

185 FERC ¶ 61,204  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;  
James P. Danly, and Mark C. Christie.

PJM Interconnection L.L.C.	Docket Nos. ER23-2975-000
Essential Power OPP, LLC, Essential Power Rock Springs, LLC, and Lakewood Cogeneration, L.P.	EL23-53-000 EL23-53-002
v. PJM Interconnection, L.L.C.	
Aurora Generation, LLC, LSP University Park, LLC, Rockford Power, LLC, Rockford Power II, LLC, University Park Energy, LLC, Elwood Energy LLC, Jackson Generation, LLC, Lee County Generating Station, LLC, and Lincoln Generating Facility, LLC	EL23-54-000 EL23-54-002
v. PJM Interconnection, L.L.C.	
Coalition of PJM Capacity Resources	EL23-55-000 EL23-55-002
v. PJM Interconnection, L.L.C.	
Talen Energy Marketing, LLC	EL23-56-000 EL23-56-002
v. PJM Interconnection, L.L.C.	
Lee County Generating Station, LLC	EL23-57-000 EL23-57-001 EL23-57-004 EL23-57-006
v. PJM Interconnection, L.L.C.	
SunEnergy1, LLC	EL23-58-000 EL23-58-002
v. PJM Interconnection, L.L.C.	
Lincoln Generating Facility, LLC	EL23-59-000 EL23-59-002
v. PJM Interconnection, L.L.C.	

Parkway Generation Keys Energy Center LLC	EL23-60-000
v.	EL23-60-002
PJM Interconnection, L.L.C.	
Old Dominion Electric Cooperative	EL23-61-000
v.	EL23-61-002
PJM Interconnection, L.L.C.	
Energy Harbor LLC	EL23-63-000
v.	EL23-63-002
PJM Interconnection, L.L.C.	
Calpine Corporation	EL23-66-000
v.	EL23-66-002
PJM Interconnection, L.L.C.	
Invenergy Nelson LLC	EL23-67-000
v.	EL23-67-002
PJM Interconnection, L.L.C.	
East Kentucky Power Cooperative, Inc.	EL23-74-000
v.	EL23-74-002
PJM Interconnection, L.L.C.	
CPV Maryland, LLC and Competitive Power Ventures Holdings, LP	EL23-75-000
v.	EL23-75-002
PJM Interconnection, L.L.C.	
Parkway Generation Operating LLC and Parkway Generation Sewaren Urban Renewal Entity LLC	EL23-77-000
v.	EL23-77-002
PJM Interconnection, L.L.C.	

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued December 19, 2023)

1. On September 29, 2023, the Settling Parties<sup>1</sup> filed an Offer of Settlement (Settlement) in Docket No. ER23-2975-000 pursuant to the procedures adopted by the Commission and the Chief Administrative Law Judge for filing settlements through the Commission's eTariff system.<sup>2</sup> The Settlement resolves 15 different complaints in the other captioned dockets that challenged PJM Interconnection, L.L.C.'s (PJM) assessment of penalties for resources that failed to perform during Emergency Actions that occurred on December 23-24, 2022. As discussed below, we find that the Settlement is uncontested and approve it as it appears to be fair and reasonable and in the public interest.

## **I. Background**

### **A. Tariff**

2. PJM's Capacity Performance construct creates an incentive for capacity resources to deliver energy and reserves during emergency conditions by imposing Non-Performance Charges (or penalties) on capacity resources that perform below their expected level and awarding bonus performance payments to resources that perform above their expected level.<sup>3</sup> PJM assesses these charges and associated payments during Performance Assessment Intervals (PAI), which are triggered when PJM declares an

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<sup>1</sup> Settling Parties are listed in Appendix A.

<sup>2</sup> See *Elec. Tariff Filings*, 130 FERC ¶ 61,047 (2010); *Procedures Governing Rule 602 Settlement Filings* (Oct. 13, 2017), <https://cms.ferc.gov/sites/default/files/2020-05/notice-to-the-public-ProceduresGoverningRule602SettlementFilings.docx>.

<sup>3</sup> PJM, Intra-PJM Tariffs, OATT (Tariff), attach. DD, § 10A, (Charges for Non-Performance and Credits for Performance) (12.0.0) (Tariff, Attach. DD § 10A).

Emergency Action.<sup>4</sup> PJM pays entities due bonus payments from the revenue collected from Non-Performance Charges.<sup>5</sup>

3. Resources are excused from penalties during PAIs under two limited exceptions: (1) to the extent the resource is unavailable solely because the resource is on a Generator Planned Outage or Generator Maintenance Outage approved by PJM; and (2) the resource was not scheduled by PJM, or was scheduled down by PJM, based on a determination that such scheduling action was appropriate to the security-constrained economic dispatch.<sup>6</sup>

## **B. Procedural Background**

4. On December 23-24, 2022, Winter Storm Elliott brought precipitous temperature drops and powerful winds in the PJM region which, while driving up electricity demand, also led to a high level of generation outages.<sup>7</sup> Throughout the storm, PJM implemented a number of Emergency Actions to help maintain reliability, thereby triggering a significant amount of PAIs, resulting in penalties that totaled approximately \$1.8 billion.<sup>8</sup>

