170 FERC ¶ 61,243
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 Nos. ER19-2915-000
ER19-2915-001

ORDER ACCEPTING TARIFF PROPOSAL

(Issued March 20, 2020)

1. On September 30, 2019, pursuant to section 205 of the Federal Power Act (FPA),[1] PJM Interconnection, L.L.C. (PJM) submitted proposed revisions to the PJM Amended and Restated Operating Agreement (Operating Agreement). The revisions would allow a developer to submit sufficient information about the binding nature of its voluntary cost commitment proposal and require PJM to undertake a comparative review and analysis of any binding cost commitments voluntarily presented as part of proposals submitted in PJM's competitive proposal window process (Filing).[2] As discussed below, we accept PJM's Filing, effective January 1, 2020, as requested. We also dismiss a request for waiver of Operating Agreement, section 18.6(a) as moot.

I. Background

2. Section 1.5.8 of Schedule 6 of PJM's Operating Agreement describes PJM's competitive proposal window process used to develop the PJM Regional Transmission Expansion Plan (RTEP). Section 1.5.8(c)(1) requires that proposals submitted in competitive proposal windows contain certain information including, among other things, relevant engineering studies, a proposed initial construction schedule, and cost estimates and analyses that provide sufficient detail for PJM to review and analyze the proposed cost of the project proposal.

3. In addition, section 1.5.8(c)(2) permits transmission developers, whether they are existing transmission owners or nonincumbent transmission developers, to submit further information, including among other factors, a demonstration of "other advantages the

[1] 16 U.S.C. § 824d (2018).

[2] PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA Schedule 6, §§ 1.5.8(c)(2) & (e).

entity may have to construct, operate, and maintain the proposed project, including any cost commitment the entity may wish to submit."

4. After a proposal window closes, PJM reviews the submitted proposals, while considering the criteria in sections 1.5.8(e) and 1.5.8(f), and presents to the Transmission Expansion Advisory Committee (TEAC) the proposals that merit further consideration for inclusion in the recommended RTEP as the more efficient or cost-effective transmission solution. Under section 1.5.8(e), PJM is required to consider multiple criteria, including the "cost effectiveness" of project proposals.[3] Section 1.5.8(f) specifies entity-specific criteria that PJM considers in determining the designated transmission developer for a project, including whether the entity is prequalified, evidence of an entity's ability to secure a financial commitment to finance the project, and the technical and engineering experience of the entity, among others.

II. PJM's Filing

5. In the Filing, PJM presents proposed revisions to Operating Agreement sections 1.5.8(c)(2) and 1.5.8(e). PJM proposes to modify section 1.5.8(c)(2) to clarify that any voluntary cost commitment submitted as part of a proposal is binding and that "the entity shall submit sufficient information for [PJM] to determine the binding nature of the proposal with respect to critical elements of project development." The proposed revisions also include language to clarify that submission of binding cost commitment proposals must at all times remain voluntary and that PJM may not alter project submission requirements or otherwise mandate submittal of binding cost containment proposals.

6. Proposed revisions to section 1.5.8(e) provide more detail about how PJM would consider the "cost-effectiveness" of certain types of cost commitment proposals. PJM states it would do so by evaluating "the quality and effectiveness" of a submitted cost commitment provision that "caps project construction costs (either in whole or in part), project total return on equity [(ROE)] (including incentive adders), or capital structure."

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[3] Other criteria include: (1) the extent to which a proposal would address and solve a posted violation, system condition, or economic constraint; (2) if an economic project, the extent to which the relative benefits of the project proposal meet a Benefit/Cost Ratio Threshold of at least 1.25:1; (3) the extent to which the proposal would have secondary benefits, such as addressing additional or other system reliability, operational performance, economic efficiency issues or federal Public Policy Requirements or state Public Policy Requirements identified by the states in the PJM region; and (4) other factors such as the ability to timely complete the project, and project development feasibility. PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA Schedule 6, § 1.5.8(e).

PJM also proposes, as part of its cost-effectiveness evaluation, to determine, for each project finalist's proposal, the comparative risks to be borne by ratepayers as a result of the proposal's binding cost commitment or the use of non-binding cost estimates; the comparative analysis will detail, in a clear and transparent manner, the method that PJM uses to determine the cost and overall cost-effectiveness of each proposal, including any binding cost commitments. PJM would then submit the comparative risk analysis to the TEAC for review and comment.

7. PJM's proposed revisions to section 1.5.8(c) also clarify that in evaluating any cost, ROE, and/or capital structure in a binding cost commitment proposal, PJM would not be making a determination that these cost-related provisions result in just and reasonable rates. PJM states such determination rather will be addressed in the required rate filing with the Commission and that stakeholders who seek to dispute a particular ROE analysis used in the selection process can bring such claims in the rate proceeding where the Designated Entity[4] seeks approval of its rates from the Commission. Finally, PJM proposes that neither PJM, the Designated Entity, nor any stakeholders will be waiving any of their respective FPA section 205 or 206 rights through the process and that challenges to the Designated Entity Agreements will be subject to the just and reasonable standard.

8. PJM explains that the proposal is the product of stakeholder-drafted motions and amendments initiated at the PJM Markets and Reliability Committee (MRC). PJM states that it continues to work with stakeholders on developing details in the applicable manual around how PJM would implement the stakeholder proposal. PJM requests that its proposed revisions become effective on January 1, 2020.[5]

III. Notice of the Filing

9. Notice of PJM's Filing was published in the *Federal Register*, 84 Fed. Reg. 53,439 (Sept. 12, 2019), with interventions and protests due on or before October 21, 2019. Timely motions to intervene were filed by Monitoring Analytics, LLC, in its capacity as the Independent Market Monitor for PJM (Market Monitor), Exelon Corporation (Exelon), Duquesne Light Company, Rockland Electric Company,

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[4] A Designated Entity is "an entity, including an existing Transmission Owner or Nonincumbent Developer, designated by the Office of the Interconnection with the responsibility to construct, own, operate, maintain, and finance Immediate-need Reliability Projects, Short-term Projects, Long-lead Projects, or Economic-based Enhancements or Expansions pursuant to Operating Agreement, Schedule 6, section 1.5.8." PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA, § 1, Definitions C – D.

[5] PJM Filing at 6.

Calpine Corporation, Duke Energy Corporation, Dominion Energy Services, Inc. (Dominion Energy), Old Dominion Electric Cooperative, American Municipal Power, Inc., and Transource Energy, LLC. The Office of the People's Counsel for the District of Columbia (DC People's Counsel), Southern Maryland Electric Cooperative, Inc., West Virginia Consumer Advocate Division, and Edison Electric Institute (EEI) filed motions to intervene out-of-time.

