

151 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Duke Energy Corporation, Duke Energy Commercial Asset Management, Inc., and Duke Energy Lee II, LLC v. PJM Interconnection, L.L.C., and PJM Settlement, Inc. Docket Nos. EL14-45-000

PJM Interconnection, L.L.C. EL15-73-000

ORDER ON COMPLAINT, INSTITUTING SECTION 206 PROCEEDING, AND
ESTABLISHING REFUND EFFECTIVE DATE

(Issued June 9, 2015)

1. On May 5, 2014, Duke Energy Corporation, on behalf of its subsidiaries Duke Energy Lee II, LLC and Duke Energy Commercial Asset Management, Inc., (collectively, Duke) filed a complaint against PJM Interconnection, L.L.C. (PJM), pursuant to sections 206 and 306 of the Federal Power Act (FPA)¹ and Rule 206 of the Commission's regulations,² alleging that PJM failed to fulfill its obligation under section 10.3 of the PJM Open Access Transmission Tariff (OATT) to indemnify Duke for losses incurred to implement a PJM directive. In the alternative, Duke seeks a one-time, limited waiver of certain provisions of the PJM OATT and Amended and Restated Operating Agreement (Operating Agreement),³ so that Duke may recover its losses

¹ 16 U.S.C. §§ 824e, 825e (2012).

² 18 C.F.R. § 385.206 (2014).

³ Specifically, Duke seeks a one-time, limited waiver of parts of sections 1.9.7(b)(i), 1.10.2(d) and 1.10.4(c) of Schedule 1 of the PJM Operating Agreement and the mirror provisions of Attachment K – Appendix of the PJM OATT. As Duke explains, Attachment K – Appendix incorporates the provisions of Schedule 1 to the Operating Agreement into the PJM OATT; therefore, the request for waiver

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through make-whole payments. As discussed below, we deny Duke's complaint because Duke has failed to demonstrate that it is entitled to indemnification under section 10.3 of the PJM OATT. We also deny the requested waiver because, in the circumstances presented, granting the requested waiver would be a violation of the filed rate doctrine and the rule against retroactive ratemaking.

2. While we deny Duke's complaint, we find that aspects of PJM's current tariffs may be unjust, unreasonable, unduly discriminatory or preferential because they do not appear to allow market participants to submit day-ahead offers that vary by hour and do not appear to allow market participants to update their offers in real time, including during emergency situations. Accordingly, we institute a proceeding, in Docket No. EL15-73-000, pursuant to section 206 of the FPA to examine these provisions, as discussed more fully below.

I. Background

3. Duke owns the Lee Facility in Dixon, Illinois, which consists of eight 80-MW natural gas-fired, combustion turbines that are Generation Capacity Resources in PJM (Lee units). On May 5, 2014, Duke filed a formal complaint against PJM seeking to recover costs it incurred in January 2014 to secure natural gas for the Lee units following PJM's communication, through alerts and over the phone with Duke personnel, that "all units need to be available" without regard to economics because PJM was in an emergency reliability state.⁴ Duke seeks cost recovery pursuant to section 10.3 of the PJM OATT, alleging that the provision requires PJM, on behalf of PJM transmission customers, to indemnify Duke for losses it incurred, in good faith, in response to PJM's communications. In the alternative, Duke seeks a limited, one-time waiver of certain provisions of the PJM OATT and Operating Agreement, so that Duke may recover its losses through make-whole payments.

A. Basis for Duke's Request for Cost Recovery

4. Duke states that, in January 2014, extreme weather conditions affected much of the eastern United States. For example, as Duke indicates, temperatures in January in Dixon, Illinois (the location of the Lee units) were significantly below average resulting

includes the relevant portions of both the Operating Agreement and Attachment K-Appendix of the OATT. *See* Duke Complaint at 2 & n.3.

⁴ Duke was not able to purchase gas to run three of these units (units 3, 4 and 7), so the amount Duke is seeking to recover does not include any costs for these three units.

in record peak demand for natural gas.⁵ As Duke describes in its complaint, on the morning of January 27, PJM called a Maximum Emergency Generation Alert⁶ covering the entire PJM footprint for January 28, expecting record low temperatures, high load, and low reserves.⁷ In an emergency procedures message broadcast to PJM members, including generation dispatchers, PJM stated:

Good morning, this is PJM with an emergency procedures message. As of 08:45, Eastern Time, PJM is issuing a maximum emergency generation alert for the entire PJM [Regional Transmission Organization (RTO)] for the day and evening periods of Tuesday, January 28th. The RTO load estimate is 141,000 megawatts; the reserve objective is 9,450 megawatts; estimated reserves are 1,000 megawatts. PJM is calling maximum emergency in[to] the capacity. PJM is requesting all generation owners to verify their maximum emergency values and report changes to the master coordinator at extension 8809 and update e-market as appropriate. . . .⁸

5. Duke states that, on the morning of January 27, it initially decided not to purchase gas for the Lee units prior to learning whether the units would clear the Day-ahead Energy Market for January 28. Duke explains that it based its decision on its belief that PJM would likely not dispatch the units in real time. Duke explains that this decision was also informed by its experience during prior similar cold weather and load conditions, power market prices, and the “high and extremely volatile price of gas given

⁵ Duke Complaint at 11-12 & nn. 27-29.

⁶ According to PJM Operating Agreement, Schedule 1, section 1.3.13, Maximum Emergency Generation is “an Emergency declared by the Office of the Interconnection to address either a generation or transmission emergency in which the Office of the Interconnection anticipates requesting one or more Generation Capacity Resources . . . to operate at its maximum net or gross electrical power output, subject to the equipment stress limits for such Generation Capacity Resource . . . in order to manage, alleviate, or end the Emergency.” Capitalized terms that are used herein and not otherwise defined have the meanings used in the OATT.

⁷ Duke Complaint at 12.

⁸ *Id.*

increased demand” and restrictions on the pipeline that supplies the Lee units.⁹ For example, Duke states that on January 27, “a few minutes”¹⁰ after PJM called a Maximum Emergency Generation Alert, an employee with Duke’s Generation Dispatch (Duke Dispatch) called PJM’s dispatch desk (PJM Dispatch) to explain that gas was a limiting factor for the Lee units and that he was worried about buying gas without knowing whether PJM would call the Lee units.¹¹ According to the complaint, PJM Dispatch responded that “more than likely, your units will be running. However, if we’re up against a transmission constraint which is unforeseeable right now in the present time for tomorrow, [PJM Dispatch] can’t guarantee 100 percent that you will be on. 99.9 percent you will run though.”¹² Duke reiterates that, at this time, it thought the Lee units would not be called and decided not to buy gas based on the economics of gas and day-ahead energy prices.¹³

6. Duke states that, despite its decision not to purchase gas prior to learning whether the Lee units would clear the Day-ahead Energy Market for January 28, Duke would still offer the Lee units into the Day-ahead Energy Market consistent with its must-offer obligation as a Generation Capacity Resource. Duke explains that:

In accordance with the must-offer obligation for Generation Capacity Resources . . . the Lee units are offered into the Day-ahead Energy Market for every Operating Day. If PJM did decide to schedule the Lee units, [the] decision not to

⁹ *Id.* at 18-19.

¹⁰ According to Duke’s exhibits, Duke Generation Dispatch placed the call seven minutes after PJM issued the Maximum Emergency Generation Alert. Duke Complaint, Ex. No. D-1 (testimony of Gregory H. Cecil), at 5.

¹¹ Duke Complaint at 3.

¹² Duke Complaint, Ex. No. D-2 (Transcripts and Audio Files of Recorded Phone Calls Between Duke and PJM on January 27 and 28, 2014), at 3.

¹³ Duke Complaint at 3-4 & Ex. No. D-1 (testimony of Gregory H. Cecil), at 5 (explaining that the price of gas was \$37/MMBtu, while the day-ahead price was around \$270/MWh, which was “much less than what we needed to break even”).

purchase the gas as this point did not foreclose the possibility of buying any needed gas volumes later.¹⁴

7. Duke asserts that, three minutes after its initial call to PJM Dispatch, PJM Dispatch called Duke Dispatch back and “directed Duke to help PJM maintain the reliability of its system by ‘securing’ the gas without regard to economics.”¹⁵ Specifically, according to the complaint, PJM Dispatch stated “[t]his is a reliability issue, so all units must be available. . . . It’s a reliability issue, not economic concerning gas And if there [are] any other further issues with that, [Duke Dispatch] can call me back and I can talk to him or he can talk to my manager.”¹⁶ Duke states that another three minutes later, the manager of Duke Dispatch called the manager of PJM Dispatch who confirmed that PJM was “anticipating reliability issues, so all units need to be available, it is not an economic decision.”¹⁷

8. Duke states that, following its communications with PJM Dispatch, it purchased 209,100 MMBtus of gas for a total cost of \$12,456,500.¹⁸ Consistent with its

¹⁴ *Id.* at 5 n.9 (citing PJM Operating Agreement, Schedule 1, §§ 1.10.1A(d), 1.10.4).

¹⁵ *Id.* at 5.

¹⁶ Duke Complaint, Ex. No. D-2 (Transcripts and Audio Files of Recorded Phone Calls Between Duke and PJM on January 27 and 28, 2014), at 5.

¹⁷ Duke Complaint, Ex. No. D-2 (Transcripts and Audio Files of Recorded Phone Calls Between Duke and PJM on January 27 and 28, 2014), at 6.

¹⁸ Duke Complaint at 19. Duke states that, typically, it uses balancing service to provide gas to the Lee units, where gas is essentially “borrowed” (also known as a take) and paid back to Natural Gas Pipeline Company of America (Natural), the pipeline that supplies the Lee units, within 48 hours. Gas may also be “banked” on the pipeline for later use. However, on January 15, Natural issued an Operational Flow Order, and on January 22, 2014, it issued a Point Hourly Flow-Off-rate Advisory. These restrictions provided that if a generator exceeded its hourly take limit by a certain percentage (a restriction that requires gas purchases to be ratable), Natural would manually operate the point of interconnection to restrict that generator’s gas take. In addition, Natural suspended the balancing service effective January 23. *See id.* at 14-15; Gronefeld Affidavit at 3-4.

