

169 FERC ¶ 61,237
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

PJM Interconnection, L.L.C.

Docket No. ER13-535-005

ORDER DENYING REHEARING

(Issued December 19, 2019)

1. Old Dominion Electric Cooperative (Old Dominion) and the PSEG Companies (PSEG)¹ seek rehearing of the Commission's December 8, 2017 order on remand² from the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *NRG Power Marketing, LLC v. FERC*.³ The Order on Remand found that PJM Interconnection, L.L.C. (PJM) had not shown that its proposed revisions to its minimum offer price rule (MOPR) were just and reasonable, and it rejected PJM's filing in its entirety in light of the court's opinion in *NRG*. In this order, we deny the rehearing requests.

I. Background

A. The May 2013 Order

2. On December 7, 2012, PJM filed in Docket No. ER13-535-000 proposed revisions to Attachment DD, Section 5.14(h), and related provisions of its Open Access Transmission Tariff (OATT) to modify its MOPR.⁴ Prior to that filing, the MOPR

¹ The PSEG Companies consist of PSEG Power LLC, PSEG Energy Resources & Trade LLC and Public Service Electric and Gas Company.

² *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 (2017) (Order on Remand).

³ 862 F.3d 108 (2017) (*NRG*).

⁴ For a detailed discussion of the history leading up to the Order on Remand, see Order on Remand, 161 FERC ¶ 61,252 at PP 3-37.

mitigated the exercise of buyer-side market power in PJM's capacity market (referred to as the Reliability Pricing Model (RPM)) by setting a price floor, i.e., a minimum offer, and requiring new natural gas resources to offer into PJM's capacity auctions at this floor or higher. A new resource could, however, obtain an exception from the MOPR if it successfully demonstrated that its lower offer was justified based on the economics of that specific unit (unit-specific review process). No other MOPR exceptions or exemptions were available prior to the December 2012 filing.⁵

3. PJM proposed in the December 2012 filing to eliminate the unit-specific review process and replace it with two categorical exemptions: competitive entry and self-supply. PJM stated that the proposed categorical exemptions were designed to provide a better defined and more transparent process for granting exemptions to the MOPR.⁶ PJM also proposed, among other things, to extend from one year to three years the period in which the MOPR may apply to a new resource, to narrow the list of resource types subject to the MOPR, and to extend application of the MOPR across the entire PJM region.

4. The Commission conditionally accepted PJM's December 2012 filing in part, subject to a further compliance filing, and rejected the filing in part.⁷ Specifically, the Commission accepted PJM's proposed categorical exemptions from the MOPR for competitive entry and self-supply, subject to conditions, but it required PJM to retain its unit-specific review process. The Commission explained that the unit-specific review process recognizes that some resources, including those that would fail to qualify for PJM's proposed exemptions, may nonetheless have competitive costs that fall below the benchmark price. The Commission found that such resources should continue to have the opportunity to make this showing. With regard to the self-supply exemption, the Commission accepted the filing on the condition that PJM add new tariff provisions obligating PJM to modify the net-long test to recognize the winter peak for a winter-peaking load-serving entity (LSE) and to review and, if necessary, revise its net-short and net-long thresholds on a periodic basis.⁸

⁵ *Id.* P 3.

⁶ *Id.* P 4.

⁷ *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013) (May 2013 Order).

⁸ Order on Remand, 161 FERC ¶ 61,252 at P 13. Being in a net-short position refers to the circumstance where an LSE owns and/or contracts for an amount of capacity, measured by megawatts of unforced capacity, that is less than its capacity needs. Being in a net-long position refers to the circumstance where an LSE owns or

5. The May 2013 Order also rejected PJM's proposed revisions to extend from one year to three years the MOPR mitigation period, finding that a single-year application of the MOPR was sufficient to address price suppression concerns and was consistent with Commission precedent. The Commission found that applying the MOPR to a resource that was already determined to be economic would be unreasonable and could discourage the entry of new capacity that is economic.⁹

B. The October 2015 Order

6. The Commission denied rehearing of the May 2013 Order in October 2015.¹⁰

7. As relevant here, the Commission rejected arguments that it exceeded its authority under section 205 of the Federal Power Act (FPA)¹¹ by accepting PJM's proposal subject to the condition that PJM retain the unit-specific review process. The Commission found that it may attach conditions to certain section 205 filings provided that the utility accepts the Commission's modifications.¹² The Commission explained that because PJM did not seek rehearing of the May 2013 Order, and because PJM in fact submitted a compliance filing to that order, it appeared that PJM consented to the conditions. The Commission explained that given the complexity of PJM's filing, which contained numerous interrelated parts, a conditional acceptance serves administrative efficiency by avoiding the necessity of rejecting the filing in its entirety only to have the utility submit a new filing that cures the previous deficiencies.¹³

contracts for generation in excess of its capacity needs, measured by megawatts of unforced capacity. May 2013 Order, 143 FERC ¶ 61,090 at n.19.

⁹ *Id.* P 14.

¹⁰ *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,066 (2015) (October 2015 Order).

¹¹ 16 U.S.C. § 824d (2018).

¹² The Commission stated in the October 2015 Order that in exercising its authority under FPA section 205 and section 4 of the Natural Gas Act, 15 U.S.C. § 717c (2018), it has utilized a long-standing practice of accepting filings conditioned on the utility or pipeline revising its proposal when the Commission finds the filing generally just and reasonable, but further determines that certain components of the filing are not just and reasonable.

¹³ Order on Remand, 161 FERC ¶ 61,252 at P 19.

