161 FERC ¶ 61,252
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Neil Chatterjee,
and Richard Glick.

PJM Interconnection, L.L.C. Docket No. ER13-535-004

ORDER ON REMAND

(Issued December 8, 2017)

1. On July 7, 2017, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an order vacating, in part, and remanding to the Commission for further proceedings, two Commission orders[1] conditionally accepting in part, and rejecting in part, PJM Interconnection, L.L.C.'s (PJM) proposed revisions to its minimum offer price rule (MOPR).[2] The D.C. Circuit found that the Commission exceeded its authority under section 205 of the Federal Power Act (FPA)[3] when it accepted, subject to condition, PJM's proposal introducing two new categorical exemptions from the MOPR, and extending the mitigation period from one to three years. Accordingly, the court vacated the Commission's orders with respect to those issues and remanded the matter to the Commission.

2. In this order, upon further review of the record, we find that PJM failed to establish that its proposal is just and reasonable, and, thus, in light of *NRG*, we reject the December 2012 filing in its entirety. We direct PJM to submit a compliance filing within 30 days of the date of this order containing revised tariff sheets reflecting our rejection of its December 2012 filing.[4] Our determination is without prejudice to PJM submitting a

[1] *See PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013) (May 2013 Order), *order on reh'g & compliance*, 153 FERC ¶ 61,066 (2015) (October 2015 Order).

[2] *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108, 117 (2017) (*NRG*).

[3] 16 U.S.C. § 824d (2012).

[4] *See PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011) (April 2011 Order), *order on compliance filing, reh'g, & tech. conference*, 137 FERC ¶ 61,145 (2011), *order on reh'g*, 138 FERC ¶ 61,194 (2012), *aff'd sub nom. N.J. Bd. of Pub. Utils. v. FERC*,

new, revised FPA section 205 filing if it determines doing so will cure the deficiencies with the December 2012 filing.

I. Background

A. PJM's MOPR Revisions and the May 2013 Order

3. This proceeding began on December 7, 2012, when PJM filed proposed revisions to Attachment DD, section 5.14(h), and related provisions, of its Open Access Transmission Tariff (OATT) to modify its MOPR. Prior to PJM's December 2012 filing, PJM's MOPR mitigated the exercise of buyer-side market power in its capacity market (referred to as the Reliability Pricing Model (RPM)) by setting a price floor, i.e., a minimum bid, and requiring new resources to bid into PJM's capacity auctions at that floor or higher. A new resource could, however, obtain an exception from the MOPR, if it successfully demonstrated that its lower bid was justified based on the economics of that specific unit. Except for this unit-specific review process, no other MOPR exceptions or exemptions were available prior to the December 2012 filing.

4. In the December 2012 filing, PJM proposed to eliminate the unit-specific review process and replace it with two categorical exemptions: competitive entry and self-supply.[5] PJM also proposed to, among other things, extend the period over which the MOPR may apply from one year to three years, narrow the list of resource types subject to the MOPR, and extend application of the MOPR across the entire PJM region. As further detailed in the May 2013 Order, PJM stated that the proposed categorical exemptions were designed to provide a better defined and more transparent process for granting exemptions to the MOPR. PJM further argued that the elimination of the unit-specific review process is appropriate because projects that fail to qualify for one of PJM's proposed categorical exemptions will necessarily present a high risk of price suppression that need not be further considered by a case-specific review.[6] PJM stated

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744 F.3d 74 (3d Cir. 2014) (approving PJM's MOPR with a unit-specific review process and a one-year mitigation period).

[5] As described in the May 2013 Order, the competitive entry exemption would be available to resources that receive no out-of-market funding, or, if a resource does receive outside funding, such funds were to be awarded as a result of a competitive auction open to all available resources, both new and existing. May 2013 Order, 143 FERC ¶ 61,090 at P 24. The self-supply exemption would be available to certain load-serving entities, such as municipalities, cooperatives, single customer entities, and vertically integrated utilities, that meet specific net-short or net-long thresholds. *Id.* P 25.

[6] *Id.* P 116.

that reliance on broad categorical exemptions in place of a unit-specific review process is also preferable, given the complexities involved in a case-specific cost and revenue review, the lack of transparency this process entails, and the resulting uncertainty in the market regarding the plausibility of the capacity market price signal.

5. In support of extending the mitigation period, PJM stated that, given the proposal's focus on those resources most likely to raise price suppression concerns, it is appropriate that the MOPR remain in effect for a longer term.[7] PJM asserted that applying the MOPR for only one year allows subsidized units to enter the market on a noncompetitive basis, based on a temporary, coincident increase in capacity prices, or a temporary decrease in the MOPR price floor. PJM added that the MOPR price floor is just an estimate of new entry costs and if a unit clears at that price in a single year, it could still disrupt an otherwise competitive market in subsequent years.

6. While some parties supported the categorical exemptions,[8] several State agencies,[9] market participants,[10] and the market monitor (Monitoring Analytics, LLC (IMM)) objected to PJM's categorical exemptions, in whole or in part, and objected to eliminating the unit-specific review process.[11] Specifically, the New Jersey Board argued that PJM's proposed elimination of the unit-specific review process will prevent

[7] *Id.* P 200.

[8] *Id.* PP 32-34, 69-70, 117.

[9] The state agencies included: the Maryland Public Service Commission (Maryland Commission), Maryland Energy Administration, Illinois Commerce Commission (Illinois Commission), New Jersey Board of Public Utilities (New Jersey Board), Public Utilities Commission of Ohio (Ohio Commission), Office of the Ohio Consumers' Counsel (Ohio Consumers Counsel), New Jersey Division of Rate Counsel, Maryland Office of People's Counsel, West Virginia Consumer Advocate Division, Delaware Division of the Public Advocate, and the District of Columbia Office of People's Counsel.

[10] Market participants protesting the filing included: NRG Companies (NRG), CPV Power Development, Inc. (CPV), LS Power Associates, L.P. (LS Power), FirstEnergy Companies (First Energy), Dayton Power and Light Company (Dayton), Eastern Kentucky Power Cooperative (EKPC), and Hess Corporation (Hess).

[11] May 2013 Order, 143 FERC ¶ 61,090 at PP 35-46, 70-83, 98-99, 102-106, 118-124, 133-134, 136-140. The Pennsylvania Public Utility Commission (Pennsylvania Commission) and Ohio Commission filed comments in support of eliminating the unit-specific review process. *Id.* P 117.

economic state-sponsored new entry from participating in RPM auctions and thus interferes with the responsibility reserved to the states under the FPA. The New Jersey Board also argued that a unit-specific review process is appropriate because it results in a cost-based, positive-value offer price equivalent to the actual first year net cost of new entry (net CONE). It argued that the categorical exemptions, by contrast, benefit load-serving entities that receive state or local subsidies under business models that predate the RPM, specifically including load-serving entities that receive state subsidies in states with regulated markets.

7. CPV argued that prohibiting suppliers from showing that their actual costs are lower than 100 percent of the net CONE, which the unit-specific review process allows, deprives the market of lower-cost generation. CPV further asserted that, because PJM's administratively determined net CONE is susceptible to errors, a unit-specific review process should be retained as a necessary safety valve. CPV also challenged PJM's focus on the asserted lack of transparency of the unit-specific review process, arguing that the need for price transparency need not extend to cost transparency. Hess argued that, in the absence of a unit-specific review process, PJM is left with a MOPR that unreasonably assumes that every new entrant that participates in a state program designed to attract new entry is uneconomic.