Duke explains that the pipeline restrictions, together with the mismatched timing of the gas and electric days, meant that, to have gas available to run the Lee units for an

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requirement as a Generation Capacity Resource, Duke states, it offered the Lee units into the Day-ahead Energy Market for January 28. Five of the eight Lee units cleared the Day-ahead Energy Market, for a few hours in the morning and the evening. However, as the complaint outlines, PJM did not call the Lee units to run in real time. Duke asserts that it made reasonable and appropriate efforts to mitigate its losses,¹⁹ but nevertheless incurred unrecoverable losses totaling \$9,843,621.²⁰

9. Duke adds that, following the events outlined above, it requested compensation from PJM, pursuant to section 10.3 of the OATT, for the unrecovered costs Duke incurred to purchase gas on January 27. In particular, Duke explains that, on April 2, 2014, it sent a demand letter to PJM notifying PJM of its responsibility to provide indemnification under section 10.3, which Duke explains is consistent with generation commercial practice for indemnification.²¹ Duke states that PJM responded by letter on April 8, 2014, stating that it would not honor Duke's indemnification request.²²

entire electric day, Duke was required to purchase gas for two entire gas days and to use or re-sell the gas by the end of each day. Specifically, the PJM real-time electric power Operating Day (which Duke refers to as the electric day) runs from 12:00 a.m. to 11:59 p.m. Eastern Prevailing Time (EPT). The gas day runs from 10:00 a.m. to 10:00 a.m. EPT, and so does not match up with the electric day. According to Duke, because the "Electric Day includes parts of two Gas Days, under the hourly takes restriction and the [Operational Flow Order], a unit needing to be available in all hours of an Electric Day would need to buy two full Gas Days' worth of gas – 48 hours of supply." *See* Duke Complaint at 14-15 & n.36; Cecil Affidavit at 3; Gronefeld Affidavit at 3-5.

¹⁹ Specifically, Duke states that it mitigated its losses by: (1) self-scheduling units and (2) selling what excess gas it could within the short window of time permitted by Natural's restrictions on balancing service. Duke states it further mitigated the January 27 purchases by selling the remaining gas volumes once Natural lifted the applicable pipeline restrictions. Duke Complaint at 19-20.

²⁰ Duke Complaint at 6.

²¹ *Id.* at 23.

²² *Id.*

B. Section 10.3 of the PJM OATT

10. In its complaint, Duke seeks compensation for the losses it incurred as a result of its January 27 gas purchases. Specifically, Duke asserts that section 10.3 of the OATT²³ requires transmission customers to hold Duke harmless for obligations to third parties arising out of its good-faith actions to implement PJM directives related to capacity resource obligations. Duke argues that the plain language of the provision and Commission precedent support compensating Duke for its unrecovered losses, plus reasonable interest, minus limited payments and credits for amounts that Duke was able to recoup through mitigation efforts.

11. Duke contends that PJM Dispatch's communications with Duke Dispatch amounted to a directive to purchase gas. Duke states that, prior to the communications, Duke had decided not to purchase gas before knowing whether the Lee units would operate in real time.²⁴ However, Duke states that it "reversed course to follow the

²³ PJM OATT, § 10.3. In its entirety, section 10.3 of the PJM OATT provides:

"The Transmission Customer shall at all times indemnify, defend, and save each Transmission Owner, the Transmission Provider, PJM Settlement, and each Generation Owner acting in good faith to implement or comply with the directives of the Transmission Provider, and their directors, managers, members, shareholders, officers and employees harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the Transmission Provider's, PJM Settlement's, a Transmission Owner's, or a Generation Owner's (acting in good faith to implement or comply with the directives of the Transmission Provider) performance of its obligations under this Tariff on behalf of the Transmission Customer, except in cases of negligence or intentional wrongdoing by such Transmission Owner, the Transmission Provider, or such Generation Owner acting in good faith to implement or comply with the directives of the Transmission Provider."

²⁴ Duke Complaint at 29.

directive of the RTO [PJM] and buy the gas.”²⁵ Duke argues that various provisions in the PJM Operating Agreement, and the parallel provisions included in Attachment K-Appendix of the OATT, support its position that PJM Dispatch’s statement amounted to a directive. Duke points out that section 1.8.2(a) requires market participants to “comply with all determinations of the Office of the Interconnection on the selection, scheduling or dispatch of resources in the PJM Interchange Energy Market, or to meet the operational requirements of the PJM Region.”²⁶ In addition, Duke notes that, in emergency circumstances, “PJM is responsible . . . for ‘directing the operations of [m]arket [p]articipants as necessary to manage, alleviate or end an Emergency’”²⁷ and that market participants must “undertake all operations in or affecting the PJM Interchange Energy Market and the PJM Region including but not limited to compliance with all Emergency procedures.”²⁸

12. Duke claims that section 10.3 requires PJM, as an intermediary, to compensate Duke for the losses it incurred from purchasing gas for the Lee units on January 27, asserting that Duke’s purchase of gas constitutes performance under the PJM OATT on behalf of transmission customers.²⁹ Duke argues that its gas purchases provided PJM a reliability service that went against Duke’s “judgment and self-interest . . . at a time when PJM was faced with a realistic possibility of load shedding and loss of customer service.”³⁰ Duke reiterates that its purchases constitute action on behalf of PJM load and, therefore, transmission customers.³¹ Further, Duke argues that PJM’s directive fell within its authority under the OATT to direct generators’ activities in an emergency and that the OATT requires Duke to comply with such directives.³²

²⁵ *Id.*

²⁶ *Id.* at 32 (referring to PJM Operating Agreement, Schedule 1, § 1.8.2(a)).

²⁷ *Id.*; *see* PJM Operating Agreement, Schedule 1, § 1.7.11.

²⁸ Duke Complaint at 33 (citing PJM Operating Agreement, Schedule 1, § 1.7.4(b) and the parallel provisions in PJM OATT, Attachment K-Appendix, § 1.7.4(b)).

²⁹ *See* Duke Complaint at 7, 26.

³⁰ *Id.* at 27.

³¹ *Id.*

³² *Id.* at 32 (citing PJM Operating Agreement, Schedule 1, § 1.8.2(a) and PJM OATT, Attachment K – Appendix, § 1.7.4(f)).

13. Duke asserts that section 10.3 provides additional protection beyond that provided by the *pro forma* OATT indemnification provision.³³ Duke points out that section 10.3 applies to actions taken by generation owners and requires good faith. Duke argues that, because the list of protected parties in section 10.3 goes beyond the transmission provider to include generation owners, the provision protects Duke's actions here – the purchase of natural gas at PJM's direction to preserve reliability. Similarly, Duke argues that, because section 10.3 requires good faith, the provision provides additional protection – a “safety net” – for generators that follow directives immediately and without question, particularly in the RTO context.³⁴

14. Duke asserts that Commission precedent supports holding Duke harmless for its gas-purchase losses. In particular, Duke argues that the Commission permitted similar cost recovery in *New England Power Pool (NEPOOL)*, pursuant to a provision with “the same broad purpose: to serve as a safety net, and permit recovery in circumstances where no other provision . . . directly applies.”³⁵

15. Finally, Duke contends that requiring PJM to indemnify it for the losses it incurred to purchase gas would not invite a profusion of meritless claims for cost recovery. Duke reasons that the provision can and should only provide “a safety net, to use sparingly in rare cases. . . where the [OATT] does not otherwise speak directly to an issue”³⁶ Additionally, Duke argues that the indemnification provision is expressly limited because it does not apply in cases of negligence or intentional wrongdoing.³⁷

C. Alternative Request for Waiver

16. In the alternative, Duke seeks a limited, one-time waiver of three provisions of Schedule 1 of the PJM Operating Agreement: (1) section 1.9.7(b)(i), which authorizes

³³ Duke Complaint at 30.

³⁴ *Id.* at 29-30, 34 & n.102 (citing *Sw. Power Pool, Inc.*, 113 FERC ¶ 61,287, at P 11 (2005)).

³⁵ *Id.* at 36 (citing *NEPOOL*, 107 FERC ¶ 61,183, *order on reh'g*, 108 FERC ¶ 61,207 (2004)) (finding that a proposal to provide “special compensation pursuant to section 7.5(g) of the Restated NEPOOL Agreement [was] reasonable,” because the section specifically addressed the facts presented); *see infra* paragraph 65.

³⁶ Duke Complaint at 38.

³⁷ *Id.*

generators to elect market-based start-up and no-load fees twice a year but limits requests for payments to the biannually-established figures; (2) section 1.10.2(d), which, if PJM cancels its selection of a generator, caps that generator's request for make-whole payments at actual costs up to the generator's start-up fee,³⁸ and (3) section 1.10.4(c), which prohibits self-scheduled resources from seeking to recover start-up fees.³⁹ In support of its waiver request, Duke asserts that waiver is strongly supported by policy and equitable considerations.⁴⁰

17. Duke explains that, pursuant to section 1.9.7(b)(i), it elected to use a market-based start-up cost for the relevant six-month period (October 1, 2013-March 31, 2014) and chose \$1,200; however, the \$1,200 amount "was not developed with [Natural's] restrictions in mind."⁴¹ Duke adds that, due to Natural's restrictions in place, it was required to buy forty-eight (48) hours' worth of gas to be available for the full electric day on January 28, and, therefore, under these unique facts the purchases constituted a legitimate start-up cost.⁴² Therefore, Duke requests waiver of sections 1.9.7(b) and

³⁸ Section 1.10.2(d) provides that:

The Market Seller of a resource selected as a pool-scheduled resource shall receive payments or credits for energy, demand reductions or related services, or for start-up and no-load fees, from the Office of the Interconnection on behalf of the Market Buyers in accordance with Section 3 of this Schedule 1. Alternatively, the Market Seller shall receive, in lieu of start-up and no-load fees, its actual costs incurred, if any, up to a cap of the resource's start-up cost, if the Office of the Interconnection cancels its selection of the resource as a pool-scheduled resource and so notifies the Market Seller before the resource is synchronized.

³⁹ Section 1.10.4(c) provides that "a resource that has been self-scheduled shall not receive payments or credits for start-up or no-load fees."

⁴⁰ Duke Complaint at 7-8, 48-49. Duke notes that, to the extent necessary, it also requests waiver of the Commission's prior notice requirements, asserting that "the Commission permits back-ward looking waivers of the prior-notice requirement in extraordinary circumstances." Duke Complaint at 48 n.143.

⁴¹ *Id.* at 44.

⁴² *Id.*

1.10.2(d) so that it can recover these gas-purchase costs. Finally, Duke explains that it self-scheduled some of the Lee units to mitigate its losses and argues that it should not be penalized for doing so. On this basis, Duke requests waiver of section 1.10.4(c), which would otherwise bar its eligibility for make-whole payments.⁴³

18. In support of its waiver request, Duke contends that the waiver is limited in scope, asserting that it would only apply to Duke and is narrowly drawn based on specific tariff provisions. In addition, it asserts that the waiver remedies a concrete problem, namely stranded gas-purchase costs. Finally, Duke asserts that granting waiver will have no unintended consequences, such as harm to third parties, because the costs it seeks to recover were incurred to provide PJM transmission customers a public good, reliability.⁴⁴

II. Notice of Filings and Responsive Pleadings

19. Notice of the complaint was published in the *Federal Register*, 79 Fed. Reg. 26,747 (2014) with answers, interventions and protests due on or before May 27, 2014. Notices of intervention were filed by Illinois Commerce Commission and the New Jersey Board of Public Utilities (NJ Board).

