UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

H.A. Wagner LLC Brandon Shores LLC	Docket Nos. ER24-1787, 1787-001 Docket Nos. ER24-1790, 1790-001 (not consolidated)

PROTEST OF CONTESTED SETTLEMENT OF THE MARYLAND OFFICE OF PEOPLE'S COUNSEL

Pursuant to Rule 602(f)(2) of the Rules of Practice and Procedure[1] of the Federal Energy Regulatory Commission ("FERC" or the "Commission"), the Maryland Office of People's Counsel ("MPC") respectfully submits this protest to the separate—though largely similar—Joint Settlement Offers (the "JSOs"), simultaneously filed with the Commission, by H. Wagner LLC ("Wagner") and Brandon Shores LLC ("Brandon Shores"), respectively, each dated January 27, 2025 , in the captioned proceedings currently pending before the Commission.[2] Those proceedings were initiated by the

[1] 18 CFR § 385.602 (f)(2).

[2] Wagner and Brandon Shores are affiliated companies wholly owned, through intervening subsidiaries, by Talen Energy Corporation ("Talen"), their ultimate parent. Initial Talen Filings (p. 4 of the Initial Brandon Shores Filing, same for Initial Wagner Filing) ("All of the membership interests in Brandon Shores [and Wagner] are held by Raven FS Property Holdings LLC, all of whose membership interests are held by Raven Power Fort Smallwood LLC ('RPFS'). All of the membership interests of RPFS are held by Raven Power Finance LLC, which is wholly owned by Raven Power Generation Holdings LLC ('Raven Holdings'). All of the membership interests of Raven Holdings are held by Talen Generation LLC, which is wholly owned by Talen Energy Supply, LLC ('Talen Energy Supply'). All of the membership interests of Talen Energy Supply are held by Talen, a public corporation traded on the over-the-counter markets under the ticker 'TLNE.'"). For simplicity, Brandon Shores and Wagner are referred to as Talen, unless the context requires a more specific reference.

filings, dated April 18, 2024 (the "Initial Talen Filings"), by Wagner (docketed as ER24-1787) and by Brandon Shores (docketed as ER24-1790) for individual Continuing Operations Rate Schedules ("CORS") applicable to each of the H.A. Wagner and Brandon Shores power plants located near Baltimore, Maryland (collectively, the "Power Plants"). Pursuant to both of the Initial Talen filings, Talen agreed to provide so-called Part V reliability service (sometimes referred to as service under a "Reliability Must Run" or "RMR" arrangement) under the terms of the Open Access Transmission Tariff (the "OATT") of PJM Interconnection, LLC ("PJM"), OATT, §§113-119.[3] Moreover, in making those filings, Talen elected to seek a "cost of service recovery rate" of compensation as determined by the Commission.[4]

MPC is charged by Maryland statute with, among other matters, representing and protecting the interests of Maryland residential and non-commercial consumers with respect to electric service.[5] As stated in MPC's Initial Protest, most of the Talen RMR arrangements' costs will be paid by Maryland ratepayers[6] netted against credits from the PJM capacity market accruing only in future base residual auctions ("BRAs") as a result

[3] RMR or "reliability must-run" is a general term used in the electric utility industry to describe roughly similar functions—namely requested service of a generating resource beyond its proposed date for deactivation to avoid grid reliability violations. The function and operation of RMR resources can vary across the different Regional Transmission Organizations such that the term, while useful shorthand, should be considered in the context of the particular RTO under investigation. The PJM OATT does not expressly use the term.

[4] OATT, Part V, §119.

[5] Md Code, Public Utilities Article, §§ 2-204, 2-205.

[6] *See* Protest and Comments of the Maryland Office of People's Counsel and the Southern Maryland Electric Cooperative, May 16, 2024 ("MPC Initial Protest), p, 6.

of the Commission's recent order in docket ER25-682.[7] MPC timely filed doc-less motions to intervene in each of the proceedings, docketed as ER24-1787 and ER24-1790. MPC subsequently filed its protest of and comments on the Initial Talen Filings by pleading, filed jointly with the Southern Maryland Electric Cooperative, dated May 16, 2024 ("MPC's Initial Protest").

The Commission issued a single order dated June 17, 2024, accepting for filing both of the Initial Talen Filings, subject to refund (the "Initial Order").[8] In the order, the Commission established hearing and settlement procedures, as a predicate to a trial-type evidentiary hearing, to address several issues, including the application of the Commission's original cost test and the determination of "rate base" for establishing the annual fixed revenue requirements ("AFRRs") under the CORS for the Power Plants.[9] The Commission expressly reserved decision on the merits of the Initial Talen Filings, determining that the filings "have not be shown to be just and reasonable and may be unjust and unreasonable, discriminatory or preferential or otherwise unlawful."[10] Talen now files the JSOs seeking Commission approval for each of the Wagner and Brandon Shores CORS, as modified by the JSOs.[11]

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[7] *PJM Interconnection, LLC*, 190 FERC ¶ 61,088 (Feb. 14, 2025)

[8] *H.A. Wagner LLC and Brandon Shores LLC*, 187 FERC ¶ 61,176 (2024).

