

127 FERC ¶ 61,274
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Maryland Public Service Commission, Delaware Public Service Commission, Pennsylvania Public Utility Commission, New Jersey Board of Public Utilities, Public Power Association of New Jersey, Maryland Office of the People's Counsel, Office of the People's Counsel of the District of Columbia, Southern Maryland Electric Cooperative, Inc., Blue Ridge Power Agency, Allegheny Electric Cooperative, Inc., Office of the Ohio Consumers' Counsel, New Jersey Department of the Public Advocate, Division of Rate Counsel, Pennsylvania Officer of Consumer Advocate, PJM Industrial Customer Coalition, American Forest and Paper Association, Portland Cement Association, Duquesne Light Company, and United States Department of Defense and other affected Federal Executive Agencies,

Docket No. EL08-67-001

v.

PJM Interconnection, L.L.C.

ORDER DENYING REHEARING AND REQUEST FOR ORAL
ARGUMENT

(Issued June 18, 2009)

1. In an earlier order,¹ the Commission dismissed a complaint filed by RPM Buyers against PJM Interconnection, L.L.C. (PJM) regarding the prices set for capacity in PJM's

¹ *Maryland Public Service Commission, et al. v. PJM Interconnection, LLC*, 124 FERC ¶ 61,276 (2008) (September 19 Order).

Reliability Pricing Model (RPM) for the delivery years governed by the transitional RPM auctions that had already been completed at the time of the complaint. The Commission dismissed the complaint, finding that RPM Buyers had not shown any violation of the tariff provisions, and had failed to provide a sufficient basis for us to require that these auctions be re-run. We deny rehearing and also deny RPM Buyers' request for oral argument.

1. **Background**

1.1. **RPM**

2. RPM is a capacity market based on three-year forward-looking, annual obligations for locational capacity under which supply offers are cleared against a downward sloping demand curve, also called the Variable Resource Requirement curve (the VRR curve).² RPM provides for base residual auctions to be conducted every year to procure capacity three years in advance of the year in which the capacity will be provided (the delivery year). Generators, transmission providers and demand resources may make offers to supply capacity to PJM in those auctions, and the prices set by those auctions determine the rates for capacity for that delivery year.

3. Because the RPM model establishes prices three years in the future, the tariff established a transition period for the first few years of the operation of the RPM market. This transition period included, as relevant here, an accelerated schedule for the transition auctions that established the capacity prices for delivery years 2007-2008 through 2010-2011.

4. RPM also includes measures to mitigate the exercise of market power. For each auction, the RPM market rules provide a test to determine whether each capacity seller has market power.³ If the seller fails that test and is therefore considered to have market power, that seller's offer is capped so as to replicate that seller's avoidable or opportunity

² The VRR curve establishes the amount of capacity that PJM requires its Load Serving Entity (LSE) customers to purchase, and the price for that capacity, in each capacity zone (Locational Deliverability Area or LDA). The VRR curve is based on two parameters – the net Cost of New Entry (CONE) and the Installed Reserve Margin, which is intended to ensure the availability of sufficient capacity to assure reliability.

³ PJM uses the “Three Pivotal Supplier Test” – see Appendix L of PJM’s 2008 *State of the Market Report*.

costs. A seller may either (1) obtain an offer cap specific to its unit, in which case it would be required to provide its actual costs to the PJM Market Monitoring Unit for evaluation, or (2) utilize a default offer cap designed for resources of its particular type. The first "transitional" base auction took place in April 2007 and procured capacity for the 2007-2008 delivery year. Since then, three additional transitional base residual auctions have been conducted. The most recent base residual auction, the May 2008 auction for the 2011-2012 delivery year, was the first to procure capacity under a full three-year forward commitment.⁴

1.2. September 19 Order

5. On May 30, 2008, RPM Buyers filed a complaint alleging that the rates for the transition period, which resulted from the first four base auctions, are unjust and unreasonable, and they asked the Commission to alter those rates on that basis. RPM Buyers asserted primarily that, during the transition period, "[t]he absence of price discipline provided by new capacity resources and the ability of existing resources to withhold some capacity within the RPM rules combined to produce capacity prices in the transition period that are not comparable to those that would be produced in a competitive market or determined under cost-based regulation."⁵ Therefore, RPM Buyers asserted, "even if RPM had some meager impact on reliability, its costs far outweigh any possible benefit."⁶ RPM Buyers proposed a method for re-determining RPM rates.

