

155 FERC ¶ 61,164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Maryland Electric Cooperative, Inc.

Docket No. EL16-35-000

v.

J.P. Morgan Ventures Energy Corporation

ORDER ON COMPLAINT

(Issued May 16, 2016)

1. On February 1, 2016, Southern Maryland Electric Cooperative, Inc. (SMECO) filed a complaint against J.P. Morgan Ventures Energy Corporation (JPMVEC) pursuant to Sections 206 and 306 of the Federal Power Act (FPA),¹ and Rule 206 of the Commission's Rules of Practice and Procedure.² In its complaint, SMECO alleges that it has the right to Capacity Performance credit³ under a bilateral capacity purchase agreement with JPMVEC. SMECO believes that JPMVEC does not intend to transfer Capacity Performance credit to SMECO, starting with the 2016-2017 delivery year that begins June 1, 2016.

2. As discussed below, we decline to exercise primary jurisdiction over this contractual dispute and, accordingly, dismiss the complaint.

¹ 16 USC 824e, 825e (2012).

² 18 C.F.R. § 385.206 (2015).

³ A capacity credit is an entitlement to a specified number of MW of unforced capacity from a specific resource which satisfies capacity obligations imposed under the Reliability Assurance Agreement among load serving entities in PJM.

I. Background

3. SMECO is a load serving entity and network transmission customer under the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (Tariff) in the Potomac Electric Power Company (PEPCO) transmission zone. JPMVEC is a wholly owned subsidiary of JPMorgan Chase & Co. and is authorized to sell energy, capacity, and ancillary services at market-based rates pursuant to its market-based rate tariff.⁴

4. On April 28, 2011, SMECO and JPMVEC executed a Capacity Purchase & Day Ahead Heat Rate Call Option on Physical Electricity for the Brandywine Generation Facility (Brandywine Facility),⁵ for the term of January 1, 2014 until December 31, 2021 (Brandywine PPA).⁶ The Brandywine PPA provides SMECO a 225 MW Reliability Pricing Model (RPM) capacity credit from the Brandywine Facility in exchange for a monthly payment by SMECO to JPMVEC.

5. On June 9, 2015, the Commission approved PJM's tariff revisions establishing a new capacity product, Capacity Performance Resources, to replace, on a phased-in basis, PJM's current capacity construct.⁷ The Capacity Performance product, among other things, increases penalties for failing to perform during system emergencies in order to ensure that PJM's capacity market provides adequate incentives for resource

⁴ *J.P. Morgan Ventures Energy Corp.*, 112 FERC ¶ 61,322 (2005).

⁵ The Brandywine Facility is a 225 MW dual-fuel facility located in Brandywine, Maryland. When JPMVEC entered into the Brandywine PPA in 2011, JPMVEC indirectly owned 100 percent of the owner-participant interests in the facility through its wholly owned subsidiary KMC Thermo, LLC (KMC Thermo) and JPMVEC purchased all of the energy and capacity of the Brandywine Facility pursuant to a tolling agreement with the operator, Panda-Brandywine. In 2014, KMC Thermo acquired the facility, ending the tolling arrangement and making JPMVEC an indirect non-passive owner of the facility. In October 2015, JPMVEC sold all of the equity interests in KMC Thermo to Webb Energy LLC.

⁶ The four page contract is a supplement to the EEI Master Power Purchase Agreement. The contract price appears to include both the Day Ahead Heat Rate Call Option and the Capacity Purchase (although the price term is redacted in the filed agreement).

