

140 FERC ¶ 61,052
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Primary Power, LLC

Docket Nos. ER10-253-001
EL10-14-001

ORDER ON REHEARING AND CLARIFICATION

(Issued July 19, 2012)

1. On May 13, 2010, the PSEG Companies (PSEG)¹ and certain PJM transmission owners (PJM Owners Group)² requested rehearing of the Commission's April 13, 2010 Declaratory Order in this proceeding.³ The April 13 Order addressed Primary Power, LLC's (Primary Power) requests for transmission rate incentives and assurances that it

¹ The PSEG Companies are Public Service Electric and Gas Co., PSEG Power LLC and PSEG Energy Resources & Trade LLC (PSEG).

² The PJM Owners Group is American Electric Power Service Corp. on behalf of Appalachian Power Co., Columbus Southern Power Co., Indiana Michigan Power Co., Kentucky Power Co., Kingsport Power Co., Ohio Power Co. and Wheeling Power Co. (AEP); Baltimore Gas and Electric Co.; Virginia Electric and Power Co. d/b/a Dominion Virginia Power (Dominion); Exelon Corp.; Monongahela Power Co., The Potomac Edison Co. and West Penn Power Co., d/b/a FirstEnergy Corp., Trans-Allegheny Interstate Line Co. and Jersey Central Power & Light Co., Metropolitan Edison Co. and Pennsylvania Electric Co. (FirstEnergy); the PPL PJM Companies (PPL Electric Utilities Corp.; PPL EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; PPL University Park, LLC and Lower Mount Bethel Energy, LLC); Pepco Holdings, Inc. and its affiliates Potomac Electric and Power Co., Delmarva Power & Light Co. and Atlantic City Electric Co.; and PSEG.

³ *Primary Power, LLC*, 131 FERC ¶ 61,015 (2010) (April 13 Order) (granting rate incentives, conditioned on PJM including project in the RTEP as a baseline reliability or economic project).

was eligible to build an economic expansion project under the PJM Interconnection, L.L.C. (PJM) Regional Transmission Expansion Plan (RTEP) procedures.⁴ Primary Power seeks to construct a cost-of-service or cost-based project as a non-incumbent transmission developer.⁵ In this order, the Commission denies the PSEG's and PJM Owners Group's requests for clarification and rehearing, as discussed below, affirming its determination, based on the language of the regional planning procedures, that PJM Interconnection, L.L.C. (PJM) may designate Primary Power, LLC, a non-incumbent transmission owner, to build an economic expansion or enhancement project and receive cost-based or cost-of-service compensation, as a PJM Transmission Owner,⁶ for the use of its facilities. The order also grants a requested clarification that the Commission's April 13 Order did not establish a preference for market participant sponsors of proposed projects or otherwise add requirements in PJM's consideration of proposals under its regional planning procedures.

⁴ These procedures are provided in the PJM Amended and Restated Operating Agreement, FERC Electric Rate Schedule No. 24 (Operating Agreement), Schedule 6, Regional Transmission Expansion Planning Protocol (RTEP procedures).

⁵ The PJM Owners Group appears to use the term "merchant transmission" developer to describe any third-party developer. In Order No. 1000, the Commission instead used the term non-incumbent transmission developer to cover this broad category, while using the term "merchant transmission" (developer or facility) to describe a narrower category in which the costs of constructing a proposed transmission facility will be recovered through negotiated rates instead of cost based rates. We will maintain that distinction here. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012), 139 FERC ¶ 61,132 (2012).

⁶ Under the PJM Operating Agreement, the term "Transmission Owner" (as capitalized) refers to an incumbent transmission owner that "owns or leases with rights equivalent to ownership Transmission Facilities and is a signatory to the PJM Transmission Owners Agreement." It does not refer to future or potential owners of transmission facilities that will become "Transmission Owners" upon the in-service date of their facilities.

I. Background

A. Primary Power's Petition

2. On November 10, 2009, Primary Power filed a petition for declaratory order (Petition) pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, requesting transmission rate incentives under the Federal Power Act (FPA) section 219 and Order No. 679,⁷ and assurances that it would be designated to build its proposed Grid Plus Transmission System (Grid Plus) project as an economic project if the project was selected for inclusion in the PJM RTEP.⁸ In addition, Primary Power requested a determination that it would be eligible for cost-of-service rate treatment if Grid Plus was included in RTEP.⁹ Primary Power stated that it was submitting Grid Plus for approval as an economic project for inclusion in the PJM RTEP.¹⁰ Primary Power was concerned that the RTEP procedures could be interpreted to authorize PJM to designate another entity to construct its project.

3. In its Petition, Primary Power specifically requested that the Commission: (1) find that PJM must designate it to own, construct, and finance Grid Plus if it is included in the RTEP; (2) direct PJM to make changes to the standard terms and conditions for interconnection under the PJM Open Access Transmission Tariff (OATT) to allow Primary Power's cost-of-service rates; and (3) allow cost-based rate recovery through

⁷ 16 U.S.C. § 825s (2006); *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007).

⁸ Grid Plus is proposed as four 500 MVar (500+/100-) Static Var Compensators (SVC) in the franchised service territories of Allegheny Power, FirstEnergy, and PPL, with a combined cost of \$200 million. Specifically, the SVC facilities consist of 500+ MVar capacitive, and 100- or more inductive, depending on location. Two SVCs are planned for Jacks Mountain in Mifflin County, Pennsylvania, one SVC is planned for the Juniata substation in Perry County, Pennsylvania, and one SVC is planned on the Meadowbrook 500 kV line in Hardy County, West Virginia.

⁹ The April 13 Order also rejected an attempt by Primary Power to unilaterally file under FPA section 205 proposed terms to be included in a future interconnection service agreement with PJM. No Party objects on rehearing to the Commission's rejection of the proposed terms or transmission incentive findings.

¹⁰ April 13 Order, 131 FERC ¶ 61,015 at P 49; Primary Power Dec. 28, 2009 Answer at 8 (Answer).

Schedule 12 of the PJM OATT conditioned on Grid Plus being included in the PJM RTEP. Primary Power stated that, as of the date of the Petition, it had spent five years and hundreds of thousands of dollars to develop Grid Plus, and that it would be unfair and would discourage innovation if PJM were to designate another entity to build Grid Plus.¹¹

4. Primary Power explained that it submitted Grid Plus to PJM for review pursuant to a July 30, 2008 merchant transmission interconnection request and received queue positions, because there was no clear place in the PJM process to include independent transmission projects such as Grid Plus. Primary Power explained that the only practical path available for Grid Plus was the merchant review process, as it was being developed by a non-incumbent transmission developer.¹² Primary Power asserted that Grid Plus could not be financed except on a cost-of-service basis and asked to work within the RTEP procedures to achieve prompt and equitable results to this end.¹³

B. The April 13 Order

5. In the April 13 Order, the Commission declined to grant the relief requested by Primary Power to find that PJM must designate Primary Power to build Grid Plus if it is included in the RTEP. The Commission found instead that the PJM Operating Agreement permitted, but did not require, PJM to designate an entity other than an incumbent transmission owner, such as Primary Power, to build a project that is included in the RTEP as a baseline reliability project or economic project.¹⁴ The Commission determined that PJM must designate projects under the relevant Operating Agreement and OATT provisions in a not unduly discriminatory manner, whether sponsored by transmission owners or others.¹⁵

¹¹ Primary Power Petition at 4, 6, 72-78.

¹² *Id.* at 22; *see also* Primary Power Answer at 3; Primary Power Feb. 12, 2010 response to deficiency letter at 4 (Deficiency Response).

¹³ Primary Power Answer at 3; Primary Power Petition, Brozina testimony at 20; Deficiency Response at 4.

¹⁴ Reliability projects are upgrades or enhancements that PJM identifies in the RTEP to address reliability concerns. Economic projects are upgrades or enhancements included in the RTEP to relieve transmission congestion in accordance with the cost-benefit analysis established in the RTEP procedures, section 1.5.7.

¹⁵ April 13 Order, 131 FERC ¶ 61,015 at P 62.

6. The Commission found that the RTEP procedures, specifically sections 1.5.7(c)(iii) and 1.5.6(f) of Schedule 6 of the PJM Operating Agreement, permit PJM to designate not just transmission owners, but also entities other than incumbent transmission owners, to construct projects. To support its holding, the Commission cited to section 1.5.7(c)(iii) of the Operating Agreement which permits any market participant to submit a proposal to construct an “additional” economic-based enhancement (i.e., an enhancement that is not already included in the plan recommended by PJM). The Commission also found that section 1.5.7(c)(iii) of the RTEP procedures allows PJM to designate the entity that is responsible for constructing and owning such additional economic enhancements.¹⁶

7. The Commission further found that the PJM OATT does not prevent a non-incumbent transmission developer from seeking cost-based rate recovery if its project is included in the RTEP and satisfies the same reliability and/or economic requirements that are set forth in the PJM OATT and Operating Agreement for other transmission owner cost-based projects.¹⁷ Under the terms of the PJM OATT in effect at the time of the April 13 Order, the Commission found that as a merchant transmission project, Primary Power was not eligible for cost-based rates and rejected Primary Power’s requested effective date for cost-based rate treatments as premature.¹⁸ The Commission found that cost-based projects must satisfy more stringent conditions designed to ensure that these projects are necessary investments to ensure reliability and that, for economic projects, the benefits of the project exceed the costs.¹⁹

8. The Commission also found that, given PJM’s and Primary Power’s concerns about the clarity of PJM’s RTEP procedures, to the extent that PJM believed that additional language would be helpful in processing such filings, it may make a filing under FPA section 205 to clarify the relevant provisions of its OATT or Operating Agreement. The Commission found that as part of the RTEP process, PJM would

¹⁶ *Id.* PP 63, 64. Section 1.5.6(g) provides terms for designating cost responsibility for projects in the recommended plan developed by PJM unless otherwise specified.

