

170 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

PJM Interconnection, L.L.C.

Docket No. EL17-84-001

ORDER DENYING REHEARING

(Issued January 23, 2020)

1. On September 8, 2017, the Commission instituted a proceeding pursuant to section 206 of the Federal Power Act (FPA)¹ directing PJM Interconnection, L.L.C. (PJM) and Public Service Electric and Gas Company (PSEG) to show cause: (1) why the Interconnection Service Agreement (Original ISA) between Hudson Transmission Partners, LLC (HTP), PSEG, and PJM was not unjust and unreasonable and unduly discriminatory to the extent it failed to allow HTP to convert Firm Transmission Withdrawal Rights (TWRs) to Non-Firm TWRs; and (2) why PSEG's failure to consent to an amendment to the Original ISA reflecting the same was not unjust, unreasonable, and unduly discriminatory.²
2. In an order dated December 15, 2017, the Commission found that the Original ISA was unjust and unreasonable insofar as it did not permit HTP to convert its Firm TWRs to Non-Firm TWRs, and required PJM to revise the Original ISA to reflect the conversion of 320 megawatts (MW) of Firm TWRs to a total of 0 MW of Firm TWRs and 673 MW Non-Firm TWRs, effective December 14, 2017.³
3. On January 16, 2018, PSEG and New Jersey Board of Public Utilities (NJ BPU) timely requested rehearing of the December 2017 Order, and PJM Transmission Owners timely filed a request for clarification and, in the alternative, limited request for rehearing

¹ 16 U.S.C. § 824e (2018).

² *PJM Interconnection, L.L.C.*, 160 FERC ¶ 61,056 (2017) (Show Cause Order).

³ *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,262, at P 1 and ordering paragraphs (A) and (B) (2017) (December 2017 Order). In an order dated March 5, 2018, the Commission accepted PJM's compliance filing in response to the December 2017 Order. See *PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,200 (2018).

of the December 2017 Order. For the reasons discussed below, we deny PSEG's, NJ BPU's, and PJM Transmission Owners' requests for rehearing.

I. Background

4. PJM's Open Access Transmission Tariff (Tariff) provides merchant transmission facilities with the right to elect TWRs in lieu of other transmission rights⁴ and to request either Firm or Non-Firm TWRs. Firm TWRs allow the merchant transmission facility to schedule energy and capacity withdrawals from the PJM system.⁵ In contrast, Non-Firm TWRs only allow the merchant transmission facility to schedule energy and, as such, are similar to Non-Firm Point-to-Point Transmission Service in that Non-Firm TWRs allow the merchant transmission facility to schedule transmission service on an as-available basis and are subject to curtailment.⁶

5. Once a merchant transmission facility has elected to obtain TWRs rather than another type of transmission right, PJM determines the necessary upgrades to support the Firm or Non-Firm TWRs requested through its interconnection process.⁷ Upon receiving an interconnection request, PJM undertakes feasibility and system impact studies, and based on these costs, the merchant transmission facility decides the level of Firm or Non-Firm TWRs it wishes to obtain. The interconnecting merchant transmission facility is assigned the costs of the Merchant Network Upgrades that would not have been incurred

⁴ Interconnection customers can elect TWRs in lieu of Incremental Deliverability Rights, Incremental Auction Revenue Rights, Incremental Capacity Transfer Rights, and Incremental Available Transfer Capability Revenue Rights. *See* PJM Tariff § 232, Transmission Injection Rights and Transmission Withdrawal Rights.

⁵ Firm TWRs are similar to the rights under Firm Point-to-Point Transmission Service. Firm TWRs are rights to schedule energy and capacity withdrawals between a Point of Interconnection of a merchant transmission facility with the transmission system that can only be awarded to a merchant transmission facility, whereas Firm Point-to-Point Transmission Service is reserved or scheduled energy between specified Points of Receipt and Points of Delivery for transmission customers generally. *See* PJM Tariff § I, OATT Definitions 1.13A, E-F, 5.0.1 and Definitions L-M-N, 14.0.0. *See also* PJM Tariff § II, Point-to-Point Transmission Service.

