UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

NRG Power Marketing LLC	)	Docket No. ER22-1539-000

To: The Honorable Stephanie L. Nagel
Settlement Judge

ANSWER AND MOTION FOR LEAVE TO ANSWER OF THE INDEPENDENT MARKET MONITOR FOR PJM

Pursuant to Rules 212 and 213 of the Commission's Rules and Regulations,[1] Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor ("Market Monitor") for PJM Interconnection, L.L.C. ("PJM"),[2] submits this answer to the reply comments submitted by Commission Trial Staff ("Staff ") and by NRG Business Marketing LLC, on behalf of Indian River Power LLC ("NRG"), on May 2, 2024, to the Market Monitor's comments filed April 22, 2024 ("April 22nd Comments"), and to the Maryland Office of People's Counsel's comments filed April 22, 2024. The April 22nd Comments were filed in opposition to the settlement filed in the above captioned proceeding on May 2, 2024, by NRG Power Marketing LLC on behalf of Indian River Power LLC, Delaware Public Service Commission, Old Dominion Electric Cooperative, Delaware Municipal Electric

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1 18 CFR §§ 385.212 & 385.213 (2023).

2 Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff ("OATT"), the PJM Operating Agreement ("OA") or the PJM Reliability Assurance Agreement ("RAA").

Corporation, Inc., the City of Dover Delaware, and PJM Interconnection, L.L.C. (collectively, the "Settling Parties).

Nothing in the reply comments provides support in the record for finding that the proposed settlement establishes a just and reasonable rate as required under the *Trailblazer* line of cases for evaluating a contested settlement.[3] The settlement should not be certified to the Commission; it should be rejected. Rejecting the settlement would allow for a hearing, an initial decision on the merits, and Commission resolution of the issues raised here. Additional Part V cases are pending, and additional cases could be imminent.[4] The issues raised in this case have a significant impact on customer costs in PJM and it is important that they be addressed now.

The reply comments fail to refute arguments raised by the Market Monitor and the Maryland Office of the Ratepayers Advocate ("Contesting Parties") in support of their objections to the settlement. Contrary to their assertions, Staff and NRG fail to provide any material evidence in support of the Settlement. Staff and NRG assert nonexistent benefits of the settlement. Staff and NRG incorrectly assert that load supports the Settlement. The Market Monitor requests that this answer be accepted in order to ensure a complete record and to facilitate the decision making process.

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[3] *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,082 (1998); *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 at 62,341 ("*Trailblazer II*"), *order on reh'g*, 87 FERC ¶ 61,110, *aff'd*, 88 FERC ¶ 61,168; *see also Pub. Utils. Comm'n of Cal. v. El Paso Natural Gas Co.*, 105 FERC ¶ 61,201 at P 44 (2003), *reh'g denied*, 106 FERC ¶ 61,315 (2004). *Trailblazer II* summarizes (at 61,436 n.5) four approaches for the Commission to approve contested settlements: "Approach No. 1, where the Commission renders a binding merits decision on each of the contested issues; Approach No. 2, where approval of the contested settlement is based on a finding that the overall settlement as a package provides a just and reasonable result; Approach No. 3, where the Commission determines whether the benefits of the settlement out balance the nature of the objections, in light of the limited interest of the contesting party in the outcome of the case; and Approach No. 4, where the Commission approves the settlement as uncontested for the consenting parties, and severs the contesting parties to litigate the issues."

[4] *See* Docket Nos. ER24-1787 and ER24-1790.

The Market Monitor interprets the OATT language based on a plain reading and interprets Commission policy and precedent in the same manner. Effectively the Market Monitor requests, in this objection to the Settlement, that the Commission make an explicit statement about the costs that are includable in a Part V rate, consistent with the OATT language. The imaginative reading offered by Staff and NRG will provide an almost overwhelming incentive for units in the competitive PJM markets to request RMR rates that have recently exceeded market revenues by multiples. The PJM markets are competitive markets and the Commission's approach to regulation through competition should not be replaced with the outdated approach of full rate base rate of return regulation for specific units when generation owners become dissatisfied with the outcome of competitive markets for those units.

I. ANSWER

A. The Settlement Should Be Rejected Because It Is Arbitrary and Unlawful.

Staff argues (at 2) that the policy issues raised by the Contesting Parties are contrary to established precedent. Staff misreads the applicable precedent and does not consider the language and purpose of Part V of the OATT. Staff attempts to import atavistic traditional cost of service ratemaking concepts into a competitive market. The PJM market design is based on regulation through competition, and Part V should be interpreted consistent with that market design.