¹⁷ *Id.* P 62.

¹⁸ *Id.* P 68.

¹⁹ *Id.*

allocate cost responsibility for the cost-based rate treatments of Grid Plus, should it be approved as a reliability or economic project.²⁰

9. Similarly, in response to PJM's request regarding the evaluation of Primary Power with respect to two competing projects, the Commission found that "because we are not designating Primary Power to build the project, the Commission considers PJM's concern to be moot. PJM must evaluate Primary Power's proposal in the same manner as any proposed cost-based project in the RTEP process, and should use its procedures for evaluating competing projects."²¹

II. Requests For Rehearing and Clarification and Responsive Pleadings

10. On May 13, 2010, the PJM Owners Group filed a request for rehearing of the Commission's April 13 Order, and PSEG filed a request for rehearing and clarification. On June 14, 2010, Primary Power filed an answer to the requests for rehearing and clarification.

11. The PJM Owners Group and PSEG both seek rehearing of the April 13 Order, questioning: (1) whether the Commission properly found that the PJM Operating Agreement permits PJM to designate parties other than existing transmission owners to build economic upgrades in the zone of an existing transmission owner;²² (2) whether Primary Power is eligible for cost-based rate recovery, despite its presence in the PJM interconnection queue as a merchant transmission project;²³ and (3) whether the Commission impermissibly introduced requirements in the RTEP procedures that PJM must recognize (sponsorship and proprietary rights) and treat non-incumbent transmission developers' proposals comparably to incumbent transmission owners' projects. PSEG requests clarification on the latter two issues.²⁴

12. The PJM Owners Group and PSEG present a number of grounds in support of their argument that PJM cannot designate Primary Power to build its economic project. PSEG argues that evidence dating to the incorporation of PJM as a Regional

²⁰ *Id.* PP 69-72.

²¹ *Id.* P 71.

²² *See* PSEG Rehearing at 6-17.

²³ *Id.* at 23-25; PJM Owners Group Rehearing at 18-23.

²⁴ PSEG Rehearing at 3-4. PSEG otherwise seeks rehearing on these issues.

Transmission Organization (RTO) demonstrates that only incumbent transmission owners or merchant transmission developers and parties willing to bear the cost of projects may be designated to build RTEP projects. PSEG argues that the RTEP procedures section 1.5.6(f) establishes a right of first refusal that precludes PJM from designating Primary Power to construct and own the project. The PJM Owners Group argues that the interaction of the PJM Operating Agreement, OATT and Owners Agreement establish a right of first refusal, embodied in the contractual bargain made by the transmission owners in PJM in establishing the RTO.²⁵ PSEG and the PJM Owners Group argue that policy considerations weigh against interpreting the PJM RTEP procedures to permit PJM to designate entities other than incumbent transmission owners from constructing and owning RTEP projects. The PJM Owners Group and PSEG argue that the Commission's failure to recognize a right of first refusal raises constitutional issues and is contrary to the holding in *Atlantic City*.²⁶

III. Procedural Matters

13. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2012), provides that the Commission will not permit answers to requests for rehearing. Accordingly, we will reject Primary Power's answer to the requests for rehearing.

14. The PJM Owners Group submits additional testimony to support their positions.²⁷ As the Commission has stated, it is reluctant to chase a "moving target" by considering

²⁵ Citing PJM Consolidated Transmission Owners Agreement (Owners Agreement), *available at* <http://www.pjm.com/documents/agreements.aspx> .

²⁶ *Atl. City Elec. Co. v. FERC*, 295 F.3d 1(D.C. Cir. 2002) (*Atlantic City*); *Atl. City Elec. Co. v. FERC*, 329 F.3d 856 (D.C. Cir. 2003) (*Atlantic City II*).

²⁷ PJM Owners Group Rehearing, Exh. A, Affidavit of J. Bailey, Dominion Manager – Electric Transmission Planning (describing Dominion experience in proposing an RTEP project and PJM's revision and designation of Dominion and another Transmission Owner to build the approved upgrades) and Exh. B, Affidavit of S. Glatz, PPL Manager Transmission Regulatory and Business Affairs (describing PPL's experience submitting proposals to PJM to resolve reliability violations and explaining that PPL never had an expectation that it held any exclusive right to the projects that it submitted).

new evidence presented for the first time at the rehearing stage of Commission proceedings.²⁸ Consequently, we reject these exhibits.²⁹

IV. Clarification and Rehearing

15. As discussed more fully below, we deny rehearing and continue to find, under the RTEP procedures as set forth in the Operating Agreement, that PJM has the ability to designate a non-incumbent transmission developer to construct economic upgrades under the PJM Operating Agreement, OATT and other applicable materials. We grant PSEG's requested clarification that Primary Power will not be considered as a merchant transmission provider under PJM's Operating Agreement, Owners Agreement, OATT and other applicable materials, but rather should be treated comparably to any transmission owner or other entity constructing economic upgrades using cost-based rates as provided in the applicable documents and agreements. We also clarify below that the Commission is not creating a special presumption that Primary Power would be designated to build its proposed project as a "sponsor" of the project or otherwise adding requirements in PJM's consideration of proposals under its RTEP procedures.

A. Right of First Refusal for Economic Projects

1. April 13 Order

16. In the April 13 Order, the Commission found that the RTEP procedures found in Schedule 6, sections 1.5.7(c)(iii) and 1.5.6(f) of the PJM Operating Agreement permit PJM to designate an entity other than an incumbent transmission owner to build an economic project under cost-based rates. In particular, the Commission found that section 1.5.7(c)(iii) authorizes any market participant to propose to construct an "additional economic-based enhancement or expansion," with PJM to designate the entity or entities responsible for constructing and owning the enhancement. Schedule 6, section 1.5.7(c)(iii) states (emphasis added):

²⁸ *Idaho Power Co.*, 137 FERC ¶ 61,235, at P 14 (2011); *Southern Cal. Edison Co.*, 137 FERC ¶ 61,016, at P 11 (2011); *Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152 (2010); *Philadelphia Elec. Co.*, 58 FERC ¶ 61,060, at 61,133 & n.4 (1992).

²⁹ Even if we were to accept this extra-record evidence, it would not change our ruling on the merits, as it does not undermine our conclusions in the April 13 Order, but only reflects that PJM has the authority to decide whether an entity proposing a project will be designated to build it, or whether some alternate proposal will be pursued.

The Office of the Interconnection shall evaluate whether including any additional economic-based enhancements or expansions in the Regional Transmission Expansion Plan or modifications of existing Regional Transmission Expansion Plan reliability-based enhancements or expansions would relieve an economic constraint. In addition, **any market participant at any time may submit to the Office of the Interconnection a proposal to construct an additional economic-based enhancement or expansion to relieve an economic constraint.** . . . Upon consideration of the advice of the Transmission Expansion Advisory Committee, the PJM Board shall consider any new economic-based enhancements and expansions for inclusion in the Regional Transmission Plan and for those enhancements and expansions it approves, the PJM Board shall designate (a) **the entity or entities that will be responsible for constructing and owning or financing the additional economic-based enhancements and expansions**, (b) the estimated costs of such enhancements and expansions, and (c) the market participants that will bear responsibility for the costs of the additional economic-based enhancements and expansions pursuant to section 1.5.6(g) of this Schedule 6.

17. In addition, the Commission found that the language “or other entities” in section 1.5.6(f) also authorized PJM to designate a non-incumbent developer of transmission facilities to construct, own, and finance an economic-based project if it is included in the RTEP as a transmission enhancement or expansion.³⁰ Section 1.5.6(f) states in relevant part (emphasis added):

For each enhancement or expansion that is included in the recommended plan, the plan shall consider, based on the planning analysis: other input from participants, including any indications of a willingness to bear cost responsibility for such enhancement or expansion; and, when applicable, relevant projects being undertaken to ensure the simultaneous feasibility of Stage 1A [Auction Revenue Rights (ARRs)], to facilitate Incremental ARR pursuant to the provisions of Section 7.8 of Schedule 1 of this Agreement or to facilitate

³⁰ April 13 Order, 131 FERC ¶ 61,015 at PP 63-64.

upgrades pursuant to Parts II, III or IV of the PJM Tariff, **and designate one or more Transmission Owners or other entities to construct, own and, unless otherwise provided, finance the recommended transmission enhancement or expansion.**

18. PJM and the PJM transmission owners cited to a subsequent clause in section 1.5.6(f) as establishing a right of first refusal. This clause states: “To the extent that one or more Transmission Owners are designated to construct, own and/or finance a recommended transmission enhancement or expansion, the recommended plan shall designate the Transmission Owner that owns transmission facilities located in the Zone where the particular enhancement or expansion is to be located.” With regard to this clause, the Commission found that “that section applies by its own terms ‘to the extent that one or more Transmission Owners are designated.’ The ‘to the extent’ clause does not provide for reassignment of projects assigned to ‘other entities.’”³¹

19. The Commission also responded to concerns that the PJM OATT and Operating Agreement lacked specific procedures to process such proposals and stated that, “[g]iven PJM and Primary Power’s concerns about the clarity of PJM’s Tariff, to the extent that PJM believes that additional tariff language would be helpful in processing such filings, it may make a filing under FPA section 205 to clarify its tariff.”³²

2. Requests for Rehearing

20. PSEG argues that the Commission acted arbitrarily in finding that PJM could designate parties other than incumbent transmission owners to build a reliability or economic project in the zone of the existing transmission owner.³³ It argues that a right of first refusal prevents PJM designating Primary Power to build a reliability or economic project in the zone of the existing transmission owner.³⁴ PSEG and the PJM Owners Group argue that, in finding that PJM may designate Primary Power to build its project, the Commission improperly and unilaterally modified the PJM Transmission Owners’

³¹ *Id.* PP 64-65.