8. The Maryland Commission further stated that PJM failed to support its claims that the unit-specific review process may discourage lenders and investors from making commitments to a project, drive capital elsewhere, or raise risk premiums increasing the cost of capital. The Maryland Commission also asserted that the unit-specific review process assures that resources' offers represent their actual costs and appropriately preserves market participants' legitimate confidentiality interests.

9. The IMM argued that maintaining the unit-specific review process is necessary because the proposed MOPR offer floor, i.e., net CONE, does not reflect the actual, competitive cost of new entry. The IMM argued that the higher-than-necessary net CONE benchmark, without an opportunity for unit-specific review, creates a harmful barrier to entry, and that requiring a resource to bid above its competitive costs is not reasonable. The IMM noted that PJM proposed to calculate the energy and ancillary services revenues by using average historical data, which results in an incorrect forecast, especially as changes in market conditions result in substantial differences between historical and expected market revenues. Lower gas costs and improvements in combined-cycle technology mean that market revenues for a new unit will be higher than the historical average, the IMM argued. The IMM further argued that the gross cost-of-new-entry levels are inflated because they do not reflect competition among equipment manufacturers. Finally, the IMM disputed PJM's claim that the unit-specific review cannot be applied consistently, arguing that the modeling assumptions used to calculate net costs for a unit should be identical to the assumptions used in the development of net CONE. The unit-specific review process would therefore be limited to establishing

offers based on competitive cost differences and not based on different modeling assumptions.

10. Joint Consumer Advocates[12] and the New Jersey Board asserted that by eliminating the unit-specific review and instituting the proposed exemptions, PJM's proposal would unreasonably prevent economic entry by gas-fired units that fail to qualify for one of the two proposed exemptions. These intervenors further argued that PJM's proposal would allow resources eligible for the exemptions to clear in the auction despite having actual net costs of new entry greater than the benchmark. They added that the unit-specific review process merely allows for the opportunity to demonstrate net costs to a neutral party. The New Jersey Board concluded that such a review process is qualitatively different from and more stringent than an outright exemption as PJM proposes for self-supply and competitive entry.

11. With regard to the three-year mitigation period, Electric Power Supply Association (EPSA), the IMM, PJM Power Providers Group (P3), the Competitive Markets Coalition, the Pennsylvania Commission, and the Ohio Commission filed comments that generally supported the extension, arguing that application of the MOPR for a three-year period is appropriate because of the stricter focus on the resources that are most likely to pose price suppression concerns.[13] The IMM supported applying the MOPR until an exempted resource has cleared three RPM auctions for three delivery years, but recommended continued evaluation of its effect on the market. The Competitive Markets Coalition argued that for a new resource, with a useful life of several decades, one year's mitigation is a small cost and can be strategically minimized or gamed. While the Competitive Markets Coalition believed that technically, uneconomic resources should be mitigated for the life of the unit, it accepted the three auction compromise because it will make the MOPR more effective.

12. Others, however, opposed the three-year mitigation period.[14] The New Jersey Board, for example, argued that the MOPR offer floor should apply to each new resource in the base residual auction and each incremental auction until the resource demonstrates, by clearing one of the PJM capacity auctions, that its capacity is needed by the market at a price near its full entry cost – by clearing one of the PJM capacity auctions. The

[12] Joint Consumer Advocates included the New Jersey Division of Rate Counsel, Maryland Office of People's Counsel, West Virginia Consumer Advocate Division, Delaware Division of the Public Advocate, and District of Columbia Office of People's Counsel.

[13] May 2013 Order, 143 FERC ¶ 61,090, at PP 201-203, 209.

[14] *Id.* PP 204-207.

Maryland Commission and the Joint Consumer Advocates asserted that the Commission rejected similar proposals in prior orders, finding that a resource demonstrates that it is needed by the market by clearing just one auction. CPV argued that no developer will reasonably commence construction without the certainty that it has been accepted in RPM as a new capacity resource. CPV further asserted that existing generators were not required to clear in three auctions and that, as such, PJM's proposal would unjustly discriminate against potential new entrants. The Competitive Markets Coalition responded to those who opposed the three-year mitigation period, arguing that PJM's proposal to extend the mitigation period is appropriate given PJM's proposed narrowing of the MOPR through the proposed categorical exemptions and limiting the types of resources subject to the MOPR.

13. The Commission conditionally accepted in part, subject to a further compliance filing, and rejected in part PJM's December 2012 filing on May 2, 2013.[15] As relevant here, the Commission accepted PJM's proposed categorical exemptions for competitive entry and self-supply, subject to conditions, but required PJM to retain its unit-specific review process.[16] The Commission explained that the unit specific review process recognizes that some resources, including those that would fail to qualify for PJM's proposed exemptions, may nonetheless have competitive costs that fall below the benchmark price. The Commission found that such resources should have the continued opportunity to avoid the MOPR.[17] Additionally, with regard to the self-supply exemption, the May 2013 Order accepted the filing on the condition that PJM add new tariff provisions obligating PJM to modify the net-long test to recognize the winter peak for a winter-peaking load-serving entity and to review, and, if necessary, revise, its net-short and net-long thresholds on a periodic basis.[18]

14. The May 2013 Order also rejected PJM's proposed revisions to extend the MOPR mitigation period from one year to three years, finding that a single year application of the MOPR was sufficient to address price suppression concerns and consistent with Commission precedent.[19] The Commission found that applying the MOPR to a resource that was already determined to be economic would be unreasonable and could

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[15] *Id.* P 3.

[16] *Id.* PP 53-62, 107-115, 141-144.

[17] *Id.* P 141.

[18] *Id.* PP 113-114.

[19] *Id.* PP 210-212 (citing April 2011 Order, 135 FERC ¶ 61,022 at PP 160-162, 175).

inefficiently discourage the entry of new capacity that is economic. Specifically, the Commission stated that "after clearing in the market at the offer floor price, 'there is no reasonable basis for continuing to apply the MOPR,' given the market's demonstration of its need for the resource."[20]

B. The October 2015 Order

15. The October 2015 Order addressed rehearing requests of the May 2013 Order as well as PJM's compliance filing to that order.[21]

16. As further detailed in the October 2015 Order, NRG argued on rehearing that the Commission exceeded its authority under FPA section 205 by accepting PJM's proposal subject to retention of the unit-specific review process. NRG argued that under FPA section 205, the Commission may only accept PJM's filing or reject it. By rejecting PJM's rate proposal in favor of a substitute rate proposal of its design marrying elements of PJM's proposal with the Commission's own conditions, NRG argued that the Commission effectively acted under FPA section 206[22] without satisfying the requirements of section 206. P3, Competitive Markets Coalition, and Calpine Corporation further argued that, under FPA section 205, PJM was only required to establish that its proposal was just and reasonable, and not that the unit-specific review process is unjust and unreasonable as the Commission discussed in the May 2013 Order.

17. FirstEnergy argued that, regardless of whether the Commission acted within its statutory authority, retention of the unit-specific review process is unwarranted on the merits. FirstEnergy argued that the unit-specific review process is flawed, given its lack of objectivity and transparency, and that the May 2013 Order erred by providing for both categorical exemptions and unit-specific review, with the result that the MOPR will be largely ineffective and rarely, if ever, invoked. With regard to the categorical exemptions,[23] NRG asserted that the Commission's acceptance of a categorical exemption at all was in error. NRG argued that having rejected PJM's proposal to eliminate the unit-specific review process and found that the existing rate was just and reasonable, the Commission's work in this proceeding was done. NRG argued that a categorical exemption is not required when a unit-specific review mechanism is available

[20] *Id.* at P 211 (quoting April 2011 Order, 135 FERC ¶ 61,022 at P 175).

