UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

	)	
NRG Power Marketing LLC	)	**Docket No. ER22-1539-000**
NRG Business Marketing LLC	)	**Docket No. ER23-2688-003**
	)	**(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 (the "Commission" or "FERC"), the Maryland Office of People's Counsel ("MPC") submits this protest to the filing of NRG Business Marketing LLC ("NRG BML"), dated April 2, 2024 (the "NRG Filing"), on behalf of Indian River Power LLC ("IRP").[2] For the reasons set forth in greater detail below, MPC protests the proposed settlement contained in the NRG Filing.

In the NRG Filing, NRG seeks Commission approval of the proposed Settlement Agreement and Offer of Settlement among IRP and various intervenors in the proceeding pending before the Commission and previously docketed as ER22-1539, with regards to the reliability service arrangement applicable to the Indian River Unit Number 4 generating unit ("IR4") asserted to be undertaken pursuant to the procedures of Part V,

---

[1] 18 CFR § 385.602(f)(2).

[2] NRG-BML succeeded to the tariffs previously filed with respect to the Indian River Unit 4 generating resource by NRG Power Marketing LLC ("NRG-PML"). *NRG Business Marketing LLC*, 186 FERC ¶ 61,215 (Mar. 26, 2024). For simplicity's sake, NRG-BML and its affiliates are all referred to herein as "NRG" unless the context requires a more specific reference.

secs. 113-119 of the Open Access Transmission Tariff ("OATT") of PJM Interconnection LLC ("PJM") (referred to below as "Part V reliability service" or "RMR" service).[3][4] NRG asserts that the NRG Filing, would, if approved by the Commission, resolve all issues arising from its predecessor's initial filing with the Commission dated April 1, 2022 (the "NRG Initial Filing") commencing this proceeding as accepted by the Commission's initial order in this proceeding (the "Initial Order").[5] NRG requests effective dates for the NRG Filing of June 1, 2022 and August 1, 2023, as further described in the NRG Filing, relating back to the initial effective date of the Part V reliability service arrangement applicable to IR4, as previously accepted by the Initial Order.

MPC previously filed with the Commission its doc-less motion to intervene in this proceeding, dated April 13, 2022, and its protest of the NRG Initial Filing, dated May 6,

---

[3] The NRG Filing describes the parties, intervenors in ER22-1539, consenting to the proposed settlement incorporated into the NRG Filing as the "Settling Parties." Those parties include the Delaware Public Service Commission, Old Dominion Electric Cooperative, Delaware Municipal Electric Corporation, Inc., the City of Dover, Delaware and PJM. In the Explanatory Statement section of the NRG Filing, NRG represents that additional intervenors, Delaware Energy Users Group, Delaware Division of the Public Advocate, the Maryland Public Service Commission and Southern Maryland Electric Cooperative, Inc., do not oppose resolution of the proceeding consistent with the settlement agreement contained in the NRG Filing. NRG Filing, Explanatory Statement at 1 and 2.
MPC contests the settlement, as described in this pleading, and understands that the PJM Internal Market Monitor ("IMM") will also contest the settlement.

[4] 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 ("RTOs") such that the term, while useful shorthand, needs always to be considered in the context of the particular RTO under investigation. The PJM OATT does not expressly use the term.

[5] *NRG Power Marketing LLC*, 179 FERC ¶61,156 (May 31, 2022).

2022, setting forth the basis for its intervention in the proceeding and bases for its protest of the NRG Initial Filing. With this protest, MPC states its opposition to the proposed settlement contained in the NRG Filing. MPC particularly objects to the excessive compensation otherwise due to NRG through the proposed “black-box” rate component of the proposed settlement, inferred to comprise recovery of a substantial amount “of” and “on” NRG’s claimed capital investments in IR4 that were not made in anticipation of providing Part V reliability service in 2022. Recovery “of” and “on” these capital investments is not necessary for NRG to receive reasonable compensation for continuing to operate the plant during the RMR period. Including that recovery in the RMR rate causes the rate to be unjust and unreasonable. Additionally, NRG fully wrote off for GAAP accounting purposes many years ago the investment in this plant as a loss impairment while NRG operated IR4 under Commission granted market-based rate authority. MPC asserts that NRG’s recovery of its loss impaired, sunk investment as is proposed in the NRG Filing is contrary to the PJM OATT and the mandate to ensure just and reasonable rates of the Federal Power Act (“FPA”). MPC’s objection (and, further, due to the anticipated protest of NRG Filing by the IMM), makes the NRG Filing a contested settlement filing for purposes of the Commission’s determinations regarding the filing.