⁶ *See* PJM Tariff § I, OATT Definitions L-M-N, 14.0.0, Non-Firm Transmission Withdrawal Rights.

⁷ PJM Tariff § 232.3, Determination of Transmission Injection Rights and Transmission Withdrawal Rights to be Provided to Interconnection Customer.

“but for” the interconnection request.⁸ The merchant transmission facility, PJM, and the transmission owner to which the facility will be interconnected enter into a three-party ISA establishing the costs and conditions of the interconnection. In addition, a merchant transmission facility is responsible, on an annual basis, for the costs of any post-interconnection network upgrades to the transmission system necessary to support the merchant transmission facility’s Firm TWRs.⁹

A. Filing in Docket No. ER17-2073-000

6. The Original ISA sets out the rights and responsibilities of PJM, HTP, and PSEG with respect to the interconnection to the PJM system of the Hudson Line,¹⁰ a 660 MW high voltage direct current (HVDC) fully controllable merchant transmission facility that connects PJM in Northern New Jersey and the New York Independent System Operator, Inc. (NYISO) in New York City via a 345 kV undersea cable.¹¹ On July 10, 2017, at the

⁸ *PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,277, at P 4 (2003). Merchant Network Upgrades are additions or upgrades to, or replacement of, existing transmission system facilities by or on behalf of a merchant transmission facility developer. *See* PJM Tariff, § I, OATT Definitions - L - M - N, 11.0.0. In exchange for their Merchant Network Upgrades, merchant transmission facilities receive Firm TWRs and Financial Transmission Rights. *See* PJM Filing, Docket No. ER03-405-000, at 12 (filed Jan. 10, 2003) (identifying transmission-related rights to which merchant transmission facility developers may be entitled); PJM Tariff, § 206.5 Estimates of Certain Upgrade-Related Rights.

⁹ *See* PJM Tariff Schedule 12, § (b), and PJM Tariff § 232.2, Right of Interconnection Customer to Transmission Injection Rights and Transmission Withdrawal Rights. *See also* *PJM Interconnection, L.L.C.*, Opinion No. 503, 129 FERC ¶ 61,161, at P 80 (2009), *order on reh’g*, Opinion No. 503-A, 139 FERC ¶ 61,243 (2012) (finding that merchant transmission facilities should be responsible for the costs of maintaining network reliability, including costs for Regional Transmission Expansion Plan (RTEP) responsibility assignments, based on their Firm TWRs).

¹⁰ HTP stated that the Hudson Line, over which PJM has operational control, went into service in June 2013. HTP Response, Docket No. EL17-84-000, at 5 (filed Oct. 29, 2017).

¹¹ HTP stated that, pursuant to a long-term offtake contract, it transferred all of its Firm TWRs on the Hudson Line to the New York Power Authority (NYPA) for the purpose of exporting energy and capacity from PJM to NYISO. HTP stated that NYPA pays for the rights that it received under the long-term offtake contract, including costs of network upgrades required for the interconnection of the Hudson Line to PJM and for PJM RTEP transmission enhancement costs allocated to HTP under the existing Schedule

request of HTP, PJM filed, under section 205 of the FPA,¹² an unexecuted amended ISA (Amended ISA) among PJM, HTP, and PSEG, to be effective June 2, 2017.¹³ PJM filed the Amended ISA unexecuted, because PSEG, a party to the agreement, did not consent. Under the Amended ISA, HTP sought to convert its 320 MW of Firm TWRs to Non-Firm TWRs, resulting in 673 MW of Non-Firm TWRs and 0 MW of Firm TWRs. PJM stated that the proposed amendment to the Original ISA comported with the 673 MW Nominal Rated Capability of the facility specified in the Original ISA and that HTP's request would not adversely impact the operation or reliability of the PJM system.¹⁴

