ORDER REJECTING UNEXECUTED AMENDMENT TO INTERCONNECTION SERVICE AGREEMENT AND INSTITUTING PROCEEDING UNDER SECTION 206

(Issued September 8, 2017)


2. In this order, we reject PJM’s section 205 filing. While we reject PJM’s filing, we institute a proceeding, in Docket No. EL17-84-000, pursuant to section 206 of the FPA to examine the justness and reasonableness of HTP being unable to convert its Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights, as discussed more fully below.

I. **Background**

3. PJM’s Open Access Transmission Tariff (tariff or OATT) provides merchant transmission facilities the right to elect Transmission Withdrawal Rights in lieu of other transmission rights and to request either Firm or Non-Firm Transmission Withdrawal

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1 HTP currently holds 353 MW of Non-Firm Transmission Withdrawal Rights.

2 Interconnection customers can elect Transmission Withdrawal Rights in lieu of Incremental Deliverability Rights, Incremental Auction Revenue Rights, Incremental
Rights. Firm Transmission Withdrawal Rights include the right to schedule energy and capacity withdrawals from the PJM system, whereas Non-Firm Transmission Withdrawal Rights only include the right to schedule energy and are similar to Non-Firm Point-to-Point Transmission Service in that they are scheduled on an as-available basis and subject to curtailment.

4. Through its interconnection process, PJM determines the necessary upgrades to support the level of Firm or Non-Firm Transmission Withdrawal Rights requested. These upgrades include costs to interconnect to PJM’s system and the cost of upgrades to the network to support the Firm Transmission Withdrawal Rights requested. Based on these costs, the merchant transmission facility will decide the level of Firm Transmission Withdrawal Rights it wishes to obtain. The merchant transmission facility, PJM, and the transmission owner to which the facility will be connected enter into a three-party interconnection service agreement (ISA) establishing the costs and conditions of the interconnection.

5. PJM states that the Existing ISA sets out the rights and responsibilities of PJM, HTP and PSEG with respect to the interconnection to the PJM system of HTP’s facility, a 660 MW high voltage direct current (HVDC) merchant transmission facility that connects PJM and the New York Independent System Operator, Inc. (NYISO) via a 345 kV undersea cable. PJM states that, pursuant to section 2.2 of the Existing ISA, HTP was granted 320 MW of Firm Transmission Withdrawal Rights and 353 MW of Non-Firm Transmission Withdrawal Rights at PSEG’s Bergen substation. PJM further states that HTP transferred all of its Firm Transmission Withdrawal Rights to the New York Power Authority (NYPA), its anchor customer on the project via a long-term contract expiring in 2033. PJM explains that HTP and NYPA now seek to amend section 2.2 of the Existing ISA to reflect the surrender of all 320 MW of Firm Transmission Withdrawal Rights, and Incremental Available Transfer Capability Revenue Rights, see PJM OATT § 232, Transmission Injection Rights and Transmission Withdrawal Rights.

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3 PJM OATT § 232.3, Determination of Transmission Injection Rights and Transmission Withdrawal Rights to be Provided to Interconnection Customer.

4 Pursuant to Schedule 12 of the PJM tariff, merchant transmission facilities with Firm Transmission Withdrawal Rights may be responsible for paying for transmission upgrades, including Regional Transmission. See PJM OATT § Schedule 12 (b), and PJM OATT § 232.2, Right of Interconnection Customer to Transmission Injection Rights and Transmission Withdrawal Rights.

5 PJM Transmittal at 3.
Transmission Withdrawal Rights and their conversion to Non-Firm Transmission Withdrawal Rights.\(^6\) PJM states that HTP and NYPA request that this change be made effective June 2, 2017. PJM also states that these revisions comport with the 673 MW Nominal Rated Capability of the facility specified in the Existing ISA.

6. PJM states that, initially, HTP requested these modifications consistent with section 16.0 of the Existing ISA, which requires the written consent of all parties to an amendment to the agreement.\(^7\) In a letter submitted to PJM, PSEG declined the proposed modifications and instead suggested that HTP terminate the Existing ISA or submit the matter to informal dispute resolution. HTP responded that it is not willing to terminate the Existing ISA and that dispute resolution is inconsistent with section 12.1 of the PJM Open Access Transmission Tariff (tariff or OATT).\(^8\) HTP asserted that section 12.1 provides that informal dispute resolution “exclud[es] applications for rate changes or other changes…..to any Service Agreement entered into under the Tariff, which shall be presented directly to the Commission for resolution.”\(^9\) As a result, PJM states it is filing the Amended ISA at HTP’s request.

II. Notice of Filing and Responsive Pleadings


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\(^6\) PJM states that, in addition, HTP and NYPA seek to modify (1) section 18.0 to update addresses relative to the Existing ISA notice requirements, and (2) Schedule F to coincide with changes to HTP’s Transmission Withdrawal Rights in section 2.2.

\(^7\) Section 16 of the Existing ISA provides as follows: “Amendment. This ISA or any part thereof, may not be amended, modified, or waived other than by a written document signed by all parties hereto.”

