefits on the Settling Parties and customers by providing rate certainty, reducing rates, and avoiding protracted

explain in detail above in part V.A, the Courts and Commission precedent and regulations make clear 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, and before I may certify the Settlement, Rule 602(h)(2)(iii)(B) requires that I find such substantial evidence is in the record. Under *Trailblazer* Approach No. 2, I cannot simply disregard the IMM's opposition and apply the more limited evidentiary requirements of an uncontested settlement to this Settlement, and the Settling Parties and Trial Staff cannot discharge their evidentiary obligations to support the Settlement by simply labelling it a black box. Even if the Settlement is a black-box settlement, the proponents of the Settlement could have offered evidence that the resulting Capital Cost Recovery Rates is within the range of rates the Commission has found to be just and reasonable, but they did not do that.

121. In fact, the cases cited by Trial Staff, the Settling Customers, and the Indicated Suppliers to justify ignoring the substantial evidence requirement do not stand for that proposition at all. To the contrary, in both cases, the Commission found that the settlements were just and reasonable overall *because* the records of those proceedings contained substantial evidence to support those findings.[206] There are no special exemptions under Approach No. 2 or Rule 602(h)(2)(iii)(B) for contested black-box settlements.

122. Second, Trial Staff and the Indicated Suppliers spend several pages of their respective reply comments challenging the IMM's arguments and evidence.[207] The Indicated Suppliers also challenge the IMM's assertions that the Settlement CRFs were calculated based on a specific methodology.[208] I do not find that such arguments provide affirmative evidence that the Settlement is just and reasonable overall. To the contrary,

---

litigation.") (citing *El Paso*, 132 FERC ¶ 61,139 at P 82 and *GenOn*, 149 FERC ¶ 61,218 at P 32) (footnotes omitted).

[206] *See El Paso*, 132 FERC ¶ 61,139 at P 42 ("In reviewing contested settlements, the Commission may decide the merits of the contested issues if the record contains substantial evidence on which to base a reasoned decision. Here, the Commission finds that the record in this case is sufficient for Commission approval of the 2006 Settlement."); *GenOn*, 149 FERC ¶ 61,218 at P 36 ("We find the GenOn Settlement factually is supported by the Stewart Affidavit, and is within the range of just and reasonable outcomes.")

[207] Trial Staff Reply Comments at 5-8; Indicated Suppliers Reply Comments at 9-18.

[208] Indicated Suppliers Reply comments at 4-5.

without prejudging the validity of the IMM's, Trial Staff's, and the Indicated Suppliers' respective arguments, I find that their many disagreements confirm my conclusion above in part V.B.2 that there remain several genuine issues of material fact that can only be resolved through a trial-type evidentiary hearing.

123. Third, PJM and the Settling Customers argue that because the IMM is not a ratepayer, it would be no worse off under the Settlement than if it were allowed to pursue a fully litigated resolution.[209] However, these parties cannot cure the lack of evidence showing that the overall package falls within a range of just and reasonable rates by denigrating the IMM's interest. Both PJM and the Settling Customers acknowledge IMM's legitimate interest in "efficient and competitive markets" and in "ensuring that CRF values are properly calculated."[210] Accordingly, the only way to determine whether the Settlement will serve or harm those interests is to assess the likely outcome of litigation. Given that the only evidence currently in the record on this point is the IMM's evidence pointing to an alleged over-recovery of capital costs under both the existing CRF values and those proposed in the Settlement, there is no basis in the record to establish that the IMM would be no worse off under the Settlement than if it were permitted to litigate the case fully. I find that approving the Settlement over the IMM's objections would harm the IMM by depriving it the ability to safeguard its unique interest in this case.

124. Fourth, Trial Staff, PJM, the Settling Customers, and the Indicated Suppliers all point to substantial benefits that they allege will come from the Settlement in terms of

---

[209] PJM Reply Comments at 5 ("The IMM, however, does not pay the CRF rates and therefore cannot be harmed by the Commission's approval of the Settlement. Therefore, the objecting party will be no worse off as a result of the Commission's approval of the Settlement."); Settling Customers Reply Comments at 5 ("However, the IMM is not a customer responsible for paying the costs of Black Start Service. This circumstance is important here because the Settlement has no economic impact on the sole opposing party. Likewise, the economic impact (or lack thereof) on the opposing party would be the same under the Settlement and litigation.").