[21] October 2015 Order, 153 FERC ¶ 61,066 at PP 9-14, 25-31, 45-51, 73-76.

[22] 16 U.S.C. § 824e (2012).

[23] October 2015 Order, 153 FERC ¶ 61,066 at PP 25-31, 45-51.

and that such an exemption is inconsistent with the Commission's past statements regarding the need for all uneconomic entry to be mitigated.

18. With regard to the mitigation period, FirstEnergy and the Competitive Markets Coalition argued that a three-year MOPR mitigation period is appropriate because a resource that is subject to the MOPR for only a single year could be entering the market under anomalous circumstances.[24] FirstEnergy, in particular, argued that a three-year mitigation period, as proposed by PJM, is essential to address this market risk. The Competitive Markets Coalition agreed, stating that a longer mitigation period is appropriate given the fluctuation of offer floors on a year-to-year basis and the inherent uncertainties in estimating new entry costs. The Competitive Markets Coalition added that a three-year mitigation period is appropriate because it allows more time for uneconomic new entry to be absorbed by the market. The Competitive Markets Coalition and P3 argued that the May 2013 Order erroneously relied on the Commission's prior findings on the issue, arguing that clearing an auction should not result in a free pass to exercise buyer-side market power. P3 and the Competitive Markets Coalition also argued that the May 2013 Order departed from the Commission's prior rulings on the buyer-side market power mitigation terms of the New York Independent System Operator, Inc. (NYISO) capacity market, in that the Commission accepted a mitigation period that, in effect, mitigates resources for a minimum two-year period. P3 also asserts that, in a 2012 NYISO complaint proceeding, the Commission required NYISO to reapply its market power screen to the complainant's project, even though that project had already participated in and cleared several prior auctions. Finally, P3 challenged the May 2013 Order's finding that when a new resource clears in PJM's capacity auction, it is required to begin construction in order to provide the capacity it will be obligated to make available in the corresponding delivery year.

19. In the October 2015 Order, the Commission denied the rehearing requests. The Commission reiterated its previous finding that PJM had failed to show that the categorical exemptions, standing alone, were just and reasonable, explaining that generation offers that did not fall within these exemptions might also be just and reasonable. The Commission rejected arguments that the Commission had exceeded its authority under section 205 of the FPA.[25] Relying on *City of Winnfield v. FERC*,[26] the Commission found that it may attach conditions to certain section 205 filings provided that the utility accepts the Commission's modifications. The Commission explained that because PJM did not seek rehearing of the May 2013 Order, and because PJM in fact

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[24] *Id.* PP 73-76.

[25] *Id.* PP 15-23.

[26] 774 F.2d 871 (D.C. Cir. 1984) (*City of Winnfield*).

submitted a compliance filing to that order, it appeared that PJM consented to the conditions.[27] The Commission explained that, given the complexity of PJM's filing, which contained numerous interrelated parts, a conditional acceptance serves administrative efficiency by avoiding the necessity of rejecting the filing in its entirety only to have the utility submit a new filing that cures the previous deficiencies.

20. The Commission also denied rehearing with regard to the MOPR mitigation period, explaining that the proposed three-year mitigation period is unjustified as it imposes an artificially inflated bidding price on resources that have lower going-forward costs.[28] Lastly, the Commission accepted PJM's compliance filing.[29]

C. NRG Power Marketing, LLC v. FERC

21. NRG Power Marketing, LLC, GenOn Energy Management, LLC, and P3 (collectively, Petitioners) petitioned for review of the May 2013 and October 2015 Orders in the D.C. Circuit, arguing that the Commission had exceeded its authority under section 205 of the FPA in conditionally accepting in part, and rejecting in part, PJM's December 2012 filing. The D.C. Circuit granted the petitions for review and vacated the Commission's May 2013 and October 2015 Orders, in part, with regard to the unit-specific review process, the competitive entry exemption, the self-supply exemption, and the MOPR mitigation period.[30]

22. The court began its analysis by observing that section 205 places the Commission in a "passive and reactive role."[31] The court acknowledged *City of Winnfield*'s holding that the Commission "does not violate [s]ection 205 when it suggests 'a system of rates

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[27] October 2015 Order, 153 FERC ¶ 61,066 at PP 16-17, 22. PJM's acceptance of the Commission's modifications can be inferred by it making a compliance filing in accordance with the directives of the May 2013 Order and its failure to withdraw the filing within 30 days of the October 2015 Order. *See id.* P 22 (directing PJM to withdraw its filing within 30 days of the October 2015 Order if it did not accept the Commission's conditions).

[28] *Id.* PP 77-81.

[29] *Id.* PP 96, 107.

[30] *NRG*, 862 F.3d at 117.

[31] *Id.* at 114 (quoting *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (internal quotation marks omitted)).

similar to that previously in effect, and the utility acquiesces.'"[32] However, the court explained, "there are limits on the Commission's authority to propose modifications under [s]ection 205 even when the utility consents to those modifications."[33] In particular, the court explained that *Western Resources, Inc. v. FERC*[34] turned on the conclusion that the Commission may not under section 205 "'adopt[ ] . . . an entirely different rate design' than th[at] propos[ed]'" by the filing utility.[35] The court thus concluded that *City of Winnfield* and *Western Resources* together stand for the proposition that, although the Commission may suggest "minor deviations" from the proposed rate, the Commission may not suggest modifications that result in an "entirely different rate design" under section 205.[36]

23. Applying that principle here, the court concluded that the Commission had adopted a "completely different strategy" than both PJM's December 2012 filing and PJM's existing tariff because, while the original filing would have replaced one exception with two exemptions, the Commission's conditions turned those *replacement* exemptions into *additional* exemptions and "layer[ed]" them on top of the original tariff.[37] Ultimately, the court explained, the Commission, as in *Western Resources*, approved only half of a proposed rate.[38] That result, the D.C. Circuit concluded, violated section 205.

24. The court also rejected the Commission's contention that PJM's consent cured the FPA section 205 violation. Again applying *Western Resources* and *City of Winnfield*, the court explained that, although "a utility's consent is relevant when FERC proposes 'minor' modifications to the utility's proposal, . . . when FERC proposes its 'own original notion of a new form of rate,' the utility's consent does not excuse a Section 205 violation."[39] Under those circumstances, the "utility's customers do not have adequate

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[32] *Id.* at 115 (quoting *City of Winnfield*, 744 F.2d at 876).

[33] *Id.* (emphasis omitted).

[34] 9 F.3d 1568 (D.C. Cir. 1993) (*Western Resources*).

[35] *NRG*, 862 F.3d at 115 (quoting *Western Resources*, 9 F.3d at 1578).

[36] *Id.* (quoting *Western Resources*, 9 F.3d at 1578).

[37] *Id.* at 116.

[38] *Id.*

[39] *Id.*

notice of the proposed rate changes or an adequate opportunity to comment on the[m]."[40] The court then concluded that the parties here did not receive adequate notice.