5. Between March 31, 2023 and June 16, 2023, fifteen complaints were filed challenging PJM's assessment of these penalties (Complaints). These Complaints advanced a variety of theories for relief, including that PJM made errors in its load forecast, that PJM was required, but failed to, follow the proper procedure before entering

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<sup>4</sup> The Tariff applicable during Winter Storm Elliott defined an Emergency Action as “any emergency action for locational or system-wide capacity shortages that either utilizes pre-emergency mandatory load management reductions or other emergency capacity, or initiates a more severe action including, but not limited to, a Voltage Reduction Warning, Voltage Reduction Action, Manual Load Dump Warning, or Manual Load Dump Action.” PJM, Intra-PJM Tariffs, Tariff, Definitions - E - F (32.2.0). In July 2023, the Commission accepted PJM's proposal to narrow the definition of Emergency Action to shortages of the Primary Reserve requirement when coupled with certain emergency procedures. *PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,058, at P 1 (2023).

<sup>5</sup> Tariff, Attach. DD § 10A(g).

<sup>6</sup> *Id.* § 10A(d).

<sup>7</sup> See PJM Answer, Docket No. EL23-54-000, at 22-25, 29 (filed May 30, 2023).

<sup>8</sup> See Settlement at § 1.1.

into Emergency Actions, and that PJM assessed penalties despite resources not being dispatched or scheduled by PJM.<sup>9</sup>

6. On April 14, 2023, PJM filed a motion requesting that the Commission implement settlement judge procedures to resolve the Complaints. Constellation Energy Generation, LLC (Constellation) and Vistra Corp., parties that overperformed during Winter Storm Elliott and were due large bonus payments, timely intervened in the proceedings and opposed settlement judge procedures. The Commission nonetheless granted PJM's motion, finding that "settlement of highly contested and complex issues is superior to years of ongoing litigation which, as PJM notes, could be disruptive to the market."<sup>10</sup> The Commission set a time limit on settlement procedures, giving the parties 60 days to reach a settlement agreement, with the possibility of a 30-day extension.<sup>11</sup> The Commission, in establishing settlement procedures, also noted that there was still time to intervene in some of the complaint dockets, and, to the extent the intervention deadline had passed, the Chief Judge had authority to grant late interventions during settlement judge procedures.<sup>12</sup>

7. The Chief Judge subsequently appointed Judge Matthew J. Vlissides Jr. as Settlement Judge. Under his auspices, the participants convened for eight in-person settlement conferences, all of which were publicly noticed, to try to reach settlement. On August 11, 2023, Judge Vlissides reported that the parties were "significantly progressing towards settlement, and continued negotiations may yield an agreement,"<sup>13</sup> and the Chief Judge accordingly granted the parties an additional 30 days to conduct further

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<sup>9</sup> See *Essential Power OPP, LLC v. PJM Interconnection, L.L.C.*, 183 FERC ¶ 61,163, at P 18 (2023) (Settlement Order).

<sup>10</sup> Settlement Order, 183 FERC ¶ 61,163 at P 17 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 122 FERC ¶ 61,009, at P 13 (2008) ("[T]he Commission strongly favors settlements, particularly in cases that are highly contested and complex."); *The Mont. Power Co.*, 77 FERC ¶ 61,110, at 61,434 (1996) ("[T]he Commission strongly favors settlements, which provide the opportunity to eliminate the need for more lengthy proceedings if the parties reach an agreement on the issues that is compatible with the public interest"); *San Diego Gas & Elec. Co.*, 180 FERC ¶ 61,121, at P 9 (2022) (ordering settlement judge procedures before making any merits determinations)).

<sup>11</sup> *Id.* P 20.

<sup>12</sup> *Id.* P 15 n.32.

<sup>13</sup> *Second Status Report of Settlement Judge*, Docket No. EL23-53-000, at P 3 (Aug. 11, 2023).

negotiations.<sup>14</sup> On September 1, 2023, Judge Vlissides reported that a “settlement in principle” was reached and that the parties expected to file a settlement by late September.<sup>15</sup>

8. On September 8, 2023, 70 parties, including PJM and numerous intervenors and complainants, filed a request for waiver of the Tariff to defer collection of the remaining unbilled penalties associated with Winter Storm Elliott. The Commission noticed the filing with a comment and intervention deadline of September 15, 2023. On September 22, 2023, Chief Companies moved to intervene out of time with respect to the waiver sub-dockets and the complaint sub-dockets and protested the waiver. On September 25, 2023, the Commission granted Chief Companies’ untimely motion to intervene with respect to the waiver dockets<sup>16</sup> and also granted the request for waiver.<sup>17</sup>

9. On September 29, 2023, the Settling Parties filed the Settlement, triggering the creation of a new docket, Docket No. ER23-2975-000. On October 17, 2023, Chief Companies also moved to intervene in that new docket and subsequently filed comments opposing the Settlement on October 19, 2023. Chief Companies is the sole entity filing comments opposing the Settlement.