1. Staff and NRG Ignore the Plain Language of Part V of the OATT.

Staff and NRG assert that the Market Monitor's position means that there is no difference between Sections 114-15 and Section 119 of Part V. That is clearly and demonstrably incorrect.

The avoidable cost option in Sections 114–115 of Part V has very specifically defined avoidable costs plus an investment cap.

Section 119 of Part V provides an alternative approach, under which the service provider can file "a cost of service rate with the Commission in order to recover the entire

cost of operating the generating unit." There are clear differences between the two options. The differences between the two options are that Sections 114-115 define avoidable costs in an extremely precise, detailed and prescriptive way using defined formulas and in a way that could exclude legitimate costs of operating the unit. For example, Sections 114-115 establish a cap on the investment amount required to continue operation of the unit that can be recovered. Section 119 allows the resource owner to include all identifiable costs to operate the unit to provide Part V service, including for example required investment costs above the $two million level, without the limitations of Sections 114-115.

The Staff and NRG neglect the fact that Part V has a single overarching purpose that could be implemented in two very different ways. Staff and NRG claim that the Market Monitor's position is that Sections 114-115 and 119 are "effectively the same" and provide only for the recovery of "going forward costs." The Market Monitor's position does not mean that the two sections are effectively the same. They are clearly not the same. The two sections are, however, consistent in their general approach to defining the costs of operating the unit. The Market Monitor does not claim that a party filing under Section 119 is required to use the specific avoidable cost formulas included in Sections 114–115. However, it is correct and essential to understand that Sections 114–115 and 119 both have the same goal, to compensate units providing Part V service for the "entire cost of operating the generating unit" to provide RMR service.

2. Staff and NRG Confuse Return On and Of Capital with Sunk Costs.

The plain meaning of Section 119 does not include sunk costs or anything else associated with an imaginary rate case. Staff and NRG conflate the meaning of "cost of operating the unit" with an entirely different system of rate base rate of return regulation that was applied to ongoing utilities. That inventive extrapolation is not supported in the language of the OATT or in any other Commission orders. Despite citations to a range of asserted precedents, neither Staff nor NRG has identified any Commission order that permits recovery of sunk costs, including costs that have already been fully written off on the

established and public books and records of the company, subject to the regulation of the Securities and Exchange Commission (SEC).

Sunk costs are costs that were incurred while the unit was operating as a competitive market unit and were incurred prior to the decision to continue to operate under Part V. In this case, sunk costs also include costs that NRG wrote off on its books as having zero value (also known as impaired assets).

Staff asserts that the orders approving Part V allow for the recovery of sunk costs, emphasizing a statement in the rehearing order providing: "A generator may file for cost-of-service rates with the Commission and seek a rate which would provide for the recovery of fixed costs, *including return on and of capital*."[5] NRG makes the same argument (at 8). Staff and NRG ignore the fact that RMR costs include the cost of the new investments required to keep the RMR units operating safely and reliably. Those investment costs included the return on and of capital under both sections, although such investment is capped in Sections 114-115, subject to requests for a higher level. Both Sections 114–115 and 119 allow for a return on and of capital. Section 114-115 limits recovery of new project investment needed to keep the unit operating to $2 million.[6] That limitation creates a reason for a unit requiring new project investment greater than $2 million to file under Section 119 to recover such investment. The level of new project investment in this case exceeds $2 million.

The language cited by Staff does not support filing for or payment for the recovery of sunk costs. Return on and of capital does not mean sunk costs. There is no reference in Part V or the cited orders to the recovery of sunk costs. The orders identify only one goal for compensation under Part V:

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[5] Staff at 7, citing *PJM Interconnection, LLC*, 110 FERC ¶ 61,053 (2005), *order on reh'g*, 112 FERC ¶ 61,031 at P 18 (2005) (emphasis in original).

[6] OATT § 115.

> It would not be appropriate to base compensation on generator entry costs because these do not necessarily reflect the least cost solution to reliability concerns. The goal here is to support reliability needs by fully compensating any unit for all going forward costs for the period it must delay its exit.[7]

Staff's interpretation of Part V is not consistent with the stated goal. Staff has cited no legal, economic or regulatory support for the inclusion of sunk costs in a rate designed to cover the costs of operating the RMR unit.

The dispute over sunk costs is a dispute over law and policy, but it is also a disputed issue of fact. Evidence provided by the Market Monitor shows that sunk costs are included in the settlement rate.[8] The settlement rate is described as a "black box," but the Market Monitor argues that a rate at the proposed level necessarily includes a significant portion of the sunk costs NRG identified in its filing. Although logic and math compel the conclusion that the settlement rate is based in significant part upon the recovery of sunk costs, the Settling Parties have not explicitly conceded this point. Unless or until they stipulate that the settlement rate is based on significant part upon the recovery of sunk costs, there is a material fact in dispute.

