

123 FERC ¶ 61,289  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

FPL Energy Marcus Hook, L.P.

v.

Docket No. EL04-57-003

PJM Interconnection, L.L.C.

ORDER DENYING REHEARING

(Issued June 20, 2008)

1. In this order, the Commission denies rehearing of an order on remand<sup>1</sup> from the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit)<sup>2</sup> that affirmed the denial of a complaint filed by FPL Energy Marcus Hook, L.P. (FPL) against PJM Interconnection, L.L.C. (PJM). FPL argues that PJM should be required to credit FPL for system benefits resulting from the construction of its Mickleton-Monroe upgrade. The Commission reaffirms its earlier finding that: (a) FPL failed to timely challenge PJM's allocation of costs relating to the Mickleton-Monroe upgrade, and (b) assuming *arguendo* that FPL may make this challenge, FPL has failed to demonstrate that its Mickleton-Monroe upgrade provides benefit to the system within the meaning of section 37.2 of PJM's Open Access Transmission Tariff (PJM OATT or tariff). Under either reason, the Commission finds that FPL is not entitled to a credit for the costs of the upgrade.

**Background**

2. FPL proposed to develop a generation project in Marcus Hook, Pennsylvania, which it wished to interconnect to the transmission system of Conectiv, a PJM member.

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<sup>1</sup> *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 118 FERC ¶ 61,169 (2007) (Order on Remand Denying Complaint).

<sup>2</sup> *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441 (D.C. Cir. 2005) (Remand Decision). The court affirmed in part and remanded in part the Commission's initial denial of FPL's complaint.

PJM assigned the Marcus Hook project queue position A21, and assessed the need for an upgrade of Conectiv's Mickleton-Monroe 230 kV circuit to accommodate the Marcus Hook project.

3. At that time, there were two earlier projects in the queue, projects A13 and A19, in the same electrical vicinity. PJM determined that an upgrade of the Mickleton-Monroe circuit was not required by the A13 project, but would be required to connect the A19 and Marcus Hook projects to Conectiv's system. PJM therefore allocated to FPL approximately \$10 million of the costs of a network upgrade to the Mickleton-Monroe circuit, which added a second 230 kV transmission line in addition to the 230 kV line already present on that circuit.<sup>3</sup> FPL entered into an Interconnection Service Agreement (ISA) with PJM, accepting that assigned cost responsibility, in January 2002, and Conectiv began construction of the Mickleton-Monroe upgrade.

4. In December 2002, after the Mickleton-Monroe upgrade had been substantially completed, project A13 unexpectedly withdrew from the queue. PJM determined that because the Mickleton-Monroe upgrade was nearly finished, the prudent course of action was for Conectiv to complete the upgrade, which it did.

5. On January 20, 2004, FPL filed a complaint against PJM regarding the allocation of costs for the Mickleton-Monroe upgrade. It alleged, *inter alia*, that under these circumstances, section 37.2 of the PJM tariff required PJM to reassign the cost responsibility for the Mickleton-Monroe circuit upgrade and to execute an amended ISA.

6. Section 37.2 of the PJM tariff that was in effect at the time of the execution of the ISA included the "but for" test for assessing generator upgrades as provided in Order No. 2003.<sup>4</sup> Under the "but for" test, FPL would bear the costs of those network upgrades that "would not be needed but for the interconnection"<sup>5</sup> of its generating facility. Section 37.2 of the PJM tariff reflected the "but for" test, by providing that the generator would bear

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<sup>3</sup> The remainder of the Mickleton-Monroe upgrade costs were allocated to the sponsor of project A19, who is not seeking relief here.

<sup>4</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 677, 693-95, *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2003), *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

<sup>5</sup> *Id.* P 695.

the costs “that would not have been incurred under the Regional Transmission Expansion Plan but for such Interconnection Request.” But Section 37.2 went on to provide that the “but for” costs should also reflect any benefits provided by the construction of the upgrades.

An Interconnection Customer shall be obligated to pay for 100 percent of the costs of the minimum amount of Local Upgrades and Network Upgrades necessary to accommodate its Interconnection Request and that would not have been incurred under the Regional Transmission Expansion Plan but for such Interconnection Request, *net of benefits resulting from the construction of the upgrades, such costs not to be less than zero.*<sup>6</sup>

Section 37.2 then provided a description of the costs and benefits to be included:

Such costs and benefits shall include costs and benefits such as those associated with accelerating, deferring, or eliminating the construction of planned Local Upgrades and Network Upgrades, the construction of unplanned Local Upgrades and Network Upgrades, and Local and Network Upgrades resulting from modifications to the Regional Transmission Expansion Plan to accommodate the Interconnection Request.

7. FPL argued that it should be entitled to a credit for the costs of the Mickleton-Monroe upgrade because, as a result of the withdrawal of the A13 project, the Mickleton-Monroe upgrade would not have been necessary. FPL also argued that because the Mickleton-Monroe upgrade provided system-wide benefits, it should not be solely responsible for the costs of constructing that upgrade, and PJM should, instead, allocate those costs to its transmission owner members, and provide a credit to FPL for the payments it had already made for the Mickleton-Monroe upgrade. The Commission

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<sup>6</sup> PJM Interconnection, L.L.C, Open Access Transmission Tariff, Original Sheet No. 74k, §37.2 (emphasis added). As will be discussed *infra* at P 77, the language of the version of section 37.2 of the PJM tariff cited by FPL in its complaint differs slightly from the version in force at the time that FPL executed its ISA with PJM. The above, however, is the version of section 37.2 in force at the time of execution of the ISA.

rejected this argument in its April 20, 2004 Order on Complaint and August 9, 2004 Order on Rehearing, holding that FPL remained responsible for the costs of the Mickleton-Monroe upgrade.<sup>7</sup>

8. FPL appealed the Commission's decision to the D.C. Circuit. The court affirmed other aspects of the Commission's rulings, but held that the Commission had not adequately supported its finding that there were no benefits from the Mickleton-Monroe circuit upgrade. The court found that the Commission had failed to explain why the question of whether an upgrade was part of PJM's RTEP plan was dispositive of the question of whether that upgrade provided a benefit to the system since section 37.2 of the PJM OATT envisioned that benefits could come from sources other than RTEP:

Nothing in its orders adequately explains why PJM's RTEP should be the sole dispositive factor for Marcus Hook's cost responsibility in this case. Accordingly, "we remand to FERC for further consideration . . . in light of the entire" tariff section.<sup>8</sup>

9. After the court's remand, the Commission directed the parties to brief four issues: (1) the definition of the term "benefits" and how the value of such benefits should be measured or determined; (2) relevant facts about the constructed facilities and the PJM system and whether the transmission facilities constructed by FPL provide benefits as contemplated in section 37 of the PJM OATT; (3) when the determination of benefits is to be made, i.e., whether the PJM OATT or other agreements contemplate a determination of benefits only at the time the Interconnection Agreement is executed, or whether benefits can be determined at a subsequent point in time, such as when a higher-queued project withdraws and the costs cannot be reallocated to other, lower-queued projects; and (4) when generation interconnection customers are required to raise questions concerning the determination of benefits under section 37 of the PJM OATT.<sup>9</sup> The parties provided briefs on those issues. Additionally, certain PJM transmission

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<sup>7</sup> *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,069 (2004) (April 2004 Order), *order on reh'g*, 108 FERC ¶ 61,171 (2004) (2004 Rehearing Order).

<sup>8</sup> Remand Decision, 430 F.3d 441 at 449 (quoting *Office of Consumers' Counsel v. FERC*, 783 F.2d 206, 223 (D.C. Cir. 1986)).

<sup>9</sup> *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 114 FERC ¶ 61,296, at P 9 (2006) (March 2006 Order).

owners (Indicated PJM Transmission Owners)<sup>10</sup> and Old Dominion Electric Cooperative, Inc. sought late intervention in this proceeding, asserting that in the March 2006 Order, the Commission expanded the scope of the proceeding beyond the dispute between FPL and PJM to a more generic proceeding in which the Commission would be considering new issues that were not before the Commission prior to the court's remand.

10. On March 1, 2007, the Commission issued its Order on Remand Denying Complaint, again denying FPL's complaint. We principally held there that: (a) FPL failed to contest PJM's cost determination within the time period provided by the PJM tariff, and (b) FPL's upgrades do not qualify for cost reduction under the PJM tariff.<sup>11</sup>

11. FPL filed a timely request for rehearing of the Order on Remand Denying Complaint. PJM filed an answer to FPL's request for rehearing, and FPL filed an answer to PJM's answer. As set forth below, we deny FPL's request for rehearing.

## **Discussion**

### **A. Procedural Determinations**

12. We will accept the answer to FPL's request for rehearing filed by PJM, and the answer to PJM's answer filed by FPL. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. We will accept PJM's and FPL's answers, because they have provided information that assisted us in our decision-making process.

### **B. FPL Failed to Challenge the Determination of Benefits within the Time Provided in PJM's Tariff**

13. In the Order on Remand Denying Complaint, the Commission re-examined PJM's tariff based on the briefs of the parties and concluded that FPL's complaint failed because FPL failed to raise its concerns with benefit calculations at the time required by the tariff. As the Commission explained, section 37 of the PJM tariff is only one part of an integrated series of tariff provisions that establish the generation interconnection

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<sup>10</sup> The PSEG Companies (Public Service Electric and Gas Company, PSEG Energy Resources & Trade, LLC, and PSEG Fossil, LLC); Exelon Corporation; the PHI Companies (Pepco Holdings, Inc., Potomac Electric Power Company, Delmarva Power & Light Company, and Atlantic City Electric Company); American Electric Power Service Corporation; and Dominion Resource Services, Inc.

