UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

| | | |
|---|---|---|
| Louisiana Public Service Commission<br><br>Arkansas Public Service Commission<br>Council of the City of New Orleans, Louisiana<br><br>Complainants,<br><br>v.<br><br>System Energy Resources, Inc.,<br>Entergy Services, LLC,<br>Entergy Operations, Inc., and<br>Entergy Corporation<br><br>Respondents. | ) | Docket No. EL21-56-000 |
| System Energy Resources, Inc. | ) | Docket No. ER18-1182-002 |

**COMMENTS OF THE ALLIANCE FOR AFFORDABLE ENERGY, THE DEEP SOUTH CENTER FOR ENVIRONMENTAL JUSTICE AND SIERRA CLUB IN OPPOSITION TO THE PROPOSED PARTIAL SETTLEMENT**

Susan Stevens Miller
Senior Attorney
Earthjustice
1001 G Street, NW, Suite 1000
Washington, DC 20001
smiller@earthjustice.org

*Counsel for the Alliance for Affordable Energy, Deep South Center for Environmental Justice and Sierra Club*

August 1, 2022

On June 23, 2022, Entergy Services, LLC, as agent for System Energy Resources, Inc. ("SERI") filed a Partial Settlement Agreement and Offer of Settlement ("Settlement")[1] on behalf of itself, Entergy Corporation, Entergy Mississippi, LLC, and intervenor the Mississippi Public Service Commission ("MPSC") (jointly, "Settling Parties"). Pursuant to Rule 602(f) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.602(f), and the July 6, 2022 Notice Extending Comment Periods For Settlement Agreement, the Alliance for Affordable Energy, the Deep South Center for Environmental Justice, and Sierra Club ("Louisiana Stakeholders") respectfully submit the following comments in opposition to the proposed Settlement.[2] The Louisiana Stakeholders oppose the Offer of Settlement because, if the Settlement is accepted, the well-documented imprudence and mismanagement by SERI of the Grand Gulf Nuclear Station ("Grand Gulf") will continue. The Settlement offers no resolution of the mismanagement or prudence issues raised in Docket No. EL21-56-000. The Settlement is not in the public interest and must therefore be rejected.

## I. GRAND GULF BACKGROUND

Construction on Grand Gulf in Port Gibson, Mississippi began in the 1970s and the plant was completed in the first half of the 1980s. In 1974, Entergy determined that Entergy Mississippi could not finance the unit independently, so Middle South Energy, Inc. was created to own and construct the unit. Middle South Energy's name was changed to System Energy

[1] The Settlement was assigned Docket No. ER18-1182-002, with eLibrary accession number 20220623-5119.

[2] The Louisiana Stakeholders filed a timely Motion to Intervene in Docket No. EL21-56-000 on March 22, 2021. While the Louisiana Stakeholders are not intervenors in Docket No. ER18-1182, this Opposition is filed in both EL21-56-000 and ER18-1182-002 because the Settlement was assigned Docket No. ER18-1182-002.

Resources, Inc. ("SERI") in the late 1980s. Construction of Grand Gulf was completed and low power operations began in 1982[3] and Grand Gulf began providing electricity to the grid in July 1985.[4]

In 2009, SERI and Cooperative Energy filed a joint petition with the MPSC seeking a certificate of convenience and necessity to construct an uprate. Final work on the uprate was completed in June 2012, and Grand Gulf first produced electricity within the uprated zone of operation on August 1, 2012.

Grand Gulf had a summer capacity of 1,251 MW before the uprate[5] and a summer capacity of 1,401 MW after the uprate.[6] SERI owns or leases 90% of Grand Gulf; the remaining 10% is owned by a Mississippi electric cooperative (now known as Cooperative Energy).[7] Middle South Energy's original plan for allocating the output entitlements and costs of Grand Gulf to the Entergy operating companies was found by the FERC to be unduly discriminatory and the Commission adopted a replacement allocation plan in 1985.[8]

Grand Gulf's history of imposing inordinate costs on ratepayers is long and legendary. For example, as of 1983, well before the Grand Gulf plant went on-line, the project cost had risen "from a projected total cost of $1.2 billion for both units to $2.8 billion for Unit No. 1

---

[3] Issuance of Facility Operating License NPF-29 – Grand Gulf Nuclear Station, Unit 1, at 1, NRC, Accession No. ML02140165 (Nov. 1, 1984), https://www.nrc.gov/docs/ML0214/ML021410165.pdf.
[4] Entergy, *Grand Gulf Nuclear Station*, https://www.entergy-nuclear.com/ep/grandgulf/ (last visited July 28, 2022).
[5] U.S. Energy Info. Admin., *Mississippi Nuclear Profile 2010* (Apr. 26, 2012), https://www.eia.gov/nuclear/state/mississippi/index.php.
[6] U.S. Energy Info. Admin., *Nuclear Reactor, State, and Net Capacity*, (Sept. 2021), https://www.eia.gov/nuclear/reactors/reactorcapacity.php.
[7] Grand Gulf Nuclear Station, *supra* note 4.
[8] *See Middle S. Energy, Inc.*, 31 FERC ¶ 61,305 (1985); *Mississippi Industries, Inc. v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987); *System Energy Resources, Inc.*, 41 FERC ¶ 61,238 (1987).