10. American Electric Power Service Corporation; PPL Electric Utilities Corporation (PPL) and The Dayton Power and Light Company (Dayton) (together, PPL/Dayton); Public Service Electric and Gas Company (PSEG); and the Indicated TOs Group 1[6] filed timely motions to intervene and protests. LSP Transmission Holdings II, LLC (LS Power) and New Jersey Board of Public Utilities (NJBPU) filed timely motions to intervene and comments. LS Power, DC People's Counsel, and West Virginia Consumer Advocate Divisions (together, Joint Answering Parties), PSEG, PJM, and PPL/Dayton filed answers to protests and comments. LS Power, PPL/Dayton, and PSEG filed answers to answers.

11. On December 23, 2019, Commission staff issued a deficiency letter requesting additional information about PJM's proposed binding cost commitment language and comparative review and analysis, as well as the process for submitting the proposed revisions to the PJM Board of Managers (Board) for review and comment (Deficiency Letter).

12. On January 22, 2020, PJM filed its response to the Deficiency Letter (Deficiency Letter Response). Notice of PJM's Deficiency Letter Response was published in the *Federal Register*, 85 Fed. Reg. 5411 (2020), with interventions and protests due on or before February 12, 2020. NJBPU and Exelon and Dominion (together, Exelon/Dominion) filed comments. PPL/Dayton, PSEG, and Indicated TOs Group 2[7]

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[6] Indicated TOs Group 1 are: Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Monongahela Power Company, The Potomac Edison Company, West Penn Power Company, and American Transmission Systems, Incorporated; and PPL.

[7] Indicated TOs Group 2 are: American Electric Power Service Corporation on behalf of its affiliates Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Wheeling Power Company, AEP Appalachian Transmission Company, Inc., AEP Indiana Michigan Transmission Company, Inc., AEP Kentucky Transmission Company, Inc., AEP Ohio Transmission Company, Inc., and AEP West Virginia Transmission Company, Inc. (together, AEP); Duquesne Light Company; Jersey Central Power & Light Company, Mid-Atlantic Interstate Transmission, LLC, Monongahela Power Company, The Potomac Edison Company, West Penn Power Company and American Transmission

filed protests. The Market Monitor, LS Power, PSEG, PPL, Indicated TOs Group 3[8], and EEI filed answers.

IV. Commission Determination

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

14. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2019), we grant the late-filed motions to intervene by DC People's Counsel, Southern Maryland Electric Cooperative, Inc., West Virginia Consumer Advocate Division, and EEI, given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept the answers submitted by Joint Answering Parties, PSEG, PJM, LS Power, PPL/Dayton, PPL, Indicated TOs Group 3, and the Market Monitor because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

16. We find that PJM's proposed revisions to sections 1.5.8(c)(2) and (e) of Schedule 6 of the Operating Agreement are just and reasonable and, therefore, we accept PJM's Filing, effective January 1, 2020, as requested. Under PJM's existing competitive proposal window process, a developer is free to submit cost commitments in its proposal as part of its demonstration of "other advantages" that developer may have to "construct, operate, and maintain the proposed project."[9] PJM's proposed revisions add clarity that such cost commitments must at all times remain voluntary, that developers are to submit information to define the binding elements of the proposal, and that PJM will include in its assessment of a project's cost-effectiveness the quality and effectiveness of

Systems, Incorporated; PPL; PSEG; Rockland Electric Company; and Transource West Virginia, LLC.

[8] Indicated TOs Group 3 are AEP, Duquesne Light Company, and Transource West Virginia, LLC.

[9] PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA Schedule 6, § 1.5.8(c)(2).

any voluntarily-submitted binding cost commitment proposal. Additionally, PJM's proposed revisions provide transparency into how PJM will determine the cost and overall cost-effectiveness of competing proposals, including any binding cost commitments. Accordingly, we find that PJM's Filing is just and reasonable because it may assist PJM in its selection of the more efficient or cost-effective transmission solution and provides additional transparency of PJM's evaluation of competing proposals. We address specific protests and comments below.

1. Incomplete Filing

a. Protests

17. Protestors argue that PJM's filing is incomplete and unsupported.[10] They state that PJM offers no justification for why the proposed revisions are just and reasonable other than that the proposal was approved through a stakeholder process.[11] Additionally, protestors argue that the Filing lacks specificity, noting PJM's acknowledgement that it "continues to work with stakeholders on developing details in the applicable Manual around how PJM would implement the stakeholder proposal."[12] Protestors argue that the proposed revisions do not provide sufficient notice of which factors will be evaluated in PJM's comparative analysis, how these factors will be weighted, and which assumptions will be made, thus making it unclear how PJM intends to evaluate and weigh the binding cost commitment provisions.[13] PSEG argues that PJM's proposal fails to meet the requirement in Order No. 890 that a transmission provider's planning process must include sufficient detail to enable customers to understand, among other things, the methodology, criteria, and processes used to develop transmission plans.[14] PSEG also argues that PJM fails to define what attributes a developer's cost commitment provision must have to be considered "binding." PSEG asserts that the missing elements fail to

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[10] *See* Indicated TOs Group 1 Protest at 4-6; AEP Protest at 2; PSEG Protest at 4-9.

[11] PSEG Protest at 6; AEP Protest at 2; Indicated TOs Group 1 Protest at 4.

[12] *See* AEP Protest at 2 (citing PJM Filing at 6).

[13] *See* Indicated TOs Group 1 Protest at 4-6; AEP Protest at 2; PSEG Protest at 4-9.

[14] PSEG Protest at 6 n.9 (citing *Preventing Undue Discrimination & Preference in Transmission Serv.*, Order No. 890, 118 FERC ¶ 61,119, at P 602, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)).

comport with the policy that "[a]ll practices that 'significantly affect rates, terms and conditions of service' must be included in the tariff, as opposed to manual or other documents not filed with the Commission."[15]

b. Answers

18. Joint Answering Parties argue that the proposed revisions do not lead to an unjust and unreasonable result, but rather provide more context and transparency to existing language. Joint Answering Parties and PJM respond that the new language in section 1.5.8(e) merely memorializes the evaluation of voluntarily-submitted cost commitments included in project proposals that PJM has already been doing under the existing, Commission-accepted language.[16] Joint Answering Parties argue that PJM has been making a comparative analysis of the risks borne by ratepayers under each proposal and that the proposed revisions here provide developers with *more* information and context regarding PJM's analysis than in the existing language.[17]

19. Joint Answering Parties state that "binding" is a generally understood word, meaning "imposing an obligation" and "to obligate." Thus, Joint Answering Parties assert, rather than adding vagueness, inclusion of the word "binding" clarifies that the cost commitments are "binding" commitments. Joint Answering Parties argue that the remaining proposed language in section 1.5.8(c)(2) makes clear that the language only applies to cost containment proposals that an entity voluntarily submits and requires the submitting entity to clearly explain to PJM what cost containment obligations the entity is accepting as part of its proposal.[18]

20. In response to PSEG's assertion that PJM would be required to make assumptions regarding debt rates and capital structure for comparison with proposals by companies that do not make such proposals, Joint Answering Parties answer that that is true under the existing tariff language. They note that PJM is currently receiving proposals with binding cost commitments, including proposals that place limitations on ROE and capital structure, and in order for PJM to make a determination of the more efficient or

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[15] *Id.* at 4-5 (citing *Transource, LLC v. PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,119, at PP 78-84 (2019) (additional citation omitted)).