C. NRG Power Marketing, LLC v. FERC

8. NRG Power Marketing, LLC, GenOn Energy Management, LLC, and certain members of PJM Power Providers Group petitioned for review of the May 2013 and October 2015 Orders at the D.C. Circuit. They argued that the Commission had exceeded its authority under section 205 of the FPA in conditionally accepting in part, and rejecting in part, PJM's December 2012 filing. The court held that while the Commission may suggest "minor deviations" from the proposed rate, the Commission may not suggest modifications that result in an "entirely different rate design" under section 205.¹⁴ The D.C. Circuit granted the petitions for review and vacated the Commission's May 2013 and October 2015 Orders, in part, with regard to the unit-specific review process, the competitive entry exemption, the self-supply exemption, and the MOPR mitigation period, and it remanded the matter to the Commission.¹⁵

II. Order on Remand

9. On remand, the Commission found that PJM failed to establish that its proposal is just and reasonable, and in light of *NRG*, it rejected the December 2012 filing in its entirety. The Commission directed PJM to submit within 30 days of the date of the order a compliance filing containing revised tariff sheets reflecting the rejection of its December 2012 filing. The Commission stated that its determination was without prejudice to PJM's submission of a new, revised FPA section 205 filing if PJM determines that doing so will cure the deficiencies with the December 2012 filing.¹⁶

10. Turning to the question of what remedy, if any, is appropriate for the period between the effective date of PJM's December 2012 filing and the Order on Remand, the Commission stated that it generally does not order a remedy that requires rerunning a market because market participants participate in the market with the expectation that the rules in place and the outcomes will not change after the results are set. The Commission explained that rerunning past auctions creates two different types of risk: (1) capital risk for resources that made investments based on auction results, and (2) regulatory risk going forward (i.e., investors would be unlikely to want to invest capital in a market if the results were subject to change at a later date due to legal error). Rerunning markets thus

¹⁴ *NRG*, 862 F.3d at 115 (quoting *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993)).

¹⁵ *Id.* at 117.

¹⁶ Order on Remand, 161 FERC ¶ 61,252 at P 2.

generally undermines the markets themselves by creating uncertainty for market participants, and the Commission generally eschews this course of action.¹⁷

11. The Commission also rejected PSEG's proposed remedy that the Commission direct PJM to rerun the markets by first determining what the unit-specific offer price would have been for new entrants (or the general MOPR floors if unit-specific values were higher) and then repricing the impacted auctions. According to PSEG, replacement offers would be substituted for the offers actually submitted by units that used the competitive entry or self-supply exemptions in the affected Base Residual Auctions. PSEG stated that if different prices resulted, the difference between the original prices and the new prices, i.e., the underpayments, would become payable to affected generators by zone. However, under PSEG's proposal the new entrants that had relied on the then-existing MOPR exemptions for a particular auction year would not be eligible for any additional amounts. PSEG stressed the importance of assuring that all units that cleared in previous Base Residual Auctions using either of the categorical exemptions would retain their capacity resource commitments. To mitigate rate shock, PSEG advocated that any payments that come due as a result of repricing the auction be collected over a five-year period.¹⁸

12. Noting its broad discretion when a challenged action relates to remedies,¹⁹ the Commission declined to accept PSEG's proposal to require PJM to reprice new entrants' offers for the affected auctions using simplifications and estimates to create a unit-specific offer price at or near the default offer floor. In particular, the Commission disagreed with PSEG's presumption that the replacement offers would be at or near the default offer floor if the unit-specific review process was the only MOPR exception available.²⁰ The Commission found that it was not reasonable to presume such behavior for new entrants because previous auctions, in which the unit-specific review process was the only MOPR exception, did not see similar clearing prices.²¹

13. The Commission also stated that PSEG's proposal would undermine market participants' confidence in PJM's markets because a generator that has cleared an auction might hesitate to invest large sums to build a new plant needed by the market for fear that

¹⁷ *Id.* P 58.

¹⁸ *Id.* P 34.

¹⁹ *Id.* P 53.

²⁰ *Id.* P 58.

²¹ *Id.*

the auction will be conducted anew; or it might include an enormous risk premium in its offer to address that risk. The Commission concluded that it would be exceedingly difficult, if not impossible, for PJM to attempt to recreate prices in a fair manner under these circumstances, and it would lead to extensive and unproductive litigation.²²

III. Discussion

A. Old Dominion's Rehearing Request

1. Old Dominion's Arguments

14. Old Dominion argues on rehearing that the Commission erred in directing PJM to reinstate tariff provisions that Old Dominion states are unjust and unreasonable. Old Dominion maintains that PJM demonstrated when submitting its December 2012 filing that the MOPR provisions containing unit-specific review as the only mechanism for exemption were unjust and unreasonable. Old Dominion states that this is shown by PJM's reference to: (1) advice by the Brattle Group describing problems with the 2011 MOPR that would adversely affect markets, (2) a filing at the Commission prompted by the 2011 Base Residual Auction MOPR unit-specific review process in which West Deptford Energy, L.L.C. sought advance approval of its expected capacity offer below the MOPR benchmark level, (3) filings made in connection with the MOPR unit-specific review process for the 2012 Base Residual Auction that were prompted by significant differences between PJM and the PJM Independent Market Monitor (PJM IMM) concerning the interpretation and application of the discretion afforded under the unit-specific exemption process, (4) a complaint filed by the PJM IMM against an unnamed market participant highlighting disagreements between PJM and the PJM IMM about the justification of unit-specific exemptions, and (5) intensified controversy over the MOPR exemption process after completion of the 2012 Base Residual Auction.²³

15. Old Dominion also argues that the Order on Remand departs from prior Commission precedent without sufficient explanation. Specifically, Old Dominion states that the Commission has "departed from its precedent that 'the purpose and function of the MOPR is not to unreasonably impede the efforts of resources choosing to procure or build capacity under longstanding business models.'"²⁴ Old Dominion asserts that unit-

²² *Id.* P 59.