\(^8\) Appendix 2, section 20.1 of the Existing ISA references section 12.1 of the PJM tariff.

\(^9\) PJM Transmittal at 2.
Independent System Operator. An out-of-time motion to intervene was filed by New Jersey Division of Rate Counsel.

9. Protests were filed by PSEG and FirstEnergy, which filed late. Comments were filed by NYPA, HTP, Linden, NYPSC, and NYISO.

10. Linden, HTP, and NYPA each filed answers to PSEG’s protest. PSEG filed an answer to HTP’s answer and NJBPU filed an answer. PJM filed a clarifying answer. HTP filed a reply to PSEG’s answer, and Linden and NYPA each filed answers to the PSEG and NJBPU answers.

III. Pleadings

A. Protests

11. PSEG argues that PJM filed the Amended ISA in contravention of the plain reading of the Existing ISA and PJM’s tariff. PSEG states that the Existing ISA unambiguously requires HTP to obtain the consent of all parties before amending the Existing ISA. PSEG maintains that HTP may instead unilaterally terminate the contract, after which HTP can submit a new transmission service request and enter the PJM queue to seek Non-Firm Transmission Withdrawal Rights pursuant to Part IV of PJM’s tariff. PSEG argues that even if it agreed to the modifications in the Amended ISA, the PJM tariff would require HTP to submit a new transmission interconnection request. PSEG argues PJM and HTP improperly rely on section 212.7 of PJM’s tariff for this amendment, as this section only applies to new service requests. PSEG also argues that changes to the Existing ISA are not excluded from dispute resolution under PJM’s tariff, contrary to PJM and HTP.

10 PSEG Protest at 2-3 (citing PJM OATT, Interconnection Procedures § 36).

11 Id. at 4-5 (citing Existing ISA, Appendix 2, § 16.0 and § 22.3).

12 Id. at 5 (citing Existing ISA, Appendix 2, § 16.1.2).

13 Id. at 3 (citing PJM OATT, Interconnection Procedures § 36)

14 Id. at 6 (citing PJM OATT § 212.7, “Interconnection Service Agreement and Interconnection Construction Service Agreement execution by Interconnected Transmission Owner”).

15 Id. at 8 (citing PJM OATT§ 12.1).
12. FirstEnergy argues that accepting a unilateral modification by any party to an ISA where there is a requirement for consent, sets bad Commission precedent and undercuts fundamentals of contract law. FirstEnergy also argues that Commission regulations require section 205 applicants to demonstrate receipt of “all requisite agreement” to proposed changes, “including any agreement required by contract.”

13. NJBPU argues that PJM’s filing constitutes a collateral attack on pending Regional Transmission Expansion Plan (RTEP) cost allocation proceedings, and that accepting the Amended ISA would set a dangerous precedent for other parties seeking a “favorable decision [on cost allocation] by any means necessary.” NJBPU also maintains that accepting the Amended ISA would undercut the beneficiary-pays model for RTEP upgrades and asserts that accepting the Amended ISA would produce a preferential rate for HTP and NYPA, thus unfairly discriminating against New Jersey ratepayers.

B. Comments

14. HTP, Linden, NYPA, and NYPSC filed comments in support of PJM’s filing. New York Independent System Operator, Inc. NYISO filed comments without taking a position on PJM’s filing, but maintains that reliability would be negatively impacted only if the facility is taken out of service, as PSEG proposes.

15. NYPA states that it is contractually entitled to the majority of the line’s 660 MW of transmission capacity and all 320 MW of the line’s Firm Transmission Withdrawal Rights, which required $328 million in interconnection upgrades. NYPA also states that it pays HTP’s assigned share of the RTEP costs, which are calculated on its Firm Transmission Withdrawal Rights under the Existing ISA, and which PJM treats as load.

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16 FirstEnergy Protest at 1-2 (citing 18 C.F.R. § 35.13(b)(6) (2017)).

17 NJBPU Answer at 6-7.

18 NJBPU asserts that New York customers would continue to benefit from HTP’s interconnection to PJM via Non-Firm Transmission Withdrawal Rights. Id. at 9.

19 Id. at 8, 10-11.

20 Like HTP, Linden owns and operates a merchant transmission facility between PJM and NYISO and holds Firm Transmission Withdrawal Rights. After Linden filed its comments, PJM filed on its behalf an unexecuted ISA with PSEG to similarly relinquish these rights under Docket No. ER17-2267-000.
in its solution-based distribution factor analysis (DFAX) cost allocation formula. NYPA explains that it is not seeking to recover the $328 million it has paid for upgrades to support the 320 MW of Firm Transmission Withdrawal Rights. HTP explains that it was awarded 673 MW of Non-Firm Transmission Withdrawal Rights when it began commercial operation in June 2013, and that it has retained them since then.

16. HTP and NYPA maintain that several factors threaten the continued viability of HTP. First, NYPA asserts that it has not been able to secure meaningful revenues from the HTP line’s participation in the NYISO capacity market because of the mitigation of NYPA’s supply offers into the Zone J (New York City) auction. Second, NYPA states that, since the execution of the Existing ISA, NYPA’s RTEP cost responsibility has skyrocketed, now totaling $4.83 million per month. NYPA asserts that this current

21 PJM’s solution-based DFAX method allocates the costs of new transmission facilities based on modeling of the benefits that they provide to each load zone in PJM. Under the solution-based DFAX method, PJM quantifies the benefits that new transmission facilities provide based on usage in terms of how each load zone contributes to the flows over a new transmission facility.