<sup>11</sup> Order on Remand Denying Complaint at P 10.

procedures used by PJM. These procedures culminate with PJM tendering an ISA to the generation interconnection customer.<sup>12</sup> The ISA is designed to establish the generation interconnection customer's final cost responsibility.<sup>13</sup>

14. The Commission then found that under section 37.4 of the PJM tariff, the generation interconnection customer is required to challenge any cost determination at the time the ISA is tendered, either by submitting the dispute to Dispute Resolution under Article 12 of the PJM tariff or by having PJM file an unexecuted service agreement with the Commission.<sup>14</sup> As the Commission concluded, “[t]he interconnection process cannot work efficiently if the determinations made in these studies were under continual review with the potential for never-ending reallocations of costs related to numerous other projects.”<sup>15</sup>

15. On rehearing, FPL argues first that the Commission's determination that it failed to contest the cost allocation on a timely basis exceeded the scope of the court's remand,<sup>16</sup> and that section 37.4 of the PJM tariff should not bar its ability to protest the allocation of costs after signing the ISA.<sup>17</sup>

**1. Scope of the Court Remand**

**a. Request for Rehearing and Answer**

16. FPL states that, when the court remanded this case to the Commission, it required the Commission to further consider and support its finding that the Mickleton-Monroe upgrade did not provide system benefits. Therefore, FPL argues, by allowing PJM to raise a new defense to FPL's complaint on remand and finding that FPL is now foreclosed from raising the question of system benefits, the Commission has gone beyond the scope of the remand and stripped FPL of the ability to pursue the precise issue remanded by the court. FPL states that “[t]he mandate of the Court was very specific in calling for an adequate explanation of the system benefits issue under Section 37.2 [and

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<sup>12</sup> *Id.* P 12.

<sup>13</sup> *Id.* P 14.

<sup>14</sup> *Id.* P 15.

<sup>15</sup> *Id.* P 17.

<sup>16</sup> FPL's March 30, 2007 Request for Rehearing at 17-20 (Request for Rehearing).

<sup>17</sup> *Id.* at 20-24.

the Court's mandate does not permit the Commission to render the remanded issue moot,"<sup>18</sup> by introducing "an unrelated issue that yields the same end result" as the remanded orders.<sup>19</sup> FPL states that there is a general prohibition against consideration of new issues on remand, since the mandate forecloses relitigation of issues either expressly or implicitly decided by the appellate court,<sup>20</sup> and that since PJM could have raised the waiver defense at any point prior to remand, it cannot now do so after remand.<sup>21</sup>

17. PJM states in its answer that the court's Remand Decision is silent on the question of when an interconnection customer itself must raise PJM's determination of benefits and cost allocation, since the court was concerned solely with the Commission's failure to make clear at what point, in approving PJM's allocation of costs to FPL, the Commission had considered the potential offsetting benefits of non-RTEP projects, and remanded the case for further explanation of that point alone.<sup>22</sup>

18. PJM also asserts that it stated in its original answer to FPL's complaint that "[t]he ISA . . . stated [FPL's] allocated cost responsibility" and that FPL "knew (or should have known)" the basis for its cost allocation "at the time [FPL] agreed in its ISA to pay for its assigned share of the cost" of the Mickleton-Monroe upgrade.<sup>23</sup> PJM further notes that the Commission never addressed PJM's argument that FPL's challenge to the cost allocation provisions of the ISA was untimely, because it dismissed FPL's complaint on the merits, and thus that argument was never before the court; PJM therefore argues that the Commission is free to address this affirmative defense after remand.<sup>24</sup>

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<sup>18</sup> *Id.* at 18.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 18-20. FPL cites to, among other cases articulating the position, *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) ("[W]here an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so.").

<sup>21</sup> *Id.* at 19.

<sup>22</sup> PJM's April 16, 2007 Answer at 9.

<sup>23</sup> *Id.* at 12 (quoting PJM's February 9, 2004 Answer to Complaint at 16, 18 (internal quotation marks omitted)).

<sup>24</sup> *Id.*

**b. Commission Determination**

19. We disagree with FPL's contention that we cannot rely on its failure to seek timely review of the cost determinations in this case in determining the outcome of the proceeding. "[O]nce FERC reacquire[s] jurisdiction [of a case following a remand], it ha[s] the discretion to reconsider the whole of its original decision."<sup>25</sup> The court's remand does not prevent the Commission from addressing on remand the question of when a challenge to PJM's determination as to system benefit must be made, since the court's remand for further proceedings leaves open "a wide range of actions,"<sup>26</sup> and generally leaves the agency with "discretion to reconsider the whole of its original decision."<sup>27</sup>

20. To support its argument that the Commission's determination regarding the untimeliness of FPL's complaint here deprives FPL of the right granted to it by the court, to obtain a reconsideration of the Commission's original finding, FPL cites to *Atlantic City Electric Co. v. FERC*.<sup>28</sup> That case is inapposite. In the *Atlantic City* proceedings, the court interpreted section 203 of the Federal Power Act, 16 U.S.C. § 824b, and found that the Commission lacked jurisdiction to require that transmission owners make an FPA section 203 filing to withdraw from an RTO.<sup>29</sup> When, on remand, the Commission sought to re-justify its jurisdiction to take those actions, the court found that the Commission had violated its mandate by ignoring the court's explicit statutory interpretation that the Commission did not have such jurisdiction.<sup>30</sup>

21. No such statutory interpretation was made here. The court remanded this case "for further proceedings"<sup>31</sup> to determine whether FPL is entitled to a credit under the PJM

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<sup>25</sup> *Southeastern Mich. Gas Co. v. FERC*, 133 F.3d 34, 38 (D.C. Cir. 1998) (citing *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078, 1083 (D.C. Cir. 1997)).

<sup>26</sup> *Radio Television S.A. de C.V.*, 130 F.3d at 1083.

<sup>27</sup> *Process Gas Consumers Group v. FERC*, 292 F.3d 831, 834 (D.C. Cir. 2002) (quoting *Tenn. Gas Pipeline Co.*, 94 FERC ¶ 61,097, at 61,398 (2001)); *see also* *Southeastern Mich. Gas Co.*, 133 F.3d at 38.

<sup>28</sup> 329 F.3d 856 (D.C. Cir. 2003) (*Atlantic City*).

<sup>29</sup> *Id.* at 857.

<sup>30</sup> *Id.* at 859.

<sup>31</sup> Remand Decision, 430 F.3d at 442, 449.

tariff for its construction of the Mickleton-Monroe upgrade. While the Remand Decision focused on the Commission's determination of the meaning of benefits, it did not foreclose the Commission, upon reacquiring jurisdiction, from reexamining the entirety of the case. In this case, in particular, most of the original set of pleadings by both PJM and FPL focused on whether FPL should be responsible for the costs of an unnecessary project, not the issue of possible system benefits.<sup>32</sup> Upon reacquiring jurisdiction, the Commission provided the parties with an opportunity to brief this limited issue, and concluded that under the PJM tariff, FPL should have contested the cost allocation at the time it signed the ISA, not years later. Further, the court's remand did not address the question of the timeliness of FPL's challenge to PJM's cost allocation determination, because that question was never before the court. Therefore, the Commission is not ignoring a determination made by the court.

22. FPL similarly relies on *United States v. Ben Zvi*<sup>33</sup> and similar decisions<sup>34</sup> to support the proposition that "where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand."<sup>35</sup> But the mandate rule does not apply to remands to administrative agencies. When a court of appeals remands a case to an administrative agency, different considerations prevail than when a court of appeals remands a case to a lower court, and an agency is empowered to revisit its earlier decision in whatever respect necessary to fulfill its agency functions.<sup>36</sup>

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<sup>32</sup> Moreover, as PJM points out, it did in fact raise generally the argument that FPL knew or should have known the basis for the cost allocation at the time that FPL executed its ISA. Thus, even if FPL is correct that PJM should be foreclosed from raising a new issue on remand (a position with which we do not agree, as discussed above), PJM did raise this issue in the underlying proceeding.

<sup>33</sup> 242 F.3d 89 (2d Cir. 2001).

<sup>34</sup> *S. Atl. Ltd. P'ship of Tenn., L.P. v. Riese*, 356 F.3d 576, 584 (5th Cir. 2004) and *United States v. Aramony*, 166 F.3d 655, 662 (4th Cir. 1999).

<sup>35</sup> *Ben Zvi*, 242 F.2d at 95.

<sup>36</sup> The Supreme Court stated in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141-43 (1940) (footnotes omitted):

What is in issue [when a court remands a case to an agency] is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of

(continued...)

23. Further, the “law of the case” doctrine precludes reconsideration of issues that “were decided either explicitly or by necessary implication.”<sup>37</sup> Here, at the time that the court considered the Commission’s earlier orders, the issue of *when* the determination of

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authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. . . . Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.

*See also Chesapeake & Ohio Ry. Co. v. ICC*, 571 F.2d 1190, 1193 (D.C. Cir. 1977) (“The Supreme Court’s remand to the agency did not require the agency to limit itself to the issue previously before the Court, but gave the agency authority to clarify its intention and make revisions in any respect that was within its statutory authority.”).

<sup>37</sup> *United States ex rel. Dep’t of Labor v. Ins. Co. of N. Am.*, 131 F.3d 1037, 1041 (D.C. Cir. 1997). The court there stated:

As we have previously noted, the “mandate rule,” an application of the “law of the case” doctrine, states that a district court is bound by the mandate of a federal appellate court and generally may not reconsider issues decided on a previous appeal. *See, e.g., Maggard v. O’Connell*, 227 U.S. App. D.C. 62, 703 F.2d 1284, 1289 (D.C. Cir. 1983); *City of Cleveland, Ohio v. Federal Power Comm’n*, 182 U.S. App. D.C. 346, 561 F.2d 344, 348 (D.C. Cir. 1977). Unlike the doctrine of *res judicata*, however, the “law of the case” doctrine does not seek to sweep under its coverage all possible issues arising out of the facts of the case. *See City of Cleveland*, 561 F.2d at 348. Rather, the scope of the “law of the case” doctrine is limited to issues that were decided either explicitly or by necessary implication—“the mere fact that [an issue] could have been decided is not sufficient to foreclose the issue on remand.” *Maggard*, 703 F.2d at 1289.

system benefit should be made (and thus, when PJM's cost allocation determination became final) was never before the court. The Commission is, therefore, not precluded from addressing that question now.