20. Timely motions to intervene were filed by PJM Industrial Customer Coalition (PJM ICC); Dayton Power and Light Company (Dayton); American Electric Power Service Corporation; Exelon Corporation; the PJM Power Providers Group (P3); Buckeye Power, Inc.; PPL Electric Utilities Corporation, *et al.*; the Electric Power Supply Association (EPSA); the National Rural Electric Cooperative Association; Calpine Corporation; DC Energy, LLC; Eagle Point Power Generation, LLC; NRG Companies;⁴⁵ PSEG Companies;⁴⁶ York Generation Company, LLC; the PJM Independent Market Monitor (PJM Market Monitor); FirstEnergy Service Company (FirstEnergy); the Retail Energy Supply Association (RESA); Dynegy Entities;⁴⁷ NextEra Energy Resources, LLC

⁴³ *Id.* at 45.

⁴⁴ *Id.* at 46-47.

⁴⁵ The NRG Companies are NRG Power Marketing LLC and GenOn Energy Management, LLC.

⁴⁶ The PSEG Companies are the Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.

⁴⁷ The Dynegy Entities are Dynegy Marketing and Trade, LLC, Dynegy Kendall Energy, LLC, and Ontelaunee Power Operating Company, LLC.

(NextEra); North Carolina Electric Membership Corporation; ReliabilityFirst Corporation; Dominion Resource Services, Inc. (Dominion); Kansas City Power & Light Co. (KCP&L) and KCP&L Greater Missouri Operations Company (GMO); and Old Dominion Electric Cooperative (ODEC). On May 28, 2014, Hess Energy Marketing, LLC and J.P. Morgan Ventures Energy Corporation filed motions to intervene out-of-time. An out-of-time motion to intervene and protests were filed by Duquesne Light Company, Duquesne Light Energy, and Duquesne Power, LLC (Duquesne Entities) on June 20, 2014.

21. PJM filed an answer to the Complaint on May 27, 2014. On June 11, 2014, Duke filed a motion for leave to answer and answer to PJM's answer to the Complaint. On June 26, 2014, PJM filed a motion for leave to answer and supplemental answer to Duke's motion for leave to answer and answer filed on June 11, 2014. On July 10, 2014, the PJM Market Monitor filed an answer and a motion for leave to answer to Duke's answer of June 11, 2014, and to PJM's answer of May 27, 2014 and supplemental answer of June 26, 2014. On July 18, 2014, Duke filed a reply to the answer submitted by the PJM Market Monitor.

22. Comments were filed in support of Duke's complaint by Dayton, KCP&L and GMO, Dominion, P3, NextEra, EPSA, Dynegy Entities, and FirstEnergy. In addition, several parties protested Duke's complaint including the PJM ICC, RESA, the PJM Market Monitor, and the NJ Board.

A. PJM's Answer

23. In its answer, PJM argues that section 10.3 of the OATT does not apply to the facts presented in Duke's complaint. According to PJM, the purpose, history, and plain language of section 10.3 indicate the provision does not apply to Duke's claim and extending the provision to apply to the case presented "would read the indemnification provision into a blanket insurance policy for losses of whatever sort, caused by accident, act of God, or plain misfortune that a Market Seller may incur in responding to PJM dispatch."⁴⁸ PJM adds that indemnification would render other cost recovery provisions in the OATT, the Operating Agreement, and the Reliability Assurance Agreement meaningless. However, PJM supports Duke being compensated for some or all of its losses, as deemed appropriate by the Commission, as an equitable resolution of the request for waiver.⁴⁹ Consistent with this position, PJM notes that it agrees that the

⁴⁸ PJM May 27 Answer at 5-6.

⁴⁹ *Id.* at 5, 7.

waiver is limited in scope, there is a concrete problem needing to be remedied, and the waiver will not have unintended consequences, such as harm to third parties.⁵⁰

24. PJM disagrees with Duke's characterization of several facts underlying the complaint. In particular, PJM states that the discussions between PJM Dispatch and Duke Dispatch did not amount to a directive; rather, PJM Dispatch "merely advised Duke's operators that the reason PJM was expecting to call on the Duke resources on January 28, 2014 was for reliability, not economics."⁵¹ Similarly, PJM seeks to clarify that PJM Dispatch did not give Duke any kind of reliability directive, including a directive related to the North American Electric Reliability Corporation (NERC) reliability standards. PJM explains that it "would not give a reliability directive 36 to 48 hours in advance . . . and, if PJM had given a reliability directive or NERC Reliability Directive, it would have informed Duke that PJM needed to shed load, which did not occur."⁵² PJM adds that "[h]ad PJM given a reliability directive, it would have requested that Duke operate specific resources for a specific period of time during the Operating Day, and that did not occur."⁵³

25. Further, PJM explains that Duke's Lee units are Generation Capacity Resources, which obligates Duke to offer the resources into the PJM Day-ahead Energy Market every day for the duration of the delivery year – June 1, 2013 to May 31, 2014 – and to "be available to run for PJM every day during the [d]elivery [y]ear."⁵⁴ PJM adds that a Generation Capacity Resource "is not permitted to declare an outage simply because it faced uncertainty as to the purchase price of natural gas and whether it would be able to recoup this cost in its sales of energy to PJM."⁵⁵ PJM also seeks to clarify that the losses that Duke seeks to recover are more accurately characterized as cancellation fees, rather than start-up costs. In addition, PJM states that it lacks "sufficient independent knowledge and information to respond," to Duke's assertions about Duke's gas-purchase

⁵⁰ *Id.* at 52-57.

⁵¹ *Id.* at 8. PJM states that it denies the discussions amounted to a directive to purchase gas, but asserts that "whether or not the discussions amount to a directive to buy gas is not material to the issues at hand." PJM May 27 Answer at 4.

⁵² *Id.* at 9 n.19.

⁵³ *Id.*

⁵⁴ *Id.* at 10.

⁵⁵ *Id.*

costs, its efforts to mitigate or recoup losses, the reasons it “did or did not procure gas at specific times on specific dates,” and the restrictions imposed by Natural.⁵⁶

26. PJM also asserts that indemnity is the incorrect legal theory under which Duke should seek to recover its losses. PJM argues that Duke’s claim lies “solely and directly against PJM, in its role as Transmission Provider, for its alleged failure to dispatch Duke’s resources after instructing them to be available to run” and, therefore, must be based on a breach of contract, not indemnification. However, PJM argues such claim would fail because PJM has not violated any provision, obligation, or duty under the PJM OATT, Operating Agreement, or Reliability Assurance Agreement. Rather, PJM adds, its actions were consistent with its operative documents in seeking to maintain the reliability of the transmission system.⁵⁷

27. PJM disagrees with Duke’s interpretation of section 10.3 of the OATT, arguing that the language and history of the provision, as well as Commission precedent, indicate that it does not apply to Duke’s claimed losses. PJM asserts that section 10.3 only provides compensation for losses suffered from specific claims brought by third parties, not losses due to market activity.⁵⁸ PJM argues that, contrary to Duke’s assertion, the gas marketers from whom it purchased gas are not third parties within the meaning of section 10.3.⁵⁹ PJM asserts that indemnification is limited to third-party claims against a generation owner (among others) resulting from an individual transmission customer taking transmission service under the OATT.⁶⁰ PJM notes that Duke has neither

⁵⁶ *Id.* at 11.

⁵⁷ *Id.* at 14.

⁵⁸ *Id.* at 19, 26-27 (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,765 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002)).

⁵⁹ *Id.* at 25-27 (referencing *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, FERC Stats. & Regs. ¶ 31,180, at P 366, *order on reh’g*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 (2005), *order granting clarification*, Order No. 2006-B, FERC Stats. & Regs. ¶ 31,221 (2006)).

⁶⁰ *Id.* at 17.

identified a specific transmission customer for which it performed transmission service nor alleged it provided any transmission-related service to a specific transmission customer.⁶¹ Rather, PJM explains, “Duke merely claims its losses incurred in PJM’s energy market should be reimbursed.”⁶²

28. PJM argues that Duke’s actions were not on behalf of a transmission customer within the meaning of the OATT; rather, “Duke purchased gas to fulfill its obligations as a [Generation] Capacity Resource.”⁶³ Specifically, PJM explains, “Duke had an obligation to offer its [Generation] Capacity Resources into the Day-ahead Energy Market and be available to operate in real time even if they did not clear the Day-ahead Energy Market if PJM called them to run in real time.”⁶⁴ PJM argues that purchasing gas to be prepared to operate a Generation Capacity Resource is not performance of an obligation under the OATT on behalf of a transmission customer.⁶⁵

29. PJM adds that the language and history of section 10.3 demonstrate that indemnification applies to the performance of obligations related to transmission service, not participation in PJM’s markets for capacity, energy, or ancillary services. In particular, PJM explains that section 10.3 stems from restructuring changes related to open access transmission service that occurred following Order No. 888, and, therefore, the provision’s reference to a generation owner’s performance of obligations under the OATT on behalf of a transmission customer refers to transmission-service-related obligations, not market activity.⁶⁶ In particular, PJM points out that, in Order No. 888-A, the Commission stated:

The purpose of the indemnification provision is to allocate the risks of a transaction, and the costs associated with those risks, to the party on whose behalf the transaction has been conducted, the transmission customer. As the tariff does not obligate the customer to perform services on behalf of the

⁶¹ *Id.* at 27.

⁶² *Id.* at 19.

⁶³ *Id.* at 27-28.

⁶⁴ *Id.* at 28.

⁶⁵ *Id.* at 28-29.