²³ Old Dominion Rehearing Request at 3-7.

²⁴ *Id.* at 8 (quoting *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 208 (2011), *order on reh'g*, 138 FERC ¶ 61,194 (2012), *aff'd sub nom. N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014)).

specific review represents a threat to long-standing business models of load serving entities and confidence in the outcome of the RPM auctions, and the Order on Remand failed to take this into account or address how these problems will not recur as a result of the return to the MOPR provisions existing prior to the December 2012 filing.²⁵

2. Commission Determination

16. Old Dominion's rehearing request is premised on its conclusion that the market design that the Order on Remand requires be reinstated is not just and reasonable. But the Commission never made a finding to that effect in the underlying orders at issue here. On the contrary, in the October 2015 Order, the Commission rejected the argument that the unit-specific review process is not just and reasonable,²⁶ and in the Order on Remand, the Commission ordered PJM to "to reinstate the just and reasonable tariff provisions that were in effect prior to the December 2012 filing."²⁷ PJM made this filing under FPA section 205. As the court found in *NRG*, under section 205 the Commission has authority to "accept or reject the proposal," but it does not have authority to "impose a new rate scheme."²⁸ The Commission acted appropriately on remand in rejecting PJM's section 205 filing, as it found the filing unjust and unreasonable. This action left in place the pre-existing tariff provisions. The Commission did not have before it the issue of the justness and reasonableness of the pre-existing tariff. Old Dominion, in fact, acknowledges that the previous market design had not been found to be unjust and unreasonable in these proceedings, as it calls upon the Commission to act under FPA section 206²⁹ and make such a finding.³⁰

²⁵ *Id.*

²⁶ October 2015 Order, 153 FERC ¶ 61,066 at P 23; *see also* May 2013 Order, 143 FERC ¶ 61,090 at P 141 ("PJM's proposed changes are not just and reasonable standing alone, and therefore we accept the filing subject to PJM's retention of its unit-specific review process.").

²⁷ Order on Remand, 161 FERC ¶ 61,252 at P 42.

²⁸ *NRG*, 862 F.3d at 114.

²⁹ 16 U.S.C. § 824e (2018).

³⁰ Old Dominion Rehearing Request at 9. The Commission in June 2018 found the existing PJM MOPR to be unjust and unreasonable and initiated an FPA Section 206 proceeding into PJM's OATT in light of the combined record of other proceedings. *See Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, at PP 150-56 (2018) (finding PJM's existing OATT to be unjust and unreasonable and unduly discriminatory

17. Furthermore, the existence of controversy regarding the MOPR provisions does not in itself establish that the provisions are unjust and unreasonable, and therefore the Commission's requirement that they be reinstated is not an error. Similar considerations apply to Old Dominion's contention that "the Commission has unreasonably departed from its precedent that 'the purpose and function of the MOPR is not to *unreasonably* impede the efforts of resources choosing to procure or build capacity under longstanding business models.'"³¹ The statement that Old Dominion quotes is a general principle of Commission policy, not a finding concerning specific facts. At the time of the Order on Remand, the Commission had not found, on the facts presented, that the previous market design was unjust and unreasonable.³² We thus reject Old Dominion's contention that the Commission departed from precedent on this point.

B. PSEG's Rehearing Request

1. PSEG's Arguments

18. PSEG argues that the Order on Remand never acknowledges that there is a "strong presumption in favor of making injured parties whole"³³ when Commission legal error results in injury to a party or a presumption in favor of putting "the parties in the position they would have been in had the error not been made."³⁴ PSEG states that the

based on evolving circumstances and additional record evidence submitted in Docket Nos. EL16-49-000, ER18-1314-000, ER18-1314-001, and EL18-178). The effects of that finding, which were made in a FPA section 206 proceeding, are prospective. *See, e.g., City of Anaheim, Cal. v. FERC*, 558 F.3d 521, 523-24 (2009). Such a finding does not invalidate a previously applicable rate or authorize relief for a period prior to the refund effective date set in the section 206 proceeding. The Commission's finding in *Calpine Corp. v. PJM Interconnection, L.L.C.* therefore does not affect our conclusions here.

³¹ Old Dominion Rehearing Request at 8 (quoting *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 208 (2011), *order on reh'g*, 138 FERC ¶ 61,194 (2012), *aff'd sub nom. N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014)) (emphasis supplied).

³² *See supra* note 30.

³³ PSEG Rehearing Request at 5 (quoting *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) (*Exxon*)).

³⁴ *Id.* n.16, 10, 13 (quoting, *e.g., Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1139 (D.C. Cir. 1987) (*Office of Consumers' Counsel*)).

Commission did not explain why this presumption does not apply here and instead focused on its considerable discretion to fashion remedies. According to PSEG, the Commission excessively narrowed its focus when contemplating potential remedies by only considering the approach that would be the most disruptive, i.e., rerunning markets. PSEG maintains that this “unnecessarily constrained view” is based on an assumption the Commission “can only fashion remedies that provide an exact reconstruction of what market outcomes would have been in the absence of legal error.”³⁵ PSEG states that the Commission “has the authority to adopt mechanisms to *approximate* reasonable market outcomes as a remedial measure.”³⁶

19. PSEG states that the Commission found that repricing previous auctions creates certain risks, but the Commission failed to acknowledge approaches that would eliminate these risks, such as the one that PSEG proposed.³⁷ PSEG notes that the Commission took exception to its proposal, but it argues that the Commission made no effort to identify modifications to the proposal that would address the problems the Commission identified.³⁸ PSEG states that the matter could have been addressed by modifying how the proxy values were calculated. According to PSEG, if the Commission was concerned that an assumed 20-year life for a unit was too short, it could have extended the term or held additional proceedings to determine an appropriate term. PSEG states that another approach would be to direct PJM to calculate a unit-specific value based on the actual costs of construction. PSEG states that unit-specific costs can be determined based on the actual costs of constructing the plants that clear the auctions. PSEG also states that the Commission could have considered the PJM IMM’s proposal for implementing the unit-specific exemption, which PSEG describes as similar to its own proposal but allowing submittal of additional unit specific information for construction cost and cost of capital.³⁹ PSEG maintains that the Commission has a “statutory obligation” to “demonstrate[] that other, less disruptive options for placing parties in the position they would have occupied in the absence of legal error[] could not be implemented,” and the

³⁵ *Id.* at 6-7.

