UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

JOINT MOTION FOR RECONSIDERATION OR INTERLOCUTORY APPEAL

To: The Honorable Joel deJesus
Presiding Administrative Law Judge

Pursuant to Rules 212 and 715(b) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"),[1] the Settling Parties[2] hereby move the Presiding Judge to reconsider the Order Denying Request to Certify Contested Settlement ("Denial Order") or to otherwise permit an interlocutory appeal.[3] The Settling Parties are parties to the Offer of Settlement and Settlement Agreement ("Settlement")[4] in the above-captioned dockets that is supported or not opposed by FERC Trial Staff and all intervenors in this proceeding, bar one, Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM ("IMM").

The Settlement fully resolves the issues set for hearing by the Commission by reducing the existing Capital Recovery Factor ("CRF") values for generating units that were selected to provide Black Start Service prior to June 6, 2021. Despite the immediate rate relief and rate certainty

[1] 18 C.F.R. §§ 385.212 & 385.715(b).

[2] The Settling Parties include American Municipal Power, Inc., Dynegy Marketing and Trade, LLC ("Dynegy"), Hazleton Generation LLC, J-POWER USA Development Co., Ltd., LS Power Development, LLC, Old Dominion Electric Cooperative, PJM Interconnection, L.L.C. ("PJM"), PJM Industrial Customer Coalition, and Vistra Corp. ("Vistra").

[3] *PJM Interconnection, L.L.C.*, 186 FERC ¶ 63,019 (2024).

[4] *PJM Interconnection, L.L.C.*, Docket Nos. EL21-91-003, et al., Settlement Agreement (Jan. 31, 2024).

produced by the Settlement, which would accrue to all parties with a material financial interest in the outcome of this proceeding, the Denial Order takes the extraordinary step of denying certification, finding that litigation is necessary. In denying the Settling Parties the benefits of their bargain, the Denial Order is inconsistent with the Commission's standard for certifying contested settlements,[5] the Commission's orders in this proceeding,[6] and the issues relevant to a determination of whether the Settlement is just and reasonable.

The Settling Parties respectfully submit that the Presiding Judge should grant this Joint Motion for Reconsideration or Interlocutory Appeal ("Motion") and promptly certify the Settlement to the Commission in accordance with Rule 602(h)(2)(ii).[7] If the Presiding Judge does not grant reconsideration, then the Presiding Judge should permit an interlocutory appeal to the Commission in accordance with Rule 715 so that the Commission may approve the Settlement thereby allowing the Settling Parties to secure the rate and other benefits therein.

I. EXECUTIVE SUMMARY

Certification of a contested settlement is permissible when there is no genuine issue of material fact. It is the burden of the party contesting the settlement to identify and provide support demonstrating that there are genuine issues of material fact that prevent certification of the settlement—FERC practice and precedent does not permit a presiding judge to identify these issues, find support for them if the contesting party has not done so itself, and deny certification

[5] *See* 18 C.F.R. § 385.602(h); *see also, Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *order denying request for reh'g*, 88 FERC ¶ 61,168 (1999) ("*Trailblazer*").

[6] *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,194 (2023) ("Hearing Order"); *PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,077 (2023) ("Rehearing Order").

[7] 18 C.F.R. § 385.602(h)(2)(ii).

on that basis.[8] In this case, the IMM failed to carry its burden and the issues that were identified *sua sponte* in the Denial Order do not raise genuine issues of material fact that would preclude the Commission from making a determination that the Settlement is just and reasonable. The Denial Order's determination to the contrary is flawed and should be reconsidered.

The Denial Order also erred in concluding that the Settlement could not be certified in accordance with *Trailblazer*. Even if a contesting party demonstrates that there are genuine issues of material fact that remain, a Commission order certifying a contested settlement on the merits is permissible if supported by substantial evidence.[9] This accords with general principles of administrative law that require the Commission to engage in reasoned decision-making.[10] It also advances the Commission's strong policy in favor of settlements. Here, the Commission has an adequate record on which to rule on the proposed Settlement.

If reconsideration is not granted, then the Settling Parties respectfully request that the Presiding Judge grant their motion for interlocutory appeal. Interlocutory appeals are permitted when extraordinary circumstances "make prompt Commission review of the contested ruling necessary to prevent detriment of the public interest or irreparable harm to any person."[11] Extraordinary circumstances are present here. The Denial Order incorrectly applies the Commission's standard for certification of settlements and thereby denies nearly all parties with an economic interest in these proceedings the significant rate and certainty benefits of their

[8] *See, e.g.*, *Hunlock Energy, LLC*, 170 FERC ¶ 61,090, at P 28 (2020) ("The IMM failed to file an affidavit or any supporting evidence regarding its challenges to the revenue requirements established in the Settlements or any other aspect of the Settlements. Thus, we cannot find that the IMM's comments raise a genuine issue of material fact with respect to the Settlements.").

[9] 18 C.F.R. § 385.602(h)(1)(i).

[10] *See Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

[11] 18 C.F.R. § 385.715(a).

negotiated settlement. If permitted to stand, the Denial Order may force the Settling Parties, FERC Trial Staff, and the IMM to litigate a proceeding and to expend resources when no participant supports litigation,[12] and an alternative path forward exists.