6. The Commission dismissed the RPM Buyers' complaint, finding that no party violated PJM's tariff in the transition auctions and the prices determined during the auctions were in accord with the tariff provisions governing the auctions. The Commission found that RPM Buyers had not provided a sufficient basis to re-run the past auctions or change the prices that resulted from those auctions. The Commission also found that, since the tariff provisions at issue set the rate and quantity that will be paid to capacity resources that are selected in the auction to provide future service, changing a

⁴ After the Commission approved RPM, several parties, including some of the RPM Buyers, petitioned for review of those orders. That appeal was denied (*Pub. Serv. Elec. & Gas Co. v. FERC*, D.C. Cir. No. 07-1336, *et al.*, 2009 U.S. App. LEXIS 5699 (March 17, 2009 unpublished decision)).

⁵ Complaint at 2.

⁶ *Id.* at 7.

rate already determined in accordance with existing tariff provisions on which parties have relied would defeat the purpose of the forward binding commitment and undo the incentives for new capacity resources. The September 19 Order also stated that RPM Buyers failed to show that any seller violated the tariff provisions containing the mitigation rules in place during the auctions.

1.3. Requests for Rehearing and Oral Argument

7. RPM Buyers filed a request for rehearing and a separate request for oral argument on rehearing. They argue on rehearing that, because the Commission failed to evaluate the issues that the Complaint raised, the Commission should grant rehearing to find (1) that PJM's transition auctions produced unjust and unreasonable capacity prices, and (2) that capacity prices established in the transition auctions for delivery years beginning in June 2008, June 2009, and June 2010, should be revised. Alternatively, RPM Buyers request rehearing on the basis that the Complaint raised substantial questions of fact that require further investigation to determine whether the transition auctions produced unjust and unreasonable rates and whether those capacity prices should be modified, and order a full evidentiary hearing to address those issues. Allegheny Energy Supply Company (AE Supply) filed a motion for leave to answer and an answer to RPM Buyers' request for rehearing.

2. Procedural Issues

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. We will accept AE Supply's answer because it has provided information that has assisted us in our decision-making process.

3. Discussion

9. The Commission will deny RPM Buyers' request for rehearing.

10. In the September 19 Order, we dismissed RPM Buyers' complaint requesting that we upset previously-conducted auctions on a number of grounds. We found that no party had violated PJM's tariff. We also found that, even though the RPM tariff provisions are continually subject to revision on a prospective basis, RPM Buyers had failed to support their contention that these provisions were unjust and unreasonable so as to warrant the undoing of already conducted auctions. In this regard, we found that all the offers in these auctions were subject to mitigation according to the PJM tariff and the PJM Market Monitor found that no significant exercise of market power occurred. We further found that RPM Buyers' suggested remedy of returning prices to pre-RPM levels was not just

and reasonable. We reiterate this position here. RPM Buyers are arguing, in essence, that even though the transition auctions were conducted in compliance with the tariff, the Commission should nonetheless grant relief because the results of applying the tariff are not what RPM Buyers expected. As we found in the September 19 Order, while revisions to RPM may be appropriate for the future,⁷ RPM Buyers have not made a sufficient showing to justify upsetting already-conducted auctions: "the fact that certain RPM provisions are being examined for future changes does not justify the relief sought by RPM Buyers – namely, changing the results of past auctions."⁸

3.1. Evidence Does Not Warrant Revising Past Auction Results

11. RPM Buyers first argue that, in finding that the capacity prices resulting from the transition auctions were just and reasonable because no tariff provisions were violated, the Commission abrogated its obligations under the Federal Power Act (FPA). It asks the Commission to grant rehearing and rule that (1) the transition auctions produced unjust and unreasonable prices, and (2) capacity prices should be reformed to match the objectives of the transition auctions.