[9] *Id.* P 59.

[10] *Id.* P 56.

[11] The JSOs are identical in major respects and relate to overlapping subject matter. Accordingly, MPC's protest addresses the two JSOs on a consolidated basis in this pleading.

INTRODUCTION

The Talen JSOs implicate important matters, but, in their current form, at inflated rates in violation of the Federal Power Act's ("FPA") requirement that rates be just and reasonable.[12] On the one hand, Talen commits under the JSOs to continued necessary operation of the Power Plants; but, on the other, seeks an excessive level of compensation violating fundamental Commission principles of cost recovery and rendering the rates unjust and unreasonable contrary to the FPA. The Commission should modify the JSOs to ensure continued operation of the Power Plants but at a level of compensation consistent with the "cost of service" election that Talen made in the Initial Talen Filings for the provision of OATT, Part V Reliability Service.[13]

As determined by PJM, the continued operation of the Power Plants is required to preserve grid reliability for an extended time before upgrades to the PJM-administered transmission grid can be installed to allow for the Power Plants to shut-down permanently without creating grid reliability violations. Prior to the filing of the JSOs, Talen repeatedly asserted that it would shut the Power Plants down, notwithstanding PJM's request for their continued operation under RMR arrangements.[14] Through the

[12] 16 U.S.C. § 824d.

[13] The JSOs also would hard-wire the claimed levels of compensation into any possible future order directing the Power Plants operation pursuant to FPA § 202(c). For the same reasons that the "cost of service" rate sought by Talen under the PJM OATT are not just and reasonable, the level of compensation sought by Talen in the event of the issuance of § 202(c) orders affecting the Power Plants is unjust and unreasonable. Rate issues for service required by a § 202(c) order are "refer[red] to the [Commission] for determination by that agency in accordance with its standard and procedures." 10 CFR § 205.376.

[14] *See, e.g.*, Letter of Dale Lebsack, Talen Energy President, to David Souder, Executive Director, System Planning, PJM (June 23, 2023) (responding to PJM's designation of the Brandon Shores' units as RMR

JSOs, Talen agrees to RMR arrangements for continued operation of the Power Plants at excessive levels that are not just and reasonable, are unsupported by any record evidence and contrary to Commission precedent concerning the proper determinants of the level of compensation for "cost of service recovery."[15] Put simply, it is readily apparent that Talen extracted a high level of compensation under the threat of shutting down the Power Plants and creating the grid reliability violations that PJM determined would result.

In considering the protests of the JSOs, the Commission should also be aware of the larger context of the Power Plants' status as RMR units and the timing of Talen's deactivation notices. That timing resulted in a huge increase in revenues to Talen's portfolio of generation in PJM from PJM's now completed BRA for delivery year 2025/2026—the increase due to the withdrawal of the Power Plants from PJM's capacity market as a result of deactivation and RMR status.[16]

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units: "In short, because (i) the NPDES permit and Settlement Agreement preclude operation using coal after December 31, 2025, (ii) Brandon does not have requisite certainty that Conversion can be achieved timely and economically to meet the period of the RMR Need, and (iii) it is not clear whether the Conversion is even within the scope of RMR, **Brandon cannot agree to an RMR arrangement**." (emphasis supplied)). In subsequent correspondence, PJM noted that Talen had not kept PJM aware of its decision not to pursue the cited "Conversion" until the formal notice of the deactivation of Brandon Shores. Letter of M. Asthana, PJM President and CEO, to Josh Tulkin *et al.* (Dec. 5, 2023).

[15] MPC's protest addresses Talen's misapplication of the Commission's original cost test in determining the cost-of-service revenue requirements for the Power Plants. MPC has raised in this proceeding in its Initial Protest and in pleadings filed in the NRG Indian River Unit 4 RMR proceeding, ER22-1539/ER23-2688, the infirmity of recovery of sunk investment costs or costs written off as accounting loss impairments under RMR arrangements under the PJM OATT. In the Indian River Unit 4 RMR proceeding, the Commission recently ruled against these arguments, *NRG Business Marketing LLC*, 190 FERC ¶ 61,026 (Jan. 16, 2025); but that determination is the subject of a pending request for rehearing filed by the PJM IMM and MPC. MPC does not waive its right to assert those arguments in ER22-1539 and in this proceeding pending the results of the request for rehearing.