22 HTP Comments at 9.

23 NYPA explains the HTP facility, contrary to initial intention, only receives meaningful revenues from economic energy schedules and such energy transactions do not require Firm Transmission Withdrawal Rights. NYPA also states that it generated revenues from the HTP facility of about $15.5 million in 2015 and $4.7 million in 2016, the majority of which were attributable to energy transactions rather than capacity transactions. NYPA Comments at 20.

24 NYPA states that, following the termination of Con Edison’s years-long wheeling arrangement, PJM made a section 205 filing in Docket No. ER17-950-000 proposing to reassign an additional $533 million in costs related to the Bergen-Linden Corridor (BLC) project to HTP effective May 1, 2017. NYPA states that on April 25, 2017, the Commission accepted and suspended PJM’s filing subject to refund and further Commission order. NYPA states that this reassignment increased NYPA’s total cost responsibility for the BLC project to approximately $645.42 million, up from $111.99 million originally allocated to NYPA. NYPA states that it has sought rehearing of the April 25 order. Id. at 2, 10-12, 20-21.
situation has become untenable and can only be resolved by relinquishing HTP’s Firm Transmission Withdrawal Rights. 25

17. Linden, HTP, and NYPA contend that HTP’s reduction of its Firm Transmission Withdrawal Rights does not reconfigure the transmission facilities, will not impose additional operational responsibilities on PSEG, and will not impact the reliability of PJM’s system. 26 HTP states that if it terminates the ISA, as PSEG suggests, it would be forced to relinquish the right to schedule energy withdrawals and disconnect an important interregional connection. 27 HTP, NYPA, and NYPSC argue this contradicts Commission policy to support transmission infrastructure development, especially between RTOs. In addition, NYISO and NYPSC state that the HTP facility provides operational and reliability support—including contributing to the reserve margin—for NYISO’s New York City Control Area, in addition to facilitating interregional market benefits. 28

18. HTP, Linden, and NYPA contend that, consistent with the Existing ISA and PJM’s tariff, the Existing ISA can be amended absent unanimous written consent, and that dispute resolution is not required. 29 Linden goes further, explaining that the Existing ISA allows HTP to increase its Firm Transmission Withdrawal Rights, provided it submits a transmission interconnection request and pays for upgrades to support that request. NYPA and Linden argue that PJM’s tariff allows merchant facilities to elect Transmission Withdrawal Rights in lieu of other transmission rights, 30 and to choose the quantity of Firm or Non-Firm Transmission Withdrawal Rights to receive. 31 Linden thus

25 NYPA states the recent increase in RTEP cost responsibility of about $4.8 million per month as a result of Con Edison’s termination far exceeds the total value of the HTP facility. Id. at 21.

26 Linden Comments at 12-13, HTP Comments at 11, and NYPA Comments at 17.

27 HTP Comments at 12.

28 NYPSC Comments at 3-4 and NYISO Comments at 3-5.

29 Linden Comments at 17, HTP Comments at 12-14, NYPA Comments at 23 (citing PJM OATT, Common Service Provisions, § 12.1 and ISA § 22.1).

30 NYPA Comments at 7.

31 NYPA Comments at 8-9, Linden Comments at 8 (citing PJM OATT § 36.1.03 Transmission Interconnection Request and § 232.2, Right of Interconnection Customer to Transmission Injection Rights and Transmission Withdrawal).
asserts that HTP’s modification to its Firm Transmission Withdrawal Rights is governed by the PJM tariff, not the ISA.

19. Linden states neither PJM’s tariff nor the Existing ISA contain conditions or other requirements for the reduction of Firm Transmission Withdrawal Rights, which it notes is reasonable provided this reduction alleviates a burden on PJM’s system. NYPA also argues that requiring HTP to negotiate with PSEG rather than PJM over the status of these rights would confuse the interconnection parties’ roles in the Existing ISA. Linden argues PSEG is using its standing as a transmission owner to impede on HTP’s business interests in order to avoid assuming a greater share of RTEP cost responsibility for the BLC project. Linden and NYPA argue the Existing ISA preserves any interconnection party’s rights to make a section 205 filing, and grants HTP the ability to request that PJM file an unexecuted ISA with the Commission, for any ISA tendered to HTP. NYPA states that the Commission has permitted interconnection parties to amend existing agreements through unilateral, unexecuted filings, which is consistent with the reservation of rights provision in the Commission’s pro forma Large Generator Interconnection Agreement.