## II. Settlement

10. The Settlement largely resolves all 15 Complaints filed against PJM relating to Winter Storm Elliott. The Settlement is supported by 81 Settling Parties, including PJM, all but one of the complainants in these proceedings, many intervenors who protested the Complaints, and a number of other interested parties.<sup>18</sup> An additional 19 parties have

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<sup>14</sup> *Order Granting Extension of Settlement Judge Procedures*, Docket No. EL23-53-000 (Aug. 14, 2023).

<sup>15</sup> *Final Status Report of Settlement Judge*, Docket No. EL23-53-000, at P 4 (Sept. 1, 2023).

<sup>16</sup> In an order being issued concurrently, the Commission sets aside its prior order on waiver, in part, to specify that the Commission’s determination to “grant the Chief Companies’ late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay” was limited to the waiver sub-dockets. *Essential Power OPP, LLC v. PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,193, at P 30 (2023) (Waiver Order).

<sup>17</sup> *Id.* P 32.

<sup>18</sup> A full list of Settling Parties is included as Appendix A. Parties that have indicated they will not oppose are listed in Appendix B.

indicated that they will not oppose the Settlement, including ODEC, the lone complainant who did not join as a settling party.

11. Section 3.1 of the Settlement provides that PJM will reduce the total assessed penalties incurred during Winter Storm Elliott by 31.7%. Section 3.3 specifies that if any seller defaults or otherwise fails to pay its full penalties as revised, plus any applicable interest, such seller shall continue to owe the full amount originally assessed.

12. Section 4.3 separates two issues reserved for the Commission to resolve. First, section 4.3.1 states that the Settling Parties request the Commission decide the merits of the Energy Harbor Complaint (Docket No. EL23-63-000) on the current record. Section 4.3.1.1 specifies that the 31.7% reduction in penalties will nonetheless apply to Energy Harbor. Second, section 4.3.2 preserves the right of EKPC (Docket No. EL23-74-000) to pursue its claim requesting modification of the penalty rate and stop-loss, beginning with the 2023/2024 delivery year.

13. Article 8 of the Settlement provides that, upon approval of the Settlement, all claims against PJM arising from Winter Storm Elliott are released, whether such claims are the subject of pending complaints or not, except as provided for in section 4.3 of the Settlement.

14. Section 10.4 provides that:

The standard of review for any proposed changes to the terms of this Settlement unilaterally sought by a Settling Party shall be the “public interest” standard of review commonly referred to as the “Mobile Sierra” standard of review. The standard of review for any modifications to this Settlement proposed by any other person or entity, including any modifications resulting from the Commission acting *sua sponte*, will be the most stringent standard permitted by law.

### **III. Settlement Comments**

15. Initial comments to the Settlement were due on October 19, 2023, and 20 comments were filed. Reply comments were due on October 30, 2023, and seven were filed.

16. On November 8, 2023, PJM filed an answer to respond to the reply comments filed by Trial Staff and Chief Companies. On November 9, 2023, Coalition of PJM Capacity Resources also filed an answer in support of PJM’s answer. On November 13, 2023, Nautilus Entities and Chief Companies also filed answers. On November 17, 2023, PJM submitted an additional answer in response to Chief Companies’ answer.

#### IV. Chief Companies' Intervention

17. On October 30, 2023, PJM filed an answer opposing Chief Companies' motion to intervene in Docket No. ER23-2975-000, which was generated when Settling Parties filed the Settlement.

18. PJM argues that filing a settlement should not create a new avenue for intervention long after the deadline in the underlying proceedings has passed.<sup>19</sup> PJM states that new dockets are generated when a settlement is filed, and that it is a ministerial exercise not dictated by statute or regulation. Instead, PJM contends, the new docket is a helpful way to streamline proceedings by segregating parties' settlement-related pleadings from the pleadings in the underlying litigation.<sup>20</sup> PJM states that the Commission did not notice the Settlement to invite interventions or comments because Rule 602 only requires actual notice to the parties to the proceeding and directs the participants who submitted the settlement to identify the dates on which comments are due.<sup>21</sup>

19. PJM argues that only those intervenors that were parties to the Winter Storm Elliott Complaint proceedings can now participate in these Settlement proceedings because settlements are not standalone filings under FPA section 205 and do not provide an independent basis for intervention.<sup>22</sup> PJM argues that this is particularly true in cases, as here, where no new tariff sheets were generated.

20. PJM argues that the Commission should recognize Chief Companies' motion here as a second untimely motion to intervene, which it has filed in case their intervention in the complaint dockets was overturned on rehearing.<sup>23</sup> PJM contends that therefore, even if the Commission concludes that the Settlement docket provides Chief Companies a new opportunity to intervene, it must still apply "the strictest possible scrutiny."<sup>24</sup>

21. PJM argues that Chief Companies' intervention has disrupted the proceeding and burdened the parties because after dozens of entities engaged in months of intensive

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<sup>19</sup> PJM October 30 Answer at 3.

