UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Essential Power OPP, LLC, et al.
   v.
PJM Interconnection, L.L.C.
   )
   Docket No. EL23-53-000

Aurora Generation, LLC, et al.
   v.
PJM Interconnection, L.L.C.
   )
   Docket No. EL23-54-000

Coalition of PJM Capacity Resources
   v.
PJM Interconnection, L.L.C.
   )
   Docket No. EL23-55-000

Talen Energy Marketing, LLC
   v.
PJM Interconnection, L.L.C.
   )
   Docket No. EL23-56-000

Lee County Generating Station, LLC
   v.
PJM Interconnection, L.L.C.
   )
   Docket No. EL23-57-000

SunEnergy1, LLC
   v.
PJM Interconnection, L.L.C.
   )
   Docket No. EL23-58-000

Lincoln Generating Facility, LLC
   v.
PJM Interconnection, L.L.C.
   )
   Docket No. EL23-59-000

Parkway Generating Keys Energy
Center LLC
   v.
PJM Interconnection, L.L.C.
   )
   Docket No. EL23-60-000

Old Dominion Electric Cooperative
   v.
PJM Interconnection, L.L.C.
   )
   Docket No. EL23-61-000

Energy Harbor LLC
   v.
PJM Interconnection, L.L.C.
   )
   Docket No. EL23-63-000
MOTION FOR LEAVE TO ANSWER AND ANSWER OF PJM INTERCONNECTION, L.L.C.

Pursuant to Rule 213(a) of the Commission’s Rules of Practice and Procedure, PJM Interconnection, L.L.C. (PJM) submits this Motion for Leave to Answer and Answer to (i) the reply comments concerning the Offer of Settlement (Settlement) submitted by Commission Trial Staff and Chief Keystone Power LLC and Chief Conemaugh Power LLC (Chief), and (ii) Chief’s response to PJM’s protest to Chief’s “doc-less” motion to intervene in Docket No. ER23-2975.  

1 18 C.F.R. § 385.213(a).


The Commission should not lose sight of the forest for a weed. Chief’s late-in-the-game dramatics do not alter a record that reflects a substantial body of undisputed facts and near universal support or non-opposition from Market Participants, including every participant in the actual settlement negotiations.4 This record plainly supports approval of the Settlement as just and reasonable. Incredibly, no commenter in this proceeding presents a concern about any specific term or condition of the Settlement except for Chief’s issue with Section 3.1 of the Settlement (although the provision is never expressly cited). That is, Chief objects to the market-wide 31.7% reduction in Winter Storm Elliott Non-Performance Charges. When Chief’s issue is laid bare, there is no issue at all because the objection is unsupported by any evidence and is manufactured contrary to Commission rules and precedent.

As explained herein, the comments incorrectly suggest that the Settlement cannot be approved under Trailblazer Approach II.5 Specifically, the comments (a) misapprehend the “no worse off” aspect of Trailblazer Approach II, (b) erroneously shift the burden of meeting that standard from Chief to PJM, and (c) fail to acknowledge both that (i) future litigation could only

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4 “Trial Staff believes the Settlement provides important benefits and is a fair and reasonable resolution” and “would therefore support the Settlement if it is uncontested.” Trial Staff Comments at 3; accord id. at 23. If the Commission permits Chief’s late intervention to oppose the Settlement, then Trial Staff would take no position, but observes that the Settlement provides several “important benefits.” Id. at 4; accord id. at 23-24. Either way, Trial Staff maintains that “the filed-rate doctrine does not preclude approval of the Settlement. Id. at 4; accord id. at 24.

harm Chief’s interest and that (ii) Chief itself is to blame for any alleged inadequacies in the record regarding Chief’s interest.

Chief continues to misunderstand the filed rate doctrine and rule against retroactive ratemaking and continues to submit arguments that contradict the governing caselaw on those subjects. Moreover, Chief has unilaterally violated settlement privilege (and broken any claim to shelter thereunder) by publicly announcing a private “settlement” offer to PJM, which PJM rejected, in which Chief attempted to leverage its late-stage intervention as a means of shaking down PJM for a payout to be extracted from the Settling Parties and other Market Participants. Indeed, Chief boasts about demanding that PJM pay approximately $4.6 million—i.e., 100% of the maximum amount Chief could hope to receive at the conclusion of perfectly successful litigation rejecting every argument made in fifteen Winter Storm Elliott Complaints—in order to make Chief disappear from these proceedings.6

PJM respectfully requests that the Commission accept this Answer and approve the Settlement no later than December 29, 2023, so that all PJM suppliers can properly reflect their liabilities and revenues when they close their books for the year.

I. MOTION FOR LEAVE TO ANSWER

The Commission has discretion to accept responses to answers and has routinely done so for good cause shown where accepting the response would either lead to a more complete or

6 See Chief Response to PJM Protest at 3-4 (“It might surprise parties in the above-captioned dockets to learn that Chief Companies, on October 22, offered to settle its issues with PJM in exchange for the remaining 31.7% of the Performance Credit to which it is entitled; approximately $4.6 million. Paying a party that fully performed during Elliott in accordance with PJM directives and complied with the Tariff the approximately $4.6 million PJM calculated was owed seems like a logical choice to support an approximately $600 million dollar Offer of Settlement. Yet, PJM and other parties in the Settlement’s select leadership rejected that proposal on October 25, 2023.”).
accurate record, improve the Commission’s understanding of the issues, clarify disputed or erroneous matters, or help the Commission in its decision-making.\(^7\) Good cause exists for the Commission to accept this Answer because it clarifies the misstatements and mischaracterizations in the reply comments to the Settlement, provides information that is not otherwise in the record, and will assist the Commission in approving the Settlement.\(^8\)

II. THE COMMENTS MISUNDERSTAND THE REQUIREMENTS OF THE TRAILBLAZER APPROACH II ANALYSIS

A. The Comments Misunderstand the “No Worse Off” Aspect of the Trailblazer Approach II Analysis.

The comments misapprehend the “no worse off” standard of Trailblazer Approach II. Some comments assert that “[w]hen it is unclear whether a contesting party would be better off litigating, the ‘no worse off’ requirement is not satisfied.”\(^9\) That flips Trailblazer Approach II on its head, as it will never be perfectly clear whether a contesting party would be better off litigating. That uncertainty is precisely why parties agree to settle claims in the first place. As PJM and the Settling Parties previously explained, the “no worse off” standard does not require settling parties

\(^7\) 18 C.F.R. § 385.213(a)(2); see, e.g., *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,133, at P 12 (2017) (accepting answers to protests because they provided information that assisted in the Commission’s decision-making process); *KO Transmission Co.*, 156 FERC ¶ 61,147, at n.5 (2016) (accepting an answer to a protest because it provided a better understanding of the issues and ensured a complete record); *TransColorado Gas Transmission Co.*, 111 FERC ¶ 61,208, at P 4 (2005) (accepting an answer to a protest because it clarified the issues).