7. In the September 8, 2017 order, the Commission rejected the Amended ISA, finding that neither the Original ISA nor PJM's tariff permitted PJM to file, under section 205, an unexecuted amended ISA with modifications requested by an interconnection customer.¹⁵ While the Commission rejected PJM's filing, the Commission also found that, based on the evidence in the proceeding, the Original ISA may be unjust and unreasonable and unduly discriminatory to the extent that it fails to permit HTP to convert Firm TWRs to Non-Firm TWRs and that PSEG's withholding of consent to the Amended ISA may also be unjust and unreasonable. Accordingly, the Commission instituted a proceeding, in Docket No. EL17-84-000, pursuant to section 206 of the FPA, requiring PSEG and PJM to show cause why the Original ISA and PSEG's failure to consent to the Amended ISA was not unjust and unreasonable and unduly discriminatory.

8. In instituting the section 206 proceeding, the Commission stated that not permitting HTP to reduce the quality of its service from Firm TWRs to Non-Firm TWRs appeared to be unjust and unreasonable in these factual circumstances. The Commission reasoned that: (1) HTP had fully paid for the network upgrades necessary for its Firm TWRs and therefore the reduction would not affect payments for previously

12 of the PJM Tariff. Show Cause Order, 160 FERC ¶ 61,056 at P 5; HTP Response, Docket No. EL17-84-000, at 5-6 (filed Oct. 29, 2017).

¹² 16 U.S.C. § 824d (2018).

¹³ PJM made this filing in Docket No. ER17-2073-000.

¹⁴ Show Cause Order, 160 FERC ¶ 61,056 at P 5.

¹⁵ The Commission found that, under PJM's tariff and the Original ISA, without the consent of all parties to the Amended ISA, HTP was required to file under section 206 of the FPA to amend the Original ISA. *Id.* PP 34-40.

constructed facilities;¹⁶ (2) the conversion would not exceed the nominal rated capability of the Hudson Line and therefore system withdrawals would not increase; (3) HTP operates a DC line that is fully controllable by PJM, so PJM can shut off flows, consistent with applicable rules and procedures, in the event that a reliability or other operational problem arises; and (4) HTP's relinquishing of Firm TWRs would not adversely impact the operation or reliability of the PJM system.¹⁷

9. In response to a PSEG argument, the Commission also stated that requiring HTP to terminate the Original ISA and disconnect an already constructed transmission line, rather than permitting an amendment of the Original ISA to convert Firm TWRs to Non-Firm TWRs, appeared to be unjust and unreasonable. The Commission noted that Non-Firm TWRs impose less of a burden on the system than HTP's Firm TWRs and that PJM, as the system operator, finds that such a conversion will not have adverse reliability or operational impacts.¹⁸

10. The Commission also found that the protestors' arguments related to cost allocation were beyond the scope of the proceeding because such arguments challenged the justness and reasonableness of PJM's RTEP cost allocation method, not whether HTP should be able to convert its Firm TWRs to Non-Firm TWRs.¹⁹

¹⁶ See Opinion No. 503, 129 FERC ¶ 61,161 at P 80 & n.84 ("PJM would not need to incur the upgrades since it has *no obligation to plan for Non-Firm Transmission Withdrawal Rights in the RTEP process.*") (emphasis added).

As the system changes for a variety of reasons (e.g., retirements and load growth), it may be necessary to construct additional facilities in order for PJM to be able to provide the level of *Firm Transmission Withdrawal Rights* to which the customers subscribed. In those circumstances, we find it just and reasonable and not unduly discriminatory or preferential for PJM to charge the Merchant Transmission Facilities for the costs of assuring their service.

Id. P 110 (emphasis added).

¹⁷ Show Cause Order, 160 FERC ¶ 61,056 at P 43.

¹⁸ *Id.* P 44.

¹⁹ *Id.* P 45.

