

148 FERC ¶ 61,241  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

DC Energy, LLC  
DC Energy Mid-Atlantic, LLC

v.

Docket Nos. EL12-8-000 and  
EL12-8-001

PJM Interconnection, L.L.C.

ORDER ACCEPTING PROPOSED SETTLEMENT AGREEMENT

(Issued September 29, 2014)

1. On April 28, 2014, DC Energy, LLC and DC Energy Mid-Atlantic, LLC (collectively, the DC Companies or Complainants) filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,<sup>1</sup> a Stipulation and Agreement of Settlement (Settlement) in the above-referenced dockets on behalf of themselves, Scylla Energy LLC (Scylla), and PJM Interconnection, L.L.C. (PJM) (collectively, Settling Parties). The Settlement would resolve all issues among the Settling Parties arising from DC Companies' complaint filed in Docket No. EL12-8-000 against PJM and provide for DC Companies' and Scylla's withdrawal of their pending court appeal. The PJM Independent Market Monitor (Market Monitor) filed an objection to the Settlement. For the reasons discussed below, we accept the contested Settlement, finding that as a package, it presents an overall just and reasonable outcome for this proceeding.

**I. Background**

2. By order dated March 9, 2012 (March 9 Order), the Commission denied a complaint (Complaint) filed on October 27, 2011 by DC Companies against PJM in

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<sup>1</sup> 18 C.F.R. § 385.602 (2014).

Docket No. EL12-8-000.<sup>2</sup> Complainants opposed PJM's plan to retroactively bill them for deviation charges that PJM believed the Complainants had inappropriately avoided by characterizing certain transactions between DC Energy and DC Energy Mid-Atlantic as internal bilateral transactions (IBTs) to be reported to PJM pursuant to section 1.7.10 of the PJM Open Access Transmission Tariff (Tariff).

3. Focusing on the language of section 1.7.10 of the Tariff, the Commission found that the IBTs did not represent electric energy available to offset real-time balances and, therefore, did not "contemplate the physical transfer of energy" as required by the language of Attachment K and Schedule 1 and should not have been reported under section 1.7.10. On July 12, 2013, the Commission denied DC Companies and Scylla's requests for rehearing.<sup>3</sup> In August 2013, PJM commenced invoicing DC Companies and the other entities it had identified as reporting non-compliant IBTs for the deviation charges.

4. On September 9, 2013, DC Companies and Scylla filed an appeal at the D.C. Circuit Court of Appeals.<sup>4</sup> PJM intervened. Subsequently, the Court of Appeals' Circuit Mediation Office contacted the parties and encouraged them to enter into mediation.<sup>5</sup> The parties agreed to participate in the mediation process, which resulted in the instant IBT Settlement. DC Companies filed the IBT Settlement with the Commission pursuant to Rule 602 on April 28, 2014. The Settling Parties had agreed to file the Settlement in accordance with Rule 602 of the Commission's Rules of Practice and Procedure so as to provide notice to all parties in this proceeding and provide them with an opportunity to comment on the Settlement.<sup>6</sup>

5. On May 16, 2014, the Market Monitor filed an objection to the IBT Settlement (Market Monitor Protest). On May 28, 2014, PJM and DC Companies and Scylla filed reply comments. On June 12, 2014, the Market Monitor filed an answer to PJM and DC Companies and Scylla.

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<sup>2</sup> *DC Energy, LLC and DC Energy Mid-Atlantic, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165 (2012) (March 9 Order).

<sup>3</sup> *DC Energy, LLC and DC Energy Mid-Atlantic, LLC v. PJM Interconnection, L.L.C.*, 144 FERC ¶ 61,024 (2013) (July 12 Order).

<sup>4</sup> *DC Energy, LLC v. FERC*, D.C. Cir. No. 13-1240.

<sup>5</sup> Explanatory Statement at 2; PJM Reply Comments at 2.

<sup>6</sup> Explanatory Statement at 3; Settlement at 3.