³² *Id.* P 66.

³³ PSEG Rehearing at 6-12.

³⁴ *Id.* at 12-17.

delegation of authority to the PJM RTO, in violation of their section 205 rights, the *Atlantic City* decisions,³⁵ and the Constitution's takings clause.³⁶

21. The PJM Owners Group argues that the currently effective methodology for third party participation in transmission development and construction is the merchant transmission process, and the Commission cannot ignore this process and find a new avenue for third party participation.³⁷

22. The PJM Owners Group argues that the Commission may not abrogate the existing RTEP procedures without first finding that they are unjust and unreasonable, and then demonstrating that the new proposed rate revisions are just and reasonable and not unduly discriminatory or preferential.³⁸

23. The PJM Owners Group argues that allowing third party developers to be included in the RTEP for cost-based reliability projects would conflict with the Commission's goal of promoting reliable and efficient energy for consumers. The PJM Owners Group states that this would create a scenario where each PJM zone could become fragmented with numerous third party developers owning, maintaining, and operating reliability projects of their choice supported by cost-based rates. The PJM Owners Group states that such "fragmentation ... will require greater coordination among more parties and expense to maintain reliability... reduce economies of scale and scope, resulting in a less economically efficient transmission system."³⁹

24. The PJM Owners Group and PSEG argue that the Commission's interpretations of the reference to "other entities" in section 1.5.6(f) of the RTEP procedures in the April 13

³⁵ PSEG Rehearing at 19-21; PJM Owners Group Rehearing at 32-36. Citing *Atlantic City*, 295 F.3d 1; *Atlantic City II*, 329 F.3d 856.

³⁶ PSEG Rehearing at 17-19; PJM Owners Group Rehearing at 37.

³⁷ PJM Owners Group Rehearing at 14-15.

³⁸ *Id.* at 10, 17 (citing 16 U.S.C. § 824a; *Exxon Mobile v. FERC*, 571 F.3d 1208, 1211 (D.C. Cir. 2009); *Panhandle Pipeline Co. v. FERC*, 613 F.2d 1120, 1129 n.47 (D.C. Cir. 1979); *Idaho Power Co. v. FERC*, 312 F.3d 454, 461-62 (D.C. Cir. 2002) (holding that the court will give no deference to FERC's interpretations of a tariff that are inconsistent with prior agency interpretations or directly at odds with the language and logic of the tariff)).

³⁹ *Id.* at 16-17.

Order was wrong. The PJM Owners Group and PSEG cite the filing in which PJM proposed, and the Commission accepted, this provision in which PJM explained: “[e]xcept with respect to merchant transmission facilities, such responsibility [for building facilities] generally will be allocated to the PJM Transmission Owner(s) that own the facilities in the Zone(s) where the new facilities will be built.”⁴⁰ The PJM Owners Group and PSEG argue, therefore, that the “other entities” language refers to merchant projects but was not intended to supplant incumbent transmission owners’ rights to build centrally-planned projects in their own zones. PSEG adds that this language was added to comply with a Commission order requiring PJM to make changes to its Operating Agreement to accommodate merchant transmission projects, quoting the Commission directing PJM to “add language ... that explicitly states that any party may propose a new project- whether a transmission owner, or a third party seeking to build a merchant transmission plant — and the party proposing the project will be responsible for its costs of the project.”⁴¹

25. PSEG adds that the “other entities” language also permits an interconnection customer’s exercise of the option to build certain transmission facilities (such as substations) under the PJM standard interconnection rules, but even then these rules provide for the transfer of title and ownership to the PJM Transmission Owner upon completion and that the interconnection customer may not own such facilities.

26. PSEG states that the Commission erred in finding that “[t]he ‘to the extent’ clause does not provide for reassignment of projects proposed by ‘other entities’ to transmission owners.”⁴² First, PSEG states that “other entities” are only eligible to build market solutions (i.e., market-based rate projects). Second, PSEG states that the Commission’s reasoning creates an implausible scenario where “other entities” can build cost-of-service projects, but at the same time, not be “Transmission Owners” under section 1.5.6(f). PSEG argues that there are only two classes of transmission owners in the PJM OATT: merchant transmission owners and transmission owners who are building non-merchant projects. PSEG states that the latter would be a “Transmission Owner” subject to the right of first refusal in the PJM Operating Agreement.⁴³ PSEG argues that, to the extent

⁴⁰ *Id.* at 25 (citing PJM Compliance Filing, Docket No. RT01-2-006, at 11 (filed March 20, 2003) (2003 Compliance Filing)).

⁴¹ PSEG Rehearing at 9-10 (citing *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,345, at P 26 (2002)).

⁴² *Id.* at 12-13 (citing April 13 Order at P 65).

⁴³ *See* section 1.5.6(f) of the RTEP procedures in Schedule 6 of the PJM Operating

an incoming developer gets to build a non-merchant project for which cost-of-service recovery is available under Schedule 12, this developer could only do so by becoming a Transmission Owner (as defined in the OATT) and would, as such, be subject to the right of first refusal.

27. The PJM Owners Group and PSEG also argue that when they voluntarily formed the PJM RTO, they gave up the right to decide which projects would be built in PJM, and accepted the obligation to build non-merchant projects.⁴⁴ The PJM Owners Group argues that the right of a PJM Transmission Owner to build in its own zone is coterminous with its obligation to build. The PJM Owners Group argues that this right of a transmission owner to build within its own zone is evidenced by section 7.4 of the Consolidated Transmission Owners Agreement (Owners Agreement), which bars the creation of transmission rate zones or subzones smaller than those shown in Attachment J of the PJM OATT. The PJM Owners Group states that new transmission rate zones can only be added to the PJM OATT if PJM's footprint is increased.

28. The PJM Owners Group argues that, in the April 13 Order, the Commission exceeded its statutory authority when it took from incumbent transmission owners the exclusive right to build RTEP cost-of-service transmission projects in their respective zones.⁴⁵ The PJM Owners Group and PSEG state that their exclusive right to build within their transmission zones pre-dates the formation of PJM and while they surrendered the right to plan transmission to PJM when they joined PJM, they never voluntarily surrendered the right to build all cost-of-service transmission projects in their zones.⁴⁶ The PJM Owners Group cites Order No. 2003, which permits transmission owners to retain ownership of stand-alone network upgrades and interconnection facilities. The PJM Owners Group argues that, by permitting a merchant transmission developer to retain ownership of transmission facilities in an RTEP project, the April 13

Agreement.

⁴⁴ PJM Owners Group Rehearing at 25 (citing § 4.2 of the Consolidated Transmission Owners Agreement (Owners Agreement) and § 1.7 of Schedule 6 of the PJM Operating Agreement).

⁴⁵ PJM Owners Group Rehearing at 32 (citing *Atlantic City*, 295 F.3d at 8; *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (finding that "an agency literally has no power to act... unless and until Congress confers power upon it"))).

⁴⁶ PJM Owners Group Rehearing at 32-33; PSEG Rehearing at 20-21.

Order conflicts with this final rule.⁴⁷ The PJM Owners Group and PSEG argue that the approach in the April 13 Order would allow third party developers to cherry pick transmission projects with a more favorable return, while leaving incumbent transmission owners with the remaining less desirable projects as providers of last resort.⁴⁸

29. PSEG states that eliminating the right of first refusal within their own service territories will likely create a disincentive for utilities to join RTOs, because they would see little benefit in an arrangement that deprives them of a right they currently enjoy, while at the same time being obligated to build “leftover” facilities.⁴⁹

30. The PJM Owners Group and PSEG cite to the Owners Agreement, which reserves to utilities those “rights not specifically transferred by the Parties to PJM pursuant to this agreement or any other agreement” and argue that this provision indicates that incumbent transmission owners did not surrender their right to build all cost-of-service transmission projects in their zones.⁵⁰ PSEG states that in Article 4.2.1 of the Owners Agreement the Transmission Owners made a commitment to build RTEP upgrades.⁵¹ PSEG cites Article 5.2 which reserves to transmission owners “the right to build, finance, own, acquire, sell, dispose, retire, merge or otherwise transfer or convey all or any part of its assets, including any Transmission Facilities” and Article 5.4 as reserving rights under the FPA. PSEG concludes that these provisions reserve to transmission owners the sole

⁴⁷ PJM Owners Group Rehearing at 30 (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 230).

⁴⁸ PJM Owners Group Rehearing at 30-31, PSEG Rehearing at 14.

⁴⁹ PSEG Rehearing at 15-16.

⁵⁰ PJM Owners Group Rehearing at 33 (citing Owners Agreement § 5.6; PSEG Rehearing at 21(internal citations omitted)).

⁵¹ PSEG Rehearing at 7-8 (citing Owners Agreement § 4.2.1, stating that “Parties designated as the appropriate entities to construct and own or finance enhancements or expansions applicable to the PJM Region specified in the Regional Transmission Expansion Plan or required to expand or modify Transmission Facilities pursuant to the PJM Tariff shall construct and own or finance such facilities or enter into appropriate contracts to fulfill such obligations” subject to the RTEP procedures and regulatory approvals).

right under the FPA to make section 205 filings regarding any right specifically reserved to them, including the right to build and own transmission in its service territory.⁵²

31. Moreover, the PJM Owners Group state that, in the April 13 Order, the Commission impermissibly established a requirement that PJM “adequately justify its action if it denied the sponsor of the project *the right to construct a project and receive the economic benefit of its project.*”⁵³ The PJM Owners Group states that the Commission has no statutory authority to require PJM to determine who has the right to construct a project, and who has the right to receive an economic benefit of that project.