11. On September 20, 2018, the Commission denied Linden VFT, L.L.C.'s request for rehearing of the Show Cause Order.²⁰

B. December 2017 Order

12. The Commission in the December 2017 Order found that the Original ISA was unjust and unreasonable insofar as it did not permit HTP to convert its Firm TWRs to Non-Firm TWRs. The Commission directed PJM to make a compliance filing amending section 2.2 of Specifications for the Original ISA to reflect the conversion of 320 MW Firm TWRs to a total of 0 MW of Firm TWRs and 673 MW Non-Firm TWRs, effective December 15, 2017.²¹

13. The Commission stated that HTP already satisfied the interconnection requirements, and found that requiring HTP to maintain such Firm TWRs for the life of the merchant transmission facility is unjust and unreasonable in the absence of any operational or reliability basis for doing so. The Commission stated that converting those Firm TWRs to Non-Firm TWRs imposes no additional obligation on PJM and, in fact, is less burdensome in that PJM will no longer have to guarantee that its transmission system can support such use.²²

14. The Commission disagreed with PSEG's assertion that allowing HTP to convert its Firm TWRs to Non-Firm TWRs will undermine the interconnection process as HTP has already fulfilled its interconnection requirements. The Commission agreed with PJM that HTP's conversion of Firm TWRs to Non-Firm TWRs does not require any additional system upgrades as the Non-Firm TWRs do not increase system withdrawals and will not affect payments for previously constructed facilities.²³ The Commission also was not persuaded by PSEG's arguments that (1) the Original ISA is a bilateral contract governed by the public interest *Mobile-Sierra*²⁴ standard; (2) the issue of operational and reliability impacts raises a multitude of disputed material facts regarding the effect on the NYISO

²⁰ *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,192 (2018).

²¹ December 2017 Order, 161 FERC ¶ 61,262 at P 41.

²² *Id.* PP 42-43.

²³ *Id.* P 44.

²⁴ *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 344 (1956) (*Mobile*) (together, *Mobile-Sierra*).

system warranting a hearing; and (3) cost allocation is not beyond the scope of this proceeding.²⁵

II. Discussion

A. Procedural Matters

15. On January 31, 2018, HTP filed an answer and NYPA filed an answer and, in the alternative, motion to dismiss in response to PJM Transmission Owners' request for clarification and rehearing. On February 15, 2018, PJM Transmission Owners filed an answer to NYPA's motion to dismiss. On February 20, 2018, NJ BPU filed a reply to HTP's answer.

16. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2019), prohibits an answer to a request for rehearing. Because the Commission regards PJM Transmission Owners' request for clarification as a request for rehearing of the December 2017 Order, the Commission dismisses HTP's and NYPA's answers and also dismisses PJM Transmission Owners' answer and NJ BPU's reply.

B. Substantive Matters

1. Mobile-Sierra

17. PSEG argues that the Commission's directive that PJM unilaterally amend the Original ISA erred by failing to apply the public interest standard of the *Mobile-Sierra* doctrine.²⁶ PSEG argues that the Commission erred in finding that the "just and reasonable" standard, rather than the "public interest" standard, applied to the ISA. PSEG maintains that, contrary to the Commission's assertions, the type of TWRs and the level of those TWRs' firmness are not *pro forma* provisions, and there were legitimate operational and reliability reasons why these provisions were negotiated by the parties, specific to HTP, and to which HTP consented. PSEG argues that the *Mobile-Sierra* doctrine applies to all contracts, unless parties establish a different standard of review or the terms at issue are rates set unilaterally by tariff.²⁷ PSEG argues that the Commission

²⁵ December 2017 Order, 161 FERC ¶ 61,262 at PP 45-55.

²⁶ PSEG Request for Rehearing at 3.

