

154 FERC ¶ 61,157
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

R.E. Ginna Nuclear Power Plant, LLC

Docket Nos. ER15-1047-000
ER15-1047-002

ORDER ON CONTESTED SETTLEMENT AGREEMENT

(Issued March 1, 2016)

1. On October 21, 2015, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,¹ R.E. Ginna Nuclear Power Plant, LLC (Ginna) filed, on behalf of itself, Rochester Gas and Electric Corporation (RG&E), the New York Public Service Commission (New York Commission), the New York Utility Intervention Unit (Utility Intervention Unit) and Multiple Intervenors² (collectively, Settling Parties) an Offer of Settlement, including a Settlement Agreement between the Settling Parties (Settlement Agreement) and a revised Reliability and Support Services Agreement between Ginna and RG&E (Settlement RSSA), which resolves all issues that the Commission set for hearing and settlement judge procedures in Docket Nos. ER15-1047-000 and ER15-1047-002.³ Alliance for a Green Economy and Citizens' Environmental Coalition (collectively, AGREE) filed an objection to the Settlement Agreement. As discussed

¹ 18 C.F.R. § 385.602 (2015).

² Multiple Intervenors is an unincorporated association of approximately 60 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, including the RG&E service territory.

³ *R.E. Ginna Nuclear Power Plant, LLC*, 151 FERC ¶ 61,023 (Ginna Hearing Order), *order on reh'g*, 152 FERC ¶ 61,027 (Ginna Rehearing Order), *order dismissing reh'g*, 153 FERC ¶ 61,030 (2015).

below, we approve the contested Settlement Agreement, subject to conditions, and direct the Settling Parties to submit a compliance filing.

I. Background

2. On February 13, 2015, Ginna filed, pursuant to section 205 of the Federal Power Act (FPA),⁴ an executed Reliability Support Services Agreement between Ginna and RG&E (Original RSSA).⁵ Under the Original RSSA, Ginna's R.E. Ginna Nuclear Power Plant (Ginna Plant) was to provide Reliability Support Service,⁶ for an initial term of April 1, 2015 through September 30, 2018, to RG&E to help ensure reliability in the Rochester, New York region. The Original RSSA contained two rate components to compensate Ginna, a stated Monthly Fixed Amount of \$17,504,118.25 from RG&E, and an additional 15 percent share of Ginna's energy and capacity revenues from its sales into the New York Independent System Operator, Inc. (NYISO) markets. Several parties, including the Settling Parties, intervened and filed comments or protests regarding the Original RSSA.

3. In the Ginna Hearing Order, issued April 14, 2015, the Commission rejected in part and accepted and suspended in part, subject to a compliance filing, the Original RSSA and established hearing and settlement judge procedures.⁷ The order required Ginna to submit a compliance filing removing: (i) all provisions related to extension of the RSSA beyond its initial term; and (ii) the aspect of the proposed rate providing Ginna with a 15 percent share of its energy and capacity revenues from its sales into the NYISO markets. With respect to the former compliance requirement, the Commission noted that it had initiated a proceeding under section 206 of the FPA,⁸ to require NYISO to submit tariff revisions governing the retention of and compensation to generating units required

⁴16 U.S.C. § 824d (2012).

⁵ R.E. Ginna Nuclear Power Plant, LLC, R.E. Ginna Nuclear Power Plant, LLC, [RSSA, FERC Rate Schedule No. 1 \(0.0.0\)](#).

⁶ "Reliability Support Service," also referred to as "must run" service or "reliability must run" (RMR) service, provides for the continued operation of generation units wishing to deactivate, often because they have become uneconomic, but which are needed for transmission system reliability.

⁷ Ginna Hearing Order, 151 FERC ¶ 61,023.

⁸ 16 U.S.C. § 824e (2012).

for reliability,⁹ and that any future reliability need for the Original RSSA beyond its original term would be subject to the procedures that NYISO establishes and the Commission approves in response to the NYISO RMR Order.¹⁰ With respect to the latter compliance requirement, the Commission found that the 15 percent mechanism was not consistent with the general principle that rates under an RMR agreement should be cost-based, because the mechanism could permit Ginna to recover more than its full cost of service.¹¹ In addition, as relevant here, the Commission stated that it would not revisit NYISO's reliability determination that the Original RSSA is needed for reliability, and it found that the Original RSSA provided a sufficient toggling disincentive against Ginna's potential toggling between market revenues and revenues provided by the Original RSSA.¹² The Commission set all remaining issues for hearing and settlement judge procedures.

4. On May 14, 2015, Ginna sought rehearing of the Ginna Hearing Order, arguing that it should be allowed to retain the 15 percent market revenue sharing mechanism. On the same date, Ginna submitted its compliance filing to remove the Original RSSA's extension provision, but the filing retained the 15 percent mechanism and added a cost of service cap that would cap the revenues that Ginna would earn under the Original RSSA at Ginna's cost of service requirement. Multiple parties also sought rehearing challenging various aspects of the Ginna Hearing Order.¹³

5. On July 13, 2015, the Commission issued the Ginna Rehearing Order,¹⁴ in which it granted rehearing to find that it was not possible at that point to conclude that the Original RSSA provided an adequate toggling disincentive; accordingly, the Commission

⁹ *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 (2015) (NYISO RMR Order).

¹⁰ Ginna Hearing Order, 151 FERC ¶ 61,023 at P 40.

¹¹ *Id.* P 44.

¹² *Id.* PP 40, 45.

¹³ AGREE, TC Ravenswood, Multiple Intervenors, Entergy Nuclear Power Marketing, Inc. (Entergy), and Ginna each filed requests for rehearing or, in the alternative, clarification. The New York Commission filed a request for rehearing.