12. According to RPM Buyers, the Commission's analysis of the justness and reasonableness of the transition prices was flawed, because it did not include an investigation into (1) how the transitional auctions functioned, even if these auctions satisfied all tariff requirements, and (2) whether the resulting capacity prices match those that would be produced in a competitive market or determined under cost-based regulation.⁹ RPM Buyers similarly asserted that the Commission failed to balance the interests of suppliers with the interests of customers in paying just and reasonable rates.

13. As the complainants in an action under section 206, RPM Buyers bear the burden of proof to show that the rate, term or condition of which they complain is unjust and unreasonable. RPM Buyers have not provided sufficient evidence for the Commission to justify the undoing and resetting of prices in already completed auctions. Not only did all

⁷ On March 26, 2009, in *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 (2009), the Commission approved revisions to the RPM program supported, in part, by PJM stakeholders including RPM Buyers, and further revisions to RPM are currently being addressed in an ongoing PJM stakeholder process.

⁸ September 19 Order at P 24.

⁹ Request for Rehearing at 14.

sellers comply with the tariff provisions, but we cannot find that the prices produced by these auctions were unjust and unreasonable. First, with regard to RPM Buyers' argument that the Commission must determine whether prices match those that would be produced by a competitive market, as we pointed out in the September 19 Order, PJM's tariff contains market power mitigation provisions to ensure that in those circumstances in which competition may not be sufficient to assure a lack of market power, generators' offers are limited to competitive offers. In fact, in the transitional auctions, every offer by generators was subject to the mitigation process established in the tariff, under which the market monitor approves a rate designed to represent the seller's avoidable costs, and those rates are used to establish just and reasonable offer prices.¹⁰ The PJM Market Monitor reviewed those offers and concluded based on his review that "[t]he data do not support the claim that suppliers could offer prices well in excess of avoidable costs."¹¹ In contrast to the PJM Market Monitor's unequivocal statement, RPM Buyers have offered nothing other than suggestions and speculation that parties may have, or could have, exercised market power, despite complying fully with the tariff.¹² These unsubstantiated suggestions do not meet the burden of proof that a section 206 complainant must meet. We therefore find no basis to reverse our determination that RPM Buyers have failed to demonstrate that the prices resulting from the auctions were unjust and unreasonable.

14. Second, RPM Buyers argue that to determine whether the RPM rates are just and reasonable, the Commission must investigate whether the resulting capacity prices match

¹⁰ September 19 Order at P 30.

¹¹ Declaration of Joseph Bowring, Attachment A to PJM Answer to Complaint (Bowring Declaration) at P 11.

¹² RPM Buyers have asserted that the mitigation procedures used during the transition auctions were inadequate because generators could have manipulated the prices that the market monitor substituted for their offers through such measures as basing their avoidable costs on proxy data rather than actual cost data and accelerating depreciation on capital improvement costs (see request for rehearing at 35). RPM Buyers may term these practices "loopholes;" they are, however, practices approved under the PJM market rules, and as we pointed out in the September 19 Order at P 31, objections to those rules "can be raised in the context of challenges to future auctions, but do not justify overturning the results of past auctions." Moreover, RPM Buyers have presented no evidence that these provisions are in fact unjust and unreasonable and do not reflect legitimate methods of quantifying generator costs.

those that would be determined under cost-based regulation. They maintain that rates cannot be just and reasonable if they deviate too significantly from the rates produced in a competitive market or determined under cost-based rate regulation.¹³

15. First, it is not clear exactly what RPM Buyers are contending is the difference between the rates determined through the PJM auction and the rates produced in a competitive market. The single price auction employed by PJM simulates the rates produced in a competitive market in which the same price is paid to all suppliers based on the marginal cost of the least efficient supplier necessary to serve that market. Moreover, using the auction methodology produces rates that send more "appropriate price signals . . . to provide incentives to construct facilities necessary for regional reliability."¹⁴ Also, as discussed above, we have instituted mitigation procedures that are designed to limit the potential to exercise market power in these auctions.