[210] *See* PJM Reply Comments at 5 ("The IMM's stated interest in this proceeding is to 'represent[] the public interest in efficient and competitive markets.'") (citing IMM Initial Comments at 3); Settling Customers Reply Comments at 5 ("Though the IMM does not directly pay the costs of Black Start Service, the Settling Customers recognize the IMM's significant interest in ensuring that CRF values are properly calculated.").

allegedly material reductions in the stated CRF values,[211] immediate rate certainty,[212] and avoidance of litigation costs.[213] These arguments also do not make up for the fact that

[211] Trial Staff Reply Comments at 4 ("The Settlement materially reduces all stated CRF values and results in significant savings for ratepayers"); PJM Reply Comments at 5 ("Thus, approval of the Settlement would result in a reduction of the CRF effective January 1, 2024, while avoiding additional procedures."); Indicated Suppliers Reply Comments at 3 ("Nonetheless, in the interest of avoiding prolonged litigation, the Indicated Suppliers entered into and support the Settlement as a negotiated compromise that provides rate certainty, results in a reduction in rates, and eliminates the cost and burden of litigation."); *see also* Trial Staff Initial Comments at 6 ("Material Rate Reductions: The Settlement reduces all CRF values for the relevant Black Start Service facilities, with the percentage reductions varying based on the length of the Black Start commitment. The range of reductions is from 5.6 percent (for 20-year commitments) to nearly 14.7 percent (for five-year commitments).").

[212] Trial Staff Reply Comments at 4 ("Further, rate relief under the Settlement is immediate, with the CRF reductions taking effect January 1, 2024."); Settling Customers Reply Comments at 4 ("Setting aside the uncertainty all litigants face regarding how the Commission may ultimately rule, it would be years before these proceedings were resolved and parties had certainty about the rates at issue here."); Indicated Suppliers Reply Comments at 8 ("By contrast, the rate relief provided under the Settlement is effective as of January 1, 2024, without the uncertainty and delays associated with what in all likelihood would be protracted litigation before the Presiding Judge, the Commission, and the Courts of Appeals.").

I question whether rate certainty is a true benefit of the Settlement given that the IMM has pressed its opposition to the Settlement and would likely continue pressing if the Commission approved the Settlement over its opposition. Although the Settlement CRF values have gone into effect as of January 1, 2024, pursuant to section 2.1 of the Settlement, section 2.4 provides for the unwinding of the interim rate relief and surcharges if the Commission rejects the Settlement or PJM ends up terminating the Settlement after the Commission modifies the Settlement. In fact, section 3.1 of the Settlement provides that the Settlement Effective Date could be as late as the date that appeals of the Commission order approving the Settlement are complete. So even if the Settlement provides immediate rate reductions, the Settlement appears to offer no greater rate certainty about such reduced rates than a full litigation of the issues set for hearing.

[213] PJM Reply Comments at 5 ("Therefore, the Settlement resolves all of the issues in this proceeding while avoiding additional protracted litigation."); Settling Customers Reply Comments at 2 ("The Settling Customers support the Settlement as a just and reasonable outcome because it provides rate certainty; provides immediate and material

there has been no evidentiary demonstration that the Settlement CRFs and resulting Capital Cost Recovery Rates are just and reasonable or even fall within the range of just and reasonable rates. The evidence in the record suggests that even with the reductions proposed in the Settlement, the CRFs and resulting Capital Cost Recovery Rate will lead to an over-recovery.

125. Moreover, these participants have not provided any evidence of how much these benefits are worth, and even if they did, the quantification of such benefits needs to be balanced against the costs and likely result of litigation for which there is no record.[214] In *Trailblazer*-C and -D, the Commission reviewed the parties' detailed analysis and quantification of the settlement's benefits compared to the cost of continued litigation.[215] Even with that analysis, the Commission could not approve that settlement under

---

rate relief; and avoids the time, expense, and uncertainty associated with protracted litigation of the complex issues raised in this proceeding."); Indicated Suppliers Reply Comments at 18 ("The Settlement avoids the need for potentially protracted litigation to determine whether the existing rates are unjust and unreasonable and, if so, to set a just and reasonable replacement rate."). In its initial comments, Trial Staff also highlighted "rate stability" and the termination of pending appeals as two other benefits derived from the Settlement that could not be achieved through litigation. Trial Staff Initial Comments at 7.