⁷ The target procurement quantities for the Capacity Performance phase-in are: 60 percent for 2016-2017; 70 percent for 2017-2018; 80 percent for 2018-2019 and 2019-2020; and 100 percent for 2020-2021.

performance.⁸ The two resulting capacity products, Capacity Performance and Base Capacity,⁹ are defined as two types of capacity resources in the PJM Tariff.¹⁰

II. SMECO's Complaint and JPMVEC's Answer

6. In its complaint, SMECO asserts that, in light of the new Capacity Performance construct, the type of capacity to be transferred to SMECO under the Brandywine PPA should be Capacity Performance credit rather than Base Capacity credit because the specified unit in the Brandywine PPA is the Brandywine Facility and the Brandywine Facility is believed to be a Capacity Performance Resource.¹¹

7. SMECO claims that its interpretation of the Brandywine PPA is supported by the designation of the Brandywine Facility as the “Capacity Source” and by the “Capacity Product” as “PJM Unit Specific Available Capacity” as those terms are defined in PJM’s RPM Business Rules. SMECO states, based on information and belief, the Brandywine-Facility cleared as Capacity Performance for the transition years. SMECO further points to the Replacement Product provision of the Brandywine PPA,¹² which SMECO interprets as allowing JPMVEC to replace the Brandywine Facility with another Capacity Resource within the PEPCO Zone or another PJM Zone if JPMVEC makes SMECO whole for any price difference between the PEPCO Zone and the other PJM Zone in a given delivery year. SMECO claims that the purpose of the provision is to hold SMECO harmless from any replacement of the Brandywine Facility that would give SMECO a lesser capacity value and that it would render the provision meaningless to interpret it now, with the advent of PJM’s Capacity Performance program, as allowing JPMVEC to

⁸ *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, *reh’g granted in part*, 152 FERC ¶ 61,064 (2015).

⁹ In this order, Base Capacity refers to two types of capacity: capacity previously accepted in the auctions for the 2016-2017 and 2017-2018 delivery years, which did not upgrade to Capacity Performance in the transition auctions; and capacity for the delivery years from 2018 to 2020 that is not bid into the auction as Capacity Performance.

¹⁰ PJM Tariff, § 5.5A.

¹¹ SMECO Complaint at 4.

¹² The Replacement Product clause states: “Seller shall have the right to replace all or a portion of the Capacity Product from a Capacity Resource within the PEPCO Zone or within any other PJM Zone if Seller agrees to reimburse Buyer for the price differential between such PJM Zone and the PEPCO Zone with regard to such Delivery Year.”

substitute an inferior Base Capacity resource for the Brandywine Facility (a purported Capacity Performance Resource) under the Brandywine PPA.

8. In support of its assertion that the Brandywine Facility is a Capacity Performance Resource, SMECO states that on April 21, 2015, JPMVEC confirmed by email that it intended to designate the Brandywine Facility as a Capacity Performance Resource and to use the Brandywine Facility to fulfill its obligation to SMECO for the 2018-2019 delivery year.¹³ SMECO further states that, on information and belief, JPMVEC offered and cleared the Brandywine Facility as a Capacity Performance Resource for the following delivery years: 2016-2017, 2017-2018, and 2018-2019. SMECO states that, nevertheless, a recent communication from JPMVEC raises doubt as to whether JPMVEC will transfer Capacity Performance credit instead of Base Capacity credit starting with the 2016-2017 delivery year, which begins on June 1, 2016.

9. SMECO states that the purpose of the Brandywine PPA, as evidenced by the Material Changes clause,¹⁴ is to enable SMECO to meet its RPM obligation, which requires recognition of the Brandywine Facility as a Capacity Performance Resource. SMECO explains that approximately 80 percent of a load serving entity's RPM obligation for the 2018-2019 and 2019-2020 delivery years is required to be Capacity Performance capacity, transitioning to a 100 percent Capacity Performance capacity requirement beginning in delivery year 2020-2021. Thus, SMECO states, because SMECO's overall RPM obligation is 884.9 MW, it could use only 177 MW (20 percent of its RPM obligation) of the 225 MW provided for in the Brandywine PPA, if it received only Base Capacity (in the 2018-2019 and 2019-2020 delivery years). SMECO states that the remaining 48 MW of Base Capacity could not be used to fulfill SMECO's RPM obligation, which must be satisfied with a Capacity Performance Resource.¹⁵ SMECO further asserts that it would be unjust and unreasonable for SMECO not to receive Capacity Performance credit because SMECO is paying for the reliability benefit that

¹³ SMECO Complaint at 4 (referencing Attachment 2).