[16] PJM states that under the existing Operating Agreement, transmission project sponsors can voluntarily submit cost commitment proposals during PJM's competitive proposal window process and PJM considers the "cost-effectiveness" of project proposals. PJM Answer at 2; Joint Answering Parties Answer at 6-7.

[17] Joint Answering Parties Answer at 4, 6-9.

[18] *Id.* at 4-5.

cost-effective transmission solution, it must make a determination of the value of the cost commitments when comparing to a proposal that does not have cost commitments. Joint Answering Parties state that the new language simply requires that PJM make a comparative analysis and provide that analysis in a manner that is transparent.[19]

21. PJM states that the call for detail beyond what is included in the proposal and what is being finalized in the PJM manual is unnecessary because PJM needs flexibility to analyze diverse project proposals and cost commitments submitted in its proposal window process and to refine its processes without seeking further tariff revisions. Further, PJM states that the proposal provides the level of detail in its Operating Agreement similar to that of the other criteria PJM considers when reviewing project proposals.[20]

22. PSEG answers that, on December 12, 2019, PJM posted draft manual language stating that the Market Monitor may, at its discretion, perform an independent financial analysis of projects submitted to PJM through PJM's competitive proposal window process. PSEG states that, although this proposal is pending stakeholder endorsement, it is unknown as to whether PJM or the Market Monitor will have the principal role in analyzing cost commitment provisions of open window proposals or, if there is disagreement between PJM and the Market Monitor, how such disagreements would be resolved. Further, PSEG states that some proposals will be evaluated by both PJM and the Market Monitor, while others will only be reviewed once, based on unspecified criteria, which may be unduly discriminatory.[21]

c. Deficiency Letter Response and Responsive Pleadings

23. In response to the Deficiency Letter question asking for a more detailed explanation of the comparative review and analysis that PJM proposes to conduct to evaluate cost containment proposals, PJM states that, if the Commission approves the proposed Operating Agreement revisions, a more detailed explanation of the comparative

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

[20] PJM Answer at 4-5.

[21] PSEG Second Answer at 2-3 (citing MRC, Request for Endorsement of a new M14F, § 8.4, https://www.pjm.com/- /media/committees-groups/committees/mrc/20191219/20191219-item-03-3-m14f-revisions-redline.ashx).

review and analysis process would be included in Manual 14F, section 8.4. PJM notes that the MRC recently endorsed such language on December 19, 2019.[22]

24. In response to the questions asking whether there are minimum characteristics for the proposal to be binding and what type of information a developer would need to submit for PJM to determine the proposal's binding nature, PJM clarifies that a developer submitting a cost commitment provision would define what "binding" means for purposes of its particular proposal. Thus, PJM states, in addition to describing what elements would be capped (*i.e.*, construction costs, total return on equity, and/or capital structure) and any exceptions, contingencies, and conditions to the caps, the developer could choose to limit its right to seek changes in rates under certain specified circumstances. For instance, the developer could include a limit on its rights to modify the cost commitment in the future and/or a limit on its section 205 rights to recover costs (and include any exclusions to the limit).[23] Thus, in response to the question of whether a developer would be able to exceed its construction cost cap as long as it could show its costs were prudently incurred and necessary to advance the project, PJM states that it would depend on the nature of the commitment, any exceptions, contingencies, or conditions, as well as the proffered standard for review of any changes to any commitments.[24]

25. PJM states that it would evaluate competing proposals by considering the elements being capped, exceptions, contingencies, or conditions, and limits (and exclusions to the limit) on the developer to seek future changes to the rate. PJM acknowledges that it could be faced with having to assess competing carve-outs and varying levels of commitments due to the flexibility provided to developers under the proposal, but it believes that it can implement the proposal and deliver the associated consumer benefits. PJM contends that by conducting its comparative analysis, it would select the more efficient or cost-effective transmission proposal.[25]

26. PJM explains that if there is a cost commitment as part of the selected solution, it would then memorialize the commitment as a non-conforming term in the Designated Entity Agreement (DEA) between PJM and the selected developer, and the Commission would determine whether it is just and reasonable. The non-conforming DEA would include any standard of review that the developer included in its cost commitment

[22] PJM attaches a draft Manual 14F, § 8.4 as Exhibit 1 to its Deficiency Letter Response.

[23] PJM Deficiency Letter Response at 6-7, 10, 12.

[24] *Id.* at 12.

[25] *Id.* at 2, 8-10.

(*e.g.*, an enhanced section 205 prudency review that would limit changes only to increases that were not reasonably foreseeable at the time the commitment was made or that are a result of force majeure).[26] PJM states that its role is to provide information regarding project status updates, including whether the developer may exceed a cost commitment or an exclusion may be triggered, but that enforcement of a developer's binding cost commitment would come through the regulatory process by way of the filing of a complaint or examination of cost overruns through the formula rate process. In the case of a proposed modification to a proffered cost commitment, PJM states that a revised non-conforming DEA would be filed for the Commission to determine whether it is just and reasonable.[27]

27. Protestors argue that PJM's Deficiency Letter Response continues to provide insufficient detail about how PJM would conduct the comparative analysis and how the proposal would be implemented.[28] Indicated TOs Group 2 submit that the proposal cannot be implemented in a transparent manner that permits meaningful comparison of proposals, and thus it is unjust and unreasonable and inherently discriminatory. They argue that PJM has not adequately justified or explained the lack of minimum characteristics for a cost commitment to be binding and for exceptions, contingencies, and conditions.[29] Indicated TOs Group 2 emphasize that the filing imposes no constraints on the forms of voluntary cost commitments that would be considered, thereby rendering comparisons that much more difficult. Indicated TOs Group 2 and PPL/Dayton note that PJM itself recognizes that it may not be equipped to evaluate and assess competing carve-outs and contingencies and that the proposal fails to provide a framework for PJM to make these type of decisions.[30]

28. Indicated TOs Group 2 contend that the methodology should not rely on factors that require PJM to predict what rate decisions the Commission will make in the future to

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[26] PJM states that a developer could possibly propose that any modifications to its proffered cost commitment would be subject to the *Mobile-Sierra* public interest standard of review but acknowledges that the proposed Operating Agreement revisions "appear to foreclose a *Mobile-Sierra*-level commitment." *Id.* at 10 n.24.

[27] *Id.* at 5-6, 12.