¹⁴ Ginna Rehearing Order, 152 FERC ¶ 61,027.

set that issue for hearing and settlement judge procedures.¹⁵ The Commission also granted clarification regarding the 15 percent mechanism, explaining that while Ginna should not be compensated at a level that is higher than its full cost of service, a 15 percent mechanism that ensures that total compensation under the Original RSSA is capped at Ginna's full cost of service is consistent with Commission's discussion in the Ginna Hearing Order. Accordingly, the Commission accepted Ginna's compliance filing.¹⁶ The Commission denied rehearing on all other issues.¹⁷

6. On August 12, 2015, TC Ravenswood filed a request for rehearing of the Commission's Ginna Rehearing Order. On October 15, 2015, the Commission dismissed TC Ravenswood's request for rehearing.¹⁸

II. Proposed Settlement Agreement

7. On October 21, 2015, the Settling Parties filed an Offer of Settlement with the Commission, including the Settlement Agreement¹⁹ and the Settlement RSSA.²⁰ The

¹⁵ *Id.* P 47.

¹⁶ *Id.* P 29.

¹⁷ Specifically, the Commission denied rehearing on issues regarding: (i) the Commission's jurisdiction over the Original RSSA; (ii) NYISO's reliability determination underlying the Original RSSA and its duty to examine alternatives to the Original RSSA; (iii) the length of the term of the Original RSSA; and (iv) whether the Original RSSA will cause price suppression in NYISO markets. *See id.* P 15.

¹⁸ *R.E. Ginna Nuclear Power Plant, LLC*, 153 FERC ¶ 61,030 (2015).

¹⁹ Ginna was authorized to state that Entergy and the NRG Companies, which include NRG Marketing LLC and GenOn Energy Management LLC, would not oppose the Settlement Agreement.

²⁰ During the course of settlement negotiations, Ginna and RG&E amended Section 2.1(c) of the Original RSSA on five occasions, to allow brief extensions of Ginna's unilateral right to terminate the RSSA upon 10 days written notice if certain conditions were not met. In unpublished letter orders, the Commission accepted the First Extension Filing on August 27, 2015; the Second and Third Extension Filings on September 22, 2015; the Fourth Extension Filing on October 15, 2015; and, the Fifth Extension Filing on November 12, 2015.

Settlement Agreement and Settlement RSSA reflect the Settling Parties' agreement to: (1) the wholesale rate, terms and conditions in the Settlement RSSA; and (2) certain retail-related issues included in the Settlement RSSA. The Settling Parties request that the Commission: (1) accept and approve the Settlement Agreement; and (2) grant the request for clarification set forth in section 4.1.3.5 of the Settlement Agreement, which provides that any further selection of Ginna to provide Reliability Support Service, and any Ginna retirement decision, will not be subject to the NYISO tariff RMR process established pursuant to the NYISO RMR Order.²¹ On December 16, 2015, the Settlement Judge issued a Report of Partially Contested Settlement for the Commission to consider. The Settlement Judge reported to the Commission the partially contested nature of the Settlement Agreement, and stated that there do not appear to be any genuine issues of material fact. On January 6, 2016, the Acting Chief Judge terminated the Settlement Judge proceeding.

8. Settling Parties state that the Settlement Agreement resolves all disputes related to the Original RSSA, including disputes among the Settling Parties in a proceeding before the New York Commission. Article I of the Settlement Agreement sets forth definitions for terms used in the Settlement Agreement. Article II explains the following modifications to the Original RSSA, which are reflected in the Settlement RSSA, including that: the Term²² is shortened from 42 months to 24 months, beginning April 1, 2015 through March 31, 2017; Ginna has the right to terminate the Settlement RSSA without liability upon 10 days written notice if the Commission does not accept the Settlement Agreement by March 1, 2016; the payment obligations under the Settlement RSSA are subject to the approval of both the Commission and the New York

²¹ Specifically, the Settlement Agreement states:

4.1.3.5. For the avoidance of doubt, the Parties hereby request that FERC, in ruling on this Settlement Agreement, confirm that any further selection of Ginna and subsequent rate filing at FERC through the process described herein shall be instead of, and shall not be subject to, the NYISO tariff RMR process now under development in FERC Docket No. EL15-37, or any successor thereto, and shall also be in place of any NYISO process that would otherwise require NYISO review or approval of Ginna retirement. This request to FERC does not include any request to relieve Ginna of its obligation to comply with any bidding or mitigation requirements that apply to NYISO's energy and capacity markets.

²² Capitalized terms not otherwise defined have the meaning specified in the Settlement RSSA, Article I § 1.1, "Definitions."

Commission; the Settlement RSSA specifies RG&E's retail accounting treatment of all Settlement RSSA costs; RG&E does not have early-termination rights and will make a one-time, approximately \$11 million Settlement Payment to Ginna at the end of the Term of the Settlement RSSA; Ginna's compensation will be a Monthly Fixed Amount of \$15,420,000.00 and Ginna will be entitled to 30 percent of energy and capacity revenues from its sales into NYISO's markets, with Ginna's total revenues under the Settlement RSSA subject to an overall cost-based revenue cap of \$510,000,000.00 and a cost-based revenue floor of \$425,000,000.00;²³ the New York Commission will determine RG&E's cost recovery of Settlement RSSA costs from retail customers through an RSSA surcharge to retail customers for RG&E, and the New York Commission may reduce Ginna's Monthly Fixed Amount to reflect the amount that the New York Commission authorizes in an RSSA surcharge to retail customers for RG&E; the Capital Recovery Balance shall be \$20,140,090.97, to be recovered over a two-year period, with a new Capital Recovery Balance calculated if Ginna is selected to provide Reliability Support Services beyond the Term of the Settlement RSSA; and, Ginna will not seek an RMR agreement from the Commission that would become effective prior to the end of the Term of the Settlement RSSA.