¹⁴ The Material Changes clause obligates JPMVEC, in the event of any material changes in the PJM capacity market that render performance illegal or impossible, to provide Unforced Capacity that satisfies "the resource adequacy requirements of the PJM Tariff" and to cooperate with SMECO "to satisfy any administrative requirements necessary for the capacity sold and purchased hereunder to satisfy Buyer's load obligations, if any."

¹⁵ SMECO Complaint at 7.

PJM receives from the Brandywine Facility being a Capacity Performance Resource and therefore other entities would be unjustly enriched at SMECO's expense.¹⁶

10. SMECO argues that the Commission should assert primary jurisdiction over the Brandywine PPA under the Commission's three-factor test¹⁷ because (1) the dispute arises exclusively from a fundamental change in the pervasively regulated PJM capacity market, (2) there is a need for uniformity in the event this issue should arise under other PPAs involving the sale and purchase of capacity, and (3) whether buyers of capacity pay just and reasonable rates is important to the Commission's regulatory responsibilities as the Commission has a "duty" to "ensure that rules or practices 'affecting' wholesale rates are just and reasonable."¹⁸

11. Based upon the foregoing, SMECO requests that the Commission determine that SMECO is entitled to Capacity Performance credit under the Brandywine PPA. SMECO asserts that, absent such relief, its total financial harm would be approximately \$6.2 million. Because the 2016-2017 delivery year begins on June 1, 2016, SMECO requests that the Commission issue an order before June 1, 2016, so that it is not financially harmed by not receiving Capacity Performance credit for the Brandywine Facility. Finally, SMECO states that the parties' attempts to resolve this matter through dispute resolution were unsuccessful.¹⁹

12. In its answer, JPMVEC raises several arguments contending that the Commission should not entertain the Complaint. It argues that the Complaint should be dismissed as it does not meet the threshold requirements under sections 206 and 306 of the FPA and rule 206 of the Commission's regulations, since the Complaint does not state that the Brandywine PPA is no longer just and reasonable or that a statute or tariff has been violated.²⁰

13. JPMVEC asserts that, by asking the Commission to interpret and determine the obligations of the parties under the Brandywine PPA, SMECO is effectively requesting

¹⁶ *Id.* at 10-11.

¹⁷ *Id.* at 14 (citing *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (*Arkla*), *reh'g denied*, 8 FERC ¶ 61,031 (1979)).

¹⁸ *Id.* at 14-15 (citing *FERC v. Electric Power Supply Ass'n*, 136 S.Ct. 760, 774 (2016)).

¹⁹ *Id.* at 15.

²⁰ JPMVEC Answer at 2.

that the Commission issue a declaratory ruling in a manner that does not comply with the substantive and procedural standards governing petitions for declaratory orders.²¹

14. JPMVEC further argues that the Commission should decline to act on the Complaint because the Complaint does not meet any of the three requirements of the Commission's three-factor test:²² (1) the Commission has no special expertise making the case "peculiarly appropriate" for decision by the Commission because the interpretation sought is the parameters of what qualifying PJM capacity is properly delivered pursuant to the Brandywine PPA; (2) there is no need for uniformity of interpretation because the Commission has repeatedly determined that uniformity is not needed where the issue at stake is limited to the interpretation of a contract; and (3) this case is not important in relation to the Commission's regulatory responsibilities because the facts in dispute are unique to the parties, the terms of their agreement, and the parties' conduct.²³

15. However, JPMVEC states that if the Commission does assert jurisdiction and does not dismiss the Complaint, then the Commission should set the matter for hearing to afford parties the right to perform discovery, cross-examine witnesses and present their case. JPMVEC further states that it no longer owns the Brandywine Facility and, therefore, if the Commission sets the matter for hearing, such hearing would likely require the involvement of the buyer of the Brandywine Facility.²⁴

16. Finally, JPMVEC asserts that the definition of Capacity Product in the Brandywine PPA is unambiguous and that it can deliver to SMECO either Base Capacity credit or Capacity Performance credit. JPMVEC points to the Replacement Product provision of the contract and argues that this clause does not require that JPMVEC provide capacity from the Brandywine Facility, but provides it the right to deliver the capacity product from a source other than the Brandywine Facility within the PEPCO Zone (or any other PJM Zone if the price is trued up to the PEPCO Zone) without any reference to SMECO's RPM obligations.²⁵

²¹ *Id.* at 2, 5.