II. BACKGROUND

The Settlement resolves a matter that has been before the Commission for nearly three years. On April 7, 2021,[13] as amended June 11, 2021,[14] PJM filed revisions to Schedule 6A of its Open Access Transmission Tariff ("Tariff") pursuant to section 205 of the Federal Power Act ("FPA") proposing to implement a formula-based rate for generators that PJM selects to provide Black Start Service in competitive solicitations held after the proposed effective date of June 6, 2021.[15] The Commission accepted PJM's proposed revisions to Schedule 6A of its Tariff effective June 6, 2021,[16] but initiated this proceeding pursuant to FPA section 206 to investigate whether PJM's existing rates in Schedule 6A for units selected to provide Black Start Service[17] prior to the June 6, 2021 effective date for the formula rate (the "Existing CRF Rates") remain just and reasonable.[18] In particular, the Commission instituted this proceeding to investigate whether PJM's existing rates for units providing Black Start Service, "which are based on a federal

[12] *PJM Interconnection, L.L.C.*, Docket Nos. EL21-91-003, et al., Comments of the Independent Market Monitor for PJM in Opposition to Offer of Settlement at 3 (Feb. 20, 2024) ("IMM Comments") ("The matter could continue to proceed to hearing. However, this is unnecessary.").

[13] *PJM Interconnection, L.L.C.*, Tariff, Docket No. ER21-1635-000, Schedule 6A, Black Start Revisions of PJM Interconnection, L.L.C. (Apr. 7, 2021).

[14] *PJM Interconnection, L.L.C.*, Docket No. ER21-1635-000, Submission of Response to Deficiency Letter of PJM Interconnection, L.L.C. (June 11, 2021).

[15] *See id.* at 1-3.

[16] *PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,080, at P 1 (2021).

[17] Capitalized terms used, but not defined, in this motion have the meaning set forth in the PJM Tariff.

[18] *PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,080, at P 2 (2021).

corporate income tax rate that pre-dates the Tax Cuts and Jobs Act [("TCJA")], remain just and reasonable."[19] The Commission "direct[ed] PJM to either: (1) propose revisions to its Black Start Service rates to reflect changes in the federal corporate income tax rate and describe the methodology used for making those revisions; or (2) show cause why it should not be required to do so."[20]

On October 12, 2021, PJM responded to the Commission's order explaining that no changes to the pre-June 6, 2021 rates were necessary.[21] The Commission then issued the Hearing Order setting this proceeding for hearing to determine whether, in light of the TCJA, the existing CRF values for generating units that were selected to provide Black Start Service prior to June 6, 2021 are unjust and unreasonable.[22] On April 21, 2023, Vistra and Dynegy (collectively "Vistra") filed a request for rehearing of the Hearing Order which the Commission subsequently denied.[23] Vistra filed timely petitions for review of the Hearing Order, the notice denying rehearing by operation of law, and the Commission's order addressing the arguments raised on rehearing by Vistra.[24]

The designated Settlement Judge convened formal settlement conferences on April 25, July 18, and August 22, 2023.[25] The participants were unable to reach an agreement during those

[19] *Id.* at PP 1-2.

[20] *Id.* at P 2.

[21] *PJM Interconnection, L.L.C.*, Docket No. EL21-91-000, PJM Interconnection, L.L.C. Response to Commission's Show Cause Order at 5 (Oct. 12, 2021).

[22] Hearing Order at P 21.

[23] *PJM Interconnection, L.L.C.*, 183 FERC ¶ 62,094 (2023); *PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,077 (2023).

[24] Petition for Review, *Vistra Corp., v. FERC*, Case No. 23-1186 (D.C. Cir. July 17, 2023); Petition for Review, *Vistra Corp. v. FERC*, Case No. 23-1228 (D.C. Cir. Aug. 22, 2023).

[25] *PJM Interconnection, L.L.C.*, Docket No, EL21-91-000, Order Declaring Impasse at P 2 (Aug. 23, 2023).

conferences and therefore the Settlement Judge issued an order declaring an impasse and recommending the termination of settlement procedures on August 23, 2023.[26] On August 25, 2023, the Chief Judge terminated settlement procedures, designated the Honorable Joel deJesus as the Presiding Administrative Law Judge, and set this proceeding for a Track III procedural schedule.[27]

Following further settlement discussions, the Settling Parties reached a settlement in principle that would provide all the parties with a material interest in the proceeding substantial benefits in the form of immediately lower CRF rates (the "Settlement CRF Rates"), a two-year moratorium on rate changes, and the termination of Commission and D.C. Circuit litigation. PJM filed the Settlement with the Commission on January 31, 2024.

The Settlement proposes a "black box" reduction to the Existing CRF Rates that would be effective as of January 1, 2024 and implemented on an interim basis pending the Commission's consideration of the Settlement. The Settlement is supported or not opposed by participants representing both generation and load interests in this proceeding. In addition to the Settling Parties, the Maryland Office of People's Counsel, the Office of the People's Counsel for the District of Columbia, the Public Utilities Commission of Ohio Office of the Federal Energy Advocate, and the Delaware Division of the Public Advocate do not oppose the Settlement.

Despite the material benefits provided by the Settlement and its near universal support or non-opposition, the IMM submitted comments and an affidavit opposing the Settlement arguing that the Settlement "does not and cannot resolve the single issue, an issue of material fact,

[26] *Id.*

[27] *PJM Interconnection, L.L.C.*, Docket Nos. EL21-91-000, et al., Order of Chief Judge Terminating Settlement Judge Procedures, Designating Presiding Administrative Law Judge, and Establishing Track III Procedural Time Standards, (Aug. 25, 2023).

identified in the order setting this matter for hearing."[28] The IMM's comments and affidavit largely reiterated its prior arguments regarding the origins and calculations of the Existing CRF Rates and claims that the issue set for hearing cannot be resolved because "[t]he updated CRFs were incorrectly calculated using the correct components of the CRF formula in Schedule 6A . . . but with the incorrect input values."[29]

FERC Trial Staff and the Settling Parties filed reply comments affirming that the Settlement fully resolved the issue set for hearing by the Commission by reducing the rates for Black Start Service and that the IMM's sole basis for opposing the Settlement appears to be that the Settlement CRF Rates did not align with those that would result from the IMM's preferred calculation.[30] These parties also pointed out that the IMM's arguments about how the Settlement CRF Rates were calculated were unsupported, as the Settlement CRF Rates are black box values. Because the IMM had failed to raise a genuine issue of material fact and there is substantial evidence in the record supporting the conclusion that the Settlement is just and reasonable, FERC Trial Staff and the Settling Parties requested that the Presiding Judge promptly certify the Settlement to the Commission.

