142 FERC ¶ 61,079
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

PJM Interconnection, L.L.C. Docket Nos. ER12-513-000
ER12-513-003

ORDER ACCEPTING PROPOSED SETTLEMENT AGREEMENT

(Issued January 31, 2013)

1. On November 21, 2012, PJM Interconnection, L.L.C. (PJM) filed with the Commission a Settlement Agreement and Offer of Settlement (Settlement Agreement, or Settlement) that represent a settlement of its Cost of New Entry (CONE) values used in its Reliability Price Model (RPM) that the Commission accepted and suspended for a period up to five months, to become effective the earlier of June 30, 2012, or a date set by a subsequent Commission order in this proceeding, subject to refund, and to the outcome of a hearing and settlement judge procedures. According to PJM, the Settlement represents a collaborative resolution that nearly all of the parties that have been active on the issues set for hearing in this proceeding either support or do not oppose. The Settlement Agreement is submitted on behalf of: American Electric Power Service Corporation (AEP),[1] Dominion Resources Services, Inc. (Dominion),[2] Edison Mission Energy, Exelon Corporation (Exelon), FirstEnergy Service Company, GenOn,[3] L.S. Power Associates, L.P., North Carolina Electric Membership Corporation

[1] AEP intervened in this proceeding on behalf of certain operating companies of the AEP system, i.e., Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company.

[2] Dominion Resources Services, Inc. (Dominion) intervened in this proceeding on behalf of its public utility affiliates Virginia Electric and Power Company and Dominion Energy Marketing, Inc.

[3] GenOn refers to GenOn Energy Management, LLC, GenOn Mid-Atlantic, LLC, GenOn Chalk Point, LLC, GenOn Power Midwest, LP, and GenOn REMA, LLC.

(NCEMC), Old Dominion Electric Cooperative (ODEC), PJM Industrial Customer Coalition (PJMICC), PJM, and PJM Power Providers Group (P3) (collectively, Settling Parties). The Settlement is contested by the Independent Market Monitor (IMM) and Maryland Public Service Commission (Maryland PSC). As discussed below, we approve the contested Settlement Agreement, finding that as a package, it presents an overall just and reasonable outcome for this proceeding. Accordingly, we will require PJM to make a compliance filing to make any Tariff revisions necessary to implement the Settlement Agreement.

I. Background

2. Since December 2006, PJM has had Open Access Transmission Tariff (Tariff) provisions (specifically Attachment DD) implementing a reformed Reliability Pricing Model (RPM). RPM is a competitive auction mechanism intended to ensure that sufficient electric capacity is committed to serve reliably the peak needs (plus a reasonable reserve margin) of loads in the PJM region generally and in specific capacity-constrained portions of that region.[4]

3. PJM secures capacity commitments under the RPM through a Base Residual Auction (Auction), held three years before a "Delivery Year," and three subsequent Incremental Auctions.[5] Under the auction clearing requirements of the RPM, PJM develops a "Variable Resource Requirement" (VRR) Curve related to capacity market demand.[6] On December 1, 2011, following a triennial review of key elements of the RPM, PJM filed amendments to its RPM Tariff. The filing proposed to revise the VRR curve and two inputs to the VRR curve formula, including the Gross CONE.

4. Gross CONE is an estimate of the total project capital cost and annual fixed operations and maintenance expenses of a new combustion turbine (CT) power plant (the so-called Reference Resource)[7] in the forward delivery year addressed by the RPM auctions. The PJM Tariff states a Gross CONE value for the PJM Region as a whole, and

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[4] *PJM Interconnection, LLC*, 117 FERC ¶ 61,331 (2006), *order on reh'g*, 119 FERC ¶ 61,318 (2007), *reh'g denied*, 121 FERC ¶ 61,173 (2007), *aff'd Pub. Serv. Elec. & Gas Co. v. FERC*, 324 Fed. App. 1 (D.C. Cir. 2009).

[5] A Delivery Year is a twelve-month period beginning on June 1 and ending on May 31. *See* Tariff Attachment DD, §§ 2.5 and 2.34.

[6] *See id*. § 5.10.

[7] *See id.* Attachment DD, § 2.58.

individual Gross CONE values for each of five subsets of the PJM Region identified in the PJM Tariff as "CONE Areas."[8]

II. Procedural History

5. The background section of the Settlement Agreement describes in detail PJM's December 2011 filing in this proceeding and the responsive pleadings.[9] PJM proposed, among other things, to replace the Gross CONE values for the five CONE Areas with new values based on estimates of the costs of delivering a new plant for the 2015-2016 Delivery Year and to establish a new methodology to determine the region-wide Gross CONE and region-wide Net CONE. PJM also proposed to modify the Gross CONE estimates for a representative combined cycle (CC) generation plant in each of the five CONE Areas, which it uses in the RPM's minimum offer price rule (MOPR).[10] PJM supported its proposed CONE values with detailed cost estimates prepared by independent consultants.

6. Certain generators protested the proposed Gross CONE values, alleging they were too low. GenOn and PSEG[11] also filed affidavits to support their position that the values were too low, and presented alternative estimates of CT and CC construction and operating costs.

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[8] *See id*. § 5.10(a)(iv)(A). *CONE Area 1* represents the Eastern Mid-Atlantic Area Council (MAAC), as comprised by the transmission facilities owned by: Public Service Electric and Gas Company, Jersey Central Power and Light Company, Atlantic City Electric Company, PECO Energy Company, Delmarva Power and Light Company, and Rockland Electric Company. *CONE Area 2* represents Southwest MAAC, as comprised by the transmission facilities owned by: Potomac Electric Power Company and Baltimore Gas and Electric Company. *CONE Area 3* designates the transmission facilities owned by: American Electric Power, Dayton Power and Light Company, Commonwealth Edison Company, Allegheny Power, Duquesne Light Company, American Transmission Systems, Inc., and Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc. *CONE Area 4* represents Western MAAC, as comprised by the transmission facilities owned by: PPL Electric Utilities Corporation, Metropolitan Edison Company, and Pennsylvania Electric Company. Finally, *CONE Area 5* designates the transmission facilities owned by Virginia Electric and Power Company.