6. Separately, on May 19, 2014, the Retail Energy Supply Association (RESA) filed a motion to intervene and comments (Motion). RESA also filed an answer in support of the Market Monitor on July 22, 2014. On May 24, 2014, the MD Energy Group LLC (MDEG) filed a protest.<sup>7</sup>

## II. Proposed IBT Settlement

7. According to its terms, the proposed IBT Settlement would resolve all actual and potential disputes among the Settling Parties related to the retroactive payment of deviation charges and PJM's resettlement activities.<sup>8</sup> The Settling Parties state that it was determined in the mediation that a settlement of the petition of review proceeding and the underlying proceeding before the Commission would be desirable in order to bring certainty to the marketplace and avoid the costs, risks, and uncertainties of continued litigation.<sup>9</sup> The Settling Parties further state that, because other persons may have an interest in the IBT Settlement, the Settling Parties agreed to file the IBT Settlement in accordance with Rule 602 of the Commission's Rules of Practice and Procedure to provide notice to all parties in this proceeding and provide them with an opportunity to comment on the IBT Settlement.<sup>10</sup>

8. The IBT Settlement provides that PJM will not rebill the remaining deviation charges, and DC Companies and Scylla will file to withdraw their petition for review of the Commission's Complaint Orders in the D.C. Circuit within 60 days of the effective date of the IBT Settlement.<sup>11</sup> PJM has rebilled and collected approximately \$38.8 million, with the amount remaining to be resettled estimated at \$10.2 million. PJM ceased rebilling as of February 21, 2014.<sup>12</sup> The Settling Parties state that the IBT

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<sup>7</sup> MDEG is not an intervenor in Docket No. EL12-8-000 nor did it file a motion to intervene out of time.

<sup>8</sup> Explanatory Statement at 3; Settlement at 2.

<sup>9</sup> Explanatory Statement at 2; Settlement at 2.

<sup>10</sup> Explanatory Statement at 3.

<sup>11</sup> Settlement at 2-3.

<sup>12</sup> *Id.* at 3.

Settlement results in a fair, just, and reasonable resolution of the matters in the controversy.<sup>13</sup>

### **III. Objections to the IBT Settlement**

9. The Market Monitor states that the IBT Settlement compromises the outcome in the Complaint Orders, has no merit, and should be rejected.<sup>14</sup> The Market Monitor asserts that full enforcement of the orders is important to discourage inappropriate market behavior and restore confidence in the integrity of PJM's markets. The Market Monitor states that PJM has unilaterally surrendered the result that PJM sought and obtained in the Complaint Orders.<sup>15</sup>

10. The Market Monitor asserts that, because the IBT Settlement requires PJM to cease rebilling, PJM members will not receive an estimated \$10.2 million which the Commission has found they are entitled to. The Market Monitor argues that the \$10.2 million is a black-box value without record support or any explanation for why that dollar value is appropriate.<sup>16</sup>

11. The Market Monitor voices concern that the IBT Settlement does not include as parties all entities with interests in the proceeding, i.e., itself, PJM members, or any representatives of the Commission, and states that the IBT Settlement does not represent those entities' interests. The Market Monitor also objects that it was not included in the settlement discussions or given advance review of the IBT Settlement.<sup>17</sup>

12. With respect to the *Trailblazer* criteria for contested settlements,<sup>18</sup> the Market Monitor argues that whether considered issue by issue or as a package, the IBT Settlement cannot be approved. Under *Trailblazer* approach one, the Market Monitor

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<sup>13</sup> Explanatory Statement at 6.

<sup>14</sup> Market Monitor Protest at 1.

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 2-3.

<sup>17</sup> *Id.*

<sup>18</sup> *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,342-44 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*). To approve a contested settlement under *Trailblazer*, the Commission may: (1) make a decision on the merits of each contested issue; (2) determine that the settlement, as a

(continued...)

states that no explanation is offered for the \$10.2 million figure.<sup>19</sup> The Market Monitor states that because the IBT Settlement only offers one substantive element, the end of re-settlement billing, it cannot be approved as a package under *Trailblazer* approach two. The Market Monitor argues that the benefits of the IBT Settlement cannot be balanced against the costs of litigation because DC Companies and Scylla receive not only the benefits, but also avoid the costs of litigation. The Market Monitor states that it must resume litigating to protect the public interest.<sup>20</sup> Finally, the Market Monitor argues that *Trailblazer* approach three does not apply because it does not object to a limited issue, but to the settlement itself, because the IBT Settlement materially alters the outcomes of the overall proceeding and nullifies the rebilling which broadly impacts all PJM members.<sup>21</sup>

#### **IV. PJM's and DC Companies/Scylla's Reply Comments**

13. PJM states that the Market Monitor's criticisms are not directed to the merits of the IBT Settlement, but instead to the court-initiated mediation process that produced the IBT Settlement. In this regard, PJM points out that the Market Monitor elected not to intervene in the petition for review proceeding.<sup>22</sup> PJM notes that the Market Monitor also has no direct financial stake in the proceeding, and points out that no party with a direct financial interest in the outcome has objected to the IBT Settlement.