Background[6]

NRG is the owner of IR4. IR4 is a 410 MW coal-fired unit located on the Delmarva Peninsula. It began operation in 1980. NRG acquired IR4 in 2001 and subsequently operated it for over two decades under Commission granted market-based rates authority, participating in the PJM administered, competitive wholesale power markets during the whole of that period. In 2013 and 2017, NRG in its public reporting of its financial position took accounting loss impairments or write-downs of the investment in IR4 of $495 million, in aggregate, thereby effecting, on information and belief, the full write off for GAAP accounting purposes of all of NRG's capital investments in IR4.[7]

In 2021, NRG provided notice to PJM that it intended to deactivate IR4. PJM then determined that IR4 was necessary to avoid reliability violations until a transmission solution could be completed to resolve the reliability violations and allow IR4 to shut down, with the putting into service of the transmission solution projected for the end of calendar year 2026. NRG then filed with the Commission (through the Initial Filing) for Part V reliability service under the PJM OATT, specifically opting for the method for compensation under Part V, sec. 119 (providing for filing with the Commission "a cost-

[6] MPC summarizes here the more extensive discussion of the background to NRG's filings relating to IR4 contained in MPC's protest of the Initial Filing, dated May 6, 2022, ("MPC Initial Protest").
[7] *See* NRG Energy, Inc. 2013 Form 10K at 147 (reporting an impairment loss of the Indian River power plant of $459 million); NRG Energy, Inc. 2017 Form 10K at 108 (reporting an additional impairment loss of the plant of $36 million). The aggregate amount of impairments losses substantially exceeds the amount NRG's witness in this proceeding claims that NRG has invested in IR4 since NRG's emergence from bankruptcy in 2003). For web-links to the 10K Forms (2013):
https://www.sec.gov/Archives/edgar/data/1013871/000101387114000003/a201310-k.htm
(2017) - https://investors.nrg.com/node/27081/html

of-service rate to recover the entire cost of operating the generating unit”), with an effective date of June 1, 2022. In the Initial Filing, NRG sought a fixed annual revenue requirement (“FRR”) of approximately $70 million, of which approximately $42 million, as described by NRG, was comprised of the recovery of and on NRG’s previously fully written off net capital investment (plus related taxes).[8] MPC and multiple other intervenors asserted in their initial protests that NRG’s inclusion of the recovery of and on previously written-off due to loss impairments of prior capital investments (NRG’s “sunk investment” in IR4) should be excluded from IR4’s FRR for providing Part V reliability service. In the Initial Order, the Commission accepted the Initial Filing for filing with the Commission, suspended the rate subject to refund and set the matters raised in the intervenors’ protests for settlement procedures and hearing, including the issue of the appropriate treatment of NRG’s sunk investment (among the many issues raised by the intervenors). MPC participated in the ensuing settlement negotiations administered by the Commission’s settlement judge.

Under the proposed settlement, the equivalent total annual FRR is now approximately $50 million. The portion of the FRR attributable to the recovery of and on NRG’s fully written-off sunk investment plus related taxes can be inferred to be approximately $22 million. This amount comprises approximately 43 percent of the total FRR to be recovered through the proposed settlement rate. Reserving its rights to

---

[8] *See* Initial Filing, Exhibit No. NPM-003, Statement 1: Total Overall Cost of Service, p. 1 of 1. *See also*, further discussion, *infra*, at 9-10.

challenge the other components of NRG's FRR, MPC submits that recovery under the proposed settlement of NRG's sunk investment is hugely excessive and contrary to the public interest and not just and reasonable as the FPA requires. Further, NRG's proposed sunk investment recovery lacks substantial evidence in the record that is necessary to support Commission approval of the settlement.

PROTEST

I. The NRG Filing fails to satisfy FERC's requirements for approval of a contested settlement.

NRG seeks Commission approval of a contested settlement. 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.[9] Conforming to that responsibility, the Commission, through the so-called *Trailblazer* line of decisions, has established four circumstances or "approaches"[10] in which it can approve a contested settlement.[11] Moreover, under each of these approaches, the party seeking approval of the

[9] *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).

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

[11] *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.),

settlement, here NRG, bears the burden of supporting the settlement under the applicable standard.[12]

Here, Commission approval of the proposed settlement is not authorized under any of the *Trailblazer* approaches; or, if an approach is arguably applicable, NRG has wholly failed to carry its burden to establish the basis for Commission approval. Accordingly, the proposed settlement should be rejected.

The four *Trailblazer* approaches to Commission approval of a contested settlement include where: (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 litigation"[13] (Approach 2); (3) the contesting party's interest is "too attenuated"

---

order on reh'g and contested settlement, 87 FERC ¶ 61,110 (Trailblazer-C), reh'g denied, 88 FERC ¶ 61,168 (1999) (Trailblazer-D).