[9] Settlement Agreement at 2-5.

[10] The MOPR prevents uncompetitive power sale bids from entering the capacity market. *See PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 103 (2006).

[11] PSEG refers to Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.

7. A group of state consumer advocate offices urged the Commission to accept PJM's filed updates to the Gross CONE values. The IMM filed a protest, but its protest did not take issue with the Gross CONE estimates. Some parties filed answers, many of which included additional affidavits.

8. On January 30, 2012, the Commission issued a Hearing Order accepting most of PJM's proposed Tariff changes to be effective January 31, 2012. However, concerning the proposed Gross CONE values, the Commission found that the intervenors raised material issues of disputed fact as to the proper calculation of the Gross CONE values.[12]

9. The Commission accepted the Gross CONE values for the five CONE Areas and suspended them until June 30, 2012, subject to refund, a hearing, and settlement judge procedures. It also rejected the new method for determining the PJM region-wide Gross CONE value. On April 11, 2012, the Commission affirmed its rejection of the proposed region-wide Gross CONE value.[13] The Commission also set the region-wide Gross CONE value for hearing and settlement judge procedures.[14]

10. The Chief Administrative Law Judge appointed Judge John P. Dring to serve as settlement judge.[15] The parties negotiated at eight conferences. Ultimately, the settlement conferences produced the Settlement Agreement filed on November 21, 2012.

11. On November 21, 2012, in accordance with Rule 602, PJM, on behalf of the Settling Parties in this proceeding, submitted a Settlement Agreement, which resolves all issues set for hearing in these proceedings. The Settling Parties are authorized to state that Calpine Corporation, Dayton Power and Light Company (Dayton), Dynegy Power Marketing, LLC, Illinois Municipal Electric Agency, Public Power Association of New Jersey, the New Jersey Board of Public Utilities, NextEra Energy Generators, NRG,[16] Pepco Holdings, Inc. (PHI), PPL,[17] PSEG, Rockland Electric Company, and

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[12] *PJM Interconnection, LLC*, 138 FERC ¶ 61,062, at P 41 (2012) (Hearing Order).

[13] In effect, the Commission found that the region-wide CONE value would be the just and reasonable region-wide Gross CONE value in PJM's rates ($112,868/MW-year).

[14] *PJM Interconnection, LLC*, 139 FERC ¶ 61,031 (2012) (Rehearing Order).

[15] *PJM Interconnection, LLC*, Docket No. ER12-513-000 (February 7, 2012) (unpublished order).

[16] NRG refers to NRG Power Marketing LLC, Conemaugh Power LLC, Indian River Power LLC, Keystone Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG Rockford LLC, NRG Rockford II LLC, and Vienna Power LLC.

Southern Maryland Electric Cooperative do not oppose resolution of this proceeding upon the terms set forth in the Settlement Agreement. Accordingly, nearly all of the parties that have been active on the issues set for hearing in this proceeding either support or do not oppose the Settlement Agreement.

12. The Settling Parties requested that the Commission approve the Settlement Agreement on or before January 20, 2013, so that the CONE and other values in this settlement can be posted to PJM's website, along with other relevant auction parameters, by February 1, 2013 to govern the capacity auction that PJM will conduct in May 2013.

13. On January 8, 2013, Administrative Law Judge Dring issued a Report of Contested Settlement notifying the Commission that the Settlement Agreement is contested and is before the Commission for its consideration.

III. Description of Proposed Settlement Agreement

A. Contents of the Proposed Settlement Agreement

14. In the Settlement Agreement, the Settling Parties agree that PJM will revise its RPM Tariff to establish the Gross CONE Area and region-wide Gross CONE values for the 2016-2017 Delivery Year. In Section II.A., they agree that PJM will include the following Gross CONE values for the CT Reference Resource for each indicated CONE Area: CONE Area 1, $140,000 per MW-year; CONE Area 2, $130,600 per MW-year; CONE Area 3, $127,500 per MW-year; CONE Area 4, $134,500 per MW-year; and, CONE Area 5, $114,500 per MW-year.

15. In Section II.B., the Settling Parties set at $128,000 per MW-year the region-wide Gross CONE value.

16. In Section II.C., the Settling Parties establish the following gross CONE values for the CC asset class for each indicated CONE Area: CONE Area 1, $173,000 per MW-year; CONE Area 2, $152,600 per MW-year; CONE Area 3, $166,000 per MW-year; CONE Area 4, $166,000 per MW-year; and CONE Area 5, $147,000 per MW-year.

17. In Section II.D., the Settling Parties state that while they agree to these Gross CONE values, they do not establish any method for calculating them.

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[17] PPL refers to PPL Electric Utilities Corporation, PPL EnergyPlus, LLC, PPL Brunner Island, LLC, PPL Holtwood, LLC, PPL Martins Creek, LLC, PPL Montour, LLC, PPL Susquehanna, LLC, Lower Mount Bethel Energy, LLC, PPL New Jersey Solar, LLC, PPL New Jersey Biogas, LLC, and PPL Renewable Energy, LLC.