3. The Nature of NRG's Sunk Costs Is Irrelevant.

NRG attempts to defend (at 19) the inclusion of sunk costs because some of the capital expenditures were required to install emissions controls, and the equipment is still needed for the unit to operate. The nature and usefulness of the capital investment is irrelevant. Whether the investment was reasonable at the time is irrelevant. NRG's logic proves too much. Following NRG's reasoning, NRG could have requested a return on and of the fully depreciated investment in the rest of the unit that is needed in order to generate power and

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[7] 110 FERC ¶ 61,053 at P 147; *see also* 112 FERC ¶ 61,031 at P 14 ("The goal, explained the Commission, is to support reliability needs by fully compensating any unit for all going forward costs for the period it delays its exit.").

[8] April 22nd Comments, Attachment (Affidavit of Joseph E. Bowring).

provide Part V service. NRG decided to make the investment in order to continue operating and then NRG determined not to continue operating before it could recover its investment and that the investment was a mistake and that the investment had zero value. In competitive markets, NRG and its investors are responsible for the consequences of their investment decisions. Customers are not responsible. Investors are best positioned to make investment decisions and should have incentives to make the best possible decisions. Investors may be rewarded or punished. That is how markets operate. Regulation through competition does not work if investors are not accountable for their decisions.

4. That the Settlement Rate Is Less than NRG's Filed Rate Does Not Show that the Settlement Is Just and Reasonable.

NRG asserts that the settlement provides benefits. The benefits are measured against NRG's initial filing, which, in the spirit of old fashioned rate base rate of return regulation, substantially overstated the costs. Much of the actual practice of rate base rate of return regulation included excessive requests for compensation, discussions over the fine details of that regulatory design, and settlements that split the difference. NRG's initial filing is not a reasonable metric for defining the asserted benefits of the settlement.

Staff and NRG even overplay the nature of rate base rate of return regulation. That regulatory approach did not lock in a fixed recovery of costs without review for a five year period. That regulatory approach included ongoing review of rates including a review of earnings.

NRG argues (at 13–14) that the settlement rate should be approved because it represents significant concessions by the company and provides customers "a close to 30 percent reduction" compared to the rate that NRG filed. NRG's filed rate was excessive and the settlement rate is excessive.

5. The Rules Exist to Prevent NRG from Exercising Market Power.

NRG denies (at 21–22) that it is exercising market power, claiming that it is following the tariff rules and that any flaws in those rules are outside the scope of this proceeding. In NRG's view, apparently, the exercise of market power is acceptable if it can be argued that

the exercise of market power is permitted under the rules. NRG mischaracterizes the Market Monitor's position. The point of this proceeding is to determine a just and reasonable rate for Part V service. The determination should implement the goals of Part V and should recognize Indian River Unit No. 4 operates under regulation through competition. NRG cannot be permitted to charge any amount it wants. Market power exists in this situation because PJM needs Indian River Unit No. 4 to be available, even in only a very limited fashion, in order to ensure grid reliability, as defined by PJM analysis. The exercise of market power occurs because NRG is able to impose a guaranteed rate on PJM customers because PJM has no choice but to procure its service under Part V if it is to maintain reliability. Proper implementation of the rules requires consideration of the rules as they are structured in Part V, and it requires that just and reasonable compensation be determined based on the nature and purpose of the service provided. The traditional cost of service concepts for which NRG advocates (*id*.) do not apply in PJM. The settlement rate exceeds the revenues that would be earned in PJM's competitive markets and far exceeds what Indian River Unit No. 4 would be paid under Sections 114–115, even though the Commission has determined that Section 114–115 provide just and reasonable compensation. The Section 114-115 formula and the settlement rate are not within the same zone of reasonableness. Both rates cannot logically be, at once, just and reasonable. NRG has market power in the current process and is attempting to exercise that market power through a black box settlement that does not provide for a full review of costs and that includes significant sunk costs. The rules, if properly interpreted and applied, will prevent the exercise of market power while providing full cost recovery to NRG.