²⁷ *Id.* at 6-8 (citing *NRG Power Mktg, LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 175 (2010); *Morgan Stanley Cap. Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530-34, 546 n.3 (2008) (internal citations omitted); *Texaco Inc. v. FERC*, 148 F.3d 1091, 1094, 1097 (D.C. Cir. 1998) (internal citations omitted); *New England Power*

erred in relying on *Oklahoma Gas*²⁸ as an exception to the *Mobile-Sierra* doctrine because *Oklahoma Gas* only provided an additional exception to *Mobile-Sierra* where competitors agreed to exclude future competition, which is inapplicable to HTP's ISA.²⁹ PSEG argues that section 22.6 of the Original ISA grants to interconnection parties, not the Commission, the right to bring a complaint pursuant to section 206 of the FPA.³⁰

18. We are not persuaded by PSEG's arguments that the Commission erred in applying the "just and reasonable" rather than the "public interest" standard of *Mobile-Sierra*. As the Commission stated in the December 2017 Order, the *Mobile-Sierra* "public interest" presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption.³¹ In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption.³²

Generators Ass'n v. FERC, 707 F.3d 364, 366 (D.C. Cir. 2013); *Mojave Pipeline Co.*, 62 FERC ¶ 61,195, at 62,361 (1993)).

²⁸ *Okla. Gas & Elec. Co. v. FERC*, 827 F.3d 75, 76, 79-80 (D.C. Cir. 2016) (*Oklahoma Gas*).

²⁹ PSEG Request for Rehearing at 8-9.

³⁰ *Id.* at 9.

³¹ See December 2017 Order, 161 FERC ¶ 61,262 at P 46.

³² The Commission has followed this approach in other contexts. See, e.g., *Southwest Power Pool, Inc.*, 144 FERC ¶ 61,059 (2013), *order on reh'g and compliance*, 149 FERC ¶ 61,048, at PP 100-104 (2014), *denying petition for review, Oklahoma Gas*, 827 F.3d at 76; *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 184 (2013), *order on reh'g and compliance*, 147 FERC ¶ 61,128 (2014), *order on reh'g and compliance*, 150 FERC ¶ 61,038, *order on reh'g and compliance*, 151 FERC ¶ 61,250 (2015) (citing *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014, at P 17 (2011) (holding that the terms of an agreement that are "incorporated into the service agreements of all present and future customers . . . are properly classified as tariff rates and the *Mobile-Sierra* presumption would not apply"))).

19. PSEG is correct that the D.C. Circuit in *Oklahoma Gas* found that the *Mobile-Sierra* presumption does not apply where competitors agree to exclude competition. But the court did not restrict exceptions to application of the *Mobile-Sierra* presumption in the manner that PSEG suggests, nor did the court disturb the Commission's earlier distinction between the types of agreements subject and not subject to the *Mobile-Sierra* presumption.³³

20. We affirm the December 2017 Order's finding that the terms in the ISA were generally applicable and, therefore, were not protected by the *Mobile-Sierra* presumption. Section 232.3 of PJM's Tariff governs the conditions under which a transmission interconnection customer receives Firm and Non-Firm TWRs: "The Office of Interconnection [PJM] shall determine the . . . Transmission Withdrawal Rights . . . to be provided to eligible Transmission Interconnection Customer(s)."³⁴ Once determined by PJM following a System Impact Study, those rights became available to the Transmission Interconnection Customer (e.g., HTP) pursuant to execution of an ISA based on the *pro forma* ISA attached to the PJM Tariff as Attachment O. Because PJM determined the TWRs available to HTP following that study conducted under terms and conditions that are generally applicable (even though the results of that study were specific to HTP), we regard those terms as generally applicable and therefore subject to the "just and reasonable" standard, rather than the *Mobile-Sierra* presumption.

³³ As neither party advocates for restricting *Mobile-Sierra* exclusively to rates, there is no need to decide that question. We assume *arguendo* that the presumption is not so limited. More importantly, this precedent reflects that no matter the contract provision at issue, even if the *Mobile-Sierra* doctrine might apply to it generally, FERC did not err in determining that the doctrine does not extend to anti-competitive measures that were not arrived at through arms-length bargaining. In other words, the *term must be the product of adversarial negotiations between sophisticated parties pursuing independent interests*.

Oklahoma Gas, 827 F.3d at 79-80 (emphasis added).