9. Article III states that the Settlement Agreement resolves all issues among the Settling Parties in New York Commission Case No. 14-E-0270, and that the Settling Parties shall file a substantively identical settlement before the New York Commission. Article IV includes a study, solicitation and reporting process to determine whether there is a reliability need for the Ginna Plant after the Settlement RSSA expires on March 31, 2017, and to address such a reliability need. In particular, Article IV requires RG&E to complete and publish a reliability study in coordination with the NYISO that confirms that the Ginna Retirement Transmission Alternative will resolve the reliability needs associated with the Ginna Plant's retirement. Section 4.1.3.5 of Article IV states that any further selection of Ginna to provide Reliability Support Service, and any Ginna retirement decision, will not be subject to the NYISO tariff RMR process under development pursuant to Docket No. EL15-37-000, i.e., the NYISO RMR Order.²⁴

10. Article V provides for an April 1, 2015 effective date for the Settlement RSSA, consistent with the effective date established for the Original RSSA in the Ginna Hearing Order. Article VI defines the standard for review for any modifications to the Settlement

²³ Section 10.2 of the Settlement RSSA provides that a Market or Regulatory Change that provides additional revenues to Ginna shall be for RG&E's account and shall be credited against the Monthly Fixed Amount.

²⁴ See *supra* note 21.

Agreement.²⁵ Finally, Article VII details various general provisions in the Settlement Agreement, *e.g.*, scope and non-severability rights, providing that if the Commission orders any material condition or modification, then the adversely affected party may terminate the Settlement Agreement.

III. Comments on the Proposed Settlement Agreement

11. AGREE opposes the Settlement Agreement, and requests that the Commission order the Ginna Plant to close upon expiration of the Settlement RSSA, or otherwise “put into place an adequate disincentive for Ginna to toggle.”²⁶ AGREE states that it supports the reduced Term of the Settlement RSSA and notes that if Ginna shuts down following termination of the Settlement RSSA, there will be beneficial environmental outcomes locally via the reduction of radioactive releases and thermal pollution of Lake Ontario.²⁷ It alleges that the Settlement Agreement does not adequately address toggling, stating: (i) there is no change in Ginna’s accelerated depreciation rate, (ii) RG&E has an obligation to make a one-time Settlement Payment to Ginna of \$11,458,030.70, and (iii) Ginna has an obligation to pay RG&E a \$20,140,090.97 Capital Recovery Balance in the event that the Ginna Plant re-enters the NYISO markets. AGREE explains that the net payment (of the Capital Recovery Balance less the Settlement Payment) from Ginna to RG&E in such a scenario will be approximately \$8.6 million, to be paid back over a

²⁵ Specifically, Article VI of the Settlement Agreement states:

To the extent the Commission considers any changes to the provisions of this Settlement Agreement during its term, as defined in Article 2.1, the standard of review for such changes shall be the strictest standard permissible under applicable law. For the avoidance of doubt, the standard of review for any modifications to the Settlement Agreement, other than amendments agreed to by all Parties, whether proposed by a Party, any third party, or the Commission acting *sua sponte*, shall be solely the most strict standard set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), as clarified in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527 (2008) and refined in *NRG Power Mktg. v. Maine Pub. Utils. Comm’n*, 130 S. Ct. 693, 700 (2010).

²⁶ AGREE Comments at 2.

²⁷ *Id.* at 3.

two-year period (i.e., approximately \$4.3 million in annual payments). It asserts that this amount is two percent of the Ginna Plant's annual revenue, and unlikely to be the determining factor in Ginna's decision to return to the market.

12. AGREE argues that this proceeding set into motion RG&E's pursuit of the Ginna Retirement Transmission Alternative, "a multi-million dollar project necessitated by Ginna's supposed impending retirement. ... If Ginna does not, in fact, retire as predicted in April 2017, but instead stays in operation through yet another refueling cycle, then the investment in the Ginna Retirement Transmission Alternative may turn out to have been entirely unnecessary."²⁸ AGREE asserts that this outcome would be unfair for consumers, and concludes that the Settlement Agreement does not satisfy the Ginna Rehearing Order's directive to ensure that the outcome of this proceeding contains an adequate disincentive for Ginna to toggle between the revenues under the Original RSSA and the revenues under the NYISO markets.

13. The Utility Intervention Unit urges the Commission to approve the Settlement Agreement, arguing that "the Settlement Agreement represents the best option available under current circumstances."²⁹ The Utility Intervention Unit states that by reducing the Term of the RSSA, from 42 months to 24 months, the Settlement Agreement saves RG&E consumers approximately \$375 million, compared to the costs of the Original RSSA. The Utility Intervention Unit notes that the Settlement Agreement eliminates language in the Original RSSA that would have allowed for an 18-month extension of the RSSA without public consultation. The Utility Intervention Unit states that it supports the Settlement Agreement because it sets a hard cost-based cap on Ginna's potential earnings at \$510 million, and a cost-based floor of \$425 million, which respectively correspond to Ginna's full cost of service, and its going-forward costs. The Utility Intervention Unit further states that Ginna's retention of 30 percent of NYISO market revenues under the Settlement Agreement's revised compensation formula decreases consumers' exposure to market price volatility.³⁰

14. Commission Trial Staff (Trial Staff) supports the Settlement Agreement, arguing that it represents a fair balance of competing interests, and a reduction in RG&E's Monthly Fixed Payment to Ginna. Trial Staff notes that the Settlement Agreement

²⁸ *Id.* at 6.

²⁹ Utility Intervention Unit Comments at 3.