alone."[9] The FERC administrative law judge found, "between now and 1993 the total amount which ratepayers will incur for Grand Gulf power, based on Middle South's figures, will be $3 billion more than if the power were generated from existing units."[10] By the time construction of Grand Gulf was completed, the cost of the plant had increased to "in excess of $3 billion for one unit."[11]

Despite the already high costs imposed on ratepayers by Grand Gulf,[12] SERI elected to expend an additional approximately $800 million to uprate Grand Gulf in 2012. For this $800 million, SERI should have obtained 160 additional megawatts ("MW"), however an ill-conceived sale/leaseback transaction resulted in the uprate increasing SERI's owned capacity by only about 142 MW.[13]

For most of its existence, Grand Gulf has been an above-market resource. However, in 2016 Grand Gulf's performance managed to reach new lows thus driving its all-in costs to consumers to exceedingly high levels. In that time period, Grand Gulf's capacity factor averaged 61.4% while the average capacity factor for the U.S. nuclear fleet was 92.7%.[14] Grand Gulf did not achieve anything approaching full output for the overall period, and approached a normal output level only in 2019 before declining again in 2020.

---

[9] *Middle S. Energy, Inc.*, 26 FERC ¶ 63,044 at 65,103 (1984). Grand Gulf was projected to "come on line at a cost per kilowatt (as well as a cost per kilowatt-hour) three to four times greater than the cost of any existing unit on the Middle South System." *Id.*

[10] *Id.*

[11] *Mississippi Industries v. FERC*, 808 F.2d 1525, 1531 (D.C. Cir. 1987).

[12] As noted by Complainants, SERI witness Michael Schnitzer testified that the cost of power from Grand Gulf was far above market when it was placed into service, agreeing that SERI's costs were 13-14 cents per kilowatthour ("kWh"), as compared to market costs of three or four cents per kWh. Complaint at ¶ 12 (citing Docket No. EL18-152 Tr. 1867–75).

[13] Complaint at ¶ 16.

[14] Complaint at Attach. A, Ex. B (CTC Report), 7 tbl.ES-1.

Thus, in four of the five years beginning in 2016, Grand Gulf's output was far below the industry average—an approximately 30% difference in capacity factor, which measures a unit's actual output versus its capability.[15] It should be noted that the average 2016 to 2020 capacity factor for nuclear plants entering commercial operations in the same time frame as Grand Gulf was 92.72%, the capacity factor average for General Electric reactors was 92.46%, and for boiling water reactors was 93.06%.[16] Grand Gulf's average 61.4% capacity factor is abysmal.

According to a recent filing by the New Orleans City Council, Grand Gulf's problems are continuing. Grand Gulf is once again experiencing an outage which began on June 30, 2022. SERI attempted to power up starting around July 3, 2022, but was unable to get more than 60% power. On or about July 12, 2022, SERI shut down completely and has remained at 0% power through the date of this filing.[17]

Over this same time period, Grand Gulf also has been subject to heightened safety review by the Nuclear Regulatory Commission ("NRC") to a far greater extent than most nuclear power plants. Of the five categories the NRC uses to rate nuclear plant performance, more than 90% of the U.S. Fleet typically falls into Category 1 and any NRC rating below one is considered to be below the acceptable standard.[18] The Complainants' nuclear expert demonstrated that Grand Gulf was rated at Category 2 for 60% of the 2016 to 2020 time period and concluded that Grand Gulf is in the bottom five percent of the U.S. nuclear fleet with regard the Nuclear Safety

[15] Complaint at Attach. A, Ex. B (CTC Report), 7.
[16] *Id.* at 13 tbl.2.1-1.
[17] Renewed Motion of the Council of the City of New Orleans for Commission Action on Complaint Against System Energy Resources Inc., Docket No. EL21-56-000 (filed July 25, 2022) at 3, (citing U.S. Nuclear Reg. Comm'n, *Power Reactor Status Report for July 25, 2022*, (July 25, 2022)), https://www.nrc.gov/reading-rm/doc-collections/event-status/reactor-status/ps.html.
[18] Complaint at Attach. A, Ex. B (CTC Report), 14–15.

Performance.[19] More shocking is the NRC's finding in 2018 that "deliberate" violations of safety protocols occurred at Grand Gulf.[20] In addition, a March 12, 2018 NRC Confirmatory Order Modifying License found, and reflected Entergy's agreement that, "deliberate" violations of safety protocols occurred.