[16] *See* Maryland Office of People's Counsel, *Bill and Rate Impacts of PJM's 2025/2026 Capacity Market Results and Reliability Must-Run Units in Maryland* (August 2024, corrected 8/29/24) at 27; IMM,

To be clear, MPC supports continued operation of the Power Plants under RMR arrangements in accordance with PJM's Tariff during the period required to construct the necessary transmission upgrades to enable the Power Plants' retirements. MPC's protest is focused on the issue of excessive compensation demanded by Talen and embedded in the JSOs. In order for the Commission to comply with its obligations under the FPA to assure just and reasonable rates for electric service, the Commission should set for hearing the level of compensation requested by Talen and not accept the "black-box" amounts for compensation set forth in the JSOs. Talen should not—through the exercise of market power because of the unique need for the Power Plants' operation as RMR units—be rewarded by securing compensation in excess of just and reasonable rates.

I. The JSOs' compensation to Talen is not just and reasonable and fails to meet the Commission's *Trailblazer* standards for approving contested settlements.

As described above, Talen elects "cost of service" compensation for both Power Plants through the proposed CORS, ostensibly in accordance with the PJM OATT, Part V, §§113-119 and pursuant to FPA § 205.[17] Section 205 expressly provides that the rates and charges for the sale of electricity by an applicant "shall be just and reasonable" and that

Analysis of the 2025/2026 RPM Base Residual Auction, Part A (Sep. 20, 2024) ("[H]olding everything constant, the fact that the RMR resources in the BGE LDA [i.e., the Power Plants] were not included in the supply curve at $0-MW day resulted in a 41.2 percent increase in RPM revenues, $4,287,256,309 for the 2025/2026 RPM Base Residual Auction compared to what RPM revenues would have been had the capacity of those RMR resources been included in the supply curve at $0 per MW-day") at 2; *see also id.* at 9, 12-13. As the Commission's recent order in docket ER25-682 affirms, the Power Plants properly should be included in the supply stack in the RPM BRAs, and by implication should have received this treatment for the now completed BRA for delivery year 2025/2026 but did not receive that treatment because the remedy was only adopted on a prospective basis. *PJM Interconnection, LLC*, 190 FERC ¶ 61,088 (Feb. 14, 2025) (accepting proposed PJM capacity market rule changes to require inclusion of qualifying RMR units in the capacity market supply stack for future BRAs).

[17] 16 U.S.C. § 824d.

an applicant bears the burden of proof to show the standard is satisfied.[18] For the reasons described further below, Talen's proposed rates and charges for operation of the Power Plants, as reflected in the JSOs, are not "just and reasonable."

By virtue of MPC's protest and the anticipated protest of Monitoring Analytics, LLC, the Independent Market Monitor for PJM (the "IMM"), the JSOs constitute contested settlements. In reviewing a contested settlement, the Commission is required to exercise its statutory obligation independently to ensure that the electric rates are just and reasonable.[19] Conforming to that responsibility, the Commission, through the *Trailblazer* line of decisions, has established four circumstances or "approaches"[20] in which it can

[18] *Id.* § 205d(a) ("All rates and charges demanded or received by any public utility for or in connection with the… sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable…"); § 205(e) ("At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility…."); *see generally*, *Anaheim, et al. v. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1981) ("The Federal Power Act imposes on the Company the 'burden of proof to show that the increased rate of charge is just and reasonable.'") (citing § 205(e)); *Nantahala Power and Light v. FERC*, 727 F.2d 1342, 1351 (4th Cir. 1984) ("A utility bears the burden of justifying each component of a rate increase, and the overall increase itself, under § 205(e)."). The conversion of the Power Plants from operation under MBRA to the CORS sought by Talen comprises a "rate increase" within the meaning of the statute.

[19] *Tri-State Generation and Transmission Ass'n, Inc.*, 181 FERC ¶ 61,255, at P 68 ("The U.S. Supreme Court has held that, where a settlement is contested, the Commission must make 'an independent finding supported by "substantial evidence on the record as a whole" that the proposal will establish "just and reasonable" rates.'") (quoting *Mobile Oil Corp v. FPC*, 417 U.S. 283, 314 (1974) and *Placid Oil Co. v. FPC*, 483 F.2d 880, 893 (5th Cir. 1973)), *modified*, *Tri-State Generation and Transmission Ass'n, Inc.*, 183 FERC ¶ 61,054 (2023) (Tri-State Rehearing Order).