³⁴ PJM Tariff § 232.3, Determination of Transmission Injection Rights and Transmission Withdrawal Rights to be Provided to Interconnection Customer.

21. We also affirm the December 2017 Order’s finding that the *Memphis* clause³⁵ in the Original ISA permitted the Commission to apply the “just and reasonable” rather than the “public interest” standard. Section 22.3 of the Original ISA, which is the same as section 22.3 of the *pro forma* ISA in Attachment O in PJM’s Tariff, provided in relevant part that:

[N]othing contained in this Interconnection Service Agreement shall be construed as affecting in any way any of the rights of any Interconnection Party with respect to changes in applicable rates or charges under Section 205 of the Federal Power Act and/or FERC’s rules and regulations thereunder, or any of the rights of any Interconnection Party under Section 206 of the Federal Power Act and/or FERC’s rules or regulations thereunder.

22. This provision preserves the rights of parties to seek changes under the “just and reasonable” standard of the FPA. We also affirm the December 2017 Order’s determination that Commission precedent preserves this right for the Commission to do so as well, and does not restrict the Commission from acting under section 206 of the FPA as it did in the December 2017 Order: “where provisions in an Interconnection Agreement allow either party to unilaterally request changes under FPA sections 205 or 206, the Commission has the authority to require changes to the contracts under the just and reasonable standard.”³⁶ Moreover, because only the Commission can change a rate under FPA section 206,³⁷ we are not persuaded by PSEG’s argument that this provision extends rights only to the Interconnection Parties.

³⁵ *United Gas Co. v. Memphis Gas Div.*, 358 U.S. 103 (1958) (contracts can preserve the rights of parties to revise rates under the ordinary just and reasonable standard).

³⁶ *Ontelaunee Power Operating Co. v. Metropolitan Edison Co.*, 119 FERC ¶ 61,181, at P 24 (citing *Duke Energy Hinds, LLC*, 102 FERC ¶ 61,068, at P 21 (2003), *order on reh’g and compliance*, 117 FERC ¶ 61,210 (2006)). *See also Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983) (“specific acknowledgement of the possibility of future rate change is virtually meaningless unless it envisions a just-and-reasonable standard”).

³⁷ 16 U.S.C. § 824e (2018) (“the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order”). *See Md. Pub. Serv. Comm’n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011).

2. Operational and Reliability Impacts

23. PSEG argues that the Commission erred in finding no operational or reliability rationale preventing it from directing that PJM convert HTP's Firm TWRs to Non-Firm TWRs and in accepting PJM's and HTP's statements that this conversion would cause no adverse reliability or operational impacts on PJM's system.³⁸ PSEG maintains that the Commission relied primarily on "one sentence written by an attorney in a PJM pleading, unsupported by any independent evidence or expert testimony."³⁹ PSEG states that the Commission ignored the affidavit of PSEG's witness, Esam A.F. Khadr, which raised concerns about the operational, reliability, and locational marginal price impacts from HTP's FTWR conversion and impacts such that the Commission should have set this disputed issue of material fact for hearing and settlement judge procedures.⁴⁰ PSEG states that the Commission had no support for its assertions that PJM could shut off flows if a reliability or other operational problem arose and that the Hudson Line will remain used and useful to HTP and NYISO after the quality of HTP's service is reduced.⁴¹

24. We disagree with these PSEG arguments. The Commission in the December 2017 Order reasonably relied on statements from PJM that reducing HTP's TWRs from Firm to Non-Firm presented no operational or reliability risks to PJM's system.⁴² PJM made a similar representation in Docket No. ER17-2073-000.⁴³ Moreover, the Commission

³⁸ PSEG Request for Rehearing at 3.

³⁹ *Id.* at 13.

⁴⁰ *Id.* at 11-13.

⁴¹ *Id.* at 13.

⁴² See December 2017 Order, 161 FERC ¶ 61,262 at P 54 (citing PJM Response, Docket No. EL17-84-000, at 3 (filed Oct. 10, 2017)).