On March 3, 2021, the day after the Complaint was filed, the NRC informed Entergy that the safety rating of Grand Gulf has been further downgraded to Category 3, for "Degraded Performance."[21] In its Annual Assessment letter, NRC stated: "We have determined that the performance of Grand Gulf Nuclear Station during the last calendar quarter of 2020 was within the "Degraded Performance" column of the NRC's Reactor Oversight Process (ROP) Action Matrix… The predominant factor leading to this PI exceeding the Yellow assessment threshold was that the station experienced five reactor scram events while at power in the last seven months of the calendar year."[22]

This dismal performance is continuing. On June 13, 2022, the NRC announced it has begun a special inspection at the Grand Gulf nuclear power plant to review circumstances related to the apparent failure of one of the plant's emergency diesel generators during testing. The generators are used to supply power to safety-related systems in the event of a loss of off-site electrical power. Plant workers determined that the failure was likely caused when an O-ring replaced within a valve with a commercial grade part, rather than one composed of special

[19] *Id.* at 17 tbl.3.1-1.
[20] NRC Confirmatory Order Modifying License at 3-4; Complaint at Attach. E.
[21] See Opposition of Retail Regulators of Companies that Purchase Power From System Energy Resources, Inc. to Request for 50-Day Extension of Time to Answer at Attach. D.
[22] *Id.* at Attach. D.

materials as called for by the manufacturer. The NRC team will evaluate the licensee's causal analyses and the adequacy of corrective actions.[23]

Complainants' nuclear expert investigated the prudence of the plant's operation and found significant evidence of imprudent management of Grand Gulf. Specifically, the nuclear expert found that since 2016 Grand Gulf has shown consistent, substantially degraded performance compared to the U.S. nuclear fleet and that this degradation cannot be explained by the age of the plant, type of plant, or any other "common cause" factor.[24]

## II. SUMMARY OF COMPLAINT

On March 2, 2021, Louisiana Public Service Commission, Arkansas Public Service Commission, and Council of The City of New Orleans, Louisiana (Complainants) filed a formal complaint against System Energy Resources, Inc. (SERI), Entergy Services, LLC, Entergy Operations, Inc., and Entergy Corporation, (collectively, Respondents) alleging that SERI has violated the obligation of prudent utility management in operating the Grand Gulf nuclear unit, resulting in large overcharges to its four affiliated customers, Entergy Arkansas, LLC; Entergy Louisiana, LLC; Entergy New Orleans, LLC; and Entergy Mississippi, LLC; and their customers, pursuant to a Unit Power Sales Agreement.[25]

---

[23] NRC Letter No: IV-22-008 (July 13, 2022) Appendix A. *See also NERC Notice of Full Penalty regarding Entergy - Nuclear and Entergy Fossil & Hydroelectric Generation,* Docket No. NP21-___-000 (Apr. 29, 2021), https://www.nerc.com/pa/comp/CE/Enforcement%20Actions%20DL/PUBLIC_FinalFiled_NOP_NOC-2708_Errata.pdf (detailing penalties and settlement between SERC Reliability Corporation, Northeast Power Coordinating Council, and Entergy resolving multiple NERC violations at Entergy nuclear facilities).

[24] Complaint at ¶ 4 (citing Attach. A, Ex. B (CTC Report) at 8).

[25] The Alliance for Affordable Energy, Deep South Center for Environmental Justice, and Sierra Club filed a timely motion to intervene on March 22, 2021.

Complainants allege that Grand Gulf has exhibited drastic and continuing degraded performance due to SERI's mismanagement, resulting in unusually degraded output for a nuclear plant and imposing a minimum of $360 million in imprudently incurred costs on consumers and that the unit's poor performance has had a significant impact on retail customers.[26] According to Complainants, Grand Gulf's performance since 2012 has been below industry standards, and since 2016 has been far below industry levels and has forced the operating companies to acquire replacement energy at much higher cost than the Grand Gulf energy cost and the failure of SERI, through Entergy's nuclear plant operator, Entergy Operations, Inc., to operate the plant prudently has caused this degraded performance. System Energy performed an $800 million uprate of the unit in 2012 without adequate economic justification and without actually achieving an increase in overall realized output of electricity from the plant from 2012 to 2020. Grand Gulf's safety performance has also been far below national averages, causing significant mitigation costs to be imposed on ratepayers as a result of System Energy's imprudent operation of the plant.