⁶⁶ *Id.* at 30.

transmission provider, there is no comparable basis for imposing an indemnification obligation on the transmission provider.⁶⁷

PJM argues that, contrary to Duke's assertion, the expansion of the indemnification provision to cover generation owners was not to place transmission providers into the role of middlemen, but rather to ensure that generators in RTOs have similar indemnification protections as state-regulated entities.⁶⁸ Further, PJM maintains, "nothing in PJM's proposal [revising section 10.3] or the Commission's order approving PJM's proposal altered the framework of how indemnification works under section 10.3 (the Transmission Customer indemnifies an indemnified entity against third party claims) or the types of costs that Generation Owners would be indemnified for by Transmission Customers."⁶⁹

30. In addition, PJM contends that the precedent Duke cites in its complaint does not support its claim for indemnification. PJM explains that, contrary to Duke's assertion, the situations presented in *Dominion Energy Marketing, Inc.* and *NEPOOL* are distinguishable from the facts, as Duke alleges them, here.⁷⁰ Similarly, PJM adds, Duke seeks compensation pursuant to different and unrelated provisions and legal theories.⁷¹

31. However, PJM supports Duke's request for waiver because it is concerned that, without recovering some of these costs, generators may hesitate to comply with PJM's dispatch instructions. PJM explains that it supports Duke's effort to recover its "legitimate, out-of-pocket" gas balancing costs, and that the only real and substantive disagreement between PJM and Duke is whether there is a provision in the existing PJM OATT to enable Duke to recover these costs.⁷² PJM adds that it agrees with Duke that

⁶⁷ *Id.* at 30 & n.65 (citing Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,301).

⁶⁸ *Id.* at 31-33 & nn.69, 72-76 (referring to *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,264 (2005)).

⁶⁹ *Id.* at 34.

⁷⁰ *Id.* at 35-41 (citing *Dominion Energy Marketing, Inc.*, 143 FERC ¶ 61,233, *order on reh'g*, 145 FERC ¶ 61,109 (2013) (*Dominion Energy Marketing*); *NEPOOL*, 107 FERC ¶ 61,183, *order on reh'g*, 108 FERC ¶ 61,207 (2004)).

⁷¹ *Id.* at 36-37.

⁷² *See id.* at 4-5.

the requested waiver is limited in scope; there is a concrete problem needing to be remedied; and the waiver will not have unintended consequences, such as harm to third parties.⁷³

B. Comments and Protests

32. Several parties filed comments in support of Duke's complaint. KCP&L and GMO state that they support Duke's request for relief and believe that the Commission should institute a national policy of interpreting RTO tariffs so that resources would be able to recover their costs incurred for maintaining reliability at the request and direction of a reliability coordinator or an RTO.⁷⁴ NextEra agrees with Duke that, pursuant to section 10.3 of the PJM OATT, PJM is required to hold Duke "harmless" from the net costs of Duke's good faith implementation of the PJM directive. As NextEra puts it, "[t]he natural reading of the [section 10.3] provision demonstrates that Transmission Customers must hold Duke "harmless" for Duke's "good faith" action to purchase the gas to "implement" PJM's "directive" to perform its obligations under the Tariff on behalf of the Transmission Customer."⁷⁵ P3 argues that market participants should not be economically harmed when responding to a PJM directive. According to P3, Duke was performing as directed by PJM and "when a generator relies on a clear communication from its RTO/[Independent System Operator (ISO)] and takes actions relying on such an instruction, particularly in a moment when the grid is under stress and the prospects of reliably [*sic*] are uncertain, such generator should not be economically punished for 'doing the right thing.'"⁷⁶

33. Other parties expressed the view that uncertainty about cost recovery in cases such as this may cause generation owners to hesitate before complying with RTO requests, and thus may harm reliability. For example, EPSA argues that generators that do not have a fair opportunity to recover their costs may be forced "to make decisions that may detrimentally impact future reliability, such as not being able to procure expensive fuel needed to operate at a critical time of system stress."⁷⁷ NextEra explains that it is critical to grid security that dispatch instructions be carried out by Generation Owners because

⁷³ *Id.* at 45-55.

⁷⁴ KCP&L and GMO Comments at 4.

⁷⁵ NextEra Comments at 6-7.

⁷⁶ P3 Comments at 2-3.

⁷⁷ EPSA Comments at 4.

“[t]he Commission should not want generators to be weighing the risk of outages against the prospect of significant unreimbursed costs or to otherwise second guess PJM (or another Independent System Operator) at a critical time.”⁷⁸ FirstEnergy states that Duke’s inability to recover its costs incurred as a result of complying with PJM’s instructions would send a strong signal to generators to reconsider prompt compliance with PJM instructions for the sake of reliability because doing so could expose them to potential losses.⁷⁹

34. While KCP&L and GMO and NextEra state their preference that cost recovery should come through indemnification under section 10.3,⁸⁰ other parties do not take a position or are in support of either method for cost recovery.⁸¹ EPSA states that, while it takes no position on whether Duke should be compensated under the indemnification or waiver provisions of the PJM OATT, assuming the facts provided by Duke are accurate, it believes that Duke should be compensated for its costs incurred as a result of responding to an apparent PJM directive.⁸² Dayton supports cost recovery, but has no preference for either option at this time. Dayton proposes that, to prevent future problems, the Commission direct PJM to clarify its market rules.⁸³ P3 supports Duke’s costs recovery under either section 10.3 of the PJM OATT or under the terms of a “Duke-specific limited waiver.”⁸⁴ Dominion supports Duke’s alternative request for a waiver of certain sections of the PJM OATT and recovery of Duke’s reasonable fuel costs.⁸⁵ Dynegy Entities state that they do not take a position on whether the PJM OATT currently permits full cost recovery in circumstances like those described by Duke, but the Commission should find that Duke is entitled to recover all of the legitimate and verifiable costs that were incurred to ensure that the Lee units would be available as requested by PJM. Dynegy Entities also state that they have experienced or are aware of

⁷⁸ NextEra Comments at 5.

⁷⁹ FirstEnergy Comments at 3.

⁸⁰ See comments filed by KCP&L and GMO and NextEra.

⁸¹ See comments filed by Dayton, Dominion, P3, EPSA, Dynegy Entities, and FirstEnergy.

⁸² EPSA Comments at 3.

⁸³ Dayton Comments at 3.

⁸⁴ P3 Comments at 3.

⁸⁵ Dominion Comments at 5.

generators having encountered similar issues in other regions.⁸⁶ Dominion and EPSA also request that the Commission direct PJM to work with stakeholders to resolve and clarify cost recovery issues.⁸⁷

35. Other commenters oppose Duke's request for cost recovery pursuant to either section 10.3 of the OATT or the requested waiver.⁸⁸ RESA argues that, if Duke's claim for indemnification is granted, any market participant may claim economic harm from any PJM request to comply with an existing obligation under the OATT or Operating Agreement. RESA states that in this case, the economics did not work out for Duke, but it was the same for Load Serving Entities (LSEs) such as RESA. RESA asserts that the indemnity provision in the OATT is not meant to cover the circumstances that occurred during January of 2014 and that Duke has not made a claim for indemnification.⁸⁹

36. PJM ICC states that Duke knew that its Lee units would have to be available to produce energy at any time in exchange for capacity payments, and that Duke also knew that, if called upon, these units would be compensated at the day-ahead price or real-time price depending on how its units were dispatched. PJM ICC states that, if the Commission were to determine that Duke is entitled to cost recovery, it should grant Duke's relief via its waiver request, and not indemnification of section 10.3, and should further deduct the capacity payments for the Lee units for the 2013/2014 Delivery Year from the \$9.8 million value.⁹⁰ PJM ICC also stated that the costs should be calculated based on the earlier price of \$37 per MMBtus, and that there is not enough evidence presented to ensure that Duke took reasonable commercial steps to minimize its losses.⁹¹

37. The PJM Market Monitor argues that granting cost recovery would be inconsistent with the proper assignment of risks in PJM's energy markets and inconsistent with the obligations of Generation Capacity Resources.⁹² The PJM Market Monitor maintains

⁸⁶ Dynegy Entities Comments at 5-6.

⁸⁷ Dominion Comments at 6; EPSA Comments at 4.

⁸⁸ See protests filed by PJM ICC, RESA, PJM Market Monitor, Duquesne Entities, and NJ Board.

⁸⁹ RESA Protest at 9-11.

⁹⁰ PJM ICC Comments at 3.

⁹¹ *Id.* at 10-11.

⁹² PJM Market Monitor May 27 Comments at 1.

that Duke's losses stem from its decisions about fuel supply and that it is "inappropriate to ask PJM to hold it harmless from such decisions."⁹³

38. The NJ Board and Duquesne Entities support the protests and the comments submitted by the PJM Market Monitor.⁹⁴ According to Duquesne Entities, PJM never issued a directive nor did it tell Duke that the LSEs would pay for the gas. Duquesne Entities assert that PJM only reminded Duke of its obligations as a Generation Capacity Resource. Duquesne Entities also request that, if the complaint and the waiver request are not denied, the Commission set this matter for hearing.⁹⁵ Duquesne Entities assert that it remains unclear whether Duke's decisions regarding the January 28 fuel purchases were reasonable and the lack of clarity raises issues of material fact that are in dispute.⁹⁶

39. The PJM Market Monitor and Duquesne Entities assert that Duke cannot reasonably claim that PJM issued a "directive" within the meaning of the indemnification provision. They add that Generation Capacity Resources, such as the Lee units, are required to be available at their rated capacity value unless under an approved schedule outage or a forced outage, and that no such outages applied to the Lee units on January 28.⁹⁷ The PJM Market Monitor states that, pursuant to PJM's market rules, communications between PJM dispatchers and resource owners are a reminder of the obligations of resource owners and an indication of PJM's expectations about system conditions; they are not legally binding directives.⁹⁸ The PJM Market Monitor further explains that PJM does not have the authority to order Duke to purchase gas and did not order Duke to purchase gas, a claim shared by RESA.⁹⁹

⁹³ *Id.* at 3; Duquesne Entities Protest at 5.

⁹⁴ *See* NJ Board Comments at 1; Duquesne Entities Protest at 2 (also noting their support of the protests submitted by PJM ICC, RESA, and the NJ Board).

⁹⁵ Duquesne Entities Protest at 4-8.

⁹⁶ *Id.* at 5.

⁹⁷ PJM Market Monitor May 27 Comments at 4 (citing PJM OATT, Attachment DD, § 8.1; PJM Reliability Assurance Agreement, § 9.1(c)); Duquesne Entities Protest at 4-5.

⁹⁸ PJM Market Monitor May 27 Comments at 14 (citing PJM Manual 13, § 2, at 16).

⁹⁹ *Id.* at 10.