⁴³ Relinquishing HTP's [Firm TWRs] (and the right to schedule capacity withdrawals from PJM using [Firm TWRs]) back to PJM as set forth in the unexecuted interconnection agreement will have no adverse operational or reliability impact on the PJM transmission system or PSEG. Relinquishing [Firm TWRs] will not change the physical configuration of the interconnection between HTP and PSEG, nor will it impose any greater operational responsibilities on PSEG.

PJM Answer, Docket No. ER17-2073-000, at 11 (filed July 31, 2017).

explained why PSEG's expert's reliance on a NYISO 2016 Reliability Needs Assessment to assert reliability consequences in NYISO due to the conversion of HTP's Firm TWRs to Non-Firm TWRs is unfounded given that that document "makes no reference to the 320 MWs of Firm TWRs, nor does it assert that those MWs are critical to NYISO's reliability."⁴⁴ The Commission therefore reasonably found that there was no dispute of material fact warranting a hearing.⁴⁵

3. Cost Allocation

25. PSEG argues that the Commission erred in rejecting arguments that cost allocation principles do not preclude HTP from terminating its Firm TWRs.⁴⁶ PSEG argues that the December 2017 Order ignores Commission policy requiring merchant transmission facilities to assume full market and financial risks for their projects.⁴⁷ PSEG argues that HTP will continue to benefit from its connection to the PJM system "built to accommodate its existence," but escape the cost allocation provisions of Schedule 12 of PJM's Tariff that will now be borne by New Jersey ratepayers. PSEG argues that it is irrelevant to the transmission planning process whether a merchant transmission facility is using all of the Firm TWRs allotted to it under an ISA because the transmission system must accommodate all TWRs held by a merchant transmission facility.⁴⁸

26. NJ BPU argues that the Commission failed to address whether reducing HTP's TWRs to Non-Firm results in unjust and unreasonable rates to New Jersey and other PJM ratepayers while granting an unlawfully preferential rate to New York ratepayers. NJ BPU describes escaping RTEP cost allocation as the primary reason why HTP and NYPA favored converting HTP's TWRs to Non-Firm in this proceeding.⁴⁹ NJ BPU

⁴⁴ December 2017 Order, 161 FERC ¶ 61,262 at PP 53-55.

⁴⁵ *Id.* P 55 (citing *Penn. Pub. Util. Comm'n v. FERC*, 881 F.2d 1123, 1126 (D.C. Cir. 1989); *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997); *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (citing *Penn. Pub. Utility Comm'n*, 881 F.2d at 1126 and *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 124 (D.C. Cir. 1982))).

⁴⁶ PSEG Request for Rehearing at 3.

⁴⁷ *Id.* at 14 (citing *PJM Interconnection, L.L.C.*, Opinion No. 503-A, 139 FERC ¶ 61,243 (2012)).

⁴⁸ *Id.* at 14-16.

⁴⁹ NJ BPU Request for Rehearing at 5-8.

states that the Commission failed to consider the benefits to New York ratepayers, as described by PSEG's expert, NYISO, and the New York Public Service Commission themselves, and as demonstrated by the fact that HTP's Firm TWRs contributed to the need for many RTEP projects in the northern PSEG zone.⁵⁰

27. We find that the Commission acted appropriately in addressing PSEG's and NJ BPU's arguments regarding cost allocation. HTP, as a merchant transmission provider requesting Firm TWRs, had to pay for necessary upgrades to support that service during the interconnection process. As long as HTP maintains Firm TWRs, it also receives a cost allocation for upgrades necessary to support that service. However, once HTP converts its Firm TWRs to Non-Firm TWRs, PJM no longer needs to plan for transmission upgrades to support HTP's Non-firm TWR service, and under PJM's Tariff, HTP would no longer be subject to future cost allocations based on Firm TWRs.⁵¹ As the Commission stated in the December 2017 Order, Schedule 12 of the PJM Tariff calculates a merchant transmission facility's cost responsibility for RTEP projects based on that facility's Firm TWRs.⁵² To the extent that PSEG or NJ BPU challenge the formula for PJM's Tariff's allocation of costs to holders of Firm or Non-Firm TWRs as unjust and unreasonable to PJM ratepayers, we dismiss that issue as beyond the scope of this proceeding. As the December 2017 Order states, "neither PSEG nor NJ BPU has contended that these provisions are unjust and unreasonable."⁵³

⁵⁰ *Id.* at 8-9.