²² *Id.* at 7 (citing *Arkla*, 7 FERC ¶ 61,175).

²³ *Id.* at 8-10.

²⁴ JPMVEC states that it sold the Brandywine facility in 2015 as part of a transaction that was approved by the Commission in an open and transparent process, all of which was known to SMECO. *See KMC Thermo, LLC*, 152 FERC ¶ 62,137 (2015).

²⁵ JPMVEC Answer at 12.

III. Notice of Filing and Responsive Pleadings

17. Notice of SMECO's complaint was published in the *Federal Register*, 81 Fed. Reg. 6,850 (2016), with interventions, answers, and protests due on or before February 21, 2016. JPMVEC filed a timely answer on February 22, 2016. KMC Thermo, LLC (KMC Thermo) filed a timely intervention.

18. On March 8, 2016, SMECO filed a response to JPMVEC's February 22 answer. On March 21, 2016, JPMVEC filed an answer to SMECO's response. On March 31, 2016, SMECO filed a response to JPMVEC's answer.

IV. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), KMC Thermo's timely, unopposed motion to intervene serves to make it a party to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept any of the answers and/or replies of the parties to JPMVEC's February 22 answer and will, therefore, reject them.

B. Commission Determination

21. We decline to exercise primary jurisdiction over this contractual dispute and therefore dismiss the complaint. Although wholesale capacity sales are subject to the Commission's jurisdiction, the question of which capacity product SMECO is entitled to under its bilateral agreement with JPMVEC turns solely on interpretation of the Brandywine PPA. In cases of contract interpretation, the Commission has concurrent jurisdiction with the courts²⁶ and whether to exercise primary jurisdiction is a matter solely within the Commission's discretion.²⁷ In determining whether to assert its primary jurisdiction over disputes concerning jurisdictional contracts, the Commission considers three factors: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for

²⁶ *Kentucky Utilities Co.*, 109 FERC ¶ 61,033, at PP 14-16 (2004), *reh'g denied*, 110 FERC ¶ 61,285 (2005); *Portland General Elec. Co.*, 72 FERC ¶ 61,009, at 61,021 (1995).

²⁷ *Portland General Elec. Co.*, 72 FERC ¶ 61,009 at 61,021-61,022.

uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.²⁸

22. While the Commission is, in general, no more expert than a court in deciding non-technical contract questions, interpretation of some types of contractual clauses may involve examination of technical issues which are within the Commission's special expertise.²⁹ Determination of the dispute between SMECO and JPMVEC depends upon whether the parties contracted to sell and purchase capacity specifically from the Brandywine Facility with the intent to allow SMECO to meet its RPM obligation, as SMECO claims, or whether the parties contracted for the transfer of any type of capacity from any source without regard to SMECO's RPM obligation, as JPMVEC argues. The outcome of this matter appears to turn on interpretation of the parties' intentions and construction of the relevant clauses in the Brandywine PPA rather than any determination requiring our special expertise. A court, for example, could determine the significance, as it pertains to the parties' mutual intent, of JPMVEC's assurance to SMECO that it would use the Brandywine Facility to fulfill its obligation for the 2018-2019 delivery year. Inquiring into the parties' intent and construing the related contract provisions is a matter of interpretation that, here, is better left to a court.³⁰

23. In addition, in the event that SMECO does not obtain relief before the start of the 2016-2017 delivery year (on June 1, 2016), contract damages may provide a satisfactory remedy.³¹ But the Commission does not have special expertise in the area of determining damages for claimed breaches of contract, and the Commission has generally left this issue to be decided in court.³²

24. With respect to the second factor, we find that the Commission's responsibilities do not require a uniform interpretation of the contractual language at issue here. The contract term "PJM Unit Specific Available Capacity" is not defined in the PJM Tariff

²⁸ *Arkla*, 7 FERC ¶ 61,175 at 61,322.