20. Linden, HTP, and NYPA also argue that the Commission’s recent order on Linden’s RTEP cost allocation complaint established that relinquishing Firm Transmission Withdrawal Rights would avoid RTEP cost responsibility. HTP also

32 Linden Comments at 12.

33 Id. at 7.

34 Linden Comments at 13, NYPA Comments at 23 (citing Existing ISA, Appendix 2 § 22.1 and § 22.3).

35 NYPA Comments at 24 (citing PJM Interconnection, L.L.C., 113 FERC ¶ 61,339 (2005) (accepting for filing, and suspending subject to refund and settlement judge procedures an unexecuted, amended ISA); Midwest Indep. Transmission Sys. Operator, Inc., 117 FERC ¶ 61,128, at P 27 (2006), reh’g denied, 119 FERC ¶ 61,097, at PP 17-18 (2007) (“we disagree with assertions that the Midwest ISO does not have the right to make a unilateral filing to apply its new cost sharing policy to an existing LGIA…”, “The pro forma LGIA under section 30.11 clearly gives the transmission provider the right to make a unilateral filing with the Commission to modify the LGIA with respect to any rates, terms and conditions, charges, classifications of service, rule or regulation under section 205”)).

36 See, e.g., Id. at 11 (citing Linden VFT, LLC v. PJM Interconnection, L.L.C., 155 FERC ¶ 61,089 at P 67 & n.106).
claims that the Commission outlined a similar option in Opinion No. 503. Linden notes that the PJM tariff defines Firm Transmission Withdrawal Rights as conferring “rights similar to those under Firm Point-to-Point Transmission Service,” which allows the holders of these rights to elect to receive Non-Firm Point-to-Point Transmission service without a new interconnection request or incurring additional charges.

C. Answers

21. PJM filed an answer clarifying that it filed the Amended ISA at HTP’s request because it believes it is required to do so pursuant to section 214 of its tariff and Appendix 2, section 22.1 of the Existing ISA. PJM also affirmed that HTP’s request will not adversely impact the operation or reliability of the PJM system.

22. HTP filed an answer rebutting PSEG’s assertion that the Amended ISA establishes new Non-Firm Transmission Withdrawal Rights. HTP maintains that: (i) it has already relinquished its Firm Transmission Withdrawal Rights to PJM (effective June 2, 2017); (ii) the Amended ISA simply reflects this transaction; (iii) PJM followed the appropriate process in filing the Amended ISA under section 205; and (iv) PSEG plays no role in this process under the PJM tariff. HTP also contends that PSEG has raised no substantive objections to PJM’s filing, is abusing its position as interconnection transmission owner, and—should it succeed in forcing HTP to terminate the Existing ISA and disconnect—would harm transmission system reliability and undercut Commission policy on transmission development.

23. Linden filed an answer stating interconnection customers are always allowed to move from firm transmission service to non-firm transmission service without amending their ISA or receiving the consent of the transmission owner to whom they are interconnected. Linden also states that an Amended ISA is not necessary, other than to accurately reflect HTP’s level of service under its Transmission Withdrawal

37 HTP Comments at 10.

38 Linden Comments at 10-11 (citing PJM OATT § 1 Definitions – E-F). See also Existing ISA § 1.13A.

39 PJM Answer at 2.

40 HTP Answer at 6-7.

41 Id. at 5, 9.

42 Id. at 6, 8, 10.
Rights. Linden states PJM regularly files amended ISAs unexecuted, which the Commission regularly accepts.

24. PSEG filed an answer arguing, contrary to HTP’s interpretation of the Existing ISA, the only rights retained by interconnection parties under section 205 relate to the right to modify applicable rates or charges. PSEG states that electric utilities regularly sign contracts that reserve the rights under section 205 to file requests to modify rates from those established in their contracts. Therefore, PSEG concludes that section 22.3 does not apply to the non-rate terms modified in Amended ISA, but would apply if HTP sought modifications to Schedule E charges under the Existing ISA.

25. PSEG argues HTP should not be permitted to change the Existing ISA outside of conventional processes to avoid RTEP cost allocation at the expense of PSEG customers. PSEG claims HTP’s answer in this proceeding is a collateral attack on PJM’s RTEP cost allocation methodology that attempts to circumvent pending RTEP proceedings. PSEG argues that HTP’s claims that the Amended ISA would have no adverse impact on PSEG’s operations or system reliability are unfounded, given that


44 Id. at 10 (citing PJM Interconnection, L.L.C., Docket No. ER16-2310-000 (letter order issued Aug. 26, 2016) (accepting an unexecuted amended ISA filed by PJM); PJM Interconnection, L.L.C., Docket No. ER16-1972-000 (letter order issued Jul. 20, 2016) (same); PJM Interconnection, L.L.C., Docket No. ER16-1386-000 (letter order issued May 27, 2016) (same); PJM Interconnection, L.L.C., Docket No. ER16-813-000 (letter order issued Mar. 14, 2016) (same); Commonwealth Edison Co., 107 FERC ¶ 61,084 (2004) (accepting an unexecuted amended Interconnection Agreement filed by ComEd)).