18. Section II.E. of the Settlement Agreement addresses the implementation and effectiveness of the Settlement Agreement. The Settlement Agreement CONE values will be effective as of January 20, 2013. Under Attachment DD to the PJM Tariff, the CONE for a CONE Area used in the Auction becomes the Benchmark CONE for that area in the next Delivery Year.[18] The Benchmark CONE is subject to adjustment using information from the applicable Handy-Whitman Index.[19] Under Section II.E. of the Settlement Agreement, the Settlement Agreement Gross CONE values will establish the Benchmark CONE values prospectively, for the 2015-2016 Delivery Year, subject to adjustment for use in capacity auctions for subsequent Delivery Years. PJM is not required to reconduct the Auction (completed in May 2012) for the 2015-2016 Delivery Year. PJM will apply the Settlement Agreement Gross CONE values to any Incremental Auctions conducted for the 2015-2016 Delivery Year after the agreed values become effective in the Tariff. The Settlement Agreement Gross CONE values also will be used to determine the Gross CONE values for subsequent Delivery Years, including the Auction for the 2016-2017 Delivery Year held in May 2013.

19. Section II.E. of the Settlement Agreement also provides that the changes to PJM's existing Tariff will be made through a compliance filing after the Commission approves the Settlement Agreement.

20. In Section II.F., PJM agrees to conduct a stakeholder process to identify desired changes in the CONE triennial review process in light of lessons learned from the most recent triennial review process. The stakeholder process will include assessing the Handy-Whitman Index adjustment to the Gross CONE. PJM will file any resulting Tariff changes with the Commission in sufficient time to govern the next triennial review, or will file a status report if there is no stakeholder consensus on such changes.

21. The remaining sections of the Settlement Agreement contain notice, choice of law, and other provisions commonly included in settlement agreements of this nature.

B. <u>Explanatory Statement</u>

22. In the Explanatory Statement accompanying the Settlement Agreement (Explanatory Statement), PJM offers support for the Settlement Agreement.

23. PJM states that the Settling Parties arrived at all of the Gross CONE values in the settlement on a "black-box" basis. The Settling Parties agreed only on the values; there was no agreement on assumptions, estimates, or methodologies to calculate those values.

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[18] Tariff, Attachment DD, § 5.10(a)(iv)(B)(3).

[19] *Id.* §§ 5.10(a)(iv)(B)(1) and (2).

Still, PJM believes that the Commission can find support in the record for the settlement values.[20]

24. PJM argues that the CONE Settlement values fall within the range of its detailed estimates. PJM adds that the Settlement values are fairly close to the CONE estimates in its December 2011 Filing, and both parties that presented detailed alternative estimates - GenOn and PSEG - either support or do not oppose the Settlement. PJM states that the Commission could arrive at the Settlement values by crediting (in whole or in part) a handful of cost adjustments from among the dozens proposed by GenOn and PSEG. PJM filed a Brattle Settlement Affidavit offering illustrative adjustments that could produce the Settlement values.[21]

25. PJM states that estimating power plant costs is not an exact science and argues that the values presented are just and reasonable. PJM believes a settlement rate that (implicitly) adopts a few alternative cost estimates on some items along with PJM's cost estimates on other items can be just and reasonable.[22] PJM also states that the Brattle Group, which prepared the original estimates for the December filing, examined these revised figures and found that they are consistent with the methodology used and are within the zone of reasonableness.

26. PJM stresses that this Settlement only establishes new CONE values. The 2015-2016 CONE values stated in the Settlement Agreement will be applied in the three Incremental Auctions that are yet to be conducted for the 2015-2016 Delivery Year, and the Settlement values will be adjusted in accordance with the Tariff to determine the Gross CONE values to be used for subsequent Delivery Years, including the Auction for the 2016-2017 Delivery Year in May 2013.[23]

27. Section II.E. also provides that the specific Tariff changes are *pro forma* and are not being submitted through the Commission's eTariff system, but will be incorporated in the current effective Tariff through an appropriate filing by PJM following Commission approval of the Settlement Agreement. PJM therefore asks that the Commission, in its order on this Settlement, direct PJM in a compliance filing to file the changes shown in

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[20] PJM notes that the Commission already has in the record (from PJM, PSEG, and GenOn) three very detailed, alternative "bottom-up" estimates with hundreds of pages of supporting detail and explanation. Explanatory Statement at 9-10.

[21] *Id.* at 10-12.

[22] *Id.* at 12-15.

[23] *Id.* at 16-17.

the *pro forma* attachments as eTariff changes to PJM's Tariff, effective January 20, 2013.[24]

IV. Procedural Matters

28. On December 11, 2012, Commission Trial Staff (Trial Staff) and PSEG filed initial comments in support of the Settlement Agreement. Also on December 11, 2012, the IMM filed comments in opposition to the Settlement Agreement.

29. On December 19, 2012, AEP and PJM filed reply comments. On December 21, 2012, Dominion, Exelon, the Maryland PSC, P3, PJM Load Group, PSEG, and Trial Staff filed reply comments. On January 7, 2013, the IMM filed an Answer and Motion for Leave to Answer (IMM Answer).

V. Comments

A. Comments in Support of the Settlement Agreement

30. P3 supports the Settlement Agreement and states that the Settlement represents a reasonable compromise among parties with competing interests on a very challenging issue. P3 believes that the Settlement Agreement is a reasonable middle ground that is worthy of Commission approval.[25] Dominion supports the Settlement Agreement as just and reasonable and supported by the Brattle Settlement Affidavit. Dominion supports PJM's Reply Comments in response to the IMM's objections to the Settlement Agreement.[26] Exelon supports the reply comments submitted on December 19, 2012 by AEP and PJM. Exelon joins them in urging the Commission to disregard the IMM's request to reject the carefully developed and reasoned Settlement Agreement.[27] The members of the PJM Load Group[28] believe that the Commission should not modify the Settlement and upset the carefully balanced compromise reached by the many parties to this proceeding.[29]

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[24] *Id.* at 16.

[25] P3 Reply Comments at 3.

[26] Dominion Reply Comments at 2.

[27] Exelon Reply Comments at 1-4.