[20] Use in the text of the term "approach" and the taxonomy of the various approaches under the *Trailblazer* cases follows the approach adopted by Administrative Law Judge deJesus in his order in the proceedings docketed as EL21-91 and ER21-1635. *PJM Interconnection, LLC*, 186 FERC ¶ 63,019 (March 13, 2024).

approve a contested settlement.[21] Under each of these approaches, the party seeking approval of a settlement, here Talen, bears the burden of supporting the settlement under the applicable standard.[22]

Commission approval of the proposed settlements is not authorized under any of the *Trailblazer* approaches. Alternatively, if the Commission would find a *Trailblazer* approach is applicable, Talen still has wholly failed to carry its burden to establish the basis for Commission approval. Accordingly, the proposed settlements should be rejected.

The four *Trailblazer* approaches to Commission approval of a contested settlement are: (1) the record contains sufficient evidence for the Commission to determine each of the issues on the merits, as resolved in the filed settlement (Approach 1); (2) even if the full settlement is not "just and reasonable," the settlement on balance is "within a broad ambit of various rates which may be just and reasonable" supported by substantial evidence in the record, including a "determination that the contesting party would be in no worse position under the settlement if the case was litigated and a balancing of the benefits of the settlement against the costs and potential effect of continued

[21] *See Trailblazer Pipeline Co.*, 83 FERC ¶ 63,018 (certifying contested settlement) (Brenner, J.), *remanded*, 85 FERC ¶ 61,082 (Trailblazer-A), *order on reh'g and interlocutory appeal*, 85 FERC 61,345 (1998) (Trailblazer-B), 86 FERC 63,006 (certifying contested amended settlement) (Brenner, J.) *order on reh'g and contested settlement*, 87 FERC ¶ 61,110 (Trailblazer-C), *reh'g denied*, 88 FERC ¶ 61,168 (1999) (Trailblazer-D).

[22] *See Tri-State Rehearing Order*, 183 FERC ¶ 61,054 at P 17 and n. 43 (2023) (citing *Kern River Gas Transmission Co.*, 89 FERC ¶ 61,144, at 61,422 (1999)) (settlement sponsor has the "burden of supporting its settlement proposal, including providing information to enable the Commission to make the necessary findings to approve the settlement ….")).

litigation"[23](Approach 2); (3) the contesting party's interest is "too attenuated" and that party has other fora to raise its contentions so as at allow for the less searching level of review of the settlement, as is afforded by the Commission to uncontested settlements (Approach 3); and (4) as an "option of last resort," the Commission can sever the contesting party or issue, approving the settlement but allowing litigation of the merits of the severed issue (Approach 4).

Approach 1 is categorically not applicable here, because the settling parties have not agreed that they will consent to modifications to the settlements that may result from the Commission's ruling on the merits, as part of its approval of the settlements.[24] Approach 2 is not applicable because there is no record evidence to support the requisite Commission findings to allow approval of the proposed settlements, and, in any event, even if Talen were to address the lack of evidentiary support in seeking approval of the proposed settlements under this approach, Talen's positions necessarily are based on the wrong standard for application of the Commission's original cost test, as discussed further below. Approach 3 is categorically inapplicable because both MPC and IMM, parties to this proceeding and contesting the settlements, have direct interests adversely affected by the proposed settlements that are not "attenuated," and they lack an alternate

[23] *Trailblazer-C*, 87 FERC ¶ 61,110 at 61,439 ("This approach does not necessarily result in a binding merits determination on the individual issues in the proceeding, but it may involve some analysis of the specific issues raised by the settlement in order to determine whether the result under the settlement is no worse for the contesting party than the likely result of continued litigation.").

[24] *See* Stipulation and Agreement (Jan. 27, 2025), sections 5.2, 6.7.

forum to raise the issues.[25] Finally, Approach 4 is categorically inapplicable because the proposed settlements do not permit the severing of issues for further litigation.[26]. For the reasons discussed in greater detail below, the JSOs do not satisfy the Commission's established requirements for approval of contested settlements.

II. The compensation the JSOs seek is not supported by substantial evidence and—notwithstanding its black-box status and slight discount from the initially filed revenue requirements—is not just and reasonable.

The JSOs describe the annual fixed revenue requirement ("AFRR") proposed to paid Talen for operation of the Power Plants during the term of the RMR arrangements as follows:

Table 1 (JSOs Revenue Requirements)			
	Brandon Shores	Wagner	Consolidated
AFRR	$145,000,000	$35,000,000	$180,000,000.
Term FRR (48 months) (excluding Project Improvement recovery)	$580,000,000.	$140,000,000	$720,000,000

In the JSOs, there is no record evidence supporting these amounts; rather, they are asserted as a proposed "black-box" settlement, anchored only by the Initial Talen Filings which proposed an AFRR of $175 million for Brandon Shores and of $40 million for

[25] In *PJM Interconnection, LLC,* 186 FERC ¶ 63,019 (2024), the IMM was determined to have sufficient interest (i.e., an interest not "too attenuated") in a PJM rate matter so that Approach 3 was deemed not applicable to a proposed settlement of the matter contested by the IMM. *Id.* at ¶ 108-110. MPC is created and directly charged by Maryland law with representing the interests of Maryland residential electric customers before the Commission and other regulatory bodies. Md. Code, Public Utilities Article, § 2-205(b) (MPC "may appear before any federal or state [agency] to protect the interests of residential and non-commercial users [of gas, electricity or other regulated services].").