<sup>20</sup> *Id.* at 3-4.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 5-6 (quoting *Maritimes & Ne. Pipeline, L.L.C.*, 154 FERC ¶ 61,182, at P 32 (2016) (*Maritimes*)).



settlement negotiations, the Chief Companies “came out of hiding” for the sole purpose of undoing the Settlement which every party who actually participated either supports or does not oppose.<sup>25</sup>

22. PJM notes that many intervenors were net bonus payment recipients with interests identical to those of Chief Companies.<sup>26</sup> PJM states that Chief Companies inexplicably waited until months after the final intervention deadline and weeks after a settlement-in-principle had been reached before attempting to intervene. PJM argues that permitting the Chief Companies to intervene in the Settlement proceeding now, and purely on the basis of the Commission’s docket management procedures, would treat them as equal participants in the extensive negotiations that created the Settlement despite contributing nothing to the significant effort put forth to resolve the Winter Storm Elliott Complaints. PJM states that this would fundamentally undermine the Commission’s intervention precedents and ignore the Commission’s expectation that intervention will occur “as early as possible.”<sup>27</sup> PJM additionally states that Chief Companies has not explained why it did not intervene sooner despite being aware of the proceedings as early as March 31, 2023.<sup>28</sup>

23. Chief Companies filed an answer in response on November 3, 2023. Chief Companies argues that the Commission granted its intervention request to the complaint dockets and that Chief Companies is therefore a party that can contest the Settlement.<sup>29</sup>

24. Chief Companies argues that, even if the Commission does grant rehearing and denies its intervention in the complaint dockets, Chief Companies’ intervened in Docket No. ER23-2975-000 two days before comments were due.<sup>30</sup> Chief Companies argues that PJM’s argument that the Settlement docket does not provide an independent basis to intervene is not supported by regulation or precedent.<sup>31</sup> Chief Companies notes that Commission regulations allow parties to comment on and contest an offer of settlement,

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<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.* (quoting *Black Marlin Pipeline*, 67 FERC ¶ 61,205, at 61,639 (1994) (*Black Marlin*)).

<sup>28</sup> *Id.* at 7-8

<sup>29</sup> *See* Chief Companies November 3 Answer at 4-5.

<sup>30</sup> *Id.* at 5.

<sup>31</sup> *Id.* at 5-6.

but do not require party status be granted in the docket leading to an offer of settlement.<sup>32</sup> Chief Companies notes that thirty other parties also intervened in the Settlement docket.

25. Chief Companies argues that it has good cause to intervene because the Settlement shields PJM from liability for alleged Tariff violations and it diminishes penalty payments.<sup>33</sup> Chief Companies argues that it has a significant interest in this proceeding because it will lose a portion of its bonus payment if the Settlement is approved. Chief Companies states that some entities supporting the Settlement are both due bonus payments and have been assessed penalties, and that those entities get some benefit from the Settlement.<sup>34</sup> Chief Companies states that it is only due bonus payments, and that no other party to the Settlement is in the same position.<sup>35</sup>

26. Chief Companies argues that its intervention is in the public interest because no other party has scrutinized the concerns it raises.<sup>36</sup> Finally, Chief Companies argues its participation will not disrupt the proceedings because it has not delayed any deadlines, and the Commission has not yet acted on the Settlement.<sup>37</sup>

27. On November 7, 2023, Constellation filed an answer supporting PJM and opposing Chief Companies' answer. Constellation states that the Chief Companies stayed silent for 175 days as the Complaints were filed and challenged, the Commission set the proceedings for settlement, Judge Vlissides held eight publicly noticed settlement conferences, and the parties negotiated a resolution, and only decided to intervene in those proceedings after the settlement process concluded.<sup>38</sup> Constellation asserts that Chief Companies then protests the otherwise uncontested Settlement in what it now admits was a ploy for a payoff, and that such conduct is hardly consistent with acting in

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<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* at 8.

<sup>34</sup> *Id.* at 8-9.

<sup>35</sup> *Id.* at 9.

<sup>36</sup> *Id.* at 9-10.

<sup>37</sup> *Id.* at 10-11.

<sup>38</sup> Constellation November 7 Answer at 0-1.

good faith.<sup>39</sup> Constellation warns that allowing Chief Companies intervention here would only perpetuate such behavior and undermine future settlements.<sup>40</sup>

28. Constellation argues that the Commission should grant rehearing and confirm that the Settlement docket does not provide a back door for participation.<sup>41</sup> Constellation states that the fact that the Chief Companies simultaneously claims that it is owed the full amount of bonus payments, and that PJM should be held to account for alleged Tariff violations, only confirms that the Settlement is a just and reasonable compromise of these inconsistent positions.<sup>42</sup> Constellation states that resolving disagreements is the whole point of settlement and if a party can stay silent until all the work is finished, and then swoop in and demand a payoff under threat of contesting the settlement, then such settlements are pointless.<sup>43</sup>

## V. Discussion

### A. Chief Companies Intervention

#### 1. Procedural

29. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2022), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept the answers filed by PJM, Chief Companies, and Constellation because they have provided information that assisted us in our decision-making process.

#### 2. Determination

30. We deny Chief Companies' motion to intervene in Docket No. ER23-2975-000. Under Commission rules, Rule 602 settlements should be submitted through the Commission's eTariff system, which in this case resulted in the creation of a new

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<sup>39</sup> *Id.* at 0.

<sup>40</sup> *Id.* at 1.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 2-3.