[28] *See* Indicated TOs Group 2 Deficiency Letter Response Protest at 5-12; PPL/Dayton Deficiency Letter Response Protest at 6-9; PSEG Deficiency Letter Response Protest at 3.

[29] Indicated TOs Group 2 Deficiency Letter Response Protest at 5, 7-8.

[30] PPL/Dayton Deficiency Letter Response Protest at 7-8; Indicated TOs Group 2 Deficiency Letter Response Protest at 7.

value such commitments. They also argue that PJM should not be required to make heroic assumptions about other future conditions, *e.g.*, factoring an abandonment incentive into the comparative analysis would require the assessment of the probability that a project would run into future obstacles, as well as an assessment of how much cost would have been incurred up to the time of abandonment.[31]

29. Indicated TOs Group 2 note that PJM submitted with its Deficiency Letter Response language to be included in Manual 14F. They argue that certain requirements included in Manual 14F are inappropriate for inclusion in a manual and should appropriately be included in the Tariff, consistent with Commission precedent, pointing to section 8.4.5, which requires PJM to evaluate "any exceptions, exclusions or limitations to the elected level of cost commitment." Indicated TOs Group 2 argue that this language is inconsistent with the Operating Agreement, which as PJM notes "is silent" on this issue.[32]

30. PSEG claims the process for making comparisons in section 8.4.4 of Manual 14F describes a procedure for rendering all of the cost elements of a proposal into the net present value of the annual revenue requirements over the life of each project proposal, but the formula used to determine net present value lacks a determinant to express the risk that contingencies or exceptions to a binding cost commitment provision may be triggered and also provides no verbal explanation of how any risks will be recognized.[33]

31. Exelon/Dominion state that, while they take no position on the proposed revisions, PJM should implement the proposal consistent with its Deficiency Letter Response such that PJM must evaluate the implications of any exclusions from a cost commitment, as well as the standard for revisiting the commitment, when assessing the relative cost-effectiveness of a proposal. Exelon/Dominion support PJM's holistic approach, stating that it is appropriate to consider cost-effectiveness as one of several factors for evaluation.[34]

d. <u>Commission Determination</u>

32. We disagree with claims that the Filing lacks sufficient specificity. PJM's proposed revisions state that PJM will determine the comparative risks to ratepayers of competing proposals resulting from a proposal's binding cost commitment or the use of

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[31] Indicated TOs Group 2 Deficiency Letter Response Protest at 9, 11-12.

[32] *Id.* at 6 & n.5 (citing PJM Deficiency Letter Response at 8).

[33] PSEG Deficiency Letter Response Protest at 3-4.

[34] Exelon/Dominion Deficiency Letter Response Comments at 3-6.

non-binding cost estimates, detail the method it used to compare proposals, and provide this comparative analysis to the TEAC for its review and comment. We agree with PJM and Joint Answering Parties that the Filing adds to the Operating Agreement a comparative risk analysis that adds transparency to the Operating Agreement.

33. PJM explains that it will include the implementation details for the comparative analysis in Manual 14F, which it is currently developing. In response to arguments that certain of these details are inappropriate for inclusion in a manual rather than the tariff, we find such arguments to be premature. We also find arguments about specific sections of the draft Manual 14F and the potential role of the Market Monitor in the draft Manual 14F to be beyond the scope of this proceeding, which is limited to reviewing the proposed revisions to the Operating Agreement.

34. We likewise find no merit in arguments that the Filing fails to comply with Order No. 890's requirement that the transmission planning attachment to a transmission provider's tariff include sufficient detail to understand the transmission provider's planning process, including a written description of the methodology, criteria, and processes used to develop transmission plans.[35] Schedule 6 of the Operating Agreement, as a whole, complies with this requirement, and the proposed revisions provide sufficient description of the comparative analysis that PJM proposes to undertake.

35. Finally, we are unpersuaded by arguments that a lack of minimum characteristics defining "binding" or the type of the cost commitments that may be submitted, the absence of parameters for how PJM will assess any carve-outs, and the subjective and predictive analysis by PJM will render the proposal unjust and unreasonable and unduly discriminatory. The proposed revisions provide reasonable flexibility both for developers to decide how to craft their voluntary cost commitment proposals and for PJM to evaluate and select the more efficient or cost-effective transmission solution. Moreover, the proposal provides for transparency, allowing stakeholders the opportunity to review any particular analysis conducted by PJM and raise any concerns via the TEAC process.

2. Section 205 Filing Rights

a. Protests

36. Indicated TOs Group 1 and AEP argue that PJM's proposal would infringe on the rights of PJM transmission owners and nonincumbent transmission developers to exclusively make section 205 filings concerning transmission rates, revenue requirements, and cost recovery.[36] Indicated TOs Group 1 and AEP argue that the

[35] Order No. 890, 118 FERC ¶ 61,119 at P 602.

[36] AEP Protest at 2-4; Indicated TOs Group 1 Protest at 6-11 (stating that transmission owners in PJM have the exclusive and unilateral section 205 rights to file

Commission must not restrict in any way the right of a transmission owner or a nonincumbent developer to submit to the Commission a section 205 filing to recover its investment, plus a reasonable return, and to recover other legitimate costs. While they note that PJM transmission owners' exclusive filing rights do not preclude PJM from considering cost estimates and cost commitments in selecting the more efficient or cost-effective transmission solution, Indicated TOs Group 1 and AEP assert that PJM cannot directly or indirectly dictate what a transmission owner can include in its section 205 rate filings to recover the costs of a selected project, including any requirement to include a binding cost commitment. They also argue that their exclusive filing rights include the right to make or decline to make such a binding cost commitment in response to a transmission need, and PJM cannot require or disadvantage a proposal on the basis of a binding cost commitment.[37]

37. Indicated TOs Group 1 and AEP contend that if the Commission does not reject PJM's proposal, it should accept the filing only if the Commission clarifies that if PJM selects a developer's proposed project, that entity is free to submit the section 205 rate filing designed to recover the costs of the project, regardless of whether the developer has proposed a cost commitment.[38] Indicated TOs Group 1 request further clarification that PJM will treat a material revision to a cost commitment proposal as grounds for reconsidering its selection of the project, consistent with how PJM currently treats changes to scope of work and cost estimates.[39]

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for any changes in or relating to the establishment and recovery of their respective transmission revenue requirements and the recovery of their transmission-related costs) (citing PJM Open Access Transmission Tariff, § 9.1(a); PJM Consolidated Transmission Owner Agreement, § 7.3.1; *Atl. City Elec. Co.* v. *FERC (Atlantic City)*, 295 F.3d 1 (D.C. Cir. 2002); *Pa.-N.J.-Md. Interconnection*, 105 FERC ¶ 61,294, at P 11 (2003)).