**2. Timing of FPL's Challenge to the Costs Allocated through the Interconnection Process**

**a. Request for Rehearing**

24. FPL asserts that the Commission erred in finding that FPL waived its right to contest PJM's allocation of the costs of the Mickleton-Monroe upgrade.<sup>38</sup> FPL points to section 37.2 of the PJM tariff, which provides that if a generator is responsible for a network upgrade that provides a benefit, that generator must receive credit;<sup>39</sup> section 37.2 then provides that, contrary to the Commission's view, the point at which the estimated costs of an interconnection become final is not when an ISA is executed. FPL asserts that PJM claims the right to impose the costs of facilities upon a generator even if those costs were not agreed to in an ISA, and has done so with regard to this project. Specifically, according to FPL, PJM sought to impose additional costs on FPL for the relocation of a breaker at the Chichester Substation and for wetlands remediation after the ISA was finalized.<sup>40</sup> FPL disagrees with the Commission's characterization in its Order on Remand Denying Complaint of this subsequent charge as the correction of an error,<sup>41</sup> stating that there is no evidence as to what this error was or when it occurred, nor any explanation as to why PJM's failure to allocate costs in a timely manner should allow subsequent changes to an ISA when FPL's failure should not.<sup>42</sup>

25. FPL further argues that the Commission's position here – that generators waive their rights to contest cost allocations once an ISA is signed – could lead to unjust and unreasonable outcomes, in that a generator may sign an ISA and then subsequently obtain information that shows the cost allocations contained therein to be unjust.<sup>43</sup> FPL disagrees with the Commission's interpretation of section 37.4 as providing that any

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<sup>38</sup> Request for Rehearing at 20-24.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 20-21 and n.21.

<sup>41</sup> *Id.* at 21 (citing Order on Remand Denying Complaint at P 23).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 21-24.

claim not raised at the time of ISA finalization is waived.<sup>44</sup> It additionally argues that the Commission's ruling that a generator who is dissatisfied with a proposed ISA's cost allocation provisions has only two possible options (requesting dispute resolution, or filing an unexecuted ISA) is inconsistent with a generator's right under current section 20.2 of the PJM tariff to file a complaint under the Federal Power Act.<sup>45</sup>

26. In addition to its challenge to the Commission's finding of waiver, FPL seeks rehearing of the Commission's finding that interconnection customers are provided with sufficient information to challenge cost allocation determinations at the time that the generator must move forward with the project.<sup>46</sup> FPL states that the section of the PJM tariff referenced here, section 36.1.7,<sup>47</sup> was only added to the tariff in 2004, and so did not govern proceedings with regard to the Mickleton-Monroe upgrade.<sup>48</sup> FPL further reiterates its argument, based on *Exelon Corporation v. PPL Electric Utilities Corporation (Exelon)*,<sup>49</sup> that there is no specific cut-off point to correct errors in billings.<sup>50</sup> FPL disagrees with the Commission's conclusion that the instant case is distinguishable from *Exelon*, stating that: (a) FPL was not in a better position to challenge PJM's interconnection cost allocation than Exelon had been to challenge PJM's

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<sup>44</sup> *Id.* at 21.

<sup>45</sup> *See id.* at 21, referencing section 20.2 of Attachment O, Appendix 2 (Standard Terms and Conditions for Interconnections) of the PJM tariff ("Nothing in this section shall restrict the rights of any Interconnection Party to file a complaint with FERC under relevant provisions of the Federal Power Act").

<sup>46</sup> *Id.* at 22-23.

<sup>47</sup> *See* Order on Remand Denying Complaint at P 22 n.22 ("PJM tariff, section 36.1.7, require[es] that PJM make the base case data available to the generator, including 'all (i) generation projects and (ii) transmission projects, including merchant transmission projects, that are included in the then-current, approved Regional Transmission Expansion Plan.' Transmission owner identified projects that are not formally part of the RTEP plan are included in the generation interconnection process and would be available to the generator.").

<sup>48</sup> Request for Rehearing at 22-23 and n.26.

<sup>49</sup> 111 FERC ¶ 61,065 (2005), *order on reh'g*, 114 FERC ¶ 61,298 (2006).

<sup>50</sup> Request for Rehearing at 23.

energy billings, and (b) as argued above, FPL does not view section 37.4 of the tariff as containing a limitation as to the time that an interconnection customer can challenge a cost allocation.<sup>51</sup>

27. PJM states that the Commission properly held, in the Order on Remand Denying Complaint, that section 37.4 of the PJM tariff provides only two options to protest a cost allocation, including a determination as to any benefits which may offset the allocated costs, and the interconnection customer may invoke those options prior to executing an ISA.<sup>52</sup> Thus, according to PJM, the Commission has met the court's requirement to explain when an interconnection customer must make a challenge to its cost allocation. PJM further asserts that, when the ISA was presented to FPL, FPL understood the nature of the upgrade (i.e., the stringing of a second wire along the Mickleton-Monroe circuit, on a pre-existing open position for that second wire). Thus, according to PJM, if FPL considers the existence of this pre-existing open position to be proof that an upgrade to the Mickleton-Monroe circuit had always been intended, FPL should have raised the issue of whether the rest of the system was receiving a benefit from this upgrade at the time that PJM tendered the ISA to FPL. But, FPL did not do so. Thus, PJM claims that FPL implicitly conceded that the Mickleton-Monroe upgrade did not confer any other benefit to the system.<sup>53</sup>

**b. Commission Determination**

28. We reaffirm our holding that section 37.4 of the PJM OATT limits the time during which a generator can challenge the costs allocated in the ISA. At the time of the interconnection here, that section provided:

If an Interconnection Customer does not agree with the Transmission Provider's determination of such cost responsibility, it may request that the matter be submitted to Dispute Resolution under Article 12 of the Tariff or, if concerning the Regional Transmission Expansion Plan, consistent with Schedule 5 of the Operating Agreement, or

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<sup>51</sup> *Id.* at 23-24.

<sup>52</sup> PJM Answer at 9.

<sup>53</sup> *Id.* at 13-14.

request that an unexecuted Interconnection Service Agreement be filed with the Commission in accordance with the Tariff.<sup>54</sup>

29. While this provision may be somewhat ambiguous insofar as it does not set forth a specific time period, e.g. 30 days, for a generator to take one of these steps, we interpret this provision, taking into account the context of the interconnection process, as providing that any such challenge must precede execution of the ISA. The two options for resolution, submitting to Dispute Resolution under Article 12 and filing an unexecuted ISA with the Commission, both logically contemplate that the ISA will not be executed prior to resolution of a dispute. Further, the Commission's interpretation of this provision is internally consistent. Section 37.4 of the tariff provides that the cost responsibility set forth in the ISA is final: "The cost responsibility of the Generation Interconnection Customer shall be specified in the Interconnection Service Agreement executed pursuant to Section 36.8 of the Tariff."<sup>55</sup> In signing the Interconnection Service Agreement, FPL agreed to pay the costs of all projects in that agreement.<sup>56</sup> Allowing cost responsibility disputes to be raised after execution would disregard this finality.

30. The Commission's interpretation of section 37 here is consistent with its prior decision in *CED Rock Springs, LLC*,<sup>57</sup> holding that questions about cost allocations must be raised at the time the interconnection agreement is executed. *CED Rock Springs* addressed a situation in which, at the time that an upgrade was constructed, the generators

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<sup>54</sup> The ISA signed by FPL specifically incorporates by reference all portions of the PJM tariff. PJM's June 5, 2006 Reply Brief (PJM Reply Brief), Attachment A (PJM Interconnection, L.L.C., FERC Electric Tariff, Sixth Revised Volume No. 1, Original Service Agreement No. 1409, §19.0).

<sup>55</sup> Original Sheet No. 741, effective April 1, 1999.

<sup>56</sup> The ISA signed by FPL required that it "shall be responsible for and shall pay upon demand all Costs associated with the interconnection of the Customer Facility as specified in the Tariff. ... A description of the facilities required and an estimate of the Costs of these facilities are included in Sections 3.0 and 4.0 of the Specifications to this ISA." Original Service Agreement No. 1409, §19.0 (Attachment A to PJM's June 5, 2006 Reply Brief).

<sup>57</sup> *CED Rock Springs, LLC*, 114 FERC ¶ 61,285 (*CED Rock Springs*), *reh'g denied*, 116 FERC ¶ 61,163 (2006) (*CED Rock Springs Rehearing Order*), *aff'd*, *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43 (D.C. Cir. 2008).

for whose facilities that upgrade was constructed did not allege the existence of “system benefits of the type referred to in section 37,”<sup>58</sup> but later raised questions regarding the cost allocation for those upgrades. The Commission stated:

[I]ssues about whether these facilities would have been necessary “but for” the interconnection of Old Dominion’s and Rock Springs’s generation and whether such facilities provide benefits to the system sufficient to warrant spreading of the costs should have been raised at the time the interconnection agreements were signed pursuant to the provisions of section 37 of the OATT. . . .

. . . Rock Springs suggests that section 37 governs only responsibility for upfront payment, without speaking to ultimate cost responsibility. We disagree. Section 37 says nothing to distinguish between up-front payment and ultimate cost responsibility. To make such a distinction would undermine the purpose of encouraging generators to undertake low-cost connections.<sup>59</sup>

Thus, the Commission has made clear its view that an interconnection customer must resolve cost allocation questions at the time that it executes its ISA.

31. Moreover, as the Commission explained in its Order on Remand, limiting the scope of challenges to cost allocation is consistent with the intent of the interconnection process and is important for that process to work efficiently:

The requirement in section 37.4 that all challenges to the ISA, including challenges to the cost allocation, be raised before signing the ISA . . . is reasonable. . . . [T]he numerous studies leading to the ISA are designed to establish the facility responsibility and costs for a particular upgrade and set the benchmark for cost allocations for future projects. The interconnection process cannot work efficiently if the

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<sup>58</sup> *CED Rock Springs* Rehearing Order at P 8.