[12] *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 ….")).

[13] 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.").

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 settlement that may result from the Commission's ruling on the merits, as part of its approval of the settlement.[14] Approach 2, as discussed further below, is not applicable because there is no record evidence to support the requisite Commission findings to allow approval of the proposed settlement, and, in any event, even if NRG were to seek to address the lack of evidentiary support in seeking approval of the proposed settlement under this approach, NRG's position would be based on an incorrect view of the appropriate standard. Approach 3 is also categorically not applicable because both MPC and IMM, parties to this proceeding and contesting the settlement, have direct interests adversely affected by the proposed settlement which are not "attenuated" and they lack an alternate forum to raise the

[14] See NRG Filing, Settlement Agreement, Section 77.

issues.[15] Finally, Approach 4 is categorically not applicable because the proposed settlement does not permit the severing of issues for further litigation.[16]

II. The NRG Filing does not provide supportive substantial (or any) evidence in violation of Approach 2 of the *Trailblazer* standards for approval of a contested settlement.

The NRG Filing merely lists the "blackbox" amount of annual FRR to be collected under the proposed settlement, and, otherwise, provides a narrative description of the contents of the filing and the changes when compared to the Initial Filing. Nowhere does NRG, as the settlement sponsor, provide any record evidence in support of the proposed settlement addressing the critical requirements of Approach 2 for approval of a contested settlement. The NRG Filing is, therefore, deficient and should be rejected.

With respect to the recovery of NRG's sunk investment embedded in the proposed settlement, the amount can be inferred from the components of the annual FRR contained in the Initial Filing, when compared to the settlement blackbox amount as set forth in the table below:

---

[15] 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 PP 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, sec. 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].").

[16] *See generally*, NRG Filing, Settlement Agreement (*esp.* section 77).

	Recovery Category	Initial Filing Annual FRR and Components	Proposed/Inferred Settlement Values
		A	B
1	Monthly FRR	$5,828,132.83	$4,150,000
2	Annual FRR	$69,939,753.96	$49,800,000
3	Return on Capex	$19,426,904	
4	Return of Capex (depreciation)	$17,912,503	
5	Associated (Income) Taxes	$5,298,147	
6	Sub-Total Sunk Investment Related	$41,737,554 (Sum A3:A5)	$21,597,799 (2.B less 10.B)
7	Other Items (O&M)	$21,814,198	
8	Other Items (A&G)	$5,868,704	
9	Taxes Other than Income Taxes	$519,299	
10	Sub-Total Non-Sunk Investment Related	$28,202,201 (Sum A7:A9)	$28,202,201
Source for Column A: Initial Filing, Exhibit No. NPM-003, page 1 of 1.			

Inferring the components of IR4's annual non-investment related expenses from the Initial Filing, recovery on and of NRG's sunk investment in IR4 comprises almost half (43%) of the settlement black-box FRR.

Implicit in the rationale behind the proposed settlement and the recovery of NRG's prior sunk investment is, presumably, NRG's argument that it is entitled to recover a very substantial quantum of this investment under the OATT for the provision of reliability service—regardless of its prior full write-off of this investment due to loss impairments under GAAP. For the reasons set forth further below, these arguments are infirm. Moreover, as required by *Trailblazer* Approach 2, the NRG Filing fails, because NRG made no attempt to show that 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 evidence that supports a Commission "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 litigation."[17]

Recovery of NRG's written-off prior sunk investment in IR4 as proposed in the filed settlement is unjust and unreasonable and contrary to the public interest. Accordingly, the Commission should reject the proposed settlement. Rejection is appropriate for the following reasons:

First, in addition to the Initial Order in this proceeding, the Commission has, at least twice, for resources within the PJM footprint, previously set for hearing the issue of whether prior sunk investment can be included in the RMR resource owner's compensation under PJM's OATT, Part V, sec. 119, as NRG seeks to do here, but has not decided the issue.[18] Moreover, the Commission has also stated that the treatment of RMR service compensation under parallel provisions of the tariffs of each of the Regional Transmission Organizations ("RTOs") can vary in each RTO, because of the different, sometimes unique layered policies and rules that attach to RMR service in each RTO.[19] [20]

---

[17] *Supra*, at footnote 10.

[18] *GenPower Midwest LLP*, 140 FERC ¶ 61,080 (2012) P 35 (Initial Order); *PSEG Energy Resources and Trade LLC*, 111 FERC ¶ 61,121 (2005) P 22.

[19] Permissible ISO/RTO variation for RMR arrangements: *NYISO*, 150 FERC ¶61,116 (2015) at Ftnt. 22 ("[W]e recognize that there may be reasons to allow variations [for RMR arrangements] among RTOs/ISOs, so we will not at this time direct NYISO to adopt any particular mechanism." Citing *PJM Interconnection, LLC*, 112 FERC ¶ 61,031 at P 21 (2005)).