[37] *Id.*

[38] Indicated TOs Group 1 and AEP argue that PJM should not assert its consideration of cost-effectiveness to challenge a developer's filing at the Commission to recover its investment in the project and related costs. Indicated TOs Group 1 Protest at 9; AEP Protest at 3-4.

[39] Indicated TOs Group 1 state that PJM currently reconsiders its selection of a project in the RTEP if the scope of the project, including its estimated cost, changes significantly by re-posting on the PJM website the unresolved violations or system conditions underlying the project, pursuant to Schedule 6, section 1.5.8(b) of the Operating Agreement, provided that such reevaluation and re-posting would not affect the ability of PJM to timely address the identified reliability need. Indicated TOs Group 1 Protest at 10.

b. Answers

38. PJM answers that under its proposed revisions, the project sponsor has the exclusive voluntary right to choose whether or not to submit a level of cost commitment and there is no language categorically disqualifying a proposal from consideration in the absence of a cost commitment. PJM contends that it is not possible to square a voluntary decision by a project proposer to exercise its right to submit a cost commitment with the claim that such a voluntary decision amounts to an infringement of reserved and exclusive rights over matters of transmission rates and rate design. PJM also states that nothing in the existing Operating Agreement language, the Filing, or the stakeholder proposal suggest that PJM is now, or intends to in the future, mandate the submission of cost commitments.[40]

39. Joint Answering Parties disagree with protestors' reliance on *Atlantic City* to support their argument, arguing that the case addressed the specific issue of the contribution of existing transmission assets to PJM's operational control. Joint Answering Parties assert that the case's findings that the Commission did not have authority to require utilities to give up their section 205 rights or to deny utilities' ability to initiate rate design changes with respect to services provided with their own assets are irrelevant to the Operating Agreement revisions proposed here because the projects at issue do not involve transmission owners' existing assets, nor assets to which they have any claim.[41]

40. Joint Answering Parties argue that there is no requirement that any transmission owner or developer participate in a PJM open window; those who participate undertake a voluntary act, consistent with the findings in *Atlantic City* that utilities may choose to voluntarily give up, by contract, some of their rate-filing rights under section 205. As such, Joint Answering Parties claim, *Atlantic City* poses no bar for PJM evaluating cost containment proposals and holding the selected developer to the terms of its proposal through the PJM Designated Entity Agreement. Joint Answering Parties state that if PJM selects an entity to build the project, the entity is not "free" to file for any rate it chooses if it has voluntarily submitted a cost containment proposal.

41. Exelon/Dominion state that while they take no position on the proposed revisions, they believe that the proposal does not infringe on the PJM transmission owners' rights under section 205 of the FPA.[42]

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[40] PJM Answer at 3-4.

[41] Joint Answering Parties Answer at 13.

[42] Exelon/Dominion Deficiency Letter Response Comments at 6-7.

42. The Market Monitor states that the Commission should clarify that a cost commitment included in a project proposal is a binding contractual commitment upon acceptance and that it would be unjust and unreasonable, and unduly discriminatory, to permit a participant with a project selected on the basis of a cost commitment and an assumption of risk to subsequently attempt to include a higher level of costs in rates.[43] PPL argues that the Commission cannot provide the confirmation that the Market Monitor seeks, however, because a cost commitment would be incorporated into the DEA, which is a construction designation agreement between PJM and the Designated Entity and not a transmission service agreement setting forth the terms and conditions of transmission service. Thus, PPL asserts that the Commission lacks the authority to enforce a cost containment commitment in a contract between PJM and the Designated Entity.[44] The Market Monitor responds that the DEA can include a provision for cost containment that includes a voluntary agreement to not exceed a defined revenue level and that it is not necessary to determine that PJM is a transmission customer or is acting on behalf of transmission customers for the Commission to recognize the existence of a binding revenue limit that applies to the transmission developer.[45]

c. Commission Determination

43. We disagree with arguments that the Filing would infringe on the rights of PJM transmission owners and nonincumbent transmission developers to exclusively make FPA section 205 filings concerning transmission rates, revenue requirements, and cost recovery. Under the proposed language, PJM cannot require that a transmission developer submit a binding cost containment provision as part of its proposal, but, rather, the developer may voluntarily determine whether to include such a provision in its proposal and even further may determine the binding characteristics of its proposal. Thus, we disagree that the Filing infringes on transmission owners' FPA section 205 filing rights. Accordingly, we decline to find the proposal unjust and unreasonable for failing to provide the clarifications requested by protestors.

44. We also do not find the tariff unjust and unreasonable for failing to include the Market Monitor's requested clarification concerning how binding the commitment would be. The Filing requires a developer proposing a binding cost commitment to provide sufficient information regarding the binding nature of the proposal, which could include specifying any limits on the scope of review applicable to a filing seeking future changes in rates and any exclusions thereof. If the developer makes a voluntary commitment to limit its ability to propose revisions, we do not see a conflict with *Atlantic City*. To the

[43] Market Monitor Deficiency Letter Response Answer at 3-4.

[44] PPL Deficiency Letter Response Answer at 3-7.

[45] Market Monitor Deficiency Letter Response Answer at 4.

extent that a developer does not provide any limits on its ability to propose revisions, we do not share the Market Monitor's concern that PJM's selection of this project based on the cost commitment necessarily is unjust and unreasonable. PJM has stated that it will consider the level of how binding a cost commitment is in its comparative risk analysis and ultimate selection of the more efficient or cost-effective transmission solution.

45. Lastly, the existence of a cost commitment in a contract between PJM and the Designated Entity (*e.g.*, the DEA) would not preclude the Commission from considering such commitment when evaluating the justness and reasonableness of the Designated Entity's section 205 rate filing.

3. Ratemaking Elements/Filed Rate Doctrine

a. Protests

46. PSEG argues that in reviewing rates under section 205, the Commission rejects a filing only if it finds that it is not just and reasonable, but it does not determine whether a proposed rate schedule is more or less reasonable than alternative rate designs.[46] PSEG argues that, by undertaking a comparative analysis and making determinations based on ROE and capital structure, PJM will be stepping into the Commission's shoes by selecting projects based on its perception of the most just and reasonable rate. PSEG argues that, as a practical matter, after being filed by PJM, the elements of the Designated Entity Agreement will be endowed with the presumption that they are just and reasonable; thus, a party challenging these elements must demonstrate that they are not just and reasonable, not merely that an alternative proposal is superior. PSEG asserts that the Commission will only be presented with the proposal recommended by PJM through the flawed evaluation process, effectively usurping the role of the regulator. It argues that while the Commission can rely on regional transmission organization (RTO) planning processes to evaluate proposals, the vague nature of how this particular process will work, along with the type of analysis that PJM intends to undertake, will result in the improper delegation of authority to PJM that resides solely within the purview of the Commission.[47]

47. PSEG further argues that PJM will make these determinations for the 40 to 60 year future period over which the costs of the transmission project will be collected, thus infringing upon matters vested solely to the Commission under the filed rate doctrine. PSEG contends that PJM would be effectively "approving a rate" because a proposal it

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[46] PSEG Protest at 7.