³⁰ Under the Original RSSA, Ginna retained 15 percent of NYISO market revenues from Ginna's sales into the NYISO markets.

provides that \$110 million in RSSA costs will be paid by RG&E with deferred rate credits, meaning that consumers will not pay a large portion of the Settlement RSSA's costs. Trial Staff supports the revenue cap and earnings floor. Trial Staff maintains that, as explained in Ginna's Affidavit, the Settlement RSSA creates a strong disincentive to toggle between the RSSA and NYISO markets.³¹ Finally Trial Staff notes that, for the following reasons, it supports section 4.1.3.5 of the Settlement Agreement, which provides that any further selection of Ginna for a second and new RSSA shall not be subject to the NYISO tariff RMR process in Docket No. EL15-37-000. Trial Staff states that in the Ginna Hearing Order, the Commission directed Ginna to remove all provisions in the Original RSSA related to extension of the Original RSSA beyond its initial term, which extended through September 30, 2018. Trial Staff states that the "initial term" referenced therein of three and one half years has been reduced to two years as part of the Settlement Agreement, and that any further selection of Ginna to provide Reliability Support Services and any subsequent rate filing at the Commission would ultimately be expected to take place within the shortened two-year term (i.e., before the end of the "initial term," September 30, 2018). In addition, Trial Staff asserts that the Settlement Agreement provisions governing retirement of the Ginna Plant require actions that must be taken by, at the latest, June 2017, which is well before the end of the initial term of the Original RSSA (i.e., September 30, 2018).

IV. Reply Comments

15. Ginna submitted reply comments on November 20, 2015, arguing that the request by AGREE to force the Ginna Plant to close after the expiration of the Settlement RSSA, or in the alternative implement different anti-toggling measures, should be rejected. Ginna states that AGREE did not request that the Settlement Agreement be rejected, rather that it be accepted in part. Ginna asserts that it cannot unilaterally determine to re-enter the market at any time during the RSSA, which Ginna maintains has historically been the Commission's concern about toggling.³²

16. Ginna disputes AGREE's arguments about the Capital Recovery Balance and depreciation. Ginna asserts that all capital costs under the Settlement RSSA are principally associated with refueling and paid during the Term. In the event Ginna stays online following the termination of the Settlement RSSA, Ginna states that the Capital

³¹ See Ginna October 21, 2015 Offer of Settlement, Affidavit of Jeanne M. Jones.

³² Ginna November 20, 2015 Reply Comments at 2 (citing, e.g., *Milford Power Co., LLC*, 119 FERC ¶ 61,167, at P 52 (2007) (rejecting provision in RMR agreement that would allow the generator to unilaterally cancel with 30 days' notice)).

Recovery Balance provides for undepreciated capital costs incurred to be repaid to RG&E. Ginna states that the Capital Recovery Balance adjusts depreciation to assume continued operation through the remainder of the term of Ginna's Nuclear Regulatory Commission license, which expires in 2029, and AGREE's arguments that Ginna is recovering accelerated depreciation are misplaced. Ginna maintains that in determining whether to stay operational, a unit owner considers going forward costs, not sunk costs or book value based on past depreciation. Ginna explains that a calculation of going forward costs excludes depreciation on sunk capital costs, because a decision whether to continue operating will be based on a comparison of projected revenues to projected new costs, not sunk costs. Ginna argues that, as such, the rate of depreciation of such sunk costs has no bearing on the toggling issue.

17. In response to AGREE's argument that the Settlement Payment should be netted against the Capital Recovery Balance, Ginna argues that the approximately \$11 million Settlement Payment cannot be netted against the Capital Recovery Balance to determine the level of toggling disincentive, because the Settlement Payment is unrelated to the Ginna Plant's continued operation. Ginna explains that the Settlement Payment should be paid to Ginna regardless of whether the Ginna Plant returns to the market, because the Settlement Payment is a true up that ensures that Ginna receives compensation for all of the costs that Ginna incurred during the Term of the Settlement RSSA. Ginna further explains that this true-up is appropriate because, according to Ginna, the levelized monthly payments under the Settlement RSSA do not exactly match the costs incurred by Ginna, as these costs are incurred on a lumpy basis. Ginna also explains that the approximately \$11 million Settlement Payment under the two-year Settlement RSSA corresponds to the Settlement Payment that RG&E would have paid if it terminated the Original RSSA after two years.

18. Ginna states that AGREE's argument that the Commission should require Ginna to retire following the termination of the Settlement RSSA is meritless. As an initial matter, Ginna asserts that AGREE provided no citation to any Commission authority for such a nuclear plant closure. Second, Ginna avers that doing so would be economically inefficient, because, in the event market conditions improve to a level where Ginna can profitably reenter the market, forcing Ginna to close would result in more expensive units clearing in its place.

19. Ginna states that Commission regulations provide that any comment that contests an Offer of Settlement by alleging a disputed issue of material fact must include an Affidavit.³³ Because AGREE did not submit an Affidavit, Ginna argues that, by rule,

³³ *Id.* at 6 (citing 18 C.F.R. § 385.602(f)(4) (2015)).

there is no disputed issue of material fact regarding the sufficiency of the toggling disincentive. Finally, Ginna argues that the Commission can accept the Settlement Agreement under either the first or second *Trailblazer* approach for approving contested settlements.³⁴

20. In its reply comments, Trial Staff states that the Commission should approve the Settlement Agreement, without modification, under the first or second *Trailblazer* approach.³⁵ Trial Staff asserts that the first *Trailblazer* approach is appropriate if the record contains evidence sufficient to support the decision, the issues are primarily policy issues, and there is no genuine issue of material fact in dispute.³⁶ Trial Staff contends that AGREE's initial comments make clear that the record is sufficient for the Commission to make a policy decision on the toggling issue. Trial Staff states that AGREE does not argue that any material facts are in dispute and AGREE did not submit an Affidavit alleging such a dispute.³⁷ Trial Staff asserts that AGREE's arguments that the Settlement does not provide an adequate disincentive for Ginna to toggle are without merit or raise policy questions that can be resolved by the Commission.³⁸

21. Trial Staff contends that AGREE's argument that the Settlement Agreement does not provide an adequate toggling disincentive is not supported by the evidence, which shows that the \$510 million cap on Ginna's compensation under the Settlement RSSA is significantly below the approximately \$730 million cap that would have resulted from

³⁴ *Id.* at 11 (citing *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,342 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999) (*Trailblazer*)). Under *Trailblazer*, the Commission can approve a contested settlement using one of four approaches: (1) by making a merits call on each contested issue, if the record is adequate to do so; (2) by finding that, despite problematic aspects, the settlement as a package is just and reasonable; (3) by finding that the settlement's benefits outweigh the nature of the objections, and the contesting party's interest is too attenuated; or (4) by severing the contesting party and allowing it to continue litigating the disputed issues. 85 FERC ¶ 61,345 at 62,342-62,345.