³⁶ *Id.* at 8.

³⁷ *Id.* at 11-12.

³⁸ *Id.* at 8-9.

³⁹ *Id.* at 8-10.

Commission has an obligation to “explore options that ameliorate its legal error even if they are not complete solutions.”⁴⁰

20. PSEG also argues that the Commission failed to balance equities reasonably. PSEG states that the Commission failed to give due weight to the strong presumption in favor placing the parties in the position they would have occupied in the absence of the Commission’s legal error; never discussed the factors that would have favored a remedy to correct legal error, such as payments to committed resources at non-competitive levels; and overstates the equities that would favor leaving auction results undisturbed, given that affected parties were on notice that the auction outcomes were provisional due to legal challenges.⁴¹

21. Finally, PSEG argues that the Commission violated the filed rate doctrine when it found that not creating a remedy to rectify its legal error is consonant with the purpose underlying the MOPR because competitive resources were not subject to the offer floor under the market design in effect during the relevant timeframe. PSEG states that this effectively applies tariff provisions not in effect at the time.⁴²

2. Commission Determination

22. According to PSEG, the Commission erred in the Order on Remand by failing to apply the presumption endorsed in *Exxon*, namely “the strong presumption in favor of making injured parties whole”⁴³ when the Commission’s legal error results in injury to a party or, stated in an alternative form, a presumption in favor of putting “the parties in the position they would have been in had the error not been made.”⁴⁴ But in endorsing this presumption, the *Exxon* court went on to state that “[t]his is not to say that FERC must [provide this remedy] in every case if the other considerations properly within its ambit counsel otherwise.”⁴⁵ In other words, the presumption is rebuttable based on the Commission’s equitable discretion in fashioning remedies that the Commission invoked

⁴⁰ *Id.* at 10.

⁴¹ *Id.* at 13-14.

⁴² *Id.* at 16.

⁴³ *Id.* at 5 (quoting *Exxon*, 182 F.3d at 50).

⁴⁴ *Id.* n.16 (quoting *Office of Consumers’ Counsel*, 826 F.2d at 1139); *see id.* at 3, 10, 13.

⁴⁵ *Exxon*, 182 F.3d at 50.

in the Order on Remand.⁴⁶ In the Order on Remand, and as discussed further below, the Commission in this proceeding has found that considerations within its ambit counsel against requiring this type of remedy, based on its review of the relevant equitable factors and balancing of the competing interests at stake.

23. The Commission stated in the Order on Remand that in addressing remedies, its task was one of balancing of equities,⁴⁷ and it found that a remedy that sought to place the parties in the position they would have been in had the Commission not erred, i.e., rerunning markets, was outweighed by the public interest in seeing the auctions remain in place.⁴⁸ The *Exxon* decision, on which PSEG relies, concerned the Commission's acceptance of a settlement involving valuation of oil products as part of the Trans Alaska Pipeline System, not, as here, rerunning a competitive auction. Indeed, in *Exxon* the court found that the Commission's stated rationales for not providing a retroactive remedy—i.e., that previous settlements had been prospective and that some parties might not support the settlement retroactively—had no actual bearing on the Commission's decision to make the remedy prospective only, and they did not provide a justification for the Commission's refusal to require a retroactive remedy in a matter involving correction of cost of service errors.⁴⁹ Here, the Commission was faced with a much more complex problem, and appropriately considered the relevant equitable factors. As the Commission explained in the Order on Remand, requiring regional transmission organizations (RTOs) to rerun auctions creates capital risk and regulatory risk.⁵⁰ The Commission further explained that rerunning the markets would likely harm customers⁵¹ and could result in either duplicative commitments or lost commitments for certain resources.⁵² We

⁴⁶ Order on Remand, 161 FERC ¶ 61,252 at PP 52-61

⁴⁷ *See id.* P 53 (“[T]he Commission must show that ‘it considered relevant factors and struck a reasonable accommodation among them, and that its order granting or denying refunds was equitable in the circumstances’” (citation omitted)).

⁴⁸ *Id.* P 54 (“[W]e find that ordering recoupment of funds through rerunning the markets or any other remedy for the period during which PJM operated its market with two categorical exemptions and a unit-specific review process is unwarranted.”).

⁴⁹ *Exxon*, 182 F.3d at 49.

⁵⁰ Order on Remand, 161 FERC ¶ 61,252 at P 55.

⁵¹ *Id.* P 60.

⁵² *Id.* P 57.

continue to find that these considerations provided a justification for the Commission's determination in this proceeding.