[214] Trial Staff acknowledges that a definite cost of the Settlement is that the Settling Parties have conceded the customers' right to refunds, which could only be obtained through litigation. *See* Trial Staff Reply Comments at 8 ("Trial Staff, of course, recognizes that, in a litigation scenario, customers would be entitled to seek refunds for the 15-month refund period starting August 17, 2021.") But Trial Staff asserts without any analysis that such refunds "would largely – if not entirely – be offset by the delay in the effectiveness of any new rates resulting from litigation, as there would be no potential for refunds beyond the 15-month period, which expired November 17, 2022." *Id.* I cannot take that assertion at face value, and Trial Staff has not demonstrated it to be true. As the 15-month refund window has closed, the possibility of refunds is effectively locked in and, once they are calculated, would be paid with interest regardless of how long the litigation might take. *See* August 11 Notice; 18 C.F.R. § 35.19a; *Pub. Serv. Co. of New Mexico*, 44 FERC ¶ 61,232, at 61,856 (1988) (noting that, while interest under section 35.19a is not applicable to proceedings under FPA section 206, the Commission has discretion to award interest on refunds in such proceedings). I fail to see how the duration of any litigation would "offset" such refunds.

[215] *Trailblazer*-C, 87 FERC ¶ 61,110 at 61,443-46; *Trailblazer*-D, 88 FERC ¶ 61,168 at 61,564.

Approach No. 2.[216] Although the Commission determined that on certain issues the record was sufficiently complete to allow it to decide the likely outcome of litigation on those issues, other issues were more problematic. Thus, the Commission could not determine the likely outcome of litigation on all the issues raised by the contesting party and found it was unable to approve the settlement under Approach No. 2 in that case.[217] Because the participants in this case offer no quantification of the settlement benefits or the cost of continued litigation and no evidence on the likely outcome of litigation, I have no basis for certifying, and the Commission has no basis for approving, the Settlement under Approach No. 2.

126. Fifth and finally, the Settling Customers and the Indicated Suppliers argue that the Commission could approve the Settlement because it has "broad support from Black Start Generators and customers responsible for paying the costs of Black Start Service."[218] While that support is an important consideration, it alone is not substantial evidence from which the Commission may reach a reasoned decision on the merits of whether the Settlement is just and reasonable overall or whether the Settlement CRF values (and resulting Capital Cost Recovery Rates) fall within the range of just and reasonable rates.

127. Having considered both the evidence presented by the IMM opposing the Settlement and the arguments and assertions of the participants supporting the Settlement, I conclude that the existing record does not allow me to certify the Settlement under Rule 602(h)(2)(iii)(B) because it does not contain substantial evidence from which the Commission could make a reasoned decision to approve the Settlement as just and reasonable overall under *Trailblazer* Approach No. 2.

VI. DENIAL OF REQUEST TO CERTIFY SETTLEMENT

128. Based on the foregoing findings, I deny the requests to certify the Settlement to the Commission. As noted above:

---

[216] *Trailblazer*-C, 87 FERC ¶ 61,110 at 61,446-47; *Trailblazer*-D, 88 FERC ¶ 61,168 at 61,564-65.

[217] *Trailblazer*-C, 87 FERC ¶ 61,110 at 61,446-47; *Trailblazer*-D, 88 FERC ¶ 61,168 at 61,564-66.

[218] Settling Customers Reply Comments at 4; Indicated Suppliers Reply Comments at 2 (asserting that the benefits of the Settlement are "evidenced by the fact that the Settling Parties and non-objecting parties include generators, load and consumer representatives.").

A. The IMM is a contesting party and has raised genuine issues of material fact.

B. The Settling Parties neglected to file the requisite motion for the omission of the initial decision pursuant to Rules 602(h)(2)(iii)(A) and 710(d).

C. The Settling Parties have indicated that they intend for the Settlement to be certified as a package, precluding a merits decision on each contested issue.

D. The IMM's interests are not attenuated, and it does not have another forum to litigate its objections.

E. Because of the IMM's position and the non-severance provision in the Settlement, severing the IMM or its issues would be inappropriate.

F. Because the record lacks substantial evidence to assess the likely outcome of litigation to balance against the asserted benefits of the Settlement, the record lacks substantial evidence required under Rule 602(h)(2)(iii)(B) from which the Commission could make a reasoned decision that the Settlement is just and reasonable overall under *Trailblazer* Approach No. 2.