²⁹ *Id.*

³⁰ *E.g.*, *Constellation Energy Commodities Group, Inc.*, 119 FERC ¶ 61,292, at P 23 (2007); *Kentucky Utilities Co.*, 109 FERC ¶ 61,033, at P 15 (2004).

³¹ While SMECO contends that the Commission needs to act prior to June 1, 2016, it makes no allegation that, for example, damages could not be determined based on any additional costs it incurs in procuring the Capacity Performance product.

³² *Southwest Power Pool, Inc.*, 150 FERC ¶ 61,091 (2015) (citing *LSP-Cottage Grove, L.P.*, 111 FERC ¶ 61,108, at P 45 & n.34 (2005); *South Carolina Public Service Authority v. FERC*, 850 F.2d 788, 795 (D.C. Cir. 1988)).

and the Commission did not dictate or approve the particular language of the Replacement Product and Material Changes clauses.³³ Thus, the interpretation of such provisions of the Brandywine PPA depends upon the intentions of the parties to this particular contract and the outcome of this proceeding would not determine a general policy regarding the interpretation of all similar clauses in bilateral capacity purchase agreements.³⁴ Resolution of the contractual dispute therefore likely will have little impact beyond the parties involved and this particular issue involving PJM's Capacity Performance construct would also not be applicable to entities operating in other RTOs.³⁵

25. Third, we find that this case does not significantly impact the Commission's regulatory responsibilities with respect to PJM's capacity market or Commission policy. SMECO does not request that the Commission find that any term of the bilateral Brandywine PPA is unjust and unreasonable;³⁶ SMECO only seeks the Commission to interpret the meaning of particular provisions of the PPA in light of a regulatory change not addressed directly by contract terms. Thus, the dispute does not involve policy questions but rather what the two contracting parties intended at the time that they drafted

³³ Under its grant of market-based rate authority, JPMVEC was not required to file the Brandywine PPA with the Commission. *Cf. Southern Calif. Edison Co.*, 151 FERC ¶ 61,273, at P 24 (2015) (interpreting a *pro forma* provision set forth by the Commission in Order No. 2003 and not bargained for by the parties to an interconnection agreement).

³⁴ *See Arkla*, 7 FERC ¶ 61,175 at 61,323 (finding no need for uniform interpretation because "whether a 'purchase' occurred within the meaning of the contract depends upon what type of transactions the parties to the contract intended 'purchase' to include").

³⁵ *See, e.g., PPL Elec. Utilities Corp.*, 92 FERC ¶ 61,057, at 61,147 (2000) (finding there "does not appear to be a need for uniformity of interpretation of the type of question raised in this dispute, since an interpretation of this contract by the [court], even if different from other courts' interpretations of similar contracts, will not impinge significantly on the operations of public utilities across the nation; and we are not, in fact, at this point aware of any contract disputes raising similar issues within [the RTO]."); *BG Energy Merchants, LLC v. Crosstex LIG, LLC*, 136 FERC ¶ 61,098, at P 37 (2011) (finding no need for uniformity of interpretation when there is nothing to indicate that the interpretation of certain service agreements will affect anyone other than the parties to the agreements).

³⁶ *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527 (2008) (bilateral contract rates must be shown to harm the public interest).

their contract.³⁷ The parties to power sales contracts regularly define the terms and conditions of services to be provided under their contracts, and we generally allow them to do so freely.³⁸

26. We conclude that under all three *Arkla* factors, it is appropriate for the Commission to decline to assert primary jurisdiction over this matter. Because we decline to exercise our jurisdiction on this issue, we will not address the merits of SMECO's claim. Accordingly, we dismiss SMECO's complaint.

The Commission orders:

SMECO's complaint is hereby dismissed, as discussed in the body of this order.

By the Commission. Commissioner LaFleur is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁷ See *PPL Elec. Utilities Corp.*, 92 FERC ¶ 61,057, at 61,147-61,148.