\(^8\) See, e.g., *Gulf S. Pipeline Co., LP*, 145 FERC ¶ 61,236, at P 35 (2013) (“We will accept the answers identified above because they . . . provide information that has assisted in our decision-making process.”), *reh’g denied*, 154 FERC ¶ 61,219 (2016); *Pioneer Transmission, LLC v. N. Ind. Pub. Serv. Co.*, 140 FERC ¶ 61,057, at P 94 (2012); *Morgan Stanley Cap. Grp., Inc. v. N. Y. Indep. Sys. Operator, Inc.*, 93 FERC ¶ 61,017, at 61,036 (2000) (accepting an answer that was “helpful in the development of the record”); *Sw. Power Pool, Inc.*, 89 FERC ¶ 61,284, at 61,888 (1999) (accepting answers that “provide information that furthers our understanding of this proceeding”), *order on reh’g*, 98 FERC ¶ 61,038 (2002).

\(^9\) Trial Staff Comments at 16.
to show that a protestor is “no worse off” under a settlement than the protestor would be if the protestor prevailed in all of its arguments in litigation; if that were the standard, no settlement would ever survive Trailblazer Approach II.\textsuperscript{10} Instead, the Commission must consider litigation risks, avoided litigation costs, and the benefits of repose.

First, it is neither PJM’s nor any Settling Party’s responsibility to prove Chief “would likely not prevail in litigation,”\textsuperscript{11} nor is it PJM’s or any Settling Party’s responsibility to prove “how much the Chief Companies may lose due to the Settlement—including from the reduction in Performance Payments—compared to other Performance Payment recipients.”\textsuperscript{12} It is instead Chief’s obligation to demonstrate the opposite,\textsuperscript{13} which Chief cannot do and which Chief has not even attempted to do in any of its pleadings to date (nor should Chief be permitted to do so given its late intervention in this matter).

Second, any claim that Chief could achieve a better outcome in litigation is entirely speculative and unsupported by the record. The only record evidence before the Commission on this subject includes five sworn affidavits supporting a Commission decision under Trailblazer Approach II submitted by PJM and several Settling Parties on both sides of this intensely negotiated resolution of fifteen separate complaints. Moreover, the Settlement is affirmatively supported or unopposed by every other net or pure recipient of Bonus Payments arising from Winter Storm Elliott, including parties with substantially larger claims at stake than Chief—a

\begin{footnotes}
\begin{enumerate}
\item Trial Staff Comments at 17.
\item Id. at 19.
\item See, e.g., 18 C.F.R. § 385.602(f)(4).
\end{enumerate}
\end{footnotes}
minor player in the PJM region—including other owners of the two coal-fired resources in which Chief holds a minority interest.

Third, the analysis of Trailblazer Approach II presented in certain comments is incorrect for a number of reasons. First, although the comments correctly recognize that “the Settlement would allow PJM, its operators, and stakeholders to focus on reliability and other important matters,” they nonetheless claim “it is unclear how much this would specifically benefit the Chief Companies, if at all.” 14 This again flips Trailblazer Approach II upside down. PJM and the other Settling parties are not required to explain how the Settlement will “specifically benefit the Chief Companies.” 15 As the lone purported opponent to the Settlement, it is up to Chief, not PJM or the Settling Parties, to demonstrate why increased focus on reliability in PJM would not benefit Chief and why Chief would instead fare better by proceeding to litigation. In any event, because the Chief Companies are, in fact, PJM stakeholders, reliability benefits must automatically extend to Chief. 16

An interpretation of the “no worse off” analysis under Trailblazer Approach II in certain comments mistakenly relies on precedent involving the settlement of prospective rate changes 17

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14 Trial Staff Comments at 14-15.

15 Id. at 15.

16 See PJM Interconnection, L.L.C., 170 FERC ¶ 61,258, 62,941–42 (2020) (approving a settlement under Trailblazer Approach II where the record “support[ed] a conclusion that all market participants, including [settlement opponents], will benefit from the Settlement’s contribution to controlling ACE while the cost of the Settlement to [opposing interest] is minimal”).

17 See, e.g., Equitrans, L.P., 104 FERC ¶ 61,008, at P 28 (2003) (rejecting settlement in part because a separate rate case provided a “better vehicle to address the complicated rate issues” that would arise); Commonwealth Edison Co., 132 FERC ¶ 61,268, at 62,491 (2010) (unable to determine the likely outcome of litigation because the record was insufficient to make a finding); ISO New Eng. Participating Transmission Owners Admin. Comm., 167 FERC ¶ 61,164, at P 22 (2019) (rejecting a settlement where the contesting parties had actually provided evidence showing
that are inapposite to the Settlement at issue here, which concerns financial liability for past events based on conflicting interpretations of the PJM Tariff. Here, the fifteen Winter Storm Elliott Complaints are not disputes over what rate can be charged prospectively, but over a substantial sum of money owed as a result of past events, i.e., a traditional resolution of financial claims. Moreover, the Settlement resolves one issue—the amount of Non-Performance Charges and Performance Payments to be paid and received for past actions or inactions during Winter Storm Elliott. Once Non-Performance Charges are collected and Performance Payments are disbursed, the Settlement will have no prospective effect on any rate. The financial impact of the Settlement is fixed, and every Market Participant knows, through a simple calculation, the Settlement’s financial impact on them.

Simply put, determining whether Chief will be “no worse off” under the Settlement merely requires a comparison of the approximately $4.6 million amount Chief believes it should receive through litigation against the undisputed benefits Chief receives under the settlement, plus Chief’s future cost to litigate the fifteen separate complaints for which Chief is now demanding a hearing, and the results of that costly and expansive litigation.