25. Notably, the D.C. Circuit did not assail the Commission's substantive rationale for finding that PJM's December 2012 filing was unjust and unreasonable without the unit-specific review process. The court's holding was limited to the finding that the Commission exceeded its FPA section 205 authority in conditionally accepting in part, and rejecting in part, PJM's December 2012 filing.

II. PJM's Motion for an Order on Remand

A. PJM's Motion

26. On October 23, 2017, PJM filed a motion requesting that the Commission issue an order on remand accepting its December 2012 filing (Motion). PJM acknowledges the Commission's broad authority when correcting its legal error[41] and argues that the Commission should either accept the December 2012 filing as just and reasonable on balance or make a reasoned determination that one or more of the Commission's conditions are sufficiently minor so that PJM's consent can cure the FPA section 205 violation.[42] In support, PJM states that the Commission's modifications were completely inconsequential to the auction clearing results, in that zero unit-specific reviews were submitted in the 14 auctions that have taken place in the time since PJM implemented the May 2013 Order.[43] As such, the Commission can conclude, PJM contends, that the May 2013 Order's condition requiring that the unit-specific review process be retained was overstated.

27. PJM similarly argues that the three-year MOPR mitigation period had no practical impact because the conditions that would have triggered the three-year mitigation period have not yet occurred. PJM states that the three-year mitigation period only applies to nonexempt capacity, i.e., capacity for which a competitive entry or self-supply exemption had not been obtained.[44] It argues that the three-year mitigation period would only matter if a seller of new capacity offers into the market at or above the MOPR floor in the first

[40] *Id.*

[41] PJM Motion at 5.

[42] *Id.* at 6.

[43] *Id.* at 7.

[44] *Id.* at 9.

year and then clears the auction. Under the one-year mitigation period, PJM explains, the seller could then offer its capacity into the second and third years below the offer floor, but under a three-year mitigation period, the seller would have to offer at the MOPR offer floor or above, or obtain an exemption.[45] However, PJM states that no new gas-fired capacity subject to the MOPR cleared because the clearing price was always below the MOPR price.[46] Accordingly, PJM argues that the Commission may conclude, on this issue as well, that there is little practical effect from adopting a three-year mitigation period.

B. Responsive Pleadings

28. On November 14, 2017, Old Dominion Electric Cooperative (ODEC), P3, PJM Generators,[47] American Municipal Power, Inc. (AMP), NRG, and PSEG Companies[48] filed timely answers to PJM's Motion.[49] On November 15, 2017, the IMM filed an untimely answer to PJM's Motion. On November 21, 2017, the Illinois Commission filed an untimely answer to PJM's Motion and PSEG Companies filed an answer to NRG's answer. On November 30, 2017, Direct Energy Business, LLC (Direct Energy) filed an untimely answer to PJM's Motion and PJM filed an answer to NRG's and PSEG Companies' answers.

1. Answers to PJM's Motion

29. Old Dominion Electric Cooperative (ODEC), P3, PJM Generators, and American Municipal Power, Inc. (AMP) filed answers in support of PJM's Motion. ODEC argues that PJM's Motion demonstrates that, on balance, the December 2012 filing is just and reasonable, as demonstrated by the fact that no unit-specific reviews were submitted to PJM.[50] ODEC further supports the self-supply exemption, and argues that it is critical for

[45] *Id.*

[46] *Id.* at 9-10.

[47] PJM Generators are Calpine Corporation, Cogentrix Energy Power Management, LLC, Dynegy Inc., and Eastern Generation, LLC.

[48] PSEG Companies are Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resource & Trade LLC.

[49] The Secretary issued a notice of extension of time, allowing parties until November 14, 2017 to file answers to PJM's Motion.

[50] ODEC Answer at 2-3.

the Commission to abide by its policy against upsetting past market outcomes.[51] P3 also supports the filing and notes that the Commission may address the broader MOPR issues in other dockets, but should accept the December 2012 filing here swiftly to provide certainty to the market.[52] PJM Generators also support the Motion and argue that the Commission should accept the December 2012 filing. They further argue that the Commission should extend the MOPR to "state subsidized existing units" and require PJM to "address its MOPR on a more holistic basis" in a compliance filing within 90 days.[53] AMP also urges the Commission to accept the filing on remand, arguing that it put in place a MOPR with two categorical exemptions that received broad stakeholder support and would add certainty to the upcoming Base Residual Auction.[54]

30. The Illinois Commission encourages us to accept PJM's Motion and the December 2012 filing, but only on a going-forward basis as it does not wish to disrupt the past auctions.[55] However, the Illinois Commission further argues that PJM has failed to establish that its December 2012 filing will be just and reasonable on a going-forward basis.[56] The Illinois Commission states that PJM fails to address the on-going risk of over-mitigation described in the May 2013 and October 2015 Orders; instead, PJM, according to the Illinois Commission, relies only on what has actually occurred in the auctions. The Illinois Commission asserts that no intervening events change the Commission's underlying concerns and that we must impose the appropriate conditions going forward.[57] As such, the Illinois Commission asserts that we should institute an investigation, pursuant to section 206 of the FPA, to require that PJM add a unit-specific review process and reduce the MOPR mitigation period from the proposed three years to one year.[58]

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[51] *Id.* at 4 (citing *Dominion Energy Mktg., Inc. v. ISO New England, Inc.*, 155 FERC ¶ 61,121, at P 23 (2016)).

[52] P3 Answer at 2-4.

[53] PJM Generators Answer at 3.

[54] AMP Answer at 5-7.

[55] Illinois Commission Answer at 2.

[56] *Id.* at 6-7.

[57] *Id.* at 7.

[58] *Id.* at 2-3, 7-9.

31. The IMM, NRG, and PSEG Companies each oppose PJM's Motion and argue that the Commission should reject the December 2012 filing. The IMM argues that the Commission's May 2013 Order reached the correct conclusion in that the unit-specific review process is necessary for the MOPR to be just and reasonable.[59] The IMM also asserts that the defined MOPR offer floor is too high, and units without an exemption are forced to offer at above competitive levels.

32. NRG similarly opposes PJM's Motion and encourages the Commission to reject PJM's December 2012 filing. NRG first argues that the effect of the D.C. Circuit's decision is to reinstate the preexisting tariff (i.e., the MOPR with a unit-specific review process and a one-year mitigation period), not the rate currently on file.[60] NRG asserts that, because the D.C. Circuit never overturned the Commission's prior findings (i.e., that the categorical exemptions standing alone and the three-year mitigation period were unjust and unreasonable) but just faulted the Commission for crafting an entirely new rate, the December 2012 filing was rejected. NRG further argues that, because the effect of the D.C. Circuit's mandate is to place petitioners on remand in the situation they would have been but for the Commission's legal error, the Commission must reinstate the preexisting market design.[61] With regard to the merits of PJM's December 2012 filing, NRG argues that the competitive entry and self-supply exemptions are unjust and unreasonable.[62] Lastly, NRG argues that the Commission does not need to rerun the markets as the equities weigh heavily in favor of a prospective application of the D.C. Circuit's decision and the Commission's discretion is at its "zenith" when it comes to fashioning remedies.[63] NRG notes that rerunning the markets here could undermine confidence in future auction results and discourage investment in new generation. It also states that the Commission ordinarily avoids rerunning markets when market participants themselves did not violate the FPA.[64]

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[59] IMM Answer at 1-2, 4.

[60] NRG Answer at 8-12.

[61] *Id.* at 13.

[62] *Id.* at 14-21.