[26] Footnote 24, s*upra.*

Wagner. Talen asserts that the slight discounts in the JSOs AFRRs when compared to the Initial Talen Filings "as filed" compensation amounts—comprising 17 percent (for Brandon Shores) and 12.5 percent (for Wagner)—transform these levels of compensation into a "just and reasonable" rate.

As further discussed below, the Initial Talen Filings wholly misinterpret Commission precedent regarding "cost of service" compensation. The discount from Talen's originally filed AFRRs, as reflected in the JSOs black-box amounts, embeds Talen's misinterpretation of Commission precedent and, if adopted, would still confer excessive compensation on Talen. Nowhere does Talen, as the settlement sponsor, provide any record evidence in support of the requested levels of compensation to address the critical requirements of *Trailblazer* Approach 2 for approval of a contested settlement. Moreover, based on the limited public information available to MPC outside of the inchoate confidential settlement phase of discovery allowed to date in this proceeding, described further below (and as presented in the affidavit accompanying the IMM's protest of the JSOs), the compensation to Talen set forth in the JSOs remains seriously inflated over what a just and reasonable rate should be. The excessive payments to Talen, embedded in the JSOs in violation of the FPA's directive that the rates must be just and reasonable, are neither commensurable with nor, by law, can they be balanced against the detriments and risks of litigation avoided by settlement.[27]

[27] Moreover, an implied major portion of the consideration that Talen proffered in the JSOs—inclusion of the Power Plants in the supply stack for future PJM capacity market base residual auctions—has been mooted by the Commission's recent order requiring such inclusion by virtue of reform to PJM's capacity market rules. *PJM Interconnection, LLC*, 190 FERC ¶ 61,088 (Feb. 14, 2025).

As set forth in the Initial Talen Filings, Talen misconstrued Commission precedent regarding the proper accounting for adjustments of regulated rate base resulting from the multiple dispositions of the Power Plants. Moreover, the Initial Talen Filings further inflate the Power Plants' claimed rate base by seeking, contrary to Commission precedent, to monetize an alleged opportunity cost for future development of the property on which the Power Plants are located. The Initial Talen Filings seriously inflated the just and reasonable level of compensation due for operation of the Power Plants due to these two wrongly conceived claims. The relatively small discounts from the original as filed AFRRs now embodied in the JSOs do not cure these deficiencies.

A. Talen's claimed net plant amounts, impliedly supporting the JSOs' claimed compensation, are contrary to the Commission's original cost test for determining cost of service rate base.

As noted in MPC's Initial Protest, the Commission has a long-standing policy and practice for setting the cost-of-service "rate base" for recovery "of" and "on" investment in a regulated asset.[28] The usual context involves dispositions of the regulated asset between different owners. The policy equates the rate base to *the lower of*: (a) depreciated or "net" plant investment in the regulated asset; or (b) a cost established by a transaction disposing of the asset with a third-party, reduced thereafter by depreciation that occurs following the disposition. Thus, the Commission has stated:

> It is longstanding Commission policy that, in a cost-of-service ratemaking context, a utility may only earn a return on (and recovery of) the *lesser* of the net original cost of plant or, when plant assets change hands in arms-length transactions, the purchase price of the plant (also

[28] *See* MPC Initial Protest at16-27.

known as the "original cost test").[29]

This original cost test—and the "lesser of" adjustments to rate base resulting from asset dispositions the test mandates—"should be applied for every change in ownership [of the regulated asset],"[30] notwithstanding that there may have been multiple dispositions of the regulated asset and not merely on a one-off basis.[31] According to the Commission, this policy advances two important purposes: (1) it "lowers rate base to the level of the actual investment made in the plant by the acquiring investors, which prevents the acquiring investors from earning a return on monies not actually invested;"[32] and (2) "[provides] an objective method of valuation without the need for independent assessment of the fair market value of individual acquisitions."[33] The Commission applies the original cost test to merchant generators that enter cost-of-ratemaking in