16. Second, the rates resulting from the transitional auctions that are the subject of this complaint would not be expected to be the same as those produced through a traditional individual cost-of-service rate proceeding using average costs.¹⁵ The fact that rates determined through a market mechanism such as an auction deviate from the average cost-based rates does not demonstrate that such rates are unjust and unreasonable. In *Federal Power Commission v. Texaco, Inc.*, the Court held the requirement "that every rate of every natural gas company must be just and reasonable does not require that the

¹³ Request for Rehearing at 14 ("the Commission's analysis of the justness and reasonableness of the capacity prices in the transition auctions must include an investigation into . . . whether the resulting capacity prices match those that would be produced in a competitive market or determined under cost-based regulation").

¹⁴ *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 68 (2006).

¹⁵ Nonetheless, we note again that in the transitional auctions that are the subject of this complaint, every offer by generators was subject to the mitigation process established in the tariff and, therefore, was cost-based. Under the mitigation process established in the tariff, generators whose offers into the auctions were mitigated by the market monitor had the choice of either demonstrating the specific costs of their unit to the monitor (in which case those costs would be the mitigated offer), or else using a pre-determined rate developed by the market monitor to approximate the costs that a generation owner would not incur if the generating unit did not operate during the delivery year.

cost of each company be ascertained and its rates fixed *with respect to its own costs*."¹⁶ Similarly, the Court of Appeals for the D.C. Circuit recently stated that "[t]he Supreme Court has repeatedly rejected the argument 'that there is only one just and reasonable rate possible . . . and that this rate must be based entirely on some concept of cost plus a reasonable rate of return.'"¹⁷

3.2. RPM Buyers Have Not Shown that Their Proposed Replacement Rate Is Just and Reasonable

17. Additionally, as the advocate of a change in rates, RPM Buyers are required to prove not only that the rate they challenge is unjust and unreasonable, but also that their proposed rates are just and reasonable.¹⁸ RPM Buyers have not made this showing. On the contrary, in their Complaint, RPM Buyers acknowledged that they "do not concede that [the rates they propose] are just and reasonable,"¹⁹ but urge the Commission to use those rates nevertheless, "for the very limited purpose of establishing an initial transition

¹⁶ 417 U.S. 380, 387 (1974), emphasis added.

¹⁷ See *Blumenthal v. FERC*, 552 F.3d 875, 883 (D.C.Cir. 2009), citing *Mobil Oil Corp. v. Fed. Power Comm'n*, 417 U.S. 283, 316 (1974); see also *In re Permian Basin*, 390 U.S. at 796–98 (explaining that there is not one reasonable rate but rather a "zone of reasonableness"); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (noting that "the Commission was not bound to the use of any single formula or combination of formulae in determining rates"); *Maine Public Utilities Commission v. FERC.*, 520 F.3d 464, 471 (D.C. Cir. 2008) ("The Supreme Court has disavowed the notion that rates must depend on historical costs and has held that rates may be determined by a variety of formulae.").

¹⁸ *Blumenthal*, *supra*, 552 F.3d at 885; *Interstate Power & Light Co. v. ITC Midwest, LLC*, 127 FERC ¶ 61,043 at P 42, citations omitted (2009) ("Section 206 of the FPA requires a complainant to satisfy a dual burden in order to obtain the relief it seeks. The complainant must establish that the current rate is unjust and unreasonable and that its alternative rate proposal is just and reasonable"); see also *La. Pub. Serv. Comm'n v. Entergy Corp.*, 123 FERC ¶ 61,188 at P 31 (2008) and *Ameren Services Co. v. Midwest Indep. Transmission System Operator*, 124 FERC ¶ 61,173 at P 9, footnote omitted (2008)

¹⁹ Complaint at 78.

rate."²⁰ However, RPM Buyers have made no showing that these rates (which are the rates determined for the unconstrained (RTO) region of PJM for the 2007-08 delivery year in the first transitional auction) are just and reasonable on the basis that they meet the goals of the RPM program by eliciting new capacity and ensuring that existing capacity does not exit the market. As we stated in our September 19 Order:

[T]he purpose of RPM was to obtain forward binding commitments from capacity resources to be available in order to ensure reliability, and to create sufficient incentives for new generation projects and demand resources to participate in the program. The tariff provisions at issue, therefore, set the rate and quantity that will be paid to capacity resources that are selected in the auction to provide future service. Changing a rate and quantity already determined in accordance with existing tariff provisions on which parties have relied would defeat the purpose of the forward binding commitment, and undo the incentives for new capacity resources.²¹

