

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

FPL Energy Marcus Hook, L.P.

Docket No. EL04-57-002

v.

PJM Interconnection, L.L.C.

ORDER ON REMAND DENYING COMPLAINT

(Issued March 1, 2007)

1. This order reaffirms the Commission's denial of a complaint filed by FPL Energy Marcus Hook, L.P (FPL Energy) arguing that PJM Interconnection, L.L.C. (PJM) should be required to pay it for system benefits resulting from its construction of transmission lines as part of a generator interconnection agreement. This proceeding is on remand from the Court of Appeals of the District of Columbia Circuit, *FPL Energy Marcus Hook, L.P. v. FERC*¹ which affirmed in part, and remanded in part, the Commission's initial denial of FPL Energy's complaint, and the Commission's subsequent March 6, 2006 order establishing a briefing schedule to consider the issues remanded by the court.²

I. Background

2. On January 20, 2004, FPL Energy filed a complaint against PJM regarding certain of the interconnection costs it had incurred as part of the generation project it was developing in Marcus Hook, Pennsylvania. The complaint centered on one of the network upgrades required for that project, namely the Mickleton-Monroe circuit

¹ *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441 (D.C. Cir. 2005) (December Remand).

² *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 114 FERC ¶ 61,296 (2006) (March 2006 order).

upgrade, of which \$10,334,018 was allocated by PJM to the FPL Energy project, listed as project A19 in PJM's interconnection queue, and \$1,148,000 was allocated to project A21, which is owned by an unaffiliated entity.³ This network upgrade added a second 230 kV Mickleton-Monroe transmission line to meet the needs of both projects. FPL Energy alleged that the need for the second transmission line was obviated when a higher-queued project, project A13, was withdrawn on December 2, 2002. FPL Energy also asserted that, under these circumstances, sections 37.2 and 36.8.4(c) of the PJM Open Access Transmission tariff (OATT or tariff) required PJM to reassign the cost responsibility for the Mickleton-Monroe circuit upgrade and to execute an amended Interconnection Service Agreement (ISA). FPL Energy concluded that because the second 230 kV Mickleton-Monroe circuit upgrade was no longer required to transmit power from either project A19 or A21, it should have no responsibility for any of the costs for the construction of that circuit upgrade. FPL Energy also asserted that the additional circuit upgrade provided system-wide benefits and should be included in the relevant transmission owners' rate base. The Commission rejected both arguments in its April 20, 2004 initial order and on rehearing, holding that under PJM's "but for" interconnection provisions, FPL Energy was responsible for the upgrade.⁴

3. The U.S. Court of Appeals for the D.C. Circuit affirmed the Commission's conclusion that, under section 36.8 of the PJM tariff, the costs of the Mickleton-Monroe circuit upgrade could not be reallocated because there were no interconnection projects lower in the queue. The court, however, concluded that the Commission had not adequately supported its finding that there were no benefits from construction of that circuit upgrade. The court pointed to the language of section 37.2 of the PJM OATT, which it read as allowing a reduction in the customer's cost responsibility by the amount of benefits resulting from the upgrades. The court stated:

The Commission correctly recognized that necessity and "but for" causation are two essential elements of the cost responsibility calculus under section 37.2; it failed, however, to acknowledge the remainder of the section. It is true that the tariff imposes on interconnection customers "100 percent of the costs" of upgrades meeting those two elements, but the tariff also reduces the customer's cost responsibility by the amount of "benefits resulting

³ Projects A-19 and A-21 were located in the same general area and thus had to share proportionately in the cost of the upgrades necessary to support both projects.