40. The PJM Market Monitor asserts that Duke's interpretation of the indemnification provision is incorrect. The PJM Market Monitor states that section 10.3 derives from the *pro forma* OATT, which concerns open-access transmission service, and is limited to the performance of obligations under the OATT.¹⁰⁰ The PJM Market Monitor argues that Duke incorrectly cites to various provisions of Schedule 1 of the PJM Operating Agreement as examples of language authorizing PJM to issue directives, under the OATT, related to the purchase of gas or other fuel arrangements. The PJM Market Monitor argues that these provisions are not relevant to Duke's claim for indemnity under section 10.3 because they are included in the OATT through Attachment K-Appendix¹⁰¹ for ease of reference only and do not concern performance of obligations under the OATT. The PJM Market Monitor states "[t]he inclusion of market rule provisions within the OATT, for convenience, is not a sufficient basis for inclusion of the market rules within the scope of indemnity provided under [s]ection 10.3 of the OATT."¹⁰²

41. The PJM Market Monitor reiterates PJM's argument that the *NEPOOL* precedent does not support Duke's claim since the facts underlying the two cases are distinguishable.¹⁰³ The PJM Market Monitor points out that in *NEPOOL*, the Commission granted cost recovery pursuant to section 7.5(g) of the ISO New England Inc. (ISO-NE) Tariff, which allowed ISO-NE's Participants Committee to vote to approve cost sharing and establish an ad hoc basis for such sharing among market participants for the reimbursement of costs "to meet or avoid short term deficiencies in the amount of resources available to meet the Pool's reliability objectives."¹⁰⁴

42. Several commenters assert that the Commission should also deny Duke's request for waiver. The PJM Market Monitor argues that the Operating Agreement provisions for which Duke seeks waiver are intended "to limit the exercise of market power and prevent market manipulation by sellers in extreme market conditions."¹⁰⁵ The PJM

¹⁰⁰ *Id.* at 11.

¹⁰¹ Attachment K - Appendix "incorporate[s] into the [OATT] for ease of reference the provisions of Schedule 1 of the Operating Agreement." PJM OATT, Attachment K – Appendix, Preface.

¹⁰² PJM Market Monitor May 27 Comments at 13.

¹⁰³ *Id.* at 18.

¹⁰⁴ *Id.* at 17-18 (citing *NEPOOL*, 107 FERC ¶ 61,183, at PP 3-6, 15, *order on reh'g*, 108 FERC ¶ 61,207 (2004)).

¹⁰⁵ *Id.* at 5.

Market Monitor asserts that it would be more appropriate to characterize Duke's request for waiver as a request to add a new market rule to allow generation owners to charge customers for all fuel costs purchased in anticipation of operating.¹⁰⁶ Duquesne Entities argue that the Operating Agreement clearly and properly provides that Duke is not entitled to cost-based recovery.¹⁰⁷ The PJM Market Monitor adds that Duke's gas costs are not start-up costs under any possible interpretation of market rules or the way units operate.¹⁰⁸

43. The PJM Market Monitor asserts that Duke's request for waiver fails under each element of the Commission's standard for granting waiver requests.¹⁰⁹ RESA agrees that Duke's alternate request for waiver is not justified, because none of the Commission's criteria for waiver are satisfied. The PJM Market Monitor argues that the waiver is not limited in scope, because granting it would require broad revisions of the PJM market rules. The PJM Market Monitor explains that the Commission recently rejected a request for waiver from the California Independent System Operator, Inc. (CAISO) market rules for certain market suppliers who sought an order that would require CAISO to "reimburse generators for the cost of natural gas procured in response to CAISO dispatch directives," including "the cost of disposing of natural gas when CAISO later elects not to dispatch units for which natural gas was procured."¹¹⁰ The PJM Market Monitor states that the Commission found that the request was "overly broad in scope and did not meet the Commission's requirements for a tariff waiver."¹¹¹

44. The PJM Market Monitor asserts that Duke's waiver request identifies some issues that Duke needs to address, such as how it manages risk and procures fuel, but does not establish a concrete problem with the PJM market rules that needs to be remedied.¹¹² In

¹⁰⁶ *Id.* at 21-23.

¹⁰⁷ Duquesne Entities Protest at 6.

¹⁰⁸ PJM Market Monitor May 27 Comments at 19-20.

¹⁰⁹ *Id.* at 18 (citing *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, at P 38 (2014)).

¹¹⁰ *Id.* at 20 (citing *Indicated CAISO Suppliers*, 146 FERC ¶ 61,183, at P 1 (2014)).

¹¹¹ *Id.*

¹¹² *Id.* at 24.

addition, the PJM Market Monitor and RESA maintain that waiving the rules for Duke's benefit means harming third parties, in this case PJM customers, who would be required to pay Duke's gas cost.¹¹³

C. Additional Answers

45. In response to PJM's assertion that Duke's claim for cost recovery should have been properly brought as a breach of contract claim against PJM, rather than indemnification against the PJM transmission customers, Duke argues that seeking indemnification from PJM transmission customers is proper. Duke adds that raising the claim against PJM was necessary because only PJM and PJM Settlement are authorized to administer the indemnification provisions.¹¹⁴

46. Duke also responds with several arguments concerning the language and applicability of section 10.3. Duke contends that, contrary to PJM's assertion, section 10.3 "does not require a causal link between a third party and the harm to a [g]eneration [o]wner."¹¹⁵ Instead, Duke argues, the relevant harm must "'arise' from the [g]eneration [o]wner's own good faith actions to implement" the transmission provider's directives and the only requirement relating to a third party is that the generation owner owes an obligation to a third party.¹¹⁶ In addition, Duke argues that the indemnification provision is not limited to actions related to transmission service, because such an interpretation would mean generation owners would never been eligible for indemnification.¹¹⁷ Duke concludes that, because generation owner do not provide transmission service, the provision must apply to services generally, such as generation-based ancillary services and, by extension, operating a Generation Capacity Resource to comply with PJM's dispatch instructions.¹¹⁸

47. Duke contends that section 10.3 is a common service provision and argues that it should therefore apply to the services referenced in Attachment K –Appendix "just as

¹¹³ *Id.*

¹¹⁴ Duke June 11 Answer at 24.

¹¹⁵ *Id.* at 25.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 27.

¹¹⁸ *Id.* at 29.

much as to other service provisions” in the OATT. Duke questions PJM’s assertion that applying the indemnification provision to Duke’s losses would invite a flood of meritless claims, noting that the provision precludes claims by generation owners who are negligent and pointing out that the provision “can simply be amended to limit its application” in the future. Similarly, Duke disagrees with PJM’s argument that reading the provision to apply here would render more specific provisions of the PJM OATT and Operating Agreement meaningless. Duke argues that the indemnification provision “is a safety net that can and should be applied *only* where there is no more specific provision for compensation.”¹¹⁹

48. Responding to the PJM Market Monitor’s assertion that PJM was right to expect Duke to purchase fuel for all of the Lee units, Duke claims that a Generation Capacity Resource is not required to purchase gas before clearing the PJM Day-ahead Energy Market, or even after clearing the Day-ahead Energy Market, since PJM might not dispatch the units in real time. Duke asserts that, but for PJM Dispatch’s communications, “Duke never would have been required to purchase gas for January 28th, notwithstanding Lee’s status as a [Generation] Capacity Resource.”¹²⁰ Duke argues that a Generation Capacity Resource ordinarily has “the flexibility to make an economic decision to wait to see if it [will] receive dispatch notification before buying” fuel.¹²¹ Duke asserts that the PJM OATT and Operating Agreement allow the owner of a Generation Capacity Resource “to make an economic decision about when to buy gas,” for example, waiting to purchase gas until PJM gives specific dispatch instructions.¹²² Further, Duke argues that “[b]y telling Duke that the decision was not to be economic and by invoking reliability . . . under the prevailing state of emergency,” PJM effectively eliminated or “trumped” Duke’s right not to buy gas, requiring Duke to abandon its preferred approach to managing commercial risk.¹²³ Duke reiterates that

¹¹⁹ *Id.* at 31 (emphasis in original).

¹²⁰ *Id.* at 4.

¹²¹ Duke July 18 Answer at 2.

¹²² Duke June 11 Answer at 10.

¹²³ *Id.* at 7-10, 13-15 (arguing that there were “at least three off-ramps that the PJM directive foreclosed,” namely three options Duke would have otherwise had available to avoid purchasing gas: (1) the option to buy replacement capacity; (2) the chance that the Lee units would not clear the Day-ahead Energy Market; (3) the chance that the Lee units would clear the Day-ahead Energy Market but PJM would cancel the units before dispatching them).

PJM Dispatch’s communications amounted to a directive that Duke buy gas and that Duke complied by purchasing as much gas as it could find.¹²⁴ However, Duke contends that the good faith language in section 10.3 “should shield Duke from second-guessing as to whether there was a ‘directive’”¹²⁵

49. Duke also reiterates its alternative request for waiver, asserting there is a “gap in the compensation mechanism” under the PJM Operating Agreement and OATT that represents a concrete problem needing a remedy, specifically the lack of a mechanism to recover costs that Duke could not avoid.¹²⁶ Duke maintains that granting waiver will not have unintended consequences or harm to third parties, because it would compensate Duke for the reliability service provided, a public good.¹²⁷ Contrary to RESA’s assertion, Duke adds that there is no need for the Commission to analyze whether the waiver request stems from a good-faith error. Nevertheless, Duke argues, if an underlying good-faith error is necessary to grant the requested waiver, that error is the creation of the gap in PJM’s compensation structure.¹²⁸

50. Duke also reiterates that the requested waiver is limited in scope, asserting that it has identified specific provisions that, if waived, would allow for cost recovery. Duke adds that its waiver request is limited to costs incurred during extraordinary circumstances, adding that in these circumstances the “ordinary notion as to the meaning of ‘start-up costs’ need not control.”¹²⁹ However, Duke states that PJM’s proposal to treat its costs as cancellation fees is also acceptable and should have no bearing on the Commission’s determination.¹³⁰

51. In response to Duke’s assertion that a generation owner could never be indemnified under PJM’s interpretation of section 10.3, PJM states that in Order No. 888, the Commission enumerated six types of ancillary services supplied by generation

¹²⁴ *Id.* at 14-15.

¹²⁵ *Id.* at 26.

¹²⁶ *Id.* at 17-18, 21.

¹²⁷ *Id.* at 21.

¹²⁸ *Id.* at 19.

¹²⁹ *Id.* at 20.

¹³⁰ *Id.* at 22-23.

owners that “are needed to provide basic transmission service to a customer,” and, thus, could be subject to claims by third-parties and indemnified under section 10.3.¹³¹

52. The PJM Market Monitor agrees that Duke, as a generation owner, has the responsibility to manage its own fuel procurement in the short and long terms. However, the PJM Market Monitor argues that, in a recent ruling, the Commission explained that capacity resources have a strict performance obligation to provide energy when it is needed and that they cannot fail to meet the obligation for economic reasons.¹³²

53. In response, Duke asserts that the Commission’s findings on rehearing in *NEPGA* support Duke’s conclusion that Generation Capacity Resources have the flexibility to wait until they receive dispatch notification before purchasing gas, even if they clear the Day-ahead Energy Market.¹³³

III. Discussion

A. Procedural Matters

54. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

55. Pursuant to Rule 214(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), the Commission will grant Hess Energy Marketing’s and Duquesne Entities’ late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

56. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept the answers submitted in this proceeding because they have provided information that assisted us in our decision-making process.