18. As we found in the September 19 Order, RPM Buyers have failed to show that if the Commission did revise the rates as they suggest, a sufficient number of sellers would commit capacity to PJM to satisfy PJM's reliability requirement. We cannot find that a replacement rate that may jeopardize PJM's ability to provide reliable service is just and reasonable. RPM Buyers fault the Commission for not sufficiently balancing the interests of suppliers and consumers, but the purpose of RPM is to ensure that PJM will continue to serve its customers reliably. RPM Buyers' proposal would undercut the very reliance on prices that RPM was designed to produce, so as to induce capacity suppliers to enter PJM and stay in PJM, thus contradicting the purpose of RPM.

3.3. Actual Reliance on Transition Auction Prices

19. In the September 19 Order, the Commission found that "the fact that certain RPM provisions are being examined for future changes does not justify the relief sought by RPM Buyers -- namely, changing the results of past auctions," and that "[c]hanging a rate and quantity already determined in accordance with existing tariff provisions on which

²⁰ *Id.*

²¹ September 19 Order at P 26.

parties have relied would defeat the purpose of the forward binding commitment, and undo the incentives for new capacity resources."²²

20. RPM Buyers argue that the Commission found no actual reliance by suppliers on the prices established by the transition auctions, and that in the absence of such reliance the Commission should revise the rates determined in the past auctions. They argue that the Commission's expectation that RPM Buyers show that no suppliers made any investments in reliance on transition auction prices is not required by the FPA:

In addition to inaccessible objective facts, the undertaking that the Commission proposes would require RPM Buyers to divine suppliers' motives and to segregate investments made in the normal course of events from those made because the supplier expected to be paid the transition auction clearing price and to replicate that analysis for all the capacity providers that cleared in the transition auctions.²³

RPM Buyers argue that they established a sufficient *prima facie* case that sellers did not rely on the transition auction prices, and it was PJM's and its supporting suppliers' burden to persuade the Commission otherwise; therefore, RPM Buyers suggest, the Commission need not consider the prices set by the transition auctions to be irrevocable. RPM Buyers similarly argue that the Commission erred in considering the prices determined by the transitional auctions for forward periods to be "fixed in stone" well before the delivery years in which the capacity is delivered and the capacity prices are paid.²⁴

21. In the first place, our determination to reject RPM Buyers' complaint was not based exclusively on a finding that generators may have relied on the outcome of the auction. Rather, as discussed above, it was based on a variety of factors, including the failure to show a violation of the tariff (as RPM Buyers acknowledge), the lack of evidence that the auction was unjust and unreasonable, and the failure to put forward a just and reasonable replacement rate.

²² *Id.* at P 24, 26.

²³ Request for Rehearing at 26, footnote omitted.

²⁴ Request for Rehearing at 5.

22. We also continue to find that, even with respect to reliance on the outcome of the auction, RPM Buyers failed to put forward evidence that no seller or other buyer relied on the auction. RPM Buyers rely solely on two suppositions to support their position that there was no actual reliance: (a) the brief forward periods prior to some of the transition auctions (for example, the second transition auction and start of the first delivery year were only eleven months apart), which might have made it difficult for capacity suppliers to integrate the new RPM construct into their planning, and (b) the fact that relatively little new capacity bid or cleared the transition auctions.

23. First, evidence in the record suggests that resources did invest in new capacity or remained in the capacity market in reliance on the RPM program. The Brattle Group report found that evidence did suggest that RPM has both attracted new investment and retained capacity:

[S]ince RPM was implemented: (a) at least 4,600 MW of capacity has been retained that would otherwise have retired; (2) almost 10,000 MW of incremental capacity has been committed; and (3) the volume of generation interconnection requests has grown to make an additional 33,000 MW of new generation projects eligible to participate into future RPM auctions. ²⁵

24. Even if RPM Buyers are correct that little new capacity was introduced into these auctions, that does not preclude market reliance on the outcome of the auction. As we noted in the September 19 Order:

[T]he capacity resource providers had every right to rely on those prices and obligations RPM Buyers have not established that any such investments were not, in fact, made. But even if resource providers had not yet made new