⁴ *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,069 (2004) (April 2004 order), *order on reh'g*, 108 FERC ¶ 61,171 (2004) (2004 rehearing order).

from the . . . upgrades." Tariff Section 37.2. Accordingly, this key language requires PJM to subtract system benefit from the interconnection customer's cost responsibility.⁵

4. The court further observed that section 37.2 provides examples of costs and benefits that may be considered when assigning cost, and pointed to language in section 37.2 providing that "applicable benefits may include those in an RTEP [Regional Transmission Expansion Plan], those placed in a modified RTEP, and those that never become part of an RTEP."⁶ It thus concluded that the earlier orders had not adequately explained why PJM's RTEP should be the sole dispositive factor for FPL Energy's cost responsibility in this proceeding given that there could be benefits from other sources.⁷

5. In the March 2006 order, the Commission directed the parties to brief four issues: (1) the definition of the term "benefits" and how the value of such "benefits" should be measured or determined; (2) relevant facts about the constructed facilities and the PJM system and whether the transmission facilities constructed by FPL Energy provide benefits as contemplated in section 37 of the PJM OATT; (3) whether the PJM OATT or other agreements contemplate a determination of benefits only at the time the Interconnection Agreement is executed, or whether this can be done at a subsequent point in time, such as when a higher-queued project withdraws and the costs cannot be reallocated to other, lower-queued project; and (4) when generation interconnection customers are required to raise questions concerning the determination of benefits under section 37 of the PJM OATT.

II. Briefs and Late Interventions

6. PJM, FPL Energy, and the Indicated PJM Transmission Owners filed initial and reply briefs,⁸ and each of the Indicated PJM Transmission Owners filed a motion to intervene out of time. They assert that late intervention is appropriate because the Commission's March 2006 order expanded the scope of this proceeding beyond a dispute

⁵ 430 F.3d at 449.

⁶ 430 F.3d at 449.

⁷ 430 F.3d at 449.

⁸ Consisting of: the PSEG Companies (Public Service Electric and Gas Company, PSEG Fossil Fuel, LLC, and PSEG Energy Resources and Trade, LLC); Exelon Corporation; the PHI Companies (Pepco Holdings, Inc., Potomac Electric Power Company, Delmarva Power & Light Company and Atlantic City Electric Company); American Electric Power Service Corporation, and Dominion Resource Services, Inc.

between two private parties to a more generic proceeding to review new issues that were not before the Commission before the court's remand. FPL Energy filed an answer arguing that the proceeding has been ongoing for some time and that the proposed late interventions are far out of time. Old Dominion Electric Cooperative (ODEC) filed an answer to the answer.

7. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. In this case the Commission will grant the motions for late intervention in light of the new and more generic issues raised by the court's remand and the Commission's subsequent March 2006 order. The Commission will accept ODEC's answer.

8. In its briefs, PJM asserts that FPL Energy has not established that there were any system benefits from the network upgrades it made to the Mickleton-Monroe circuit upgrade. It argues that this is reflected in the fact that the additional supports on the transmission towers on which the additional circuit is located were unused for almost forty years. PJM further asserts that the tariff provision that concerned the court was not part of its interconnection tariff at the time FPL Energy executed its ISA and that it should not have been applied in the instant case. It argues that FPL Energy did not exercise its right to challenge the interconnection costs at the time it was tendered the final estimate of those costs. PJM concludes that FPL may not seek review at this point of PJM's determination that there are no system benefits since it failed to pursue this issue in a timely manner. The Indicated PJM Transmission Owners support PJM's position on the system benefit issue.

9. In its briefs, FPL Energy asserts that the additional circuit upgrade provides benefits to the PJM system as a whole, as evidenced by the fact that the towers supporting the circuit had an extra set of supports for the line when the towers were constructed, and, as a minimum, a hearing is required to resolve this issue. FPL Energy also argues that the fact it was assessed certain additional costs after the ISA was signed indicates that the cost estimates contained therein are not final. It further argues that the Commission has held that billings by an RTO are never final and may be challenged at any time, and that this also establishes that the costs contained in an ISA are not necessarily final at the time of execution. FPL Energy also argues that PJM cited the portions of the tariff reviewed by the court in its appellate brief and it is precluded from pursuing a different interpretation on remand.

III. Discussion

10. Based on the briefs and our review of the PJM tariff in effect at the time the Interconnection Service Agreement was executed, the Commission will deny FPL Energy's complaint because FPL Energy failed to contest PJM's cost determination within the time period provided by the PJM tariff. In addition, the Commission finds that FPL Energy's upgrades do not qualify for cost reduction under the PJM tariff, and that disposition of this proceeding without a trial-type hearing is appropriate.