Nevertheless, on March 13, 2024, the Presiding Judge issued the Denial Order. The Denial Order concluded that the Presiding Judge could not certify the Settlement because (1) the

[28] IMM Comments at 2.

[29] IMM Comments, Ex. No. IMM-0001 Affidavit of Joseph E. Bowring on Behalf of the Independent Market Monitor for PJM at 12:30-32 ("Bowring Affidavit").

[30] *PJM Interconnection, L.L.C.*, Docket Nos. ER21-1635-005, et al., Reply Comments of Commission Trial Staff (Mar. 1, 2024) ("Trial Staff Reply Comments"); *PJM Interconnection, L.L.C.*, Docket Nos. ER21-1635-005, et al., Reply Comments of the Indicated Suppliers (Mar. 1, 2024) ("Indicated Suppliers Reply Comments"); *PJM Interconnection, L.L.C.*, Docket Nos. ER21-1635-005, et al., Reply Comments of American Municipal Power, Inc., et al. (Mar. 1, 2024).

Settlement is contested by virtue of the IMM's comments opposing the Settlement;[31] (2) genuine issues of material fact remain such that the Settlement cannot be certified pursuant to Rule 602(h)(2)(ii);[32] (3) the parties did not move to omit the initial decision under Rule 710, pursuant to Rule 602(h)(2)(iii)(A); and (4) there is a lack of substantial evidence for the Commission to make a reasoned decision on the issues of genuine material fact because "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."[33]

III. MOTION FOR RECONSIDERATION

Good cause exists for granting reconsideration of the Denial Order. As described further below, the conclusion that there remains a genuine issue of material fact, or even numerous such issues, barring certification of a contested settlement is inconsistent with applicable law and the record in this proceeding, and should be reversed. Even if there exists any genuine issue of material fact—which there are none—the record contains substantial evidence that the Commission may rely upon to reach a reasoned decision on the merits of the contested issues.

Without reconsideration and reversal of the Denial Order by the Presiding Judge, interlocutory appeal must be permitted in light of the extraordinary circumstances in this case. FERC Trial Staff and the Settling Parties worked collaboratively to reach a Settlement that is supported or not opposed by parties representing a diverse array of interests that will bring to end multiple years of litigation before this Commission, avoid the several additional years of litigation that will certainly follow absent settlement, and deliver immediate benefits by reducing the rate

[31] Denial Order at P 129.

[32] *Id.* at PP 93-101.

[33] *Id.* at PP 115 n.195, 116-127.

for Black Start Service. Before the parties are deprived of the bargained for benefits of the Settlement and sent back to litigation, the Commission should have the ability to review the Denial Order.

a. The Denial Order Erred in Denying Certification and in Its Identification of Genuine Issues of Material Fact under Rule 602(h)(2)(ii).

The Commission permits contested settlements to be certified when a contesting party fails to raise a genuine issue of material fact.[34] In this case, the Denial Order declines to certify the Settlement based on the Presiding Judge's conclusion 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."[35] Notably, the Denial Order disagrees with the IMM's assessment of the issues of material fact, but agrees with the "IMM's assessment that the Settlement does not fully address the reasons that the Commission set this case for hearing."[36] The Denial Order then proceeds to raise fourteen separate issues that the Presiding Judge believes must be resolved through litigation. As discussed further below, the Denial Order's determination that there remain genuine issues of material fact that must be resolved constitutes error, misunderstands the issues, and must be reversed.

In order to prevent certification of a settlement, the contesting party has the burden to demonstrate that there remain disputes of genuine issues of material fact that would preclude the Commission from making a determination of whether the settlement is just and reasonable.[37]

[34] 18 C.F.R. § 385.602(h)(1)(i).

[35] Denial Order at P 95.

[36] *Id.*

[37] *Trunkline Gas Co.*, 22 FERC ¶ 63,114 (1983).

Importantly, this standard is not easily satisfied merely because a contesting party would prefer to engage in litigation to establish facts rather than settle.

To raise a genuine issue of material fact a party "must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement, that are relevant to support the claim."[38] The party raising a genuine issue of material fact must do so with "sufficient particularity" such that it "would preclude the Commission from resolving the issues raised."[39] "[M]ere allegations of disputed fact are insufficient to mandate a hearing; a petitioner must make an adequate proffer of evidence to support them."[40]

The IMM's comments failed to meet this burden. While the IMM provided the affidavit of Joseph E. Bowring to support its comments opposing the Settlement, neither the comments nor the accompanying affidavit raise genuine issues of material fact that would preclude the Commission from determining whether the Settlement is just and reasonable and impede certification of the Settlement. The IMM argues that there is a "single issue, an issue of material fact, identified in the order setting this matter for hearing": whether the Existing CRF Rates remained just and reasonable as a result of the TCJA. The IMM then makes two categories of arguments in opposition to the Settlement: (1) that the Existing CFR Rates are unjust and unreasonable because they result in an over-recovery of capital costs for black start units selected prior to June 6, 2021;[41] and (2) that the Settlement rates were calculated incorrectly and should be

[38] 18 C.F.R. § 385.602(f)(4).

[39] *El Paso Nat. Gas Co.*, 118 FERC ¶ 63,015, at P 89 (2007).

