

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.

Docket No. EL21-91-003

ORDER DENYING WITHOUT PREJUDICE MOTION TO
WAIVE THE INITIAL DECISION

(Issued August 30, 2024)

1. On August 14, 2024, the Settling Parties¹ filed a joint motion² for (1) waiver of the initial decision in this proceeding and (2) extension or tolling of the time periods in Rule 710(d).³ On August 23, 2024, Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor (IMM) for PJM, filed an answer opposing the Motion.⁴ The Motion's answer period concluded on August 29, 2024. No other participants filed answers.⁵ For the reasons below, I DENY WITHOUT PREJUDICE the Motion.

¹ The Settling Parties include American Municipal Power, Inc.; Dynegy Marketing and Trade, LLC and Vistra Corp.; Hazleton Generation LLC; J-POWER USA Development Co., Ltd.; LS Power Development, LLC; PJM Interconnection, L.L.C. (PJM); and PJM Industrial Customer Coalition. Concurrently with this joint motion, the Settling Parties filed pursuant to Rule 602 an offer of settlement that would "resolve all issues in the above-referenced proceedings." Offer of Settlement, Docket No. ER21-1635-009, at 1 (Aug. 14, 2024) (Settlement). Several of the Settling Parties also filed a Joint Motion to Suspend Procedural Schedule, which is pending before the Chief Administrative Law Judge and which I do not address in this order.

² Joint Motion for Waiver of the Initial Decision Pursuant to Rules 602(h)(2)(iii)(A) and 710(d) and, to the Extent Necessary, Joint Motion to Extend or Toll the Rule 710(d) Time Periods, at 1 (Aug. 14, 2024) (Motion).

³ 18 C.F.R. § 385.710(d) (2024).

⁴ Answer of the Independent Market Monitor, at 2 (Aug. 23, 2024) (Answer).

⁵ The Settling Parties also state that PJM contacted all parties besides the IMM to confirm their support or non-opposition to the Motion's two requests. Motion at 2 n.3.

2. The Settling Parties assert that “good cause will exist to waive the initial decision once the Presiding Judge has the Settlement Record.”⁶ They explain that if I determine I cannot certify the concurrently filed Settlement under Rule 602(h)(2)(ii),⁷ I can find in the alternative that waiver of the initial decision is appropriate under Rule 710(d) and ultimately certify the Settlement under Rule 602(h)(2)(iii).⁸ According to the Settling Parties, they have satisfied the substantive and procedural requirements of Rule 710(d).⁹ They argue that the record contains substantial evidence on which the Commission can base a reasoned decision—despite the IMM’s opposition.¹⁰ And they note that the Motion includes the content that Rule 710 requires.¹¹ Finally, the Settling Parties conclude that my waiving the initial decision would “expedite the resolution of the contested issues in the most efficient manner” and is “consistent with the Commission’s policy of encouraging parties to reach settlement for the expeditious resolution of contested issues.”¹²

3. The IMM disagrees. It asserts that no good cause exists to grant the Motion because “[t]he decisional framework that the offer of settlement and its associated motions seek to create is one that avoids a decision on the merits and deprives the

⁶ Motion at 3.

⁷ 18 C.F.R. § 385.602(h)(2)(ii) (providing that the presiding officer may certify a contested settlement if “there is no genuine issue of material fact”).

⁸ Motion at 3; 18 C.F.R. § 385.602(h)(2)(iii) (providing that the presiding officer may certify a contested settlement if the presiding officer makes two determinations: (A) “[t]he parties concur on a motion for omission of the initial decision as provided in Rule 710, or, if all parties do not concur in the motion, . . . that omission of the initial decision is appropriate under Rule 710(d);” and (B) “the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues”).

⁹ Motion at 4.

¹⁰ Motion at 4.

¹¹ Motion at 5; *see* 18 C.F.R. § 385.710(d) (stating that the contents of a motion for waiver of the initial decision filed under Rule 710(d) “must comply with the requirements in paragraph (b) of this section”); 18 C.F.R. § 385.710(b) (stating the content that any motion for waiver of the initial decision “must specify”).

¹² Motion at 3.