<sup>43</sup> *Id.* at 3.

docket.<sup>44</sup> We find that, in this context, the only entities that have an interest in the Settlement are those that are parties to the underlying dockets being resolved by the Settlement. We therefore deny Chief Companies' motion to intervene under Rule 214(c).<sup>45</sup>

31. Allowing entities to intervene in the new docket generated by the filing of a Settlement, when such entities did not participate in the underlying dockets and settlement discussions, would run contrary to cases where the Commission has disallowed parties to intervene for the first time after the parties have agreed to a settlement.<sup>46</sup> While those cases all involved late motions to intervene, the Commission had not yet promulgated its guidance regarding filing settlements in eTariff, so those settlements were not filed in new dockets.<sup>47</sup> We nonetheless find that an intervention in

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<sup>44</sup> See *Elec. Tariff Filings*, 130 FERC ¶ 61,047 (2010); *Notice of Additional eTariff Type of Filing Codes* (Dec. 1, 2016), <https://www.ferc.gov/sites/default/files/2020-05/SettlementFilingCodes.pdf>; *Procedures Governing Rule 602 Settlement Filings* (Oct. 13, 2017), <https://cms.ferc.gov/sites/default/files/2020-05/notice-to-the-public-ProceduresGoverningRule602SettlementFilings.docx>. Because these are complaint proceedings that PJM did not initiate, these rules require that the Settlement be filed in a new docket. Parties to settlements filed in new dockets do not need to re-intervene to be considered parties to the settlement docket. Cf. *PPL Elec. Utils. Corp. v. PJM Interconnection, L.L.C.*, 179 FERC ¶ 61,176, at P 28 n.63 (2022) (citing *El Paso Nat. Gas Co.*, 33 FPC 1260, 1262 (1965) (“Those parties granted intervention by this order will be considered as intervenors in all the matters in these presently consolidated proceedings. Parties, therefore, need not refile for intervention in the additional and individual docket consolidated by this order unless they desire to do so.”)).

<sup>45</sup> 18 C.F.R. § 385.214(c) (2022).

<sup>46</sup> See, e.g., *Maritimes*, 154 FERC ¶ 61,182 at PP 32-39; *Black Marlin*, 67 FERC ¶ 61,205 at 61,639; *Pub. Utils. Comm'n of the State of Cal. v. Sellers of Long Term Contracts to the Cal. Dept. of Water Res. Cal. Elec. Oversight Bd.*, 141 FERC ¶ 61,092, at P 34 (2012).

<sup>47</sup> In *Maritimes*, the most recent case, the settlement was filed on January 17, 2016. 154 FERC ¶ 61,182 at P 2. The Chief Administrative Law Judge's notice requiring all settlements to be filed via eTariff was not effective until January 3, 2017, *Notice of Additional eTariff Type of Filing Codes* (Dec. 1, 2016), <https://www.ferc.gov/sites/default/files/2020-05/SettlementFilingCodes.pdf>, and the guidance was subsequently clarified on October 13, 2017. *Procedures Governing Rule 602 Settlement Filings* (Oct. 13, 2017), <https://cms.ferc.gov/sites/default/files/2020-05/notice-to-the-public-ProceduresGoverningRule602SettlementFilings.docx>.

the new docket that is generated by the filing of a Settlement presents the same concern as an untimely intervention in the complaint proceedings and find these prior cases applicable to this situation. As the Commission has explained, “[i]nterested parties are not entitled to hold back awaiting the outcome of the proceeding, or to intervene only when events take a turn not to their liking.”<sup>48</sup>

32. We additionally find that even if we accepted Chief Companies’ intervention in the docket generated by the filing of the Settlement, we would still not treat the Settlement as contested. Our regulations provide that a settlement is contested when it “is contested in whole or in part by any party.”<sup>49</sup> We find that in this context, it is a party’s status in the underlying complaint dockets alone, not a new docket generated solely by the Commission’s filing procedures, that makes it a party that can contest a settlement for purposes of the Commission’s regulations.

33. The Winter Storm Elliott Complaints and the settlement process itself were publicly noticed and widely publicized in the trade press.<sup>50</sup> While other parties intervened to protect their interests, Chief Companies remained silent as the intervention deadline for 15 separate proceedings passed. Moreover, in setting the Complaints for settlement, the Commission reminded parties that the intervention deadline had not yet lapsed in every docket, and to the extent it had, the Chief Judge had authority to grant late interventions.<sup>51</sup> Indeed, some parties did in fact file late motions to intervene, and the Chief Judge granted

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<sup>48</sup> *Maritimes*, 154 FERC ¶ 61,182 at P 36 (quoting *Summit Hydropower*, 58 FERC ¶ 61,360, at 62,199-200 (1992)); see also *Covelo Indian Cmty. v. FERC*, 895 F.2d 581, 587 (9th Cir. 1990) (“Because the Community’s motion to intervene came as the parties were entering a final settlement agreement—following protracted hearings, studies, and negotiations—late intervention obviously would have disrupted the proceedings. Courts are understandably reluctant to force agencies to prolong proceedings for latecomers.”).

<sup>49</sup> 18 C.F.R. § 385.602(h)(1)(i) (2022). A party is “[a]ny person whose intervention in a proceeding is effective under Rule 214.” 18 C.F.R. § 385.102(c)(3) (2022).