[40] *Hunlock Energy, LLC*, 170 FERC ¶ 61,090, at ¶ 61,607, n.32 (2020) (quoting *Penn. Pub. Util. Comm'n v. FERC*, 881 F.2d 1123, 1126 (D.C. Cir. 1989)).

[41] *See* IMM Comments at 2; Bowring Affidavit at 2, 10.

further reduced.[42] To the second point, Dr. Bowring declares that either the IMM's proposal or the proposed Settlement rates result in an "overpayment for capital cost recovery."[43] The IMM's theory of the case raises issues regarding whether correcting any "overpayment," would violate the limitations imposed by the FPA by ordering refunds back to January 1, 2018—more than three years *prior* to the refund effective date established by the Commission.[44] In contrast, the Settlement avoids these contentious issues, advances the Commission's policy in favor of settlements in complex litigation, and provides all parties with an economic interest in these proceedings with an outcome that is just and reasonable.

Neither category of the IMM's arguments raises a genuine issue of material fact that must be resolved for the Commission to rule on the Settlement. The vast majority of the IMM's comments and accompanying affidavit are focused on demonstrating that the Existing CRF Rates were premised on a pre-TCJA tax rate and must be reduced. But whether the Existing CRF Rates were calculated based on the pre-TCJA tax rate is immaterial at this stage, as the Settlement is not proposing a continuation of the Existing CRF Rates. In effect, the factual issue that was set for hearing no longer exists; it has been resolved by the Settlement. Rather, the Settling Parties, in furtherance of compromise, reducing litigation risk, and rate certainty, are proposing a rate reduction. As FERC Trial Staff acknowledged in its comments, the "[s]ettlement reduces all CRF values for the relevant Black Start Service facilities, with the percentage reductions varying based

[42] *Id.* at 12-15. Other issues raised by the Bowring Affidavit and echoed in the Denial Order are simply irrelevant, *i.e.*, whether the Existing CFR Rate is a formula rate or a stated rate. This was resolved in the Commission's Rehearing Order and is outside the scope of this proceeding. Rehearing Order at P 46.

[43] Bowring Affidavit at 16.

[44] *Id.* at 17. The fact of any "overpayment" is irrelevant to the extent it would require the Commission to disregard the FPA, or violate the rule against retroactive ratemaking by requiring PJM to "make retroactive changes to the rates previously paid to generators, as any such changes violate the filed rate doctrine and the related rule against retroactive ratemaking." *PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,080, at P 50 (2021).

on the length of the Black Start Commitments."[45] The issue of whether the Existing CRF Rates were premised on a particular tax rate is thus not material to the analysis of whether the Settlement should be certified and approved and the IMM's "mere allegations of disputed fact are insufficient" to bar certification of the Settlement. [46]

The Denial Order disregards arguments that the rate reduction provided by the Settlement "resolves the matters to be addressed at hearing."[47] But this misstates the applicable legal standard. The issue is not whether there are factual matters that would need to be resolved through hearing in order for the Commission to carry its burden under Section 206 to determine that the Existing CRF Rates are unjust and unreasonable or what a just and reasonable replacement rate may be. To the contrary, the issue is whether there are genuine issues of material fact that would need to be resolved in order for the Commission to accept the *Settlement*.[48] Otherwise, it would be impossible for a presiding judge to certify a settlement as long as a party opposing a settlement can identify any issue that would need to be resolved if the case were litigated. Yet, in practice, presiding judges regularly certify settlements over the objection of parties on the basis that the issues raised by the protesting party are not germane to the determination of whether the contested settlement is just and reasonable. Indeed, requiring evidence regarding any and all disputed facts that would have to be resolved at the hearing stage prior to certification would effectively negate one of the primary benefits of settlements – *i.e.*, minimizing the costs associated with litigation.

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[45] *PJM Interconnection, L.L.C.*, Docket Nos. EL21-91-000, et al., Initial Comments of Commission Trial Staff in Support of Settlement at 6 (Feb. 20, 2024).

[46] *Hunlock Energy, LLC*, 170 FERC ¶ 61,090 (quoting *Penn. Pub. Util. Comm'n v. FERC*, 881 F.2d 1123, 1126 (D.C. Cir. 1989)).

[47] Denial Order at P 98.

[48] *Holloman Lessee, LLC*, 182 FERC ¶ 63,018, at P 43 (2023).

Nor does the IMM's protestations that the Settlement CRF Rates were calculated incorrectly create a basis for finding that there is a genuine issue of material fact that prevents certification of the Settlement to the Commission. In its comments, the IMM claims errors were made in calculating the Settlement CRF Rates and that must be corrected. But the IMM's arguments are not tied to any particular calculation or assumptions regarding the tax rate, the rate of depreciation, or other inputs that typically would be accounted for in a cost-of-service rate. And the IMM cannot raise a genuine issue of material fact by pretending that they were.

Presiding judges previously have rejected attempts by the IMM to thwart certification of a black box settlement by making unsupported claims regarding the assumptions underlying the settlement rates. For example, in *Holloman Lessee, LLC,* the presiding judge certified a settlement over arguments disputing the assumptions that the IMM claimed were underlying the black box value, explaining that:

> [T]he Market Monitor states that "[t]he facts relevant to whether the level of the rate proposed by Holloman is appropriate should be established at hearing." Yet neither the Market Monitor's comments nor the Bowring Affidavit explain what disputed facts must be established to support the Settlement ARR. The Bowring Affidavit criticizes the annual carrying charge that Holloman included as part of its Filed ARR. But that figure does not provide the basis for the Settlement, which is a "black box" settlement that does not rely on any particular methodology. The Market Monitor's general allegation that relevant facts "should be established at hearing" falls short of the specific showing required under Rule 602.[49]