[47] *Id.* at 7-9.

selects that includes specified rate design elements will be considered to be a presumptively just and reasonable rate when filed at the Commission.[48]

48. PSEG argues that the filed rate doctrine would preclude adoption of the PJM proposal even if PJM is deemed only to be determining rates "hypothetically" for the purpose of valuing the competing proposals.[49] PSEG states that the principles of *Keogh* apply here, whereby in *Keogh*, the hypothetical rate would have been set by the reviewing court to calculate damages and here, hypothetical rates would need to be set by PJM to calculate benefits. Finally, PSEG asserts that the decision to apply the filed rate doctrine in appropriate circumstances is not discretionary, arguing that because the proposed revisions will interfere with the Commission's ability to evaluate and set rates when PJM has already evaluated the relevant cost commitment proposals in the project selection process, the filed rate doctrine completely bars the cost commitment proposal from being adopted.[50]

b. Answers

49. PJM answers that any exercise of its already-existing, Commission-approved authority to consider a voluntarily submitted cost commitment among a variety of other criteria is separate and apart from the determinations this Commission would make in a section 205 rate proceeding.[51]

50. Joint Answering Parties disagree with PSEG's argument that PJM will engage in a ratemaking function under its proposal. Joint Answering Parties argue that the proposed revisions do not require PJM to determine that a rate flowing from its selection is just and

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[48] PSEG Answer at 3-4 (citing *Ark. La. Gas Co. v. Hall (Arkla)*, 453 U.S. 571, 581-82 (1981)) (stating that under this seminal case for defining the filed rate doctrine, the Supreme Court found that the Commission alone is empowered to make the judgement whether an alternative rate is reasonable, and until it has done so, no rate other than the one on file may be charged).

[49] *Id.* at 4-5 (citing *Keogh v. Chi. & Nw. Ry. Co. (Keogh)*, 260 U.S. 156, 163-64 (1922); *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 930 (9th Cir. 2002) (*TANC v. Sierra*); *Arsberry v. Ill.*, 244 F.3d 558, 562 (7th Cir. 2001)) (stating that *Keogh* holds that a decisional authority other than the agency charged by statute with setting rates may not determine a hypothetical rate for the purpose of calculating damages).

[50] *Id.* at 5 (citing *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 489 (8th Cir. 1992)) (additional citations omitted).

[51] PJM Answer at 3.

reasonable. Joint Answering Parties contend the proposed analysis simply reflects what PJM has been doing in comparing different proposals. They assert that PJM currently receives proposals with cost estimates for various aspects of the proposal and that PJM makes a determination as to the reasonableness of the various estimates, and no entities have argued that PJM makes rate determinations in evaluating these uncapped cost estimates.

51. Joint Answering Parties contend that the filed rate doctrine provides no basis for rejection of the Filing and, in particular, point to PSEG's reliance on *Arkla*. Joint Answering Parties argue that, under *Arkla*, until the Commission has found an alternative rate just and reasonable, no rate other than the one on file may be charged. Here, Joint Answering Parties assert, there is no rate "on file," no rate being charged, and no determination by PJM of the rate to be charged.[52]

52. In response to PSEG's argument that PJM will effectively be approving a rate because a proposal selected by PJM will presumptively be considered "just and reasonable," Joint Answering Parties claim this argument assumes that the Commission will not do its statutory duty in reviewing a rate filing. Joint Answering Parties state that in multiple rate proceedings at the Commission related to competitively selected projects, many with binding cost commitments, the Commission has not applied such a presumption, but rather has made a finding on whether each aspect of the rate is just and reasonable.[53] Joint Answering Parties also argue that PSEG's reliance on *Keogh* is misplaced because PJM is not making a determination of a rate for purposes of paying anything, as no party can rely on PJM's determination to collect money, as the only mechanism to collect rates from a ratepayer remains solely with the Commission.[54]

53. PSEG answers that while it is true that the Commission will review the rate submittal made by PJM, the Commission will also not review any of the other proposals made to PJM during the open window process that were not selected. Thus, PSEG argues, a company whose proposal was rejected by PJM, in order to have its proposal move forward, would have to meet the burden imposed under section 206 of showing that the proposal PJM selected and submitted to the Commission is not just and reasonable. PSEG argues that, under the proposal, PJM shares rate-making authority with the Commission by determining which proposal gets presented to the Commission. PSEG contends that PJM crosses the line when it evaluates rate design elements, such as capital

[52] Joint Answering Parties Answer at 18.

[53] *Id.* at 18-19.

[54] *Id.* at 19-20.

structure or return on equity, in making a selection.[55] PSEG clarifies that it is the fact that PJM will need to quantify the value of a binding cost commitment, including making determinations as to the likelihood that an exception might be triggered and, if triggered, the level of the adjusted rate, that effectively places PJM in the role of determining expected future rates, *i.e.*, "hypothetical" rates, for the life of the project.[56] PSEG asserts that the proposed manual revisions to incorporate a formal role for the Market Monitor would compound this error by permitting the Market Monitor to also engage in determining hypothetical rates, in violation of *Keogh*.[57]

54. Indicated TOs Group 2 submit that cost commitment in competitive bids should exclude ratemaking elements and be limited to items that can be monitored and enforced, such as initial project capital costs. They point to the cost containment provisions in the New York Independent System Operator, Inc. (NYISO) tariff, which clearly establish parameters for defining capital costs that may be included in a cost commitment proposal, as well as excusing conditions. They argue that, without such definition, developers are free to inventively craft and define excusing conditions, making it impossible for PJM to compare proposals, with the potential for endless disputes and litigation. They argue that there is significant administrative burden associated with evaluating cost factors other than project capital cost, as many of these costs are the subject of extensive rate proceedings before the Commission and could introduce uncertainty and months of delay. They argue that cost commitment evaluations must exclude future ratemaking components, such as ROE and incentives, in order to respect the jurisdictional authority of the Commission and the appropriate role of RTOs. Indicated TOs Group 2 state that an RTO like PJM does not have regulatory authority or expertise in transmission rate design or cost commitment, nor enforcement authority over transmission costs or rates.[58]

c. Commission Determination

55. We disagree with the premise that PJM will be determining whether the included rate design elements under the proposal will result in just and reasonable rates. Rather, consistent with its existing tariff, PJM's evaluation will be to determine the more efficient or cost-effective transmission solution, among the competing proposals, to an identified transmission need. PJM's determination will be based on several criteria, including a proposal's cost-effectiveness, which considers the quality and effectiveness as well as the binding nature of the proffered cost commitments, and not on whether the resulting rate is

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[55] PSEG Second Answer at 3-4.