[29] *Lawrenceburg Power, LLC*, 173 FERC ¶ 61,166 (2020) at 46 (emphasis added); *see also Central Vermont Public Service Corp.,* 120 FERC ¶ 61,143 (2007) at 9 (". . . when the amount paid for the asset is less than the depreciated original cost, the negative acquisition adjustment is recorded as part of the accumulated provision for depreciation."); *Constellation Mystic Power LLC*, 165 FERC ¶ 61,267, P 64 (2018) (*Constellation Mystic Power I*), *order on rehearing*, 172 FERC ¶ 61,044 (2020) at P 31 (*Constellation Mystic Power II*), *affirmed*, *Constellation Mystic Power LLC v. FERC*, 45 F.4th 1028 (D.C. Cir. 2022) (affirming the Commission's application of the original cost test recognizing the negative acquisition adjustment from the exchange in lieu of foreclosure).

[30] *Lawrenceburg Power, LLC*, 173 FERC ¶ 61,166 (2020) at 47.

[31] *See, e.g.*, *Locus Ridge Gas Co.*, 29 FERC ¶ 61,052 (1984).

[32] *Lawrenceburg Power LLC*, 173 FERC ¶ 61,166 at 46 (citing to *Constellation Mystic II*, 172 FERC ¶61,044 at 31).

[33] *Mont. Power v. FERC*, 599 F.2d 295,300 (9th Cir. 1979); *Constellation Mystic Power II,* P 105; *Constellation Mystic Power II v. FERC*, 45 F. 4th 1028 (D.C. Cir. 2022).

diverse contexts—whether due to acquisition by a fully regulated integrated utility or when entering RMR type service.[34]

Here, the key third-party transaction—defining the Power Plants' cost of service rate base consistent with the Commission's original cost test—entailed the purchase by Talen's predecessor of the Power Plants from an independent third-party (Exelon) in 2012. In that transaction, Talen acquired the Power Plants, along with the Crane power plant, for a reported amount of $371 million in net proceeds.[35] The acquisition proceeds allocated among the three acquired plants based on nameplate capacity are as follows:

Table 2 (2012 Exelon Sale Transaction Proceeds Allocation, millions of dollars)			
Power Plant	Installed Capacity[36]	% Share of Capacity	Allocated 2012 Purchase Proceeds
Brandon Shores	1273	48.1%	$178.35
Wagner	976	36.9%	$136.74
Crane	399	15%	$55.9

The Talen Initial Filings utilized, instead, a fair market value ("FMV") assessment to determine the Power Plants' rate base for purposes of setting revenue requirements. That FMV assessment was made in 2015 in connection with a re-organization of Talen's predecessor. Based on this FMV assessment, Talen restates the net plant amount for the

[34] *See, e.g., PacificCorp.*, 124 FERC ¶, 61,046, PP 28-31; *Central Vt. Public Serv.*, 120 FERC ¶. 61,143, P 7.

[35] *See* Exelon Corporation, 2012 Form 10-K at 263.

[36] "Exelon completes sale of Maryland coal-fired power plants", Power Engineering (Dec. 3, 2012).

Brandon Shores plant in 2015 at $648 million[37], **nearly four times the net plant allocated to the plant resulting from the 2012 transaction.** There is no evidentiary basis that is consistent with the Commission's original cost test precedent for accepting Talen's 2015 restatement of Brandon Shores' net plant for the AFRRs for the Power Plants. As the net plant related components of the Initial Talen Filings (return, depreciation and income taxes) comprised over 56% of the AFRR for Brandon Shores, a discount of less than 20% from the full AFRR reflected in the JSOs' negotiated "black-box" level of compensation is grossly inadequate to address this unjust and unreasonable inflation of Talen's alleged cost of service of the Power Plants embedded in the Talen Initial Filings.

As noted in MPC's Initial Protest, Talen's support for using the 2015 FMV assessment in lieu of the 2012 third-party sale price to establish the Brandon Shores rate base must be rejected. *First*, the successor owners of the Power Plants following the 2012 transaction invested the reported 2012 sale price in acquiring the plants. Revaluing the plants' rate base to a later higher fair market value determined through an appraisal creates a windfall for these successor owners wholly unrelated to their acquisition of the assets. Avoiding such windfalls is precisely one of the policy rationales, discussed *supra*, for not allowing such revaluing of the rate base.

Second, the Commission's use of prices from transactions disposing of regulated assets among sophisticated third parties provides a more objective measure than industry

[37] *See* Initial Talen Filing for Brandon Shores, Exhibit BSH-001 at 18 of 36.

"chat" about possible or alleged "mispricing" to disqualify third party sales from use in applying the original cost test. Moreover, relying on prices from these third-party transactions avoids the potentially extended uncertainty that would ensue from requiring the vetting of the motivations of independent transacting parties for any asset sale which Talen's theory would entail.