Complainants' nuclear expert investigated the prudence of the plant's operation found significant evidence of imprudent management of Grand Gulf. Specifically, the nuclear expert found that since 2016 Grand Gulf has shown consistent, substantially degraded performance compared to the U.S. nuclear fleet and that this degradation cannot be explained by the age of the plant, type of plant, or any other "common cause" factor.[27] The expert concluded that the root causes for the degraded performance at Grand Gulf were primarily reductions in staff beginning

[26] Complaint at ¶ 2.
[27] Complaint at ¶ 4 (citing Attach. A, Ex. B (CTC Report) at 8).

in 2013 and less than appropriate attention to maintaining the plant, which led to decreased reliability of systems and degraded output from the plant.[28]

According to Complainants, the consequences of the imprudent operation of the Grand Gulf plant include: a) the Entergy operating companies have been required to purchase replacement energy at a cost much higher than the low nuclear fuel cost of Grand Gulf, even as they continue to pay the enormous fixed costs of the unit; b) unplanned shutdowns have disrupted regional energy supplies in the Midcontinent Independent System Operator ("MISO") region, causing shortages and cost increases in the region; c) SERI has incurred substantial costs attempting to comply with the NRC requirements and increased oversight required to mitigate its failure to adequately address safety issues, a cost imprudently incurred and improperly passed through to consumers; and d) SERI incurred increased costs attempting to address operational issues stemming from mismanagement, these increase costs also are charged to consumers.[29]

Complainants seek (1) modification of the Unit Power Sales Agreement ("UPSA") to tie cost recovery to Grand Gulf's performance level going forward, (2) refunds for costs that would not have been incurred but for SERI's imprudent management actions, and (3) the adoption of a new ratemaking procedure for SERI to ensure that adequate economic analysis of alternatives is performed prior to making major new investments in Grand Gulf.[30]

Thus, on addition to seeking refunds for SERI's imprudent conduct, the Complainants request a ratemaking solution that will protect consumers from imprudent charges and provide SERI with sufficient incentive to manage the plant prudently in the future.[31] The Complainants

[28] Complaint at Attach. A, Ex. B (CTC Report), 22.
[29] Complaint at ¶ 20.
[30] Complaint at ¶ 5.
[31] Complaint at ¶ 69.

suggest that SERI's rates be adjusted to reflect adequate performance and provide three alternatives designed to achieve these objectives.[32]

In response to the Complaint, the Entergy Companies moved to dismiss the Complaint, asserting that it provides insufficient detail on the causes of *each* shutdown at Grand Gulf.[33] The Entergy Companies also contend that the Complaint again does not allege facts that raise a "serious doubt" as to prudence.[34] Also, according to Respondents, because Complainant LPSC encouraged SERI to do the uprate, the Complainants cannot now raise issues regarding the uprate.[35] Respondents argue that the Complaint's focus on the capacity factor of Grand Gulf from 2016 to 2020 does not support an inference that imprudent conduct led to Grand Gulf's capacity factor, and does not raise a serious doubt as to SERI's prudence.[36] Finally, Respondents contend that Complainants have not met their burden to establish that the UPSA is or has become unjust, unreasonable, unduly discriminatory, or preferential.[37]

## III. SUMMARY OF SETTLEMENT

On June 23, 2022, Entergy Services, LLC ("Entergy Services"), as agent for SERI and on behalf of the other settling parties Entergy Corporation, Entergy Mississippi, LLC ("Entergy Mississippi"), and the Mississippi Public Service Commission ("MPSC") filed the Settlement in 13 dockets.[38] These dockets all concern challenges regarding SERI's formula rate, the UPSA.

[32] *Id.*
[33] Respondents' Motion to Dismiss the Complaint and Answer to the Complaint at 4.
[34] *Id.* at 3.
[35] *Id.* at 12, 15, 23–24.
[36] *Id.* at 34.
[37] *Id.* at 47 (citation omitted).
[38] Settlement Filing Letter at 1–2.

Under the Settlement, SERI shall provide a black-box refund to Entergy Mississippi, LLC ("EML") in the amount of $235 million, inclusive of FERC interest. The EML refund is based on a refund settlement offer by SERI of $588.25 million, inclusive of FERC interest, to the Operating Company buyers to resolve all claims in 13 dockets set forth in the Settlement.[39]

The black-box refund payment from SERI to EML is subject to a "Most Favored Nation" provision, under which it will be adjusted upward if, prior to a Commission decision in one or all of the above-captioned dockets, SERI agrees to a settlement (or settlements) with another participant to the above-captioned dockets, and such settlement (or settlements), either in the aggregate or a docket-by-docket basis, cumulatively, if grossed-up to a total company basis, would require SERI to pay a total historical refund greater than $588.25 million, inclusive of interest, to the Operating Company buyers.[40]

SERI shall use a return on common equity ("ROE") of 9.65% in UPSA monthly billings to Settling Operating Company Buyers, beginning July 1, 2022. No Settling Party may propose a change in the agreed-upon ROE in UPSA monthly billings to Settling Operating Company Buyers that would be effective during the period of four years from July 1, 2022 through June 30, 2026 ("Moratorium"). The ROE of 9.65% shall be used for Settling Operating Company Buyers even if (i) SERI or a Non-Settling Party proposes a change in the ROE authorized by FERC for SERI's UPSA monthly billings and such change becomes effective during the Moratorium or (ii) FERC issues an order during the Moratorium that authorizes a different ROE.[41]

---

[39] Settlement Statement at 12-13. The relationship of the $235 million and $588.25 million amounts reflects the following allocation percentages: EAL – 24.19%; EML – 39.95%; ELL – 16.13%; and ENO – 19.74%. *Id.* at 13.
[40] *Id.* at 13.
[41] *Id.* at 14.