[56] *See* PSEG Deficiency Letter Response Answer at 3-6.

[57] PSEG Second Answer at 4-5.

[58] Indicated TOs Group 2 Deficiency Letter Response Protest at 12-14.

just and reasonable.[59] PJM's proposed Operating Agreement revisions and Deficiency Letter Response make clear that PJM is proposing for the Commission to determine, in reviewing the nonconforming DEA with the cost commitment provision, whether any rate design component included in that provision is just and reasonable.[60] Regardless of whether the developer files cost-of-service or formula rates, parties also will be able to challenge the cost inputs to the rates and whether they are prudently incurred. While it is true, as PSEG states, that the rates the Commission reviews are dependent on the project selected by PJM, we disagree that this fact confers a ratemaking role to PJM. Instead, it is consistent with PJM's role under its existing tariff in that PJM selects the more efficient or cost-effective transmission proposal, and the Commission reviews any resulting rates.

56. For these reasons, we also dismiss arguments that PJM is effectively "approving a rate" because a selected proposal's rate design elements would be presumptively just and reasonable when filed at the Commission, thus violating the filed rate doctrine. Nothing in PJM's proposal suggests that any other entity except the Commission will be determining rates. We recognize that, as part of its analysis, PJM will have to evaluate the quality and effectiveness of each cost commitment proposal. But such an evaluation is merely part of PJM's role as an independent entity evaluating whether projects are more efficient or cost-effective, not the equivalent of PJM setting the just and reasonable rate. Protestors' reliance on *Arkla*, *Keogh*, and other related cases is similarly misplaced as these cases address the application of the filed rate doctrine in the context of whether state law may be used to invalidate a filed rate or whether a state court could assume that a hypothetical rate would be charged other than the rate actually set by a federal agency for purposes of calculating damages.[61]

57. Finally, we are not convinced by arguments that we should reject the filing because cost commitment language that excludes rate elements and relies solely on initial project construction caps is superior to the proposal here. A party filing a proposal pursuant to FPA section 205 need not demonstrate that its proposal is the best option, but only that it is just and reasonable. [62] Even assuming that cost commitments based on rate

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[59] PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA Schedule 6, § 1.5.8(e).

[60] *See* PJM Deficiency Letter Response at 5-6. Proposed §1.5.8(e) states that "[i]n evaluating any cost, ROE and/or capital structure proposal, PJM is not making a determination that the cost, ROE or capital structure results in just and reasonable rates, which shall be addressed in the required rate filing with the FERC."

[61] *See Arkla*, 453 U.S. at 573, 578-89; *Keogh*, 260 U.S. at 163-64; *TANC v. Sierra*, 295 F.3d at 929; *Arsberry v. Ill.*, 244 F.3d at 562.

[62] *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) ("FERC

elements, such as ROE, provide somewhat less upfront certainty than cost commitments limited to caps on initial project capital costs, such a factor would not render the proposal unjust and unreasonable, as PJM must evaluate the binding nature of the specific cost commitment to determine whether and how much weight to accord the commitment.

4. PJM Board Review

a. Protests

58. PPL/Dayton state that the proposed revisions, which were developed by a PJM member, were not submitted to the Board for its review and comment as required by section 18.6 of the Operating Agreement and, as a consequence, the Members Committee did not consider the views of the Board before voting to amend the Operating Agreement.[63] PPL/Dayton assert that PJM members will not always have the expertise required to weigh the potential consequences of significant proposals and the Board is designed to advise PJM membership.[64]

59. PPL/Dayton state that they raised this point of order prior to the proposal being approved at a meeting of the Members Committee on June 21, 2018, but the Chair of the Members Committee ruled that the vote could go forward based on the advice of PJM legal counsel. PPL/Dayton argues that none of the rationales provided by PJM legal counsel have any validity, including that section 18.6 pertains to PJM governance and that there is a long history of voting on non-governance matters without invoking section 18.6. PPL/Dayton argue that PJM's past violation of this provision does not

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is not required to choose the best solution, only a reasonable one"); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) ("FERC has interpreted its authority to review rates under the FPA as limited to an inquiry into whether the rates proposed by a utility are reasonable – and not to extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs."); *Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,282, at P 31 (2009) (finding that, because the Commission found the independent system operator's proposal to be just and reasonable, the Commission need not assess the justness and reasonableness of an alternative proposal).

[63] PPL/Dayton argue that §18.6 explicitly requires that before the Operating Agreement, including its Schedules, may be amended, the proposed amendment must be submitted to the PJM Board for its review and comment and that the Members Committee must consider the comments of the Board before voting to approve the amendment. PPL/Dayton Protest at 4.

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

excuse its violation here, noting that the Operating Agreement is a filed rate schedule that cannot be ignored.[65]

60. PPL/Dayton also disagree with the rationale provided by PJM legal counsel that three members of the Board were present at the Members Committee meeting, arguing that with only two voting members in attendance, no quorum of the Board was present and any views presented could not constitute the views of the Board. As for the last rationale offered by PJM legal counsel that Section 18.6 should be read in accordance with sections 15.5 and 15.6 of PJM Manual 34, which provide for communication with the Board through the posting of stakeholder materials, PPL/Dayton contend that these sections call for certain material to be provided to the Board and call for Board members to attend the PJM annual meeting and "endeavor" to attend one stakeholder meeting annually. PPL/Dayton argue that Board review of the proposed revisions required a meeting with a quorum present and approval of its comments by majority vote before it was voted on by the Members Committee. They contend that this could not have even occurred because the proposed revisions were changed by a friendly amendment at the same meeting at which it was adopted.[66]

b. Answers

61. PJM answers that the proposal was shared with the Board for its review and comment through, among other things, public posting of the various iterations of the stakeholder materials on the PJM website. PJM notes that three Board members were in attendance before the Members Committee approved the stakeholder proposal, with one Board member providing comments at the meeting prior to a vote. PJM states that PJM legal counsel apprised the Members Committee of these reasons, including noting that the Board had engaged on the topic of cost containment generally, and the Members Committee voted to support the determination that Operating Agreement, section 18.6(a) had been complied with under these facts. Further, PJM argues that the Board's opportunity to offer review and comment should not be equated with a requirement that proposed amendments receive Board approval in advance of filing. Rather, given that the intent of section 18.6(a) is to keep the Board apprised and engaged in matters of concern to stakeholders, PJM argues that the Board has discretion and flexibility on how to review and comment, if at all.[67]

62. In their answer, PPL/Dayton dispute that posting the proposal on the PJM website qualifies as a submission to the Board because submission under section 18.6 requires

[65] *Id.* at 3, 6-7.

[66] *Id.* at 7-10.