²⁵ Brattle Report at 1. Answer of PJM Power Providers Group, at 4 (citing to a report by PJM's consultant, the Brattle Group, filed in Docket No. ER05-1410). The Brattle Report also lists specific incremental commitments, amounting to over 14,500 MW of resources that the Brattle Group considers "likely not [to] have been available in the absence of RPM" (*id.*), including 4,428 MW of generation additions, over 2,900 MW of updates to existing generation capacity, close to 1,800 MW of demand resources, decreases in net exports of almost 2,200 MW, and withdrawn requests to deactivate 1,170 MW of existing resources and retire 3,500 MW of capacity (*id.* at 2).

investments in plant and equipment as a result of those auctions, each supplier of necessity would have had to forgo other opportunities to use its generating capacity, as a result of its commitment to serve PJM at the rates established in the auction. Indeed, capacity resource providers that participated in the transitional auctions gave up the opportunity to use their capacity to make bilateral sales of capacity or to participate in other RTO capacity markets.²⁶

25. As we recognized in the *Duquesne* order requiring that Duquesne satisfy its RPM capacity obligations if it chose to leave PJM, parties rely on the auction parameters in a variety of ways:

the necessary reliance that market participants place on these published forecasts For example, LSEs [such as Duquesne] seeking to [supply their own capacity needs] (in lieu of participating in the auction) are required to notify PJM of their election to do so at least two months in advance of the RPM auction. This decision, which can have significant financial implications, must be based, in part, on PJM's published auction parameters. Similarly, other market participants will make business decisions and enter into binding contracts, including financial hedges and bilateral arrangements, based on these auction parameters.²⁷

26. RPM Buyers, in fact, concede that in their Complaint they recognized that some capacity providers may have relied on the transition auctions' results to make some financial commitments.²⁸ RPM Buyers proposed in their Complaint that, to the extent

²⁶ September 19 Order at P 28.

²⁷ *Duquesne Light Company*, 122 FERC ¶ 61,039 at P 92 (2008), footnotes omitted.

²⁸ Complaint at 75, n.194 ("some sellers may have made some financial commitments in reliance on the transitional auctions' results. Any such reasonable reliance is a factor to be considered in setting just and reasonable rates going forward. Individual sellers must make a factual showing, however, that they would not have made such investments without the capacity payments set in the [Base Residual Auctions]. The

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that a supplier can show that it would not have made an investment without the capacity payment set in the transition auction, it should be reimbursed as part of establishing just and reasonable rates. RPM Buyers allege that this proposed process – which, RPM Buyers argue, the Commission disregarded in the September 19 Order – would fully protect capacity suppliers by ensuring that they are reimbursed for any reliance on the transition auctions' prices while at the same time preventing capacity suppliers from reaping windfall profits to which they are not entitled.

27. RPM Buyers have not satisfied their burden of demonstrating that it would be just and reasonable to compensate those suppliers who were found to have relied on the transition auction rates differently from those suppliers who cannot demonstrate such reliance, or that RPM Buyers' proposed after-the-fact review of reliance to determine rates would be a just and reasonable replacement for the transition auction rates. First, their proposal to review individual generators' reliance is inconsistent with the larger purpose of the RPM program, which is to provide assurance to both suppliers and buyers, on a forward basis, as to what their capacity obligations, costs and revenues will be. The Commission approved RPM on the basis that such assurance was necessary to ensure sufficient capacity in PJM. That mechanism would be rendered ineffective if, after any particular auction, those expectations could be upset by a showing that one or more suppliers did not specifically rely on the auction results in its business planning. Second, this process would be extraordinarily time-consuming and litigious as each party would have to document its investments and lost opportunities, and the Commission would have to decide which such opportunities have sufficient merit to be included. Third, as discussed above, even assuming *arguendo* that we were to accept this proposal of determining the extent to which each supplier relied on the auctions, we do not agree that the rate RPM Buyers propose to pay those suppliers that pass this particular review is just and reasonable.