Third, in *Constellation Mystic Station*, the Commission recognized that the disposition of a plant to the plant's creditors in lieu of foreclosure satisfied the requirements under the original cost test for a third-party sale sufficient to reduce the plant's rate base to the face value of the cancelled debt.[38] The 2012 transaction has an equal if not greater indicia of voluntary action by the transacting parties acting independently and should be recognized accordingly.

Fourth, Talen's assertion in its Initial Filings that the Commission enforcement action against Constellation skewed the sale process resulting in the 2012 transaction so as to disqualify it for purposes of applying the original cost test is belied by the results of the audit of the Constellation enforcement action.[39] The transaction sale price is anchored

[38] *Constellation Mystic Power LLC*, 172 FERC ¶ 61,045 at 45 (2020).

[39] *See* Department of Energy, Office of Inspector General, Office of Audits and Inspections, *Special Report: Enforcement Activities Conducted by the Federal Energy Regulatory Commission* (Sep. 2015) at 7 ("We found no indication that OE [the Office of Enforcement] had considered the merger during its investigation. In fact, we found that OE attorneys involved with this investigation were given specific instructions not to take into account the pending merger during settlement negotiations. We also found that the determination of whether the merger was consistent with the public interest was made by a separate FERC organization, the Office of Energy Market Regulation. During our review of documentation related to the merger, we discovered nothing to suggest that the then-pending Constellation enforcement action played any type of role in the determination that the merger between Constellation and Exelon was consistent with public interest.").

by the myriad fiduciary and other duties bearing on the decision-makers for the independent third parties on either side. As such, Talen's speculation about mispricing of the transaction is inapt.

B. Talen's claimed revenues impliedly supporting the settlement are improperly inflated by alleged "opportunity costs" for site redevelopment.

In the Initial Talen Filings, Talen also sought recognition of an "adder" under both the Brandon Shores and Wagner CORS to compensate it for the development potential of the Power Plants' site. This "adder" also served to inflate the revenue requirements proposed in the Initial Talen Filings above a just and reasonable rate; the discount from the as-filed level of AFRR embodied in the JSOs has not be shown to remove this infirmity.

Talen's proposed "adder" aimed to recover the alleged opportunity costs for delaying redevelopment of the Power Plants' site during the term of the CORS. The adder is based on estimated gains from the ultimate sale of the site after the term of the RMR. The estimate is purportedly based on a purchase price that assumes the highest and best alternative use of the site, less decommissioning and clean-up costs. In the Initial Talen Filings, the Talen witness asserted that the Initial Talen Filings back-out the recorded book value of the site from the Power Plants' "rate base" in order to avoid double-counting. Talen allocated the recovery of the "adder" between the Power Plants separate CORS, based on the Power Plants' relative nameplate capacities and proposed to shift the recovery of the full "adder" between the Power Plants, in the event one of the Power

Plants and not the other completes its CORS term earlier than the other. The following table depicts the impacts of the requested adder on the annual revenue requirements for the Brandon Shores and Wagner Power Plants.

Table 3 (Opportunity Cost Revenue Requirements)			
Site Development Opportunity Cost Adder (assuming both power plants continue in operation)			
	Brandon Shores	Wagner	Total
Estimated Site Net Sale Value	$69,700,992	$38,436,840	$108,137,832
Annual Revenue Requirement Addition	$5,688,040.	$3,136,688	$8,824,728
Source: Exh. No. BSH-001, pp. 20-21 of 36; Exh. WAG-001 at 18 of 32			

This item of proposed compensation is entirely without foundation. Moreover, Talen has not shown in its filing of the JSOs how this improper compensation was removed from the black-box settlement compensation amount. As noted in MPC's Initial Protest[40] [41], this item of recovery should be rejected by the Commission for several reasons.

First, Talen's proposal is contrary to the Uniform System of Accounts ("USofA") because it is divorced from the original recorded "cost" of acquiring the land.[42] As such,

[40] *See* MPC Initial Protest at 27-31.

[42] *See, e.g.*, USofA, Acct. 310, Land and land rights (for Steam Power Generation) ("This account shall include the **cost of land and land rights** used in connection with steam-power generation.") (emphasis added); Electric Plant Instructions 1.C. ("The detailed electric plant accounts (301 to 399, inclusive) shall be stated on the basis of cost to the utility of plant constructed by it, and the original cost, estimated if not

this proposal is extraordinary, unprecedented, and not tethered to any limiting principle. Although generally purporting to align its requested revenue requirements under the CORS with the Commission's USofA, Talen's request for a land development adder would support revaluing any land interest of any regulated utility devoted to public use and charging regulated rates—from its original cost when acquired and first devoted to public use—to a speculative value based on a potential sale in the future when removed from public use. The USofA's framework precludes this. Talen's proposal seeks adoption of a principle that would occasion a wholesale unraveling of the accounting system of the USofA.