32. The PJM Owners Group and PSEG argue that the April 13 Order is not consistent with *Atlantic City* and *Atlantic City II*, where the courts found that the Commission had no statutory authority to take away utilities’ filing rights.⁵⁴ The PJM Owners Group and PSEG argue that similarly here, the Commission cannot require zonal transmission owners to give up their rights to build RTEP cost-of-service projects in their respective zones and instead require PJM to determine who should do so.⁵⁵

33. The PJM Owners Group states that in *Northern States Power Co. v. FERC*,⁵⁶ the Court explained that the Commission cannot rely on an asserted need to ensure non-discrimination as a basis to expand its jurisdiction into areas not authorized by Congress. The PJM Owners Group argues that the April 13 Order’s new requirements that zonal transmission owners cede their rights to construct RTEP cost-of-service transmission projects in their respective zones and PJM determine who has the right to construct a project and receive the economic benefit from that project overreaches the Commission’s authority under the FPA.⁵⁷

⁵² *Id.* at 7-8.

⁵³ April 13 Order at P 65.

⁵⁴ PJM Owners Group Rehearing at 34-35 (citing *Atlantic City*, 295 F.3d 1; *Atlantic City II*, 329 F .3d 856 (concurring on a mandamus petition filed by PJM transmission owners that the Commission’s order on remand extended beyond its statutory authority in requiring transmission owners to cede their section 205 filing rights)); PSEG Rehearing at 20-21.

⁵⁵ PJM Owners Group Rehearing at 34-35; PSEG Rehearing at 21.

⁵⁶ *Northern States Power Co. v. FERC*, 176 F .3d 1090 (8th Cir. 1999).

⁵⁷ PJM Owners Group Rehearing at 36-37 (citing *Cal. Indep. Sys. Operator v.*

34. Finally, the PJM Owners Group and PSEG argue that the Commission abrogated their contractual rights to build under the Owners Agreement, and as such, violated the Due Process and Takings clauses of the U.S. Constitution.⁵⁸

3. Commission Determination

35. The Commission affirms the April 13 Order finding that the PJM OATT and Operating Agreement do not prohibit PJM from designating an entity other than an incumbent transmission owner to build and own an economic enhancement if the developer's proposal is approved in the RTEP.⁵⁹ The Commission finds that the language in the RTEP procedures, while ambiguous, does not establish a right of first refusal on behalf of incumbent Transmission Owners and does not preclude a non-incumbent selected in the RTEP process from seeking and receiving cost of service rate recovery under the Federal Power Act. In light of the ambiguity of the Operating Agreement, we examine the underlying orders requiring PJM to establish a process for reviewing economic projects and find that our interpretation of the Operating Agreement is consistent with the Commission's directives in the orders. Based on this analysis, we find that the RTEP procedures for economic projects were designed to provide an opportunity for a wide variety of participants and different business models to propose projects that would be economically beneficial by reducing energy costs by more than the cost of the project. Transmission Owners were permitted to participate in this process, but were neither guaranteed the right to construct the project nor were obligated to undertake such construction.

36. Primary Power represented in its original petition in this proceeding that it was seeking approval of Grid Plus in RTEP as an economic project. Consistent with that classification sought by Primary Power, this order addresses only issues relating to economic projects under the RTEP procedures.

FERC, 372 F.3d 395 (D.C. Cir. 2004) (*CAISO*)).

⁵⁸ PJM Owners Group Rehearing at 13, 37 (citing *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *Lynch v. United States*, 292 U.S. 571 (1934); *Omnia Comm. Co., Inc., v. United States*, 261 U.S. 502 (1923); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003)); PSEG at 17 (citing *San Carlos Irrigation and Drainage Dist. v. United States*, 111 F.3d 1557, 1564 (1997) (irrigation district "deprived of its contractual right to pumping power at cost" was entitled to compensation via the Court of Claims)).

⁵⁹ We address arguments relating to the PJM Owners Agreement at P 58 below.

37. As the rehearing requesters note, as originally constituted, the PJM Owners Agreement required transmission owners to build reliability upgrades as determined by PJM. It imposed no such obligation with respect to economic projects: that is, those projects that may not be needed for reliability, but would reduce the cost of transmission congestion on the PJM. The PJM Operating Agreement and OATT at that time presumed that such economic enhancements would be financed by load or merchant transmission providers in order to reduce congestion identified under the locational marginal cost pricing system employed by PJM.

38. However, when PJM applied for RTO status, the Commission found that its proposed planning procedures provided transmission owners with too large a role in planning and thus required the inclusion of third parties. The Commission explained:

[T]ransmission owners currently have too large a role in planning and expansion decisions and we will eliminate this preferential role. We also will require that PJM have the ultimate responsibility for developing plans and conducting the studies that are currently the responsibility of the transmission owners. In addition, we will allow third parties to construct and own new transmission facilities.⁶⁰

In particular, the Commission identified economic projects that needed to be addressed by PJM's RTO planning procedures and emphasized that third parties, other than merchant transmission projects, should be given an opportunity to construct such projects:

[W]e agree with TransEnergie that the [RTEP procedures] appear[] to limit construction and ownership of new transmission facilities identified by the plan to [transmission owners (TOs)] only, although merchant projects are not precluded. We find that the principle of third-party participation is an important one even though we recognize practical obstacles may prevent third parties from competing effectively with incumbent TOs, at least in the short-run. For example, obtaining rights-of-way under eminent domain authority may not be possible for some third parties.

⁶⁰ See *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,061, at 61,236 (2001) (provisionally granting RTO status and requiring PJM to revise Schedule 6 to permit third parties to participate in constructing and owning new transmission facilities identified in RTEP).

Nevertheless, we find that our long term competitive goals are better served by RTO expansion plans that allow for third party participation as well as permit merchant projects outside the plan.⁶¹

39. In a subsequent order, the Commission again identified the need to provide for economic upgrades to support competition and to provide meaningful opportunities for third parties to participate:

The PJM ISO planning process appears to be driven more by the particular needs of TOs in serving their traditional retail customers than in fostering competitive markets. We therefore found that, to meet the requirements of Order No. 2000, PJM would have to modify Schedule 6 of the [Operating Agreement] to create a planning process that gave full consideration to all market perspectives and identifies expansions that are critically needed to support competition as well as reliability needs and included meaningful opportunities for participation by third parties.⁶²

40. Based on these determinations, PJM filed OATT and Operating Agreement provisions to provide for the construction of cost effective economic projects under cost-of-service rates.⁶³ In order to receive cost-of-service recovery, the party constructing these facilities must demonstrate that the benefits of reducing congestion exceed the cost of the construction. As a result, cost-based economic construction of transmission facilities would provide an avenue for construction that was not being undertaken through merchant transmission.

41. As PJM developed its economic planning process, PJM found that its initial cost-based solution was not producing the expected results.⁶⁴ PJM filed revisions to its

⁶¹ *Id.* at 61,241.

⁶² *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,345, at P 20 (2002).

⁶³ These detailed provisions can be found in the [Operating Agreement, Schedule 6.1.5, Procedure for Development of the Regional Transmission Expansion Plan, §1.5.7](#), “Development of Economic Transmission Enhancements and Expansions” (referred to as section 1.5.7).

⁶⁴ *PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,051, at P 26 (2008) (“PJM is making revisions to its economic planning protocols because its prior methodology did

(continued...)

Operating Agreement provisions designed to revise its study and development procedures for economic based projects. It is reasonable to interpret these revisions as allowing cost-based solutions to be evaluated at the same time and on an equal footing with market-based solutions.⁶⁵

42. Consistent with this history of the requirement to include economic projects, PJM's current OATT and Operating Agreement provide that "entities" other than incumbent Transmission Owners in PJM may be selected to build economic projects. As the Commission noted in the April 13 Order, section 1.5.7(c)(iii) recognizes that any "entity" may apply for cost-based rates to construct economic projects and that PJM may therefore designate "any entity" to construct an economic project. This provision states:

[A]ny market participant at any time may submit to the Office of the Interconnection a proposal to construct an additional economic-based enhancement or expansion to relieve an economic constraint. . . . the PJM Board shall designate (a) the entity or entities that will be responsible for constructing and owning or financing the additional economic-based enhancements and expansions, (b) the estimated costs of such enhancements and expansions, and (c) the market participants that will bear responsibility for the costs of the additional economic based enhancements and expansions pursuant to section 1.5.6(g) of this Schedule 6.⁶⁶

The Commission also found that unlike reliability projects, transmission owners would not be required to construct economic projects.⁶⁷

43. Under section 201 of the Federal Power Act, Primary Power's facilities when constructed and in-service would meet the definition of transmission facilities, and the Commission has the jurisdiction to establish the rates for such facilities. The traditional mechanism for establishing the rates for transmission facilities is to use the developer's cost of service. The rehearing requesters fail to cite any provision of section 1.5.7 that

not produce the expected results. Despite several reliability-based projects recently approved through RTEP, there were very few economic projects.").

⁶⁵ *PJM Interconnection, LLC*, 117 FERC ¶ 61,218, at P 36 (2006).

⁶⁶ PJM RTEP procedures §1.5.7(c)(iii).