[20] In addition to and further supporting the "voluntary" nature of PJM's RMR regime, discussed further, *infra*, PJM's RMR regime has numerous substantial differences from those defining and governing arguably analogous RMR service in other RTOs/ISOs (*e.g.*, shorter advance notice requirements, lack of coordination of RMR service with the functioning of the capacity market, differences in interaction with the forward period for capacity market procurement (currently collapsed to less than 1 year from the intended 3-year forward period underpinning the design of the overall PJM RPM capacity market construct), lack of a pro forma contract to define consistently the RMR unit's service obligations, the risk

In the *GenOn* case (*GenPower Midwest LLP*, 149 FERC ¶ 61,218 (2014)("GenOn II"), the Commission approved a contested blackbox settlement based on its general rules for approving settlements enunciated in its *Trailblazer* decisions (*i.e.*, that the overall result was deemed just and reasonable, without deciding the merits regarding its individual components), but pivoting its approval of the settlement on the filing by the RMR proponent of an affidavit asserting that the level of compensation reflected in the settlement reflected almost complete exclusion of any return on or of prior investment.[21] By comparison, the proposed settlement FRR here, nearly half comprised by the recovery of prior sunk investment, is hugely disproportionate and wholly deficient in satisfying the decisional criteria of *Trailblazer* Approach 2.[22]

---

of hoarding of capacity interconnection rights (CIRs), as uniquely defined in the PJM footprint, by the deactivating resource to deter the entry of new resources to replace the RMR unit, PJM's limited ability devolving to only wires alternatives to deploy facilities replace RMR units). Several of these differences and their inter-relationship (as well as RMR compensation) are currently under review by PJM in an on-going stakeholder process through its Deactivation Enhancement Senior Task Force ("DESTF"). The Commission should be mindful of these important distinctions and their impacts uniquely present in the PJM footprint in any ruling in response to the NRG Filing here.

[21] The settlement rate was $13.2 million. GenOn provided an affidavit calculating the cost-of-service recovery rate with no return of or on net plant as $12.5 million. GenOn II, P 34. Emphasizing the importance of this record evidence in its approval of the settlement, FERC stated: "We find the GenOn Settlement factually is supported by the Stewart Affidavit [the GenOn sponsored affidavit] and is within the range of just and reasonable outcomes…. Because the cost-of-service recovery rate with no return of or return on net plant supports the settlement rate, we find that the contesting parties would be in no worse position under the settlement than if the case were litigated". *Id.* P 34.

[22] In the GenOn II order, the Commission also stated in passing, comprising *obiter dicta* at best given the anchoring of the Commission's decision on the assertions in the Stewart Affidavit, cited *supra*, that the generator seeking to provide reliability service under OATT, Part V, sec. 19 "may file for cost-of-service rates with the Commission and seek a rate which would provide for the recovery of fixed costs, including return on and of capital." *Id.* at P 34 (citing to an earlier 2005 order (112 FERC ¶61,031 (2005) pre-dating the PJM capacity markets and full set of rules interacting with PJM's framework for the provision of RMR service and necessary context for interpretation of the issue of RMR compensation). This language, even if considered in isolation, does not constitute an entitlement to recovery of fixed costs (a party "may… seek").

Second, subsequent to the *GenOn II* decision, the Commission has set forth a general taxonomy of types of RMR compensation across the different RTOs based on differences in the RMR regime adopted by each RTO. More specifically, the Commission has stated that if an ISO/RTO's RMR regime is "exclusive and voluntary" (meaning that under the ISO's tariff the resource owner can deactivate, without the obligation both to enter RMR service and defer the deactivation), FERC will allow compensation at a negotiated rate which at a minimum allows for recovery of "going forward costs" but the measure of permissible compensation due to the resource owner is not otherwise dictated.[23] PJM is a "voluntary" RMR regime;[24] accordingly, generators opting for "cost of service" treatment under OATT, Part V, section 119, as NRG seeks to do here, have no entitlement to recovery of their prior sunk investment costs.

Third, NRG, in support of the implicit recovery of a substantial amount of its prior sunk investment effected by the proposed settlement—notwithstanding its full write-off due to loss impairments—may seek to invoke language in Commission orders addressing the treatment of accounting loss impairments of investment in determining the revenue requirements for the Mystic Station plant under a RMR arrangement in the ISO-NE

[23] *See, e.g., NYISO*, 150 FERC ¶ 61,116 (2015) at P 17; *See also*, *NYISO, Order on Compliance and Rehearing*, 155 FERC ¶ 61,076 (2016) at P 84; *MISO*, 148 FERC ¶ 61,057 at P 84 (2014); *CAISO*, 168 FERC ¶ 61,199 at P 84 (2019).