The comments cite two Commission decisions that settle disputes over past events,\(^{18}\) but those cases also differ significantly from the record at issue here. In both cases, the Commission

\(^{18}\) See Great Lakes Gas Transmission Ltd., 153 FERC ¶ 61,053, at P 58 (2015) (rejecting several Trailblazer approaches on the basis that there was insufficient evidence related to a tariff provision permitting ANR Pipeline Company to annually adjust its rate to recover qualifying transport costs); Wyo. Interstate Co., 86 FERC ¶ 61,080, at 61,299 (1999) (rejecting the settlement under Trailblazer Approach II because, on rehearing, the settling parties did not show that the Commission had wrongly concluded that the settlement lacked substantial evidence).
was unable to determine, based on the record, that the benefits of the settlement exceeded the cost of litigation or likely result of litigation.\textsuperscript{19} But, as demonstrated \textit{infra}, PJM and the Settling Parties have not only persuasively shown that the Settlement will benefit all Market Participants more than the cost of litigation or likely result of litigation through affidavits submitted by parties on all sides of the Winter Storm Elliott Complaints, but have further shown that the Settlement also benefits Chief, which stands to lose more in litigation than even the full amount of increased Performance Payments to which Chief claims it is entitled. That is because Chief wants to open the door to theories raised in the Winter Storm Elliott Complaints that would not only eliminate the additional $4.6 million Chief would hope to achieve through a perfect outcome, but would also reduce the current amount of Performance Payments Chief would receive under the Settlement.\textsuperscript{20}

Second, although comments rightly acknowledge that future litigation may “be extremely protracted and costly if the complaints went through full-blown discovery and hearing procedures,” there is an assertion that it is impossible to assess “how much of those costs the Chief Companies, as neither a complainant nor a respondent, would bear.”\textsuperscript{21} This statement illustrates a misapplication of the “no worse off” standard. A myriad of parties in this proceeding have already devoted hundreds of hours litigating the Winter Storm Elliott Complaints, and then hundreds more negotiating and memorializing the Settlement. That Chief avoided expending any effort doing so

\textsuperscript{19} See \textit{Great Lakes}, 153 FERC ¶ 61,053 at P 57(stating that the Commission can approve a contested settlement if balancing “the Settlement’s benefits against the costs and potential impact of litigation supports the conclusion that the Settlement’s overall result is just and reasonable”); \textit{Wyo. Interstate}, 86 FERC ¶ 61,080, at 61,299 (“There must be some quantification of the benefits of the settlement versus the costs or likely results of litigation that permits the Commission to find the overall settlement provides a just and reasonable end result of this case.”).

\textsuperscript{20} See \textit{infra} note 23 and accompanying text.

\textsuperscript{21} Trial Staff Comments at 17.
(and conserving substantial costs in the process) cannot serve as a basis for the Commission to ignore the enormous litigation costs that surely lie ahead for not only Chief, but also PJM, the Settling Parties, and other Market Participants. And, of course, this litigation will place a material burden on the Commission’s own resources.

Chief cannot demand process and subsequently fail to participate, as it has indefensibly declined to do for the past several months before Chief seized on the opportunity to attempt to coerce an additional concession from the parties who have negotiated in good faith over every dollar at issue in the Winter Storm Elliott Complaints. Chief now requests that the Commission reject the Settlement because it would prevent Chief from obtaining “approximately 4.6 million dollars in Performance Credits.” If the Commission rejects the Settlement at Chief’s request, then Chief must be prepared to fully litigate its newfound de facto position as an extremely late protestor to each of the fifteen Winter Storm Elliott Complaints and to explain, as an intervenor supporting the respondent PJM, why each complaint lacks merit and the Commission should not reduce any Non-Performance Charges initially assessed by PJM. Chief must do this because, as detailed in the Explanatory Statement and its supporting affidavits, the Winter Storm Elliott Complaints include several claims that, if successful, would eradicate the $4.6 million in Performance Payments Chief claims to be owed and also place Chief at significant risk of losing Performance Payments that Chief would otherwise be paid under the Settlement.

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22 Chief Companies Reply Comments at 12.

23 See Essential Power OPP, LLC et al. v. PJM Interconnection, L.L.C., Docket No. EL23-53, et al., Offer of Settlement and Explanatory Statement of PJM Interconnection, L.L.C. and the Settling Parties at 6-7 (Sept. 29, 2023) (describing theories presented in Winter Storm Elliott and their impact on Non-Performance Charges); id., Ex 2, Bryson Aff. at ¶ 16 (describing complaint theories that, if successful “would have resulted in reductions of assessed Non-Performance Charges of approximately 71% and approximately 44%, respectively”).
Chasing that $4.6 million prize in litigation would not be cheap. Even by the most conservative estimates, it could easily cost Chief a substantial portion of its $4.6 million payoff in litigation fees to contest a single complaint proceeding from discovery, through an initial hearing, through briefs on and opposing exceptions to an initial decision, through rehearing of a Commission opinion on the initial decision, and through a petition for review. Chief would also need to actively litigate each of the fifteen Winter Storm Elliott Complaints because any issue won by any complainant would necessarily reduce Chief’s claim of $4.6 million. Chief must be prepared to expend considerable resources in litigation and must also run the table by winning all contested issues to avoid reducing its claim.\textsuperscript{24}