3.4. Distinctions from Other Cases

28. RPM Buyers maintain that if the Commission adopts a market-based tariff as the means to determine wholesale capacity prices, that tariff cannot be structured so as to "virtually deregulate an industry and remove it from statutorily required oversight."²⁹

determinations of whether those investments were reasonable and legitimately based on the transitional auctions' results are questions of fact that must be decided in an evidentiary hearing").

²⁹ Request for Rehearing at 19, *citing to California ex rel. Lockyer v. FERC*,

RPM Buyers argue that while *Lockyer* may be factually distinct from this case, its holding regarding the necessity of post-approval review of rates set by market-based tariffs is not limited to those facts. They state that the Commission recognized in its final rule regarding market-based rates that its authority to adopt market-based rate tariffs under the FPA is conditioned on the Commission retaining the ability to oversee and ensure that market-based rates remain just and reasonable.³⁰

29. The rates here are established in a far different manner than the market-based rates involved in *Lockyer*. In *Lockyer*, the only market power problems related to sellers who were granted market-based rates. With regard to rates for sales within Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs), the Commission has relied both on a finding that sellers are entitled to market-based rates because they lack market power on an individual seller basis and on a blend of market- and cost-based elements, e.g., some form of cost cap or mitigated bids, to ensure just and reasonable rates.³¹

30. The RPM rates, in particular, are developed through a thorough tariff process that not only governs the manner in which offers are considered, but includes detailed mitigation procedures to ensure that market power is not exercised. Indeed, not one offer in the auctions being challenged was determined unilaterally by the seller; every offer was subject to the mitigation procedures and reviewed by the Market Monitor.³² Even if some of the mitigation procedures need revision in the future, as RPM Buyers allege, such changes should not operate to invalidate previous auctions and the rates produced by

383 F.3d 1006, 1014 (9th Cir. 2004), *cert. denied*, 127 S.Ct. 2972 (2007) (*Lockyer*).

³⁰ *Market-Based Rates for Wholesale Sales of Electric Energy*, Order No. 697, 73 Fed. Reg. 25,832 at PP 394-97 (May 7, 2008).

³¹ *PJM Interconnection L.L.C.*, 121 FERC ¶ 61,173, at P 21 (2007).

³² *See also Blumenthal, supra*, 552 F.3d at 882, noting that "FERC reasonably relied on its continuing oversight of the market to guard against potential abuses of market power" since it required ISO-NE to file reports assessing the competitiveness of the market based on transactional data reflecting the behavior of each market participant. As noted above, PJM's market monitor files an annual State of the Market Report, and may also bring to the Commission's attention any matters which it believes may be evidence of the exercise of market power.

such auctions, particularly when the Market Monitor is satisfied that the auctions were reasonably run without the exercise of market power.³³

31. Moreover, *Lockyer* involved situations in which sellers violated the requirements of their market-based tariffs, in this instance by failing to file their quarterly reports.³⁴ As RPM Buyers concede, they have established no violation of any RPM tariff provision during these auctions.

32. In the September 19 Order, we found our holding consistent with the Commission's earlier *Bangor-Hydro Electric* and *Chambersburg* cases, in which the Commission similarly upheld terms and conditions that were determined as a result of compliance with tariff provisions. RPM Buyers argue that these cases are distinguishable from the current situation because suppliers here (1) were able to exercise market power and withhold capacity and (2) did not rely on the prices established by the transition auctions. They state that *Bangor Hydro-Electric v. ISO New England, Inc.*³⁵ involved rates already paid in the energy market due to a technical flaw, and in that case the Commission expressly found no evidence of the exercise of market power or manipulation, whereas in the instant case, RPM Buyers argue that they presented compelling evidence that suppliers were able to exercise market power and withhold capacity.³⁶ RPM Buyers also assert that the complaint in *Borough of Chambersburg v.*

³³ It would inhibit the ability to improve the RPM process if whenever PJM and its stakeholders propose changes to improve RPM, such changes can be used as evidence that the prior tariff is unjust and unreasonable, requiring that the prices from already-conducted auctions be redetermined.

³⁴ *Cal. ex rel. Bill Lockyer v. B.C. Power Exch. Corp.*, 122 FERC ¶ 61,260, at P 32 (2008) ("central question before us is whether, based on the facts and circumstances associated with each individual seller, that seller's improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable").