SERI shall use a capital structure consisting of SERI's actual capital structure, but with a ceiling on the equity ratio of 52.0%. No Settling Party may propose a change in the agreed-upon capital structure in UPSA monthly billings to Settling Operating Company Buyers during the Moratorium.[42]

For UPSA billings to Settling Operating Company Buyers, SERI agrees to utilize this Account 232 treatment for lease payments collected from customers and SERI shall remove long-term incentive plan (LTIP) performance unit awards for management level 1-4 employees from UPSA billings to Settling Operating Company Buyers.[43] Finally, beginning July 1, 2022, and through June 30, 2026, EML will agree to fund the actual costs, such costs not to exceed $150,000 per year, of a consultant chosen at the sole discretion of the MPSC that will audit the implementation of the UPSA.[44]

To the extent practicable, SERI agrees to consult with the Settling Parties by providing an advance review of substantive filings to amend the UPSA. Similarly, to the extent practicable, the Settling Retail Regulators agree to provide SERI with an advance review of any Section 206 complaint relating to UPSA billings. SERI agrees to review any feedback provided by the Settling Parties and if time permits, negotiate in good faith to develop an agreed-upon rate treatment.[45]

If the other parties to these proceedings choose not to join the settlement, their litigation rights are unaffected by the settlement. No claims addressed in the Partial Settlement Agreement and Offer of Settlement shall be deemed settled as to non-settling participants.[46]

---

[42] *Id.* at 15.
[43] *Id.*
[44] *Id.* at 16.
[45] *Id.* at 19.
[46] *Id.* at 26.

## IV. STANDARD OF REVIEW

The Federal Power Act[47] ("FPA") is primarily a consumer protection statute.[48] The FPA "does not permit [the Commission] to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.[49]" As the Supreme Court has said repeatedly, consumer protection against exploitation is "[a] major purpose"[50] and "primary aim"[51] of the FPA and the Natural Gas Act.[52]

The FPA requires just and reasonable rates in order to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."[53] "[T]he Commission must be able to demonstrate that it has 'made a reasoned decision based upon substantial evidence in the record.'"[54]

In acting on a contested settlement, "the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence … or the Commission determines there is no genuine issue of material fact." 18 C.F.R. § 385.602(h)(1)(i).[55] Where "the

---

[47] 16 U.S.C. § 821 *et seq*.
[48] *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) ("primary aim of this legislation was to protect consumers against exploitation").
[49] *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 620 (2nd Cir. 1965).
[50] *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952) ("A major purpose of the [FPA] is to protect power consumers against excessive prices.").
[51] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) (The "primary aim" of the Natural Gas Act is "to protect consumers against exploitation at the hands of natural gas companies."); *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 147 (1960) (same).
[52] *See also FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 (1962*); Atlantic Refin. Co. v. Public Serv. Comm'n,* 360 U.S. 378, 388 (1959).
[53] *Atlantic Refin. Co.* at 388.
[54] *Tennessee Gas Pipeline Co. v. FERC*, 400 F.3d 23, 25 (D.C. Cir. 2005) (quoting *Northern States Power Co. (Minnesota) v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994)).
[55] *See, e.g.*, *R.E. Ginna Nuclear Power Plant, LLC*, 154 FERC ¶ 61,157, at 26 (2016); *Duke Energy Carolinas, LLC*, 152 FERC ¶ 61,227, at 28 (2015).

Commission finds that the record lacks substantial evidence or that … contested issues can not be severed from the offer of settlement," the Commission will "[e]stablish procedures for … receiving additional evidence … or … [t]ake other action which the Commission determines to be appropriate." 18 C.F.R. § 385.602(h)(1)(ii).

The FPA and FERC regulations require the Commission to determine independently that the Settlement is just and reasonable. Pursuant to the FPA, the Commission is charged with protecting the public interest in connection with matters subject to FERC jurisdiction. To determine whether the public interest will be protected, the Commission is required to engage in a review of the "justness and reasonableness" of the proposal at issue. This standard applies to settlements. The courts have rejected the notion that a settlement, solely because of its status as a settlement, is reasonable. The FPA mandates that the Commission evaluate whether the rates, and terms and conditions set forth in a settlement are just and reasonable.

In *Mobil Oil Corp. v. FPC*,[56] the Supreme Court emphasized that because a proposal is a settlement does not "establish without more the justness and reasonableness of its terms."[57] In that case, the Court held that the Federal Power Commission ("FPC") not only had the power to consider contested settlement offers, but was in fact obligated to do so.[58] The Court further elaborated that where there is a lack of unanimity, a settlement agreement "may be adopted as a resolution on the merits, if FPC makes an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates for the area.[59]

[56] *Mobil Oil Corp. v. FPC*, 417 U.S. 283 (1974).
[57] *Id.* at 313.
[58] *Id.*
[59] *Id.* at 314 (citation omitted).