¹³¹ PJM Answer at 7.

¹³² PJM Market Monitor Answer at 6 (citing *New England Power Generators Ass’n, Inc. v. ISO New England Inc.*, 144 FERC ¶ 61,157, at PP 47-59 (2013) (*NEPGA*)).

¹³³ Duke July 18 Answer at 2.

B. Substantive Matters

57. As discussed below, we deny Duke's complaint because Duke has failed to demonstrate that it is entitled to indemnification under section 10.3 of the PJM OATT. We also deny the requested waiver because, in the circumstances presented, granting the requested waiver would violate the filed rate doctrine and the rule against retroactive ratemaking. While we deny Duke's complaint, we find that aspects of PJM's current tariffs may be unjust, unreasonable, unduly discriminatory or preferential because they do not appear to allow market participants to submit day-ahead offers that vary by hour and do not appear to allow market participants to update their offers in real time, including during emergency situations. Accordingly, we institute a proceeding, in Docket No. EL15-73-000, pursuant to section 206 of the FPA to examine these provisions.

1. Section 10.3 Indemnification

58. Duke asserts that it is entitled to recover the costs it incurred to purchase gas on January 27 from PJM, as an intermediary for all PJM transmission customers, pursuant to section 10.3 of the OATT. Based on our review of the language and history of the provision at issue, we find that PJM's refusal to honor Duke's indemnification request is consistent with section 10.3 of the PJM OATT.

59. Section 10.3 of the PJM OATT provides that:

The Transmission Customer shall at all times indemnify, defend, and save each Transmission Owner, the Transmission Provider, PJM Settlement, and each Generation Owner acting in good faith to implement or comply with the directives of the Transmission Provider, and their directors, managers, members, shareholders, officers and employees harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the Transmission Provider's, PJM Settlement's, a Transmission Owner's, or a Generation Owner's (acting in good faith to implement or comply with the directives of the Transmission Provider) performance of its obligations under this Tariff on behalf of the Transmission Customer, except in cases of negligence or intentional wrongdoing by such Transmission Owner, the Transmission Provider, or such Generation Owner

acting in good faith to implement or comply with the directives of the Transmission Provider.¹³⁴

60. In interpreting section 10.3, we have examined the history of the provision as well as the type of claims it is designed to cover. Section 10.3 stems from the *pro forma* indemnification provision that the Commission established in Order No. 888. In Order No. 888, the Commission stated, “the provision provides for indemnification against third party claims arising from the performance of obligations under the tariff.”¹³⁵ The Commission added that it “limited the indemnification portion of the provision so that it is . . . only the transmission customer who indemnifies the transmission provider,” explaining that the “customer is taking service from the transmission provider and may appropriately be asked to bear the risks of third-party suits arising from the provision of service to the customer under the tariff.”¹³⁶ The Commission reiterated this point in Order No. 888-A, stating that “the purpose of the indemnification provision is to allocate the risks of a transaction, and the costs associated with those risks, to the party on whose behalf the transaction has been conducted, the transmission customer.”¹³⁷ In accepting the current language of PJM’s section 10.3, the Commission stated the provision “extend[s] the existing indemnification of PJM and its Transmission Owners against

¹³⁴ PJM OATT, § 10.3.

¹³⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,765 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹³⁶ Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,765.

¹³⁷ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,301; *see also* Order No. 888-B, 81 FERC ¶ 61,248 at 61,082 (“The [i]ndemnification provision of the tariff, in its essence, provides that when the transmission provider behaves in all respects properly, the customer will indemnify the transmission provider for claims of damage to third parties arising from the service provided under the tariff.”).

third-party claims to include owners and operators of generation facilities acting in good faith to implement and comply with the directives of PJM.”¹³⁸

61. Accordingly, we find the PJM indemnification provision should not be interpreted to guarantee reimbursement of a generator’s losses on gas purchases incurred in meeting its capacity resource obligations in PJM. Fulfilling its energy market commitments are among the risks the Generation Capacity Resource has assumed, under the PJM OATT, Operating Agreement, and Reliability Assurance Agreement, when choosing to participate in the market. Given PJM’s existing tariff and the current structure of PJM’s capacity and energy markets, the risk of such losses should not be borne by PJM Transmission Customers pursuant to the PJM OATT’s section 10.3 indemnification provision. As explained below, a Generation Capacity Resource must offer its capacity into the Day-ahead Energy Market and must operate in real time if called upon. Nevertheless, as currently provided under the PJM OATT and Operating Agreement, Duke’s decision as to how to buy fuel to satisfy those obligations is left to its discretion. Guaranteeing Duke full recovery of its costs under the PJM OATT’s section 10.3 would improperly reallocate the risks related to fuel procurement, and the costs associated with its choices as to when or how to procure fuel, from capacity resources like Duke to PJM customers.¹³⁹ As PJM persuasively argues, to read the PJM OATT’s section 10.3 indemnification provision as Duke requests would read the provision to guarantee cost recovery for all costs – not only fuel, but also labor or any other cost – that Duke incurs, making superfluous the tariff’s rates.¹⁴⁰

62. The capacity market is designed to ensure sufficient resources are available to maintain the reliability of the system. In exchange for capacity payments, for every day of the Delivery Year, a Generation Capacity Resource in PJM must offer all available capacity into the Day-ahead Energy Market and must operate in accordance with PJM’s dispatch instructions if called upon to operate in real time.¹⁴¹ A Generation Capacity

¹³⁸ *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,264, at P 10 (2005) (emphasis added).

¹³⁹ PJM Operating Agreement, Schedule 1, §§ 1.10.1A(d), 1.10.4; *NEPGA*, 144 FERC ¶ 61,157 at P 53 (finding that the ISO-NE Tariff “does not refer to how the [capacity] resource submits or manages its offers or how it procures fuel, nor does it concern whether a resource will operate at all due to fuel procurement issues”).

¹⁴⁰ See PJM May 27 Answer at 28-29.

¹⁴¹ See PJM Operating Agreement, Schedule 1, §§ 1.7.20 (Communication and Operating Requirements), 1.10.1A(d) (Day-ahead Energy Market Scheduling).

Resource's offer is "final as to the price or prices" at which it proposes to supply energy into PJM's energy market, "such price or prices being guaranteed . . . for the period extending through the end of the following Operating Day."¹⁴² As stated above, the capacity resource owner maintains the discretion to decide when and how to satisfy its obligation at the offer price and its obligation to be available in real time, in particular when and how to secure fuel to make the units available.¹⁴³ As the PJM Market Monitor argues, this is appropriate given that capacity resources, not transmission customers, are in a better position to manage risks associated with their availability, including fuel price risk.¹⁴⁴ The Commission has also found that, under similar tariff authority, capacity resources like Duke have a strict performance obligation, explaining that "economic considerations are irrelevant to determining whether a unit is 'physically available'" and "the price of fuel may not affect a unit's physical availability."¹⁴⁵ Duke undertook this capacity resource performance obligation and thus assumed its attendant risks and rewards when it bid the Lee units into PJM's capacity market.

63. Duke nevertheless argues that, under the circumstances presented here, it should be entitled to indemnification because it acted in compliance with a PJM "directive," citing to a transcript of a discussion with a PJM dispatcher. However, we disagree; we do not find that Duke acted pursuant to a directive from PJM that might entitle it to the reimbursement it seeks. Because Generation Capacity Resources in PJM are already required to be available without regard to economics, we do not find that PJM's

¹⁴² PJM Operating Agreement, Schedule 1, § 1.10.1A(d)(vii).

¹⁴³ PJM Operating Agreement, Schedule 1, § 1.10.1A(d) (Day-ahead Energy Market Scheduling); *see also NEPGA*, 144 FERC ¶ 61,157 at P 53 (finding that the ISO-NE Tariff "does not refer to how the[capacity] resource submits or manages its offers or how it procures fuel, nor does it concern whether a resource will operate at all due to fuel procurement issues").

¹⁴⁴ For example, Duke contracted for only an interruptible balancing service agreement with the interstate pipeline and relied upon purchasing natural gas from a marketer at downstream market area prices. The risk of purchasing such interruptible services remains with Duke and is not the type of third-party claim covered by the indemnification provision.

¹⁴⁵ *NEPGA*, 144 FERC ¶ 61,157 at PP 47, 58 (Capacity resources "may not take economic outages, including outages based on decisions not to procure fuel and transportation."); *see also* Duke July 18 Answer at 2 (pointing out that it "has never argued that it can 'fail to meet' the Lee units' capacity obligation for economic reasons" as provided in *NEPGA*).

communication to Duke that “all units need to be available, it’s not an economic decision” amounted to a directive.¹⁴⁶ As PJM explains, “the PJM dispatcher’s comments merely advised Duke’s operators that the reason PJM was expecting to call on the Duke resources on January 28, 2014 was for reliability, not economics.”¹⁴⁷ Consistent with PJM’s OATT and energy market design, Duke was responsible for when and how it would purchase gas for the Lee units on January 27,¹⁴⁸ and PJM’s communications did not alter this fact. According to PJM, it is a common occurrence that PJM dispatchers indicate that units need to be available to run only to later find that due to changes in load conditions, PJM does not need to commit the particular unit.¹⁴⁹ As a Generation Capacity Resource, Duke was already obligated to be available. Therefore, the PJM dispatcher’s communications were not a directive within the meaning of the indemnification provision.

64. Moreover, in its conversations with Duke, PJM Dispatch reiterated that PJM had issued a Maximum Emergency Generation Alert¹⁵⁰ and anticipated calling on maximum emergency generation. When Duke personnel first called PJM Dispatch to ask if the Lee units would run, the dispatcher stated that, while he could not be 100 percent certain the Duke units would run, they more than likely would be required:

¹⁴⁶ Duke Complaint, Ex. No. D-2 (Transcripts and Audio Files of Recorded Phone Calls Between Duke and PJM on January 27 and 28, 2014), at 5.

¹⁴⁷ PJM May 27 Answer at 8.

¹⁴⁸ See *NEPGA*, 144 FERC ¶ 61,157 at P 54 (finding that the ISO-NE Tariff “deals explicitly with *operating* characteristics” and does “not apply to fuel procurement or transportation activities”).