<sup>50</sup> See, e.g., David Leith-Yessian, *Complaints to FERC Over PJM Performance Penalties Multiply* (Apr. 7, 2023), <https://www.rtoinsider.com/31970-complaints-ferc-pjm-performance-penalties-multiply/>; Ethan Howland, *FERC to Oversee Settlement Talks to Resolve PJM Winter Storm Elliott Complaints Amid \$1.8b in Charges* (June 7, 2023), <https://www.utilitydive.com/news/ferc-pjm-winter-storm-elliott-settlement-complaints-calpine-vistra/652282/>.

<sup>51</sup> Settlement Order, 183 FERC ¶ 61,163 at P 15 n.32.

late interventions while settlement procedures were ongoing.<sup>52</sup> The parties to this proceeding met for eight publicly-noticed conferences, but Chief Companies failed to move to intervene, even after Judge Vlissides announced that parties were progressing towards an agreement. It was not until nearly three weeks after Judge Vlissides announced that the parties had reached a settlement-in-principle that Chief Companies attempted to intervene to protect its interests for the first time.

34. Chief Companies admits that it was aware of the complaint proceedings, but stated in its comments that it “initially saw no need to participate in complaint proceedings between PJM and the Non-performing Companies because Chief Companies overperformed during Elliott.”<sup>53</sup> The Commission “expects parties to intervene in a timely manner based on the reasonably foreseeable issues arising from the applicant’s filings and the Commission’s notice of proceedings.”<sup>54</sup> The Commission has found that entities are “expected to intervene ‘as early as possible, whether or not they had yet decided the extent of their participation.’”<sup>55</sup> Indeed, the potential for these proceedings to

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<sup>52</sup> See, e.g., Order of Chief Judge Granting Late Motion to Intervene of KPSC, Docket No. EL23-53-000 (June 23, 2023); Order of Chief Judge Granting Late Motion to Intervene of Clearway, Docket No. EL23-61-000 (June 29, 2023); Order of Chief Judge Granting Late Motion to Intervene of Onward Energy, Docket No. EL23-53-000 (July 5, 2023).

<sup>53</sup> Chief Companies Reply Comments at 5.

<sup>54</sup> *Cal. Dep't of Water Res. & the City of Los Angeles*, 122 FERC ¶ 61,150, at P 9 (2008) (citing *Tex. E. Transmission, LP*, 102 FERC ¶ 61,262, at P 11-12 (2003); *S. Cal. Edison Co.*, 100 FERC ¶ 61,327 at P 7 (2002); *Niagara Mohawk Power Corp.*, 100 FERC ¶ 61,247 (2002)); *Cal. Trout v. FERC*, 572 F.3d 1003, 1014 (2009) (stating that the Commission has “steadfastly and consistently” held that a prospective intervenor lacks good cause if it has “actual or constructive notice that his interest might be adversely affected by a proceeding, but [nonetheless] fails to intervene in a timely manner”).

<sup>55</sup> *Maritimes*, 154 FERC ¶ 61,182 at P 34 (quoting *Black Marlin*, 67 FERC ¶ at 61,637); see also *KeySpan-Ravenswood, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,062 (2008) (Moeller, Comm’r, concurring) (“Incumbent on parties is the responsibility to actively monitor the proceeding and to anticipate foreseeable developments. . . . Dynegy and NRG should have contacted other parties to this case to determine if settlement discussions were ongoing. Alas, it appears they did not. Instead, only after years of silence did they awake from their slumber to complain that they were not made aware of the settlement talks. After all, since Ravenswood performed all the heavy lifting in this proceeding, perhaps they expected that Ravenswood would send an invitation informing them of the settlement discussions. I contend that Ravenswood had

reduce bonus payments for overperforming entities was evident from the beginning,<sup>56</sup> which is likely why so many overperforming generators intervened early and participated actively, including the co-owners of Chief Companies' facilities.<sup>57</sup> Moreover, the Commission issued an order and a notice establishing the settlement proceedings, and the Chief Companies still did not seek intervention even though it was aware a settlement could reduce its bonus payments. Chief Companies, therefore, had ample notice and opportunity to intervene in the underlying proceedings before a settlement in principle was reached, and should have done so if it wished to participate in these proceedings.

35. While Chief Companies asserts that the Commission's regulations do not expressly provide that only parties can file comments to a Settlement, our regulations provide that the Commission will treat a settlement as contested when it "is contested in whole or in part by any party."<sup>58</sup> As we explain above, Chief Companies is not a party to Docket No. ER23-2975-000, and as we explain in an order setting aside the Waiver

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no such obligation.").

<sup>56</sup> See Tariff, attach. DD § 10A(g) (providing that revenue collected from penalties are used to fund bonus payments).