[24] The PJM tariff affords the generator a comparatively very short period (90 days) (when compared with other ISOs) to effect notice of its intent to deactivate and then expressly notes that, so long as the notice obligations are complied with, the generator may still de-activate "[r]egardless of whether the Deactivation of the generating unit would adversely affect the reliability of the Transmission System". OATT, V, Sec. 113. The clear implication is that the PJM Tariff's RMR provisions are "voluntary" in nature, consistent with the FERC taxonomy of RMR regimes. The voluntary nature of the PJM RMR "regime" also can be derived from the multiple other distinctions in PJM's RMR regime (when compared with that of other RTOs) noted, *supra*, at ftnt. 20.

footprint.[25] The Mystic Station case is not applicable here. There, Exelon (through its then affiliate, Constellation Mystic Power LLC) filed with FERC an unexecuted RMR agreement with ISO-NE with respect to its gas-fired combined cycle 1400 MW Mystic Station power plant, located near Boston. The relatively new plant (commercial operation date, 2003) has operated in the ISO-NE administered energy and capacity markets since the beginning of its operation and would continue to do so through the RMR term. Exelon initiated the process for de-activation of the plant, as required under the ISO-NE generation deactivation rules. ISO-NE, then determined that continued operation of the plant (as well as an adjacent LNG facility serving the plant and owned by Exelon) were needed for grid reliability (the plant is in the middle of New England's largest load center, and the LNG facility is a critical supply facility for both New England's electric and natural gas systems). Exelon sought to include in the cost of service to be recovered over the two-year term of the arrangement rate base based on the gross original cost in the facility of $1.021 billion (or alternatively interim subsequent valuations to support a corporate merger at a holding company level close to that value). Intervenors in the proceeding, including NRG, argued, among other matters, that the power plant's gross plant balance should be reduced by substantial accounting write-offs attributable to the plant during its operation in the market (but later seemingly reversed or adjusted upwards in light of independent appraisals of the plant's value during the merger of Constellation

[25] *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (July 2018) (initial order), 165 FERC ¶ 61,267 (Dec. 20, 2018) (order accepting agreement, subject to condition and directing briefs), *order on clarification and rehearing*, 172 FERC ¶ 61,044 (July 17, 2020).

and Exelon in 2012 at $925 million). In the specific context of the Mystic Station filing, under ISO-NE's rule regime, FERC did not recognize accounting loss impairments of the investment in the plant that it had not previously approved.[26]

FERC's decision regarding the Mystic Station rate base is distinguishable from the circumstances of the NRG I4 RMR because: (a) unlike IR4's RMR arrangement, Mystic Station's RMR arrangement was pursuant to the tariff of ISO-NE under a different RMR regime than that in PJM so that the basis for proper compensation for IR4's continued operation can and should vary; (b) unlike IR4, Mystic Station is a relatively new plant (with substantial on-going investment value); (c) unlike IR4, Mystic Station continues to participate in the ISO-NE administered capacity and energy markets.

Moreover, NRG can claim no reliance interest in the Commission's Mystic Station decisions regarding the loss impairments of its prior investments in IR4. NRG took the loss impairments in its investments in IR4 in 2013 and 2017 well in advance of the Commission's decisions in the *Mystic Station* case, addressing specifically investment in the Mystic Station power plant. Moreover, presumably reflecting its investment expectations at the time, NRG itself argued in the *Mystic Station* proceedings before the

---

[26] FERC concluded that the plant rate base should be reduced to reflect the value of the plant as determined in a 2004 sale in lieu of foreclosure transaction involving the plant (essentially valuing the plant at the amount of the then outstanding debt or $547 million), without recognizing accounting loss impairments not previously approved by FERC (which would not have happened in real time, in any event, as the asserted impairments occurred while the plant was operating in the market and not subject to FERC accounting regulation).

Commission that accounting loss impairments properly reduced the RMR resource's rate base for purposes of setting its RMR revenue requirements.[27]

Finally, the loss impairments asserted to be applicable to the investment in Mystic Station were done at a holding company level affecting multiple other investments rather than at the plant level. The loss impairments paralleled a substantial write down of plant value that FERC did recognize (on an original cost basis to reflect a deemed arms' length sales transaction, excluding recognition of any "acquisition premium" due to later arms' length sales in excess of prior sales price reductions). The write down recognized by the Commission, duplicating in substantial part the plant's accounting loss impairments, was to match the value set in a sale of the plant in lieu of foreclosure occurring while the plant operated in the market, and asserted to be an arms' length transaction.