<sup>59</sup> *Id.* P 31-33 (footnotes omitted).

determinations made in these studies were under continual review with the potential for never-ending reallocations of costs related to numerous other projects.<sup>60</sup>

32. Because the allocation of costs in the interconnection process is based on a party's position in the queue, it is important that each party not be subject to later reallocations of unanticipated costs. In the Order on Remand Denying Complaint, we pointed to our finding in *Neptune Regional Transmission System v. PJM Interconnection, L.L.C.*<sup>61</sup> that the sequence of events established by the interconnection queue is needed to ensure a fair process for all interconnecting parties:

In turn, the interconnection customer is able to use the queue system to assess its business risks. Each customer knows that subsequent cost allocations will be determined by circumstances that are known as of the time its System Impact Study is conducted. Projects may drop out of the queue and customers may move up the queue, but the cost allocation system insulates an interconnection customer from costs arising from events occurring after its System Impact Study is completed, other than costs arising from changes from higher-queued generators.<sup>62</sup>

The D.C. Circuit affirmed the Commission, finding that the Commission's reasoning provides "workability, certainty, and predictability in the interconnection process."<sup>63</sup> Similarly, in this case, the PJM tariff provision establishing a set time period for challenging the allocation of interconnection costs promotes an efficient interconnection process and avoids the need to reallocate costs among projects based on a re-determination of costs and benefits.

33. FPL argues that applying the existing section 37.4 of the PJM OATT to limit its opportunity to challenge its cost allocation denies it the right to file a complaint under the

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<sup>60</sup> Order on Remand Denying Complaint at P 17.

<sup>61</sup> 110 FERC ¶ 61,098 (*Neptune*), order on reh'g, 111 FERC ¶ 61,455 (2005), *aff'd*, *Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164 (2007).

<sup>62</sup> *Neptune* at P 23.

<sup>63</sup> *Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d at 1169.

Federal Power Act, as provided under section 20.2.<sup>64</sup> Application of section 37.4, however, does not limit FPL's ability to file a complaint.<sup>65</sup> It is part of the complaint process to examine how tariff provisions and limitations like section 37.4 affect the resolution of a complaint within the context of the interconnection process. For the reasons discussed above, we find that application of section 37.4 to the facts of this case does not lead to an unjust and unreasonable result.

34. FPL again relies on the Commission's determination in *Exelon* to permit the correction of a clear error in billing to support its argument that "a generator which is overcharged for interconnection because benefits . . . have not been fully considered"<sup>66</sup> should be able to dispute the benefits issue in "a reasonable time."<sup>67</sup> But as we found in the Order on Remand Denying Complaint, *Exelon* is not on point. First, *Exelon* did not involve a generator interconnection agreement falling under section 37.4 of the PJM OATT, and as the Commission pointed out in *Exelon*, PJM did not have a tariff provision limiting the time period for challenging billing errors.<sup>68</sup> In fact, as a by-product of the *Exelon* case, PJM filed to impose a two-year limitation on challenges to billing errors, a tariff change accepted by the Commission.<sup>69</sup> Second, *Exelon* involved the correction of a billing error under which PJM had inadvertently charged one load serving entity (LSE) for the energy taken at a particular substation, when in fact that energy had been taken by

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<sup>64</sup> FPL's request for rehearing refers to section 70.2 (request for rehearing at 21), but presumably FPL is referring to section 20.2 of Attachment O of the PJM tariff ("Nothing in this Section shall restrict the rights of any Interconnection Party to file a complaint with FERC under relevant provisions of the Federal Power Act").

<sup>65</sup> See *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 52 (D.C. Cir. 2008) in which the court affirmed the Commission's ruling that a tariff provision that allowed a utility to submit a tariff filing to recover costs did not guarantee that the filing would be granted or that costs would be recovered. Whether such costs can be recovered, and from whom, would depend upon an analysis of the tariff and other factors.

<sup>66</sup> Request for Rehearing at 23.

<sup>67</sup> *Id.*

<sup>68</sup> *Exelon*, 111 FERC ¶ 61,065, at P 26 ("We find, *absent any specific tariff provision establishing a time frame to dispute such errors*, that no specific time frame exists within which to dispute this billing error.") (emphasis added).

<sup>69</sup> *PJM Interconnection, L.L.C.*, Docket No. ER06-1497-000, at 1 (Nov. 13, 2006) (unpublished letter order).

a different LSE. Because of the complexity of PJM's billing process (in which the bill includes only the final congestion calculation, not every nodal input), Exelon understandably failed to recognize this error in a timely fashion.<sup>70</sup> By contrast, in this case, the interconnection process is transparent and is specifically designed to facilitate the dissemination of information to the interconnecting generator. If FPL had problems with the cost allocation or questions about system benefits, it should have brought these to PJM's or Conectiv's attention, and filed any challenge, as provided in section 37.4 of the PJM OATT, at the time of the signing of the ISA.

35. FPL also asserts that, because PJM and FPL, after the signing of the parties' initial ISA, agreed that the project required additional upgrades, and attendant costs, FPL should similarly be able to challenge PJM's of cost responsibility determination after execution of the ISA. First, as we stated in the Order on Remand Denying Complaint, "[t]he ISA . . . establishes the upgrade projects needed to be completed *with an estimate of the costs* of those projects. The interconnection customer is still responsible for all *actual* costs incurred for the projects."<sup>71</sup>

36. Thus, FPL's argument conflates two different issues, namely, estimates of actual costs and cost allocation. Based on the Marcus Hook project's place in the queue, and the upgrades for which FPL became responsible, PJM and FPL entered into an agreement (the original ISA) that committed PJM to build and FPL to pay for all the upgrades necessary for the Marcus Hook project. Because additional work needed to be done on this project, PJM and FPL negotiated revisions to the original ISA to include additional costs<sup>72</sup> -- i.e., costs which both parties apparently agreed were "actual costs" of the

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<sup>70</sup> In *Exelon*, "[t]he billing error . . . was not immediately apparent from the bill sent to PECO, but was a single improper code in a massive computer program that was then used to aggregate thousands of transactions used to determine billed costs." Order on Remand Denying Complaint at P 22.

<sup>71</sup> Order on Remand Denying Complaint at P 23 (emphasis added).

<sup>72</sup> After PJM and FPL signed their original ISA regarding Marcus Hook, PJM assessed approximately \$500,000 against FPL for wetlands remediation associated with the upgrade construction necessary for the Marcus Hook project. PJM and FPL signed a revised ISA on November 29, 2005 to memorialize this agreement. PJM also assessed an additional amount against FPL for the Chichester Substation 220-43 Breaker Relocation, another upgrade necessary to complete the interconnection for Marcus Hook. PJM acknowledges that its failure to identify this upgrade in the original ISA was an oversight. While initially PJM proposed to allocate \$1.3 million in costs for the Chichester upgrade,

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Marcus Hook project. FPL did object to the cost estimates, but reached an agreement with PJM as to the amount of these costs. FPL failed to voice an objection to the project or the determination of upgrade responsibility until the A13 project withdrew.

37. What FPL seeks to do in its complaint here goes beyond challenging the cost allocation for upgrades for the Marcus Hook project. FPL seeks, in essence, to revisit not the costs for which it must pay, but the entirety of PJM's cost responsibility determination for each interconnection customer based on that customer's position in the interconnection queue, *after* FPL executed the ISA, accepted full cost responsibility, and signaled its intent to proceed with construction of the Marcus Hook project. This is a significantly different request for reassessment than PJM's determination that its original estimates were incorrect and that additional elements needed to be constructed (an engineering determination to which FPL agreed), because FPL's request would also require a reevaluation of cost responsibility for additional projects in the queue.

38. FPL further maintains that there is an asymmetry of information between PJM and the generator and argues that for this reason the Commission should not restrict its late challenge to the cost allocation for the Mickleton-Monroe upgrade. However, one of the reasons the Commission in Order No. 2003 permitted RTOs like PJM to utilize the "but for" test for generator interconnection is that RTOs are independent of generation and transmission owners and therefore can make independent judgments on whether network upgrades are necessary "but for" the interconnection request.<sup>73</sup> PJM would have no bias between allocating all the costs of the Mickleton-Monroe upgrade to FPL, or to a larger group of generators. Thus, it is appropriate for the Commission to place greater reliance on the judgment of PJM that there were no RTEP projects or non-RTEP projects<sup>74</sup> that affected the cost allocation to FPL, than on FPL's mere assertion, without evidence, that there must be other interconnection customers who benefit from the Mickleton-Monroe upgrade.

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the parties negotiated this amount, and on June 28, 2004 entered into a new Interim ISA with estimated costs of only \$131,000 to complete this additional work. *See generally*, PJM Reply Brief at 13-15.

<sup>73</sup> Order No. 2003 at P 696 ("[T]he Commission remains concerned that, when the Transmission Provider is not independent and has an interest in frustrating rival generators, the implementation [of the but for test] creates opportunities for undue discrimination.").

<sup>74</sup> Projects planned by individual transmission owners, that are not required by PJM, are also known as Transmission Owner Initiated (TOI) projects.

39. Moreover, FPL has not demonstrated that the information it received was inadequate. FPL notes that there were no TOI upgrades in the 1999 RTEP report, but it acknowledges that it had access to information regarding at least one TOI upgrade in the 2000 RTEP report.<sup>75</sup> In addition, as the Commission found in the March 1, 2007 Remand Order, PJM's interconnection process is open and transparent, involving at least three separate studies in which the interconnecting customer is intimately involved and can question each assumption.<sup>76</sup> As PJM points out, the interconnection process as a general matter is open and transparent:

PJM has an enormously open process for evaluating interconnection requests. Extensive communications occur between PJM and its interconnection customers throughout the many steps between the time of an interconnection request and the signing of an ISA. PJM conducts an interconnection feasibility study that assesses the practicality and cost of accommodating a proposed interconnection. The interconnection customer can discuss this study with PJM before entering into a system impact study agreement, under which PJM "refine[s] and more comprehensively estimate[s]" cost responsibility and construction lead times for facilities and upgrades. The interconnection customer may request to meet with PJM and the interconnected transmission owner to discuss the results of the system impact study. If the customer proceeds to the next step, PJM next conducts a facilities study. The interconnection customer then may request to meet to discuss the results of that study.<sup>77</sup>

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<sup>75</sup> Request for Rehearing at 10-11.