A. PJM's Tariff Requires Challenges to Cost Determinations To Be Made Coincident with the Interconnection Service Agreement

11. This case principally involves the interpretation of section 37.2 of the PJM OATT, the so-called "but for" provision of the PJM tariff which, at the time the issues in this case arose, provided:

A Generation Interconnection Customer shall be obligated to pay for 100 percent of the costs of the minimum amount of Local Upgrades and Network Upgrades necessary to accommodate its Generation Interconnection Request and that would not have been incurred under the Regional Transmission Expansion Plan but for such Generation Interconnection Request, net of benefits resulting from the construction of the upgrades, such costs not to be less than zero. Such costs and benefits shall include costs and benefits such as those associated with accelerating, deferring, or eliminating the construction of planned Local Upgrades and Network Upgrades, the construction of unplanned Local Upgrades and Network Upgrades, and Local and Network Upgrades resulting from modifications to the Regional Transmission Expansion Plan to accommodate the Interconnection Request. [Emphasis added.]⁹

⁹ Original Sheet No. 74K, attached to Initial Brief of PJM. The language of section 37.2 that the Commission analyzed in its initial set of orders was the PJM tariff language in effect at the time the Commission considered the complaint (2006). Based on the briefs of the parties after the remand, however, it appears that this tariff language differed from the tariff language in effect in 2001, the time the FPL Energy project was being constructed and the ISA was signed. Neither party addressed this issue on rehearing of the original Commission order. The proper tariff language to be applied to the facts of this case should be that which applied when the interconnection was being considered, and therefore this order will rely upon the tariff provision (reproduced in the text) as it existed at the time of the interconnection.

The court's opinion found that, while the Commission had addressed the "but for" provisions of this section, it had not adequately explained why FPL Energy did not qualify for a reduction in cost as a result of the net benefits its project provided to the PJM system.

12. Section 37, dealing with the allocation of cost responsibility, is only one part of an integrated series of tariff provisions that establish the procedures by which generators can interconnect with PJM and the costs they must pay for such interconnection.¹⁰ As explained by PJM in its pleadings in this proceeding, PJM uses an iterative process to evaluate a generator interconnection request that ultimately leads to an ISA if the generator interconnection customer decides to proceed with its project.¹¹ The process begins when the potential generator interconnection customer files an interconnection request with PJM under section 36.1 of the tariff describing the facility's location and size, among other things. PJM places the request in the interconnection queue on a first-come basis, as described in section 36.10 of its tariff.

13. PJM then prepares a series of studies, each of which involves greater detail and each of which may be reviewed by the generation interconnection customer, thus affording both it and PJM several opportunities to determine whether to proceed with, or to terminate, the interconnection request. The first study is a feasibility study under section 36.2, which preliminarily determines what system upgrades are necessary to accommodate the new interconnection and estimates their cost. The next step is a system impact study under section 36.4.1, which refines and more comprehensively estimates cost responsibility for the upgrades. That study provides a comprehensive regional analysis of the effect of a new interconnection, including the evaluation of multiple interconnection requests. If the generation interconnection customer accepts the framework and initial conclusions contained in the impact study, PJM prepares a detailed facilities study that allocates good faith estimates of cost responsibility among the generation interconnection customers, pursuant to section 36.7.

14. Once these studies are completed, PJM then tenders an ISA to the generation interconnection customer specifying its respective cost responsibility under sections 36.8, 36.8.3, and 37.4 of the tariff. The ISA is designed to establish the generation interconnection customer's final cost responsibility, subject to some potential changes,

¹⁰ The tariff sheets describing these provisions number over 100.

¹¹ See *FPL Energy*, 430 F.3d at 443-44 (describing the PJM interconnection process).

for example, as a result of an earlier queued generator's withdrawal.¹² Section 37.4 of the tariff provides: "The cost responsibility of the Generation Interconnection Customer shall be specified in the Interconnection Service Agreement executed pursuant to Section 36.8 of the Tariff."¹³

15. Section 37.4 goes on to require that the interconnection customer may protest any cost allocation at that time:

If an Interconnection Customer does not agree with the Transmission Provider's determination of such cost responsibility, it may request that the matter be submitted to Dispute Resolution under Article 12 of the Tariff or, if concerning the Regional Transmission Expansion Plan, consistent with Schedule 5 of the Operating Agreement, or request that an unexecuted Interconnection Service Agreement be filed with the Commission in accordance with the Tariff.¹⁴

Section 37.4, therefore, provides the generation interconnection customer with two options if it does not agree with PJM's cost allocation. It can seek to take advantage of dispute resolution or it can ask that an unexecuted ISA be filed with the Commission so that the matter can be resolved by the Commission.