[63] *Id.* at 21-22 (citing *Laclede Gas Co. v. FERC*, 997 F.2d 936, 944 (D.C. Cir. 1993); *United Gas Imp. Co. v. Callery Prop., Inc.*, 382 U.S. 223, 228-29 (1965)).

[64] *Id.* at 22 (citing *San Diego Gas & Elec. Co.*, 141 FERC ¶ 61,088, at P 25 (2012)).

33. PSEG Companies allege that the December 2012 filing is not pending before the Commission and that the Commission's prior determinations acted as a rejection of PJM's filing in light of *NRG*.[65] PSEG Companies explain that the Commission lacks authority to now change its previous determinations related to the categorical exemptions and the three-year mitigation period because doing so would not address the legal error, namely that the Commission directed PJM to submit a compliance filing implementing its conditions. They further argue that allowing the rejected provisions to become effective retroactively, as PJM proposes in its Motion, would violate the notice requirements of the FPA.[66] PSEG Companies additionally argue that PJM improperly relies on new evidence in support of its Motion by referencing the results of the 2013-2017 auctions and parties have not been given an adequate opportunity to comment.[67] Instead, PSEG Companies argue, like NRG, that the Commission is obligated to put the petitioners in the situation that they would have been in absent the legal error, which means the preexisting tariff provisions have been in effect since the effective date of the May 2013 Order.

34. PSEG Companies then assert that the Commission must fashion the appropriate remedy to correct its legal error.[68] PSEG Companies propose to rerun the markets by first determining what the unit-specific offer price would have been for new entrants (or the general MOPR floors if unit-specific values were higher) and then reprice the impacted auctions. Replacement bids, according to PSEG Companies, would be substituted for the bids actually submitted by units that used the competitive entry or self-supply exemptions in the affected Base Residual Auctions.[69] PSEG states that if different prices result, the difference between the original prices and the new prices, i.e., the underpayments, would become payable to affected generators by zone.[70] However, under PSEG Companies' proposal, the new entrants that relied upon the no-longer available MOPR exemptions for a particular auction year would not be eligible for any additional amounts.[71] In implementing this proposal, PSEG Companies stress the importance of assuring that all units that cleared in previous Base Residual Auctions using either of the

[65] PSEG Companies Answer at 1-2, 6-8.

[66] *Id.* at 8-9.

[67] *Id.* at 2-3, 10.

[68] *Id.* at 11-16.

[69] *Id.* at 14.

[70] *Id.*

[71] *Id.*

categorical exemptions retain their capacity resource commitments. To mitigate rate shock, PSEG Companies advocate for collecting any retroactive payments over a five-year period.[72]

35. Direct Energy opposes rerunning the markets or upsetting past auctions because doing so would provide PSEG Companies with a windfall without any corresponding benefit to customers.[73]

2. **Additional Answers**

36. PSEG Companies responds to NRG's answer by arguing that the Commission is obligated under its precedent to reprice the affected capacity auctions.[74] PSEG Companies first attempt to distinguish *Alabama Power Company*,[75] on which NRG relies, by noting that the Commission's main finding in that case was there was no error to correct because the discriminatory rate impact did not amount to undue discrimination.[76] PSEG Companies then argue that three Commission proceedings present facts more analogous to the current situation.[77] In *H.Q. Energy Services*, PSEG Companies argue that the Commission found that NYISO had wrongfully determined that a market flaw existed, which led NYISO to improperly recalculate clearing prices, and directed NYISO to reinstate the clearing prices for the two affected days.[78] In *SoCal Edison*, PSEG Companies argue that the Commission authorized Southern California Edison Company to recover about $23 million through a California Independent System Operator Corporation (CAISO) transmission rate surcharge and about $76 million through a

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[72] *Id.* at 15.

[73] Direct Energy Answer at 3.

[74] PSEG Companies Answer to NRG at 2.

[75] 23 FERC ¶ 61,392 (1983).

[76] PSEG Companies Answer to NRG at 3-4 (citing *Ala. Power Co.*, 23 FERC ¶ 61,392).

[77] *Id.* at 4-5 (citing *H.Q. Energy Servs. (U.S.), Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 113 FERC ¶ 61,184 (2005) (*H.Q. Energy Services*); *S. Cal. Edison Co.*, 116 FERC ¶ 61,148 (2006) (*SoCal Edison*); *Great Lakes Gas Transmission Ltd. P'ship*, 76 FERC ¶ 61,157 (1996) (*Great Lakes*)).

[78] *Id.* at 4 (citing *H.Q. Energy Services*, 113 FERC ¶ 61,184).

CAISO retail rate surcharge over a two-year period related for services it performed.[79] In *Great Lakes*, PSEG Companies allege the issue was whether a rolled-in or incremental rate design was appropriate for a pipeline expansion project. PSEG Companies state that the D.C. Court determined that the Commission erred by requiring Great Lakes to use an incremental rate design, and the Commission agreed on remand, determining that rolled-in rates were appropriate.[80]

37. PJM disagrees with NRG's and PSEG Companies' argument that the Commission is barred from accepting the December 2012 filing on remand, arguing that vacatur sets aside the Commission's previous order, not the rate. As such, PJM asserts that the original filing remains before the Commission on remand and now must be either accepted or rejected.[81] PJM further opposes PSEG Companies' flawed proposal to rerun the markets and notes that if the Commission were to accept PJM's December 2012 filing, the issue would be moot.[82] Lastly, PJM notes that it would not object to an investigation pursuant to FPA section 206, as suggested by the Illinois Commission, to address MOPR reforms prospectively.

III. Discussion

A. Procedural Matters

38. Pursuant to Rule 213(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(d)(1) (2017), we accept the untimely answers to PJM's Motion filed by the IMM, Illinois Commission, and Direct Energy, because they assisted us in our decision-making process.

39. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2017), prohibits an answer to an answer, unless otherwise ordered by the decisional authority. We accept PSEG Companies' answer to NRG's answer and PJM's answer to NRG's and PSEG Companies' answers because they assisted us in our decision-making process.

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[79] *Id.* at 5 (citing *SoCal Edison*, 116 FERC ¶ 61,148).

[80] *Id.* (citing *Great Lakes*, 76 FERC ¶ 61,157).

[81] PJM Answer at 4-5.

[82] *Id.* at 5-6.

B. Substantive Matters

40. At the outset, we reject NRG's and PSEG Companies' argument that the Commission does not have discretion to accept PJM's December 2012 filing as it is well established that "once [the Commission] reacquire[s] jurisdiction, it ha[s] discretion to reconsider the whole of its original decision."[83] In *NRG*, the D.C. Circuit found that the Commission exceeded its authority when it attached conditions to its acceptance; the D.C. Circuit remanded the proceeding for the Commission to resolve the December 2012 filing based on the applicable FPA standards. We therefore disagree with PSEG Companies and NRG and find that the December 2012 filing is currently pending before the Commission.