<sup>76</sup> 118 FERC ¶ 61,169, at P 12-14.

<sup>77</sup> PJM Reply Brief at 16 (footnotes omitted). FPL claims that one tariff provision, § 36.1.7, dealing with provision the provision of base case assumptions, as cited by the Commission in note 22 of the Order on Remand, was not put into the tariff until after 2004. However, the tariff sheets in effect at that time do provide that PJM will conduct a feasibility study to make a preliminary determination of the upgrades that may be necessary, provide the interconnection customer with a preliminary estimate of the time and cost required for such upgrades, and make the entire feasibility study available upon request (section 36.2), conduct a system impact study (section 36.4), and a facilities study agreement that will include PJM's good faith estimates of the costs of the upgrades required to accommodate the interconnection customer's request (section 36.7). *See* PJM (continued...)

40. As PJM further notes, not only were there no planned upgrades identified in the relevant 1999 RTEP that would be accelerated, deferred, or eliminated, but PJM had also stated in the 1999 RTEP that it was “unrealistic to assume that no generation would be added to the PJM system through 2006,” and it was thus assuming that “there would not be any need for transmission enhancements and upgrades to achieve compliance with reliability criteria.”<sup>78</sup>

41. FPL is required to exercise due diligence prior to signing the ISA. If it had concerns that its upgrade might reduce the need for other upgrades, it could, and should have requested any additional necessary information from both PJM and Conectiv, and challenged the allocations prior to executing the ISA.

**C. The Mickleton-Monroe Upgrade Does Not Provide System Benefit as Required Under the PJM Tariff**

**1. Order on Remand Denying Complaint**

42. On remand, FPL argued that its upgrade to the Mickleton-Monroe circuit provides system benefit to PJM, for which it should receive payment. The Commission found, however, that FPL had not demonstrated that the Mickleton-Monroe upgrade provided system benefit within the meaning of section 37.2 of the PJM Tariff. The Commission addressed the question placed before it by the court—namely, the link between PJM’s RTEP and the question of system benefit.<sup>79</sup> The Commission stated that the PJM tariff defines its RTEP as “the plan for the enhancement and expansion of the Transmission

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OATT, Original Sheets 74b – 74f (effective April 1, 1999, accepted in *PJM Interconnection, L.L.C.*, 87 FERC ¶ 61,299, reh'g denied, *PJM Interconnection, L.L.C.*, 89 FERC ¶ 61,186 (1999)).

Moreover, as the Commission pointed out in the Order on Remand, there are over 100 tariff pages dealing with the studies and interconnection process. While the interconnection provisions may have been improved over the years, the entirety of the PJM interconnection process is transparent and open, with ample opportunities for FPL to have obtained information relevant to its interconnection project. The absence of this single provision in the tariff at the time of FPL’s interconnection request does not so significantly affect FPL’s access to information or significantly compromise the process.

<sup>78</sup> PJM reply brief at 4-5, citing “1999 Baseline RTEP Report,” at 4 (Appendix C to “Request for Rehearing of FPL Energy Marcus Hook, L.P” (May 19, 2004)).

<sup>79</sup> Remand Decision, 430 F.3d at 449.

Facilities in order to meet the demands for firm transmission service, and to support competition, in the PJM Region.”<sup>80</sup> The Commission then stated that section 37.2 of the PJM tariff referred to both projects that were planned as part of the RTEP, because PJM designated those projects as necessary for system reliability, and “unplanned” projects, i.e., TOI projects that transmission owners plan and construct outside of the RTEP process. The Commission noted that, while TOI projects are not part of PJM’s RTEP (in the sense that PJM does not require transmission owners to construct those projects), at the same time, PJM’s RTEP process recognizes and takes into consideration the fact that such TOI projects are in process.<sup>81</sup>

43. The Commission then held that FPL had failed to demonstrate that the Mickleton-Monroe upgrade had affected any TOI project, or that it had replaced, deferred, or accelerated any other “discrete project, whether formally a part of the RTEP plan or not.”<sup>82</sup> On this basis, the Commission found that the Mickleton-Monroe upgrade did not provide a system benefit. The Commission pointed to the language of section 37.2 that system benefits “shall include costs and benefits such as those associated with accelerating, deferring, or eliminating the construction of planned Local Upgrades and Network Upgrades [and] the construction of unplanned Local and Network upgrades.”<sup>83</sup> The Commission then stated that, to determine the meaning of “benefits” here, it would apply the principle of *ejusdem generis* (“of the same kind”), under which “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words.”<sup>84</sup>

44. The Commission then stated that, while the Mickleton-Monroe circuit contained an open position for a second line, that fact alone did not demonstrate that the second line installed for the Marcus Hook project did, in fact, provide any benefit to the PJM system. The Commission held that in order to qualify for cost reduction under section 37.2 of the PJM tariff, there would need to be a discrete project, whether formally a part of the RTEP or not, that would have been affected by FPL’s upgrades. The Commission found that

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<sup>80</sup> Order on Remand Denying Complaint at P 29 n.29 (citing PJM Interconnection, L.L.C., Third Revised Rate Schedule FERC No. 24, Schedule 6, §1.1).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* P 28-29.

<sup>83</sup> *Id.* P 28.

<sup>84</sup> Order on Remand Denying Complaint at P 28 n.26 (citing *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003)).

this is consistent with the PJM interconnection process, since the costs of the deferred or eliminated project would be borne by the company (and customers) whose project was affected. FPL has not identified such a discrete project that its construction would affect.<sup>85</sup>

## 2. Request for Rehearing and Answer

45. On rehearing FPL argues that the Mickleton-Monroe upgrade does provide system benefits, as contemplated by section 37.2 of the PJM tariff, because, as detailed below:

(a) it satisfies the criteria for system benefits generally applied by the Commission, (b) the original construction of the circuit as a double circuit with an open position necessarily meant that use of the second position was intended at a future time, and (c) no negative inference can be drawn from the fact that the RTEP plan does not contain an upgrade that the Mickleton-Monroe upgrade affects.

46. FPL first argues that the Commission erred in finding that, in order to provide a system benefit, “an upgrade must defer or eliminate a ‘discrete project’ that was included in the RTEP” as a project needed for competition or reliability, or is a TOI project. FPL states that this ruling is an overly restrictive interpretation of section 37.2.<sup>86</sup>

47. FPL argues that even if the Mickleton-Monroe upgrade did not replace or defer the need for a TOI upgrade, that does not mean that that upgrade provided no benefit to the system. FPL states that “there are scores of [TOI] upgrades in PJM that are claimed by transmission owners to be needed for reliability purposes notwithstanding the RTEP process not identifying those upgrades as needed.”<sup>87</sup> FPL further states that PJM required Conectiv (the owner of the transmission system to which the Mickleton-Monroe upgrade connected) to reinforce its transmission system to address reliability violations in the Atlantic City Electric region at a cost of \$20 million, but at that point PJM had already assessed all the costs of the Mickleton-Monroe upgrade to FPL; thus, FPL argues, it is impossible to know whether the Mickleton-Monroe upgrade could have met some or all of this obligation placed on Conectiv by PJM.<sup>88</sup>

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<sup>85</sup> *Id.* P 28.

<sup>86</sup> Request for Rehearing at 8.

<sup>87</sup> *Id.* at 7.

<sup>88</sup> *Id.* at 11.

48. Therefore, according to FPL, the fact that the Mickleton-Monroe upgrade replaces neither an RTEP upgrade nor a TOI upgrade is not dispositive of the question of whether the Mickleton-Monroe upgrade provides benefit to the PJM system.<sup>89</sup> FPL further states that the types of “system benefits” set forth in section 37.2—“benefits such as those associated with accelerating, deferring, or eliminating” the construction of multiple types of upgrades, including planned upgrades and upgrades that are not part of the RTEP plan—are among the possible types of system benefits, but not all of the possible types of system benefits.<sup>90</sup>

49. FPL also points to cases in which, it asserts, the Commission has construed the term “system benefit” more broadly. It cites the Commission’s language in Order No. 2003-A, where we stated:

[I]n assessing the benefits of the Network Upgrades needed to interconnect new generating capacity, the Commission’s approach to interconnection pricing looks beyond the direct usage related benefits usually associated with transmission system enhancements. That is, our approach also recognizes the reliability benefits of a stronger transmission infrastructure and more competitive power markets that result from a policy that facilitates the interconnection of new generating facilities.<sup>91</sup>

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<sup>89</sup> *Id.* at 8-9. FPL also notes that the RTEP only projects the system’s needs for a few years in advance, pointing out that the 1999 Baseline RTEP Report, dated December 2, 1999, only examined the system’s needs until 2006, so that it would not have been able to evaluate whether the Mickleton-Monroe upgrade would have provided a benefit to the system after 2006. *Id.* FPL further argues that because the 2000 Baseline RTEP Report, dated April 4, 2001, already included the Mickleton-Monroe upgrade (on the basis that it was needed to accommodate project A13, as discussed above), “there is no way of telling . . . whether the upgrade otherwise would have been needed as a system upgrade.” *Id.* at 9. Thus, FPL argues, a project’s inclusion in or exclusion from a baseline RTEP plan is not necessarily an indicator of whether an upgrade provides benefit to the system.

<sup>90</sup> *Id.* at 11.

<sup>91</sup> *Id.* at 12 n.10 (quoting Order No. 2003-A at P 584). FPL also points to *Entergy Services, Inc. v. FERC*, 319 F.3d 536, 543-44 (D.C. Cir. 2003) (*Entergy Services*) in which, according to FPL, the court upheld this broad view of benefits.