⁶⁷ *PJM Interconnection, L.L.C.*, 105 FERC ¶ 61,123, at P 18 (2003).

provides incumbent transmission owners with a right of first refusal over economic projects or would otherwise prevent PJM from selecting a non-incumbent owner of transmission facilities to construct such facilities using cost-based rates. We address specific arguments they make on rehearing, below.

a. **Interpretation of Section 1.5.7 with respect to economic cost-of-service projects**

44. PSEG and the PJM Owners Group maintain that all references to “entities” in the PJM Operating Agreement relating to economic projects should be considered only as a recognition that merchant transmission can build economic projects. In support of this argument, they cite to the transmittal letter accompanying the filing to establish economic projects in which PJM stated:

Except with respect to merchant transmission facilities, such responsibility generally will be allocated to the PJM Transmission Owner(s) that own the facilities in the Zone(s) where the new facilities will be built. However, this provision also accommodates “third-party participation” in planned upgrades by entities other than “traditional” transmission owners. This is accomplished primarily by other proposed changes in Section 1.5.6(e) that respond directly to Paragraph 26 of the December 20 Order. These changes provide that any party may propose to include in the plan a transmission expansion for which it accepts full cost responsibility.⁶⁸

45. PSEG asserts that the use of the word “entity” would cover a limited number of other parties, such as a party proposing to be responsible for its costs of the project,⁶⁹ and interconnection customers that exercise the option to build certain transmission facilities such as substations.⁷⁰

⁶⁸ PJM Owners Group Rehearing at 25 (citing PJM 2003 Compliance Filing at 11). *See also PJM Interconnection, L.L.C.*, 100 FERC ¶ 61,345, at P 26 (2002) (December 20, 2002 Order).

⁶⁹ PSEG Rehearing at 9-10 (citing December 20, 2002 Order).

⁷⁰ PSEG Rehearing at 12.

46. We find that PSEG's interpretation is not consistent with the language of the RTEP procedures. In the first place, the statement that "such responsibility generally will be allocated to the PJM Transmission Owner(s)" merely conveys an expectation that generally these projects will be constructed by incumbent transmission owners, not a requirement in the Operating Agreement. The transmittal letter, like the OATT and Operating Agreement, recognizes that the designation of economic projects is not limited to transmission owners, but also can include other parties: "the RTEP also will designate the **party(ies)** that will be responsible for constructing, owning and/or financing each transmission expansion or upgrade that is included in the plan."⁷¹ Similarly, PJM's transmittal letter in its 2006 revised filing also emphasizes the other entity language.⁷² In any event, the relevant inquiry is to examine what is written in the OATT and Operating Agreement, not in ambiguous language contained in the filing letter.⁷³ The ambiguous language in these transmittal letters, regarding a particular revision filed in 2003, provides no basis upon which to revise our interpretation of section 1.5.7.

47. As noted earlier, nothing in section 1.5.7 reserves cost-based projects for incumbent Transmission Owners. Section 1.5.7(c) deals with the projects that are to be considered in the market efficiency analysis to determine whether the project meets the cost-benefit test to qualify for cost-of-service recovery. A merchant transmission provider and the other limited parties referenced by PSEG need not meet this test; interpreting the word entity in section 1.5.7(c) as applying to such parties would be inconsistent with the structure of the tariff section, since merchant transmission providers do not need to pass the cost-benefit test in section 1.5.7(c). Rather, the term "entity" is most reasonably interpreted to apply to a party that is not an incumbent "Transmission Owner" that is seeking to qualify to build transmission facilities.⁷⁴ Section 1.5.7(c)(iii)

⁷¹ PJM 2003 Compliance Filing at 11 (emphasis added).

⁷² PJM Filing in Docket No. ER06-1474-000, at 6 (Sept. 8, 2006) (for the economic-based upgrades that PJM includes in the RTEP, PJM will designate: (a) the entity(ies) that will have construction, ownership, or financing responsibilities; (b) the estimated costs of such enhancements or expansions; and (c) the market participants that will bear responsibility for the costs of the economic-based upgrades).

⁷³ See *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,017, at P 22 (2011) (rejecting proposal discussed in transmittal letter as not reflected in filed rate).

⁷⁴ A non-incumbent transmission developer building transmission facilities will become a PJM Transmission Owner when its facilities go into service. All entities constructing transmission facilities under section 1.5.6 or section 1.5.7 will become transmission owners subject to our jurisdiction when their facilities are in-service. For

(continued...)

specifically recognizes that “any market participant at any time may submit to the Office of the Interconnection a proposal to construct an additional economic-based enhancement or expansion” and that PJM may designate the “entity or entities that will be responsible for constructing and owning or financing the additional economic-based enhancements and expansions.” These projects are then evaluated according to the cost-benefit ratios as determined in section 1.5.7(d).

48. For the term “entity” to be limited only to merchant projects is not consistent with the structure of section 1.5.7(c) because merchant projects are not subject to the cost-benefit test required under section 1.5.7(d). Therefore, there is no need to consider merchant projects when defining the scope of projects that are to be considered in the cost-benefit study. As further evidence that the term “entity” is reasonably read to include more than merchant transmission projects, section 1.5.7(j) specifically recognizes that a merchant project can be submitted at any time to replace or supplant a cost-based project.⁷⁵

49. Moreover, neither PJM nor the PJM transmission owners sought to define the word “entities” as being limited, and they offer no principled basis for determining exactly which parties are to be covered by the other entity designation. It is therefore reasonable to interpret this term as referring to non-incumbent Transmission Owners that are selected to build projects and will become Transmission Owners. The drafter of the

example, owners of merchant transmission facilities become PJM Transmission Owners when their facilities go into service. Under section 1.5.7, there is no limitation that prevents non-incumbent transmission owners from competing for projects, being selected by PJM, and then becoming PJM Transmission Owners when their projects go into service.

⁷⁵ Section 1.5.7(j) states:

At any time, market participants may submit to the Office of the Interconnection requests to interconnect Merchant Transmission Facilities or generation facilities pursuant to Part IV of the PJM Tariff that could address an economic constraint. In the event the Office of the Interconnection determines that the interconnection of such facilities would relieve an economic constraint, the Office of the Interconnection may designate the project as a “market solution” and, in the event of such designation, sections 36A or 41A of the PJM Tariff, as applicable, shall apply to the project.

tariff is the one responsible for making sure that its tariff adequately defines the parties to be covered.⁷⁶ For these reasons, we interpret this Operating Agreement provision to apply to any entity that satisfies the cost-benefit tests in section 1.5.7(c).

b. Interpretation of Section 1.5.6

50. The parties seeking rehearing focus on various provisions of section 1.5.6 of the PJM RTEP procedures entitled “Development of the Recommended Regional Transmission Expansion Plan.” We find that this section of the Operating Agreement does not override or otherwise conflict with the provisions of section 1.5.7 with respect to the designation of projects. In fact, the two sections are consistent with each other, as section 1.5.6(d) indicates that with respect to economic projects, “such economic expansions and enhancements shall be developed in accordance with the procedures, criteria and analyses described in section 1.5.7 below.” As discussed above, these procedures allow any market participant to construct an economic project and permit PJM to identify the entity to construct it, without limiting those entities to existing transmission owners.

51. The rehearing requesters rely principally on the language in section 1.5.6(f) regarding the general designation of RTEP projects, including the provision stating that: “To the extent that one or more Transmission Owners are designated to construct, own and/or finance a recommended transmission enhancement or expansion, the recommended plan shall designate the Transmission Owner that owns transmission facilities located in the Zone where the particular enhancement or expansion is to be located.”

52. We do not find that this one sentence included in section 1.5.6 controls the designations of economic projects under section 1.5.7, a separate tariff provision. The clause referring to designation of Transmission Owners does not refer either to proposals for additional economic projects for which the designation is made pursuant to the economic project provisions (section 1.5.7) or to economic projects assigned to entities other than incumbent transmission owners.⁷⁷ Indeed, section 1.5.6(d) specifies that economic enhancements shall be developed in accordance with the procedures described in section 1.5.7, which permits PJM to designate parties other than incumbent Transmission Owners. Thus, the language regarding designation of Transmission

⁷⁶ *KN Energy, Inc.*, 59 FERC ¶ 61,332, at 62,219 (1992) (applying Corbin on Contracts).

⁷⁷ Nor does it refer to projects by an existing transmission owner that are located outside of its zone.

Owners in section 1.5.6(f) should not be interpreted as applying to designations of additional economic projects made pursuant to section 1.5.7. As noted earlier, incumbent Transmission Owners are required to construct projects that PJM determines are needed for reliability, and the cited clause would mean that PJM should assign those projects to the incumbent Transmission Owner in whose region the project is needed. The clause should not be interpreted so broadly as to invalidate the provisions of section 1.5.7 that permit other participants in the process to propose to construct additional economic projects.

53. Even if section 1.5.6(f) were read to control the designations of entities to build and own economic projects despite the specific provision in section 1.5.7, section 1.5.6(f) expressly permits PJM to designate not just transmission owners, but “transmission owners or other entities” to construct projects. Thus, an entity designated under section 1.5.7 does not fall under the clause which requires PJM to designate the Transmission Owner that owns transmission facilities located in the Zone where the particular enhancement or expansion is to be located.

54. The rehearing requesters maintain that the phrase “other entities” in section 1.5.6(f) should be understood as referring only to merchant transmission projects, not cost-of-service economic projects. But, as discussed above, reading section 1.5.6(f) as limited to merchant transmission projects ignores the fact that section 1.5.7 provides for the designation of entities other than transmission owners to construct economic projects.⁷⁸ We, therefore, do not find it reasonable to interpret the applicable provisions as limiting the designation of economic projects only to transmission owners. This is particularly true since, unlike reliability projects, incumbent Transmission Owners are under no obligation to build economic projects, and interpreting the RTEP procedures to restrict designations only to incumbent Transmission Owners might result in economic projects not being constructed by anyone.