\textsuperscript{24} See Explanatory Statement, Ex. 1, Borgatti Aff. at 10:10-14 (“If litigation were to proceed, it would undoubtedly involve a costly and protracted set of proceedings. Fifteen dockets involving numerous issues, some broad, many picayune to particular capacity suppliers, involving numerous expert witnesses (including myself) and potentially depositions and other discovery requests on PJM operational personnel would undoubtedly take years to fully resolve.”); id., Ex. 2, Aff. of Michael E. Bryson, at PP 8, 10 (discussing the costs of litigation and other harms averted by the Settlement); id. Ex. 3, Naumann Aff. ¶ 10 (“Settling the complaints is good for the PJM market now and in the future. Without a settlement, parties face long and difficult litigation, with major financial risks both for entities facing Non-Performance Charges and entities due to receive Performance Payments. Continued litigation of the Winter Storm Elliott Complaints would likely chill decisions on investments in PJM. Markets abhor uncertainty and the prospect of unknown financial conditions that could drag on for years or even decades.”) (footnotes citing caselaw omitted); id. Ex 4, Berg Aff. ¶ 17 (“The nature, scope, and scale of the complaints all but ensures that the proceeding would continue for many years, which would necessarily lead the parties to incur tens of millions of dollars in legal fees. In hearing procedures, parties would be entitled to significant discovery going both directions. In addition, given the fact specific nature of many of the claims and the number of participants (including the diversity of their interests), the eventual hearings themselves would likely be lengthy and contentious. Further, the eventual outcome of a Commission order on initial decision would likely be appealed. To confirm the risk of complex litigation continuing for extended periods and imposing extraordinary costs on the Commission and participants, the Commission need only consider the multi-decade pendency of the California Power Crisis litigation. Similarly, litigation arising from electricity market issues in Winter Storm Uri remains ongoing in Texas nearly three years after the storm and is not close to final resolution. For these reasons, to the extent the Commission does not approve the Settlement Agreement, the litigation is likely to continue for many years.”); id., Ex. 5, Rohrbach Aff. at ¶ 29 (explaining that, in addition to other things, “there is significant value in avoiding diversion of PJM members’ attention diverted to extensive, protracted Winter Storm Elliott litigation”).
Chief makes no effort whatsoever to address future litigation costs or to seriously engage with its future litigation risks. Instead, Chief only baldly asserts that the Settlement fails under the “no worse” off standard because “[u]nlike where FERC has approved contested settlements, the results of Chief Companies potential litigation to obtain its Performance Credits are not speculative—they are required under the Tariff.” Chief also fails to engage with the Settlement’s demonstrated benefits for the PJM region at large, and only contends that the threat of various generator insolvencies in PJM is merely a “battle cry of any company that faces significant fines.” Neither conclusory assertion is sufficient under *Trailblazer* Approach II, and the Commission need not pay Chief any heed.

Chief badly misuses the term “fines” here. Non-Performance Charges are not punitive financial penalties imposed for crimes; rather, they are payments for breaching commercial obligations to perform under the PJM Tariff at a contractual clearing price established by competitive auctions. It is also remarkable how casually Chief suggests that other Market Participants would resort to bad faith claims of impending insolvency. That suggestion is especially strange when several other generation owners have actually declared bankruptcy as the result of Winter Storm Elliott. Moreover, these facts are squarely covered in the record evidence

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25 Chief Companies Reply Comments at 11. The notion that additional payments to Chief are “required under the Tariff” is tied to Chief’s claim that the Settlement is barred by the filed rate doctrine and the rule against retroactive ratemaking. PJM has previously explained why those arguments are devoid of merit. *See Essential Power OPP, LLC et al. v. PJM Interconnection, L.L.C.*, Docket No. EL23-53, *et al.*, Reply Comments of PJM Interconnection, L.L.C., Part II.D at 18-28 (Oct. 30, 2023). We do so again in Part II, *infra*.

26 Chief Companies Reply Comments at 12.

27 *See, e.g.*, *Lincoln Power, L.L.C.*, No. 23-10382 (Bankr. D. Del.); *EFS Parlin Holdings, LLC*, No. 23-10539 (Bankr. D. Del.); *Heritage Power, LLC*, No. 23-90032 (Bankr. S.D. Tex.). In addition to these bankruptcy filings, another portfolio of resources has filed for a change of control
in this case.\textsuperscript{28} Other comments also express doubt about the risk of insolvency certain Non-Performance Charge payors may face.\textsuperscript{29} However, at least one Settling Party has presented direct and unrebutted evidence of its own risk of insolvency, which has a better chance of being averted upon the Settlement’s approval.\textsuperscript{30}

In sum, any benefit to Chief that will allegedly “occur from litigating this case is too speculative to undermine the conclusion that [Chief] would be no worse off under the Settlement than if it were free to litigate further,”\textsuperscript{31} and the Commission should not allow Chief, a minor player in these proceedings and the PJM region, a “heckler’s veto” to extract discriminatory concessions.\textsuperscript{32} The Commission’s authority to approve contested settlements is broader than takeover by the lenders to avoid foreclosure or bankruptcy. \textit{See Chalk Point Power, LLC, et al., Docket No. EC 23-141-000 at 5 (filed Sep. 30, 2023).}

\textsuperscript{28} See, e.g., Rohrbach Aff. ¶ 27 (“[I]n the aftermath of Winter Storm Elliott, four PJM market participants representing approximately 4,140 MW of capacity resources sought Chapter 11 bankruptcy protection. Specifically, Elgin and Rocky Road, Heritage Power and EFS Parlin defaulted on a collective $71 million in net Winter Storm Elliott Non-Performance Charges.”) (footnotes citing cases omitted).

\textsuperscript{29} See Trial Staff Comments at 15.

\textsuperscript{30} See \textit{Essential Power OPP, LLC et al. v. PJM Interconnection, L.L.C., Docket No. EL23-53, et al., Comments in Support of Settlement of Lee County Generating Station, LLC, et al. at 5-6 (Oct. 19, 2023) (describing the relief provided under the Settlement as “necessary in order to best position Lee County to remain solvent and continue to provide critical reliability services to both PJM and MISO”).

\textsuperscript{31} \textit{El Paso Nat. Gas Co.}, 132 FERC ¶ 61,139, at P 101 (2010); see \textit{PJM Interconnection}, 170 FERC ¶ 61,258, at P 45 (“[W]e find that any benefit that might ‘occur from litigating the case is too speculative to undermine the conclusion that the contesting parties would be no worse off.’”) (brackets omitted).