41. In further reviewing the record in light of *NRG*, we continue to find that PJM has failed to show that its proposed categorical exemptions, standing alone, are just and reasonable, and not unduly discriminatory or preferential, because there would be no means for nonexempted resources with lower costs than the MOPR offer floor to have a competitive bid considered in the auction. We also continue to find that PJM failed to show that extending the mitigation period from one year to three years is just and reasonable. In fact, we find that extending the mitigation period would be harmful because of the possibility that a more costly resource not subject to an offer floor could displace a lower-cost resource that is not eligible for a categorical exemption but must offer at a price above its costs. Accordingly, we reject PJM's December 2012 filing in its entirety and reinstate its previously approved market design, i.e., a MOPR without categorical exemptions but with a unit-specific review process and a one-year MOPR mitigation period.[84]

42. We therefore require PJM to make a compliance filing within 30 days of the date of this order to reinstate the just and reasonable tariff provisions that were in effect prior to the December 2012 filing. Furthermore, considering the relevant equities, we find that rerunning PJM's markets would cause significant disruption and burdens that are not warranted under the circumstances of this case. Accordingly, we will exercise our

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[83] *Se. Mich. Gas Co. v. FERC*, 133 F.3d 34, 38 (D.C. Cir. 1998). *See also Chesapeake & Ohio Ry. Co. v. United States*, 571 F.2d 1190, 1193 (D.C. Cir. 1977) (remand does "not require the agency to limit itself to the issue previously before the [c]ourt, but [gives] the agency authority to clarify its intention and make revisions in any respect that was within its statutory authority"). While the Commission may not relitigate before it the very issues that the court addressed, we may reconsider the record and issue an order consistent the court's determination of our statutory authority. *See Atl. City Elec. Co. v. FERC*, 329 F.3d 856, 858-59 (D.C. Cir. 2003).

[84] *See supra* note 4.

remedial discretion and not require PJM to attempt to recreate capacity rates for the prior auctions under the preexisting tariff provisions.

1. PJM Has Failed to Demonstrate that Its December 2012 Filing Is Just and Reasonable

a. Replacing the Unit-Specific Review Process with Categorical Exemptions

43. We reaffirm the Commission's prior findings with regard to the need for a unit-specific review process.[85] We emphasize that a properly designed MOPR should not erect an unnecessary barrier to entry that is detrimental to a competitive market. While the two proposed categorical exemptions may reasonably exempt some resources from the MOPR that lack the ability or incentive to exercise buyer-side market power, they do not necessarily capture all resources with competitive costs. Precluding certain resources that are not exercising market power from making a competitive offer may result in both undue discrimination against those resources and unjust and unreasonable rates because the auction potentially results in a higher clearing price than if those resources had participated. Therefore, we find that "PJM's proposed changes are not just and reasonable standing alone,"[86] and that while the categorical exemptions "will generally allow qualifying market participants to avoid the need of seeking a unit-specific review of their offers[,] . . . some resources . . . may nonetheless have competitive costs that fall below the benchmark price."[87]

44. We also disagree with PJM's position in its Motion that the Commission's concerns were overstated because no resources submitted a unit-specific review request. The fact that no resources submitted a unit-specific review request to date is not dispositive of whether such a process should remain available. As PJM recognizes, and the Commission has previously noted, the benchmark price that is used to set the MOPR is an *estimate* of the net CONE.[88] This derived price may exceed the actual costs of

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[85] May 2013 Order, 143 FERC ¶ 61,090 at P 142.

[86] *Id.* P 141. *See also* October 2015 Order, 153 FERC ¶ 61,066 at P 21.

[87] May 2013 Order, 143 FERC ¶ 61,090 at P 143.

[88] PJM Filing Letter at 6, (citing *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 242 (2011)) (noting that certain business practices "may vary from the model embedded in the MOPR's CONE estimate.").

individual generators and such generators should have an opportunity to demonstrate as much.

45. PJM initially established the default offer floor to be an estimate of net CONE, which is also used in determining the height of the downward sloping demand curve. That estimate was not intended to, nor does it necessarily, reflect the costs and revenues for any individual resource. PJM's proposal in the instant docket would prevent a resource from demonstrating that its costs and revenues result in an offer price lower than this estimate, and it attempts to justify doing so by arguing that the categorical exemptions are more transparent and less administratively burdensome than the unit-specific review process.[89] However, in attempting to promote transparency, PJM fails to explain why narrowing the opportunity for resources with potentially competitive costs to avoid the default offer floor is just and reasonable. Instead of addressing this issue directly, PJM primarily discusses the reasons why it seeks to change its preexisting tariff without offering sufficient support for the specific revisions it proposes, as FPA section 205 requires.[90]

46. Indeed, PJM's perceived deficiencies of the unit-specific review process do not justify the implementation of the categorical exemptions when the exemptions alone could result in the application of the default offer floor to a resource that can establish its costs are lower than the default offer floor. Furthermore, even if, as PJM alleges, conducting unit-specific reviews are somewhat more administratively complicated than implementing the two categorical exemptions, such difficulties are not sufficient to justify mitigating a resource with competitive costs, particularly since, as the IMM points out, PJM was able to administer the unit-specific review process prior to this filing.[91]

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[89] "The fundamental question before the Commission is whether the clarity and transparency of the proposed rules are preferable to the nontransparent, discretionary decisions associated with the existing MOPR process, which by their nature invite Commission litigation." PJM Filing Letter at 15; s*ee also id.* at 1, 2, 9, 10, 16, 18, 22, 25, 32.

[90] *See* PJM Deficiency Letter Response, Docket No. ER13-535-001, at 1-5 (filed Mar. 4, 2013) (attempting to explain why it is reasonable for a resource with competitive costs to be mitigated to the default offer floor by primarily discussing the unit-specific review process).

[91] *See* IMM Comments, Docket No. ER13-535-000, at 5 (filed Dec. 28, 2012) (stating that the IMM does not agree with certain stakeholders' grievances, including unsupported assertions about the results of the unit-specific review process).

47. Several parties, including the IMM, contended that PJM failed to demonstrate that its December 2012 filing was just and reasonable because it did not permit resources to offer below the default offer floor. The New Jersey Board contended PJM's proposed MOPR was unjust and unreasonable because it fails to provide a mechanism whereby all economic entry can participate in the capacity markets.[92] The Maryland Commission pointed out that PJM merely criticized the existing rule, but such criticism is not sufficient for the Commission to find that PJM has demonstrated that the proposed rule changes are just and reasonable. It also contended that the filing departed from standard cost principles on which parties' rates are determined based on their own costs, and supported the retention of the unit-specific review process to provide parties with the opportunity to establish their own bids based on their own costs.[93] Significantly, the IMM opposed elimination of a unit-specific review process,[94] noting that stakeholders' "perceived grievances . . . include unsupported assertions about the results of the unit-specific review process"[95] and the allegation "that the unit-specific review process is inherently flawed."[96] We concur with the IMM, and we disagree with the notion that the unit-specific review is an unworkable method to prevent buyer-side market power, as evidenced by its effective use in ISO-New England, Inc. (ISO-NE)[97] and NYISO.[98]

48. We therefore find that PJM has not shown that the proposed categorical exemptions, standing alone, are just and reasonable.

[92] New Jersey Board Comments, Docket No. ER13-535-001, at 5 (filed Mar. 25, 2013).

[93] Maryland Commission Protest of PJM's Response to Deficiency Notice, Docket No. ER13-535-001, at 16 (filed Mar. 25, 2013).

[94] IMM Comments, Docket No. ER13-535-001, at 2 (filed Mar. 26, 2013) ("provision for unit specific review does remain necessary for an effective MOPR that does not pose a barrier to entry to some participants.").

[95] IMM Comments, Docket No. ER13-535-000, at 5.

[96] *Id.* at 13 (citing PJM Filing Letter at 11).

[97] ISO-NE Transmission, Markets and Services Tariff § III.13.1.1.2.2.3(a) (Offer Information).