Commission of the ability to determine the appropriate relief.”¹³ According to the IMM, the Settling Parties fail to show how waiving the initial decision and, relatedly, delaying the hearing proceedings for me to consider certifying the Settlement, “will facilitate resolution of the issue raised in the show cause order.”¹⁴ In fact, the IMM argues, further delays reduce both “the potential for customers to recover overpayments based on the incorrectly calculated CRFs” and “the obligation to repay the overcollections of those generation owners who propose the delays.”¹⁵ The IMM concludes that a reasoned initial decision is necessary to accord appropriate relief.¹⁶

4. Under Rule 710(d), I have authority to consider motions to waive the initial decision “for the purpose of certification of a contested settlement,” and in fact, if all parties join such a motion, I have no discretion but to grant it. In this case, at least one participant, the IMM, opposes the Motion. Because not all participants joined the Motion,¹⁷ I must act on it within 30 days of its filing or the rule will consider it denied.¹⁸ That 30-day period ends on September 13, 2024. As I have previously explained, because Rule 710(d) does not establish a standard governing my decision whether to waive the initial decision when the waiver motion is opposed, I therefore apply the good cause standard.¹⁹

5. At this time, good cause does not exist to grant the Motion because I find that the Motion is premature. Although I believe that the IMM will make clear in comments that it opposes my certifying the Settlement and the Commission approving the Settlement, I will not know for certain until September 3, 2024—the deadline for initial comments²⁰—

¹³ Answer at 2–3.

¹⁴ Answer at 2.

¹⁵ Answer at 4.

¹⁶ Answer at 5.

¹⁷ *See supra* P 1.

¹⁸ 18 C.F.R. § 385.710(d) (“If not all parties join in the motion, the motion is denied unless the presiding officer grants the motion within 30 days of filing the written motion or presenting an oral motion.”).

¹⁹ *See PJM Interconnection, L.L.C.*, 186 FERC ¶ 63,019, at P 75 & n.122 (2024).

²⁰ 18 C.F.R. § 385.602(f)(2) (establishing deadlines 20 days and 30 days after the filing of the settlement for the filing of initial and reply comments, respectively).

whether the IMM or any other participants formally contest the Settlement and, therefore, whether Rule 602(h)(2) applies.

6. Moreover, the September 13, 2024, deadline for me to grant the Motion will not allow me an opportunity to consider the full record of this proceeding. At the request of some of the Settling Parties, I recently revised the procedural schedule to allow for the submission of cross-answering testimony on September 3, 2024, and extended the deadline for the submission of rebuttal testimony to September 12, 2024.²¹ In addition, reply comments on the Settlement are due on September 13, 2024.²² Under this schedule, I would not have any time to review these materials to determine whether I can certify the Settlement, thereby establishing good cause to grant the Motion.²³ The Settling Parties acknowledge that I could waive the initial decision only after the record is complete.²⁴

²¹ Order Granting Motion to Amend Procedural Schedule and Waiving Answer Period, at P 5 (Aug. 23, 2024) (granting motion by Dynegy Marketing and Trade, LLC; Hazleton Generation LLC; J-POWER USA Development Co., Ltd; LS Power Development LLC; and Vistra Corp.).

²² 18 C.F.R. § 385.602(f)(2).

²³ The Settling Parties admit that I would only need to grant the Motion to allow me to certify the settlement under Rule 602(h)(2)(iii). Motion at 3 (“**And second**, that if the Presiding Judge were to find that the concurrently filed Settlement cannot be certified under Rule 602(h)(2)(ii), the Presiding Judge find in the alternative that waiver of the initial decision is appropriate in light of the Settlement Record and this Motion so as to permit certification of the Settlement under Rule 602(h)(2)(iii).”). There would be no reason for me to grant the Motion if, for example, I were to certify the Settlement as uncontested, under Rule 602(g); certify the Settlement based on a finding that there is no genuine issue of material fact, under Rule 602(h)(2)(ii); or deny their request to certify the Settlement.