\textsuperscript{32} See, e.g., \textit{Mobil Oil Corp. v. FPC}, 417 U.S. 283, 313-14 (1974); \textit{Placid Oil Co. v. FPC}, 483 F.2d 880, 893 (5th Cir. 1973); \textit{Cities of Lexington v. FPC}, 295 F.2d 109, 121 (4th Cir. 1961) (“There is nothing in the Administrative Procedure Act which expressly requires unanimous consent of all the participating parties to an agreement of settlement; and to read such a contention into the statute in view of the countless state agencies, municipalities, and consumers who may be interested in an administrative proceeding would effectually destroy the settlement provision. In
certain commenters acknowledge. Even where a proposed settlement is contested, the Commission may approve the Settlement “if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.”\(^{33}\) Moreover, the Supreme Court not only permits the Commission to accept settlements over the objection of protestors under *Trailblazer* Approach II, but further permits parties to protect contested settlements against objectors and third-party attacks by invoking a presumption of reasonableness and heightened standard of review under the *Mobile-Sierra* doctrine.\(^{34}\)

There is no cause for any hesitancy here. Some comments rely heavily on the discussion in *Laclede Gas Co. v. FERC*,\(^{35}\) regarding the use of mere “headcount” to support a settlement in a situation where the settling parties excluded an anticipated protestor, Laclede, from their settlement negotiations.\(^{36}\) However, *Laclede* is readily distinguishable and actually illustrates why the instant Settlement should be approved. In *Laclede*, the Court found that the number of parties supporting the settlement was unpersuasive in part because Laclede, who was entitled to the largest share of the refund at issue (13%), had been excluded from negotiations and “vigorously opposed

\(^{33}\) See, e.g., *Mobil Oil Corp.*, 417 U.S. at 313-14; *Placid Oil Co.*, 483 F.2d at 893; *Cities of Lexington*, 295 F.2d at 121; *Trailblazer*, 85 FERC ¶ 61,345, at 62,342 (the Commission may review and approve a contested settlement “as a package” so long as it determines that the “overall result . . . is just and reasonable”).


\(^{35}\) 997 F.2d 936 (D.C. Cir. 1993).

\(^{36}\) See Trial Staff Comments at 10, 18-19.
the settlement.” Thus, the Court found that the number of parties in favor of the settlement was an “unreliable indicator of the reasonableness” of the settlement. Here, no one is asking the Commission to perform a mere “headcount,” although the Commission can certainly draw reasonable inferences from the fact the Settlement is putatively opposed by only one late intervenor. Rather, PJM and the Settling Parties have supported the reasonableness of the Settlement with substantial record evidence that Chief has not only failed to rebut in its pleadings, but has also failed to rebut with an affidavit contesting material facts as required by Rule 602(f).

*Laclede* is also inapposite because PJM and the other Settling Parties did not exclude Chief from the Settlement; Chief decided to opt out for reasons it has still failed to explain or justify. Moreover, unlike the situation presented in *Laclede*, Chief inserted itself into these proceedings extremely late, and Chief is a bit player with a miniscule percentage (approximately 0.8%) of the total Settlement amount at stake. Ultimately, *Laclede* stands for the proposition that the

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37 997 F.2d at 946.

38 *Id.*

39 Chief also contends that the plain language of Rule 602(f) does not limit the filing of comments to parties or participants. *See* Chief Response to PJM Protest at 6 (“[T]he Commission allows parties to comment on and contest an offer of settlement, but notably does not specify that party status must be granted in the docket leading to an offer of settlement.”) (internal citations omitted). This is incorrect. Chief’s argument ignores the plain language of Rule 602(h), which governs contested settlements, and which clearly focuses on entities that are parties or participants in settlement proceedings. *See* 18 C.F.R. § 385.602(h)(1)(i) (“If the Commission determines that any offer of settlement is contested in whole or in part, by any *party*, the Commission may decide the merits of the contested settlement issues. . . .”) (emphasis added); *id.* § 385.602(h)(2)(i) (“If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, whole or in part, by any *participant*, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only [in certain circumstances, including if the presiding officer determines that there is no genuine issue of material fact.]”) (emphasis added). Thus, if Chief’s party status is revoked, as it should be, the Settlement should be deemed uncontested.
Commission must defend the integrity of the settlement process, which is precisely what PJM and the Settling Parties ask the Commission to do here.

Chief’s faux outrage at the Settlement’s terms cannot mask the minimal nature of their actual interests. Chief is a passive investor in two coal-fired resources that were well compensated for the energy they provided during Winter Storm Elliott. Chief has not suffered any injury as a result of the Settlement; it is instead seeking an additional windfall in the form of a coerced handout beyond what the Settlement provides. Chief’s minimal interest in the Settlement is demonstrated by, among other things, their extremely late intervention and their never having bothered to file the required Non-Disclosure Certificates in these proceedings. The Commission should see Chief’s late-stage effort to sabotage the Settlement for what it is: an attempted shakedown of PJM, the Settling Parties, and the other Market Participants who have universally joined or decided not to oppose the Settlement.

**B. Chief Bears the Burden of Demonstrating it Would be Better Off Pursuing Litigation Rather than Settlement.**

The comments erroneously seek to shift the burden under *Trailblazer* Approach II to PJM and the other Settling Parties. Specifically, one comment suggests the Settling Parties must “argue that the Chief Companies are unlikely to prevail in litigation” or must do even more than they already have done to demonstrate “that the Chief Companies would be no worse off under the

\[\text{\footnotesize\[40\] See Essential Power OPP, LLC et al. v. PJM Interconnection, L.L.C., Docket No. EL23-53, et al., Order of Chief Judge Adopting Protective Order (June 14, 2023).}\]

\[\text{\footnotesize\[41\] See supra note 6 (quoting Chief Response to PJM Protest at 3).}\]

\[\text{\footnotesize\[42\] Trial Staff Comments at 15.}\]
Settlement compared to litigation.”43 The other comment claims that “PJM must show the benefits of the settlement outweigh the costs or the likely results of litigation.”44 Neither assertion has merit.

It is Chief’s responsibility to demonstrate it would fare better in litigation than under the Settlement, and PJM has no responsibility to demonstrate the opposite. That is, neither PJM nor any Settling Party has any obligation to prove (i) that the Chief Companies “would likely not prevail in litigation”45 or (ii) “how much the Chief Companies may lose due to the Settlement—including from the reduction in Performance Payments—compared to other Performance Payment recipients.”46

It is unclear where certain comments derived the notion that settling parties must identify and confront in their settlement agreements any unvoiced objections from entities who choose not to reveal themselves until after a settlement among the actual litigants has been reached. In any event, there is no discrimination against Chief as “compared to other Performance Payment recipients”47 because all Performance Payments are made on a pro rata basis once the quantity of Non-Performance Charges collected by PJM has been established. Moreover, Chief has waived confidentiality and relieved PJM of the need to submit evidence under seal by openly stating that it would receive $4.6 million less under the Settlement than Chief believes it would receive in a perfect litigation scenario—that is, if Chief, riding PJM’s coattails as the respondent, won every

43 Id. at 18.
44 Chief Reply Comments at 10.
45 Trial Staff Comments at 17.
46 Id. at 19.
47 Id.
single contested issue in every Winter Storm Elliott Complaint.\(^48\) That $4.6 million figure asserted by Chief is approximately 0.8% of the approximate $570 million reduction in Non-Performance Charges under the Settlement.\(^49\) Many other Market Participants who performed well, or even perfectly, during Winter Storm Elliott agreed to accept significantly larger reductions than Chief.\(^50\) And, of course, the other owners of the plants in which Chief has a minority interest also, as a matter of pure mathematics, gave up more Performance Payment revenue under the Settlement than Chief claims to have lost.