24. Indeed, after *Exxon*, the D.C. Circuit declined to find that the Commission had an "obligation" to correct its legal error and grant remedial relief in *Consolidated Edison Company of New York, Inc. v. FERC*.⁵³ The court stated that the Commission "ordinarily has remedial discretion, even in the face of an undoubted statutory violation, unless the statute itself mandates a particular remedy."⁵⁴ In subsequent decisions, courts have continued to recognize that, even in the case of legal error, the Commission's remedial decision remains discretionary and must be grounded in consideration of equitable factors.⁵⁵ For example, courts have held that the Commission may determine not to order refunds when a risk of under-recovery exists or where companies cannot undo reliance on a prior rate design.⁵⁶ The circumstances of this proceeding thus do not require the same result as proceedings where the Commission has determined to require remedial relief when the RTO can calculate the "exact amount" of the refunds and parties have not identified decisions made in reliance on the prior tariff.⁵⁷

25. As applied to auctions, the Commission has long concluded in specific cases that the equities weigh against rerunning auctions, because both generators and load make decisions on investment based on the price outcome of the auction that cannot

⁵³ 510 F.3d 333, 339 (D.C. Cir. 2007).

⁵⁴ *Id.* (quoting *Conn. Valley Elec. Co., Inc. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000)).

⁵⁵ *See Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 956 (D.C. Cir. 2016) (remanding orders to determine the "equities of providing refund protection to recover unlawful rates resulting" from its legal error).

⁵⁶ *La. Pub. Serv. Comm'n v. FERC*, 883 F.3d 929 (D.C. Cir. 2018) (affirming the Commission's denial of refunds where a non-trivial risk of under-recovery existed, and where customers choosing firm or interruptible service could not undo their reliance on the prior rate design allocating costs improperly to the interruptible service).

⁵⁷ *See Pub. Serv. Comm'n of Wis. v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,205, at P 47 (2016) ("MISO can calculate the exact amount of . . . costs that should be assessed to each LSE that underpaid in order to refund LSEs that overpaid"), *aff'd sub nom. Verso Corp. v. FERC*, 898 F.3d 1 (D.C. Cir. 2018) (affirming the Commission's exercise of discretion where the "exact amount" can be calculated).

be reversed.⁵⁸ For example, generators that fail to clear auctions will not make investments in new or expanded plants, while generators that do clear will make such investments, which cannot be undone, and are required to perform subject to penalties. Load also may make decisions based on the outcome of auctions, such as developing peak shaving programs, entering into interruptible contracts, or utilizing demand response programs to reduce their demand and hence their capacity payments.⁵⁹ Moreover, auctions send price signals on which companies rely for making future investment plans, and those decisions cannot be reset. In *Consolidated Edison Company of New York, Inc. v. FERC*, the court affirmed the Commission's determination not to rerun a market to correct legal error, finding that the Commission had considered the relevant factors and balanced the interests at stake.⁶⁰ Indeed, in other cases, PSEG has maintained that rerunning markets "is completely at odds with Commission precedent."⁶¹

⁵⁸ See *Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169, at P 49 (2008), *order on reh'g*, 125 FERC ¶ 61,340 (2008) ("In a case involving changes in market design, we generally exercise our discretion over remedies and do not order refunds that require rerunning a market."); *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,038, at P 90 (2017) (declining to rerun market where parties have made decisions based on prior tariff); *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,223, at P 51 (2004) (declining to order refunds because it would be disruptive to the market to change the rights already allocated for the current year); *Bangor Hydro-Elec. Co. v. ISO New Eng. Inc.*, 97 FERC ¶ 61,339 (2001) (finding that rerunning markets, even when a software error results in clearing prices that are inconsistent with the market rules, would do more harm to electric markets than is justifiable), *reh'g denied*, 98 FERC ¶ 61,298 (2002); *Cal. Indep. Sys. Operator Corp.*, 120 FERC ¶ 61,271, at P 25 (2007) (identifying market reruns as the exception, not the rule).

⁵⁹ PSEG recognizes that "parties have made arrangements and commitments based on the historic prices; LSEs will have variations in load; state provider-of-last resort auctions will have occurred and settled." PSEG Companies November 14, 2017 Answer at 15.

⁶⁰ See *Consol. Edison*, 510 F.3d at 337.

⁶¹ PSEG Companies, Motion to Intervene, Protest and Request for Summary Dismissal, Docket No. EL08-67-000 at 18 (filed July 14, 2008). PSEG explained that the proposal to rerun markets

is particularly troubling given that market participants rely on existing Tariff provisions to make commitments and determinations regarding the RPM auction markets. Generation developers may have decided to expedite commercial

26. As the Commission explained in the Order on Remand, in considering all the relevant factors presented in this case, rerunning the five PJM capacity auctions at issue in this proceeding presents all of these concerns.⁶² Changing the mitigation rules affects not only the generators whose offers might be changed; it affects the entire clearing mechanism of the PJM capacity market. Generation and load resources made investment decisions based on the outcome of these auctions.⁶³ Rerunning the auction, for example, could result in some generation resources clearing the first auction and failing to clear the second auction, thereby losing payments sufficient to cover their investments. Other generators that failed to clear the first auction might then clear the second auction, but would not be responsible for performing. In some of the auctions, the delivery year already has passed, and generators had obligations to perform and could be subject to penalties for not performing. Those decisions cannot be revisited.⁶⁴ Indeed, other generators in this proceeding advocated that the Commission not rerun the market for these same reasons.⁶⁵

operation dates, procure financing or accept higher than desired cost responsibility risks on the basis of the auction outcomes. The real world in which they operate does not offer a ‘redo’ simply because PJM is ordered to rerun auction results.

Id. at 17-18.

⁶² Order on Remand, 161 FERC ¶ 61,252 at PP 56-61.

⁶³ See, e.g., *PJM Interconnection L.L.C.*, 167 FERC ¶ 61,029, at P 103 (2019) (“[LS Power] adds, ‘[b]ased on public sources, LS Power estimates that in the last five years alone, nearly \$8 billion of non-recourse project financing has been raised for new power plant construction in PJM.’” (quoting LS Power Protest, Attachment A, Joseph D. Esteves Aff. (Esteves Aff.) at 13)). See also Esteves Aff. at Tbl. 3, listing 15 new generators built in PJM under various financing structures; sourced from “Spark Spread, ESAI Power Capacity Watch, Company press releases, [and] LS Power estimates.”).