55. Likewise, PSEG suggests that section 1.5.6(g) limits PJM’s ability to designate projects to entities willing to bear the costs, citing to the clause stating “notwithstanding the foregoing, with respect to any facilities that the [RTEP] designates to be owned by an entity other than a Transmission Owner, the plan shall designate that entity as responsible

⁷⁸ Again, we note that merchant transmission developers cannot be the entities referred to in section 1.5.7(c), because merchant projects are not economic projects, but instead are alternatives to the economic projects subject to the cost-benefit analysis under section 1.5.7(c), since the merchant projects are processed as market solutions under section 1.5.7(j).

for the cost of such facilities.”⁷⁹ PSEG argues that the final statement in section 1.5.6(g) removes any doubt that a merchant transmission project is eligible for cost-based rates.

56. In the first place, given the convoluted construction of these provisions of the PJM Operating Agreement, we cannot find that this one sentence imposes a limitation on the designation of non-incumbents to construct transmission facilities under the economic project development provisions of section 1.5.7 which permits such designation.⁸⁰ As noted above, reading section 1.5.6 as limiting non-incumbents to merchant transmission projects ignores the fact that the Commission required, and section 1.5.7 accordingly provides, that entities other than incumbent transmission owners can propose and construct economic projects. Even if section 1.5.6(g) applies to merchant transmission projects that are willing to bear their own costs, section 1.5.6(g) does not by its terms preclude a non-incumbent Transmission Owner from proposing to construct and being chosen to construct economic projects under the provisions of section 1.5.7. We, again, do not read the earlier provision of section 1.5.6(g) as taking away PJM’s authority, specifically stated in section 1.5.7, to designate entities such as independent transmission developers that propose to construct projects, and also designate the market participants that will bear the costs pursuant to section 1.5.7(c)(iii).

57. Moreover, we find that in light of section 1.5.7 and PJM’s ability to designate entities other than Transmission Owners to build economic projects, this clause of section 1.5.6 does not limit PJM’s ability to select a non-incumbent transmission owner to build a cost-of-service project. Unlike other clauses that refer to current “Transmission Owners”, this clause refers to the designation of a project “to be owned by an entity other than a Transmission Owner.” This refers to the future status of the entity when the project is completed. Primary Power, for example, will be a PJM Transmission Owner

⁷⁹ PSEG Rehearing at 29.

⁸⁰ Moreover, it is not clear from the tariff to what “notwithstanding the foregoing” refers, given that the paragraph in which it is located discusses clause 3 above and clause 3 references “the Coordinated System Plan developed under the Joint Operating Agreement Between the Midwest Independent System Operator, Inc. and PJM Interconnection, L.L.C.” Operating Agreement Schedule 6.1.5 Procedure for Development of the Regional Transmission Expansion Plan., 2.0.0 (stating the recommended plan shall designate “(3) in the event and to the extent that the Coordinated System Plan developed under the Joint Operating Agreement Between the Midwest Independent System Operator, Inc. and PJM Interconnection, L.L.C. assigns cost responsibility, the Market Participant(s) in one or more Zones from which the cost of such enhancement or expansion shall be recovered”).

when its project is constructed and thus is not precluded from being designated to build an economic project under cost of service rates. Given the Commission's requirements for PJM to open its economic planning process to non-incumbents and the imprecision in the terms used, we cannot find that the cited provisions take precedence over the provision in section 1.5.7 that permits any participant to propose to construct an economic project, and to be so designated. Therefore, we do not find that section 1.5.6(g) applies to an entity that intends to become a Transmission Owner; nor do we find that a market participant that proposes and is designated to build an economic enhancement under section 1.5.7(c)(iii) is nevertheless prevented from doing so or is forbidden to seek cost-based compensation for its project by the provisions in section 1.5.6.

c. **Interpretation of Other Provisions of the PJM Operating Agreement, OATT and Owners Agreement**

58. PSEG maintains that a right of first refusal exists due to the interaction of various provisions of the PJM OATT, Operating Agreement, and Owners Agreement.⁸¹ PSEG claims that this right of first refusal arose out of the "contractual bargain" made at the formation of the PJM RTO.⁸² The PJM Owners Group (including PSEG) argues that they possess an exclusive right to build planned cost-of-service transmission in their zones and that this right "pre-existed" PJM and is tacitly embodied in these documents as part of their contractual bargain.⁸³

59. Consistent with our discussion above, we do not find that a tacit agreement or a contractual bargain providing a right of first refusal for economic projects for transmission owners is embodied in these agreements. PSEG contends the right of first refusal is a "natural and necessary complement to the obligation to build held by the zonal PJM transmission owners."⁸⁴ The Commission has rejected this argument elsewhere and likewise finds it unpersuasive here.⁸⁵ Moreover, while transmission

⁸¹ PSEG Rehearing at 7.

⁸² PSEG Rehearing at 7-9 (citing Article 4 and 5 of the Owners Agreement and Schedule 6 of the Operating Agreement, section 1.5.6(f)).

⁸³ PJM Owners Group Rehearing at 32-33 (arguing that they did not surrender the right to build cost-of-service transmission in their zones, citing the reservation of "rights not specifically transferred to by the Parties to PJM" in the Owners Agreement § 5.6).

⁸⁴ PSEG Rehearing at 14.

⁸⁵ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 261.

owners in PJM have an obligation to build reliability projects, they do not have a comparable obligation with respect to the economic projects that are at issue here.⁸⁶

60. Those seeking rehearing cite to section 4.2.1 of the Owners Agreement as supporting their right of first refusal. Section 4.2.1, however, does not by its terms convey a right of first refusal or other reservation of cost-of-service rights to construct. Section 4.2.1 states:

Parties designated as the appropriate entities to construct and own or finance enhancements or expansions applicable to the PJM Region specified in the Regional Transmission Expansion Plan or required to expand or modify Transmission Facilities pursuant to the PJM [OATT] shall construct and own or finance such facilities or enter into appropriate contracts to fulfill such obligations.⁸⁷

This section refers to “parties designated as appropriate entities to construct,” but it does not necessarily limit such parties, and certainly not in a manner that would be inconsistent with section 1.5.7 of the Operating Agreement, as discussed above. The section also refers to parties “required to expand or modify Transmission Facilities.” As noted earlier, the PJM Transmission Owners are not required to construct economic facilities, so such a requirement does not apply to economic construction pursuant to section 1.5.7 or the Operating Agreement.

61. PSEG cites Article 5.2 of the Owners Agreement as reserving to transmission owners the right to construct all facilities in their zones. Article 5.2 states that transmission owners have reserved “the right to build, finance, own, acquire, sell, dispose, retire, merge or otherwise transfer or convey all or any part of its assets, including any Transmission Facilities.” This provision refers only to a transmission owner’s right to construct and control its assets; the provision does not guarantee a transmission owner the right to construct all assets in a defined zone or geographic area. Therefore, we do not read this provision, which preserves a transmission owner’s authority over its existing facilities, as taking away another developer’s right to build its own facilities on its own property. In any event, Primary Power does not propose to take away any transmission owner’s ability to use its property or right-of-way, nor build on or acquire any transmission owner asset.

⁸⁶ Section 1.5.7(c)(iii).

⁸⁷ Owners Agreement-42 4.2.1, 0.0.0.

62. As for the PJM Owners Group's claims that the Owners Agreement's prohibition against creating new transmission rate zones or subzones smaller than those shown in Attachment J of the PJM OATT prevents Primary Power from seeking to recover its cost of service, we find nothing in our April 13 Order that is inconsistent with such a restriction. The inclusion of a cost-based economic project does not require the construction of a new rate zone. The costs of that project will be allocated according to Schedule 12 of the OATT. In addition, we note that the PJM OATT also contains other provisions in which the costs-of-service from multiple service providers form the basis for the rate for service in a zone. In particular, the reactive power ancillary service is one rate that is structured so that the costs of facilities from multiple owners are reflected in the rate for that zone.⁸⁸

d. Purported Benefits of a Right of First Refusal

63. PSEG and the PJM Owners Group cite a host of purported benefits that will accrue from reserving to them the construction of cost-of-service economic projects and difficulties that may arise from a failure to do so. However, as the rehearing requesters also recognize, PJM's OATT has permitted merchant transmission projects to be constructed. Yet, these projects have not caused any of the operational or other difficulties identified by the rehearing requesters. The Commission made similar findings in Order No. 1000, concluding that the presence of multiple transmission owners would not affect the reliability of the interconnected grid.⁸⁹ Furthermore, the Commission found there that participation by non-incumbent transmission developers could promote competition and lower costs.⁹⁰

64. As for the suggestion in the rehearing requests that permitting non-incumbent transmission developers to construct enhancements would allow them to avoid obligations shared by other transmission owners, we note that in drafting the April 13 Order, we reviewed the PJM provisions for joining as a transmission owner and did not find these provisions would bar Primary Power from developing the project, joining PJM or seeking cost-of-service rate recovery as a transmission owner.⁹¹ Because Primary

⁸⁸ See PJM OATT, Schedule 2 ("The Transmission Provider shall post on its website a list for each Zone of the annual revenue requirements for each Generation Owner receiving payment within such Zone and specify the total annual revenue requirement for all of the Transmission providers").

⁸⁹ See Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 266.

⁹⁰ See *id.* PP 268, 286.

⁹¹ April 13 Order, 131 FERC ¶ 61,015 at PP 26, 70.

Power had committed to meet applicable requirements, the Commission did not address the fact that once its facilities are built and Primary Power owns and operates transmission facilities, it must comply with applicable reliability standards and requirements of the PJM OATT, Operating Agreement and Owners Agreement. Furthermore, Primary Power has committed to turning over operational control of its facility to PJM. Consequently, we do not agree that concerns with diversification of ownership of the grid or duplication of operation personnel preclude PJM from designating Primary Power to construct an economic enhancement. The operational benefits and costs of designating one entity over another may be considered in PJM's evaluation under section 1.5.7, as appropriate.