129. I also find that neither I nor the Commission should grant the IMM's request to resolve summarily the issues set for hearing based on the current paper record. The participants supporting the Settlement challenge the IMM's factual allegations and arguments,[219] and a full presentation of the evidence and rebuttal evidence and cross examination in a trial-type evidentiary hearing would be the most appropriate way to assign the appropriate weight to each piece of the evidence and achieve a reasoned

[219] *See*, *e.g.*, Trial Staff Reply Comments at 5-8 ("Moreover, there is no merit to any of the IMM's arguments in opposition to the Settlement."); PJM Reply Comments at 4 ("The remainder of the alleged flaws with the CRF inputs (*i.e.*, the return on equity, bonus depreciation, etc.) are beyond the scope of this proceeding."); Settling Customers Reply Comments at 5 ("[T]he basis for the IMM's opposition is that the settled CRF values are based on incorrect inputs and assumptions. Regardless of whether they have merit, the Commission can approve the Settlement without evaluating the details underlying the IMM's criticisms or the merits of the IMM's preferred approach."); Indicated Suppliers Reply Comments at 3-4 ("Instead, the IMM repackages the allegations that caused the Commission to establish settlement judge and hearing procedures in this proceeding in the first instance, without providing anything that would allow the Commission to conclude that the existing CRFs are unjust and unreasonable or what a just and reasonable alternative may be.").

decision on the contested issues.[220] Second, I question whether the IMM's comments, affidavit, and exhibits would be viewed as a substantial record in isolation even without rebuttal evidence or cross examination, since the Bowring Affidavit ranges from clearly written in some sections to poorly cited and incomprehensible in others.[221] Third, on some of the issues, the Bowring Affidavit only flags the issues without offering recommendations as to how to resolve them.[222]

130. Leaving aside the substantive deficiencies in the IMM's evidence, the IMM's request for the Commission to resolve this matter on the paper record in the comments is procedurally infirm. I note that the IMM's request constitutes a collateral attack both on the Commission's decision in the Hearing Order to require a trial-type evidentiary hearing in the absence of an approvable settlement[223] and on the Chief Judge's Order Denying Paper Hearing.[224] The IMM did not seek rehearing of the former nor did it seek an interlocutory appeal of the latter.

131. Moreover, to the extent the IMM's request to decide this case on the settlement comments can be viewed as a motion for summary disposition, I cannot grant such a

---

[220] *See Williams Nat. Gas Co.*, 52 FERC ¶ 63,021, at 65,036 (1990) (denying request to certify settlement due to the existence of several genuine issues of material fact and explaining: "Cross-examination of the witnesses in this case is crucial to an understanding of these issues by the undersigned judge and the Commission, particularly in a case as complex as this one where the witnesses so widely disagree on so many issues. Experience shows that it would be unwise to take the prefiled testimony in this case at face value. Cross-examination often shows the weaknesses in witnesses' testimony on crucial issues.") (Leibman, J.).

[221] For example, the IMM provides over 440 pages of evidence in the 13 exhibits attached to the Bowring Affidavit but completely fails to explain the relevance of these exhibits. Instead, Dr. Bowring makes only four oblique references to various exhibits without identifying the specific language in those exhibits that support his arguments or explaining how that evidence provides such support. *See* Ex. IMM-0001 at 8:10 n.18, 9:3 n.20, 11:11 n.23, 15:20 n.25.

[222] *See, e.g.*, Ex. IMM-0001 at 15:1-3 (asserting that the capital recovery period assumed in the Settlement CRF calculations is incorrect, without offering evidence or explanation of how the CRF calculations would need to change to reflect correct assumptions).

[223] Hearing Order, 182 FERC ¶ 61,194 at PP 32-33.

[224] *See* above P 21.

motion for much the same reasons I cannot certify the Settlement. Summary disposition is only available when there is no genuine issue of material fact.[225] As discussed above in part V.B.2, there are multiple genuine issues of material fact warranting further record development. Given the Commission's decision to require a trial-type evidentiary hearing and the Chief Judge's decision not to convert this proceeding into a paper hearing process, I have no authority to cut corners, and even if I did, I could not recommend summary resolution given that parties have exhausted the option of settling this case and produced a Settlement that I also cannot recommend that the Commission approve summarily.[226]

---

[225] Rule 217(b) provides that "[i]f the decisional authority determines that there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding, the decisional authority may summarily dispose of all or part of the proceeding." 18 C.F.R. § 385.217(b). The Commission's use of the word "may" here means that I have discretion to deny a motion for summary disposition even if I found that there is no genuine issue of material fact. The Indicated Suppliers agreed that summary disposition in the IMM's favor would not be appropriate. Indicated Suppliers Reply Comments at 9.