16. PJM argues that its tariff does not provide an option of signing the ISA and then challenging the cost allocation months or even years later. The Commission finds that this is the correct interpretation of the PJM tariff. Thus, since FPL Energy did not avail itself of the two options provided by the tariff at the required time -- when the ISA was prepared, it cannot later raise issues regarding cost allocation after having signed the ISA without objection.

17. The requirement in section 37.4 that all challenges to the ISA, including challenges to the cost allocation, be raised before signing the ISA, rather than years later

¹² See Section 36.8.4(c) of the PJM tariff, Original Sheet No. 74h (providing for reevaluation of costs upon withdrawal of a higher-queued generator), effective April 1, 1999, which has subsequently been revised. See generally, *Neptune Regional Transmission System*, 110 FERC ¶ 61,098, *aff'd*, 111 FERC ¶ 61,455 (2005);

¹³ Original Sheet No. 74l), effective April 1, 1999, which has subsequently been revised (attached to PJM's Initial Brief).

¹⁴ The ISA signed by FPL Energy specifically incorporates by reference all portions of the tariff. Original Service Agreement No. 1409, §19.0 (Attachment A to PJM's June 5, 2006 Reply Brief).

as FPL Energy has done, is reasonable and consistent with PJM's tariff. As discussed above, the numerous studies leading to the ISA are designed to establish the facility responsibility and costs for a particular upgrade and set the benchmark for cost allocations for future projects. The interconnection process cannot work efficiently if the determinations made in these studies were under continual review with the potential for never-ending reallocations of costs related to numerous other projects. As the Commission has stated:

By looking to the date of each customer's position in the queue, the interconnection provider may determine which interconnection costs should be allocated to an interconnection customer, and which costs belong to the system itself. In turn, the interconnection customer is able to use the queue system to assess its business risks. Each customer knows that subsequent cost allocations will be determined by circumstances that are known as of the time its System Impact Study is conducted. Projects may drop out of the queue and customers may move up the queue, but the cost allocation system insulates an interconnection customer from costs arising from events occurring after its System Impact Study is completed, other than costs arising from changes from higher-queued generators.¹⁵

18. As recognized in the court's opinion, section 36.8.4(c) of PJM's tariff does provide for a limited reevaluation of projects in the event that an interconnection customer withdraws. Section 36.8.4(c) provides:

In the event that a terminated and withdrawn Interconnection Request was included in a Facilities Study that evaluated more than one Interconnection Request, the Transmission Provider shall reevaluate the need for the facilities and upgrades indicated by the Facilities Study, redetermine the cost responsibility of each remaining Interconnection Customer for the necessary facilities and upgrades based on its assigned priority pursuant to Section 36.10, and enter into an amended Interconnection Service Agreement with each remaining Interconnection Customer setting forth its revised cost obligation.¹⁶

¹⁵ *Neptune Regional Transmission System*, 110 FERC ¶ 61,098. at P 23 (2005).

¹⁶ Original Sheet No. 74h), effective April 1, 1999, which has subsequently been revised (Attachment to PJM's May 5, 2006 Initial Brief).

19. FPL's Interconnection Request was part of a joint facilities study. But, as PJM points out,¹⁷ the review under section 36.8.4(c) is a limited review of multiple projects that were part of a single Facilities Study to determine whether the withdrawal of a project would affect the costs of the remaining projects. For instance, the withdrawal may result in increased costs being assigned to the remaining projects or a reduction in the need for facilities (if those facilities have not already been constructed). Again, though, this review is limited to the facilities in the joint Facilities Study, and would not obviate FPL Energy's obligation under the PJM tariff to raise questions about the projects in the facilities study and the cost allocations for those projects at the time it entered into the ISA.