³⁵ Trial Staff Reply Comments at 5.

³⁶ *Id.* (citing *Great Lakes Trans. Ltd. Ptnr'p*, 153 FERC ¶ 61,053, at P 52 (2015), and *Trailblazer*, 85 FERC ¶ 61,345 at 62,342).

³⁷ *Id.* at 6.

³⁸ *Id.*

simply pro-rating the Original RSSA.³⁹ Trial Staff argues that there is no evidence supporting a finding that the Settlement RSSA will allow Ginna to recover accelerated depreciation of the Ginna Plant, and the Commission's concerns should be mitigated by the reduced cap on Ginna's revenues.⁴⁰

22. Regarding AGREE's argument that the Settlement Payment and the Capital Recovery Balance should be netted against each other, Trial Staff asserts that such an approach does not make sense given the purpose of the Settlement Payment is to recover costs already expended by Ginna, but not yet recovered.⁴¹ Trial Staff argues that Ginna is entitled to receive the Settlement Payment regardless of whether it continues to operate after the Settlement RSSA expires, and therefore that Settlement Payment should not impact Ginna's decision on whether to retire after March 31, 2017.⁴² Trial Staff also takes issue with AGREE's assertion that the Settlement Agreement substantially reduces the Capital Recovery Balance compared to the Original RSSA. Trial Staff contends that AGREE fails to recognize that the Settlement Payment and Capital Recovery Balance in the Settlement Agreement are tied to the reduced term of the Settlement RSSA, and the Capital Recovery Balance is not substantially reduced as a result of the Settlement Agreement.⁴³ Trial Staff argues that the record evidence of Ginna's going-forward cost estimates and market revenue forecasts is sufficient to conclude that the Settlement Agreement provides a sufficient toggling disincentive,⁴⁴ and AGREE has not challenged that evidence.⁴⁵

23. Trial Staff states that the Commission may, alternatively, approve the Settlement under the second *Trailblazer* approach because (1) the Settlement RSSA rates fall within the zone of reasonableness, due to the reduced \$510 million cap on Ginna's

³⁹ *Id.* at 6-7.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 7-8.

⁴² *Id.* at 8.

⁴³ *Id.* at 8-9.

⁴⁴ *Id.* at 9 (citing Ginna October 21, 2015 Offer of Settlement, Affidavit of Jeanne M. Jones).

⁴⁵ *Id.* (citing AGREE Initial Comments at 5).

compensation; (2) the Settlement Agreement places AGREE in a better position than any feasible litigation because the Settlement Agreement reduces the term by more than 40 percent and obligates RG&E to conduct a new reliability study, and because a litigated outcome that forces Ginna to retire would leave RG&E's ratepayers in a worse position than they would be in under the Settlement Agreement; and (3) the benefits of the Settlement Agreement outweigh the costs and potential impact of litigation.⁴⁶

24. Trial Staff asserts that the Commission should not use the fourth Trailblazer approach—i.e., severing the contesting party and allowing it to continue litigating—because AGREE has not requested an opportunity to litigate the toggling issue, AGREE's interests are aligned with RG&E's ratepayers, and any modification on the toggling issue would likely result in termination of the Settlement Agreement.⁴⁷

V. Related New York Commission Proceeding

25. On October 20, 2015, the Settling Parties filed a Joint Proposal before the New York Commission in Case No. 14-E-2070, which includes both a settlement agreement and revised RSSA reflecting the settlement agreement (collectively, the Joint Proposal), that has the same rates, terms and conditions as the Settlement Agreement and Settlement RSSA filed in this proceeding. On February 24, 2016, the New York Commission issued an order approving the Joint Proposal without change, and authorizing 100 percent pass through of the Settlement RSSA costs through a retail surcharge to RG&E's retail customers (New York Commission Order).⁴⁸ We take official notice of the filing of the

⁴⁶ *Id.* at 12-13.

⁴⁷ *Id.* at 14.

⁴⁸ Case No. 14-E-0270 - *Petition Requesting Initiation of a Proceeding to Examine a Proposal for Continued Operation of the R.E. Ginna Nuclear Plant, LLC*, Order Adopting the Terms of a Joint Proposal (N.Y. St. Dept. of Pub. Serv. 2016). The New York Commission Order includes a discussion of proposed "zero emission credits" as part of New York's wider Clean Energy Standard proceeding. The New York Commission Order states that with the contribution of these zero emission credits, "Ginna may find revenues sufficient to continue operation of its plant beyond the term of the ARSSA." As noted above, section 10.2 of the Settlement RSSA provides that a Market or Regulatory Change that provides additional revenues to Ginna shall be for RG&E's account and shall be credited against the Monthly Fixed Amount.

Joint Proposal and the issuance of the New York Commission Order,⁴⁹ which are publicly available on the New York Commission's website.⁵⁰

VI. Commission Determination

26. Rule 602(h) of the Commission's Rules of Practice and Procedure provides that the Commission may decide the merits of a contested Offer of Settlement if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.⁵¹ In *Trailblazer*, the Commission set forth its approaches to reviewing contested settlements.⁵² Under the first approach described in *Trailblazer*, the Commission can approve the contested settlement by addressing each contested issue on its merits.⁵³ That approach is appropriate where "the issues are primarily policy issues or where . . . the parties have agreed the record is sufficient to decide the issues on the merits."⁵⁴ We apply that approach in reviewing the Settlement Agreement now before us. In particular, Ginna's Affidavit, included in the Offer of Settlement, contains substantial evidence upon which to base a reasoned decision concerning the toggling disincentive, and AGREE has not raised any genuine issue of material fact concerning the facts contained in Ginna's Affidavit. Therefore, we may proceed, consistent with the first approach in *Trailblazer*, to decide on the merits the sole contested issue in proceeding—whether, as a matter of policy, the Settlement Agreement provides an adequate disincentive for Ginna to toggle between compensation

⁴⁹ Rule 508(d) of the Commission's Rules of Practice and Procedure allows the Commission to "take official notice of any matter that may be judicially noticed by the courts of the United States. . . ." 18 C.F.R. § 385.508(d) (2015). Federal courts have taken judicial notice of documents located on government websites. *See, e.g., Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003). Judicial notice may be taken at any stage of the proceeding. Fed.R.Evid. 201(f).