[28] PJM Load Group refers to ODEC, PJMICC, Delaware Division of the Public Advocate, and NCEMC.

[29] PJM Load Group Reply Comments at 2.

31. PSEG does not oppose Commission approval of the Settlement. While it continues to believe that CONE values for CONE Area 1 should be significantly higher for all the reasons it set forth previously,[30] PSEG recognizes that the Settlement Agreement represents a hard fought compromise among most of the parties to the proceeding on complicated and difficult issues.

32. Trial Staff supports the Settlement Agreement as fair, reasonable, and in the public interest and urges that it be certified to the Commission for its approval. Trial Staff states that the Settlement Agreement, if approved, will resolve all issues the Commission set for hearing. Trial Staff represents that the Settlement Agreement resolves the challenges to the calculation of the Area Gross CONE values set for hearing in the Hearing Order as well as the challenges to the PJM region-wide Gross CONE value set for hearing in the Rehearing Order. Trial Staff believes that approval of the Settlement Agreement will avoid further proceedings in this docket, and will conserve the resources of the parties and the Commission.[31] Trial Staff agrees with the Settlement Agreement's Explanatory Statement.[32]

B. Comments in Opposition to the Settlement Agreement

33. The IMM and the Maryland PSC (collectively, Contesting Parties) filed comments in opposition to the Settlement Agreement. The comments in opposition are addressed in detail below.

1. Initial Comments

34. The IMM argues that the Hearing Order found that intervenors had raised issues that "could not be resolved based on the submitted record." Therefore, this Settlement provides no record basis for the resolution of any issue, nor does it provide meaningful evidence to support the "black box" values it includes. The IMM believes that PJM's initial values are the best supported, and that this will not change without further development of the record.[33]

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[30] *See* "Motion to Intervene, Comments, Protest, and Motion for Suspension and Evidentiary Hearing of the PSEG Companies," *PJM Interconnection, L.L.C.*, Docket No. ER12-513-000 (filed Dec. 22, 2011); "Motion for Leave to Answer and Answer of the PSEG Companies," *PJM Interconnection, L.L.C.*, Docket No. ER12-513-000 (filed Jan. 6, 2012).

[31] Trial Staff Initial Comments at 8-9.

[32] *Id.* at 9-10.

[33] IMM Initial Comments at 4.

35. The IMM opposes applying Handy-Whitman adjustments to the upcoming Auction. The Settlement provides for the immediate, substantial upward adjustment of the settlement values by the Handy-Whitman Index for the first Auction to which it would apply, the May 2013 Auction for the 2016/2017 Delivery Year. [34]

36. The IMM notes that the Settlement states that "there is no agreement on a methodology for determining the PJM Region Gross CONE." Accordingly, the IMM believes that the Settlement's region-wide Gross CONE of $128,000/MW-year is illogical, inconsistent with the Commission's findings in this proceeding, unsupported, and should be rejected. The IMM argues that to be consistent with the Commission's determination that the region-wide net CONE should be determined on the basis of "where a peaking unit can be built at lower net cost," the PJM rules should establish that the region-wide Gross CONE is always equal to the CONE Area with the lowest net CONE.[35] The IMM states that the current rules are inadequate to determine the lowest net CONE. Rather than use region-wide net revenues with Area Gross CONE values, the IMM believes it would be more accurate to use the lowest net CONE of any CONE Area based on the Area Gross CONE value less the Area net energy and ancillary services (E&AS) revenue offset. PJM already calculates the area E&AS value, which the IMM believes it could use in place of the region-wide value.[36]

37. The IMM states that the Settlement proposes a region-wide Gross CONE of $128,000/MW-year and this level is higher than the level in both CONE Area 5 ($127,500/MW-year) and CONE Area 3 ($114,500/MW-year).[37] The IMM believes that a rational investor who could invest anywhere in the PJM region and expect to receive the same revenues will not incur costs of $128,000/MW-year when it could instead incur costs of $114,500/MW-year.[38]

2. <u>Reply Comments</u>

38. The Maryland PSC also agrees with the IMM that the Settlement proposal for region-wide Gross CONE does not comport with the Hearing Order. It argues that rather than incorporate the Commission's guidance that the lowest CONE Area value should be used in setting a just and reasonable region-wide Gross CONE, PJM adopted (without justification or explanation) a region-wide Gross CONE value above the lowest CONE

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[34] *Id.* at 5.

[35] *Id.* at 6.

[36] *Id.* at 6-7.

[37] We note that the IMM has transposed the values for CONE Areas 3 and 5.

[38] IMM Initial Comments at 5.

Area value.[39] The Maryland PSC also urges the Commission to direct PJM to adopt and utilize the lowest CONE Area value, consistent with the Hearing Order, as the value for region-wide Gross CONE in the forthcoming May 2013 Auction. The Maryland PSC recommends that PJM's December 2011 as-filed CONE Area values remain in place until all CONE components and adjustment methodologies have been fully vetted through a robust stakeholder process prior to the May 2014 Auction.[40]

39. PJM states that the Commission's regulations set forth the procedures and principles the Commission uses to resolve opposition to a settlement. PJM explains that the regulations draw a distinction that turns not merely on whether a settlement is opposed, but whether it is "contested." PJM argues that not every adverse comment on a settlement renders it "contested,"[41] and that if a commenter wishes to render a settlement "contested" by "alleging a dispute as to a genuine issue of material fact," then the comment must include an affidavit.[42] PJM further states that if, after receipt of the comments, the Commission determines that an offer of settlement is contested, the Commission "may decide the merits of the contested settlement issues," if: (1) "the record contains substantial evidence upon which to base a reasoned decision"; or (2) "the Commission determines there is no genuine issue of material fact."[43]

40. PJM explains that the Settlement Gross CONE values also are broadly accepted by nearly all participants in this proceeding, including Trial Staff. Under applicable court precedent, the Commission is permitted to take that support into account as part of its rationale for accepting this aspect of the Settlement.[44]

41. PJM believes that the IMM's comments do not satisfy the requirements in the Commission's regulations for a comment that seeks to contest a settlement by raising a genuine issue of material fact, because the IMM's comments lack the required affidavit and do not state any reason to support a claim that the Settlement CONE values are too high, too low, or otherwise unreasonable.[45] PJM argues that the IMM merely points to the finding in the Hearing Order that certain protestors had raised issues that "could not

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[39] Maryland PSC Reply Comments at 2-3.