20. FPL Energy cites to the Commission's decision in *Exelon Corporation v. PPL Electric Utilities Corporation*,¹⁸ in arguing that there should not be a specific cut off date for filing complaints about billings, claiming that it was in effect overcharged for its upgrade costs. But, as we explain below, the circumstances of that case are significantly different than those at issue here, and *Exelon* does not support ignoring the PJM tariff's requirement that challenges to the ISA be made prior to signing the agreement.

21. In *Exelon*, Pennsylvania Electric Company, Inc. (PECO) filed a complaint arguing that it had been overcharged by PJM due to PJM's error in assigning a substation in PJM's state estimator (the computer system PJM uses to calculate charges). The Commission granted the complaint, finding that PJM was required to adjust an incorrect bill and refund the overpayment to PECO. In granting the complaint, the Commission emphasized that the PJM tariff did not limit the time period within which such a complaint could be filed: "We find, absent any specific tariff provision establishing a time frame to dispute such errors, that no specific time frame exists within which to dispute this billing error."¹⁹ Here, however, section 37.4 does contain such a limitation.

22. Moreover, in *Exelon*, the parties all recognized the bill sent to PECO reflected a rate that exceeded the filed rate, and the Commission found that the PJM tariff provided that "congestion charges be billed to the party incurring the charges."²⁰ The billing error also was not immediately apparent from the bill sent to PECO, but was a single improper

¹⁷ PJM Initial Brief at 25-26.

¹⁸ 111 FERC ¶ 61,065 (2005), *on reh'g*, 114 FERC ¶ 61,298 (2006) (*Exelon*).

¹⁹ 111 FERC ¶ 61,065, at P 26 (emphasis added). In fact, as a result of this case, PJM filed to impose a two-year limitation on challenges to billing errors, a tariff change accepted by the Commission. Docket No. ER06-1497-000 (Nov. 13, 2006).

²⁰ 114 FERC ¶ 61,298, at P 13.

code in a massive computer program that was then used to aggregate thousands of transactions used to determine billed costs. In contrast, PJM's interconnection procedures are transparent and provide numerous opportunities for FPL Energy to review the various studies at different stages of the process.²¹ As PJM points out, all of the analyses in the various studies are provided to the interconnection customer, and the customer can meet with PJM and the interconnected transmission owner at any time to discuss the results of the studies.²²

23. FPL Energy also argues that the signing of the ISA should not establish a date by which a complaint regarding costs must be filed because it was assessed additional costs after signing the ISA. The ISA, however, establishes the upgrade projects needed to be completed with an estimate of the costs of those projects. The interconnection customer is still responsible for all actual costs incurred for the projects. PJM concedes that, through an error, it later discovered an additional upgrade that was not included in the ISA, but it indicates that the parties negotiated and signed a revised ISA on June 28, 2004 reflecting the costs for that additional upgrade. An agreement rectifying a mistake in the original ISA does not affect FPL Energy's obligation under the PJM tariff to challenge in a timely fashion the determination of "but for" costs and related benefits prior to signing the ISA.

24. Under the PJM tariff, FPL Energy had an obligation to challenge any cost reductions before it entered into the ISA. FPL raised none of these issues prior to signing the ISA. Indeed, FPL Energy did not even communicate with PJM regarding these cost projections until a year after the higher-queued project filed for bankruptcy.²³ FPL

²¹ In *PPL EnergyPlus, LLC*, 117 FERC ¶ 61,338, at P 31-35 (2006), the Commission similarly found that a PJM tariff provision prohibiting claims for monetary damages due to dispatch errors applied to bar a complaint for damages due to such errors. The Commission has adopted similar limitations on the time period for challenging billing determinations. *E.g. New York Independent System Operator, Inc.*, 116 FERC ¶ 61,029 (2006) (two-year time period to challenge billing errors).

²² PJM Reply Brief at 16; PJM tariff, section 36.1.7, requiring that PJM make the base case data available to the generator, including "all (i) generation projects and (ii) transmission projects, including merchant transmission projects, that are included in the then-current, approved Regional Transmission Expansion Plan." Transmission owner identified projects that are not formally part of the RTEP plan are included in the generation interconnection process and would be available to the generator.