This same logic applies here. While the IMM criticizes the assumptions underlying the Settlement CRF Rates, the IMM ignores that these values are black box rates and are not tied to any specific methodology or assumptions. And the IMM's desire to litigate how these values were calculated is not sufficient to raise a genuine material of fact that would prevent the Commission from determining whether the Settlement is just and reasonable. To the contrary, the Commission

[49] *Id.*

regularly accepts black box settlements and has repeatedly recognized that settling parties are not required to demonstrate how the black box rates were calculated.[50] And when faced with a black box rate, it is immaterial whether there are other ways in which to calculate the rate.[51]

Likewise, while the IMM explains at length why it believes its rate reduction calculation is the correct one and that there should be a greater reduction than what is provided under the Settlement, a mere difference in preferred outcomes is not sufficient to defeat certification of the Settlement under the Commission's rules.[52] Indeed, settlements have been certified and approved under substantially similar circumstances. For example, in *Panda Hummel Station LLC*, a generator submitted a black box settlement to establish its reactive revenue requirement which the IMM contested by providing its own calculation of what it contended was a just and reasonable revenue requirement along with an explanation that the "best" approach for calculating a capital recovery factor was set forth in its affidavit.[53] But the presiding judge ultimately certified the settlement to the Commission finding that the IMM's proposed rate was, just like the settlement rate, a proxy.[54]

[50] *See, e.g.*, *PJM Interconnection, L.L.C.*, 181 FERC ¶ 61,181, at P 33 (2022).

[51] *Id.*

[52] *See, e.g.*, *DC Energy, LLC*, 148 FERC ¶ 61,241, at P 25 (2014) ("The Market Monitor argues that the benefits of the IBT Settlement cannot be balanced against the costs of litigation because DC Companies and Scylla not only receive the benefits, but also avoid the costs of litigation. But that is the nature of a financial settlement. Because the IBT Settlement provides for the withdrawal of the petition for review of the Complaint Orders, which will terminate the proceeding at both the appellate and administrative levels, other PJM participants benefit by ensuring the payment of 80 percent of the full amount while avoiding the risks of continued litigation. We find this to be a reasonable balance of interests.").

[53] 181 FERC ¶ 63,014, at PP 48, 51, 56 (2022).

[54] *Id.* at P 87 ("Accordingly, the only remaining dispute is which proxy revenue requirement is reasonable as a matter of law, that of the black box 2022 Settlement or that of the capacity market offset. The weight of this record confirms there remains no genuine issue of material fact that requires an evidentiary hearing or further investigation by the Commission.").

This proceeding is similar to *Panda Hummel* in that the IMM's arguments reflect a preference that the parties be required to adopt the IMM's preferred calculation and rates. Regardless of whether the IMM's preferred approach has merit, *Panda Hummel* demonstrates that, a contesting party's reliance on an alternative rate is not sufficient to give rise to a genuine issue of material fact that would prevent the Commission from determining whether the Settlement is just and reasonable. In fact, the Commission repeatedly has recognized that the just and reasonable standard "is not so rigid as to limit rates to a 'best rate' or 'most efficient rate' standard" and that a "range of alternative approaches often may be just and reasonable."[55] The fact that a better or more "correct" calculation may exist is irrelevant to the determination of whether the black box Settlement rate is just and reasonable and does not raise any issues of material fact.

Notwithstanding the fact that IMM's opposition to the Settlement is based on the IMM's general view of the rate principles that should guide development of CRF rates, the Denial Order goes beyond the IMM's comment and affidavit and inexplicably finds that there are actually ***fourteen*** issues of material fact that prevent certification of the Settlement. These include (1) existential questions such as "[w]hat is the purpose of CRF values"; (2) questions that are irrelevant to the black-box rates set forth in the Settlement, such as "[w]hat are the correct inputs to use in determining the CRF values";[56] and (3) questions that have already been addressed by the Commission, such as "[w]hether the CRF values reflect a formula rate or a stated rate[.]"[57] The

[55] *Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282, at P 29 (2006). *See Seaway Crude Pipeline Co. LLC*, 146 FERC ¶ 61,151 at P 24 (2014) (citing *Morgan Stanley Capital Group*, 554 U.S. 527, 532 (2008); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1501 (D.C. Cir. 1984) (explaining that FERC is not required to adhere rigidly to a cost-based determination of rates, much less one that base[s] each producer's rates on his own costs and holding, "[i]n ensuring that rates are just and reasonable, the Commission is not bound to one ratemaking methodology, and is certainly not bound to cost-of-service ratemaking.").

[56] Denial Order at P 96.

[57] *Id.* at PP 93-97.

Denial Order even acknowledges that it disagrees with the IMM's identification of a single issue being the only genuine issue of material fact that prevents certification of the Settlement.[58] But it is the contesting party—rather than the presiding judge—that has the duty to identify any genuine issues of material fact.[59] Moreover, it bears emphasis that almost all of the issues identified in the Denial Order have little to do with the Settlement itself.

Even putting aside that it is the burden of the contesting party, not the presiding judge, to raise a genuine issue of material fact, the issues identified in the Denial Order need not be resolved in order for the Commission to make a determination whether the Settlement is just and reasonable. The issues outlined in the Denial Order may be issues that would need to be explored through hearing to support action by the Commission under Section 206 of the FPA. But resolving these issues here is not necessary for the Commission to render a reasoned determination that the black box Settlement CRF Rates are just and reasonable.[60] The Commission routinely approves

[58] *Id.* at P 94 ("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.").

