UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

DC Energy, LLC and DC Energy Mid-Atlantic, LLC	)	Docket Nos. EL12-8-000, -001
v.	)	
PJM Interconnection, L.L.C.	)	

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 for PJM[2] ("Market Monitor"), answers and moves for leave to answer the answers filed May 28, 2014, by PJM Interconnection, L.L.C. ("PJM") and by Scylla Energy, LLC ("Scylla"), DC Energy, LLC and DC Energy Mid-Atlantic, LLC ("DC Energy") to the Market Monitor's protest to the offer of settlement filed in this proceeding on May 16, 2012 ("IMM Protest"). Neither answer provides the missing showing that the terms of settlement are just and reasonable on the merits.[3] Failure to support the Settlement with such substantial evidence means that the settlement should not be approved.[4]

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1 18 CFR § 385.212 & 385.213 (2013).

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

3 *See* Stipulation and Agreement of Settlement ("Settlement"), Docket Nos. EL12-8-000, -001 (April 28, 2014).

4 *See* 18 CFR § 285.602(h).

PJM and DC Energy instead raise arguments about why the Market Monitor should not object to the Settlement. PJM and DC Energy argue that the Settlement resolves a court case in which the Market Monitor is not participating.[5] The Market Monitor has not intervened in the appellate proceeding before the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") because it is confident that the Commission's Solicitor's Office can and will successfully defend the Commission's administration of the Federal Power Act in its Final Orders.[6]

It is not necessary for the Market Monitor to become a party to the appellate case in order to object, because the Settlement does not settle the appellate case. PJM and DC Energy, and not the Commission's Solicitor's Office, filed an offer of settlement in FERC Docket No. ER12-8-000, -001, pursuant to section 602(f) of the Commission Rules and Regulations.[7] The Market Monitor is a party to this proceeding in which a settlement has been filed and is entitled to file comments.[8]

Although the parties assert they are settling the D.C. Circuit case, the agreement actually settles the Commission proceeding despite the Commission's decisions in the Final Orders. The Settlement, if approved, would change the good outcome in the Final Orders, which permits PJM to apply its filed tariff, but it does not resolve the appeal to the D.C. Circuit.[9] The D.C. Circuit mediation program indicates that a successful mediation program

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5 *See* PJM at 2, 4, 9, 12; DC Energy at 2–3, 4 & nn. 7, 15.

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

7 18 CFR § 385.602(f).

8 See 18 CFR § 385.602(f).

9 PJM explains (at 5–6) its role in detecting the issues respecting compliance with the tariff rules and proper market behavior, seeking rebilling in accordance with the applicable rules, and successfully defending its actions. The Market Monitor appreciates PJM's central role in securing a good outcome in this proceeding as reflected in the Final Orders.

concludes with a "stipulation of dismissal."[10] That did not happen in this case. The D.C. Circuit proceeding would continue unless and until the appeals are withdrawn.

PJM and DC Energy explain that the D.C. Circuit's mediation office "supported" settlement of this case, citing a general policy favoring settlements.[11] Encouraging mediation is the job of the D.C. Circuit's mediation office.[12] The "support" of the mediation office has nothing do with the merits of the Settlement.[13] Securing a just and reasonable outcome is not the job of the D.C. Circuit's mediation office. "Mediation" is not a reason to avoid accounting for approximately $10.2 million dollars according to a correct application of the rules in the filed tariff. Meditation is not a reason to let any participant keep funds that do not belong to it. PJM customers are a diffuse interest, and they rely upon non-discriminatory implementation of the tariff,[14] PJM's fiduciary duties to them,[15] and the filed

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10 *See* U.S. Court of Appeals for the D.C. Circuit, Appellate Mediation Program at 3 ("If settlement is reached, the agreement, which shall be binding upon all parties, will be put into writing, and counsel will file a stipulation of dismissal. If the case is not settled, it will remain on the docket and proceed as though mediation had not been initiated.")

11 *See* PJM at 2, 9, 12; DC Energy at 2, 5.

12 *See* U.S. Court of Appeals for the D.C. Circuit, Appellate Mediation Program at 3 ("In mediation, a neutral helps parties reach a resolution that is acceptable to them. Cases are settled only if the parties agree to a course of action that will terminate their case so that no further Court involvement is required.").