<sup>57</sup> See, e.g., Protest of Vistra Corp. to PJM Motion for Establishment of Settlement Judge Procedures (filed Apr. 24, 2023) (bonus payment recipient advocating against motion for settlement judge procedures); Motion of Constellation Energy Generation, LLC to Dismiss Capacity Performance Complaints (filed May 1, 2023) (bonus payment recipient moving to dismiss the complaints); Comments of Brookfield Renewables Suppliers (filed May 26, 2023) (comments of bonus payment recipient urging the Commission to deny all of the complaints); PJM November 8 Answer at 5-6 (noting the participation of the other owners of Chief Companies' facilities). We additionally note that PJM provided a tolling notice to all market participants on April 24, 2023, notifying them that a reduction in bonus payments was possible as a result of the complaints. PJM Reply Comments at 6 n.16.

<sup>58</sup> 18 C.F.R. § 385.602(h)(1)(i) (emphasis added); see also *Maritimes*, 154 FERC ¶ 61,182 at PP 32, 40 & n.51 (treating settlement as uncontested after rejecting late intervention of entity contesting settlement); *S. Pac. Pipe Lines, Inc.*, 45 FERC ¶ 61,242, at 61,715-16 (1988) ("Chevron and Giant as nonparties may not contest the settlement. By not intervening in this proceeding, they 'assume[d] the hazard that the parties [would] settle their disputes in a manner that might not be to the liking of nonparties.'") (quoting *Williams Pipe Line Co.*, 30 FERC ¶ 61,262, at 61,546 (1985)); *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,181, at PP 7-8 (2016) (applying "fair and reasonable" standard to settlement contested only by non-party participant).

Order, in part,<sup>59</sup> Chief Companies is not a party to the underlying complaint proceedings. Thus, because Chief Companies is not a party to these proceedings, we find that the Settlement is uncontested.<sup>60</sup>

## **B. Settlement**

### **1. Procedural**

36. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We accept the answers filed by PJM, Chief Companies, Constellation, Coalition of PJM Capacity Resources, and Nautilus Entities because they have provided information that assisted us in our decision-making process.<sup>61</sup>

### **2. Determination**

37. The Commission finds that the Settlement appears to be fair and reasonable and in the public interest, and accordingly we approve the Settlement. Fifteen initial comments were filed in support of the Settlement, three parties filed comments to note their non-opposition to the Settlement, and Trial Staff states that the Settlement provides meaningful benefits. While the Commission can consider the Chief Companies comments in determining whether to approve the Settlement,<sup>62</sup> we find here that the Chief Companies has not raised sufficient objections to the Settlement, as it is supported by market participants representing a divergent set of interests, including bonus

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<sup>59</sup> *Essential Power OPP, LLC v. PJM Interconnection, LLC*, 185 FERC ¶ 61,205 (2023).

<sup>60</sup> *See High Island Offshore Sys., L.L.C.*, 110 FERC ¶ 61,043, at P 29 (2005) (while the Commission may consider comments opposing a settlement, the settlement rules clearly contemplate that the Commission may approve a settlement as uncontested despite comments opposing the settlement), *aff'd in relevant part sub nom. Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 701 (D.C. Cir. 2007); *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,181 at PP 7-8 (approving settlement contested by Trial Staff).

<sup>61</sup> Though we accept Chief Companies November 3 Answer here, to the extent that Chief Companies' answer responds to the arguments made in the rehearing requests filed in Docket Nos. EL23-53-003, et. al., we note that Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.

<sup>62</sup> *See High Island Offshore Sys., L.L.C.*, 110 FERC ¶ 61,043 at PP 27-29 (considering the comments of Trial Staff, a non-party participant); 18 C.F.R. § 385.602(f)(1) (providing no limitations on who may file a comment).



recipients, like the Chief Companies,<sup>63</sup> market participants assessed penalties, and a number of other interested parties. The Settlement allows all parties to avoid the distraction and costs of litigation, mitigates market disruptions that may occur from protracted litigation, and prevents diverting resources and attention away from other pressing market concerns.

38. The Settlement appears to provide that the standard of review applicable to modifications to the Settlement proposed by third parties and the Commission acting *sua sponte* is “the most stringent standard permitted by law.” Although we do not decide in this order what standard of review applies to the Settlement or any component of it, we clarify the framework that would apply if the Commission were required to determine the standard of review in a later challenge to the Settlement by a third party or the Commission acting *sua sponte*.

39. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Association v. FERC*,<sup>64</sup> however, the D.C. Circuit determined that the Commission is legally authorized to impose a more

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<sup>63</sup> The fact that other bonus recipients support the settlement indicates that the Chief Companies’ interests were represented in the settlement discussions. *Id.* at P 33 (when the Commission approves an uncontested settlement, it “relies in part on the fact that the interests of the active parties in the case are generally similar to the interests of the inactive parties and consumers.”). While Chief Companies claims that it is in the unique position of having no penalties at all and is only due to receive bonus payments, we find that this claim is speculative and unlikely to be true given the large and diverse set of parties involved. In any event, it is not clear why a party that is due bonus payments is in a fundamentally different position than a party that incurred some penalties, but on balance overperformed and is due to receive net bonus payments. In either scenario, the entity would receive approximately 31.7% less revenue under the terms of the Settlement.

<sup>64</sup> *New England Power Generators Ass’n v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. 2013).

rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above.