[40] *Id.* at 3.

[41] PJM Reply Comments at 3.

[42] *Id.* at 6.

[43] *Id.* at 7.

[44] *Id*. at 16.

[45] *Id.* at 8-9.

be resolved based on the submitted record"; and then asserts that the Settlement "resolves none of the issues set for hearing." But PJM believes this ignores the present posture of this case.

42. PJM disagrees with the IMM's argument that the CONE estimates in PJM's December 2011 Filing are the "best supported." PJM avers that this assertion is bare opinion, unaccompanied by any showing of deficiencies in the evidence presented by any other party.[46] PJM states that the IMM Initial Comments offer nothing to contradict any of the showings in the Brattle Settlement Affidavit, nor do the IMM Initial Comments contest the Brattle Settlement Affidavit's concessions that PJM's original estimates of working capital and inventories or electrical interconnection costs should be increased.

43. PJM also believes that the IMM Initial Comments erroneously object to the continued use of the Tariff's existing Handy-Whitman Index adjustment method. PJM argues that the IMM Initial Comments ignore the fact that the Tariff already provides for adjustment of the 2015 CONE values for a 2016 Delivery. PJM states that the Commission expressly approved the Handy-Whitman Index adjustment method and, absent a superseding section 205 filing by PJM, the CONE estimates prepared for a prior Delivery Year will be adjusted using the Handy-Whitman Index adjustment method for use in a subsequent Delivery Year.[47]

44. PJM believes that the IMM's assertion that new entry will locate in the lowest cost area oversimplifies the practical complications associated with siting new generation. In practice, PJM contends that there likely will be limited sites appropriate for a major new power plant in any lowest cost area.[48] PJM believes the IMM Initial Comments ignore other considerations relevant to siting a new plant. PJM argues that relying on a Gross CONE, therefore, that is somewhat higher than the lowest CONE Area Gross CONE value would facilitate adding capacity at a greater number of locations within the unconstrained part of the PJM Region, and embodies a more realistic assessment of the actual cost to add capacity in the quite large and geographically diverse unconstrained portion of the PJM Region.[49]

45. Trial Staff explains that, although the IMM alleges disputes of fact, the IMM fails to comply with the Commission's requirement in Rule 602(f)(4) that it include a supporting affidavit. Thus, Trial Staff urges the Commission to conclude that there is no

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[46] *Id.* at 9-10.

[47] *Id.* at 19.

[48] *Id.* at 16.

[49] *Id.* at 17.

genuine issue of material fact and approve the Settlement by finding that each of the IMM's contentions lacks merit.[50] Trial Staff observes that the record includes detailed, alternative "bottom-up" estimates of the costs of adding new CT and CC capacity to the PJM Region.

46. Trial Staff adds that without Rule 602(f)(4) support, the IMM makes mere conjectures. Trial Staff believes that the IMM seeks to nullify, without evidence, the results of a legitimate Commission settlement process. Trial Staff stresses that estimating the cost of a new plant to provide incremental capacity requires a number of assumptions over which reasonable parties might disagree.[51]

47. Although P3 agrees with the IMM that CONE values should "reflect real world costs of competitive entry in PJM," P3 parts ways with the IMM's conclusion that the Settlement is "unsupported in the record and should be rejected." To the contrary, P3 states that there is ample evidence in the record that the CONE values for all five regions are just and reasonable. Moreover, by better aligning the E&AS revenue offset with the CONE calculation, the Settlement materially improves the process going forward.[52] P3 agrees with the justification set forth by PJM in its reply comments that explain why certain adjustments to PJM's original proposal are appropriate. P3 believes that the ultimate values put forth in the Settlement are within the zone of reasonableness.[53]

48. Trial Staff believes that the Commission should reject the IMM's request to condition the Settlement Agreement by not applying the Handy-Whitman Index adjustment to the Gross CONE benchmark to be used during the May 2013 Auction. Trial Staff argues that the IMM is mounting a last-minute protest on an issue that it never raised before and a collateral attack on the Commission's decision not to set the Handy-Whitman Index adjustment for hearing. Trial Staff argues that the CONE values in the Settlement Agreement were part of a package of considerations. Trial Staff contends that by agreeing to continue the Handy-Whitman Index adjustments, the parties agreed to the amount by which they would increase or decrease.[54]

49. Trial Staff asserts that the IMM's claims that the Gross CONE values are unsupported are wrong. The Explanatory Statement, which was filed on behalf of the Settling Parties, includes the Brattle Settlement Affidavit which illustrates several cost

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[50] Trial Staff Reply Comments at 2.

[51] *Id.* at 4.

[52] P3 Reply Comments at 3.

[53] *Id.* at 3.