45 PSEG Answer at 4 (citing Existing ISA, Appendix 2 § 22.3).

46 Id. at 4-5.

47 Id. at 6.

48 Id. at 2, 6.
PSEG has planned its system to support HTP’s Firm Transmission Withdrawal Rights through RTEP upgrades that may not have otherwise been built.\(^{49}\) PSEG states it is not just and reasonable to leave its customers with the responsibility for these upgrades while HTP is interconnected and receiving the benefits of the system.\(^{50}\)

26. \(\) PSEG argues that merchant transmission facilities’ rights to elect Firm or Non-Firm Transmission Withdrawal Rights under PJM’s tariff only apply to the initial phases of a project. PSEG also argues that the fact that HTP received its full allocation of Firm Transmission Withdrawal Rights over a two period is irrelevant, and that only the terms of the contract that indicate the levels of Firm and Non-Firm Transmission Withdrawal Rights are relevant to this proceeding.\(^{51}\) PSEG states that if the Amended ISA is not rejected by the Commission, the issues in this proceeding should be set to hearing and settlement procedures.\(^{52}\)

27. NYPA filed an answer arguing that PSEG cannot demonstrate any operational or reliability concern related to the Amended ISA because HTP is not seeking an increase in its nominal rated capability of Transmission Withdrawal Rights, but rather seeks a lower priority transmission service. NYPA argues that PSEG is utilizing its transmission owner status to limit its potential exposure to RTEP cost allocation. NYPA argues HTP was granted 673 MW of Non-Firm Transmission Withdrawal Rights when the HTP began operations, and nothing in PJM’s tariff restricts HTP from voluntarily relinquishing Firm Transmission Withdrawal Rights it elected after operations began.\(^{53}\) NYPA states it would be punitive to push back the effective date of the Amended ISA, given HTP’s RTEP cost allocations.

28. NYPA argues that PSEG does not have a role in the PJM administered process to elect Firm or Non-Firm Transmission Withdrawal Rights, and that PSEG’s interference with this process contradicts the intent under Order No. 2003-A that a transmission owner’s role in negotiating an agreement is limited.\(^{54}\) NYPA explains the Commission

\(^{49}\) Id. at 8.

\(^{50}\) Id. at 8.

\(^{51}\) Id. at 7.

\(^{52}\) Id. at 2-3.

\(^{53}\) NYPA Answer at 2-3.

\(^{54}\) Id. at 6-7 (citing Order No. 2003-A, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,160 at PP 785-86 (2004)).
has previously determined that Order No. 2003 does not preclude PSEG from making a filing under section 205 of an unexecuted ISA to address omitted charges. NYPA states the Existing ISA clearly preserves PJM’s right to file under section 205, and section 22.1 of the Existing ISA is consistent with the “reservation of rights” provision under Order No. 2003 in that it allows an interconnection customer to request the transmission provider to file an unexecuted interconnection agreement with the Commission.

IV. Procedural Matters

29. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission’s Rules of Practice and Procedures, the Commission will grant the NJ Division of Rate Counsel’s late-filed motion to intervene given its interest in the proceeding, the early stages of the proceeding, and the absence of undue prejudice or delay.

30. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers of HTP, NYPA, Linden, PSEG, PJM, and NJBPU because they provide information that assisted us in our decision-making process.

V. Commission Determination

31. As discussed below, we reject PJM’s filing. We find that neither the Existing ISA nor PJM’s tariff require PJM to file, under section 205, an unexecuted amended ISA with modifications requested by an interconnection customer. In any event, Appendix 2, section 22.3 of the Existing ISA provides that changes to non-rate terms and conditions of service cannot be filed under section 205. While we reject PJM’s filing, we find that,

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55 This finding related to the charges that Order No. 20003 determined could be collected by the transmission owner, as described in the pro forma section 10.1 of Order No. 2003. Id. at 10.


59 Existing ISA, Appendix 2 § 22.3. Section 22.3 is quoted in relevant part at P 32 infra.
based on the evidence in this proceeding, the Existing ISA may be unjust and unreasonable and unduly discriminatory to the extent it fails to permit HTP to convert Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights and that PSEG’s withholding of consent to the Amended ISA may be unjust and unreasonable. Accordingly, we institute a proceeding, in Docket No. EL17-84-000, pursuant to section 206 of the FPA to examine this issue, as discussed more fully below.

A. **PJM’s Section 205 Filing**

32. The provisions at issue in this proceeding include section 12.1 of the PJM tariff and sections 22.1 and 22.3 of Appendix 2 of the Existing ISA. PJM interprets Appendix 2, section 22.1 of the Existing ISA to require PJM to file the unexecuted Amended ISA as requested by HTP. Section 22.1 provides that “[a]n Interconnection Customer shall have the right, with respect to any Interconnection Service Agreement tendered to it, to request … that Transmission Provider file the agreement unexecuted with the Commission.” Similarly, HTP, NYPA, and Linden interpret section 12.1 of the PJM tariff and sections 22.1 and 22.3 of Appendix 2 to the Existing ISA as requiring PJM to file the Amended ISA under section 205. Section 22.3 of Appendix 2 to the Existing ISA provides, in relevant part, as follows:

Amendments and Rights Under the Federal Power Act: This Interconnection Service Agreement may be amended or supplemented only by a written instrument duly executed by all Interconnection Parties.… Notwithstanding the foregoing, nothing contained in this Interconnection Service Agreement shall be construed as affecting in any way any of the rights of any Interconnection Party with respect to changes in applicable rates or charges under Section 205 of the Federal Power Act and/or FERC’s rules and regulations thereunder, or any of the rights of any Interconnection Party under Section 206 of the Federal Power Act and/or FERC's rules and regulations thereunder.