[67] PJM Answer at 5-8.

that the Board be specifically made aware of the proposed change and given an opportunity to provide comments. PPL/Dayton contend that even if three Board Members were "apprised and engaged" in the cost commitment issue, it does not absolve PJM from meeting the stated requirements of the Operating Agreement. PPL/Dayton also argue that the findings from PJM legal counsel and subsequent vote of the Members Committee do not absolve the requirements of section 18.6, as the provision ensures that the Members Committee receives the guidance of the independent Board before moving forward with a change to the Operating Agreement.[68]

63. LS Power answers that the Members Committee complied with section 18.6(a) of the Operating Agreement. In particular, LS Power points out that on May 22, 2018, certain PJM Transmission Owners sent a letter to the Board noting concerns about cost containment proposals being considered in the MRC and specifically referenced the proposal from LS Power. LS Power states that consistent with its discretion under the Operating Agreement, the Board chose not to send any comments to the Members Committee after the May 22, 2018 letter and before the June 21, 2018 Members Committee meeting. LS Power asserts that its proposed Operating Agreement changes were approved on May 24, 2018 by the MRC and the only revision before approval by the Members Committee on June 21, 2018 was an additional sentence added by a friendly amendment, which was not objected to by any PJM member.[69]

64. In the alternative, LS Power submits a request for waiver of section 18.6(a), arguing first that the Members Committee acted in good faith in approving the cost containment proposal because it thoroughly discussed the process concerns and determined, with input from PJM legal counsel, that it could move forward consistent with section 18.6. Second, LS Power argues that the requested waiver is narrow in scope because it is a one-time waiver of a discrete section of the Operating Agreement. Third, LS Power contends that the requested waiver remedies a concrete problem because if the Commission concludes that a more formal process is required, it is questionable whether PJM will be able to implement the cost containment proposal before the first competitive transmission proposal window in 2020. Finally, LS Power states that granting the waiver will not result in any adverse consequences, such as harming third parties because the only parties opposed to the proposal are a subset of those who sent a letter to the Board, which the Board could have raised if it shared those concerns.[70]

65. PPL/Dayton answer that LS Power mischaracterizes the Members Committee meeting approving the cost containment proposal, noting, for instance, that the minutes of

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[68] PPL/Dayton Answer at 2-6.

[69] LS Power Answer at 4-9.

[70] *Id.* at 10-12.

the Members Committee meeting report that the Board had not discussed the specific cost containment provisions being considered by the Members Committee.[71] Moreover, PPL/Dayton argue that LS Power has no right to request a waiver of any provision governing how the Operating Agreement or its Schedules are amended, stating that the Operating Agreement does not give an individual PJM member a right to file for a waiver of any provision or to make any other filing on behalf of PJM or the Members Committee. PPL/Dayton assert that even if the waiver request is properly before the Commission, it fails to meet the four criteria for granting waivers of existing tariff provisions.[72]

c. Deficiency Letter Response and Responsive Pleadings

66. In response to the Deficiency Letter question asking whether PJM's method of sharing revisions with the Board in this instance deviated from standard practice in submitting proposed amendments to the Board for review and comment, PJM states that public posting on the PJM website is one of the means by which PJM shares proposed Operating Agreement revisions with the Board.[73] PJM states that Operating Agreement, section 18.6(a) does not require that the Board aggregate and submit comments to the Members Committee whenever proposed Operating Agreement revisions are being considered. PJM states that the Board was briefed from time to time by PJM management on the cost commitment issue generally and related stakeholder activities, and that it is within the discretion of Board members, individually or in concert, to offer comments to the Members Committee.

67. In their protest, PPL/Dayton argue that PJM does not answer the Commission's question because PJM does not have a standard practice. They note that, in any case, a standard practice would also need to comply with the terms of the Operating Agreement.[74]

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[71] PPL/Dayton Second Answer at 2-5.

[72] *Id.* at 5-9.

[73] PJM states that, in addition to posting, in the case of important stakeholder initiatives and strategic decisions, PJM management reviews such matters with the Board and seeks its input and that stakeholders may elect to raise issues by letter or at the Liaison Committee meeting. PJM Deficiency Letter Response at 14 & n.28.

[74] PPL/Dayton Deficiency Letter Response Protest at 3-7 & n.16.

d. Commission Determination

68. Operating Agreement, section 18.6(a) states that the Operating Agreement "may be amended, or a new Schedule may be created, only upon: (i) submission of the proposed amendment to the PJM Board for its review and comments; (ii) approval of the amendment or new Schedule by the Members Committee, after consideration of the comments of the PJM Board, in accordance with Operating Agreement, section 8.4, or written agreement to an amendment of all Members not in default at the time the amendment is agreed upon; and (iii) approval and/or acceptance for filing of the amendment by FERC and any other regulatory body with jurisdiction thereof as may be required by law."[75]

69. Protestors argue that posting stakeholder materials on PJM's web site did not provide the required submission under section 18.6(a) because it requires that the Board be specifically made aware of the proposed revisions and given an opportunity to provide comments. Protestors also argue that Board review of the proposed revisions required a meeting with a quorum present and approval of its comments by majority vote before it is voted on by the Members Committee.

70. We disagree with protestors' interpretation of the requirements under section 18.6(a). To support their argument on requiring a quorum, protestors rely on section 7.4 of the Operating Agreement, which states that:

> The presence in person or by telephone or other authorized electronic means of a majority of the voting Board Members shall constitute a quorum *at all meetings of the PJM Board* for the transaction of business except as otherwise provided by statute….Provided a quorum is present at a meeting, the PJM Board shall act by majority vote of the Board Members present.[76]

Reliance on this provision appears to be misplaced as it applies specifically to Board meetings. Section 18.6(a) does not require that a Board meeting occur in order for the Board to provide its comments to the Members Committee prior to a vote. Section 18.6(a) is silent both on how proposed Operating Agreement amendments must be submitted to the Board and how the Board may present its comments to the

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[75] PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA, § 18.6(a). Operating Agreement, § 8.4 (Manner of Acting) describes the procedures for conducting meetings and voting for the Members Committee. PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA, § 8.4.

[76] PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA, § 7.4 (emphasis added).

Members Committee, if at all. Section 18.6(a) only states that proposed amendments must be submitted to the Board for review and comment and that the Members Committee cannot approve the amendment unless it considers any comments of the Board. Because section 18.6(a) is not prescriptive about how submission and comments must occur and PJM states that it has not deviated from its ordinary course in meeting the requirements under the Operating Agreement for Board review, we find that PJM's actions here are reasonably within the scope of the requirements of section 18.6(a). Because we disagree that PJM violated section 18.6(a), we dismiss LS Power's request for waiver of this provision as moot.

The Commission orders:

(A) PJM's proposed revisions to the Operating Agreement included in the Filing are hereby accepted, effective January 1, 2020, as requested, as discussed in the body of the order; and

(B) LS Power's request for waiver of Operating Agreement, section 18.6(a) is hereby dismissed, as discussed in the body of the order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.