## V. ARGUMENT

### A. Under the Commission's Standards for Acting on Contested Settlements, the Offer of Settlement Cannot be Accepted

#### *1. The Settlement Is Not In The Public Interest*

The basic principle underlying the Complaint is that ratepayers should not have to continue to pay exceedingly high costs for consistently degraded and imprudent performance, or for the costs of SERI's continual safety violations. Respondents cannot dispute the extremely degraded output and safety performance of the Grand Gulf unit in the last five years. Entergy has previously attributed these problems to 1) "a transition to a newer, less-experienced workforce," for which "training and procedures that worked well before were no longer as effective" and 2) "aging and technological obsolescence of plant equipment and infrastructure."[60] Entergy claims to have taken "aggressive" actions in 2018 to resolve these issues. However, the continued outages and safety violations since 2018 clearly establish that these actions were ineffective at best.

Yet, the Settlement does not even acknowledge let alone address these issues. The objective of the Complaint is to try and resolve the outage and safety violation issues by giving SERI a financial incentive to address these issues in a competent manner. Rather than offer a proposal that might stem the tide of outages and safety violations, the Respondents simply offer to refund a small percentage of the outrageous costs the ratepayers have been forced to endure since the Grand Gulf uprate problems began.

[60] Complaint at Attach. A, 1–2.

Clearly, under this Settlement the outages and safety violations will continue. Thus, ratepayers will continue to bear the burden of paying both for the full costs of operating and maintaining Grand Gulf regardless of that plant's inability to provide energy and for power that must be purchased in the Midcontinent Independent System Operator market to replace the power that the plant fails to generate during excessive outages, scrams, and other lengthy shutdowns of the facility.

Acceptance of the Settlement can only occur if the Commission turns a blind eye to SERI's imprudence and mismanagement of Grand Gulf and chooses to ignore the fact that ratepayers will continue to be saddled with unjust and unreasonable costs far into the foreseeable future. Since Grand Gulf is currently licensed to operate until November 2044 and there is no basis to conclude that SERI can or will resolve Grand Gulf's issues, ratepayers may be subject to these unreasonable rates for overt twenty more years.

The Commission should find that, at least with regard to Docket No. EL21-56-000, the Settlement is not in the public interest.

### *2. Acceptance of the Settlement as Proposed Is Not Warranted Under the Trailblazer Standards*

The standards for accepting a settlement over the objections of a contesting party are set forth in Trailblazer Pipeline Co.[61] In *Trailblazer,* the Commission outlined four conditions under which it would be appropriate to accept a contested settlement, none of which are applicable here. The *Trailblazer I* approach allows the Commission to render a merits decision on the contested issues if there is substantial evidence in the record. The *Trailblazer II* approach allows the Commission to view the settlement as a package in which the overall result is just and

[61] *Trailblazer Pipeline Co.,* 85 FERC ¶ 61,345 (1998), *reh'g denied and clarification granted*, 87 FERC ¶ 61,110 (1999), *reh'g denied*, 88 FERC ¶ 61,168 (1999).

reasonable and the settlement will leave the contesting party in no worse position than it would be if the case were litigated. The *Trailblazer III* approach allows the Commission to approve a settlement if the benefits of the settlement are deemed to outweigh the nature of the objections, and the contesting party's interest is too attenuated such that the settlement may be approved under the fair and reasonable standard applicable to uncontested settlements. Finally, the *Trailblazer IV* approach involves severing the contested issues and permitting a limited litigated result, while approving the settlement as to the consenting parties.[62]

**(i) Trailblazer I – The Record Lacks Substantial Evidence**

First, the Commission can accept a settlement where it finds substantial evidence on the record such that the Commission can resolve the contested issues on the merits. The Commission "will entertain only offers of settlement that present a realistic prospect of resolving all or a significant part of the issues in a proceeding."[63] With regard to Docket No. EL21-56-000, there is no basis for finding that there is substantial evidence on the record regarding the issues of imprudence and mismanagement. Thus, the Commission cannot reject the Complainant's contentions on the merits.

Complainants included a number of expert affidavits to support their contentions regarding the imprudence and mismanagement by SERI of Grand Gulf. Specifically, the Complainants attached the affidavit and report of Don Grace of Critical Technologies Consulting, a firm with expertise in nuclear operations and management,[64] as well as the

[62] *Alliance Pipeline L.P.*, 157 FERC ¶ 61,204, at 20 (2016).
[63] *Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189, at 60 (2006).
[64] Complaint at Attach. A.

affidavits of R. Lane Sisung,[65] Keith Berry,[66] and Byron Watson,[67] experts in regulatory ratemaking and economics, as support for the allegations in the Complaint. The Complainants also included other evidentiary support, including public documents. Overall, the Complaint includes 17 attachments, which span more than 600 pages and include affidavits from four experts, in addition to their workpapers.