[54] Trial Staff Reply Comments at 6-7.

categories the December 2011 CONE Filing may have understated and other costs that were omitted altogether from the Filing. Trial Staff contends that because a just and reasonable rate may be within a range of values, the Commission may find that substantial evidence exists to approve the Gross CONE area values. Trial Staff notes that the IMM has supplied no affidavit of its own either to dispute the Brattle Settlement Affidavit or to support its claim that PJM's values are the best supported.[55]

50. AEP disputes the IMM's logic that a competitive investor would invest in the region with the lowest costs. Even if it were physically possible, the preponderance of new units that would be built in a single state would quickly create congestion issues. Further, AEP adds that this investment pattern seems unlikely because it would create market power concerns.[56]

51. Dominion filed separately to address only the third issue raised by the IMM concerning the use of the proposed region-wide Gross CONE of $128,000/MW-year and not the lowest net CONE.[57] Dominion notes that development costs vary within CONE Area 5.[58] Dominion notes further that the unconstrained portion of PJM is a very large area, across which generation could be built for many reasons. Dominion believes that region-wide Gross CONE should not be set in a manner to discourage diversity of location.[59]

52. Trial Staff states that the IMM has not supported its proposed methodology for determining the region-wide Gross CONE. Trial Staff stresses that the IMM has failed to provide an affidavit under Rule 602(f)(4) and makes multiple and compound assertions, without any testimony.[60] Trial Staff adds that the IMM ignores the fact that the Commission granted rehearing of a portion of the Hearing Order on which the IMM relies. Trial Staff explains that the Commission, in its Hearing Order, rejected PJM's proposed change in its methodology for calculating the region-wide Net CONE, and its proposal to use the Gross CONE component of the Net CONE to set the region-wide Gross CONE. However, on rehearing, the Commission set the region-wide Gross CONE

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[55] *Id.* at 1-2.

[56] AEP Reply Comments at 4-5.

[57] Dominion Reply Comments at 2.

[58] *Id.* at 4.

[59] *Id.* at 5.

[60] Trial Staff Reply Comments at 8.

for settlement negotiations. Trial Staff argues that the IMM is trying to attribute a final decision to the Commission where one has not been made.[61]

53. The PJM Load Group believes that the region-wide Gross CONE value in the Settlement is supported by the evidence presented in this proceeding and is generally consistent with the Gross CONE values of each of the five CONE regions. The PJM Load Group believes that the Commission should find that the overall Settlement, inclusive of the region-wide Gross CONE value, is just, reasonable, and not unduly discriminatory.[62]

3. Answer

54. The IMM believes that the genuine issues of material fact in this proceeding are the same issues that the Commission set for hearing: (i) "a number of issues of disputed fact as to the proper calculation of the Gross CONE values"; and (ii) "the region-wide Gross CONE value." According to the IMM, the black box settlement specifically declines to resolve any of these disputed issues, much less provide record support for any resolution. The IMM argues that because the Commission has already identified genuine issues of material fact in this proceeding and those issues remain in dispute, PJM's argument that no genuine issue of material fact remains in dispute should be rejected. What remains to be decided, whether at hearing or on the basis of the existing record, is which values included in the record are best supported: the values filed by PJM or the Settlement values.[63]

55. The IMM believes that no additional affidavit is needed to address the Brattle Settlement Affidavit. The IMM states that the Brattle Settlement Affidavit specifically declines to explain how the values in the Settlement were calculated. The IMM points out that the Settlement values are the product of an agreement. The IMM does not dispute that the Settling Parties have agreed to support the CONE Settlement values. Instead, the IMM explains that its question is whether the Brattle Settlement Affidavit actually satisfies the requirement of Rule 602 that a contested settlement include substantial evidence upon which to base a reasoned decision.[64]

56. The IMM states that it was convinced based on its independent review and evaluation of the Brattle Initial Affidavit and supporting documentation, and remains convinced, that the values initially filed by PJM adequately reflect prevailing industry

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[61] *Id.* at 8-9.

[62] PJM Load Group Reply Comments at 2.

[63] IMM Answer at 2.

[64] *Id.* at 4.

conditions. Based on information presented during months of confidential settlement discussions and other sources, the IMM believes that the filed values are at the high end of values that reflect prevailing industry conditions.[65]

57. The IMM states that the choice now is between values filed by PJM initially, which are supported by the Brattle Initial Affidavit, and the values filed by PJM for settlement reasons, which are supported by the Brattle Settlement Affidavit. The IMM asserts that the CONE values filed by PJM are based on an extensive cost study and a substantive affidavit included in the record. It notes that PJM continues to prefer those values and that no cost study or substantive affidavit supports the CONE Settlement values. The IMM adds that the CONE Settlement values differ from the values in every cost study included in the record.[66]

58. The IMM states that the Commission can resolve the region-wide CONE Area on the basis of the existing record, consistent with its finding in the Rehearing Order. The IMM asserts that the affidavit supporting PJM's filed position is the Brattle Initial Affidavit, submitted on December 1, 2011, by PJM, along with the supporting study prepared by The Brattle Group with CH2M Hill and Wood Group Power Operations. The IMM explains that it supported this position when it was filed, and believes that it is the best supported set of CONE values in the record as it now stands. The IMM asserts that arguments that no affidavit exists in support of its position are incorrect.[67]

59. The IMM argues that the purpose of the RPM auction parameters is not to forecast where investment in new units in PJM will occur. Rather, the IMM believes that the RPM auction parameters assume objective, economic and rational behavior and attempt to establish the best available cost reference on that basis. The IMM states that if the best available analysis determines the net costs of investment in a certain location are lowest, all other consideration held equal, it is reasonable to base the market design parameters on the costs at that location.[68]

VI. <u>Discussion</u>

60. In order to approve the proposed Settlement Agreement over the objections of the IMM and Maryland PSC, the Commission must find that the Settlement is just and

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[65] *Id.*

[66] *Id.* at 4-5.

[67] *Id.* at 3.

