

PJM's January 22 Filing purports to implement, no longer exists. The Settlement terminated effective January 8, 2007. Termination of the Settlement renders the Commission's December 22 Order moot, thereby vitiating the compliance filing process.

In light of the modifications to the Settlement required by the December 22 Order, several parties, including parties that were intimately involved in the detailed negotiations leading up to the Settlement, withdrew from the Settlement. These parties include Mittal, the PJM Industrial Customer Coalition ("PJMICC"), the Portland Cement Association ("PCA") and the District of Columbia Office of People's Counsel ("DC OPC").³ American Municipal Power-Ohio, Inc. followed suit, filing a notice of withdrawal on January 22, 2007.

Article IV of the Settlement is without ambiguity:

If the Commission should condition its approval of this Settlement Agreement or seek to require modification of any of the terms of this Settlement Agreement (a "Conditional Approval Order"), the Settling Parties shall confer and either accept the condition or negotiate in good faith, if necessary, to restore the balance of risks and benefits reflected in this Settlement Agreement as executed. Any such renegotiated settlement agreement shall be filed with the Commission. If no agreement can be reached within fifteen (15) days of the date of issuance of the Conditional Approval Order, and unless all of the Settling Parties agree to extend the time period for such negotiations, this Settlement Agreement shall terminate. (emphasis added).

The Commission required modifications to the Settlement, the Settling Parties did not reach agreement by January 8 to restore the balance of risks and benefits reflected in the Settlement as originally filed and, as a result, the Settlement terminated.

To Mittal's knowledge, PJM did not make any affirmative effort to obtain the parties' agreement to extend the negotiation period notwithstanding being on notice that several parties

³ PJMICC, PCA and DC OPC were active throughout settlement negotiations and were among the handful of parties delegated the task of actually drafting the Settlement documents.

had serious concerns about the Commission's December 22 modifications.⁴ In the absence of an extension of the negotiation period, the Settlement terminated. There simply is no Settlement – as originally filed or as modified – for PJM to implement via its January 22 Filing.

Instead, on December 28, 2006, PJM announced that, in PJM's view, the changes made by the December 22 order were "minor," that they did not change the balance of the settlement and that PJM intended to accept the Commission's modifications. Although PJM may believe that the Order does not change the balance of risks and benefits of the Settlement, the Settlement does not vest PJM with the right to make this determination for anyone other than itself. The decision as to whether the Settlement should continue in effect is one that is to be made unanimously, or not at all, by all Settling Parties. That did not occur, and the Settlement terminated. PJM is seeking unilaterally to overrule the bargain struck by the Settling Parties. However, nothing in the December 22 Order purports to override the procedures set forth in the Settlement for addressing Commission-mandated changes, including the potential for termination of the Settlement. PJM's January 22 Filing provides no explanation as to why a Settlement provision that the December 22 Order left completely intact may be ignored at PJM's whim.

⁴ In its Answer to Motion to Vacate Order, Motion for Stay, Requests for Clarification and Certain Requests for Rehearing, filed February 6, 2007, PJM takes the position that it was the responsibility of the withdrawing parties to take affirmative action to keep the Settlement alive. Mittal strongly disagrees. In any event, PJM made no attempt to initiate any discussions despite the clear invitations to do so in each of the notices of withdrawal, including that of Mittal. Nor, to Mittal's knowledge, did PJM respond to party inquiries as to the reasoning behind PJM's position that the Commission's modifications to the Settlement were "minor." Rather than attempt to respond to those inquiries and the notices of withdrawal in a timely, constructive fashion, PJM sent the withdrawing parties obscure letters on January 16, asserting "This is to advise that you should not interpret PJM's lack of response to date to your January 4, 2007 e-mail to the Settling Parties or your January 8 letter to FERC as acceptance of any position you took in either of those communications, and PJM reserves all rights in this regard." Under these circumstances, PJM's attempt to cast blame on the withdrawing parties for not working to maintain the Settlement rings hollow.

II.