65. The PJM Owners Group cite to principles the Commission established in Order No. 2003 where the Commission granted rehearing explaining that "requiring the Transmission Provider to cede ownership of Stand-Alone Network Upgrades and the Transmission Provider's Interconnection Facilities to the Interconnection Customer is inconsistent with existing Commission precedent."⁹² PSEG states that it is unclear how the Commission will handle gaps in the bulk power system created by entities that built network upgrades then ultimately go bankrupt or otherwise cease operation of their system. It continues that it is also not clear how NERC criteria will be effectively safeguarded given that each owner of a piece of equipment that is part of the grid will have to be held accountable for adherence to NERC requirements.⁹³

66. We find that the principles from Order No. 2003 and its progeny that the PJM Owners Group cites are inapplicable here because the transmission owner is not ceding ownership of any transmission owner facilities. Further, as discussed above, we do not find any insurmountable difficulties created by non-incumbent transmission developers using cost-of-service rates. In fact, the same difficulties would occur if Primary Power had built as a merchant provider, and PJM has successfully dealt with the same issues presented by merchant facilities.⁹⁴

⁹² PJM Owners Group Rehearing at 30 (citing No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 230).

⁹³ PSEG Rehearing at 15.

⁹⁴ See *PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,277 (2003) (approving standard procedures for interconnecting merchant transmission facilities that complement existing PJM market structures and operational rules and include ongoing operations and maintenance provisions).

e. **Consistency with Atlantic City**

67. The PJM Owners Group and PSEG maintain that the Commission is seeking to take away rights retained by the zonal transmission owners and that such an action is inconsistent with *Atlantic City*⁹⁵ in which the court found the Commission had no statutory power to take away the FPA section 205 filing rights of any party.

68. In the first place, unlike *Atlantic City*, we did not find in the April 13 Order that the PJM OATT or Operating Agreement provisions dealing with economic projects take away filing rights reserved for the transmission owners. As discussed above, these provisions do not provide a right of first refusal with respect to economic projects.

69. Further we do not find that *Atlantic City* applies here because the Commission is not taking away any section 205 filing right from the transmission owners. Each transmission owner is permitted to make its own filing to recover its costs for its own facilities. The FPA states that the Commission shall have jurisdiction over the rates and terms and conditions charged by all facilities for the transmission of electric energy in interstate commerce and defines a public utility as any person who owns or operates facilities subject to the jurisdiction of the Commission.⁹⁶ Primary Power's facilities when constructed would meet the definition of transmission facilities, and the rates for such facilities must be just and reasonable as determined by the Commission. The traditional mechanism for establishing the rates for transmission facilities is to use the developer's cost of service, as Primary Power has proposed in this proceeding. While the Commission has permitted other approaches, such as merchant transmission facilities, these approaches are additional options, but do not bar a non-incumbent transmission developer or other entities designated to build economic projects from proposing to use the traditional cost-of-service approach.

70. Neither the FPA nor PJM's OATT or Operating Agreement provided transmission owners with the absolute right to bar a third party from constructing facilities within a transmission owner's historic state defined zone. Thus, the Commission has not deprived the transmission owners of revenues to which they had a federal right and has not denied the reasonable investment backed expectations of the incumbent transmission owners. Because the Commission has not altered the transmission owners' position under the relevant agreements, there is no taking. Moreover, even if the Commission were acting under section 206 to make a change in the transmission owner's rights under the relevant agreements, the Commission does not agree that such an action would constitute a taking.

⁹⁵ *Atlantic City*, 295 F.3d 1 (2002); *Atlantic City II*, 329 F.3d 856 (D.C. Cir. 2003).

⁹⁶ 16 U.S.C. §§ 824 & 824e.

The Commission has addressed arguments similar to those raised on rehearing in this proceeding, and has found that removal of a right of first refusal in accordance with our authority under section 206 of the FPA does not constitute a taking.⁹⁷ Recognizing non-incumbent transmission developers' rights under the Operating Agreement to pursue their economic interests permits greater competition between incumbents and non-incumbents, and does not deprive the incumbent Transmission Owners of a right to profit from or expand their existing facilities.

B. Merchant Transmission Eligibility for Cost-of-Service Recovery

1. April 13 Order

71. The April 13 Order noted that Primary Power initially had applied to PJM under the merchant transmission provisions of PJM's OATT.⁹⁸ The Commission determined, however, that Primary Power could receive cost-based rates as a non-incumbent transmission owner if PJM designated it to construct an economic project under the applicable provisions of the PJM Operating Agreement.

2. Requests for Rehearing and Clarification

72. PSEG requests clarification that the Commission did not find that a merchant transmission project is eligible for cost-based rate recovery, and the PJM Owners Group seeks rehearing on this issue.⁹⁹ PSEG and the PJM Owners Group cite provisions in the PJM OATT, stating that Merchant Transmission Facilities cannot be included in the rate base of a public utility on which a regulated return is earned.¹⁰⁰ They argue, therefore, that the costs of merchant transmission projects cannot be recovered under the PJM OATT, Schedule 12. According to PSEG, a merchant project can only be included in the RTEP as a "market solution," with the developer bearing the cost and receiving certain transmission rights.¹⁰¹ The PJM Owners Group notes that Primary Power has submitted

⁹⁷ See also Order No. 1000-A at PP 368-369 (addressing similar arguments).

⁹⁸ 131 FERC ¶ 61,015 at P 13.

⁹⁹ PJM Owners Group Rehearing at 14-15; PSEG Rehearing at 25. PSEG also seeks rehearing, in the alternative.

¹⁰⁰ PSEG Rehearing at 26-27 (citing PJM OATT, section 1.18E, definitions).

¹⁰¹ PSEG Rehearing at 27 (citing PJM Operating Agreement, Schedule 6, section 1.5.7(j)); see also PJM Owners Group Rehearing at 15-16.

an interconnection request for merchant transmission facilities, and argues that this means that the project is ineligible for cost-based recovery under the PJM definitions.¹⁰²

73. PSEG cites Commission findings that “Merchant transmission facilities are transmission projects funded outside of traditional cost of service ratemaking,” which must be funded by parties that benefit from the reduced congestion or less expensive power.¹⁰³

74. The PJM Owners Group suggests that, under the RTEP procedures section 1.5.6(g), cost responsibility would be assigned to Primary Power, because cost responsibility is assigned to the entity that has agreed to fully fund a transmission enhancement and the PJM OATT and Operating Agreement already assign cost-responsibility for merchant transmission facilities through market-based rates.¹⁰⁴ Specifically, the PJM Owners Group cites PJM’s interconnection procedures, arguing that the five scenarios under which an interconnection customer can interconnect to the PJM transmission system would limit RTEP participation to generation expansions and merchant transmission projects.¹⁰⁵

75. The PJM Owners Group suggests that the Commission clarify, if it denies rehearing, that Primary Power cannot collect expenditures made in furtherance of Grid Plus when it was a merchant transmission project in the merchant transmission queue. According to the PJM Owners Group, these expenditures were made for a merchant transmission project and cannot be switched retroactively to a cost-based rate project.¹⁰⁶

76. PSEG states that the Commission did not condition its findings on Primary Power becoming a transmission owner under the Owners Agreement, and as such, its finding

¹⁰² PJM Owners Group Rehearing at 15 (citing PJM OATT Part IV).

¹⁰³ *Id.* (citing *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,161, at P 2 (2009)).

¹⁰⁴ PJM Owners Group Rehearing at 16 (citing the RTEP procedures, § 1.5.7(c)(iii), §1.5.6(g), and §1.5.7(j)).

¹⁰⁵ *Id.* at 14 (citing PJM OATT Part IV, Preamble, which indicates that the interconnection procedures apply to proposals to: (1) interconnect generating units; (2) increase the capacity of generating units; (3) interconnect merchant transmission facilities; (4) increase the capacity of merchant transmission facilities; and (5) interconnect generating units at distribution level for wholesale sales).

¹⁰⁶ *Id.* at 17.

may incorrectly suggest that merchant transmission owners can actually obtain cost-based recovery for their various projects under Schedule 12 of the PJM OATT. PSEG states that there is no right to cost recovery under Schedule 12 for projects by entities that are not parties to the Owners Agreement as a Participating Transmission Owner.¹⁰⁷ PSEG states that cost recovery under Schedule 12 of the PJM OATT is restricted to non-merchant projects only, and to be eligible for cost recovery under Schedule 12, a party must (1) be designated to build an RTEP project (excluding economic solutions) with the consent (or as the assignee or designee) of the zonal transmission owner in whose zone the project is located and (2) must become a Participating Transmission Owner under the Owners Agreement, subject to all of the rights and responsibilities there under. PSEG states that if the Commission did not intend to require Primary Power to be a signatory to the Owners Agreement as a Participating Transmission Owner, then it requests rehearing.

3. Commission Determination

77. The PJM Owners Group and PSEG maintain that the Commission erred in providing cost-of-service recovery for a merchant transmission project. They point out that Primary Power originally sought interconnection as a merchant project and maintain that cost-of-service recovery for a merchant project is inconsistent with the PJM OATT, Schedule 12 and RTEP procedures.

78. We clarify that the April 13 Order does not allow a company to seek cost-of-service recovery under the merchant transmission provisions of the PJM's OATT or Operating Agreement. Rather, a developer seeking cost-of-service recovery must do so pursuant to Operating Agreement Schedule 6, section 1.5.7. In doing so, the project will be treated the same as any economic enhancement proposed by an incumbent transmission owner and will be subject to the same study rules and obligations as would apply to any other transmission owner.