33. PSEG, on the other hand, interprets Appendix 2, section 22.3 of the Existing ISA as requiring agreement among all the parties to the amendment and does not contemplate

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60 PJM OATT § 12.1 provides, in relevant part, as follows: “Any dispute between a Transmission Customer, an affected Transmission Owner, or the Transmission Provider involving transmission service under the Tariff (excluding applications for rate changes or other changes to the Tariff, or to any Service Agreement entered into under the Tariff, which shall be presented directly to the Commission for resolution) shall be referred to a designated senior representative of each of the parties to the dispute for resolution on an informal basis as promptly as practicable.”
the filing by PJM under section 205 of an unexecuted ISA to amend an existing agreement. PSEG also maintains, according to section 212.7 of PJM’s tariff, that the right to demand the filing of an unexecuted ISA relates only to the filing of the initial agreement and not to amendments. PSEG also maintains that, under Appendix 2, section 22.3 of the Existing ISA, no party to the interconnection agreement, including itself and PJM, is entitled to make a section 205 filing revising a term of the agreement that does not relate to rates and charges. PSEG argues that here HTP seeks to change a non-rate term, which is not permitted under section 22.3 of the Existing ISA.

34. We find that PJM’s tariff and the Existing ISA do not authorize PJM to file an unexecuted Amended ISA with the new terms and conditions requested by HTP, the interconnection customer. Under the tariff and the Existing ISA, if HTP does not receive the agreement of all parties to amend the Existing ISA, it only reserves its right to file under section 206 of the FPA to amend the Existing ISA.

35. Appendix 2, section 22.1 of the Existing ISA provides that “[a]n Interconnection Customer shall have the right, with respect to any Interconnection Service Agreement tendered to it, to request…that Transmission Provider filed the agreement unexecuted with the Commission.”\(^{61}\) We interpret this provision as a reference to the initial ISA resulting from the interconnection process; this provision specifically applies in instances in which an interconnection customer is pursuing a new interconnection request, but is tendered an ISA by PJM containing terms which are unacceptable to the interconnection customer. The interconnection customer can then request that PJM file the ISA under section 205 unexecuted with the terms and conditions of service that it or the transmission owner find just and reasonable. The interconnection customer may raise its concerns with the Commission in the relevant proceeding. Appendix 2, section 22.1 does not provide that PJM must file an unexecuted ISA, amended or otherwise, containing the terms and conditions preferred by the interconnection customer.

36. This interpretation of Appendix 2, section 22.1 of the Existing ISA is consistent with Order No. 2003.\(^{62}\) Order No. 2003 provided that, if the transmission provider and the interconnection customer disagree over the terms and costs of the interconnection, the

\(^{61}\) Existing ISA, Appendix 2 § 22.1 (emphasis added).

transmission provider is required to file an unexecuted ISA under section 205 containing the transmission provider’s determination of the terms and costs. Order No. 2003 did not impose on the transmission provider the requirement to file an unexecuted ISA concerning amendments or revisions to an existing ISA, or that a filing must track the preferences of the interconnection customer rather than the transmission provider.

37. Section 12.1 of the PJM tariff also does not mandate the filing of an unexecuted amended ISA under section 205. Section 12.1 of the PJM tariff provides that dispute resolution does not apply to applications for rate changes or other changes to the tariff, or any service agreement entered into under the tariff and that such disputes “shall be presented directly to the Commission for resolution.” It does not specify the form of that presentation, nor does it provide the interconnection customer with a right to demand the filing of an unexecuted amendment to an existing ISA under section 205.

38. We also find that Appendix 2, section 22.3 of the Existing ISA does not provide authority for an interconnection customer to require the transmission provider to file an unexecuted amendment to the Existing ISA under section 205. As PSEG points out, section 22.3 provides that an amendment can be made only with the consent of all parties to the agreement. However, section 22.3 does provide that, notwithstanding such requirement, nothing contained in Existing ISA shall be construed as “affecting in any way any of the rights of any Interconnection Party with respect to changes in applicable rates or charges under Section 205 of the Federal Power Act and/or FERC’s rules and regulations thereunder.” We interpret this language to preserve the statutory rights of the parties to the agreement, not to provide additional filing rights to an interconnection customer to require the filing of an unexecuted amendment to the Existing ISA under section 205. Section 22.3 also preserves the interconnection customer’s statutory rights to file a section 206 complaint to seek a modification to the Existing ISA.

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63 PJM OATT § 12.1.