²³ FPL Energy Complaint, at 10.

Energy, therefore, cannot, under the PJM tariff, raise those issues almost two years after signing the ISA.

B. FPL Energy Does Not Qualify for a Reduction in Costs under the Interconnection Provisions of the PJM Tariff

25. FPL Energy sought interconnection to PJM in 1998 and was assigned a queue date of August 17, 1998. Based on PJM's studies, there were three related projects in the queue. PJM determined that no upgrades would be necessary for the earliest project in the queue, but that FPL Energy's project and one later project would require upgrades. FPL Energy signed the ISA on January 22, 2002, and did not raise any objection at that time to any of the upgrades in the Facilities Study or argue that the cost of those upgrades should have been reduced under section 37.2.

26. The higher queued project was terminated due to bankruptcy almost a year after the FPL Energy signed the ISA. By that time, FPL Energy's Mickleton-Monroe upgrades were essentially complete. PJM then applied section 36.8.4(c) of its tariff and determined that there was no need to redetermine costs as between the three related projects.²⁴ As the Commission found, and the court affirmed, section 36.8.4(c) provided no basis upon which to reassign those costs to other customers.

27. FPL Energy's argument is that, with the termination of the higher-queued project, the second line it installed should have some value to PJM and that it should receive some payment from PJM representing such potential long term benefits. It argues that the fact that the double-circuited towers were installed means "use of the second set of positions was envisioned at some point in the useful life of the towers."²⁵

28. We find that section 37.2 of the PJM tariff does not provide for such a broad definition of benefits. Section 37.2 states that:

Such costs and benefits shall include costs and benefits such as those associated with accelerating, deferring, or eliminating the construction of planned Local Upgrades and Network Upgrades, the construction of unplanned Local and Network upgrades.

²⁴ Since no costs had been assigned the higher-queued, terminated project, FPL Energy's costs did not increase. Moreover, because FPL Energy's upgrades had been completed, there was no basis to reduce the costs of its construction.

²⁵ FPL Energy, Initial Brief at 11.

Applying general principles of contract interpretation,²⁶ we find that the benefits to be considered are those in the same category as the enumerated items: benefits that accelerate, defer, or eliminate planned or unplanned upgrades. While towers with a second set of mounts may be able to accommodate an extra line (should such a line ever become necessary), that fact is not sufficient under the tariff to qualify for cost reduction.²⁷ In order to qualify for cost reduction under section 37.2, at the time the studies were completed, there would need to be a discrete project, whether formally a part of the RTEP plan or not, that would have been affected by FPL Energy's upgrades. This is consistent with the PJM interconnection process, since the costs of the deferred or eliminated project would be borne by the company (and customers) whose project was affected. FPL Energy has not identified such a discrete project that its construction would affect.

29. The court's opinion found that the Commission had not adequately explained the link between PJM's RTEP and the question of system benefit.²⁸ The RTEP, in the PJM tariff definition, refers to the plan for the enhancement and expansion of the Transmission Facilities in order to meet the demands for firm transmission service, and to support competition, in the PJM Region.²⁹ Section 37.2 refers to both projects that are planned as part of the RTEP and unplanned projects. The unplanned projects refer to transmission owner identified upgrades, which are projects that the transmission owners construct without going through the formal RTEP process to have those projects certified by PJM as being needed for reliability or competition. While these transmission owners identified upgrades are not formally included in the approved RTEP plan by PJM, the RTEP documents and the transmission planning documents take into account these transmission owner identified upgrades, and these transmission owner identified upgrades

²⁶ *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (the interpretive canon of ejusdem generis would attribute to the last item the same characteristic of discreteness shared by all the preceding items); *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003) (where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words).

²⁷ The PJM Transmission Owners claimed that the second set of mounts on the towers at issue were installed because of the difficulty in attaining future rights of way if another high-voltage line were necessary. Indicated PJM Transmission Owners Initial Brief at 11.

²⁸ 430 F.3d at 449.

²⁹ PJM Operating Agreement, at Schedule 6, section 1.1.

are posted on the PJM website.³⁰ FPL Energy made no claim when it signed the ISA that such a non-RTEP project existed, and it has failed to identify any such project here.