Fourth, NRG's recovery of prior sunk investment that is implicit in the proposed settlement runs counter to significant policy concerns and the FPA requirement to ensure just and reasonable rates. Such recovery results in an undue windfall for continued operation of an old, if venerable, polluting coal-fired electric power plant. It does this by misapplying and exploiting the gaps and inconsistencies in rules and regulations applying at the "border"—in a kind of limbo space—between the competitive wholesale electric generation market and the regulated provision of transmission grid services.

Affording NRG the relief in compensation that it requests would damage the structure and design of the wholesale electric generation market because it: (1)

---

[27] *See Reply Brief of NRG Power Marketing LLC* in FERC Docket No. 18-1639 (Nov. 16, 2018).

improperly incents, through an excessive regulated revenue requirement, other generators operating in the competitive market in similar circumstances to seek similar relief by prematurely withdrawing from the competitive generation market; and (2) undermines the competitive position of generators remaining in that market.

NRG has operated IR4 for nearly two decades in the competitive wholesale electric generation market, taking the benefits and fully assuming the risks of that operation. Now through the proposed settlement, NRG seeks to transform IR4 into a newly minted regulated asset, with recovery of a substantial portion of its prior, fully written-off, sunk investment under cost-of-service principles, as though, contrary to the facts, IR4 had never before been operated in the competitive generation market. Its effort is directly contrary to the full write-off it did recognize of its prior investment in IR4 that it now seeks to recover from captive ratepayers through transmission-related regulated rates. NRG seeks to ignore the profits it may have made during the period of market operations of IR4 and to exploit the leverage it has because continued operation of IR4 is deemed necessary to keep the regulated transmission grid from violating reliability criteria. NRG's proposition to the Commission embedded in the proposed settlement, to the affected States, and to affected electric consumers—boiled down to its essence—is that absent securing the windfall of recovery of a substantial and disproportionate quantum of its already written off investment, it will retire the plant, thereby putting at risk operation of the electric grid. The Commission cannot and should not endorse this. The plant can be fully compensated for those on-going operating costs incurred so the plant remains in service during the RMR period without providing it a windfall for sunk

investments that it had no investment backed expectation to recoup years following their write-off. The proposed settlement's level of compensation vastly exceeds these on-going operating costs and, therefore, confers an undue windfall.

Fifth, the inflated FRR contained in the proposed settlement creates and exacerbates distorted incentives favoring market exit for generator resources considering whether and when to de-activate, particularly in the PJM footprint. This is particularly so for older, larger plants located in transmission constrained in PJM Locational Deliverability Areas ("LDAs") (like IR4, located in the transmission constrained DPL-South LDA) and, therefore, more likely to be required for continued operation due to transmission system reliability violations for a longer term due to the extended period required to construct a transmission grid solution.[28] This distortion of incentives is contrary to the Commission's general view that RMR service should only be a measure of "last resort".[29]

---

[28] DPL-South LDA's transmission constraints are evidenced by, among other matters, the separate modeling of the DPL-South LDA by PJM in the conduct of the BRAs and the LDA's frequent clearing of PJM's BRA for DPL-South LDA above the footprint-wide BRA clearing price. Separate modeling occurs for a LDA when the transmission system's transfer capacity into the LDA is less than 115% of the margin for imports into the LDA determined by PJM required to satisfy the resource adequacy standard for the LDA. *See generally*, PJM Manual 18. In PJM also, a longer RMR term (enhancing the incentive of an inflated FRR) is more likely given the current bottlenecks in the PJM interconnection queue preventing new entry and PJM's proclivity and constraints, under its current rules, to opt for grid solutions under the immediate need exception, but with extended in-service dates. *See, e.g*., *PJM Interconnection LLC*, 185 FERC ¶61,107 (Nov. 8, 2023) (describing PJM's truncated methods for determining grid solutions to the proposed deactivation of the Brandon Shores power plant and the anticipated five-year period for their completion extending the period of the plant's continued RMR operation).

[29] *See, e.g*., *N.Y. Indep. Sys. Operator, Inc.,* 150 FERC ¶ 61,116, at P 16 (2015), order on compliance and reh'g, 155 FERC ¶ 61,076 (2016), *order on compliance and reh'g*, 161 FERC ¶ 61,189 (2017), *order on clarification and reh'g*, 163 FERC ¶ 61,047 (2018); *Midwest Indep. Transmission Sys. Operator, Inc.,* 140 FERC ¶ 61,237, at P 10 (2012). *See Greenleaf Energy Unit 2, LLC*, 172 FERC ¶ 61,111 (2020) (Commissioner Danly, concurring) ("RMR agreements are a product of market failure, and they themselves cause markets to fail. This further failure arises as RMR agreements obscure the market