FPL further states that, in Order No. 2003-A, the Commission concluded that network upgrades generally provide system benefits by putting new generators on an equal footing with pre-existing generators, enhancing an integrated system used by many customers, accommodating greater load flow, and potentially increasing the transfer capability of the grid.<sup>92</sup> Thus, according to FPL, a broader interpretation of “system benefit” is appropriate here.

50. PJM, in its answer on this point, states that the Commission has properly interpreted section 37.2 by using the principle of *eiusdem generis*<sup>93</sup> to limit the possible benefits of an upgrade to those arising from the acceleration, deferral, or elimination of construction of other planned or unplanned upgrades.<sup>94</sup> PJM states that “[t]he express listing of these types of benefits in the Tariff demonstrates the intent to consider only tangible, identifiable, and quantifiable benefits that upgrades may produce, . . . not every conceivable generic and intangible benefit of an upgrade.”<sup>95</sup> PJM further states:

If section 37.2 were read to include all potential future system benefits, no matter how intangible or unidentifiable, that interpretation would consume the “but for” standard. Every addition to the system could be characterized as providing some possible intangible system benefit by adding transmission capacity redundancy, or might later be deemed to have accelerated some unspecified, future upgrade.<sup>96</sup>

51. FPL also points to the fact that the Mickleton-Monroe circuit was originally built as a double-circuited tower with spaces for two sets of transmission lines, and argues that this construction would not have been used unless the builder of the circuit contemplated that the facility would eventually be upgraded to contain two sets of lines.<sup>97</sup> FPL states

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<sup>92</sup> *Id.* at 13-14 (citing *Entergy Services*, 319 F.3d at 543-44).

<sup>93</sup> *Meeker & Co.*, 31 FERC ¶ 63,055 at 65,200 (1985); *accord Bernstein v. N. E. Ins. Co.*, 19 F.3d 1456, 1458 (D.C. Cir. 1994); *Ne. Utils. Serv. Co.*, 62 FERC ¶ 63,013, at 65,027 (1993) (general language followed by a list of examples defines a class limited to instances that resemble the examples), *aff'd*, Opinion 422, 83 FERC ¶ 61,184, *reh'g denied*, Opinion No. 422-A, 84 FERC ¶ 61,159 (1998).

<sup>94</sup> PJM Answer at 5.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 8.

<sup>97</sup> Request for Rehearing at 14.

that building the circuit with a second line position would have required a significant incremental cost, and that, as FPL's witness Villar testified, utilities do not generally build such second positions unless they anticipate using them.<sup>98</sup> FPL also asserts that, according to the documentary evidence it submitted (i.e., photographs of other 230 kV lines), similar circuits have not been built with an open second position.<sup>99</sup> Thus, FPL states, the fact that the Mickleton-Monroe line was the only facility built with a double-circuited tower shows that it was anticipated that a second line would at some point be needed, and on this basis, the Commission should conclude that the Mickleton-Monroe upgrade constructed here provides benefit to the system.<sup>100</sup>

### 3. Commission Determination

#### a. The section 37.2 Standard for Evaluating Upgrades

52. We reaffirm our holding that, in determining whether an upgrade provides benefits to the PJM system within the meaning of section 37.2 of the PJM tariff, "the benefits to be considered are those in the same category as the enumerated items [in section 37.2]: benefits that accelerate, defer, or eliminate planned or unplanned upgrades."<sup>101</sup> Section 37.2, as it existed at the time of the interconnection states in full:

An Interconnection Customer shall be obligated to pay for 100 percent of the costs of the minimum amount of Local Upgrades and Network Upgrades necessary to accommodate its Interconnection Request and that would not have been incurred under the Regional Transmission Expansion Plan but for such Interconnection Request, net of benefits resulting from the construction of the upgrades, such costs not to be less than zero. Such costs and benefits shall include costs and benefits such as those associated with accelerating, deferring, or eliminating the construction of planned Local Upgrades and Network Upgrades, the construction of unplanned Local Upgrades and Network Upgrades, and Local and Network

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<sup>98</sup> *Id.* at 15.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 16-17.

<sup>101</sup> Order on Remand Denying Complaint at P 28.

Upgrades resulting from modifications to the Regional Transmission Expansion Plan to accommodate the Interconnection Request.<sup>102</sup>

53. By its very terms, section 37.2 of the PJM tariff seeks to define the meaning of costs and benefits by indicating that such costs and benefits are those associated with “accelerating, deferring, or eliminating the construction of” upgrades. The court remanded the original order because the Commission had focused only on the upgrades included in the RTEP and did not address the other provisions of section 37.2 regarding non-RTEP projects. On remand, we agreed that this section did go beyond those projects formally evaluated through the RTEP process and included both planned and unplanned local upgrades. For the reasons set forth in the Order on Remand Denying Complaint and those discussed below, we again conclude that section 37.2 refers to the relationship between the interconnection project and other projects whether formally a part of the RTEP or local TOI projects. We note further that the Commission properly applied the principle of *ejusdem generis* to find that “[a]pplying general principles of contract interpretation, . . . the benefits to be considered are those in the same category as the enumerated items: benefits that accelerate, defer, or eliminate planned or unplanned upgrades.”<sup>103</sup>

54. While the use of the term “unplanned” is somewhat vague, we interpret this term to refer to TOI projects that are not included in the RTEP, rather than some generic indeterminate concept of an unknown, but potential or possible future project, as urged by FPL. This interpretation is the most reasonable interpretation of the PJM tariff in context. The RTEP includes those projects included in the PJM RTEP planning process, so the term “planned” is reasonably construed to refer to those projects included in the RTEP planning process. Thus, it is reasonable to construe the term “unplanned” as referring only to TOI projects not included in the formal RTEP planning process.<sup>104</sup>

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<sup>102</sup> PJM’s May 5, 2006 Initial Brief, Attachment A (PJM Interconnection, L.L.C., Open Access Transmission Tariff, Original Sheet No. 74k).

<sup>103</sup> Order on Remand Denying Complaint at P 28 (footnotes omitted).

<sup>104</sup> As pointed out in the Remand Order, because of the interconnectedness of the transmission grid, PJM requires transmission owners to provide it with information about their “unplanned” TOI projects in order for PJM to formulate its planned RTEP projects. And, although not formally a part of the RTEP plan, these projects are listed in the RTEP documents and would be available to FPL. *See* Remand Order, 118 FERC ¶ 61,169 at P 29, footnote omitted (“The unplanned projects refer to transmission owner identified upgrades, which are projects that the transmission owners construct without going

(continued...)

55. Moreover, this interpretation is the most consistent with the “but for” test employed by the PJM OATT. An interpretation of the term “unplanned” to refer to the possibility that an interconnection project might displace some future, unknown project is inconsistent with the “but for” test. The “but for” test is based on an engineering analysis conducted by PJM of whether a project would be needed but for the interconnection request, taking into account the discrete information available to PJM at the time of the request. Adoption of the amorphous and undefined “benefit” test urged by FPL would provide no basis for PJM to determine how much of a benefit a project provides, nor how much credit to give for that project. Any such determination could not be based on engineering or any other quantitative assessment by PJM.

56. FPL itself seeks rehearing of the Commission’s determination to use the version of section 37.2 of the PJM tariff in effect at the time of the Mickleton-Monroe interconnection request, arguing that we should in fact be interpreting the same version that was before the court. In fact, using the later version of section 37.2 (as FPL urges) reinforces our conclusion here, because PJM revised section 37.2 to replace the words “unplanned Local Upgrades and Network Upgrades” with the phrase “construction of other Local Upgrades and Network Upgrades that are not and do not formally become part of the Regional Transmission Expansion Plan.”<sup>105</sup> This clarification reinforces our conclusion that the use of the word “unplanned” in section 37.2 is properly interpreted to mean unplanned as far as PJM’s planning process is concerned, not generically unplanned, as in not currently existing.

57. In *CED Rock Springs*, the Commission interpreted section 37.2 similarly. The Commission found that the parties had not demonstrated that they were eligible for cost recovery for network upgrades because “there is no evidence that these facilities were sized to provide additional system benefits by accelerating, deferring or eliminating transmission projects necessary for PJM to reliably operate its system.”<sup>106</sup> Thus, relying on section 37.2 of the PJM tariff, the Commission allocated all of the costs of an upgrade

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through the formal RTEP process to have those projects certified by PJM as being needed for reliability or competition. While these transmission owners identified upgrades are not formally included in the approved RTEP plan by PJM, the RTEP documents and the transmission planning documents take into account these transmission owner identified upgrades, and these transmission owner identified upgrades are posted on the PJM website”).

<sup>105</sup> See March 2006 Order at P 7; Request for Rehearing at 5.

<sup>106</sup> *CED Rock Springs* Rehearing Order at P 32.

to interconnection customers. The D.C. Circuit affirmed this finding, concluding that under the “but for” test, benefits are determined by the demonstrated need for the facilities, not merely by potential incidental benefits:

Petitioners make several allusions to services their transmission facilities now provide to the grid, but they still point to no evidence in the record that the PJM Transmission System would have built facilities to provide these services in the absence of Petitioners’ need to connect to the grid. While Petitioners contend that FERC refused “to acknowledge the benefits of increased reliability and flexibility” to the grid their facilities provide, the presence or absence of these purported benefits is not controlling. The allocation of costs under Section 37.2 depends on the grid’s demonstrated need for interconnection facilities, not the incidental services or benefits any given interconnection facility may provide once it is built.<sup>107</sup>

**b. FPL Failed to Show that Its Project Met the Standard for Providing System Benefits**

58. We reaffirm our earlier holding that FPL has failed to show that its Mickleton-Monroe upgrade meets the PJM tariff standard for determining that construction provides benefits to the system. FPL points to no specific project, whether listed in the RTEP or not, that PJM or another party has been able to accelerate, defer, or eliminate because FPL constructed the Mickleton-Monroe upgrade. No party here contests the fact that, until generators proposed to interconnect projects A13, A19, and Marcus Hook to Conectiv’s system, PJM did not consider an upgrade to the existing Mickleton-Monroe circuit to be necessary. Further, although FPL alludes to “scores of [TOI] upgrades in PJM that are claimed by transmission owners to be needed for reliability purposes”<sup>108</sup> but that are not listed in the RTEP, FPL does not point to any one of those proposed upgrades as having been accelerated, deferred, or eliminated as a result of the Mickleton-Monroe upgrade.