[98] NYISO Market Administration and Control Area Services Tariff § 23.4.5.7.2.

b. Three-year Mitigation Period

49. We also reaffirm the Commission's prior reasoning and continue to find that PJM has failed to justify extending the MOPR mitigation period from one year to three years. As with the unit-specific review process, we disagree with PJM's position in its Motion that the three-year mitigation period is inconsequential because the conditions necessary to trigger the three-year mitigation period have not yet occurred. Again, we note that PJM's tariff will be in effect on a prospective basis. Instead, we continue to find that extending the MOPR offer floor for a mitigated resource that has cleared in the first auction would prevent a developer from accurately reflecting its actual going-forward costs, and we therefore reject PJM's proposed three-year mitigation period.[99] We also note that this is not the first time parties have proposed extending the mitigation period of PJM's MOPR beyond one year—nor is it the first time that the Commission has rejected such a proposal for similar reasons.[100]

50. As the Commission has done in the past, we begin by reiterating basic economic principles that drive competitive market design. When bidding in PJM's current market, a competitive resource submits offers that reflect its incremental cost. Before a resource is built, its incremental cost would reflect the unit-specific net CONE, but once the resource has cleared in one auction, its developer would need to begin construction to meet its obligation three years later in the delivery year.[101] At that point, the construction costs incurred prior to subsequent auctions become sunk costs, and they are not part of the resource's incremental costs going-forward.[102]

51. But under a three-year mitigation period, developers whose offers are mitigated and clear in the auction would be prevented from offering at their going-forward costs for at least two years beyond the first auction in which they clear and would instead have to offer at net CONE.[103] Thus, the resource would be forced to offer at an artificially

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[99] *See* May 2013 Order, 143 FERC ¶ 61,090 at P 211 (citing April 2011 Order, 135 FERC ¶ 61,022 at P 175) ("applying the MOPR offer floor to a resource already determined to be economic would be unreasonable and could inefficiently discourage the entry of new capacity that is economic.").

[100] *See PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at PP 130-132 (2011).

[101] Alternatively, a resource that clears in PJM's capacity auction could find an acceptable replacement resource bilaterally or through an incremental auction. October 2015 Order, 153 FERC ¶ 61,066 at P 77.

[102] *Id.*

[103] *Id.* P 78.

inflated price, thereby raising the risk that the resource may fail to clear in auction-years two and three and be displaced by another resource with higher going-forward costs. We see no justification for requiring a resource to subsequently offer above its costs once it has cleared the first auction. Besides failing to reflect the appropriate costs of such a resource, we find that this approach might have an adverse effect on market entry. As such, we continue to find that the one-year application of the MOPR permits a resource to submit a competitive offer price reflecting its going-forward costs that do not include sunk construction costs, after it has cleared and incurred significant construction costs.[104] We therefore find PJM's proposed three-year mitigation period to be unjust and unreasonable because it would artificially inflate an otherwise competitive resource's incremental cost in the second and third years.

2. Remedy for Past Auctions

52. We turn now to the question of what remedy, if any, is appropriate for the period between the effective date of PJM's December 2012 filing and the date of this order. Considering the relevant equities and the record, we find that rerunning PJM's markets under the preexisting tariff would cause significant disruptions and burdens and thus doing so is not warranted in this case.

53. The D.C. Circuit has repeatedly observed that the Commission's "discretion 'is often at its "zenith" when the challenged action relates to the fashioning of remedies.'"[105] By the same token, the court has also explained that "the scope of judicial review is particularly narrow[,]" when reviewing an agency's choice of remedies.[106] Thus, courts generally "defer to the Commission's decisions in remedial matters, respecting the difficult problem of balancing competing equities and interests has been given by Congress to the Commission with full knowledge that this judgment requires a great deal of discretion."[107] However, under the Administrative Procedure Act,[108] the Commission

[104] *Id.* at P 77.

[105] *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 163 (D.C. Cir. 1993) (quoting *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (*Towns of Concord*)).

[106] *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1302 (D.C. Cir. 2014), *order on remand*, 155 FERC ¶ 61,120 (2016), *reh'g denied*, 156 FERC ¶ 61,221, *appeal docketed*, No. 16-1382 (D.C. Cir. Nov. 4, 2016) (citing *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 224 (D.C. Cir. 1999)).

[107] *Id.* (quoting *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998) (internal quotations omitted)).

must show that "it considered relevant factors and struck a reasonable accommodation among them, and that its order granting or denying refunds was equitable in the circumstances . . . ."[109] As the court stated in *Towns of Concord*,[110] in affirming the Commission's determination not to order refunds of a filed rate violation, "the agency need only show that it 'considered relevant factors and . . . struck a reasonable accommodation among them,' and that its order granting or denying refunds was 'equitable in the circumstances of this litigation.'"[111] In two recent orders, where the D.C. Circuit relied in part on FPA section 309[112] to conclude the Commission had erred in finding it did not have authority to correct its legal error, it emphasized that the Commission on remand would need to consider the "relevant equities" of providing refund protection.[113]

54. With this precedent in mind, and based on the record before us in this proceeding, we find that ordering recoupment of funds through rerunning the markets or any other remedy for the period during which PJM operated its market with two categorical exemptions and a unit-specific review process is unwarranted. We similarly reject PSEG Companies' argument that Commission precedent requires us to impose a retroactive remedy under these circumstances.[114] The Commission orders on which PSEG

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[108] *See* 5 U.S.C. § 706(2) (forbidding administrative agencies from acting in a way that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]").

[109] *La. Pub. Serv. Comm'n*, 772 F.3d at 1302 (quoting *Towns of Concord*, 955 F.2d at 76).

[110] 955 F.2d 67 (D.C. Cir. 1992).

[111] *Id.* at 76. *See also Conn. Valley Elec. Co., Inc. v. FERC*, 208 F.3d 1037, 1047 (D.C. Cir. 2000) (affirming the Commission's discretion not to order refunds based on consideration of all relevant factors).

[112] 16 U.S.C. § 825h (2012).

[113] *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 363 (D.C. Cir. 2017) ("on remand, FERC should evaluate the relevant equities" of requiring recoupment); *Xcel Energy Servs. Inc. v. FERC*, 815 F. 3d 947, 956 (D.C. Cir. 2016) (leaving to the Commission to "evaluate the equities of providing refund protection").

[114] *See, e.g.*, *La. Pub. Serv. Comm'n*, 772 F.3d at 1300-02, 1305-06 (quoting *Towns of Concord*, 955 F.2d at 76) (discussing the deference owed to the Commission on remedial matters and stating that the Commission can depart from its refund policy so long as it shows that it "considered relevant factors and struck a reasonable

Companies rely do not involve rerunning markets.[115]

55. The Commission generally does not order a remedy that requires rerunning a market because market participants participate in the market with the expectation that the rules in place and the outcomes will not change after the results are set.[116] Rerunning past auctions creates two different types of risk: (1) capital risks for resources that made investments based on auction results, and (2) regulatory risk going forward (i.e., investors would be unlikely to want to invest capital in a market if the results were subject to change at a later date due to legal error). Thus, as a general matter, rerunning the markets undermines the markets themselves by creating uncertainty for market participants, and we generally eschew directing them to be rerun.

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accommodation among them . . . .”).