30. FPL Energy cites to language in Order No. 2003³¹ to support its argument for a broader definition of the term “benefits”, asserting that it should be defined to include, quoting from Order No. 2003, “the reliability benefits of a stronger transmission infrastructure and more competitive power markets that result from a policy that facilitates the interconnection of new generation facilities.”³² However, the quoted passage did not establish a benefits test to be applied in particular cases, as FPL Energy contends. Rather, this language was part of the Commission’s explanation as to why it adopted a bright line test for determining whether facilities would be considered network upgrades, which benefit all customers, or interconnection facilities.³³ The Commission, however, made clear that this bright line test was inapplicable to RTOs, which are permitted to apply the “but for” test.³⁴ We therefore reject FPL’s contention that Order No. 2003 established a benefits test to be applied to its upgrades, and find that the definition of benefits from the PJM tariff limits the consideration of benefits to upgrades that accelerate, defer, or eliminate the construction of planned or unplanned upgrades.

31. FPL Energy also maintains that because the towers may be able to accommodate a second line, the Mickleton-Monroe upgrades accelerated what was already contemplated for the future. The existence of mounts for double-circuited towers only suggests that in the exercise of good business judgment by the transmission owner during construction,

³⁰ PJM Reply Brief at 8-9. PJM Planning Manual 14A states: “The final Regional Transmission Expansion Plan includes the requirements for: ... Transmission Owner identified local upgrades.” PJM Manual 14A, Introduction to the Generation and Transmission Interconnection Process, Revision: 05, Effective Date: June 7, 2006, at 6. Similarly, PJM Manual 14B states: “The RTEP base case is developed for a reference year 5 years in the future. All RTEP identified system upgrades and Transmission Owner Identified (TOI) projects are included in the system model.” PJM Manual 14B: Generation and Transmission Interconnection Planning Revision: 09, Effective Date: June 7, 2006, Attachment E: PJM Deliverability Testing Methods, at 85.

³¹ Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, FERC Stats. & Regs. [Regulations Preambles] ¶ 31,146 (2003) (Order No. 2003).

³² FPL Energy, Initial Brief, at 7.

³³ Order No. 2003 at P 21, 65.

³⁴ *Id.* at P 677, 693-95.

the towers were sized to accommodate a potential future line, if it became necessary. However, to qualify under section 37.2, FPL Energy needs to show more than a possible future benefit, which may never occur; it must show that the project is, in fact, an acceleration of a planned future project, whether that project is part of the RTEP plan or a transmission owner identified upgrade that is not formally part of the RTEP plan. FPL Energy, however, has not identified any project that its upgrades accelerated.

C. FPL Energy Is Compensated by Potential Benefits from Financial Transmission Rights

32. Under the PJM tariff, if the second line installed by FPL Energy becomes valuable in the future, FPL Energy has financial transmission rights that entitle it to payment should these lines become congested. Pursuant to section 46 of the PJM tariff, these financial rights, termed Incremental Auction Revenue Rights (IARRs), are assigned to the generator building network upgrades. The IARRs will enable that generator to receive payment for congestion costs over that line. Congestion costs occur when the demand for service over the line exceeds the capacity of the line such that PJM is required to dispatch other (higher cost generators) to serve load. Thus, to the extent that the Mickleton-Monroe upgrades built by FPL Energy do become valuable in the future, it will receive compensation for constructing those lines.

33. FPL Energy asserts that, rather than just receiving financial rights, it should receive offsets or credits for the potential value of its upgrades. FPL Energy claims that the value of its upgrades can be determined by their cost: “there is nothing that precludes a network upgrade from being considered to have a value equal to its cost. This is implicit in the Commission’s interconnection cost rule outside of RTOs.”³⁵

34. In Order No. 2003, the Commission found that in RTO markets like PJM’s, generators can receive financial rights, as opposed to the credits available in non-RTO markets for upgrades that, like FPL Energy’s, may provide future benefit, but do not offset currently planned projects.³⁶ FPL Energy’s claim that it should receive offsets or credits for the potential value of its upgrades is equivalent to a request that it receive credits for all network upgrades. But this is precisely the position that the Commission found in Order No. 2003 would not be required for RTOs. Under Order No. 2003 and the PJM tariff, generation interconnection customers are not entitled to credits equal to the cost of facilities simply for building network upgrades that may potentially provide system benefits. Instead of credits, they may receive IARRS if such upgrades expand the transmission capacity of PJM’s system. As discussed previously, generation

³⁵ FPL Energy Reply Brief at 12.