59. FPL argues that the presence or absence of a proposed upgrade in the RTEP does not demonstrate that such an upgrade may not be valuable to the system, and thus, no negative inference should be drawn from the lack of such a proposed upgrade in the

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<sup>107</sup> *Old Dominion*, 518 F.3d at 51 (citation omitted).

<sup>108</sup> Request for Rehearing at 7.

RTEP. But, as just explained, the possible intangible value of an upgrade to the grid does not determine whether the upgrade qualifies as a benefit for which the interconnection customer qualifies for a reduction in cost. The upgrade must be shown to accelerate, defer, or eliminate another known upgrade, whether part of the PJM RTEP or a planned transmission owner investment.

60. FPL asserts that after the Mickleton-Monroe project in 1999, Conectiv, in 2000, proposed a \$20 million TOI upgrade, and that it cannot know whether the Mickleton-Monroe upgrade reduced the ultimate cost to Conectiv for that upgrade. First, as discussed earlier, the purpose of the interconnection queue is to assess cost responsibility at the time of the interconnection, not to reassess the cost allocated to each project based on a later project that may be built.<sup>109</sup> PJM can analyze only the projects anticipated at the time of the interconnection, not projects that materialize afterwards. As PJM points out, “[e]very addition to the system could be characterized as providing some possible intangible system benefit by adding transmission capacity redundancy, or might later be deemed to have accelerated some unspecified, future upgrade.”<sup>110</sup> In the *CED Rock Springs* case, the court affirmed the Commission’s finding that construction of future facilities does not demonstrate that the facilities in question would not have been built “but for” the interconnection request:

The same reasoning applies to explain why the future cost of a \$200,000 wave trap replacement and other unquantified costs associated with complying . . . are not evidence that the facilities would have been built but for their interconnection request. FERC adequately responded to this argument, asserting that “these costs resulted from [Petitioners’] choice to build and own these facilities[,]” not from any demonstrated need by the system.<sup>111</sup>

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<sup>109</sup> In other words, each project takes the grid as it finds it and is assigned upgrade costs based on the projects needed to connect to the existing grid. In this case, for example, FPL was assigned the cost of the Mickleton-Monroe upgrade because the earlier A13 project used the existing capacity of the transmission grid. Upon the cancellation of the A13 project, the Mickleton-Monroe upgrade would not have been necessary, but by that time the project had been substantially completed.

<sup>110</sup> PJM Answer at 8.

<sup>111</sup> *Old Dominion*, 518 F.3d at 51 (citation omitted) (quoting *CED Rock Springs* Rehearing Order at P 14).

Second, despite hindsight, FPL has not provided any evidence that the Mickleton-Monroe upgrade, accelerated, deferred or eliminated any component of the Conective Year 2000 TIO upgrade. Without any showing of some specific benefit—namely, the acceleration, deferral, or elimination of some other upgrade—FPL has failed to meet the “system benefit” test of section 37.2 of the PJM tariff.

61. FPL reiterates its assertion that language in Order Nos. 2003 and 2003-A indicates that benefits to the system should be defined more broadly, because those orders stressed the general reliability benefits and greater competition in power markets that would result from a policy that encourage the interconnection of new generation facilities.<sup>112</sup> FPL takes the quotations from Order No. 2003-A out of context. FPL’s quotations explain why in the context of non-independent transmission owners, the Commission determined that the interconnection customer would receive a credit toward its network upgrades. The Commission found that because these network upgrades can provide unquantifiable system benefits, and because non-independent transmission owners may have an interest in frustrating rival generators, it would adopt a “simple” test under which all network upgrades would be considered to provide system benefits and interconnection customers would receive a credit for such construction.<sup>113</sup>

62. However, for independent transmission owners the Commission permitted the use of the “but for” test under which the interconnection customer is responsible for the cost of network upgrades that were necessary only because of its project, even though such upgrades may provide some system benefit. As the Commission stated:

[U]nder the right circumstances, a well-designed and independently administered participant funding policy for Network Upgrades offers the potential to provide more efficient price signals and a more equitable allocation of costs than the crediting approach. The Commission notes that the transmission pricing policies that the Commission has permitted for an RTO or ISO with locational pricing, in which the Interconnection Customer bears the cost of all facilities and upgrades that would not be needed but for the

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<sup>112</sup> Request for Rehearing at 11-13.

<sup>113</sup> Order No. 2003 at P 21, 696, 701.

interconnection of the new Generating Facility and receives valuable transmission rights in return, are acceptable forms of participant funding.<sup>114</sup>

63. While it may be true that network upgrades provide some generalized system-wide benefit, under the “but for” test applied under the PJM tariff, the interconnection customer receives no credit for such benefits if the upgrade would not have been built “but for” the interconnection. FPL cites to no statement by the Commission where the Commission has suggested that in administering the “but for” test, the RTO is required to make a non-quantitative judgment as to the extent of the potential generalized benefits provided by an upgrade, and section 37.2 of the PJM tariff does not impose such a non-quantitative standard. Rather, the PJM tariff requires a specific determination that such benefits must be associated with accelerating, deferring, or eliminating the actual construction of upgrades by another party.

64. Turning to the evidence presented by FPL, we find that FPL has brought no new facts to the Commission in its request for rehearing. FPL again points to the fact that, when the Mickleton-Monroe circuit was first constructed, forty years ago, an open position for a second line was constructed, so that a second line could be added as necessary. FPL points to the fact that the construction of this open second position added to the costs of the initial construction of the Mickleton-Monroe circuit, and asserts that those costs would not have been incurred had it not been contemplated that a second line would certainly be needed. FPL also points to the fact that other, similar circuits were constructed without this second open position.

65. At best, this fact shows that the original developers of the Mickleton-Monroe circuit believed that there was a chance such a second line might be needed. This is a far cry from serving as actual proof that this second line was necessary at the time that the Mickleton-Monroe circuit was constructed, or, most crucially under the PJM tariff, that the construction of such a second line accelerated, deferred, or eliminated another project. Moreover, as PJM points out, the fact that for forty years no second line was added, until FPL proposed its Marcus Hook project, suggests equally strongly that no need existed for this second line. In fact, the Commission in *CED Rock Springs*, as affirmed by the D.C. Circuit, rejected an argument that such generalized benefit is sufficient to satisfy the “but for” test:

And while the 500 kV capacity of their substation and transmission lines more than doubles the maximum output of their generation units, this additional capacity is not evidence

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<sup>114</sup> *Id.* P 695.

that the PJM Transmission System would have added facilities such as these absent Petitioners' need to interconnect. FERC reasonably attributed this extra capacity to the need for the interconnection facilities to match the transmission capacity of the grid so as not to adversely affect the reliability of the grid. Because Section 37.2 requires evidence that facilities would have been built "but for" a [generation interconnection customer's] need to interconnect for the [generator interconnection customer] to receive any credit towards interconnection construction costs, FERC reasonably assigned to Petitioners 100 percent of interconnection costs and denied their rate filing for reimbursement of these costs.<sup>115</sup>

Similarly here, the fact that the Mickleton-Monroe circuit will utilize the second tower<sup>116</sup> and provide an increase in transmission capacity does not demonstrate that this extra capacity would have been needed absent the FPL generation project.

#### **D. Other Issues**

##### **1. Incremental Auction Revenue Rights Accruing to FPL**

66. In the Order on Remand Denying Complaint, the Commission found that under the "but for" test, rather than receiving transmission credits for building network upgrades, generation interconnection customers receive financial transmission rights, termed Incremental Auction Revenue Rights (IARRs), for building such upgrades.<sup>117</sup>

67. On rehearing, FPL claims that IARRs are "a measure of energy congestion relief, which is separate from the reliability system benefit of network upgrades," and thus should not be considered as part of the inquiry into whether an upgrade provides system benefits under section 37.2.<sup>118</sup> FPL states that, absent the separation of these two

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<sup>115</sup> *Old Dominion*, 518 F.3d at 51 (citation omitted).

<sup>116</sup> The presence of the open position on the tower may have reduced the interconnection costs to FPL because, without this position, FPL might well have been required to build even more additional facilities. But the mere presence of the open position does not demonstrate that the second line would have been needed absent the FPL project.

<sup>117</sup> Order on Remand Denying Complaint at P 32, 34.

<sup>118</sup> Request for Rehearing at 24.

concepts, “a network upgrade that incontrovertibly provided a system benefit by eliminating a discrete RTEP upgrade would be disqualified from receiving [credit] because of the potential for IARRs. . . . [T]his approach would eliminate all recognition of system benefit for all upgrades in contravention of the plain language of Section 37.2.”<sup>119</sup>

68. FPL misconstrues the Commission’s determination. In discussing financial transmission rights in the Order on Remand Denying Complaint, the Commission was responding to FPL’s argument that it should be provided with a cost reduction, not because its project displaced another project, but because its project may provide general system reliability benefits. As the Commission stated:

In Order No. 2003, the Commission found that in RTO markets like PJM’s, generators can receive financial rights, as opposed to the credits available in non-RTO markets for upgrades that, like FPL Energy’s, may provide future benefit, but do not offset currently planned projects.<sup>120</sup> FPL Energy’s claim that it should receive offsets or credits for the potential value of its upgrades is equivalent to a request that it receive credits for all network upgrades. But this is precisely the position that the Commission found in Order No. 2003 would not be required for RTOs. Under Order No. 2003 and the PJM tariff, generation interconnection customers are not entitled to credits equal to the cost of facilities simply for building network upgrades that may potentially provide system benefits. Instead of credits, they may receive IARR[s] if such upgrades expand the transmission capacity of PJM’s system.<sup>121</sup>

69. The Commission was not, as FPL claims, finding that a network upgrade that incontrovertibly provided a system benefit by eliminating a discrete RTEP upgrade would be disqualified from receiving credit because of the potential for IARRs. As we have explained in both the Order on Remand Denying Complaint and this order, FPL would be entitled to receive credit for any network upgrade that genuinely provides system benefit, because it meets the section 37.2 test of eliminating, deferring, or

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<sup>119</sup> *Id.*

<sup>120</sup> Order No. 2003 at P 695, 700 (footnote in quoted text).