[115] In *H.Q. Energy Services*, the Commission, on remand from the D.C. Circuit, did not accept NYISO’s proposed market rerun to change the clearing price; instead, it found no market design flaw existed and it chose to reinstate the actual market clearing price. *H.Q. Energy Services*, 113 FERC ¶ 61,184 at PP 3-18, 20, 36-38. *SoCal Edison* and *Great Lakes* did not involve rerunning markets, but involved remands of cost-of-service determinations, involving easily measured costs. *See SoCal Edison*, 116 FERC ¶ 61,148 at PP 2-9, 23-25 (allowing SoCal Edison to recover certain costs related to it being a scheduling coordinator through its transmission owner tariff); *Great Lakes*, 76 FERC ¶ 61,157 at 61,927 (allowing a pipeline to recover certain expansion-related costs on a rolled-in basis, rather than an incremental basis, following the D.C. Circuit’s remand).

[116] *See Md. Pub. Serv. Comm’n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169, at P 49 (2008), *order on reh’g*, 125 FERC ¶ 61,340 (2008) (“In a case involving changes in market design, we generally exercise our discretion over remedies and do not order refunds that require rerunning a market.”). *See also Bangor Hydro-Elec. Co. v. ISO New England Inc.*, 97 FERC ¶ 61,339 (2001) (finding that rerunning markets, even when a software error results in clearing prices that are inconsistent with the market rules, would do more harm to electric markets than is justifiable), *reh’g denied*, 98 FERC ¶ 61,298 (2002); *Cal. Indep. Sys. Operator*, 120 FERC ¶ 61,271, at P 25 (2007) (identifying market reruns as the exception, not the rule).

56. As to capital risk, resources participating in these auctions made investment decisions based on the clearing prices of the auctions. Resources are required to invest capital in new or upgraded facilities in order to meet their delivery commitment during the delivery year. One of the major justifications for PJM instituting the three-year forward auction was to encourage competition between new and existing resources by providing sufficient time to construct new plants. The resources need to make the investment determination based on receiving an auction price sufficient to cover costs plus a reasonable return. Indeed, rerunning the auctions under different rules might result in some of the resources that cleared in the first auction failing to clear in the rerun auction, thereby losing all payment for their commitment. For some of the past auctions, these resources will already have provided the service for which they were awarded the auction rate.

57. By the same token, rerunning the auctions under different market rules could result in resources that failed to clear in the original auction clearing in the rerun auction. This could result in resources receiving payment even if the resource had never invested the capital necessary to build the resource, if a new resource, or to make upgrades necessary to perform. This could result in a situation where some resources would be required to repay amounts received for a service that it actually provided, which would be transferred to another resource that did not provide that service and perhaps could not have provided it since the resource failed to make the necessary investments.

58. Attempting to rerun the auctions also would necessitate determinations as to how to treat the bids of resources that previously qualified under the competitive entry and self-supply exemptions. It would be extremely difficult for PJM to attempt to recreate unit-specific bids retroactively for each of these generators. And, rerunning the auctions without permitting such resources to requalify under the unit-specific review exception could significantly harm resources that already made investments. PSEG Companies concede that this would be a "difficult task,"[117] and suggest a methodology whereby new entrants' offers for the affected auctions would be repriced using simplifications and estimates to create a unit-specific offer price at or near the default offer floor.[118] These bids would ultimately determine a new clearing price, which, according to PSEG Companies, will be paid only to existing generators. We decline to adopt PSEG Companies' proposal because it presumes that the replacement bids would be at, or near, the default offer floor if PSEG Companies' unit-specific review process was the only

[117] PSEG Companies Answer, Aff. of Roy J. Shanker Ph.D. at PP 16-17.

[118] PSEG Companies Answer at 13. To make this calculation, PSEG Companies proposes to begin with the Commission-approved gross CONE calculation of each new unit, then use actual energy and ancillary services data to determine its net CONE, which would become the unit's "replacement bid."

MOPR exception available. However, previous auctions when the unit-specific review process was the only MOPR exception did not see similar clearing prices. Thus, we do not find it reasonable to presume such behavior for all new entrants here.

59. Moreover, such a course of action would undermine market participants' confidence in PJM's markets. As NRG notes, "a generator that has cleared an auction might hesitate to invest hundreds of millions of dollars to build a new plant needed by the market for fear that the auction will be conducted anew; or it might include an enormous risk premium in its bid to address that risk."[119] We agree. Given these significant problems, we decline to adopt PSEG Companies' methodology and find that it would be exceedingly difficult, if not impossible, for PJM to attempt to recreate prices in a fair manner under these circumstances, and it would lead to extensive and unproductive litigation.[120]

60. Rerunning markets also would not benefit customers as they could end up paying higher capacity prices for service that was actually rendered by lower-cost resources.[121] In at least some instances, the offer of a new resource that qualified for one of the categorical exemptions in the original auction may be below the IMM's estimate of the resource's unit-specific costs. In these instances, the new resource would have to "re-bid" at a higher price in the rerun auction than its bid in the original auction, which could raise the resulting clearing price in the rerun auction.[122] We also note that the legal error

[119] NRG Answer at 22.

[120] *See Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121, at PP 154-157 (2009) (determining not to rerun an auction as such an effort would be inaccurate, because they cannot take into account the changes in behavior that those market participants would have made if they could be certain of the rate the Commission would ultimately adopt and because the computation of refunds will be complex, and likely to encourage needless litigation); *N.Y. Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073, at 61,307 (2000) (declining to require refunds because doing so would create substantial uncertainty and would undermine confidence in the markets, customers cannot effectively revisit their economic decisions, parties cannot retroactively alter their conduct, and the computation of refunds would be complex and would encourage needless litigation).

[121] This could occur if resources that qualified for the competitive entry and self-supply exemptions were deemed not to qualify under the unit-specific review exception so that higher priced resources would need to be selected.

[122] Rerunning the auctions, with a resulting higher price, also would create an unjustified windfall to generators that may clear in the rerun auctions since the auction as run already produced the price that PJM and the vast majority of stakeholders supported

in this case involves the Commission's improper revision of PJM's filing under FPA section 205, not the merits of the competitive entry and self-supply exemptions that were implemented during the relevant period and which the Commission found just and reasonable. Leaving the auction results undisturbed is therefore consonant with the underlying purpose of the MOPR in that competitive resources were not subject to the offer floor under the market design in effect during the relevant timeframe.

61. Based upon the foregoing considerations, we find that leaving the past auction results undisturbed equitably balances the relevant factors in this proceeding.[123]

The Commission orders:

(A) PJM's December 7, 2012 filing is hereby rejected, as discussed in the body of this order.

(B) PJM's Motion is hereby denied, as discussed in the body of this order.

(C) PJM is hereby required to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission. Chairman McIntyre and Commissioner Powelson are not participating.

(S E A L)

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as no resources qualified under the unit-specific exemption. *See* PJM December 2012 Filing at 1-2 (asserting that 89 percent of stakeholders supported the categorical exemptions); PJM Motion at 7 (explaining that no unit-specific reviews were submitted in these past auctions and the only exemptions that were provided to resources were to those qualifying for the categorical exemptions).

[123] *See Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333 (D.C. Cir. 2007) (affirming the Commission's determination not to remedy tariff violation that would have necessitated rerunning a market); *Koch Gateway Pipeline Co.*, 136 F.3d at 816-18 (agreeing that Koch violated the terms of its tariff, but found that the Commission "abused its remedial discretion by ordering a refund" as Koch did not receive a windfall and its actions, while violative of its tariff, were consistent with Commission policy).

Kimberly D. Bose,
Secretary.

Document Content(s)