On April 16, 2021, Respondents filed a Motion to Dismiss the Complaint and Answer to the Complaint disputing the Complainants' contentions. While this document included 45 attachments, the Respondents chose not to provide any expert testimony or affidavits which would contradict Complainants experts or support of their arguments.[68] Respondents provide two primary arguments in response to the Complaint. First, Respondents assert that its uniquely degraded performance does not indicate poor management. Second, Respondents argue that the repeated safety issues, which caused unplanned shutdowns and compliance outages, does not support an inference that imprudent conduct led to those outcomes.[69] These arguments raise issues of fact.

Complainants have substantiated a prima facie case that merits investigation under sections 206 and 306 of the Federal Power Act. However, the Commission has taken no action regarding the Complaint. Thus, the parties have had no opportunity to undertake discovery.[70] Moreover, no substantial evidence has been introduced into a hearing record or been subjected to

[65] Complaint at Attach. B.
[66] Complaint at Attach. C.
[67] Complaint at Attach. D.
[68] *See* Respondents' Motion to Dismiss the Complaint and Answer to the Complaint at xii-xiii (List of Attachments).
[69] *Id.* at ¶¶ 32–37, 37–41.
[70] Rule 401 of the Commission's Rules of Practice and Procedure limits discovery to only those "proceedings set for hearing under Subpart E of this part, and to such other proceedings as the Commission may order." 18 C.F.R. § 385.401(a).

cross-examination (because the Commission has not set the Complaint for hearing). For these reasons, it is impossible for the Commission to adequately review the contested issues. Thus, the record does not contain the substantial evidence necessary to support ruling against the Complainants on their imprudence and mismanagement contentions.

The Commission also should review the extensive Complaint and associated exhibits, as well as Respondents' responsive filings filed in EL21-56-000 and determine that there are genuine issues of material fact in dispute that require examination at an administrative hearing. Complainants and Respondents have painted completely different pictures concerning the causes of Grand Gulf's myriad of problems and how to resolve those issues. The Commission should find that an administrative hearing is the only appropriate option that will provide all interested parties the opportunity to engage in discovery, to scrutinize exhibits and documents and to cross-examine witnesses for the purposes of establishing an adequate evidentiary record.

#### (ii) Trailblazer II – Determination that Settlement is Just and Reasonable Despite Contesting Party's Objection

Second, the Commission could accept the Offer of Settlement, notwithstanding the Louisiana Stakeholders' valid contentions that the Settlement utterly fails to address the imprudence and mismanagement issues raised in Docket No. EL21-56-000, if the Commission were to conclude that the settlement produces just and reasonable results that fall within the range of likely results from litigation of all issues raised in Docket No. EL21-56-000. This is a higher standard than is applied to uncontested settlements and requires the Commission to determine that the settlement package as a whole is just and reasonable, and the contesting party

is in no worse position than if the case were litigated.[71] The Louisiana Stakeholders submit that the Commission cannot make any such determination in Docket No. EL21-56-000.

In considering the second prong of Trailblazer, the Commission should recognize that, as noted above, in Docket No. EL21-56-000 there has been no opportunity for the parties or Commission Trial Staff to engage in discovery and develop a record that would enable the Commission to conduct such an analysis. Absent a summary ruling on the imprudence and mismanagement issues (which, the Louisiana Stakeholders submit, would clearly require rejection of the Settlement), it would be virtually impossible for the Commission to make the necessary findings to support acceptance of the contested settlement under the second Trailblazer approach.

Moreover, on the record as it now stands the Commission cannot find that contesting parties are in no worse position than if the case were litigated. As previously noted, the Settlement ignores the issues of imprudence and mismanagement in favor of simply throwing money at the Complainants. The Settlement represents the worst case outcome for contesting parties because it assumes, without any possible support, that the Commission will ignore the issues raised in the Complaint and chose not to take any action on those issues. At this stage of the proceedings, where there has been no discovery, no filed testimony and no cross-examination of witnesses, the Commission cannot reasonably find that the Settlement leaves contesting parties no worse off than if those parties litigated the case.

[71] 87 FERC ¶ 61,110, 61,439 (1999).

### (iii) Trailblazer III – Contesting Party's Interests Are Attenuated and Can Be Resolved in Another Forum

Under the third prong of *Trailblazer*, if the Commission cannot either summarily rule against the contesting party's issues on the merits, or make a well-supported finding that the settlement terms are just and reasonable notwithstanding the validity of the contesting party's objections, the Commission can still accept a settlement if it finds that (1) the contesting party's interests are sufficiently attenuated that they do not justify rejecting or modifying the proposed settlement, (2) the settlement benefits the settling parties, *and* (3) the contesting party will have another forum in which it can raise its objections. No such finding can be made here.