²⁴ See Motion at 2–3 (“**First**, that good cause exists to extend or toll (to the extent necessary) the time period under Rule 710(d) *to allow the Presiding Judge sufficient time to consider the record regarding the offer of settlement (“Settlement”) being filed concurrently with this Motion by the Settling Parties, . . .* so that the Presiding Judge may simultaneously issue orders on both this Motion and the Settling Parties’ request for certification of the Settlement to the Commission.”) (emphasis added) (footnotes omitted); see also Motion at 3 (“[G]ood cause *will* exist to waive the initial decision once the Presiding Judge has the Settlement Record.”) (emphasis added); Motion at 3 n.7 (“[T]his Motion therefore requests, *infra*, that the Presiding Judge wait until the Settlement Record is submitted before ruling on this Motion.”).

By denying the Motion now without prejudice to the Settling Parties renewing the Motion at a later time, I preserve my ability to give due consideration to all prefiled testimony and comments on the Settlement.²⁵

7. Additionally, while the Settling Parties request that I simply defer ruling on their Motion to waive the initial decision,²⁶ it is not clear that I have that authority.²⁷

²⁵ On the subject of needing as fulsome a record as possible, I note that the IMM failed to comply with my order requiring the submission of workpapers in their native format. Order Confirming Bench Rulings and Adopting Revised Procedural Schedule, at P 3 (Aug. 15, 2024) (requiring each participant to serve on all participants the workpapers related to their direct and answering testimony, in the workpapers' native formats, by Wednesday, August 21, 2024). The IMM should immediately either (1) “[f]or all testimony filed to date, . . . serve on all participants the workpapers related to their filed testimony, in the workpapers' native formats,” or (2) “[i]f [the IMM] has already produced a witness's workpapers in discovery, or the workpapers are otherwise publicly available, . . . notify all participants where such workpapers are located.” *Id.* P 3 & n.6.

²⁶ Motion at 2 n.5.

²⁷ Under Rule 504(b)(15), 18 C.F.R. § 385.504(b)(15), I have the authority to “modify any time period, if such modification is in the interest of justice and will result in no undue prejudice to any participant.” The Settling Parties do not cite any decision, nor could I find one in my own research, applying Rule 504(b)(15) to the deadlines in Rule 710(d). Typically, when presiding judges use Rule 504(b)(15), they use it to modify deadlines they set or deadlines under rules in which the Commission explicitly recognizes presiding judges' authority to set modified deadlines. *See, e.g.*, 18 C.F.R. § 385.213(d)(1) (setting the deadline for answering a motion “unless otherwise ordered”); 18 C.F.R. § 385.602(f)(2) (setting deadlines for settlement comments “unless otherwise provided by the Commission or the presiding officer”). In contrast, Rule 710(d) is written in a way that appears to circumscribe my authority to decide whether and when to grant a motion to waive the initial decision. If all parties join the motion, “the presiding office will grant the motion,” and I have no discretion but to grant it. If not all parties join the motion, Rule 710(d) provides that the motion is denied unless I grant it within 30 days. In any event, regardless of whether Rule 710(d) implicitly allows or bars me from exercising my general authority under Rule 504(b)(15), I do not believe I need to modify the deadline “in the interest of justice” because I am denying the Motion without prejudice to the Settling Parties' renewing the Motion at a more appropriate time.

8. Accordingly, per Rule 710(d),²⁸ I DENY WITHOUT PREJUDICE the Motion. The Settling Parties may refile the same or similar Motion at a later date. Although they may make that filing at any time per Rule 212,²⁹ I recommend refiling no earlier than September 3, 2024, when I will know whether the Settlement is formally contested. In fact, the Settling Parties should consider waiting to renew their Motion until after participants submit reply comments on the Settlement by September 13, 2024. Only after that date will I be able to assess whether I should certify the Settlement under Rule 602(h)(2)(iii) and, therefore, whether my granting a motion for the omission of the initial decision under Rule 710(d) is necessary.

SO ORDERED.

Joel deJesus
Presiding Administrative Law Judge

²⁸ 18 C.F.R. § 385.710(d).

²⁹ *See* 18 C.F.R. § 385.212(a) (“A motion may be filed: . . . [a]t any time, unless otherwise provided . . .”).