64 Order No. 2003 similarly reserved the interconnection customer’s right to seek a revision pursuant to section 206.

65 Existing ISA, Appendix 2 § 22.3 (emphasis added). Section 22.3 is quoted in relevant part at P 32 supra.

66 See Atlantic City Elec. Co. v. FERC, 295 F. 3d 1, 10 (D.C. Cir. 2002) (holding that transmission owners retain their section 205 filing rights when joining an RTO and that the Commission cannot force public utilities to file particular rates unless it first finds the existing filed rates unlawful).
39. In any event, section 22.3 of the Existing ISA expressly limits section 205 filings only to requesting changes in rates and charges. Changes to non-rate terms and conditions of service cannot be filed under section 205 by any party. Thus, even if HTP could demand that PJM file an unexecuted ISA with its proposed amendments to the ISA, it could not require such a filing in this case, because converting Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights is not a change to “rates or charges,” but a change in the terms of service.

40. PJM intentionally included this limitation on section 205 rights as part of the ISA. For comparison purposes, section 30.11 of the Order No. 2003 pro forma interconnection agreement explicitly provides that the transmission provider “shall have the right to make a unilateral filing to modify an interconnection agreement with respect to any rates, terms and conditions, charges, classifications of service, rule or regulation under section 205….”67 While in its Order No. 2003 compliance filing PJM represented that section 72.3 (now section 22.3 of Appendix 2 to the Existing ISA) was generally comparable to Article 30.11 of the pro forma interconnection agreement, PJM stated that it drafted this provision more narrowly because it did not seek to make the terms and conditions of service subject to unilateral change.68 In its Order No. 2003 compliance

67 Section 30.11 of the Order No. 2003 pro forma interconnection agreement provides as follows:

Reservation of Rights. Transmission Provider shall have the right to make a unilateral filing with FERC to modify this LGIA with respect to any rates, terms and conditions, charges, classifications of service, rule or regulation under section 205 or any other applicable provision of the Federal Power Act and FERC’s rules and regulations thereunder, and Interconnection Customer shall have the right to make a unilateral filing with FERC to modify this LGIA pursuant to section 206 or any other applicable provision of the Federal Power Act and FERC’s rules and regulations thereunder; provided that each Party shall have the right to protest any such filing by the other Party and to participate fully in any proceeding before FERC in which such modifications may be considered. Nothing in this LGIA shall limit the rights of the Parties or of FERC under sections 205 or 206 of the Federal Power Act and FERC’s rules and regulations thereunder, except to the extent that the Parties otherwise mutually agree as provided herein.

filing, PJM stated that “[i]n order to ensure that the terms and conditions of ISAs are not susceptible to unilateral changes by PJM throughout the agreement's duration, each ISA includes as an attachment the standard terms and conditions of Subpart E in effect on the date of execution of the agreement.”

41. Linden cites several cases arguing that PJM regularly files amended ISAs unexecuted, which the Commission regularly accepts. We find those cases unpersuasive. In those cases, unlike the case here, the parties each consented to amend the relevant agreement. For the reasons stated above, PJM’s filing is rejected.

B. Institution of Section 206 Proceeding

42. Based on the information in this proceeding, as explained below, the Existing ISA may be unjust and unreasonable and unduly discriminatory to the extent it fails to permit HTP to convert Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights and that PSEG’s withholding of consent to the Amended ISA may be unjust and unreasonable. Accordingly, we institute a proceeding, in Docket No. EL17-

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69 PJM Transmittal Letter, Docket No. ER04-457-000, at 9 & n.8 (filed January 20, 2004).

70 In the cases cited by Linden, all parties to the ISA have signed a supplemental Executed Agreement to Amend the ISA. PJM states it then makes the agreed upon revisions to the ISA itself and files a revised ISA without signatures, citing to the Commission rules and regulations that require any change to the provisions of a service agreement on file with the Commission must be filed as change in rate. See 18 C.F.R. § 35.1(c)(2017) (requiring tariff filings to reflect a change in rate); Electronic Tariff Filings, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 51 n.37 (Sept. 19, 2008), 73 FR 57515 (Oct. 3, 2008) (Commission policy that utilities must file only effective tariff provisions, not addendums or supplements); Pacificorp, 97 FERC ¶ 61,336, at 62,581 (2001) (eliminating the use of supplements and requiring “if a change is proposed in an existing tariff or rate schedule, the entire tariff or rate schedule must be refilled”)

71 See American Electric Power Service Corp., 67 FERC ¶ 61,168, at 61,491 (1994) (“AEPSC approval of sales or assignments of rights to eligible utilities, is acceptable to the extent AEPSC's approval is not unreasonably withheld” and “a customer may challenge AEPSC's denial under section 206 of the FPA”); Northeast Utilities Service Co., 62 FERC ¶ 61,294, at 62,916 (1993) (“any increase in service amounts could affect NU’s system differently and may require a new or updated system study…. However, if NU unreasonably refuses to waive the study requirement, Norwood/Wellesley may file a complaint”); Pacific Gas Transmission Co., 64 FERC ¶ 61,052 (1993) (“the Commission has found that a pipeline may not unreasonably
84-000, pursuant to section 206 of the FPA to examine this issue and we will require PSEG and PJM to show cause, within 30 days, why the Existing ISA and PSEG’s failure to consent to the Amended ISA is not unjust and unreasonable and unduly discriminatory.