14. PJM rejects the Market Monitor's contentions that PJM surrendered the results it obtained in the Complaint Orders. PJM points out that, as a specific result of the IBT Settlement, both it and the Market Monitor will retain the primary relief sought in Docket No. EL12-8-000, that is, a Commission finding that non-physical IBTs cannot be used to

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package, provides an overall just and reasonable result; (3) determine that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated; or (4) determine that the contesting parties can be severed.

<sup>19</sup> In this regard, however, the Market Monitor did not submit the affidavit required by the Commission's Rules of Practice and Procedure if a comment contesting a settlement alleges a genuine issue of material fact. 18 C.F.R. § 385.602(f)(4) (2014).

<sup>20</sup> Market Monitor Protest at 6.

<sup>21</sup> *Id.* at 7.

<sup>22</sup> PJM Reply Comments at 4.

avoid payment of deviation charges. PJM states that, as a specific result of the IBT Settlement, that holding will remain undisturbed.<sup>23</sup>

15. PJM states that the IBT Settlement's financial terms reflect each party's assessment of its own risks/rewards and the desire for the certainty of settlement as opposed to continued litigation. PJM asserts that it agreed to the IBT Settlement because in the context of all the relevant facts and circumstances, the IBT Settlement is in the best interest of the PJM stakeholders.<sup>24</sup> PJM argues that, under the IBT Settlement, the \$38.8 million already paid will remain paid, PJM's interpretation of the applicable tariff language and market rules, as reflected in the Complaint Orders, will endure, and the litigation risks are eliminated.<sup>25</sup> Finally, PJM argues that the Market Monitor ignores the Commission's policy favoring settlement and the overall benefits of the IBT Settlement.

16. DC Companies and Scylla largely echo PJM's arguments. They agree that the IBT Settlement does not disturb any of the Commission's substantive findings in the underlying proceeding and that the precedential value of the Complaint Orders is assured by the IBT Settlement, which terminates their court challenge to the orders.<sup>26</sup> DC Companies state that the rebilling of Scylla has been completed. DC Companies note that over 75 percent of the re-billing process for DC Companies is completed.<sup>27</sup> DC Companies and Scylla believe that the IBT Settlement can be approved under *Trailblazer*.

## V. Commission Determination

### A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>28</sup> the Commission will deny RESA's late-filed Motion for failure to demonstrate good cause warranting late intervention. The Commission has found that parties seeking to intervene

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<sup>23</sup> *Id.* at 4-5.

<sup>24</sup> *Id.* at 9.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> DC Companies Reply Comments at 3.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> 18 C.F.R. § 385.214 (2014).

after issuance of a Commission determination in a case bear a heavy burden. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial.<sup>29</sup> Thus, RESA bears a higher burden to demonstrate good cause for the granting of such late intervention.

18. Here, RESA seeks to intervene well over two years after the December 2, 2011 deadline for interventions and comments in the Complaint proceeding.<sup>30</sup> Further, RESA did not seek to intervene in the appeal of those orders. In its Motion, RESA concedes that it did not intervene in the Complaint proceeding, stating that “[s]ubstantively, application of [deviation charges] on DC Energy Companies for IBTs did not directly affect RESA or its members such that it would participate at the Commission in the complaint proceeding.”<sup>31</sup> Accordingly, we find that RESA has not met its burden of justifying late intervention. Since we are denying RESA’s Motion, we reject the comments RESA attached to its Motion, and its answer in support of the Market Monitor.

19. Similarly, we reject MDEG’s late protest which raises issues similar to those of the Market Monitor. We note that MDEG states that it is no longer a member of PJM, and does not attempt to quantify what amounts it might be owed due to the rebilling for the time it was a PJM member.