C. The Unrebutted Record Evidence in this Proceeding Demonstrates that Chief Will Be Worse off in the Absence of a Settlement.

To the extent there is any contest over the burden to present or contest evidence on whether Chief “would be better off” under the Settlement, PJM and the Settling Parties have presented substantial record evidence that settlement is superior to litigation for parties on all sides of the

\(^{48}\) *See supra note* 6 (quoting Chief Response to PJM Protest at 3-4).

\(^{49}\) *See* Borgatti Aff. at 5:1-3 (“The 31.7 percent Settlement 1 adjustment reduces the market-wide NPC assessment by about $570 million to approximately $1.226 billion or nearly one-third of the total capacity revenues paid to suppliers that cleared the 2022/23 BRA.”); Rohrbach Aff. ¶ 14 (“The settlement provides for a 31.7% reduction in Winter Storm Elliott PAI charges. Given PJM’s final Winter Storm Elliott PAI charge amount of approximately $1.8 billion, the settlement results in a reduction of more than $569 million in Non-Performance Charges.”) (footnote omitted).

\(^{50}\) Chief suggests that it has a unique position because Chief has no Non-Performance Charges but would only receive Performance Payments arising from the Winter Storm Elliott Event. That suggestion is incorrect. There are several entities in the same position as “pure” recipients of Performance Payments. For example, several member companies of the PJM Industrial Customer Coalition, which is a signatory to the Settlement, received only Performance Payments, and no Non-Performance Charges, for their performance during Winter Storm Elliott. Other entities can choose to identify themselves publicly, but their identities are protected from unilateral disclosure by PJM under the Tariff and protected from disclosure by others under settlement privilege.
Winter Storm Elliott Complaints. Chief, by contrast, merely makes bald assertions, unsupported in any way, that it has a “high likelihood” of litigation success – which actually means not losing a single issue across fifteen complaints it has not even fully reviewed because Chief has not returned Non-Disclosure Certificates necessary to view confidential material. Chief has presented zero evidence supporting the notion that the Chief Companies would be placed in a worse position under the Settlement. The Commission’s Rules of Practice and Procedure explicitly require settlement opponents to submit affidavits to contest any factual issues, but Chief failed to do so in both its initial and reply comments. That should be the end of this matter. It is not enough for Chief to baldly assert a “high likelihood” of success without providing any evidence to support that notion, and the Commission should reject any mistaken effort to flip this burden onto the Settling Parties.

Trial Staff wrongly concludes that Chief did not need to submit an affidavit with its comments because its “opposition to the Settlement is not predicated on the presence of a genuine issue of material fact.” Trial Staff likely reached this conclusion because Chief did not even mention Trailblazer in its initial comments. In addition, Chief’s Reply Comments, which were filed at the same time as Trial Staff’s Reply Comments, contradict Trial Staff’s theory that Chief’s

51 See, e.g., Offer of Settlement & Explanatory Statement at 8-9, 11, 16-18, 24-27; Bryson Aff. at PP 8-9; Naumann Aff. at P 10; Berg Aff. at P 17.

52 Chief Reply Comments at 13.

53 18 C.F.R. § 385.602(f)(4) (“Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement, that are relevant to support the claim. Reply comments may include responding affidavits.”).

54 Trial Staff Comments at 7 n.31.
opposition to the Settlement is not predicated on asserted factual disputes. Chief’s Reply Comments made the following factual allegations unsupported by any affidavit: (1) over-performing generators will be “significantly undercompensated” under the Settlement;55 (2) the Settlement will decrease investor confidence in PJM’s market rules;56 (3) reliability will be undermined;57 and (4) PJM and the “Non-performing Companies” are the only parties to benefit from the Settlement.58 Therefore, Chief’s Reply Comments are not only out of compliance with Rule 602(f)(4),59 but also fail to acknowledge or rebut squarely contradictory testimony in five sworn affidavits submitted with the Explanatory Statement.60

D. A Hearing on the Merits of the Winter Storm Elliott Complaints Could Not Improve, But Only Diminish, Chief’s Position

The comments fail to confront the fact that no merits hearing on any of the fifteen Winter Storm Elliott Complaints could improve Chief’s position or, for that matter, any other net over-performer’s position. As explained above, if arguments set forth in any of the fifteen pending Winter Storm Elliott Complaints prove successful, Chief will see whatever Performance Payments it hopes to gain either partially diminished or completely eradicated, including a substantial risk

55 Chief Reply Comments at 4.

56 See id.

57 See id. at 5, 10

58 See id. at 9.


60 See, e.g., Naumann Aff. at PP 5-8, 12 (testifying that the Settlement “appropriately compensates and rewards generators” and preserves system reliability); Borgatti Aff. at 8:13-14 (testifying that the Settlement will stabilize investor confidence in PJM’s markets); Berg Aff. at PP 17-18 (testifying that the Settlement “will benefit PJM and all parties” by avoiding the burden of litigation).
of further reductions below what Chief would receive under the Settlement. The Tariff limits the Performance Payments that the Chief Companies can receive to the Non-Performance Charges PJM actually collects.\textsuperscript{61} In other words, Chief must completely run the table in future litigation to avoid losing any of the $4.6 million in Performance Payments Chief alleges it is owed. This does not even take into account the significant litigation expenses that Chief will undoubtedly incur to defend its positions.