[68] *Id.* at 13.

reasonable.[69] In determining whether to approve a contested settlement under that standard, section 385.602(h)(1)(i)[70] of the settlement rules permits the Commission to decide the merits of the contested issues, if the record contains substantial evidence on which to base a reasoned decision, or if the Commission determines there is no genuine issue of material fact. In addition, as the Commission held in *Trailblazer*, even if some individual aspects of a settlement may be problematic, the Commission still may approve a contested settlement as a package if the overall result of the settlement is just and reasonable.[71] When the Commission takes this approach under *Trailblazer*, it need not find that the settlement rate is exactly the rate the Commission would find just and reasonable on the merits after litigation.[72] Instead, the Commission need only find that the settlement rate falls within a range of reasonableness and that the contesting party would be in no worse position under the settlement agreement than if the case were litigated.[73]

61. After considering the IMM's and Maryland PSC's comments opposing the Settlement, we find that those comments do not raise any genuine issue of material fact. We also find that the overall result of the Settlement is just and reasonable. Accordingly, we approve the Settlement for all parties.

62. The IMM and the Maryland PSC request that we retain PJM's filed December 2011 CONE values for the purposes of the May 2013 Auction and, thereby, reject the Settlement CONE values. We will not modify the CONE values proposed in the Settlement Agreement. We find that these values are a reasonable estimate of CONE for the Auction, and we believe they are supported by substantial evidence in the record. Moreover, 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. We disagree with the IMM that there is not an adequate record basis to accept the Settlement CONE values. We are also not persuaded to condition our acceptance of the

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[69] *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,339 (1998), *reh'g*, 87 FERC ¶ 61,110 (1999), *reh'g*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*) (citing *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974)).

[70] 18 C.F.R. § 385.602(h)(1)(i) (2012).

[71] *Trailblazer*, 85 FERC ¶ 61,345 at 62,342-3, explaining what that order described as the second of three approaches the Commission has used to approve contested settlements, without severing the contesting parties.

[72] *Id.* at 62,343.

[73] *Id.*

Settlement CONE values on PJM's immediate commencement of a new CONE filing, per the IMM's recommendation.

63. The Commission recognizes that the Settling Parties arrived at the Settlement CONE values after extensive negotiations. We note that, as Trial Staff points out, all Parties that filed affidavits about the Gross CONE values either support or do not oppose the Settlement Agreement. We agree that these parties fairly represent both load and supply interests and note that under *Trailblazer*, we may consider such a broad level of support when considering whether to accept a contested settlement. Further, we agree with P3 that the IMM has not supported its assertion that the Settlement values are unsupported in the record and should be rejected. As noted above, neither of the Contesting Parties submitted an affidavit supporting their position that we should reject the Settlement CONE values. In contrast, parties who either support or do not oppose the Settlement introduced three affidavits into the record as of the date when we set this matter for hearing. Further, Settling Parties in their Explanatory Statement attached the Brattle Settlement Affidavit which demonstrates in several ways that the Settlement values are within the zone of reasonableness. Therefore, we find that substantial evidence exists to approve the Gross CONE area values.

64. The IMM contends that PJM should not apply the Handy-Whitman Index adjustments to the Settlement CONE values for use in the May 2013 Auction for the 2016-2017 Delivery Year. We disagree. Instead, we find that PJM must apply the Handy-Whitman Index adjustments as required in the Tariff. PJM intended to use its filed December 2011 CONE values in the May 2012 Auction for the 2015-2016 Delivery Year. Moreover, all of the affidavits in this record contain analyses for CT and CC CONE values for the 2015-2016 Delivery Year. Based on these affidavits, we found above that the CONE values are supported by substantial evidence in the record. Therefore, we find that it would be unreasonable to not apply the Handy-Whitman Index adjustments to the Settlement CONE values for the May 2013 Auction for the 2016-2017 Delivery Year, as required in the Tariff. Finally, we agree with the parties who assert that the issue of how to apply the Handy-Whitman Index adjustments was not set for hearing and, therefore, is beyond the scope of this proceeding.

65. In addition, we will not modify the region-wide Gross CONE value proposed in the Settlement Agreement. Accordingly, we will not direct PJM to utilize the lowest CONE Area value for the region-wide Gross CONE value, as the IMM and the Maryland PSC request. As an initial matter, we note that we granted rehearing on the region-wide Gross CONE value, setting only the *value* for hearing and settlement judge procedures.[74] We did not require the parties to propose an alternate *methodology* for calculating the region-wide Gross CONE value to replace the stated value that the Commission

[74] Rehearing Order at P 18.

previously found to be just and reasonable.[75] However, we did not grant rehearing on the region-wide Net CONE value, inclusive of the calculation of the region-wide E&AS revenue offset.[76] Instead, we stated that once a just and reasonable region-wide Gross CONE is established, PJM can calculate the region-wide Net CONE by subtracting the region-wide E&AS revenues from the region-wide Gross CONE.[77]

66. Further, we reiterate that our acceptance of the region-wide Gross CONE value of $128,000/MW-year will result in a lower value than if we reject the Settlement. As we explained above, PJM used a region-wide Gross CONE value of $131,303/MW-year in the May 2012 Auction for the 2015-2016 Delivery Year, after proper application of the Tariff-required Handy-Whitman Index adjustments.[78] For the May 2013 Auction for the 2016-2017 Delivery Year, PJM will use the $128,000/MW-year value (subject to adjustment by the Handy-Whitman Index) rather than the $131,303/MW-year value (also subject to adjustment by the Handy-Whitman Index). We conclude that the IMM and Maryland PSC are in no worse position under the Settlement Agreement, and may very well be in a better position, than if the case were litigated on the merits.[79] We note that the Settling Parties did not agree to calculate the region-wide Gross CONE on any particular methodology and therefore, we emphasize that our acceptance of the Settlement Agreement's region-wide Gross CONE value does not establish any precedent on this issue.

67. The IMM's and the Maryland PSC's comments suggest, as a matter of policy, that the region-wide Gross CONE value should be equal to the lowest Gross CONE of any CONE Area. The Settlement Agreement does not propose a methodology for calculating

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[75] *Id.* P 19.