43. Not permitting HTP to reduce the quality of its service from Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights appears unjust and unreasonable in these factual circumstances. HTP has fully paid for the network upgrades necessary for its Firm Transmission Withdrawal Rights and therefore the reduction will not affect payments for previously constructed facilities. The conversion will not exceed the nominal rated capability of the HTP line and therefore system withdrawals will not increase. HTP also operates a DC line that is fully controllable by PJM, so PJM can shut off flows, consistent with applicable rules and procedures, in the event that a reliability or other operational problem arises. Indeed, PJM represents that HTP’s relinquishing of Firm Transmission Withdrawal Rights will not adversely impact the operation or reliability of the PJM system.

44. As PSEG acknowledges, HTP could effectuate such a reduction under the Existing ISA by exercising its unilateral right to terminate the Existing ISA, disconnecting its line, and reapplying for Non-Firm Withdrawal Transmission Rights. Interpreting the Existing ISA, as PSEG does, to require that HTP terminate the Existing ISA and disconnect an already constructed transmission line, rather than permitting an amendment of the Existing ISA, merely to convert Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights, appears unjust and unreasonable. Non-Firm Transmission Withdrawal Rights impose less of a burden on the system than HTP’s Firm Transmission Withdrawal Rights. Moreover, PJM, as the system operator, finds that such a conversion will not have adverse reliability or operational impacts.

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refuse to relieve a releasing shipper of liability under the contract where there is a permanent release of capacity’’); *El Paso Natural Gas Co.*, 61 FERC ¶ 61,333, at 62,312 (1992) (same).

72 See Opinion No. 503, 129 FERC ¶ 61,161, at P 80 & n.84 (“PJM would not need to incur the upgrades since it has no obligation to plan for Non-Firm Transmission Withdrawal Rights in the RTEP process”) and P 110 (“As the system changes for a variety of reasons (e.g., retirements and load growth), it may be necessary to construct additional facilities in order for PJM to be able to provide the level of Firm Transmission Withdrawal Rights to which the customers subscribed. In those circumstances, we find it just and reasonable and not unduly discriminatory or preferential for PJM to charge the Merchant Transmission Facilities for the costs of assuring their service.”).
45. PSEG and NJBPU argue it is not unreasonable to refuse to permit a conversion of Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights due to the changes in future cost allocation that might occur under the PJM tariff. The question of RTEP cost allocation seems beyond the scope of this proceeding as it does not relate to revisions to the Existing ISA, but to the operation of PJM’s tariff and the determination under the tariff. PSEG’s and NJBPU’s argument that HTP unfairly will avoid RTEP cost allocation is a challenge to the justness and reasonableness of PJM’s RTEP cost allocation, not whether HTP should be able to relinquish its Firm Transmission Withdrawal Rights.73

46. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than five months after the publication date. In such cases, in order to give maximum protection to customers, and consistent with our precedent, we have historically tended to establish the section 206 refund effective date at the earliest date allowed by section 206, and we do so here as well.74 That date is the date of publication of notice of initiation of the section 206 proceeding in Docket No. EL17-84-000 in the Federal Register.

47. Section 206(b) of the FPA also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision. Allowing time for briefing, and for consideration of such briefs, we expect to be able to render a decision by the expiration of the 15-month refund period.

The Commission orders:

(A) PJM’s section 205 filing is hereby rejected, as discussed in the body of the order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the

73 The reasonableness of PJM’s cost allocation mechanism is at issue in a number of pending proceedings. See Linden VFT. LLC v. PJM Interconnection, L.L.C., 155 FERC ¶ 61,089 (2016), reh’g pending; Delaware Public Service Commission and Maryland Public Service Commission v. PJM Interconnection, L.L.C., 155 FERC ¶ 61,090 (2016), rehearing pending.

Department of Energy Organization Act and the FPA, particularly section 206 thereof, and pursuant to the Commission’s Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), the Commission hereby institutes a proceeding in Docket No. EL17-84-000, concerning the justness and reasonableness of HTP being unable to convert its Firm Transmission Withdrawal Rights into Non-Firm Transmission Withdrawal Rights.

(C) The Secretary shall promptly publish in the Federal Register a notice of the Commission’s initiation of the proceeding under section 206 of the FPA in Docket No. EL17-84-000.

(D) The refund effective date in Docket No. EL17-84-000 established pursuant to section 206 of the FPA shall be the date of publication in the Federal Register of the notice discussed in Ordering Paragraph C above.

(E) Any interested person desiring to be heard in Docket No. EL17-84-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), within 21 days of the date of issuance of this order. The Commission encourages electronic submission of interventions in lieu of paper using the “eFiling” link at http://www.ferc.gov. Persons unable to file electronically should submit an original and three copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.
I concur with today’s decision to reject this section 205 filing and institute a section 206 proceeding to examine the justness and reasonableness of Hudson Transmission Partners (HTP) being unable to convert its Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights.

I write separately only to note my dissent in the underlying cost allocation orders that applied solution-based DFAX to the Bergen-Linden Corridor project. It was these orders, all of which are still pending rehearing, which gave rise to the circumstances that caused HTP to request to convert its Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights.

Accordingly, I respectfully concur.

Cheryl A. LaFleur
Commissioner

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