³⁸ *Southern California Edison Co.*, 85 FERC ¶ 61,023, at 61,069 (1998). See *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1177 n.8 (D.C. Cir. 2005) (“...wise or not, a deal is a deal, and therefore people must abide by the consequences of their choices.”).

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v.

J.P. Morgan Ventures Energy Corporation

(Issued May 16, 2016)

LaFLEUR, Commissioner *dissenting*:

In today's order, the Commission declines to exercise primary jurisdiction over a contractual dispute between Southern Maryland Electric Cooperative, Inc. (SMECO) and J.P. Morgan Ventures Energy Corporation (JPMVEC), concerning JPMVEC's obligation to provide capacity credit to SMECO under the PJM Interconnection, L.L.C. (PJM) resource adequacy construct.

¹ That decision, which the order recognizes is an exercise of Commission discretion, effectively consigns SMECO to a potentially lengthy and costly court proceeding to resolve what is, in my view, a clear and easily-resolved contractual interpretation that is squarely within the Commission's jurisdiction and expertise. As discussed below, I dissent from the order and would assert primary jurisdiction over the dispute, grant SMECO's complaint, and find that the parties' contract requires JPMVEC to provide SMECO with capacity credits to meet SMECO's obligations under the RPM.

As the order notes, in cases of contract interpretation, the Commission has concurrent jurisdiction with the courts² and whether to exercise primary jurisdiction is a matter solely within the Commission's discretion.³ In determining whether to assert its primary jurisdiction over disputes concerning jurisdictional contracts, the Commission considers three factors: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there

¹ PJM's capacity market, through which load serving entities in PJM procure capacity to meet their resource requirements, is called the Reliability Pricing Model (RPM).

² *E.g.*, *Kentucky Utilities Co.*, 109 FERC ¶ 61,033, at PP 14-16 (2004), *reh'g denied*, 110 FERC ¶ 61,285 (2005); *Portland General Elec. Co.*, 72 FERC ¶ 61,009, at 61,021 (1995).

³ *E.g.*, *Portland General Elec. Co.*, 72 FERC at 61,021-61,022.

is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.⁴

I believe SMECO has demonstrated that the Commission should assert primary jurisdiction.⁵ First, the Commission possesses special, relevant expertise regarding the core issue in dispute, i.e., under what terms and conditions capacity arrangements that pre-date PJM's Capacity Performance reforms convert into the new Capacity Performance construct.⁶ These types of transition issues were a significant, contested issue in the Capacity Performance proceedings, and ones the Commission was extensively involved in resolving.⁷ In my view, the Commission errs by failing to frame the dispute between these two parties in the proper context of the broader transition underway in the PJM capacity market.

Consistent with this view, I believe it is therefore important that the Commission retain primary jurisdiction over this and any similar disputes that could arise regarding pre-Capacity Performance contractual obligations and their transition into a Capacity Performance construct. The resolution of these disputes should occur at the Commission to minimize the potential for inconsistent interpretations of common contractual language

⁴ *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175 at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*).

⁵ I note that SMECO includes additional information in its answer that is relevant to the Commission's *Arkla* evaluation, but that the Commission nonetheless declines to consider as a result of its rejection of that answer. *So. Md. Elec. Coop. v. J.P. Morgan Ventures Energy Corp.*, 155 FERC ¶ 61,164, at P 18 (2016); *see also* SMECO Motion for Leave to Answer and Answer, Docket No. EL16-35-000, at 14-19 (filed Mar. 8, 2016). I disagree with the Commission's decision to reject this answer and the additional pleadings submitted in this docket.

⁶ *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015) (Capacity Performance Order), *order on reh'g and compliance*, 155 FERC ¶ 61,157 (2016) (Capacity Performance Rehearing Order).

⁷ *E.g.*, Capacity Performance Order, 151 FERC ¶ 61,208 at P 212 (requiring a phase-in of the Capacity Performance requirements for certain resources), PP 253-261 (addressing mechanisms for transitioning previously-cleared resources to Capacity Performance resources); Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at PP 149-152 (addressing rehearing arguments regarding the phase-in), PP 164-173 (addressing rehearing arguments regarding the transition mechanisms).

or the unintended undermining of the Capacity Performance reforms.⁸ Given the significance of these reforms to the reliability of the PJM system, and the central role played by the Commission in overseeing them, disputes like this are, in my view, firmly within the Commission's regulatory responsibilities. I would therefore assert primary jurisdiction.