Inflation of the RMR unit's FRR creating this distortion in incentives follows from inappropriate use of legacy utility "cost of service" accounting in circumstances wholly different than those of the modern, restructured power markets. Basic economic principles counsel compensating the RMR unit for no less than its going forward cost of operation. Those principles are recognized in PJM's existing rules and the Commission's guidance regarding the floor for RMR units' compensation in a voluntary RMR regime. Here, however, NRG's use, as reflected in the proposed settlement, of legacy utility "cost of service" accounting to confect a "rate base" for sunk, previously fully loss impaired investment made during market operations long before contemplation of RMR service is without foundation in economic principles. As such, this additional amount of compensation comprises an undue windfall accruing to the owner of the RMR resource. It results from the resource owner's ability to exploit, through what is in effect an exercise of market power, the unit's strategic location on the transmission grid and the lack of competitive market forces affecting that location for an extended period (*e.g.*, lack of new entry due to queue processing bottlenecks, PJM's rules directing adoption of grid solutions over non-wires alternatives, potential hoarding of CIRs to the detriment of competing new entry by the generator signaling deactivation).

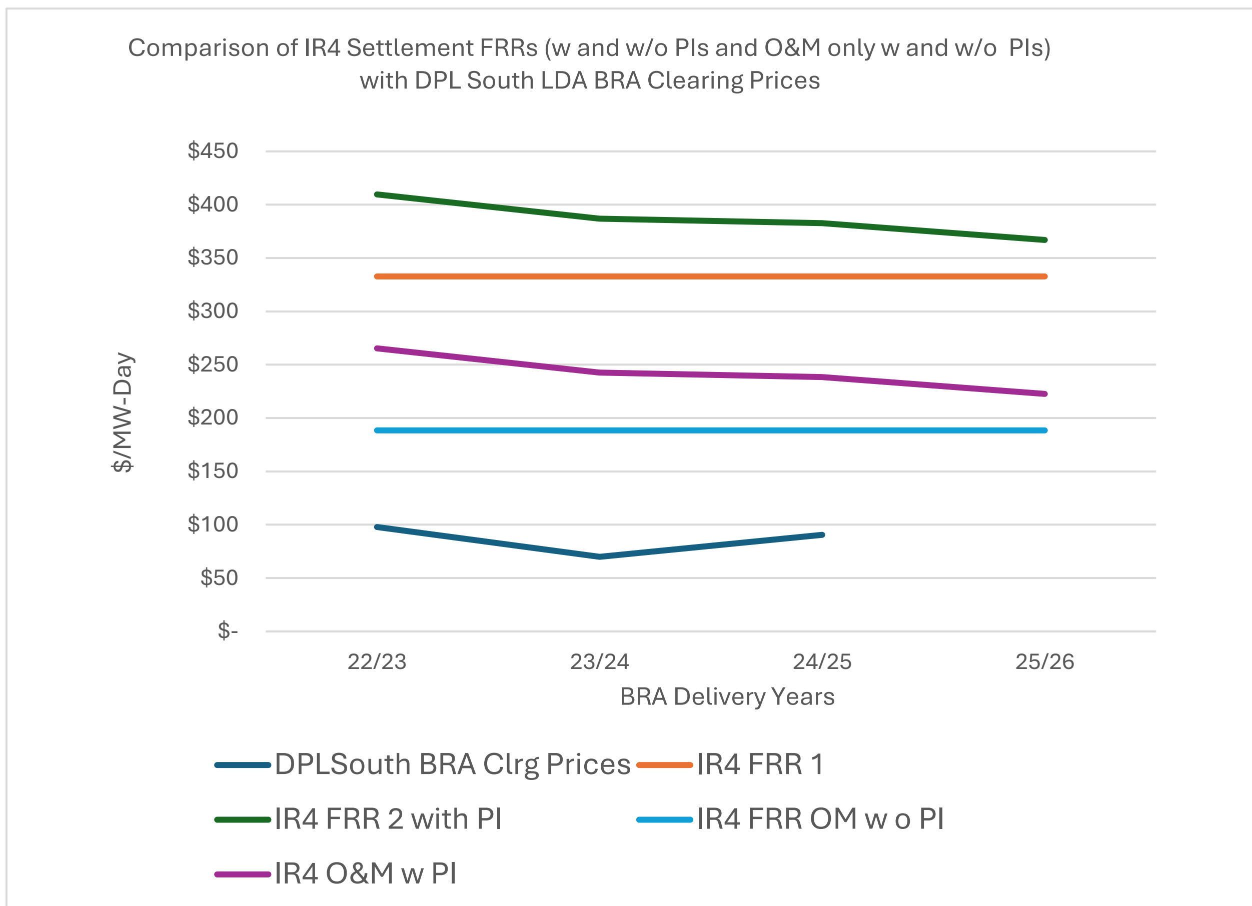
Here, the blindered carry-over of legacy utility accounting is a makeweight applied to the "edge" problem of RMRs. Such accounting treatment creates incentives

---

signals that would create incentives for the very development that the markets are intended to deliver. I therefore agree with Commission precedent that RMR agreements should be a measure of last resort").

for premature exit and undercuts maximum participation by generating resources in competitive power markets, if applied to the NRG filing, but also with adverse implications if applied to the larger PJM footprint.