[59] *PG&E Gas Transmission*, 100 FERC ¶ 61,291 (2002) ("We note at the outset that the CPUC, by filing unsworn initial comments, failed to comply with the Commission's Rules of Practice and Procedure, which require an affidavit detailing any issue of material fact 'by reference to documents, testimony, or other items included in the offer of settlement' be included with any comment that contests an offer of settlement. We, therefore, affirm the ALJ's conclusion that no genuine issue of material fact exists with respect to any of the issues raised by the CPUC, and with regard to the proposed Settlement.") (internal citations omitted). *See also, Hunlock Energy, LLC*, 170 FERC ¶ 61,090, at P 28 (2020). A policy in which the presiding judge is tasked with determining that there were no genuine issues of material fact in the underlying proceeding including those not raised by any party would not only be unduly burdensome for the presiding judge, but it would also be contrary to the Commission's policy favoring settlements. *See Procedure for Submission of Settlement Agreements*, Order No. 32, 44 Fed. Reg., 34,936 at 34,937 (June 18, 1979) ("The Commission is particularly desirous of having its judges attempt to secure settlements in all cases where settlement is possible and would be in the public interest. The Administrative Law Judges are encouraged to use all of the tools and resources at their command to that end.").

[60] The Settling Parties note that a number of the issues identified in the Denial Order already have been found by the Commission to be outside of the scope of the proceeding. For instance, the Denial Order found that a genuine issue of material fact existed with respect to when the revised CRF values should become effective. But the Commission has already rejected the IMM's claims that effective date for the revised CRFs should be any earlier than the refund effective date that was established in this proceeding. *PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,080, at PP 33, 47 (2021). Similarly, while the Denial Order also identifies the issue of whether the existing rates reflect a formula rate or a stated rate as an issue requiring resolution, the Commission already resolved this issue. *Id.* at P 46.

settlements that resolve the core issue set for hearing, even if a particular settlement does not resolve and address all subsets of issues or tangential issues.

In short, the Denial Order appears to be based on a flawed premise: that as long as either the IMM or the Presiding Judge can identify issues that would need to be resolved through hearing in order for the Commission to determine that the Existing CRF Rates are unjust and unreasonable and establish replacement rates under Section 206 of the FPA, then there are genuine issues of material facts in dispute. But while both the IMM and the Presiding Judge identify issues that may need to be resolved if the parties were to proceed to a full hearing, none of these issues give rise to a genuine dispute of material fact that would prevent the Commission from rendering a determination on the Settlement. For that reason, the Settling Parties respectfully request that the Presiding Judge reconsider his decision and promptly certify the Settlement to the Commission.

b. The Denial Order Erred in Its Application of the "Substantial Evidence" Standard and Finding that Certification is Impermissible under Rule 602(h)(2)(iii).

Even if there are genuine issues of material fact that remain (which there are not),[61] the Settling Parties respectfully submit that substantial evidence in the record supports certification

[61] Because the IMM raises no genuine issues of material fact that would bar certification of the Settlement, there was no need for the Settling Parties to move for omission or waiver of the Initial Decision pursuant to 18 C.F.R. § 602(h)(2)(iii)(A), 18 C.F.R. § 385.602(h)(2)(iii)(A), and 18 C.F.R. § 385.710, as the Settlement can be certified in accordance with Rule 602(h)(2)(ii). 18 C.F.R. § 385.602(h)(2)(ii). To the extent the Presiding Judge disagrees and continues to find that a genuine issue of material fact remains, the Settling Parties understand the Presiding Judge to have the discretionary right to waive the Initial Decision under Rule 602(h)(2)(iii) and the *Trailblazer* standard. *See Koch Gateway Pipeline Co.*, 71 FERC ¶ 63,012, at 65,079 (1995) (explaining that "the presiding judge may elect to omit the initial decision on his own and certify parts of the Settlement."). To the extent necessary, however, the Settling Parties hereby move to waive the Initial Decision for the limited purpose of certifying the underlying Settlement. *See Am. Elec. Power Serv. Corp.*¸ 72 FERC ¶ 63,019, at 65,189-90 (1995). Waiver is in the parties' and the public interest because it will allow an expeditious determination on the merits of the Settlement, which shall include, among other things, rate certainty, the conservation of administrative and legal resources, and the immediate payment of refunds. With this waiver and the substantial evidence in the record, the Presiding Judge may exercise his discretion to certify the Settlement under Rule 602(h)(2)(iii)(A). This waiver is for the limited purpose of certifying the Settlement to ensure that the Settling Parties have all rights to the due process awarded under 18 C.F.R. subparts E and G if the Settlement is rejected.

under both Rule 602(h)(2)(iii) and the *Trailblazer* Approach No. 2.[62] Under Approach No. 2, the Commission may "approve a contested settlement as a package on the grounds that the overall result of the settlement is just and reasonable."[63] In this scenario, the Commission may weigh the costs and benefits of settlement versus litigation, including the value of the uncontested issues against the contested ones. In order to meet Approach No. 2, there must be substantial evidence in the record sufficient to allow the Commission to reach a reasoned determination that the Settlement is just and reasonable. As the courts have explained, "substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires more than a scintilla but less than a preponderance of evidence."[64] There is not a lack of substantial evidence "simply because [a party] offered some contradictory evidence."[65]

In the Denial Order, the Presiding Judge concludes that "the only evidence in the record is the Bowring Affidavit" and faults the Settling Parties for failing to provide any affidavits or other evidence to rebut the IMM's arguments.[66] But the evidence in this proceeding is not limited to the Bowring Affidavit. To the contrary, this proceeding has been ongoing for nearly three years, with numerous pleadings filed with FERC by the Settling Parties, FERC Trial Staff, and others. When conducting the analysis required by the *Trailblazer* Approach No. 2, the Commission will look beyond the Settlement package to include, "the Offer, comments and accompanying affidavits,"

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[62] *Trailblazer*, 85 FERC at 62,342. Alternatively, the Commission can approve the Settlement under Trailblazer Approach No. 1, which permits approval of a contested settlement if there is an adequate record to "address the contentions of the contesting party on the merits" when the contested issues are primarily policy oriented. *Id*.