Because the Commission fails to assert primary jurisdiction over the contract, it does not reach the merits of the parties' dispute. Upon asserting primary jurisdiction, and based on the full record presented, I would grant SMECO's complaint.

First, it is clear that SMECO and JPMVEC entered into this contract to meet SMECO's RPM obligations, and I believe the contract must be interpreted with this clear purpose in mind. As SMECO notes, this conclusion is reinforced by the plain language of the contract, including the Material Changes provision requiring that the parties "if permissible and practicable, cooperate in good faith to satisfy any administrative requirements necessary for the capacity sold and purchased hereunder *to satisfy Buyer's load obligations, if any.*"⁹ Similarly, I agree with SMECO that the contract's "Replacement Product" provision is plainly intended to ensure that SMECO gets the capacity value it has purchased to meet its RPM obligations, whether from the Brandywine unit or a replacement resource.¹⁰

By comparison, I disagree with JPMVEC's assertion that the contract authorizes JPMVEC to *elect* which form of capacity credit – Capacity Performance or Base Capacity – SMECO receives under the contract. As SMECO notes, the result of this interpretation could be that JPMVEC provides SMECO an amount of Base Capacity that exceeds the amount of Base Capacity that SMECO may use under the RPM;¹¹ in effect, JPMVEC would read the contract to authorize it to provide unneeded capacity to SMECO at the sole discretion of JPMVEC, thereby improperly increasing SMECO's

⁸ For example, as discussed below, JPMVEC's interpretation of the parties' agreement would potentially result in the procurement of excess and unneeded capacity, at increased cost to SMECO's customers.

⁹ SMECO/JPMVEC Contract, Material Changes provision (emphasis added).

¹⁰ JPMVEC asserts that this "Replacement Product" provision is, in fact, a protection for the *seller*, not the *buyer*. I disagree, as the provision simply gives some flexibility to the seller in meeting its obligations to the buyer; it does not give JPMVEC the authority to effectively change those obligations by providing capacity to SMECO that has less value than capacity from the Brandywine unit.

¹¹ SMECO Complaint, Docket No. EL16-35-000, at 7-8 (filed Feb. 1, 2016).

costs of meeting its RPM obligations. I do not believe that this outcome is supported by the record.

I believe that the plain language and clear purpose of the contract establish that JPMVEC is required to provide SMECO (1) 225 MW of capacity credit needed to meet SMECO's RPM obligation, whether from the Brandywine unit or replacement capacity, and (2) capacity credit at least comparable to the value of the Brandywine unit if JPMVEC provides replacement capacity from a different resource. As a result, if the 225 MW Brandywine unit clears as a Capacity Performance resource, I believe that JPMVEC must provide 225 MW of Capacity Performance credit to SMECO; if the Brandywine unit does not clear as a Capacity Performance resource, JPMVEC must provide 225 MW of replacement capacity sufficient to meet SMECO's capacity needs under the RPM.¹²

Accordingly, I respectfully dissent.

Cheryl A. LaFleur
Commissioner

¹² As SMECO explains, the share of its RPM obligation that must be met through Capacity Performance credit increases from 80 percent for the 2018-2019 delivery year to 100 percent for the 2020-2021 delivery year. *Id.* at 7. As a result, if the entire Brandywine unit did not clear as Capacity Performance for the 2018-2019 and 2019-2020 delivery years, I believe it would be permissible under the contract for a portion of the replacement capacity to be provided as Base Capacity, in proportion to SMECO's allowable share of its RPM obligation (e.g., for the 2018-2019 delivery year, 180 MW of Capacity Performance credit and 45 MW of Base Capacity). Beginning in the 2020-2021 delivery year, JPMVEC would be required to provide a full 225 MW Capacity Performance credit.