## **B. Discussion**

20. Where there is a contested settlement, the Commission considers some or all of the four approaches set out in *Trailblazer* to determine if a contested settlement can be approved. Under *Trailblazer*’s second approach, a contested settlement can be approved under the Commission’s regulations and precedent if the settlement as a whole, considering not just the contested issues, but the uncontested issues as well, provides a just and reasonable result. As discussed below, the Commission finds that the overall result of the IBT Settlement is just and reasonable, and we therefore approve the IBT Settlement under *Trailblazer*’s second approach.

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<sup>29</sup> July 12 Order, 144 FERC ¶ 61,024 at P 19.

<sup>30</sup> We previously denied the motion to intervene out-of-time of Financial Institutions Energy Group, which filed two and one half months after the deadline for requests for rehearing. *Id.* P 19.

<sup>31</sup> RESA Motion to Intervene at 4.

21. The IBT Settlement provides that PJM will not rebill the remaining 20 percent (\$10.2 million) of the deviation charges. Under the Settlement, therefore, the PJM market participants are assured that they will receive 80 percent of the total potential funds and avoid the potential litigation risk of proceeding. In addition, as PJM, DC Companies, and Scylla point out, the Commission's Complaint Orders continue to constitute precedent regarding the treatment of IBTs. The purpose of filing the court settlement with the Commission was to provide parties to the Commission proceeding who were not parties to the appeal with the opportunity to comment on the settlement.

22. The Market Monitor argues that other parties to the proceeding, who were not parties to the court appeal, were not able to participate in the settlement. However, as noted above, the settlement filing with the Commission has provided an opportunity for those parties to be heard.

23. The Market Monitor also argues there is no record support for not rebilling the \$10.2 million figure and states that it is concerned on behalf of market participants who, through PJM, will not recover the remaining \$10.2 million. However, under the second *Trailblazer* approach, the Commission focuses on whether the overall result of the settlement is just and reasonable. Furthermore, the Market Monitor has not identified any party who was not provided with a reasonable opportunity to represent its financial interests, and we note that no party with a direct financial stake in the outcome has objected to the financial settlement.

24. The Market Monitor further contends that full enforcement of the Complaint Orders is necessary to discourage inappropriate market behavior. However, as PJM, DC Companies, and Scylla point out, the terms of the IBT Settlement do not alter or overturn the Commission's interpretation of the PJM tariff provisions. PJM market participants, therefore, remain on notice that IBTs may not be used to avoid deviation charges. Thus, the Market Monitor's interest in ensuring the viability of the findings in the Commission's Complaint Orders is protected.

25. 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.

26. Accordingly, we find that, under the second *Trailblazer* approach, the overall result of the settlement as a package is just and reasonable. While 20 percent of the deviation charges will not be rebilled, the IBT Settlement will terminate the court appeal, which preserves the Commission's findings in the Complaint Orders, eliminates any

uncertainty over the 80 percent of the charges that have already been rebilled, and obviates the need for further litigation for all parties to the court appeal. The IBT Settlement resolves the Market Monitor's concern that the settlement would adversely impact the determinations in the Complaint Orders that the PJM tariff does not permit non-physical IBTS to be used to offset deviation charges. Finally, no entity with a direct financial interest has objected to the settlement proposal to cap rebilling at 80 percent.

27. Section 5.6 of the IBT Settlement states that “[t]o the extent the Commission considers or directs any changes to the terms of this Settlement, the standard of review for such changes shall be the most stringent standard permissible under applicable law.” Because the IBT Settlement provides that the standard of review for changes to the IBT Settlement is “the most stringent standard permissible under applicable law,” we clarify the framework that would apply if the Commission were required to determine the standard of review in a later challenge to the IBT Settlement.

28. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Association v. FERC*,<sup>32</sup> however, the U.S. Court of Appeals for the District of Columbia Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above.

29. The IBT Settlement resolves all issues in dispute in these proceedings. The Commission finds that the IBT Settlement is fair and reasonable and in the public interest, and therefore, the Commission approves the IBT Settlement pursuant to Rule 602(h), 18 C.F.R. § 385.602(h) (2014). The Commission’s approval of the IBT Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

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<sup>32</sup> *New Eng. Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

30. This order terminates Docket Nos. EL12-8-000 and EL12-8-001.

The Commission orders:

The IBT Settlement is hereby approved, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.