⁵⁰ *See* <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=45789&MNO=14-E-0270>.

⁵¹ 18 C.F.R. § 385.602(h)(1)(i) (2015).

⁵² *See supra* note 34.

⁵³ *Trailblazer*, 85 FERC ¶ 61,345 at 62,342.

⁵⁴ *Id.*

under the Settlement RSSA and the NYISO markets. In addition, we have identified several other policy or legal issues raised by the Settlement Agreement and the Settlement RSSA because they either potentially infringe upon the Commission's exclusive jurisdiction over wholesale rates under the FPA, or are inconsistent with the Commission's directives in the Ginna Hearing Order. As discussed below, we find that the toggling disincentive is adequate, and we order conditions to ensure that the operation of the Settlement Agreement and Settlement RSSA do not infringe upon the Commission's exclusive jurisdiction over wholesale rates under the FPA, and is consistent with the Commission's directives in the Ginna Hearing Order. With these conditions, we further find that the Settlement Agreement and Settlement RSSA are just and reasonable and in the public interest.

27. As previously noted, the sole contested issue remaining in this proceeding involves a policy question, namely, whether the Settlement Agreement provides an adequate disincentive for Ginna to toggle between compensation under the Settlement RSSA and the NYISO markets. In the Ginna Rehearing Order, the Commission directed

the parties to address, at a minimum, not only the appropriate dollar amounts for the Capital Recovery Balance, but also the Settlement Payment, Ginna's overall revenues under the RSSA and projected market revenues that Ginna could earn from sales in the NYISO market. Based on this information, the Commission will determine whether or not the RSSA provides a sufficient disincentive for Ginna to toggle between the RSSA and the NYISO markets.⁵⁵

Ginna's Affidavit includes the requested evidence. Ginna's Affidavit concludes that it is unlikely there will be an incentive for Ginna to return to the market after RSSA termination.⁵⁶ We note that AGREE does not dispute the facts contained in Ginna's Affidavit concerning the toggling disincentive. Rather, AGREE disputes, as a matter of policy, whether the toggling disincentive is adequate. Under the Settlement Agreement, if Ginna wishes to return to the NYISO markets, it must pay RG&E the Capital Recovery Balance within two years. As Ginna notes, the Capital Recovery Balance represents the

⁵⁵ Ginna Rehearing Order, 152 FERC ¶ 61,027 at P 48.

⁵⁶ Ginna October 21, 2015 Offer of Settlement, Affidavit of Jeanne M. Jones at 10. Ginna's Affidavit contains discussions related to NYISO wholesale capacity, energy and ancillary services revenues. Ginna's Affidavit does not mention New York's proposed Clean Energy Standard, nor does it mention zero emission credits. Potential revenue streams provided to Ginna through a future Clean Energy Standard or zero emission credits are not included in our analysis here as they are absent from Ginna's Affidavit.

sum total of all capital costs (less depreciation), which are principally associated with refueling, in the Ginna Plant. These costs are required to ensure that the Ginna Plant is available to provide Reliability Support Service. Therefore, we find it just and reasonable for Ginna to return the Capital Recovery Balance should it seek to re-enter the market. In addition, the Settlement RSSA does not allow Ginna to unilaterally terminate the Settlement RSSA. This limitation ensures that Ginna is unable to toggle back into the NYISO markets prior to the Settlement RSSA's end date by terminating the Settlement RSSA early.⁵⁷ Based upon the foregoing, we find that the Settlement Agreement provides an adequate toggling disincentive.⁵⁸ We disagree with AGREE's assertion that the Settlement Payment⁵⁹ that RG&E will pay to Ginna at the end of the Term⁶⁰ of the Settlement RSSA mitigates the toggling disincentive provided by the Capital Recovery Balance. The Settlement Payment represents costs that Ginna will have incurred during the Settlement RSSA's Term, but, due to timing, Ginna will not yet have recovered those costs from RG&E by the end of the Settlement RSSA's Term. Therefore, we are not persuaded that Ginna's recovery of those costs through the Settlement Payment, to which Ginna is entitled under the Settlement RSSA, should be netted against the Capital Recovery Balance in assessing whether the Capital Recovery Balance provides an adequate disincentive for Ginna to return to the NYISO markets.

28. Although the toggling issue addressed above is the only aspect of the Settlement Agreement that is contested in this proceeding, we also have identified other aspects of the Settlement Agreement and the Settlement RSSA that are problematic because they either (1) potentially infringe upon the Commission's exclusive jurisdiction over wholesale rates under the FPA, or (2) are inconsistent with the Commission's directives in the Ginna Hearing Order. The specific provisions that raise jurisdictional concerns are Articles 2.1.2 and 2.3.8 of the Settlement Agreement, and Articles 2.1(a)(ii) and 10.3(b)

⁵⁷ See, e.g., *supra* note 32.

⁵⁸ As we stated in the Ginna Hearing Order, while we find the toggling disincentive to be just and reasonable based on the facts in this case, "we note that we are not prejudging any proposal that NYISO must file to comply with the NYISO RMR Order regarding toggling." 151 FERC ¶ 61,023 at P 45 n.95.

⁵⁹ Article 2.3.3 of the Settlement Agreement states that there will be a one-time Settlement Payment of \$11,458,030.70 paid by RG&E to Ginna following the expiration of the Settlement RSSA on March 31, 2017.