¹⁴⁹ PJM May 27 Answer at 4. PJM states that generators do not have an automatic right to recover all of their costs should their units not actually be dispatched and losses related to procuring excess gas generators did not use to operate their units as originally anticipated is also a normal risk that generators assume in conducting their business. *Id.*

¹⁵⁰ A “Maximum Generation Emergency” is defined as “an Emergency declared by the Office of the Interconnection to address either a generation or transmission emergency in which the Office of Interconnection anticipates requesting one or more Generation Capacity Resources . . . to operate at its maximum net or gross electrical power output, subject to the equipment stress limits for such Generation Capacity Resource . . . in order to manage, alleviate, or end the Emergency.” PJM Operating Agreement, Schedule 1, § 1.3.13.

I cannot anticipate what is going to be the situation. However, I can say that we're calling maximum emergency generation into the capacity for tomorrow. So, more than likely, your units will be running. However, if we're up against a transmission constraint which is unforeseeable right now in the present time for tomorrow, I can't guarantee 100% that you will be on. 99.9% you will run though.¹⁵¹

The PJM dispatcher's communications are consistent with Generation Capacity Resources' existing obligations in PJM, particularly under maximum emergency generation conditions.¹⁵² In such circumstances, Generation Capacity Resources continue to be obligated to make their capacity available to PJM for real-time scheduling and dispatch, but must also make any capacity designated as maximum emergency generation available as well.¹⁵³ Nothing in these conversations dictates that PJM indemnify Duke against the risk it voluntarily assumed in choosing not to purchase natural gas to fulfill its capacity resource obligation.

65. Compensating Generation Capacity Resources for costs incurred to fulfill their capacity obligations through the PJM OATT's indemnification provision would render the cost recovery and energy and capacity payment provisions of the PJM governing documents meaningless. Requiring transmission customers to guarantee full cost recovery under section 10.3 for losses related to its gas purchases would significantly expand, and indeed re-write, the scope of the provision. Additionally, contrary to Duke's

¹⁵¹ Duke Complaint, Exhibit No. D-2, at 3.

¹⁵² See PJM Operating Agreement, Schedule 1, § 1.10.1A(d). Offers may only be designated as Maximum Emergency Offers to the extent that the Generation Capacity Resource falls into at least one of the following categories: environmental limits imposed by a federal, state, or other governmental agency; fuel limits due to *physical* events beyond the control of the resource, *expressly excluding a fuel supplier's exercise of a contractual right to interrupt supply or delivery under an interruptible service agreement*; temporary emergency physical conditions at the unit; or temporary megawatt additions. *Id.* (emphasis added).

¹⁵³ Further, PJM's Operating Agreement provides that any Generation Capacity Resource that contracted its output on a bilateral basis – because it offered such capacity into the Day-ahead Energy Market but did not clear – is under an obligation to make that capacity “available upon request to the Office of the Interconnection for scheduling and dispatch during the Operating Day if the Office of the Interconnection declares a Maximum Generation Emergency.” Schedule 1, § 1.10.4 (Capacity Resources).

assertions, the Commission precedent cited in the complaint does not require PJM to honor Duke's indemnification request under section 10.3 of the PJM OATT. Rather, both *NEPOOL* and *Dominion Energy Marketing* reflect factual distinctions that justify different outcomes from the instant complaint. In *NEPOOL*, the Commission found that a proposal to provide "special compensation pursuant to section 7.5(g) of the Restated NEPOOL Agreement [was] reasonable," because the section specifically addressed the facts presented.¹⁵⁴ Similarly, in *Dominion Energy Marketing*, the Commission permitted compensation under a provision that allows a market participant to seek additional cost recovery if, as a result of mitigation, it does not recover costs incurred to operate.¹⁵⁵ In both cases, the Commission found that compensation was appropriate under discrete tariff sections allowing cost recovery in specific circumstances, and in neither instance was it pursuant to the indemnification provision.¹⁵⁶ The precedent Duke cites thus does not address the scope of indemnification provisions similar to PJM's, and does not require interpreting such a provision as providing for indemnification in the circumstances presented here, where Duke assumed the risk of natural gas price volatility.

2. Request for Waiver

66. As discussed below, the Commission denies Duke's request for waiver. The Commission finds that the filed rate doctrine and the rule against retroactive ratemaking preclude granting Duke's waiver request.

67. The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."¹⁵⁷ The related rule against retroactive ratemaking also "prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods."¹⁵⁸ When evaluating whether granting the requested relief would violate either the filed rate

¹⁵⁴ *NEPOOL*, 107 FERC ¶ 61,183 at P 26.

¹⁵⁵ *Dominion Energy Marketing*, 143 FERC ¶ 61,233 at PP 7, 24.

¹⁵⁶ *NEPOOL*, 107 FERC ¶ 61,183 at P 26.

¹⁵⁷ *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

¹⁵⁸ *Towns of Concord v. FERC*, 955 F.2d 67, 71 & n.2 (D.C. Cir. 1992).

doctrine or the rule against retroactive ratemaking, the Commission considers whether the ratepayers had sufficient notice that the approved rate was subject to change.¹⁵⁹

68. Here, Duke seeks a retroactive waiver of various provisions of the PJM OATT and Operating Agreement in order to recover gas-related costs totaling \$9,643,821 incurred prior to the date on which it made its waiver filing.¹⁶⁰ As noted above, such gas cost recovery is not currently allowed by the PJM OATT or Operating Agreement. We find that the relief sought by Duke is prohibited by the filed rate doctrine and rule against retroactive ratemaking. In this case, ratepayers had not received prior notice of Duke's application for such retroactive cost recovery, which was sought roughly three months after the events in question. Duke points to the Commission's determination in *Midwest Independent Transmission System Operator, Inc. (MISO)*,¹⁶¹ to support its assertion that "the Commission permits back-ward looking waivers of the prior-notice requirement in extraordinary circumstances," but this case is inapposite.¹⁶² The Commission's determination in *MISO* that it was appropriate to grant waiver of the prior notice rule was not based on extraordinary circumstances.¹⁶³ Rather, the Commission determined that it was appropriate to grant waiver because prior notice had been given to ratepayers that they would be responsible for the costs.¹⁶⁴ Duke's request for waiver, accordingly, is denied. In light of our decision to deny waiver as impermissible retroactive relief, we need not reach Duke's equitable arguments for granting waiver.

¹⁵⁹ See *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993); see also *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, at P 46 (2014) ("The waiver is effective prospectively, as of the date of this order, and therefore does not retroactively change the rules Further, the instant filing put market participants on notice regarding a possible rule change."); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 794-97 (D.C. Cir. 1990) (applying same concepts in waiver context); *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 968-70 (D.C. Cir. 2003) (applying same concepts in waiver context).

¹⁶⁰ Duke Complaint at 6.

¹⁶¹ 142 FERC ¶ 61,170, *order on reh'g*, 144 FERC ¶ 61,128 (2013).

¹⁶² Duke Complaint at 48 n.143 (citing *MISO*, 142 FERC ¶ 61,170 at PP 84-85).

¹⁶³ See *MISO*, 142 FERC ¶ 61,170 at PP 84-86.

¹⁶⁴ *Id.*

3. Institution of New Proceeding

69. While we deny Duke's complaint, we have examined PJM's OATT and Operating Agreement procedures and have concluded that aspects of PJM's current tariffs may be unjust, unreasonable, unduly discriminatory or preferential because they do not appear to allow market participants to submit day-ahead offers that vary by hour and do not appear to allow market participants to update their offers in real time, including during emergency situations. Accordingly, we institute a proceeding, in Docket No. EL15-73-000, pursuant to section 206 of the FPA to examine these provisions.

70. As one example, PJM's Operating Agreement and equivalent sections of OATT Attachment K-Appendix detail a number of obligations for Generation Capacity Resources, including the obligation to offer into the Day-ahead Energy Market, respond to PJM's directives to start, shutdown or change output levels, and keep supply offers open throughout the operating day. However, PJM's OATT and Operating Agreement do not appear to allow appropriate cost recovery for fulfilling those obligations in all circumstances. For example, in *NEPGA*, the Commission found that capacity generators in ISO-NE with generally the same obligations as those in PJM should be able to update their supply offers in real time to reflect changes to their operating costs after the reoffer period.¹⁶⁵ ISO-NE later addressed the cost-recovery issue in Docket No. ER13-1877-000.¹⁶⁶ Here, PJM's OATT and Operating Agreement similarly fail to provide opportunities for Generation Capacity Resources like Duke to update their real-time bids to reflect changes in cost and to submit buy-back bids to reflect costs that may become sunk between the Day-ahead and Real-time Energy Markets.¹⁶⁷

71. Further, our review of the record established through the Commission's recent technical conferences on price formation in organized energy and ancillary services markets demonstrates the importance of supply offer flexibility in day-ahead and real-

¹⁶⁵ See *NEPGA*, 145 FERC ¶ 61,206, at 14-15.

¹⁶⁶ *ISO New England Inc. and New England Power Pool*, 145 FERC ¶ 61,014 (2013) (order conditionally accepting ISO-NE's proposed "Offer Flexibility Changes" involving energy market enhancements intended to provide greater flexibility for market participants to structure and modify their supply offers in the day-ahead and real-time markets).

¹⁶⁷ A buy-back bid would permit a generator that, for example, has had to lock-in natural gas costs in order to submit a day-ahead bid to submit a bid in real time to ensure that PJM will not back down that generator and require it to buy-back its position at a price that does not cover its fuel costs.

time energy markets.¹⁶⁸ In light of the potential for significant changes in costs between the time for submitting offers in the day-ahead market and real-time operation, ensuring market participants greater flexibility to structure and modify their offers in such markets will allow resources in PJM to better reflect their actual costs in their offers.¹⁶⁹ Such flexibility will also support proper price formation and efficient real-time dispatch.¹⁷⁰ Moreover, as commenters and panelists from the price-formation proceeding have noted, the ability to submit day-ahead offers that vary by hour and to update offers in real-time is especially critical in markets with demands for more flexible and responsive generation resources.¹⁷¹

72. As noted above, we are concerned that PJM's OATT and Operating Agreement do not provide adequate supply offer flexibility. We balance our directive in this order with PJM's position that given the potentially high costs and impacts on bidding behavior, the Commission should move carefully should it seek to impose a sweeping directive coming out of this proceeding¹⁷² and the fact that PJM is currently working on several initiatives with its stakeholders to identify potential solutions to the problems that occurred during January 2014 in the PJM region.

¹⁶⁸ See *Price Formation in Energy and Ancillary Services Markets Operated by Regional Transmission Organizations and Independent System Operators*, Notice of Proceeding, Docket No. AD14-14-000 (June 19, 2014); *Price Formation in Energy and Ancillary Services Markets Operated by Regional Transmission Organizations and Independent System Operators*, Notice Inviting Post-Technical Workshop Comments, Docket No. AD14-14-000 (Jan. 16, 2015).