40. With the exception of two issues expressly reserved for the Commission to decide on the merits,<sup>65</sup> the Settlement resolves all issues in dispute in Docket Nos. EL23-53, EL23-54, EL23-55, EL23-56, EL23-57, EL23-58, EL23-59, EL23-60, EL23-61, EL23-63, EL23-66, EL23-67, EL23-74, EL23-75, and EL23-77. The Commission’s approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

41. We also dismiss as moot all pending motions, including the motion to stay and joint request for waiver pending in Docket Nos. EL23-57-001 and EL23-57-006, respectively.

The Commission orders:

(A) Chief Companies’ motion to intervene is hereby denied, as discussed in the body of this order.

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

By the Commission. Commissioner Clements is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>65</sup> See *supra* P 12. We are concurrently issuing an order resolving the issues raised in Docket No. EL23-63-000. The issues reserved from EKPC’s complaint in Docket No. EL23-74-000 remain under consideration.

**Appendix A - List of Settling Parties**

Settling Complainants:

Ad Hoc Committee of Certain Noteholders of Talen Energy Corp.  
Aurora Generation, LLC  
Brunner Island, LLC  
Calpine Corporation  
Camden Plant Holding, L.L.C.  
Clean Energy Future – Lordstown, LLC  
Competitive Power Ventures Holdings, LP  
CPV Power Holdings, LP18  
East Kentucky Power Cooperative, Inc.  
Elwood Energy LLC  
Energy Harbor LLC  
Essential Power OPP, LLC  
Essential Power Rock Springs, LLC  
H.A. Wagner LLC  
Hickory Run Energy, LLC  
Invenergy Nelson, LLC  
Jackson Generation, LLC  
Lakewood Cogeneration, L.P.  
Lanyard Power Holdings, LLC  
Lee County Generating Station, LLC  
Lightstone Marketing LLC  
Lincoln Generating Facility, LLC  
LSP University Park, LLC  
MC Project Company LLC  
Montour, LLC  
Orion Power Holdings, LLC  
Parkway Generation Keys Energy Center LLC  
Parkway Generation Operating LLC\*  
Parkway Generation Sewaren Urban Renewal Entity LLC  
Red Oak Power, LLC  
Rockford Power, LLC  
Rockford Power II, LLC  
South Field Energy LLC  
SunEnergy 1, LLC  
Talen Energy Marketing, LLC  
University Park Energy, LLC

Settling Intervenor:

American Municipal Power, Inc.  
Big Sandy Peaker Plant, LLC  
Bluestone Farm Solar, LLC  
Buckeye Power, Inc.  
Constellation Energy Generation, LLC  
Cordova Energy Company  
Cypress Creek Renewables, LLC  
Delaware Municipal Electric Corporation, Inc.  
Eagle Point Power Generation LLC  
ENGIE Solidago Solar, LLC  
Fairless Energy, L.L.C.  
Forked River Power LLC  
Garrison Energy Center LLC  
Harts Mill Solar, LLC  
Hawtree Creek Farm Solar, LLC  
Hazleton Generation LLC  
Homer City Generation, L.P.  
Illinois Municipal Electric Agency  
Indeck Niles, LLC  
LS Power Development, LLC  
Midwest Generation, LLC  
Montpelier Generating Station, LLC  
Monument Generating Station, LLC  
Mt. Carmel Cogen Inc.  
NRG Business Marketing LLC  
O.H. Hutchings CT, LLC  
Pine Gate Renewables, LLC  
PJM Industrial Customer Coalition  
PJM Power Providers Group (P3)  
Powells Creek Farm Solar, LLC  
REV Renewables, LLC  
Salt City Solar LLC  
Shell Energy North America (US), L.P.  
Sidney, LLC  
Southern Maryland Electric Cooperative, Inc.  
Sunnybrook Farm Solar, LLC  
Tait Electric Generating Station, LLC  
Vermillion Power, L.L.C.  
Vitol Inc.  
Vitol PA Wind Marketing LLC  
Vitol Solar I LLC  
Vitol Wind I LLC  
Whitehorn Solar LLC

Wolf Hills Energy, LLC  
Yankee Street, LLC

**Appendix B – List of Non-Opposing Parties**

Non-Opposing Complainants:

Old Dominion Electric Cooperative

Non-Opposing Intervenors:

AES Clean Energy Development, LLC  
American Electric Power Service Corporation  
Avangrid Renewables  
Blooming Grove Wind Energy Center LLC  
Boston Energy Trading and Marketing LLC  
Dominion Energy Services  
Duke Energy Business Services LLC; Duke Energy Ohio, Inc.; and Duke Energy Kentucky, Inc.  
EDP Renewables North America LLC  
Leeward Renewable Energy, LLC  
Marcus Hook Energy, L.P.  
Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM Interconnection, L.L.C.  
PSEG Companies<sup>66</sup>  
Northern Virginia Electric Cooperative  
Onward Energy  
RWE Clean Energy Wholesale Services, Inc.  
Solar Energy Industries Association  
Tenaska, Inc.  
Vistra Corporation

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<sup>66</sup> PSEG Companies was not originally including in the list of non-opposing parties, but subsequently agreed to not oppose the Settlement “consistent with other Non-Opposing Intervenors listed in Exhibit B to the Offer of Settlement.”