³⁶ Order No. 2003 at P 695, 700.

interconnection customers are entitled to credits or offsets under section 37.4 of the PJM tariff only if their upgrades accelerate, defer, or eliminate the need for specifically identified projects.

D. Request for a Hearing

35. FPL Energy maintains that summary disposition of its complaint is not consistent with the court's opinion and that the Commission should establish a trial-type hearing on the question of whether benefits are provided by its upgrades. The court's opinion found that the Commission had not adequately explained its decision on system benefits and remanded the case for further proceedings. But the court opinion did not specify a particular process for or outcome of such review, including holding a trial-type hearing.³⁷

36. On remand, the Commission issued an order specifically asking the parties to brief a number of issues that had not been adequately explored in the earlier orders. Based on the parties' responses and the specific tariff provisions PJM cited, the Commission has determined that, under the structure of the PJM tariff, challenges to the cost allocations and the projects that would result in reduction in cost due to the provision of benefits must be lodged before the ISA is executed.

37. In any event, FPL Energy has not proffered sufficient evidence to warrant setting the issue of benefits for a trial-type hearing. In order to justify a hearing, a complainant must do more than put forward "mere allegations of disputed fact"; it "must make an adequate proffer of evidence to support" its allegations.³⁸ A trial-type hearing is also not required when the Commission can resolve the dispute based on a written record.³⁹

³⁷ On remand, the Commission is not limited to the issue discussed by the court, but can reconsider the whole of its original decision. *See Process Gas Consumers Group v. FERC*, 292 F.3d 831 (D.C. Cir. 2002) (Commission did not ignore remand when it satisfactorily explained its ultimate decisions); *Southeastern Mich. Gas Co. v. FERC*, 133 F.3d 34, 37-38 (D.C. Cir. 1998) ("once FERC reacquired jurisdiction, it had the discretion to reconsider the whole of its original decision"); *Chesapeake and Ohio Railway Co. v. U.S.*, 571 F.2d 1190, 1193 (D.C. Cir.1977) (remand does "not require the agency to limit itself to the issue previously before the Court, but [gives] the agency authority to clarify its intention and make revisions in any respect that was within its statutory authority").

³⁸ *Pennsylvania Public Utility Comm. v. FERC*, 881 F.2d 1123, 1126 (D.C. Cir. 1989); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982).

³⁹ *Union Pacific Fuels, Inc. v. FERC*, 129 F. 3d 157, 164 (D.C. Cir. 1997); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) *Louisiana Ass'n of Indep.*

38. FPL Energy has alleged only that the existence of double towers shows that the line it constructed might someday be of benefit to the system. It has not proffered evidence to show that these towers would have accelerated, deferred or eliminated any specific project, as required by section 37.2 of PJM's tariff. PJM, an independent operator, has consistently asserted that there have been no such projects, either RTEP or non-RTEP, that would have been accelerated, deferred, or eliminated by virtue of FPL Energy's upgrades. And, despite the passage of six years from the date on which it signed the ISA, and the opportunity to submit record evidence, FPL Energy still has not identified any projects that would meet the tariff definition. Indeed, as PJM points out, these towers have been in place since 1965 and a second line has never been needed in those 40 years.⁴⁰ In these circumstances, in the absence of any countervailing evidence put forward by FPL Energy that the second line accelerates, defers, or eliminates a specific project, the Commission finds that FPL Energy has not proffered sufficient evidence to establish a material issue of disputed fact and that this proceeding can be resolved based on the written record before the Commission.

The Commission orders:

The complaint is hereby denied, as discussed in the body of the order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

Producers & Royalty Owners v. FERC, 958 F.2d 1101, 1113 (D.C. Cir. 1992); *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1167 n. 41 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

⁴⁰ PJM Reply Brief, at 10.