⁶⁴ Here, as the Commission has found elsewhere, the “application of mitigation to a previously exempt generator affects not only the rate it receives, but the entire dispatch of the PJM market, and payments to other generators which bid appropriately. Even if PJM could recalculate prices based on mitigating certain generators, it cannot retroactively change the output of plants or easily adjust for the differences in cost and output that would result.” *Md. Pub. Serv. Comm’n*, 123 FERC ¶ 61,169, at P 49 (2008).

⁶⁵ See, e.g., NRG Companies November 14, 2017 Answer at 22 (“[A] generator that has cleared an auction might hesitate to invest hundreds of millions of dollars to

27. PSEG claims the Commission ignored its precedent, particularly *H.Q. Energy Services (U.S.), Inc. v. New York Independent System Operator, Inc.*,⁶⁶ in which the Commission required a remedy to correct legal error. In *H.Q. Energy Services*, the Commission found on remand that the New York Independent System Operator, Inc. (NYISO) was not justified in invoking its Temporary Extraordinary Procedures to rerun markets and found that NYISO should “restore the prices to what they would have been, absent that error.”⁶⁷ Contrary to PSEG’s suggestion, the Commission did not require NYISO to rerun its market to create different prices. Rather, the Commission required NYISO to use the market prices actually determined by the market. As PSEG acknowledges, when parties objected to “the amounts that NYISO is proposing to refund, and the methods by which NYISO is calculating those refunds,” the Commission set those issues for hearing and settlement proceedings.⁶⁸ The parties ultimately settled, and the Commission did not, as PSEG advocates here, rerun the market by revising or changing the offers used to determine the market clearing price. As the Commission explained in the Order on Remand,⁶⁹ the two other cases PSEG cited are likewise inapposite because they do not involve rerunning markets.⁷⁰

28. PSEG argues on rehearing that the Commission “has the authority to adopt mechanisms to *approximate* reasonable market outcomes” and is obligated to consider “less disruptive options” in addition to rerunning the market.⁷¹ While refunds do not have to replicate perfectly the outcome that would have occurred absent legal error, when the Commission finds that refunds are warranted by the equities, it seeks to put the parties

build a new plant needed by the market for fear that the auction will be conducted anew; or it might include an enormous risk premium in its bid to address that risk”).

⁶⁶ 113 FERC ¶ 61,184 (2005) (*H.Q. Energy Services*).

⁶⁷ *Id.* P 36.

⁶⁸ *Id.* P 59.

⁶⁹ Order on Remand, 161 FERC ¶ 61,252 at P 54 n.115.

⁷⁰ See *S. Cal. Edison Co.*, 116 FERC ¶ 61,148, at PP 2-9, 23-25 (2006) (allowing SoCal Edison to recover certain costs related to it being a scheduling coordinator through its transmission owner tariff); *Great Lakes Gas Transmission Ltd. P’ship*, 76 FERC ¶ 61,157, at 61,927 (1996) (allowing a pipeline to recover certain expansion-related costs on a rolled-in basis, rather than an incremental basis, following the D.C. Circuit’s remand).

⁷¹ PSEG Rehearing Request at 8.

in a position that is reasonably close to the one they would have occupied. As discussed above, however, rerunning the market here simply cannot approximate the results that would have occurred had the auction been run according to PJM's Tariff in place prior to the effective date of the December 2012 filing.

29. PSEG claims that its proposal to recreate auction results based only on the exemption process that existed prior to *NRG* (*i.e.*, the unit specific review) would approximate reasonable market outcomes. Specifically, PSEG proposes to determine what the unit-specific offer price would have been for generators that were granted one of the two categorical exemptions, and then reprice the impacted auctions to determine which, if any, generators were underpaid. This does not approximate a reasonable market outcome; it simply revises the prices for certain generators that cleared the original auction.

30. Moreover, PSEG recognizes that however an attempted rerun is structured, the major difficulty would be to establish offers retroactively for those units that cleared using the competitive entry exemption and the self-supply exemption. PSEG's witness, Dr. Shanker, acknowledges that "[t]his final piece could be a difficult task."⁷² Dr. Shanker proposed at the outset that such an offer be set by using proxies, the Gross Cost of New Entry figure calculated by PJM less the expected energy market and ancillary services revenues determined by PJM, with a possible adjustment to the energy market revenues for lower fuel costs. In the Order on Remand, the Commission found that such an approach ignores the unit-specific review component of PJM's prior tariff under which generators could seek to justify lower offers based on specific cost factors, opportunity costs, and predicted energy market revenues. In its rehearing request, PSEG states in response that the Commission could establish other methods for more accurately determining these rates, such as extending the 20-year life or relying on the actual costs for new entrants that have gone into service.

31. We reject PSEG's attempt, on rehearing, to revise and/or bolster its preferred remedy. Because other parties are precluded under Rule 713(d)(1)⁷³ from filing answers to requests for rehearing, allowing PSEG to introduce new evidence at this stage would raise concerns of fairness and due process for other parties to the proceeding.⁷⁴ In any

⁷² Affidavit of Roy J. Shanker at P 17.

⁷³ 18 C.F.R. § 385.713(d)(1) (2019).