⁶⁰ Article 2.1.1 of the Settlement Agreement states that the Term of the Settlement RSSA extends from April 1, 2015 to March 31, 2017.

of the Settlement RSSA, each of which relate to the New York Commission's review of the Settlement RSSA. The specific provision that is inconsistent with the Commission's directive in the Ginna Hearing Order is Article 4.1.3.5 of the Settlement Agreement, which seeks to exempt a subsequent RMR agreement with Ginna from the NYISO RMR tariff process under development pursuant to the NYISO RMR Order. Accordingly, we will require modifications to those provisions, as discussed below.

29. Articles 2.1.2 and 2.3.8 of the Settlement Agreement and Articles 2.1(a)(ii) and 10.3(b) of the Settlement RSSA potentially infringe upon the Commission's jurisdiction over the Settlement RSSA, because they allow the New York Commission to approve all aspects of the Settlement RSSA, including the wholesale aspects of the Settlement RSSA, and potentially reduce a wholesale rate in the Settlement RSSA. As the Commission explained in the Ginna Rehearing Order, the Settlement RSSA falls squarely within the Commission's jurisdiction under the FPA, because the Settlement RSSA sets forth the rates, terms, and conditions of providing a service to maintain the reliability and efficient operation of the interstate transmission system and NYISO's wholesale markets.⁶¹ As the U.S. Supreme Court explained in *Oneok*, a case involving the Natural Gas Act, the proper test for determining whether a state action is pre-empted is "whether the challenged measures are 'aimed directly at interstate purchasers and wholesalers for resale' or not."⁶²

⁶¹ Ginna Rehearing Order, 152 FERC ¶ 61,027 at PP 18-20 (citing 16 U.S.C. §§ 824(a), 824(b), 824d(a), 824e(a), 824o(b); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (*Nantahala*); *Mississippi Power and Light Co. v. State of Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (*Mississippi*); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 718 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 63 (2014)). While the Ginna Rehearing Order concerned the Original RSSA, rather than the Settlement RSSA, no party has argued that the Settlement RSSA is distinguishable from the Original RSSA for jurisdictional purposes, and we find no basis for such a distinction.

⁶² *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1600 (2015) (*Oneok*) (quoting *Northern Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 82, 94 (1963)). Prior to *Oneok*, other courts and this Commission had recognized that not all State actions that have an effect on wholesale rates are necessarily field pre-empted. See, e.g., *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014), *cert. granted sub nom. CPV Maryland, LLC v. PPL EnergyPlus, LLC*, 136 S. Ct. 356 (2015) ("not every state statute that has some indirect effect on wholesale rates is preempted.") (internal quotations omitted); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014), *petition for cert. filed* ("When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation

(continued ...)

Furthermore, under long-standing Supreme Court precedent in *Nantahala* and *Mississippi*, once the Commission approves a wholesale rate, a state commission must allow 100 percent of the wholesale rate to be passed through to customers in the utility's retail rate design.⁶³ The Supreme Court expounded on that principle at length in *Mississippi*, concluding that

[i]n this case as in *Nantahala* we hold that 'a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.'⁶⁴

30. Articles 2.1.2 and 2.3.8 of the Settlement Agreement and Articles 2.1(a)(ii) and 10.3(b) of the Settlement RSSA allow the New York Commission to take action in ways that directly target the wholesale rate, or have more than an indirect or incidental effect on the wholesale rate. Specifically, Article 2.1.2 of the Settlement Agreement and Article 2.1(a)(ii) of the Settlement RSSA provide, *inter alia*, that the financial obligations under the Settlement RSSA do not become effective unless and until the New York

invalid.") (citing *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 514 (1989)).

⁶³ *Mississippi*, 487 U.S. at 372 ("States may not bar regulated entities from passing through to retail consumers FERC-mandated wholesale rates.") (citing *Nantahala*, 476 U.S. at 970). *Mississippi* involved a state commission's decision to deny, as not prudent, a utility's rate change that sought to pass through the costs of high-cost power that the Commission concluded the utility was obligated to purchase from an affiliate.

⁶⁴ *Id.* at 373 (quoting *Nantahala*, 476 U.S. at 965, 966). We note that, in *Oneok*, the Supreme Court interpreted *Mississippi* in the context of the current test for whether a state action is pre-empted, explaining that the state action in *Mississippi* was pre-empted because it was directed at Commission-jurisdictional sales. *Oneok*, 135 S. Ct. at 1602 ("Mississippi's inquiry into the reasonableness of FERC-approved purchases was effectively an attempt to regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates.") (internal quotations omitted).

Commission issues an order “accepting the [Settlement RSSA].”⁶⁵ Because these provisions condition the financial obligations under the Settlement RSSA on the New York Commission’s acceptance of *all* aspects of the Settlement RSSA—including the wholesale rate and the terms and conditions of service related thereto—rather than only those aspects of the Settlement RSSA that are within the New York Commission’s jurisdiction, these provisions potentially allow the New York Commission to impermissibly reject or otherwise impact the aspects of the Settlement RSSA that are within the Commission’s exclusive jurisdiction.⁶⁶ Further, Article 2.3.8 of the Settlement Agreement and Article 10.3(b) of the Settlement RSSA provide, *inter alia*, that the \$15.4 million Monthly Fixed Payment of the wholesale rate that Ginna will charge RG&E under the Settlement RSSA, i.e., the wholesale rate that we conditionally approve here, will be immediately reduced to reflect the amount the New York Commission determines RG&E can recover from its retail customers through the RSSA surcharge.⁶⁷ Moreover, it appears that Article 2.3.8 of the Settlement Agreement and Article 10.3(b) of the Settlement RSSA would effectuate such change to the wholesale rate without the submission of a filing to the Commission under section 205 of the FPA. These provisions are inconsistent with section 205 of the FPA and precedent.⁶⁸