Chief has very little to gain and much to lose in future litigation. Simply put, Chief is a wrong-way driver in these proceedings. Chief knew of its overperformer status but failed to even attempt to intervene until three weeks after the parties reached a settlement in principle. Now Chief objects to the Settlement’s reduction of Performance Payments,\textsuperscript{62} but nonetheless endorses allegations made in the Winter Storm Elliott complaints against PJM\textsuperscript{63} that, if successful, would reduce the very same Performance Payments that Chief wants to receive. The Commission should not reward such irresponsible and contradictory behavior.

\textbf{E. Chief Alone Is Responsible For Any Inadequacies in the Record}

Some comments contend that “[b]ased on the record as it currently stands,”\textsuperscript{64} the Commission cannot conclude Chief would be no worse off under the Settlement.\textsuperscript{65} But Chief is

\begin{itemize}
\item \textsuperscript{61} Tariff, Attach. DD, § 10A(g).
\item \textsuperscript{62} See Chief Reply Comments at 3-4.
\item \textsuperscript{63} See id. at 4.
\item \textsuperscript{64} Trial Staff Comments at 13.
\item \textsuperscript{65} Id. at 19 (“The record, for example, does not show how much the Chief Companies may lose due to the Settlement—including from the reduction in Performance Payments—compared to other Performance Payment recipient.”). That argument lacks any force for the reasons given \textit{supra}, in Part I. B at 16-17.
\end{itemize}
entirely to blame for these alleged record defects. That is because Chief chose not to file any pleadings in any Winter Storm Elliott Complaint proceeding, chose not to participate in any Settlement proceedings, and waited to advise the world of its interests in the Winter Storm Elliott litigation until after the Settlement was announced. Thus, Chief has only itself to blame for any lack of evidence in the record concerning its purportedly unique interests, and the Settling Parties should not be penalized for such irresponsible litigation tactics.

Fairness prohibits third parties who never announced their positions until after a settlement’s comment period from being able to subvert that same settlement due to alleged record inadequacies. Otherwise, such inappropriate gamesmanship will dominate every settlement proceeding moving forward. The Commission thus need not concern itself with the adequacy of the record, which provides more than sufficient information to satisfy Trailblazer Approach II. Chief plainly failed to comply with Commission Rule 602(f) because Chief submitted no affidavit to present or contest any disputed issue of material facts in the Winter Storm Elliott Complaints or in the Settlement. Chiefly simply defaulted. That fact alone should end any discussion about whether the Commission has an adequate record to determine whether or not Chief is “better off” under the Settlement.

III. CHIEF’S FILED RATE DOCTRINE AND RETROACTIVE RATEMAKING ARGUMENTS CONTRADICT APPLICABLE LAW

A. The Filed Rate Doctrine and Rule Against Retroactive Ratemaking Do Not Bar Settlement of Complaints About the Interpretation and Application of Filed Rates

Chief recycles its argument that the filed rate doctrine and the rule against retroactive ratemaking prohibit all settlements of complaints addressing the application of filed rates.66 PJM

66 Chief Reply Comments at 10.
thoroughly disposed of these arguments in its Reply Comments, 67 and Chief’s scattered Reply Comments provide no meaningful additions to Chief’s novel arguments. 68

The filed rate doctrine and the rule against retroactive ratemaking are used to determine the outcome of litigation on the merits. Those doctrines cannot control in situations where, as here, the Settlement resolves disputes about the interpretation and application of the Tariff as applied to past actions or inactions. The Winter Storm Elliott Complaints allege that the inputs to the formula rate applied by PJM to assess Non-Performance Charges and disburse Performance Payments are wrong for a wide variety of reasons, so there is no agreement about what the lawful filed rate actually is, but only an agreement to surrender those litigation claims by compromising on a partial remedy in the Settlement. Chief’s contention that the filed rate doctrine prohibits parties from agreeing to settle upon remedies for allegedly wrongful actions or inactions in the past would make it unlawful for the Commission to approve any settlement in such cases.

The Tenth Circuit has already squarely rejected Chief’s filed rate doctrine theory. In Qwest Corp. v. AT&T Corp. 69 the court addressed “whether the filed-rate doctrine precludes the good faith settlement of a dispute regarding a federal tariff’s applicability in the first instance in the absence of a regulatory or judicial ruling directly resolving the issue.” 70 The court concluded that the filed rate doctrine does not bar “a settlement resolving the factual issue regarding retroactive

68 See Chief Reply Comments passim.
69 479 F.3d 1206, 1211 (10th Cir. 2007).
70 Id. at 1211.
application” of a disputed rate. Ultimately, the court upheld the principle that “there must be an exception to the filed rate doctrine for good faith settlements of legal disputes over tariffs.”

This conclusion makes sense, especially here. The Settlement does not make any changes to the Tariff, as indicated by the absence of any tariff sheets associated with the Settlement. Instead, the Settlement resolves disputes about the factual or legal validity of Emergency Actions taken by PJM. Those Emergency Actions contribute to the inputs that go into the Tariff’s formula rate for assessing Non-Performance Charges and Performance Payments, but those actions are not themselves the filed rate. Resolving the validity of inputs to the formula rate does not change the rate itself. Notably, after two sets of comments, Chief has still never identified what rate the Settlement has allegedly changed. As in Qwest, the instant Settlement resolves disputes over the proper interpretation and application of the Tariff to past events, and the agreement to resolve those disputes over past actions or inactions does not violate the filed rate doctrine or the rule against retroactive ratemaking.

B. The Filed Rate Doctrine and Rule Against Retroactive Ratemaking Do Not Bar Settlement of Disputes Over the Correct Inputs to Formula Rates

Chief reiterates, but does not expound on, its mistaken contention that the Settlement violates PJM’s Tariff. This argument is based on a fundamentally flawed understanding of the Tariff provision at issue—Attachment DD, section 10—and of the Commission’s long-standing

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71 Id. at 1212 (discussing, inter alia, the decision in Panhandle E. Pipe Line Co. v. FERC, 95 F.3d 62 (D.C. Cir. 1996)).