6. Staff's Reliance on *Genon* Is Misplaced.

Staff and NRG cite to *Genon* to support their position.[9] *Genon* does not state that recovery of sunk costs is allowable. Rather, *Genon* states that a generator may "seek a rate

[9] Staff at 7–11, NRG at 8–9, citing *GenOn Power Midwest, LP*, 149 FERC ¶ 61,218 (2014)

which would provide for the recovery of fixed costs, including return on and of capital." *Genon* does not state that payments for return on and of sunk costs are includable. Even more important here is that *Genon* never states that payments for return on and of costs that are sunk are includable.

The avoidable cost option includes the return on and of the required investments and also includes an incentive payment. The Market Monitor has not asserted that recovery under Part V is limited to "going forward" costs. The inclusion of a reasonable incentive does not mean that there are no limits to the costs recoverable under Section 119.

The language relied on by staff is not the holding in *Genon*. Genon held:

> We find the *GenOn* Settlement factually is supported by the Stewart Affidavit, and is within the range of just and reasonable outcomes. The settlement rate of $ 13,200,000 is substantially below the initially calculated cost-of-service recovery rate of $ 23,982,100 for the Locked-in RMR Term. Moreover, the Stewart Affidavit calculated the rate that would apply with no return of, or return on, net plant and determined that this would result in a cost-of-service recovery rate of $ 12,540,098, which supports the rate of $ 13,200,000 in the settlement. Because the cost-of-service recovery rate with no return of or return on net plant supports the settlement rate, we find that the contesting parties would be in no worse position under the settlement than if the case were litigated. Balancing the benefits of the settlement against the costs and potential effect of continued litigation, we find that the overall result of the settlement is just and reasonable.[10]

The *Genon* approach was approved under *Trailblazer* Approach No. 2. Approach No. 2 evaluates a rate based on whether, taken as a whole, that rate is within the zone of reasonableness of a just and reasonable rate. The metric used in *Genon*, based on the testimony filed by the company's witness, is the rate calculated by the Market Monitor excluding sunk costs. The Commission found that the settlement rate is within the zone of

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[10] *Id.* at P 36.

reasonableness of a rate excluding sunk costs. That is the sole basis for approval of the settlement rate, and it is the only precedent established in *Genon*.[11] The *Genon* holding directly contradicts Staff's position on sunk costs. The *Genon* holding contradicts Staff's misinterpretation of nondecisional language. Staff has not demonstrated that the settlement rate proposed in this case is within a zone of reasonableness established by the level of a rate excluding sunk costs. The settlement cannot be approved under *Trailblazer* Approach No. 2 based on the *Genon*.

7. Staff's and NRG's Arguments on Impairments Have No Merit.

Staff and NRG oppose the Market Monitor's position that the settlement rate should not include impairments, but fail to refute the Market Monitor's explanation in its comments opposing the settlement (at 17) explaining why the precedent on which they rely on has no relevance to this proceeding. Staff's argument is circular. That the Commission never previously required the Indian River Unit No. 4 to reflect an impairment is irrelevant because it was a market unit. The Commission had no reason to regulate the accounting practices of a market unit. The fact that it did not do so is not relevant. The impairment reflects an outcome from participation in markets, an outcome that the principles of regulation through competition assign to investors and not customers. Staff cannot properly ignore the difference between units whose operational history is in the context of traditional cost of service ratemaking and units whose operation history is in the context of markets.

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[11] Staff claims (at 2) that "the Contesting Parties are no worse off under the Settlement than they would be under the likely litigated outcome of this proceeding." The Commission used similar language when it approved the *Genon* settlement over the Market Monitor's objections. The basis for the Commission's finding was its determination that the sunk costs to which the Market Monitor objected had been sufficiently removed. *See* 149 FERC ¶ 61,218 at P 36. That is not the case with the settlement proposed in this case.

8. *Trailblazer* Approach No. 1 Does Not Apply to the Settlement.

Staff concedes that the settlement includes a provision that, under recent precedent, precludes certifying it under *Trailblazer* Approach No. 1.[12] Staff argues, nevertheless, that the settlement should be certified under *Trailblazer* Approach No. 1. The Presiding Judge in *PJM Interconnection, L.L.C.* recognized that a Commission order approving a settlement certified under *Trailblazer* Approach No. 1 must be based on a determination of each issue on the merits. *Trailblazer II* (at 61,436 n.5) defined "Approach No. 1," as an approach "where the Commission renders a *binding* merits decision on each of the contested issues" [emphasis added]. The settlement includes a provision that allows parties to accept or reject an order approving the settlement if it includes conditions or modifications. The settlement is, therefore, not subject to a binding decision. There is no reason for the Presiding Judge and the Commission to invest resources into consideration and resolution of every issue on the merits if it does not bind the parties. There is no reason to expect that a Commission order on the matter will materially differ from an order on a settlement approved under *Trailblazer* Approach No. 1. The Presiding Judge's implementation of *Trailblazer* Approach No. 1 is well reasoned and should be confirmed.