Nor does PJM suggest any other authority upon which the Commission can rely at this juncture to simply accept the January 22 Filing. The Commission cannot, of course, accept PJM's January 22 filing as a Section 206 compliance filing. The January 22 Filing is inadequate, standing on its own, to constitute a Section 206 filing made in response to the Commission's April 20 Order.⁵ The January 22 Filing contains only those tariff sheets that reflect the Commission's modifications to the September 29 Filing.

Nor could PJM validly contend that its compliance filing is appropriate because the Commission's December 22 order constitutes a Section 206 decision on the merits of all issues set for further proceedings in the April 20 Order. In its December 22 Order, the Commission asserted it was acting under the first approach in *Trailblazer Pipeline Co.*, 85 FERC ¶61,345 (1998).⁶ A key assumption underlying the lawfulness of this approach is that parties have been afforded an effective ability to voice their concerns about a settlement, so that all issues that are truly contested are presented for review and decided on the basis of the record. That could not happen in this case because, as the Commission found, the Settlement's own provisions improperly held adverse comments hostage.

A second premise of proceeding under the first *Trailblazer* approach is that the parties agree the record is adequate to support a decision on the merits.⁷ As Mittal explained in its Motion to Vacate, the current record is devoid of any evidence that would support a sustainable

⁵ *PJM Interconnection, L.L.C.*, 115 FERC ¶61,079 (2006)

⁶ December 22 Order, P57.

⁷ December 22 Order, P52.

finding that the Settlement's mitigation measures, either as filed or as modified by the Commission, are just and reasonable.⁸

Had the September 29 and January 22 Filings been presented as a proposed Section 206 resolution of the issues identified for further proceedings in the April 20 Order, parties would have been free to contest any and all of the filings' proposed resolutions. In turn, the Commission would have been obliged to fulfill its administrative duty to reach a decision on the merits of each issue, supported by reasoned decisionmaking and substantial evidence. As the process has unfolded in this proceeding, however, parties were unable to effectively comment on the September 29 proposals and the Commission, as a result, did not have to engage in rigorous analysis or ensure that adequate record evidence existed to support the key elements of the proposed September 29 Filing.

III.

PJM's strategy is clear. It intends to simply push forward on its misguided RPM initiative, in hopes that it can achieve the very end that the PJM Industrial Customer Coalition ("PJMICC") warned of in its Motion for Stay: an egg that cannot be unscrambled when the Commission or a reviewing court ultimately determines that the Settlement never became effective and the efforts to resuscitate were fundamentally lacking in due process. PJM's strategy will work only if the Commission serves as an enabler. The Commission should not endorse PJM's attempt to implement a defunct Settlement and a Commission order that is now moot. PJM's January 22 Filing should be rejected.

⁸ See Motion to Vacate, pp. 11-24.

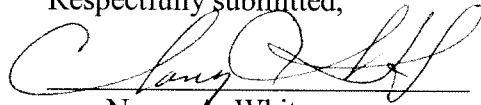
IV.

If the Commission does not reject PJM's filing, it still cannot accept the filing and permit the proposed tariff sheets to go into effect. As Mittal explained in its Motion to Vacate, the Settlement's mitigation mechanisms, as well as the Commission's modifications thereto, are totally unsupported by substantial record evidence and thus, the Commission's conclusion that those elements of the Settlement are just and reasonable cannot stand. It necessarily follows that the Commission cannot accept as just and reasonable tariff sheets to implement those elements of the proposed RPM mechanism.

Conclusion

WHEREFORE, Mittal Steel USA, Inc. respectfully requests that the Commission reject PJM's January 22, 2007 Filing.

Respectfully submitted,



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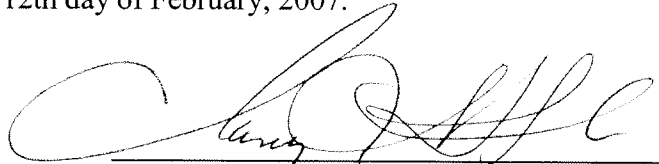
Counsel for Mittal Steel USA, Inc.

February 12, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this day served by first class mail, postage prepaid, the foregoing document upon the Applicants and each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 12th day of February, 2007.

A handwritten signature in black ink, appearing to read 'Nancy A. White', written over a horizontal line.

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