⁷⁴ See, e.g., *Joint Cal. Complainants v. Pac. Gas & Elec. Co.*, 163 FERC ¶ 61,112 (2018) ("Further, as the Commission has made clear, allowing new evidence on rehearing presents a moving target and frustrates needed finality.").

event, we do not find that PSEG's list of proposed approaches⁷⁵ would create a cost-based method for retroactively determining new entrant's offers that would sufficiently reproduce the results that would have occurred had the Commission not erred in accepting PJM's proposed exemptions. As noted above,⁷⁶ PSEG proposes that the Commission could increase the assumed life of a unit beyond 20 years. As alternatives, PSEG proposes that the Commission could direct PJM to calculate a unit-specific value based on actual costs of construction, or that it could consider the PJM IMM's proposal for implementing the unit-specific exemption, which PSEG describes as similar to its own proposal but allows submittal of additional unit specific information for construction cost and cost of capital. However, even if the Commission could determine the costs of generators by relying on actual costs for some and projected costs for others, such a determination would still require a retroactive determination of the energy market and ancillary services revenues that each generator could have expected to receive and any opportunity costs that applied in the past. Moreover, nothing in this record would enable the Commission to determine what adjustments, if any, to make to the 20-year life of the unit, as PSEG suggests.

32. We further disagree with PSEG's assertion⁷⁷ that the Commission has a statutory obligation to consider other unidentified "less disruptive options" in order to determine, as it has here, that the balance of the equities weighs against "ordering recoupment of funds through rerunning the markets or any other remedy"⁷⁸ PSEG cites no authority for this "statutory obligation." The Commission has adequately considered and responded to PSEG's arguments in favor of its preferred remedial approach. That is all that is required.⁷⁹ And, as discussed throughout this order, the Commission properly found that the most equitable course is to leave the auction results in place.

⁷⁵ PSEG Rehearing Request at 8-10.

⁷⁶ *See supra* P 19.

⁷⁷ *Id.*; *see id.* at 10 ("The Commission will not have met its statutory obligations until, at a minimum, it demonstrates that other, less disruptive options for placing parties in the position they would have occupied in the absence of legal error, could not be implemented.").

⁷⁸ Order on Remand, 161 FERC ¶ 61,252 at P 54.

⁷⁹ *See, e.g., Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1171 (D.C. Cir. 2007) (rejecting petitioners' statutory argument and explaining that "when a party advances a wholly undeveloped claim—as here—the agency has little occasion to present a reasoned explanation").

33. Moreover, given the facts in this case, we conclude that relying on the actual offers by the exempt generators here provides a more accurate proxy for their actual costs than an after-the-fact reconstruction. As PSEG recognizes, the vast majority of the units qualifying for the exemptions qualified under the competitive exemption as unsubsidized offers.⁸⁰ Since PJM and the PJM IMM found these offers unsubsidized and hence competitive, it is reasonable to assume that their offers would better represent the actual marginal or incremental costs for these generators than PSEG's proposed methods of reconstructing offers.⁸¹ We therefore see no need to make assumptions about the offers of the competitive generators that qualified for the exemption or institute litigation over a cost-of-service study that looks at retroactive predictions as to costs, energy market and ancillary services revenues, or opportunity costs. We similarly decline to undertake a retroactive reconstruction of offers provided by generators under the self-supply exemption before that exemption was eliminated. The parameters PJM established for the self-supply exemption were designed to ensure that the load relying on those resources had no incentive to submit artificially low offers below their costs.⁸²

⁸⁰ Affidavit of Roy J. Shanker at 7 (competitive exemption accounted for 94 percent of the exemptions accepted).

⁸¹ See *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) (“In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment.”). The principle of the single-price auction PJM runs is that generators offer their incremental costs because they will be paid the market clearing price as long as it exceeds their incremental costs. Because a competitive generator receives no external subsidy, its economic incentive is to offer no lower than its incremental costs, as offering lower creates a risk that the market clearing price will not cover its incremental costs. See *Md. Pub. Serv. Comm’n v. FERC*, 632 F.3d 1283 (D.C. Cir. 2011) (affirming Commission finding that competitive market produced just and reasonable prices).

⁸² The concern that the PJM MOPR sought to mitigate is that buyers can reduce their total capacity cost by financing uncompetitive entry, which can occur because the cost of financing the entrant is offset by the overall cost reduction achieved by lowering the price of capacity for the remainder of the capacity purchased. *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 108 (2013).

34. As a result, we find that an attempted reconstruction of costs, revenues, and opportunities would not necessarily create a more accurate price than the prices produced by the auction. Therefore, we conclude that it is not necessary to rerun the market.⁸³ We therefore disagree that it was error for the Commission to conclude that leaving auction results undisturbed was consonant with the MOPR's underlying purpose because competitive resources were not subject to the offer floor under the market design in effect during the relevant timeframe. According to PSEG, this finding violates the filed rate doctrine because it effectively enforces a rate different from the rate on file.⁸⁴ This argument ignores the equitable considerations involved in granting refunds. The Commission recognized its legal error in seeking to modify PJM's filing under FPA section 205. But such recognition does not remove the Commission's discretion over remedies when considering whether to seek to revise past auction results retrospectively.

35. As the Commission and the courts have found in determining whether to order refunds, the Commission must balance equitable considerations.⁸⁵ The Commission has determined not to order refunds even in the case of a violation of the tariff when the method used by the RTO "was the proper and appropriate pricing method that provided efficient prices for the least cost dispatch."⁸⁶ Here, the legal error identified by the court in *NRG* did not involve the merits of the exemptions, but rather the Commission's

⁸³ See *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 223-30 (D.C. Cir. 1999) (affirming a Commission determination not to remedy a tariff violation when the end result of the tariff violation was not unjust, unreasonable, or unduly discriminatory); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 817 (D.C. Cir. 1998) (*Koch*) (reversing the Commission's remedy for a tariff violation when that violation was consistent with Commission policies and did not result in a windfall); *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1099 (D.C. Cir. 1993) (reversing the Commission when "[t]he remedial sanction that FERC chose to impose on Gulf [was] wholly disproportionate to Gulf's error").

⁸⁴ PSEG Rehearing Request at 16.