The Louisiana Stakeholders interests are not attenuated and will be directly affected by the Commission's actions on the Complaint. The Alliance for Affordable Energy ("Alliance") is a non-profit Louisiana organization that serves as a consumer advocate[72] for the electric ratepayers of Louisiana, with special concern for residential and small commercial customers. The Alliance is dedicated to supporting equitable, affordable, environmentally responsible energy policy for the citizens of New Orleans and Louisiana. The issue at the core of the Complaint, that ratepayers in New Orleans and Louisiana have paid and will continue to pay exorbitant and unfair rates due to SERI's imprudence and mismanagement of Grand Gulf. These issues go to the very core of the Alliance's mission.

The Deep South Center for Environmental Justice ("DSCEJ") intends to participate in this proceeding to offer its environmental justice analysis of the poor management of the Grand Gulf nuclear facility, the exorbitant costs imposed on customers, and the lengthy record of Grand Gulf safety violations in the predominantly African American community of Port Gibson,

[72] The Commission should note that neither the City of New Orleans nor Louisiana have an Office of People's Counsel or other governmental consumer advocate.

Mississippi. As with the Alliance, the issues raised by Complainants go to the heart of DSCEJ's mission.

Sierra Club's work focuses on environmental and public health problems associated with energy generation. Sierra Club seeks to reduce these impacts of energy generation while enhancing the affordability of electric service. The Complaint raises issues regarding Grand Gulf's imprudence resulting in the increased use of fossil fueled generation (through the need for additional energy purchases from MISO) in the region and the adverse impact of this imprudent management on clean energy. Sierra Club's issues also are not attenuated from the Complaint or the Settlement.

Accordingly, the Louisiana Stakeholders would be directly affected and adversely affected by the Settlement (if it were accepted) and clearly have a vested interest in the outcome of this issue.

Moreover, there is no other forum in which the Louisiana Stakeholders can raise their objections. The UPSA is a FERC-jurisdictional agreement. Thus, there is no other forum which would have the authority to address the issues raised in Docket No. EL21-56-000.

**(iv) Trailblazer IV – Severance of Contesting Party**

Finally, if none of the prior three bases for accepting a settlement is justified, Trailblazer establishes that the Commission may accept the settlement as to the consenting parties while severing the contesting party, allowing that party to litigate its issues.[73] Severance of a party is an

[73] Severing contesting *parties* is distinct from the option of severing an *issue* raised by a contesting party. The Louisiana Stakeholders submit that the Commission should sever Docket No. EL21-56-000 from the Settlement if it concludes that further proceedings are necessary before the Commission can decide the issues raised in that proceeding.

"option of last resort."[74] If the Commission's review indicates that "the contesting parties have raised a valid concern such that the settlement should be modified for all parties including the consenting parties, then severance is inappropriate, and the Commission should issue a merits order applicable to all parties."[75] The Complainants have raised valid concerns that should be addressed not just for the Complainants, but for all Louisiana, new Orleans and Arkansas ratepayers.

The cost-based tariff of System Energy Resources, Inc., which provides for a pass-through of all costs incurred for System Energy's share of Grand Gulf, has contributed to a culture that is inadequately focused on improving the performance of the plant. The sooner that Respondents are provided ratemaking incentives to improve, the better for efficiency and safety

## VI. CONCLUSION

Entergy's degraded safety performance over five years and the latest downgrade of Grand Gulf to the NRC's Category 3 reveal a pattern of mismanagement and an inability to rectify the recurring problems with the plant. The Complaint demonstrates a history of failures that together have resulted in ratepayers being saddled with unreasonable and excessive costs. SERI's tariff, which provides for a pass-through of *all* costs incurred for SERI's share of Grand Gulf, provides an overwhelming disincentive for SERI to adequately focus on improving the performance of the plant. The Commission must impose ratemaking incentives to improve the operation and safety of Grand Gulf.

[74] 85 FERC ¶ 61,345, 62,344 (1998) (quoting *Nw. Pipeline Corp.*, 81 FERC ¶ 61,262, 62,124).
[75] *Id.*

Section 306 of the FPA establishes the "duty" of the Commission to investigate a complaint when "any reasonable ground" is provided.[76] This Settlement negates that duty without justification. The Respondents cannot be permitted to avoid an examination of the substantial issues raised in the Complaint through a settlement which ignores the very issues the Complainants asked this Commission to address.

Under the Commission's standards for acting on contested settlements, the offer of settlement cannot be accepted. The Administrative Law Judge should find that the Settlement is contested and the Commission should reject the settlement.

Respectfully submitted,

Susan Stevens Miller
Senior Attorney
Earthjustice
1001 G Street, NW, Suite 1000
Washington, DC 20001
smiller@earthjustice.org

*Counsel for the Alliance for Affordable Energy, Deep South Center for Environmental Justice and Sierra Club*

[76] 16 U.S.C. § 825e.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in Docket No. EL21-56-000 and Docket No. ER18-1182-000.

Dated this 1st of August, 2022.

*/s/ Maya DeGasperi*
Litigation Assistant, Earthjustice
mdegasperi@earthjustice.org