[63] *Id.*

[64] *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). *See also PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,079, at P 62 (2013) ("the IMM is incorrect that the Commission's standard for accepting a contested settlement is the 'best supported' values. It is, instead, a 'substantial evidence' standard.").

[65] *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954-55 (D.C. Cir. 2005).

[66] Denial Order at P 117.

as well as "testimony, exhibits, and other documents filed in the rate proceeding [including briefs]."[67] The Commission also weighs the benefits of a settlement against the costs of continuing litigation. In other words, the Commission will take into account the record as a whole to determine whether the Settlement is just and reasonable.

There is more than sufficient evidence in the record for the Commission to reach a reasoned determination that the Settlement is just and reasonable. First and foremost, there is substantial evidence in the record that the Settlement will result in benefits to PJM customers. The IMM's sworn affidavit does not dispute that the Settlement provides the benefits of immediate rate relief, rate certainty, and avoidance of litigation costs before the Commission and in federal court, or provide a rational basis for denying certification under the Commission's policy favoring settlements.[68] Even assuming there was no other evidence in the record, which would be an incorrect assumption, the IMM's affidavit supports a finding of immediate rate relief by estimating that the Settlement's revised CRF values would reduce rates by $15.6 million or 17.4%.[69] It is a fallacy that the Presiding Judge must conclude that this reduction in rates is "no worse than the range of just and reasonable rates the Commission would have approved based on a fully litigated resolution of all the contested issues in this proceeding."[70] The IMM's presentation of its preferred outcome does not, in itself, support any finding as to the justness and the reasonableness of the Settlement rates. Rather, it simply presents an alternative. Further, in applying this legal standard, the Presiding Judge does not appear to give full effect to the Commission's regular practice of

[67] *Sw. Power Pool, Inc*., 171 FERC ¶ 63,032, at P 79 (2020) (certifying a contested settlement and explaining why the second *Trailblazer* approach would be permissible).

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

[69] Bowring Affidavit at 15:21-28.

[70] Denial Order at P 116.

approving settlements over arguments by an objecting party that the Settlement would result in rates higher than a preferred alternative that the party has identified.[71]

Moreover, the Denial Order errs in dismissing Trial Staff's explanation that refunds provided by the Settlement "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."[72] Rather than crediting this benefit as part of the substantial evidence in favor of the approving the Settlement, the Presiding Judge says that he:

> 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. I fail to see how the duration of any litigation would "offset" such refunds.[73]

The Presiding Judge appears to have misunderstood Trial Staff's point. While the 15-month refund window indeed closed in November of 2022, every day that passes after that window has closed—including time spent litigating this proceeding—is time when the existing rates remain in effect without any possibility of refunds. Through their arm's length negotiations, the Settling Parties agreed to an outcome permitting lower rates to go into effect immediately, without the need to wait for the litigation to conclude. This alone is a substantial and material benefit to the settling customers that the Denial Order has deprived them of.

In addition to undermining the Commission's policy in favor of settlements in complex litigation and failing to advance the public interest underlying that policy, the Denial Order fails

[71] *PJM Interconnection, L.L.C.*, 170 FERC ¶ 61,258, at P 46 (2020).

[72] Denial Order at P 125, n.214.

[73] *Id.* at P 125, n. 214 (citations omitted).

to afford appropriate weight to the Settlement's benefits. Worse yet, it unduly delays rate relief for customers and rate certainty for suppliers. Under *Trailblazer* No 2, the Commission can find that overall result of the Settlement is just and reasonable, given the rate reductions achieved and the avoidance of substantial litigation costs. Consequently, the Presiding Judge should have certified the Settlement.

IV. MOTION TO PERMIT INTERLOCUTORY APPEAL

If the Presiding Judge declines to reconsider the Denial Order, the Settling Parties move to permit appeal to the Commission so that it can rule on the Settlement and provide all parties with a material interest in this proceeding with the benefits they have negotiated. The Settling Parties have expended significant time and resources to achieve the Settlement. Their efforts to resolve this matter by means other than litigation have been repeatedly encouraged by the Commission[74] and even the Presiding Judge.[75] Yet now that the Settling Parties have reached an agreement that would resolve all issues in this proceeding, provide them with substantial rate benefits, and put an end to litigation that has been prolonged for nearly three years, the Denial Order forecloses them from concluding this proceeding and realizing the benefits of the Settlement. The only party that opposes the Settlement has no economic interest in this proceeding. Further, the Settlement has

[74] Hearing Order at P 33 ("While we are setting these matters for a trial-type evidentiary hearing, we encourage efforts to reach settlement before hearing procedures commence.").

[75] *PJM Interconnection, L.L.C.*, Docket No. El21-91-003, Pre-hearing Conference Transcript at 84:10-14 (Oct. 5, 2023) ("I just wanted to make clear in this prehearing conference, settlement is always an option, particularly, you know, if you all sort of find more information in discovery, and start looking at your litigation positions in greater detail."); *id* at 84:18-22 ("I'm okay if you settle at any time, so the Commission clearly favors settlements, and I'm happy to pass on a message to the Chief Judge if you all want to take time out of the schedule to settle, or want redesignation of Judge Hurt, or some other settlement.").

no impact on the IMM's ability to advocate for the rate-design principles that should guide development of CRF rates in future proceedings.