The problem is illustrated by comparing the IR4 Settlement FRR with recent capacity market clearing prices for the Base Residual Auction ("BRA") conducted by PJM for the procurement of capacity resources to supply the DPL-South LDA. As depicted in the chart below, the settlement FRR revenue requirement (translated into the $/MW-day metric for reporting BRA prices) plus "project improvements" ("PIs") is over four times the recent clearing prices in the BRA auctions for DPL-South.



Notes: IR FRR1 is the settlement blackbox amount. IR FRR2 is IR FRR1 plus "project improvements" or "PI" comprising capex during the RMR term needed to keep the plant running, recovered as an expense by NRG. IR4 OM w/o PI is the level of non-sunk investment related expense inferred from NRG's Initial Filing, excluding PIs. IR4 O&M w PI is the portion of the requested revenue requirement included in NRG's Initial Filing, excluding investment related components, but including PIs.
Note that the DPL South LDA 24-25 BRA clearing price is subject to possible resetting at $426.17 MW-day, currently the subject of determination in docket ER23-729-002. This higher value is the product of PJM's errors in administering the auction (as determined on appeal of the Commission's order addressing the auction by the federal 3d Circuit Court of Appeals), and not the result of underlying supply and demand in the LDA. *See*, *Protest of American Municipal Power et al.*, docket ER23-729-002 (April 11, 2024).

While PJM OATT, Part V reliability service is not the same as the capacity product procured through the BRAs by PJM, reliability service and BRA procurements overlap significantly in the services provided. Unlike RMR service, capacity procured through the BRA, is a "market" product subject to competitive forces (and has significantly more rigorous performance and operational obligations when compared to RMR service), and, therefore, the preferred manner of providing the required service, as well as providing a revenue stream to support continued market participation. Revenue provided through an RMR arrangement over an extended RMR service term inflated through the resurrection of previously written off sunk investment and its conversion into regulated rate base is multiples of the level of alternative revenue streams derived from the PJM administered markets. This creates an undue incentive for older plants, like IR4, with low-capacity factors due to adverse economics in the energy market yet needed for resource adequacy and transmission system reliability (with a high probability of securing RMR treatment if located in a transmission constrained LDA), to exit from market operations prematurely.

PJM has provided warnings about pre-mature retirement of electric generating resources across the PJM footprint, without anchoring it to its likely earliest wave occurring in transmission constrained LDAs, such as the DPL-South LDA, as exemplified by the IR4 proposed deactivation and provision of RMR service.[30] The distorted incentives resulting from possible recognition of an inflated rate base due to sunk, fully loss impaired, investment, for RMR service units will only accelerate this process. The recent filings by Talen Energy in dockets ER24-1787 and ER24-1790 seeking RMR service for the Brandon Shores and Wagner power plants in the constrained BGE LDA is an exponential exacerbation of this problem.

[30] PJM, *Energy Transition in PJM: Resource Retirements, Replacements & Risks* (Feb. 24, 2023).

CONCLUSION

The NRG Filing is a contested settlement. For the reasons stated above, the settlement is not just and reasonable and is contrary to the public interest. Moreover, the filing in support of the settlement is deficient because it lacks sufficient evidentiary support in conformity with the applicable Approach 2 of the *Trailblazer* decisions' standard for approval of a contested settlement.

Respectfully submitted,

DAVID S. LAPP
PEOPLE'S COUNSEL

/s/ electronic signature

William Fields, Deputy People's Counsel
Philip L. Sussler, Assistant People's Counsel

Email addresses:
William.fields@maryland.gov
Philip.Sussler@maryland.gov

Office of People's Counsel
State of Maryland
6 St. Paul Street, Suite 2102
Baltimore, Maryland 21202
Tel: (410) 767-8150

Dated: April 22, 2024.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding. This 22nd day of April 2024.

/s/ electronic signature

____

Philip L. Sussler
Assistant People's Counsel
Office of People's Counsel
State of Maryland
6 St. Paul Street, Suite 2102
Baltimore, Maryland 21202
Tel: (410) 767-8150
Philip.sussler@maryland.gov