Second, Talen's witness supporting this issue in the Initial Talen Filings claims to have developed a "traditional cost of service analysis for Units 3 and 4."[43] However, Talen's witness attempts to include market-based land value for the "foregone potential use of the land"[44] due to the RMR. This is not an actual incurred cost of the Power Plants and cost of service analyses do not include market-based values, but rather book values when computing revenue requirements. This proposal is inappropriate and should not be allowed in a cost of service-based rate. Talen is receiving a return and taxes on the land value and therefore, is already receiving compensation for the use of the land. Furthermore, decommissioning of this land would have occurred past the original

known, of plant acquired as an operating unit or system….") 7; Land and Land Rights. A. ("The accounts for land and land rights shall include the **cost of land** owned in fee by the utility…") (emphasis added).

[43] Initial Talen Filings, Wagner Transmittal at 10 and Brandon Shores Transmittal at 11.

[44] *Id.* at 14 and 12, respectively.

deactivation date of June 1, 2025, and Talen would not have been able to sell this land for years. Talen does not explain or provide a rationale for why it should be paid the adder when it is operating the Power Plants during the term of the CORS, precluding decommissioning and development, and while it is receiving compensation for such operation. There is no real "opportunity cost" incurred in such circumstances. Instead, Talen's "adder" is a confected doubling up of compensation, presuming the fictional ability to deploy the asset for two conflicting purposes simultaneously.

Third, Talen analogizes its proposed land value "adder" to the recognition of "opportunity costs" arising from air emissions or other permit operational limits applicable to power plants that bid into wholesale competitive energy markets. This analogy is infirm. Generator resource operational permit limits affect the marginal going forward cost of power plants competing in a competitive power market. These permit limitations are potentially relevant to the formation of efficient price signals for those markets. On the other hand, land costs or values—particularly for land dispositions made long in the past or many years in the future—are "sunk" investments irrelevant to operational costs and efficient market signals based on marginal cost calculations.

Fourth, even if such opportunity costs were appropriate (which they are not), Talen's decommissioning and clean up costs are entirely speculative. In fact, there may be no gains after a sale of the property after decommissioning and clean-up costs.

C. The compensation under the JSOs is unjust and unreasonable.

The AFRRs for the Power Plants, as filed in the Initial Talen Filings, are substantially in excess of just and reasonable rates, as demonstrated by the affidavit accompanying the IMM's protest of the JSOs filed this date. Moreover, the IMM affidavit also demonstrates that the "black-box" levels of compensation contained in the JSOs remain materially in excess of just and reasonable rates; the infirmities of the Initial Talen Filings are not cured by the relatively small discounts reflected in the JSOs from the original AFRRs.[45] The proposed AFRRs in the JSOs are more than $45 million per year ($180 million over the RMR arrangement term) higher than just and reasonable rates for the provision of OATT Part V Reliability Services by the Power Plants when correctly applying the Commission's original cost test precedent and recognition of the 2012 transaction entailing the acquisition of the Power Plants by Talen's predecessor. Nowhere has Talen provided evidence of record to counter the conclusions of the IMM Affidavit. Under the *Trailblazer* standards for Commission review of a contested settlement, the Commission cannot approve the levels of compensation embodied in the JSOs as proposed by Talen.

[45] *See* IMM Affidavit (Feb. 18, 2025), Table 1 (Annual Charge Row, columns 3 (Brandon Settlement), 4 (Wagner Settlement), 5 (Brandon Dep. Based on Sale Price) and 6 (Wagner Dep. Based on MW Allocations) (comparing the AFRRs of (i) the original as filed AFRRs for the Power Plants; (ii) those embodied in the JSOs (columns 3 and 4); and (iii) those restated to reflect proper use of the Commission's original cost test and removal of the opportunity cost adder (columns 5 and 6).).

CONCLUSION

MPC supports continued operation of the Power Plants under RMR arrangements in accordance with PJM's Tariff during the period required to construct the necessary transmission upgrades to enable the Power Plants' retirements. MPC protests the excessive compensation demanded by Talen embedded in the JSOs, which is far in excess of a just and reasonable rate. In order for the Commission to comply with its obligations under the FPA to assure just and reasonable rates for electric service, the Commission should set for hearing the level of compensation requested by Talen and not accept the "black-box" amounts for compensation set forth in the JSOs.

Respectfully submitted,
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February 18, 2025

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of February, 2025 caused a copy of the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Philip L. Sussler
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