Rule 715 of the Commission's Rules of Practice and Procedure allows a party to appeal an order of the presiding judge if the presiding judge finds 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.[76] The Commission has found extraordinary circumstances to exist in circumstances that are far less extraordinary than those presented here. For example, the Commission has granted a Rule 715 motion for interlocutory appeal where the presiding judge issued a procedural schedule that required Trial Staff to file its direct case before it filed top sheets.[77] The Commission also granted an interlocutory appeal to determine whether the presiding judge appropriately struck testimony.[78] The Commission has found extraordinary circumstances to exist warranting interlocutory appeal merely to clarify the scope of proceedings set for hearing.[79] And the Commission has granted interlocutory appeal to address a presiding judge's denial of a late motion to intervene.[80]

In relation to these largely procedural issues on which the Commission has granted interlocutory appeals, the Denial Order presents circumstances that are far more extraordinary. The Denial Order deprives the Settling Parties of a bargained for Settlement—which, as addressed

[76] 18 C.F.R. § 385.715.

[77] *Tenn. Gas Pipeline Co.*, 33 FERC ¶ 61,059 (1985).

[78] *Pacific Gas Transmission Co*., 56 FERC ¶ 61,430 (1991).

[79] *BP Pipelines (Alaska) Inc.*, 173 FERC ¶ 61,132 (2020); *Consol. Edison Co. of N.Y.*, 68 FERC ¶ 61,332 (1994).

[80] *ANR Pipeline Co*., 48 FERC 61,308, at 62,011 (1989). *See also, Entergy Servs*., 135 FERC ¶ 63,008, at P 6 (2011) (noting that "adjustment in the procedural schedule, stricken testimony, and a right of intervention, all present extraordinary circumstances.").

above, includes immediate rate relief, rate certainty, and resolution of Commission and D.C. Circuit litigation—to their detriment and irreparable harm. It also forces them to continue to litigate and expend significant resources (and consume Commission resources) on a proceeding that none of the parties—including the IMM—have an interest in litigating.[81] The Settling Parties appreciate Your Honor's diligence in attempting to ensure that the Commission has a robust evidentiary record on which it can make a decision. In this case, however, the Settling Parties demonstrated that the Settlement should be certified and approved under *Trailblazer* Approach No. 2. No further development of the evidentiary record is required. Consequently, the Settling Parties respectfully request that the Presiding Judge find that extraordinary circumstances exist that if not addressed by the Commission on appeal will be a detriment to the public interest and irreparably harm the Settling Parties and thus grant their motion to permit appeal.

Permitting appeal to allow the Commission to rule on the Settlement would be consistent with its long-standing policy that favors settlements to resolve contested proceedings:

> The Commission wishes to emphasize the importance of voluntary settlements to the orderly and expeditious conduct of its business. During the period when responsibility for administering the Natural Gas Act and the Federal Power Act was in the hands of the Federal Power Commission, that agency had a strong policy favoring the disposition of cases through settlements. The FPC and the courts recognized that the Commission could not possibly cope with the flood of business engendered by its jurisdictional statutes if the outcome of a substantial proportion of that business were not the result of voluntary settlements entered into by the parties... We adhere to that view.[82]

The Commission's policy favoring settlements includes cases where the settlement is not supported by all parties.[83]

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[81] IMM Comments at 3.

[82] *Procedure for Submission of Settlement Agreements*, Order No. 32, 44 Fed. Reg., 34,936 at 34,937 (June 18, 1979).

[83] *See, e.g., El Paso*, 132 FERC ¶ 61,139, at PP 89, 92 (2010) (approving settlement under the second *Trailblazer*

Although the Commission's regulations contemplate a presiding judge having a role in certifying matters that the Commission sets for hearing, that role is necessarily limited to reviewing the issues presented by contesting parties to determine whether there is genuine issue of material fact and there is substantial evidence to support the settlement.[84] As explained above, the issues identified by the Denial Order go beyond the "single issue" raised by the IMM and have already been foreclosed by the Commission's prior orders. And the Settling Parties have provided substantial evidence that the Settlement will include significant benefits such as immediate rate relief, a two-year moratorium on rate changes, and the termination of Commission and federal court litigation. To the extent certification is denied, effectively rejecting these benefits without an opportunity for the Commission to review them, on the basis of alleged "material facts" that are not contested and that are beyond the scope of the proceeding, it would be contrary to the Commission's policy favoring settlements and degrade efficient administrative processes. That outcome is particularly inappropriate here given the impact on customers' rates and the rate certainty provided. Therefore, the Settling Parties respectfully ask the Presiding Judge to permit this interlocutory appeal so that the Commission can be the arbiter of whether the Settlement can be approved under *Trailblazer* Approach No. 2.

approach where the settlement "provides substantial benefits to all . . . shippers" and "[r]ejecting the . . . settlement in its entirety is not a reasonable option. While this would provide [the contesting party] with the opportunity for a hearing, it would also eliminate the extensive benefits the [settlement] provides to the settling parties and disregard the wishes of every other . . . shipper who supported" the settlement).

[84] *Hunlock Energy, LLC*, 170 FERC ¶ 61,090, at P 28 (2020); *Seaway Crude Pipeline Co. LLC*, 154 FERC ¶ 61,070, at P 35 (2016) (The instructions were to follow well-established Commission policy, and to determine whether, in accordance with this policy, the committed rates should stand.").

V. CONCLUSION

For the foregoing reasons, the Settling Parties respectfully request that the Presiding Judge either reconsider the Denial Order and certify the Settlement or grant this motion to permit an interlocutory appeal of the Denial Order.

Respectfully submitted,

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March 28, 2024

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on all persons on the Commission's service list in Docket Nos. EL21-91-003 and ER21-1635-005.

Dated at Washington, D.C., this 28th day of March 2024.

/s/ Stephen J. Hug
Stephen J. Hug