[76] *Id.* P 22.

[77] *Id.* P 23.

[78] PJM calculated the $131,303 value for the region-wide Gross CONE used in the May 2012 Auction for the 2015-2016 Delivery Year by applying the three most recently published twelve-month changes of the Applicable Handy-Whitman Index to the Tariff-stated value of $112,868, first established for use in the May 2009 Auction for the 2012-2013 Delivery Year. In the May 2013 Auction for the 2016-2017 Delivery Year, PJM will apply the Applicable Handy-Whitman Index adjustments to the CONE values established by the Settlement Agreement.

[79] Under section 205 of the Federal Power Act, the existing just and reasonable rate establishes the rate floor for the filing. Any reduction below the just and reasonable rate would have to occur under section 206, and we do not find that there is sufficient justification provided to establish a section 206 proceeding.

the region-wide Gross CONE, nor did we require the establishment of a methodology to do so.[80] Region-wide Gross CONE is used to calculate region-wide Net CONE by subtracting the region-wide E&AS revenue offset from it. The mere fact that the region-wide Gross CONE value is above the Gross CONE value in a CONE Area does not necessarily result in an illogical price signal, as argued by the Contesting Parties. For example, if the region-wide Gross CONE value is above the value for any of the five CONE Areas, but the E&AS revenue offset for that CONE Area is lower than the region-wide E&AS revenue offset, the Area Net CONE value might be higher than the region-wide Net CONE value. Thus, we find that it is a reasonable outcome, in the context of the instant proceeding, to establish a region-wide Gross CONE value that is above the Gross CONE value in some CONE areas.

68. The Settlement also provides benefits that would not likely exist if this case were litigated on its merits. For example, the Settlement provides for a stakeholder process to strengthen the triennial review process in order to, among other things, reassess the Handy-Whitman Index adjustment method. Both the IMM and the Maryland PSC supported this aspect of the Settlement in their comments. If the Settlement is approved, the Settlement values will be effective only through the 2016-2017 and 2017-2018 Delivery Years, after which a new review will be necessary.

69. In addition to the above policy issue, the IMM's objection to the Settlement Agreement also raises a factual issue by alleging that there is a lack of evidentiary support for the other CONE values in the Settlement. The IMM argues PJM's December 2011 Filing provides better support for the CONE values than for the Settlement values.

70. We find however that the record contains sufficient evidence for concluding that the Settlement values as a whole are just and reasonable. While the IMM seeks to rely solely on the initial filed values, the Commission in the Hearing Order recognized that these estimates may well have failed to accurately consider several elements, including "electrical and gas interconnection costs, property tax estimates, location-specific adjustments, and costs for material, labor, and equipment."[81] As PJM points out, "estimating the cost of a power plant is not an exact science"[82] and the settlement values are fairly close to the CONE estimates in its December 2011 Filing, and both parties that presented detailed alternative estimates--GenOn and PSEG--either support or do not oppose the Settlement.[83] PJM showed that utilizing the cost adjustments proposed by the

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[80] *See* Rehearing Order, 139 FERC ¶ 61,031 at P 19.

[81] Hearing Order, 138 FERC ¶ 61,062 at P 16.

[82] Explanatory Statement at 12.

[83] *Id.* at 10.

other protesters would produce CONE values similar to the Settlement values. Moreover, the Brattle Group finds that the revised estimates are within the zone of reasonableness.

71. In contrast to the multiple affidavits submitted by PJM and others containing estimate the costs of building new CT and CC capacity in the PJM region, the IMM neither provides evidence to address these, or any other, inadequacies in the Settlement CONE values, nor suggests alternative adjustments of values. Rule 602(f)(4) of the Commission's regulations requires that "any comment that contests a settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any issue of material fact by specific reference."[84] We therefore find that the Settlement values are just and reasonable and the IMM has not raised a material issue of disputed fact.

72. Lastly, we note that we will not modify the stakeholder process requirements as stated in the Settlement Agreement. No party opposes the Settlement's provision requiring PJM to conduct a stakeholder process to identify any desired changes in the triennial review process. In addition, no party objects to including in the stakeholder process a reassessment of the CONE adjustment methodologies, including whether to retain or modify the use of the Handy-Whitman Index to adjust the CONE values between triennial review periods. However, we agree with PJM and AEP that the Contesting Parties' proposal for a mandatory section 205 filing goes well beyond the triennial review provisions in the Tariff. Therefore, we will not require PJM to immediately conduct a new stakeholder process for the purpose of developing new CONE values.

73. However, as recognized by the IMM and the Maryland PSC, the Commission has previously stated that it would be reasonable to establish a VRR Curve for the unconstrained area that is based on the "lowest net cost" of entry.[85] Due to the interconnected nature of the region-wide Gross CONE and the region-wide Net CONE, and the Commission's previous statements in the Hearing Order in this proceeding, we require PJM to file an informational report on its efforts to address this issue with its stakeholders by September 1, 2013.

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[84] 18 C.F.R. § 385.602(f)(4) (2012).

[85] Specifically, in the Hearing Order at P 63, the Commission stated that: "[w]ithin the unconstrained portion of the PJM region, developers would have an incentive to build any new peaking capacity that is needed where such capacity can be constructed at the lowest net cost. Therefore, it is reasonable to establish a VRR Curve for the unconstrained area based on the net entry cost within the unconstrained area where a peaking unit can be built at lowest net cost. Establishing a VRR Curve at a higher cost would provide more revenues to new entrants than are needed to encourage efficient entry in the unconstrained area."

The Commission orders:

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

(B) PJM is hereby directed to make a compliance filing within 30 days of the date of this order, to file the Tariff revisions necessary to implement the Settlement Agreement.

(C) PJM is hereby directed to make an informational filing by September 1, 2013, as discussed above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.