79. We deny the PJM Owners Group's request that we preemptively rule out future cost-based rates for any costs incurred for Grid Plus when it was in the merchant transmission queue under any circumstances.¹⁰⁸ It is not clear from the record in this proceeding that such costs are necessarily barred under PJM's OATT or Operating Agreement, especially given the confusion as to how the OATT and Operating Agreement provisions should be applied. In any event, the question of whether costs incurred when Primary Power was part of the merchant queue should be excluded from

¹⁰⁷ PSEG Rehearing at 25-26.

¹⁰⁸ PJM Owners Group Rehearing at 17.

Primary Power's cost of service is premature and can be addressed if and when Primary Power submits a section 205 filing seeking recovery of its costs for the Grid Plus project.

C. Other Issues Related to PJM RTEP Procedures

1. April 13 Order

80. In the April 13 Order, the Commission found that PJM should administer the RTEP provisions in a not unduly discriminatory manner; in this regard it should handle the study of Primary Power's application no differently than that of any other application proposing to build a project, be it an existing transmission owner or an "other entity," and would need to adequately justify its action if it denied the sponsor of the project the right to construct that project and receive the economic benefit of its project.¹⁰⁹

81. The Commission also found that PJM must evaluate Primary Power's proposal in the same manner as any proposed cost-based project in the RTEP process, and should use its existing procedures for evaluating competing projects. The Commission referenced the PJM Operating Agreement benefit-cost procedures, which permit PJM to select among competing projects.¹¹⁰

2. Requests for Rehearing and Clarification

82. PSEG seeks clarification that Primary Power is not entitled to a presumption that it would be designated to build its proposed project as the sponsor of that project.¹¹¹ PJM Owners Group claims that the Commission improperly introduced the concept of application and sponsorship into the RTEP procedures.¹¹² In addition, PJM Owners

¹⁰⁹ The April 13 Order noted that Primary Power has obtained (or will obtain) necessary rights-of-way or other property rights, P 65 (citing *PJM Interconnection LLC*, 102 FERC ¶ 61,277, at P 21 (2003) (noting that merchant transmission developers have no right to build on transmission facilities owned by others and also noting that the PJM tariff provisions were not intended to preempt state siting procedures)).

¹¹⁰ PJM Operating Agreement §§ 1.5.6(i) – (k) (permitting PJM to select an Transmission Owner or PJM proposed alternate enhancement by reviewing relative cost, benefits, effectiveness and reliability factors, subject to dispute resolution procedures). *See also PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,051, at PP 41-42, 63-80 (2008).

¹¹¹ PSEG Rehearing at 23-25.

¹¹² PJM Owners Group Rehearing at 18-23.

Group argues that the Commission erred in finding that PJM should treat parties other than existing transmission owners no differently than existing transmission owners.

83. PSEG argues that designating building authority based on sponsorship would wreak havoc on the current planning process, requiring PJM to study an increased number of duplicative, poorly formulated, or frivolous projects, and turning the planning process into a free-for-all rife with contentious debates and potential litigation.¹¹³ PSEG adds that the April 13 Order can be read to suggest that PJM should somehow alter its existing process or create an entirely new track exclusively for considering Primary Power's project, and requests clarification from the Commission that it did not intend this result. PSEG requests clarification that: (1) the Commission did not intend to create any presumption that Primary Power would be designated as the builder of the project simply because it proposed an enhancement; and (2) the Commission did not intend for PJM to alter its process to consider the Primary Power Filing. In the alternative, PSEG requests rehearing on these issues.

84. The PJM Owners Group argues that by the Commission's finding that PJM should handle the study of Primary Power's application no differently than that of any other application to develop a project, the Commission erroneously created new concepts and procedures that conflict with the existing RTEP procedures and PJM Operating Agreement.¹¹⁴ According to the PJM Owners Group, the history, intent and policy underlying the RTEP process, the PJM Operating Agreement, and the Owners Agreement require PJM to treat zonal transmission owners differently than other entities.¹¹⁵

85. According to the PJM Owners Group, "undue discrimination is in essence an unjustified difference in treatment of similarly situated customers."¹¹⁶ In this vein, PJM Owners Group argues that a zonal transmission owner in PJM is not similarly situated to a non-incumbent transmission developer because the zonal transmission owner has obligations that a third party developer does not – such as the obligation to build transmission to provide reliable service within its zone.¹¹⁷

¹¹³ PSEG Rehearing at 24-25.

¹¹⁴ PJM Owners Group Rehearing at 2-3.

¹¹⁵ *Id.* at 26-28.

¹¹⁶ *Id.* at 27.

¹¹⁷ *Id.* (explaining that transmission owners and their affiliates have an obligation to state regulators to provide safe and reliable service, complete facilities they are

86. The PJM Owners Group requests rehearing, arguing that introducing a concept of sponsorship effectively requires PJM to put a thumb on the scale when selecting the entity to build a project. The PJM Owners Group asserts that the Commission proposes that the first entity to make a proposal should build a project – without regard to prudence, reliability, or efficiency considerations as set forth in the PJM Operating Agreement.¹¹⁸ The PJM Owners Group and PSEG state that, unlike the interconnection queue process for generation and merchant transmission, the RTEP neither has a queue procedure, nor a stated or implied first-in-time benefit.¹¹⁹

87. The PJM Owners Group argues that the RTEP procedures set forth in the PJM Operating Agreement do not convey any kind of physical or intellectual property or contractual right to entities that propose certain types of projects (in contrast to the generation and merchant transmission interconnection queue). Instead, the RTEP process is designed to be flexible so that PJM can reconfigure any enhancement or expansion to address system reliability, operational performance, or economic efficiency.¹²⁰ According to PJM Owners Group, PJM is not bound to give the first entity to make a proposal preferred status either with respect to type, size, location and specifications or by recognizing a “right” to the project.¹²¹

88. The PJM Owners Group argues that, the Commission failed to find that the existing processes were unjust and unreasonable when it proposed a new formal application and queue process into the PJM RTEP, based on this new concept of “sponsorship” and that a sponsorship standard is unduly discriminatory because it establishes a preference in designating entities, not based on prudence, reliability, or efficiency considerations.¹²²

assigned to build, and operate and maintain the facilities throughout their service life. The PJM Owners Group states that no third party developer has this obligation).

¹¹⁸ *Id.* at 18.

¹¹⁹ *See id.* at 19.

¹²⁰ PJM Owners Group Rehearing at 20; PJM Operating Agreement, Schedule 6, § 1.5.3, § 1.5.6, and § 1.5.7.

¹²¹ PJM Owners Group Rehearing at 20; PSEG Rehearing at 24.

¹²² PJM Owners Group Rehearing at 23.

3. Commission Determination

89. The Commission grants clarification concerning the establishment of a preference under Schedule 6. As we stated earlier, Primary Power's project should not be considered under the merchant transmission provisions of PJM's OATT which contain certain rights associated with queue position. Rather, it should be treated no differently than any other cost-based economic project under Schedule 6, section 1.5.7. In fact, the April 13 Order states, "the PJM Tariff permits, but does not require, PJM to designate Primary Power . . . to build Grid Plus if this project is included in the RTEP[.]"¹²³ Furthermore, the order continues, "PJM must designate projects under the relevant tariff provisions in a not unduly discriminatory manner, whether sponsored by transmission owners or others."¹²⁴ All existing provisions that permit PJM to consider alternative or more efficient projects would therefore apply equally to Primary Power's project.

90. We otherwise disagree with the suggestion on rehearing that the Commission erred in its holding that PJM should handle the study of Primary Power's proposal to construct and additional economic-based enhancement no differently than that of any other proposal under section 1.5.7(c)(iii). The duty to implement the OATT and Operating Agreement in a non-discriminatory fashion arises under section 205 of the FPA. Just as we find nothing in the RTEP procedures which would justify a preference for non-incumbent transmission developer proposals, we likewise see nothing to justify discriminating against a non-incumbent proposal.¹²⁵ PJM's planning process will also be subject to the requirements of Order No. 1000. When PJM has adopted any changes necessary to comply with those requirements, the Commission and interested parties will be able to determine whether any entity has been unduly discriminated against in the course of regional transmission plan development.

91. For the same reason, we reject the argument that the Commission failed to find that the existing processes were unjust and unreasonable when it proposed a new formal application and queue process into the PJM RTEP. As discussed above, the Commission did not establish a new application or queue process. We simply required PJM to apply

¹²³ April 13 Order, 131 FERC ¶ 61,015 at P 62.

¹²⁴ *Id.*

¹²⁵ *Accord*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 265 (finding that lack of federal right of first refusal does not amount to discrimination against incumbent transmission owners). To the extent that incumbent transmission owners possess rights and assets that permit them to propose more beneficial, efficient or effective enhancements, those advantages may be taken into account in the evaluation process.

its existing RTEP procedures, as written, to all cost-based economic projects. Because we did not revise or modify any OATT or Operating Agreement provision, the Commission did not have a section 206 burden to find that the existing OATT and/or Operating Agreement is unjust and unreasonable.

92. Likewise, we reject the assertion that the Commission erred in stating that PJM must adequately justify its action if it denied the sponsor of the project the right to construct that project and receive the economic benefit of its project. PJM must administer its RTEP procedures in a non-discriminatory manner.¹²⁶ Consequently, if PJM designates another entity to build an enhancement to address the constraint to be addressed by the Grid Plus project, PJM must demonstrate that it followed the RTEP procedures, selected the alternate proposal in accordance with the filed procedures, and acted in an impartial and non-discriminatory manner. The factors that PSEG and the PJM Owners Group discuss on rehearing as justifying different treatment may be taken into account, as appropriate and to the extent they are consistent with the provisions for PJM review under Schedule 6.

The Commission orders:

PSEG's request for clarification is hereby granted, as discussed above, and all other requests for rehearing and clarification are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹²⁶ See *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 31,024 (1999).