31. To address these concerns, we accept the Settlement Agreement and Settlement RSSA, subject to the condition that the Settling Parties submit a compliance filing, within 30 days of the date of this order, that: (1) modifies Article 2.1.2 of the Settlement Agreement and Article 2.1(a)(ii) of the Settlement RSSA to make clear that the New York Commission’s approval of the Settlement RSSA is limited to “the aspects of the Settlement RSSA that are within the New York Commission’s jurisdiction”; (2) adds the requirement to Article VI Standard of Review in the Settlement Agreement and Article 10.17 Standard of Review in the Settlement RSSA to clarify that, (i) if there is a change to the Settlement RSSA as a result of the New York Commission’s review of the Settlement RSSA, Ginna must submit the change under section 205 of the FPA to the Commission to ensure that the Commission reviews any changes to the rates, terms and conditions of the Settlement RSSA within the Commission’s jurisdiction, and (ii) the Commission’s standard of review that will apply to such a filing will be the ordinary just and reasonable standard; and (3) deletes the aforementioned provision, in Article 2.3.8 of

⁶⁵ Settlement Agreement at Article 2.1.2; Settlement RSSA at Article 2.1(a)(ii).

⁶⁶ *Supra* P 29.

⁶⁷ Settlement Agreement at Article 2.3.8; Settlement RSSA at Article 10.3(b).

⁶⁸ *Supra* P 29.

the Settlement Agreement and Article 10.3(b) of the Settlement RSSA, that the \$15.4 million Fixed Monthly Payment under the Settlement RSSA will be immediately reduced to reflect the amount the New York Commission determines RG&E can recover from its retail customers through the RSSA surcharge. These modifications allow the New York Commission to exercise its authority but they also maintain the Commission's jurisdiction over the rates, terms and conditions of the Settlement RSSA under the FPA.

32. We also find Article 4.1.3.5 of the Settlement Agreement to be inconsistent with the Commission's directive in the Ginna Hearing Order. Article 4.1.3.5 of the Settlement Agreement provides as follows:

any further selection of Ginna and subsequent rate filing at FERC through the process described herein shall be instead of, and shall not be subject to, the NYISO tariff RMR process now under development in FERC Docket No. EL15-37, or any successor thereto, and shall also be in place of any NYISO process that would otherwise require NYISO review or approval of Ginna retirement.⁶⁹

33. As noted above, in the Ginna Hearing Order, the Commission directed Ginna to remove all provisions related to the extension of the Original RSSA beyond the initial term, because Ginna "did not submit evidence demonstrating a reliability need beyond the initial term of the RSSA."⁷⁰ The Commission stated that "if there is a future reliability need for the RSSA beyond its initial term, Ginna will be subject to the procedures that NYISO establishes, and the Commission approves, in response to the *NYISO RMR Order*."⁷¹ While we recognize that the term of the Settlement RSSA has been reduced from the Original RSSA, we find that Article 4.1.3.5 is inconsistent with that directive. To address this concern, we approve the Settlement Agreement, subject to the condition that the Settling Parties eliminate Article 4.1.3.5 of the Settlement Agreement as part of the compliance filing directed in this order.⁷²

⁶⁹ Settlement at Agreement at Article 4.1.3.5.

⁷⁰ Ginna Hearing Order, 151 FERC ¶ 61,023 at P 40.

⁷¹ *Id.*

⁷² While we are approving Article IV of the Settlement Agreement which includes a study, solicitation and reporting process to determine whether there is a reliability need after the Settlement RSSA expires on March 31, 2017, and a process to address such a need, we do not intend for Article IV to supersede the NYISO tariff RMR construct that

34. Lastly, we note that Article VI of the Settlement Agreement provides that:

To the extent the Commission considers any changes to the provisions of this Settlement Agreement during its term, as defined in Article 2.1, the standard of review for such changes shall be the most stringent standard permissible under applicable law. For the avoidance of doubt, the standard of review for any modifications to the Settlement Agreement, other than amendments agreed to by all Parties, whether proposed by a Party, any third party, or the Commission acting *sua sponte*, shall be solely the most strict standard set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), as clarified in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527 (2008) and refined in *NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 130 S. Ct. 693, 700 (2010).⁷³

Whereas, Article 10.17 of the Settlement RSSA provides that:

The standard of review for any modifications to this Agreement requested by a Party will be subject to the “public interest” standard of review set forth in *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Company*, 350 U.S. 348 (1956). See also *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527 (2008). The standard of review for any modifications to this Agreement requested by a non-party to this Agreement or initiated by FERC will be the most stringent standard permissible under applicable law. See *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010).⁷⁴

35. Because the Settlement Agreement appears to provide that the standard of review applicable to modifications to the Settlement Agreement proposed by third parties and the

the Commission approves. Where there is any conflict between Article IV and the NYISO RMR construct ultimately approved by the Commission, the NYISO RMR construct will govern.

⁷³ Settlement Agreement at Article VI.

⁷⁴ Settlement RSSA at Article 10.17.

Commission acting *sua sponte* is to be “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 Settlement by a third party or by the Commission acting *sua sponte*.

36. 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.⁷⁵ In *New England Power Generators Association v. FERC*,⁷⁶ however, the D.C. 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. In the event that the Commission applies this framework to the Settlement in the future, the Commission would consider the Settling Parties’ view that “the most stringent standard permissible under applicable law” is the “most strict standard set forth” in the cases cited in Article VI of the Settlement, as quoted above.

The Commission orders:

(A) The Settlement Agreement is hereby approved, subject to conditions, as discussed in the body of this order.

⁷⁵ *Panhandle Eastern Pipe Line Co., LP*, 143 FERC ¶ 61,041, at P 84; *Entergy Arkansas, Inc.*, 143 FERC ¶ 61,299, at P 92 (2013).

⁷⁶ *New England Power Generators Ass’n v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. 2013).

(B) The Settling Parties are directed to submit, within 30 days of the date of this order, a compliance filing, as directed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.