13 *Id*.

14 *See* Federal Power Act § 205, 16 U.S.C. § 824d.

15 *See* PJM Operating Agreement §§ 7.7(xii) ("Direct the Office of the Interconnection on behalf of the LLC and PJMSettlement to take appropriate legal or regulatory action against a Member (A) to recover any unpaid amounts due from the Member to the Office of the Interconnection under this Agreement and to make whole any Members subject to an assessment as a result of such unpaid amount, or (B) as may otherwise be necessary to enforce the obligations of this Agreement"); 14B.4(a) ("Each Member shall receive from PJMSettlement (and not from any other party), and shall pay to PJMSettlement (and not to any other party), the amounts specified in the PJM Tariff and this Agreement for services and transactions for which PJMSettlement is the Counterparty, and PJMSettlement shall be correspondingly obliged and entitled.").

rate doctrine[16] to protect their rights. PJM customers are at a disadvantage defending their interests directly. Nevertheless, the Commission has heard from one party representing participants who will actually pay a portion of the $10.2 million dollars, and that party states: "PJM is a party to the Settlement Agreement, agreeing to cease collecting approximately $10 million from DC Energy Companies and Scylla – money that PJM had an obligation under the Commission orders to collect and credit to BOR. It is not PJM's money. It is money that should be credited to BOR accounts and returned to market participants."[17]

The Market Monitor indicated in the IMM Protest (at 3. n.8) that it was not involved in settlement negotiations, so that the Market Monitor's role in this matter would be clear for all. Contrary to D.C. Energy's and PJM's mischaracterization of the Market Monitor's intent, the Market Monitor does not criticize the Settlement because the discussions excluded the Market Monitor.[18] The Market Monitor objects to the Settlement because it has not been supported.

PJM and DC Energy assert that the Settlement will not affect the value of the Final Orders as precedent. If the Commission approves the Settlement, it changes the outcome in the Final Orders. An order from the D.C. Circuit backing the Commission's Final Orders would significantly bolster the precedential value of this case. Approval of the Settlement would invite protracted litigation in similar situations.

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[16] *See, e.g.*, Western Resources, Inc. v. FERC, 72 F.3d 147, 149 (D.C. Cir. 1995) (filed rate doctrine, forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority); Consolidated Edison Co. of New York, Inc. v. FERC, 347 F.3d 964, 969 (filed rate doctrine precludes a rate adjustment taking place prior to a section 205 filing unless the parties are on notice that a past rate may be adjusted).

[17] Motion to Intervene of the Retail Energy Supply Association and Comments to Settlement, Docket Nos. EL12-8-000, -001 (May 19, 2014).

[18] *See* PJM at 4; DC Energy at 2.

DC Energy raises various arguments that the Settlement can be approved under *Trailblazer*, none of which are reasonable or comply with the applicable precedent cited in the IMM Protest. For example, DC Energy asserts (at 4) that the Settlement is a "package" that completely resolves the entirety of the dispute. DC Energy does not explain how a settlement which simply disposes of a $10.2 million payment obligation can reasonably be considered a "package." The policy on evaluating package settlements contemplates multiple terms that create a just and reasonable outcome considered together even if a discrete element would not meet that standard by itself. The Settlement does not include multiple elements. It is a simple quid pro quo, and it should not be treated as a package.[19] The Settlement does not resolve any issue in FERC Docket No. EL12-8-000, -001. The Settlement changes the outcome of that case, which provides for applying the current filed tariff rules, without explaining the basis for changing the outcome.

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

Respectfully submitted,

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[19] *See, e.g.*, *Trailblazer Pipeline Company*, 87 FERC ¶ 61,110 at 61,440 (1999) ("A decision on the justness and reasonableness of the overall result of a settlement package is a merits decision, but does not require a decision on whether each element of the package is also just and reasonable. To render a merits decision on each individual issue would destroy the benefits of proposing a settlement.").

Dated: June 12, 2014

CERTIFICATE OF SERVICE

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

Dated at Eagleville, Pennsylvania,
this 12th day of June, 2014.

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