¹⁶⁹ See Calpine Corporation Comments, Docket No. AD14-14-000, at 4 (Mar. 6, 2015); Brookfield Comments, Docket No. AD14-14-000, at 10 (Mar. 6, 2015); Scarcity and Shortage Pricing, Offer Mitigation and Offer Price Caps Workshop, Docket No. AD14-14-000, Tr. 271:18-273:1, 273:12-274:5 (Oct. 28, 2014).

¹⁷⁰ See Direct Energy Comments, Docket No. AD14-14-000, at 11-12 (Mar. 6, 2015); PJM Utilities Coalition Comments, Docket No. AD14-14-000, at 23 (Mar. 6, 2015); Scarcity and Shortage Pricing, Offer Mitigation and Offer Price Caps Workshop, Docket No. AD14-14-000, Tr. 191: 11-15 (Oct. 28, 2014).

¹⁷¹ See Brookfield Energy Marketing LP Comments, Docket No. AD14-14-000, at 10 (Mar. 6, 2015); Calpine Corporation Comments, Docket No. AD14-14-000, at 5 (Mar. 6, 2015); Scarcity and Shortage Pricing, Offer Mitigation and Offer Price Caps Workshop, Docket No. AD14-14-000, Tr. 275:23-276:1 (Oct. 28, 2014).

¹⁷² PJM May 27 Answer at 56-57.

73. However, based on the circumstances that gave rise to this proceeding and the information the Commission received during the price formation technical conferences, PJM's OATT and Operating Agreement may be unjust and unreasonable because the OATT and Operating Agreement do not appear to allow market participants to submit day-ahead offers that vary by hour and do not appear to allow market participants to update their offers in real time, including during emergency situations. Accordingly, we institute a proceeding, in Docket No. EL15-73-000, pursuant to section 206 of the FPA to address this failing. The Commission requires PJM, within 30 days of the date of publication of notice of the Commission's initiation of Docket No. EL15-73-000, either to (1) report whether it will propose tariff changes that (a) allow market participants to submit day-ahead offers that vary by hour and to update their offers in real time, including during emergency situations,¹⁷³ and (b) make any associated modifications to its market power mitigation rules; such report must include a proposed timeline from PJM explaining how it will implement such changes by November 1, 2015, or as soon as practicable thereafter; or (2) explain why such changes are not necessary.

74. In cases where, as here, the Commission institutes a proceeding under section 206(b) of the FPA, the Commission must establish a refund effective date that is no earlier than publication of notice of the Commission's initiation of its proceeding in the *Federal Register* and no later than five months subsequent to that date. The Commission establishes a refund effective date to be the earliest date possible in order to provide maximum protection to customers, i.e., the date that notice of initiation of the section 206 proceeding in Docket No. EL15-73-000 is published in the *Federal Register*. The Commission is also required by section 206 to indicate when it expects to issue a final order. The Commission expects to issue a final order in this section 206 proceeding by April 30, 2016.

The Commission orders:

- (A) Duke's complaint is hereby denied, as discussed in the body of this order.
- (B) Duke's request for waiver is hereby denied, as discussed in the body of this order.
- (C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA

¹⁷³ See, e.g., *ISO New England Inc.*, 145 FERC ¶ 61,014 (2013).

(18 C.F.R. Chapter I), the Commission hereby institutes a proceeding in Docket No. EL15-73-000, as discussed in the body of this order.

(D) PJM is hereby directed to submit a filing, within 30 days of the date of publication of notice of the Commission's initiation of Docket No. EL15-73-000, either to (1) report whether it will propose tariff changes that (a) allow market participants to submit day-ahead offers that vary by hour and to update their offers in real time, including during emergency situations, and (b) make any associated modifications to its market power mitigation rules; such report must include a proposed timeline from PJM explaining how it will implement such changes by November 1, 2015, or as soon as practicable thereafter; or (2) explain why such changes are not necessary.

(E) Any interested person desiring to be heard in Docket No. EL15-73-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, D.C. 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2014)) within 21 days of the date of this order.

(F) The Secretary shall promptly publish in the Federal Register a notice of the Commission's initiation of the proceeding ordered in Ordering Paragraph (C) above, under section 206 of the FPA.

(G) The refund effective date established in Docket No. EL15-73-000 pursuant to section 206(b) of the FPA will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (F) above.

By the Commission. Commissioner Moeller is dissenting in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy Corporation, Duke Energy Commercial Asset Management, Inc., and Duke Energy Lee II, LLC v. PJM Interconnection, L.L.C., and PJM Settlement, Inc.

Docket Nos. EL14-45-000
EL15-73-000

(Issued June 9, 2015)

MOELLER, Commissioner, *dissenting in part*:

I am troubled that, notwithstanding its recognition that PJM’s existing tariff may be unjust and unreasonable, the majority is unwilling to provide any corresponding relief to Duke. PJM is the only regional transmission organization that does not allow market participants to submit day-ahead offers that vary by hour or to update their offers in real time, including in emergency situations. This inflexibility contributed to the inability of generation units, like those of Duke, to recover legitimate fuel costs incurred during the polar vortex of January 2014. PJM also recognizes the need to provide cost recovery and supports granting the waiver requests in the extraordinary circumstances presented by this case. At the very least, this matter should have been set for hearing and settlement judge procedures to consider potential avenues for providing appropriate compensation to Duke and to enable the relevant parties to explore a settlement that could have amicably resolved this dispute.

Duke acted in good faith to preserve system reliability during a time of extraordinary system stress and deserve appropriate compensation. Duke seeks to recover costs incurred to secure natural gas following instructions from PJM that it needed to secure gas without regard to economics, in order to ensure availability during the cold weather events of 2014. The majority supports placing Duke in a no-win situation where it acquired natural gas consistent with PJM’s instructions, but was unable to recover the associated costs when PJM chose not to dispatch its units.¹

In finding that third parties would be harmed by granting waiver, the majority fails to apply consistently the Commission’s standard test for considering tariff waiver requests and, thus, largely ignores Duke’s arguments as to why this test has been satisfied. The majority should have applied the Commission’s waiver standards, which

¹ *Montaup Elec. Co. and Pub. Serv. Co. of N.H.*, 46 FERC ¶ 63,007 (1989) (“it would be just as imprudent or unreasonable for this Commission to place utilities in a no-win situation”).

would have enabled consideration of the potential harm to third parties due to the costs of appropriately compensating Duke against the reliability benefits received when generators are available to provide service during periods of system stress. For instance, when applying its waiver standards to approve a tariff waiver to ensure appropriate compensation to generators in NYISO during the polar vortex of 2014, the Commission found that “although granting waiver may result in increased costs to load and increase cost to certain market participants...it is appropriate to allow generators to recover such costs in this exigent circumstance.”² The same reasoning and exigent circumstances that justified allocating costs to third parties in that proceeding are also present here.

Instead of applying the Commission’s standards for considering tariff waivers, the majority applies an overly-narrow reading of the prior notice rule and prohibition against retroactive ratemaking to find that ratepayers somehow lacked adequate notice that they would, in fact, be responsible for paying the cost of services provided to them to ensure resource availability during system emergencies. The Commission can waive – and has waived – the prior notice requirement to ensure that resources are compensated for providing a reliability service. For instance, the Commission rightly waived the prior notice rule to grant a retroactive effective date to ensure compensation of the provision of reliability must-run service by the City of Escanaba, Michigan, prior to the execution and filing of the underlying agreement based on the finding that resources acting to preserve system reliability must be compensated.³ The majority claims that the Commission’s decision to grant waiver of prior notice in *MISO* is inapposite because the Commission determined that prior notice had been given to ratepayers that they would be responsible for the costs. However, the Commission granted waiver in *MISO* notwithstanding the fact that: (1) the tariff provisions on file describing the applicable rate could apply only upon the execution of the agreement,⁴ (2) those provisions were not sufficiently detailed

² *New York Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,061, at P 20 (2014) (*NYISO*).

³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,170, at PP 84, 85 (2013) (*MISO*).

⁴ In *MISO*, the Commission stated that *MISO*’s tariff provided that a resource would qualify as a System Support Resource (SSR), and thus be eligible for associated compensation, *during the period* that that the resource is subject to an *executed* SSR agreement. However, the Commission waived the prior notice rule to grant an effective date of June 15, 2012, which was prior to the September 5, 2012 execution date of the SSR agreement. *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,170, at PP 76, 85 (2013) (*MISO*).

to constitute a filed rate mechanism that could provide ratepayer notice,⁵ and (3) ratepayers lacked notice that they were, in fact, receiving service.⁶

Nonetheless, I fully support the Commission's action to remedy any defects in PJM's current market construct that do not provide adequate supply offer flexibility, in order to prevent the circumstances faced by Duke from recurring. As the Commission previously recognized during the polar vortex of 2014, requiring generators "to provide service to support reliability but without being able to recoup the incremental operating costs that they incur...would discourage generators from offering service at a time when they are needed."⁷ It is similarly imperative that generators in PJM are able to recover legitimate, actual fuel costs incurred to ensure that they can provide service during emergency conditions. I encourage PJM to implement any necessary tariff changes as quickly as possible.

Accordingly, I respectfully dissent in part.

Philip D. Moeller
Commissioner

⁵ The Commission previously found that MISO's tariff provisions describing the rate of SSR service lacked sufficient detail to constitute a filed rate mechanism, which led to the Commission's determination that separate agreements and associated rate schedules must be filed to provide the rates associated with SSR service. *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237, at P 372 ("We accept [MISO]'s negotiated approach to determining SSR costs. Accordingly, because the tariff contains no rate mechanism, we will require [MISO] to file under section 205 of the FPA for cost recovery at the time it seeks to charge customers for SSR costs."), *reh'g denied*, 109 FERC ¶ 61,157 (2004). However, in *MISO*, the Commission waived the prior notice rule to grant an effective date of June 15, 2012, which was prior to the October 5, 2012 filing date of the proposed SSR agreement and associated rate schedule. *MISO*, 142 FERC ¶ 61,170, at PP 1, 85.

⁶ The MISO tariff's confidentiality provisions prevented the disclosure of the fact that an SSR had been designated and commenced providing service on June 15, 2012. *MISO*, 142 FERC ¶ 61,170 at P 44. Thus, ratepayers were likely unaware that they were even receiving a service until the agreement and rate schedule associated with the provision of that service were filed with the Commission on October 5, 2012.

⁷ *NYISO*, 146 FERC ¶ 61,061, at P 20 (2014).