<sup>121</sup> Order on Remand Denying Complaint at P 34.

accelerating another upgrade. If FPL's project displaced another project or part of the project, and FPL did not receive a credit, then the other earlier queued project would not be paying the full costs of its upgrade. The provision of a credit in this case therefore maintains the integrity of the "but for" test by ensuring that each project pays 100 percent of the costs imposed by that project on the system as it exists at the time of the interconnection request.

## 2. Evidentiary Hearing and Late Interventions

70. In response to FPL's argument that a trial-type hearing was required by the court remand, the Commission found that a trial-type hearing was not necessary to resolve the questions remanded by the court. The Commission found that the court had not specified any specific procedures to be followed on remand, that the Commission had established a sufficient process to resolve the remanded issue, and that FPL had not proffered sufficient evidence to require a hearing on these issues.<sup>122</sup>

71. The Commission also granted the motions to intervene of the Indicated PJM Transmission Owners and Old Dominion Electric Cooperative, who had argued that the Commission's order after the remand requiring FPL and PJM to brief new issues expanded the scope of this complaint case beyond a dispute between two private parties to a more generic proceeding. The Commission agreed, granting the late interventions "in light of the new and more generic issues" raised by the court's remand and the Commission's briefing requirement.<sup>123</sup>

72. FPL asserts that the Commission erred by refusing to grant an evidentiary hearing before deciding this case.<sup>124</sup> It states that it disputed several factual propositions underlying the Order on Remand Denying Complaint,<sup>125</sup> and that, therefore, it was

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<sup>122</sup> Order on Remand Denying Complaint at P 37-39 and n.39 (citing *Union Pac. Fuels, Inc. v. FERC*, 129 F. 3d 157, 164 (D.C. Cir. 1997) (*Union Pacific*); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993); *Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992); *Wisc. Gas Co. v. FERC*, 770 F.2d 1144, 1167 n.41 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986)).

<sup>123</sup> Order on Remand Denying Complaint at P 7.

<sup>124</sup> Request for Rehearing at 24-26.

<sup>125</sup> FPL includes, as disputed factual issues, certain propositions it claims underlie the Order on Remand Denying Complaint, including that: (a) the interconnection process was transparent to it, (b) the PJM tariff required base case data to be available to a generator, (c) TOI projects were available to a generator, (d) FPL first raised issues a year

(continued...)

inappropriate for the Commission to rule summarily on the system benefit question. In particular, FPL claims that facts about whether double-circuited towers are routinely built is germane to the resolution of this case and must be resolved through a hearing.

73. PJM responds in its answer that the Commission appropriately exercised its discretion to decide this case after a paper hearing. It notes that the court did not specifically require an evidentiary hearing, and that the Commission did not need to take evidence to interpret the meaning of the PJM tariff, as a matter of law. PJM states that the Commission did, however, direct the parties to submit affidavits with their briefs providing facts relevant to the Commission's ruling, and that, based on FPL's factual assertions, the Commission found that FPL had failed to identify any project that was or would have been affected or accelerated by the Mickleton-Monroe upgrade. PJM states that the Commission properly relied on two facts, namely: (1) that FPL executed the ISA setting forth its full \$10 million cost responsibility for the Mickleton-Monroe upgrade, and (2) the fact that the open position for the second line on the Mickleton-Monroe circuit remained unused for forty years until FPL proposed its Marcus Hook project. PJM states that, to justify an evidentiary hearing, a complainant must provide more than mere allegations of disputed facts; its must make an actual proffer of evidence to support its allegation, and FPL has failed to do so.<sup>126</sup>

74. FPL also asserts that the Commission erred in granting the untimely motions to intervene in this proceeding because the expanded scope of issues said to justify the late interventions is itself not permissible under the court's remand. According to FPL, because those new and generic issues arise solely from the Commission's impermissible expansion in the scope of the remand, it was therefore error to accept the late interventions.<sup>127</sup>

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after a higher-queued project filed for bankruptcy, (e) the RTEP documents took into account TOI upgrades, (f) TOI upgrades were posted on the PJM website, (g) TOI upgrades were included in the RTEP system model, (h) the existence of double-circuited towers only suggests good business judgment by a transmission owner, and (i) there are no projects, either RTEP or non-RTEP, that were deferred or eliminated by the Mickleton-Monroe upgrade. FPL also asserts that PJM's claim that circuits containing two positions were routinely constructed was disproved in this proceeding, thus rendering evidentiary proceedings regarding PJM's claims even more critical. Request for Rehearing at 25-26.

<sup>126</sup> PJM Answer at 14-17.

<sup>127</sup> Request for Rehearing at 2, 20 n.22.

75. We deny rehearing on both of these issues. With regard to an evidentiary hearing, the Commission need not hold an evidentiary hearing when “there are no material issues of fact in dispute that cannot be resolved on the basis of the existing written record.”<sup>128</sup> The Commission provided FPL with a full opportunity to brief the legal issues and present factual evidence supporting its position. As discussed earlier, we have rejected FPL’s interpretation of section 37.2 of the PJM tariff to require a credit be provided for indeterminate generalized system benefits. We have found that the PJM tariff provides credits only in circumstances in which a project accelerates, defers, or eliminates the construction of another project. Although given a full opportunity, FPL failed to present any evidence that a specific RTEP or non-RTEP project preceding its position in the queue was accelerated, deferred, or eliminated as a result of the Mickleton-Monroe upgrade. This, therefore, is not a case where a trial-type hearing is needed because “motive, intent, or credibility are at issue.”<sup>129</sup>

76. With regard to interventions, the standard for granting late intervention is found in Rule 214(d)(1)(i) of the Commission’s Rules of Practice and Procedure,<sup>130</sup> which requires the decisional authority acting on a motion for late intervention to consider whether the movant had good cause for failing to move to intervene within the period prescribed by the Commission. In the Order on Remand Denying Complaint, we found that the movants had met this standard, on the basis of “the new and more generic issues” that would be considered in this phase of the proceeding.<sup>131</sup> We therefore exercised our discretion in favor of compiling a complete record on the remanded issue.<sup>132</sup>

**E. Appropriate Version of Section 37.2 to Analyze**

77. In FPL’s complaint, it cited the then current version of section 37.2 of the PJM tariff, rather than the version in effect at the time of FPL’s interconnection request.<sup>133</sup>

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<sup>128</sup> *Transwestern Pipeline Co.*, 122 FERC ¶ 61,165, at P 16 (2008).

<sup>129</sup> *Union Pacific*, 129 F.3d at 164.

<sup>130</sup> 18 C.F.R. § 385.214(d) (2007).

<sup>131</sup> Order on Remand Denying Complaint at P 7.

<sup>132</sup> See *Nat. Gas Pipeline Co. of Am.*, 102 FERC ¶ 61,355, at P 7-8 (2003) (parties permitted late intervention on basis that “good cause exists to allow them to intervene out of time because they had no reason to believe that the Commission would be taking steps in developing a generic standard for creditworthiness”).

<sup>133</sup> FPL Complaint at 11-12.

When PJM pointed this out in its brief, the Commission determined that the proper version to use was the one in effect at the time of the interconnection request.<sup>134</sup>

78. FPL asserts that the Commission erred in the Order on Remand Denying Complaint by basing its textual analysis on a version of section 37.2 other than that reviewed by the court in its Remand Decision. FPL argues that the court directed the Commission to consider the specific tariff section that had been before the court, and the Commission was required to consider that version.<sup>135</sup>

79. The Commission denies rehearing on this question. Contrary to FPL's assertion, the court did not specifically direct the Commission to consider, on remand, the language of the 2003 version of section 37.2 of the PJM tariff, as opposed to the 2001 version of section 37.2. At the time that this case was before the court, no party was aware of, or brought to the court's attention, the Commission's and parties' error in using the 2003 version. Thus, the court itself could not know that there were two different versions of section 37.2, and could hardly have expressly instructed to the Commission to analyze the meaning of "system benefit" under the 2003 rather than the 2001 version.

80. At the time that FPL executed its ISA with PJM in January 2002, the version of section 37.2 of the PJM tariff was the "2001 version," rather than the "2003 version." Thus, that version of section 37.2 properly governs the relationship between the parties at the time that the ISA was executed. Moreover, as discussed earlier, we would reach the same conclusion here regardless of the version used. Indeed, the version on which FPL would like us to rely clarified that the reference to "unplanned" upgrades does not refer to indeterminate generalized benefits as FPL argues, but instead to transmission owner initiated projects that have been planned outside the formal RTEP process.

## **F. Conclusion**

81. We reaffirm our finding that FPL failed to raise its concerns about PJM's determination of benefits within the time required by the PJM tariff and that section 37.2 is not unjust and unreasonable, but serves the important goal of resolving disputes before they can affect other parties in the interconnection queue. We further find in response to the court's remand, that section 37.2 of the PJM tariff does include projects outside of the formal RTEP process. But, we reaffirm our conclusion that FPL has failed to show that any such projects existed at the time of its interconnection that were eliminated, deferred, or accelerated by FPL's project. Accordingly, we deny FPL's rehearing request.

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<sup>134</sup> Order on Remand Denying Complaint at P 5 n.9.

<sup>135</sup> Request for Rehearing at 10 n.9.

The Commission orders:

The request for rehearing is hereby denied in all respects, as discussed in the body of the order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.