⁸⁵ *Towns of Concord v. FERC*, 955 F.2d 67, 72-73, 76 n.8 (D.C. Cir. 1992) ("Customer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when 'money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.'" (quoting *Atl. Coast Line R.R. v. Florida*, 295 U.S. 301, 309 (1935)); see also *Koch*, 136 F.3d at 817; *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

⁸⁶ *N.Y. Indep. Sys. Operator, Inc.*, 110 FERC ¶ 61,244 at P 65, *reh'g denied*, 113 FERC ¶ 61,155, at P 47 (2005), *aff'd sub nom. Consol. Edison*, 510 F.3d at 341.

authority to revise PJM's proposal.⁸⁷ Taking the basis for the Commission's error into account is appropriate. Thus, as discussed above, we conclude that in fashioning the most equitable resolution to the issues raised by the Commission's legal error, the offers submitted by those generators more accurately reflect costs than an after-the-fact reconstruction of the type advocated by PSEG. We also are mindful that had we rejected PJM's filing in 2013, rather than modifying it, PJM would likely have filed at a much earlier date to correct the problems it identified with the unit-specific review provision.

36. We also reject PSEG's contention that the Order on Remand overstates the equities that favor leaving auction results undisturbed because affected parties were on notice that the auctions were provisional due to the ongoing legal challenges regarding the validity of the categorical exemptions.⁸⁸ Even in circumstances where the presence of notice means that rerunning markets would not constitute retroactive ratemaking in violation of the filed rate doctrine, the Commission still must consider the equities involved.⁸⁹ PSEG's argument regarding notice does not change the Commission's conclusion that, in light of the facts presented in this proceeding, rerunning this auction would not reasonably balance the equities. The fact that the Commission may require rerunning of auctions does not necessarily imply that it should in these circumstances, particularly where the original auctions seem closer to the competitive result than any attempted reconstruction, and where delivery years have already passed.

37. PSEG argues that the Commission erred by failing to discuss factors that would have favored a remedy, citing as an example the fact that auction prices could have resulted in payments to committed resources at non-competitive levels.⁹⁰ While the Commission cannot know precisely the result if the exemptions were not in place, the Commission found, as indicated above, that the offers actually submitted by the generators are a better proxy for their costs (and hence their offers) than any after-the-fact reconstruction. The Commission found that, given the reliance on the auction process and the difficulty in putting parties in a position close to that they would have been in but for the Commission's error, the equities favored not trying to replicate the auctions that might have occurred.

⁸⁷ Order on Remand, 161 FERC ¶ 61,252 at P 60.

⁸⁸ PSEG Rehearing Request at 15.

⁸⁹ *See La. Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120, at P 34 n.74 (2016) ("The existence of notice does not override the equities involved in requiring refunds for transactions that were authorized under the [prior rate].").

⁹⁰ PSEG Rehearing Request at 13-14.

38. We find no merit in PSEG's argument that the Commission ignored evidence⁹¹ demonstrating that the prices that resulted from affected auctions were unsustainable because "PJM has had very few price spikes during peak summer periods in recent years, which are normally the times when generators hope to earn extra energy margins to pay for the substantial fixed costs of their facilities."⁹² We likewise disagree with PSEG's contention that the Commission failed to consider PJM's identified concerns with the unit-specific review process.⁹³ The issue here is not whether energy prices, in retrospect are sustainable as a factual matter, but whether in these circumstances equity requires the capacity market to be rerun due to the Commission's legal error. In light of our findings above, particularly the difficulty of reconstructing the offers of generators, we find that we appropriately balanced the relevant competing interests and equities, consistent with the purposes of the FPA.⁹⁴

39. We are also unpersuaded by PSEG's argument that, in balancing equities, the Commission failed to acknowledge that appearing to be unwilling to redress legal error that might increase payments to generators could have a potential adverse impact on investors' confidence in markets.⁹⁵ First, as discussed above, the Commission's determination not to require PJM to rerun the market was not based on considerations regarding the level of payments to generators, but on an evaluation of all the equities in the case and consideration of the fact that both load and generators rely upon the outcome of auctions to make decisions. While PSEG's proposed methodology for rerunning the auction might have helped some generators, it would not have benefitted all generators because it would not have permitted generators subject to the exemptions to resubmit their offers and would not have permitted generators that did not clear the auction to receive payment. Moreover, we find no basis to rerun an auction when, as noted above, we find that the offers submitted better reflect the actual costs of the generators than PSEG's attempted reconstructions. Therefore, we see no basis to conclude that declining to require PJM to rerun the markets based on these considerations would adversely affect

⁹¹ *Id.* at 15 (citing NRG Protest, Affidavit. of Robert B. Stoddard, ¶¶ 2, 23).

⁹² NRG Protest, Stoddard Aff. at ¶ 23.

⁹³ *Id.* at 15 & n.35 (citing comments).

⁹⁴ *See Pub. Utils. Comm'n of Cal. v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) ("A primary purpose of the Federal Power Act, and its counterpart, the Natural Gas Act, 'was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices.'"); *Consol. Edison*, 510 F.3d at 342 (finding Commission's decision not to order refunds consistent with the "multiple purposes" of the FPA).

⁹⁵ *Id.* at 14.

investor confidence. Our finding on this point is also relevant to PSEG's argument that customers may have "received a windfall" "due to the fact that prices cleared below the level" they would have absent the Commission's legal error.⁹⁶ Given that the offers submitted better reflect actual costs than PSEG's attempted reconstructions, we find no basis to conclude that the outcome inequitably favors customers.

The Commission orders:

The requests for rehearing of Old Dominion and PSEG are hereby denied, as discussed in the body of this order.

By the Commission

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁹⁶ PSEG Rehearing Request at 15.