⁵¹ See *PJM Interconnection, L.L.C.*, Opinion No. 503, 129 FERC ¶ 61,161 at P 80.

⁵² December 2017 Order, 161 FERC ¶ 61,262 at P 50.

Cost responsibility for Regional Facilities and Necessary Lower Voltage Facilities shall be allocated among Responsible Customers as defined in this Schedule 12 as follows: . . . Fifty percent (50%) shall be assigned annually on a load-ratio share basis as follows: With respect to Merchant Transmission Facilities, . . . for the calendar year following the year in which it initiates operation, the actually awarded Firm Transmission Withdrawal Rights associated with its existing Merchant Transmission Facility.

PJM Tariff Schedule 12, § (b)(i)(A)(1)(b).

⁵³ December 2017 Order, 161 FERC ¶ 61,262 at P 50.

4. PJM Transmission Owners' Request for Clarification

28. PJM Transmission Owners ask the Commission to clarify that the December 2017 Order only requires PJM to convert HTP's TWRs from Firm to Non-Firm but does not require PJM to reduce HTP's cost responsibility in a manner inconsistent with the terms of Schedule 12 of PJM's Tariff. PJM Transmission Owners state that when PJM submitted a filing in Docket No. ER18-579-000 to comply with the December 2017 Order, PJM terminated HTP's RTEP cost responsibility effective January 1, 2018. PJM Transmission Owners contend that PJM misread the December 2017 Order because Schedule 12 required PJM to adjust RTEP cost responsibility over time, rather than immediately.⁵⁴

29. PJM Transmission Owners describe Schedule 12 of PJM's Tariff as requiring that cost allocation be determined based on several inputs for calculating annual load ratio share and the solution-based distribution factor (DFAX) method. These inputs include the level of Firm TWRs held by merchant transmission facilities for the year preceding the year for which costs are allocated. PJM Transmission Owners reason that HTP's cost allocation responsibility that is based on load ratio share of zero Firm TWRs cannot be adjusted until, at the earliest, the year beginning January 1, 2019, to account for the complete 12-month period beginning after the December 2017 Order.⁵⁵

30. PJM Transmission Owners alternatively request rehearing of the December 2017 Order to modify it to "hold that adjustments to HTP's cost responsibility for RTEP projects would be made on the schedule established by the applicable provisions of Schedule 12."⁵⁶ PJM Transmission Owners state that the Commission did not find HTP's RTEP project cost responsibility pursuant to Schedule 12 of PJM's Tariff unjust and unreasonable or unduly preferential or discriminatory and that its allocations constitute the filed rate.⁵⁷

31. The Commission addressed the same protest in response to the PJM cost allocation compliance filing in Docket No. ER18-579-000,⁵⁸ which is currently pending rehearing and we find that to be the appropriate proceeding in which to address this issue. As we

⁵⁴ PJM Transmission Owners Request for Clarification at 5-6.

⁵⁵ *See id.* at 6-11.

⁵⁶ *Id.* at 11.

⁵⁷ *Id.* at 12.

⁵⁸ *See PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,197, at PP 25-29 (2018), *reh'g pending*.

stated above, because we dismiss PJM Transmission Owners' request for rehearing as beyond the scope of this proceeding, we also dismiss as moot HTP's and NYPA's answers and PJM Transmission Owners' answer and NJ BPU's reply.

The Commission orders:

(A) PSEG's and NJ BPU's requests for rehearing of the December 2017 Order are hereby denied, as discussed in the body of this order.

(B) PJM Transmission Owners' request for clarification and rehearing of the December 2017 Order is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.