9. The Affidavits Raise Irrelevant Arguments and Do Not Support the Settlement Rate.

Staff's reply comments include an affidavit of Alexander Gill, who states a position on the cost of capital. Arguments on the cost of capital are irrelevant to this case. The standard applicable to utility rate cases does not apply in this case. The rate of return is related only to the recovery of sunk costs.

Staff's reply comments also include an affidavit by Christopher Skorski, who attempts to demonstrate that the settlement's composite depreciation rate of 4.05 percent is just and

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[12] Staff at 15–16, citing *PJM Interconnection, L.L.C.*, 186 FERC ¶ 63,019 (2024).

reasonable. These arguments on the treatment of depreciation are also irrelevant to this case. The depreciation rate is relevant only to the recovery of sunk costs.

The Project Investment costs provided for in the filing and the settlement are recovered immediately and therefore do not require a return on or of that capital.

Staff affidavits do not address genuine issues of material fact. Staff affidavits are about the details of a nonexistent rate case and simply assume that costs that are both sunk and impaired are recoverable under Part V service.

The standards applicable to utility rate cases do not apply in this case. This case concerns implementing the specific provisions of Part V of the PJM OATT with the goal "to support reliability needs by fully compensating any unit for all going forward costs for the period it delays its exit."[13]

10. *Hunlock* Is Not Relevant to this Case.

Staff's and NRG's attempt to rely on the *Hunlock* case for approval of the settlement is misplaced.[14] *Hunlock* does not even purport to displace the *Trailblazer* analytical framework. *Hunlock* is about evidentiary standards. The Commission approved the settlement in *Hunlock* over the Market Monitor's objection because it determined that "the IMM failed to file an affidavit or any supporting evidence regarding its challenges to the revenue requirements established in the Settlements."[15] The Market Monitor has submitted an affidavit and other evidence in support of its objections to the settlement in this case. Moreover, the Market Monitor does not object to the settlement based solely on disputed facts.[16] The Market

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[13] 112 FERC ¶ 61,031 at P 14.

[14] *See* Staff at 22–23, NRG at 6 n.19, 15 n.48, citing *Hunlock Energy, LLC, et al.*, 170 FERC ¶ 61,090 (2020).

[15] *Id*. at P 28.

[16] Staff claims (at 2) that Contesting Parties' comments "do not establish that there is a dispute as to a genuine issue of material fact." On page 9, Staff states that "[t]he IMM and the MPC both attempt to

Monitor has explained that it also objects to the settlement rate because it is based in part on costs that are not lawfully included in a Part V rate.

II. MOTION FOR LEAVE TO ANSWER

The Commission's Rules of Practice and Procedure, 18 CFR § 385.213(a)(2), do not permit answers to protests, answers, or requests for rehearing unless otherwise ordered by the decisional authority. The Commission has made exceptions, however, where an answer clarifies the issues or assists in creating a complete record.[17] In this answer, the Market Monitor provides the Commission with information useful to the Commission's decision making process and which provides a more complete record. Accordingly, the Market Monitor respectfully requests that this answer be permitted.

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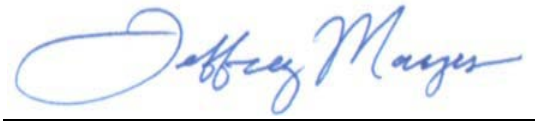
recast the *GenOn* decision, but their characterizations of that case have no basis in fact," thereby establishing a least one dispute of material fact.

[17] *See, e.g., PJM Interconnection, L.L.C.,* 119 FERC ¶61,318 at P 36 (2007) (accepted answer to answer that "provided information that assisted … decision-making process"); *California Independent System Operator Corporation*, 110 FERC ¶ 61,007 (2005) (answer to answer permitted to assist Commission in decision-making process); *New Power Company v. PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,208 (2002) (answer accepted to provide new factual and legal material to assist the Commission in decision-making process); *N.Y. Independent System Operator, Inc.*, 121 FERC ¶61,112 at P 4 (2007) (answer to protest accepted because it provided information that assisted the Commission in its decision-making process).

III. CONCLUSION

The Market Monitor respectfully requests that the Settlement Judge afford due consideration to this answer in evaluating the settlement filed in this proceeding.

Respectfully submitted,



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Dated: May 13, 2024

CERTIFICATE OF SERVICE

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

Dated at Eagleville, Pennsylvania,
this 13th day of May, 2024.

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