72 Id. at 1210.

73 See id. at 1210-12.

74 See Essential Power OPP, LLC et al. v. PJM Interconnection, L.L.C., Docket No. EL23-53, et al., Chief Companies Opposition to Settlement at 12 (Oct. 19, 2023); Chief Reply Comments at 8.
and uncontroversial use of formula rates. Attachment DD, section 10 provides a formula for determining the amount of Non-Performance Charges and corollary Performance Payments, the total of which depends entirely on the inputs to the formula.\textsuperscript{75} Inputs to formula are subject to challenge, review, and modification.\textsuperscript{76} And because that formula “itself is the rate, not the particular components of the formula, . . . periodic adjustments made in accordance with the Commission-approved formula do not constitute changes in the rate itself.”\textsuperscript{77} Ironically, Chief acknowledges, but ultimately disregards, the fact that the rule against retroactive ratemaking and filed rate doctrine yield “when the filed rate takes the form not of a number but of a formula that varies as the incorporated factors change over time.”\textsuperscript{78}

Despite Chief’s evidence-free assertions to the contrary, the Settlement neither violates nor changes the Tariff. Chief’s Initial and Reply comments are silent as to how the Settlement alters Attachment DD, section 10. Regardless, the Settlement’s 31.7% reduction in Non-Performance Charges and Performance Payments reflects a compromise among the Settling Parties about various inputs to the formula rate—such as whether a unit was actually “needed” given exports to neighboring balance areas or transmission congestion—and it is a “good faith settlement[\textsuperscript{]} of legal

\textsuperscript{75} See Tariff, Attach. DD, § 10A(g).

\textsuperscript{76} See Pub. Utils. Comm’n of State of Cal. v. FERC, 254 F.3d 250, 254 (D.C. Cir. 2001) (quoting Ocean State Power II, 69 FERC 61,146, at 61,544-45 (1994) (“[B]ecause ‘the formula itself is the rate, not the particular components of the formula, . . . periodic adjustments made in accordance with the Commission-approved formula do not constitute changes in the rate itself and accordingly do not require § 205 filings.’”)); Old Dominion Elec. Coop. v. FERC, 892 F.3d 1223, 1232 (D.C. Cir. 2018) (\textit{ODEC}) (quoting Nat. Gas Clearinghouse v. FERC, 965 F.2d 1066, 1075 (D.C. Cir. 1992)) (“Old Dominion is correct that no violation of the filed rate doctrine occurs when ‘buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.’”) (brackets omitted).

\textsuperscript{77} Pub. Utils. Comm’n, 254 F.3d at 254.

\textsuperscript{78} Opposition to Settlement at 13 (quoting \textit{ODEC}, 892 F.3d at 1227).
disputes” over the Tariff. The Settlement does not change the Tariff’s formula rate. The only rate that Attachment DD, section 10A provides is that receipt and retention of Performance Payments will not exceed the Non-Performance Charges that PJM actually collects. The Settlement preserves that methodology.

Bizarrely, Chief reveals it either does not understand its arguments, or does not believe them, when it asks the Commission to “direct PJM to slightly decrease the 31.7% reduction in Non-Performance Charges under the Offer of Settlement and require PJM to source” escrowed funds to Chief using additional Non-Performance Charges. The Settlement reduces Non-Performance Charges, which lawfully modifies an input into the filed rate without changing the formula itself. However, Chief’s request—that the Commission should unilaterally direct a discriminatory modification to the Tariff’s pro rata disbursement methodology for Performance Payments—would violate Attachment DD, section 10 because it modifies the formula itself. In other words, to cure Chief’s imagined injury that the Settlement violates the filed rate doctrine, Chief proposes that the Commission impose a straightforward violation of the filed rate doctrine, as well as a violation of the statutory prohibition against unduly discriminatory or preferential rates.

79 Qwest, 479 F.3d at 1210.

80 Opposition to Settlement at 15.

81 See Tariff, Attach. DD, § 10A(g).
C. Chief’s Arguments and Disruptive Conduct Undermine the Commission’s Policy Favoring Settlements

Finally, Chief’s arguments, like its behavior, contradict the Commission’s long-standing policy of “encouraging settlements as an effective means of resolving cases.” The Settling Parties have accomplished something nearly unheard of in matters of complex, multi-party disputes—reaching a mutually acceptable settlement where every party involved in the settlement proceedings either supports or does not oppose the Settlement. Trial Staff, even with its skepticism towards *Trailblazer* Approach II, nonetheless agrees that the Settlement accomplishes the Commission’s goal of fairly resolving proceedings and states unequivocally that the Settlement does not violate the filed rate doctrine or rule against retroactive rulemaking.

To accept Chief’s erroneous interpretations of the filed-rate doctrine and the rule against retroactive ratemaking would constitute a departure from the Commission’s well-established settlement policy and greatly diminish the prospect of settlement in future cases. Worse, indulging Chief’s disruptive tactics would send the message that settlement does not, in fact, provide a superior alternative to years of ongoing litigation. Rather, it would signal that no matter the amount of effort put into reaching a mutually beneficial settlement, and no matter the number of parties satisfied by the result, a settlement can be dissolved on the flimsiest of bases by third parties with minimal interests who contest the settlement in the thirteenth hour. The Commission should

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82 *Maritimes & Ne. Pipeline, L.L.C.*, 154 FERC ¶ 61,182 at P 38 (2016); see *El Paso Nat. Gas Co.*, 115 FERC ¶ 61,259, at P 21 (2006); see also *Essential Power OPP, LLC*, v. *PJM Interconnection, L.L.C.*, 183 FERC ¶ 61,163 at P 17 (2023) (stating that “providing parties the opportunity to enter into a mutually acceptable settlement of highly contested and complex issues is superior to years of ongoing litigation which . . . could be disruptive to the market”).

83 See Trial Staff Comments at 3, 20-22.

84 See *Essential Power OPP*, 183 FERC ¶ 61,163 at P 17.
preserve its policy of encouraging settlement and reject Chief’s attempt to shakedown the Settling Parties and other Market Participants with meritless claims.

CONCLUSION

For the reasons set forth above, PJM respectfully requests that the Commission grant this Motion for Leave to Answer and accept this Answer and approve the Settlement no later than December 29, 2023, so that all PJM suppliers can properly reflect their liabilities and revenues when they close their books for the year.

Respectfully submitted,

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November 8, 2023
CERTIFICATE OF SERVICE

I hereby certify that I have on this 8th day of November, 2023, caused to be served a copy of the foregoing upon all parties on the service list in these proceedings in accordance with the requirements of Rule 2010 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2022).

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