[226] I am sympathetic to the IMM's concern about the potential delay in resolving the issues set for hearing, a concern echoed by the Settlement's proponents. IMM Initial Comments at 1; Trial Staff Reply Comments at 4; Settling Customers Reply Comments at 4; *see also* Trial Staff Initial Comments at 6. But I take issue with the IMM's assertion that the delay is due in part to "unnecessarily lengthy procedures before the Office of Administrative Law Judges." *See* IMM Initial Comments at 1. Although the IMM notes that the 15-month refund period expired on November 17, 2022, the Commission did not refer the case for hearing and settlement judge procedures until March 24, 2003, well after the close of the refund period. Moreover, while the Chief Judge denied the Paper Hearing Motion as inappropriate (*see* above P 21), the Chief Judge had commenced hearing procedures within two days after the Settlement Judge declared an impasse in the settlement discussions ordered by the Commission (*see* above PP 14, 18-19; Hearing Order, 182 FERC ¶ 61,194, at P 33), and the Chief Judge only suspended the hearing schedule recently to facilitate renewed efforts to put forward the instant Settlement (*see* above P 27). Accordingly, any delay in this proceeding was not the product of "unnecessarily lengthy procedures before the Office of Administrative Law Judges" but from appropriate efforts by the Commission to allow PJM to provide a record on the CRF values in response to the Show Cause Order or to allow the participants to resolve the issues through settlement. Since neither of those efforts produced a legally sustainable resolution, it is now time to resume the development of an adequate record in a trial-type evidentiary hearing. In any event, as I discuss above in n.212, I question whether the

132. Although I reject the IMM's proposal to decide this matter on the current paper record, I have no authority to resume the hearing process on my own since the Chief Judge suspended this proceeding pending the submission and my review of the Settlement. I therefore recommend that the Chief Judge lift his Suspension Order and restart the Track III schedule.[227]

133. To the extent the Settling Parties wish to have the Commission review this order, they can pursue an interlocutory appeal under Rule 715. I am unlikely to reconsider my decision, and since I find that the record is inadequate to decide this issue on the merits, I do not believe there are "extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person."[228] Nevertheless, I encourage any participant aggrieved by this decision to file their motion under Rule 715(b) promptly, so I can deny it soon thereafter and allow such participants to press their interlocutory appeal with the Motions Commissioner under Rule 715(c).[229]

134. I am mindful that the ratepayers in PJM need to resolve these issues promptly. Notwithstanding the delay caused by this contested Settlement process and the underdeveloped record before us, I remain ready to work on developing a record on the merits of determining just and reasonable CRF values and resulting just and reasonable Capital Cost Recovery Rates.

---

participants' pursuit of a contested Settlement is necessarily a faster track to a final resolution of these issues than litigation in a trial-type evidentiary hearing.

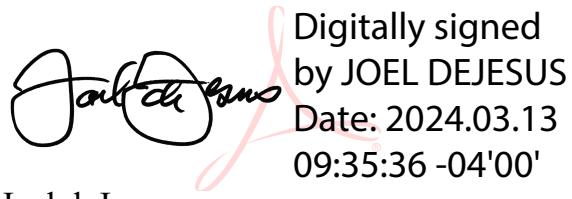
[227] *See Avista Corp.*, *et al.*, 103 FERC ¶ 63,058, at PP 23-24 (2003) (Wagner, C.J.) (declining to certify settlement and reinstating hearing procedures).

[228] 18 C.F.R. § 385.715(a).

[229] Considering that the Commission has not yet acted on contested settlements that presiding judges have certified or that settlement judges have reported over a year ago, an interlocutory appeal of my decision not to certify the Settlement may be a comparatively faster route to obtaining a Commission decision on the Settlement, with an order overruling or sustaining my decision in 60 days or less. *Compare Panda Hummel Station LLC, et al.*, 181 FERC ¶ 63,014 (2022), *Altavista Solar, LLC*, 181 FERC ¶ 63,010 (2022), and *Meyersdale Storage, LLC*, 178 FERC ¶ 63,016 (2022) *with* 18 C.F.R. §§ 385.715(b)(1), b(6), (c)(2), (c)(5), and (d)).

135. Nothing in this order, however, precludes the participants from re-submitting the Settlement with the additional substantial evidence needed to support my decision to certify the Settlement and a reasoned Commission decision to approve the Settlement under an appropriate *Trailblazer* approach.[230]

SO ORDERED.



Joel deJesus
Presiding Administrative Law Judge

[230] *See Williams Nat. Gas Co.* 56 FERC ¶ 61,089, at 61,304-305 (1991) (approving contested partial settlement that presiding judge certified to the Commission after first denying an initial request to certify the settlement and conducting a hearing "to develop a record which would contain substantial evidence from which the Commission could reach a reasoned decision on the merits on the contested issues and from which the Commission could determine whether the settlement offer was just and reasonable.").

Document Content(s)