³⁵ 97 FERC ¶ 61,339 (2001) (*Bangor Hydro-Electric*).

³⁶ RPM Buyers argue that suppliers had the ability to withhold capacity in the auctions because (a) offers were not disciplined by new entry, and (b) despite the Market Monitor's enforcement of the tariff, suppliers had sufficient flexibility in developing their offer bids to enable them to withhold. RPM Buyers assert that the proof of such withholding is that bids were higher in the transition auctions than in the subsequent first

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*PJM Interconnection, L.L.C.*³⁷ was filed after participants in the Financial Transmission Rights auction had already relied on their allocation of rights under that auction, unlike this case, where there is no actual evidence of detrimental reliance and the proposed remedy would fully compensate any suppliers who showed reliance.

33. We continue to find that *Bangor Hydro-Electric* and *Chambersburg* support our determination here. In both cases, the Commission found that the tariff governed, and refused to change the prices resulting from the operation of tariff provisions. RPM Buyers maintain that these cases are distinguishable because suppliers in the RPM auctions were able to exercise market power. But, as we discussed in our September 19 Order and above, the mitigation framework in effect during the transition period auctions included specific provisions to mitigate any potential to exercise market power, and the Market Monitor found those provisions provided adequate protection against market power. RPM Buyers maintain that the extent of reliance is different in these cases. But RPM Buyers provided no factual evidence that sellers did not make investments or otherwise rely on the outcome of the auctions in determining to commit capacity to PJM rather than elsewhere. In bringing a section 206 complaint, RPM Buyers have the burden to show both that the rates are unjust and unreasonable and that their proposed replacement rate is just and reasonable. Since they failed to elicit sufficient evidence on both points, the Commission finds no basis to upset the results of past auctions.

34. RPM Buyers assert that the Commission is ignoring the directive in *Consolidated Edison Co. of N.Y., Inc. v. FERC*³⁸ to "evaluat[e] whether to issue refunds for unjust and unreasonable prices caused by a tariff violation" by "balancing the several interests at stake, including the tariff violation, market context, high [] prices paid, expectations of affected entities, various tariff provisions, and the need to balance fair prices and system reliability."³⁹

35. In *Con Ed II*, the Commission again acknowledged the supremacy of the tariff: unlike the instant case, *Con Ed II* involved a situation in which the transmission

"full-blown" auction, whereas presumably these suppliers' marginal costs would have been the same at all times.

³⁷ 119 FERC ¶ 61,166 (2007) (*Chambersburg*).

³⁸ 510 F.3d 333, (D.C. Cir. 2007) (*Con Ed II*).

³⁹ *Con Ed II*, 510 F.3d at 341.

provider's tariff specifically permitted after-the-fact revisions to tariff provisions under clearly-defined circumstances, and the question before the Commission was whether those clearly-defined circumstances were present, not whether the underlying prices were just and reasonable. Thus, in all three of these cases, the Commission has found that the prices created by operation of the tariff provisions must govern.

3.5. Opportunity to Contest the Lawfulness of Tariff Provisions

36. RPM Buyers argue that the September 19 Order effectively denies customers any opportunity to contest the lawfulness of capacity prices in the transition auctions. They argue that they relied on the Commission's representation that if experience showed that the untried RPM mechanism was fundamentally flawed and that the auctions did not produce just and reasonable capacity charges, electricity consumers could seek redress. The Commission statement on which RPM Buyers rely was: "PJM's market participants may and should act to address deficiencies that they see in PJM's capacity markets, whether through PJM stakeholder processes or through seeking relief from the Commission."⁴⁰

37. We disagree with RPM Buyers' argument that the September 19 Order effectively denies customers the opportunity to contest the lawfulness of capacity prices in the transition auctions. First, as we found above, the RPM Buyers had every opportunity to raise objections to the transition auction mechanism during the initial RPM process. Second, as discussed in the September 19 Order and above, we have evaluated RPM Buyers' arguments and found insufficient support for their position that these auctions produced unjust and unreasonable prices such that changing the results of already-conducted auctions is warranted. Third, the Commission was and remains open to proposed prospective changes resulting either from PJM or through complaints. These opportunities are consistent with the statement in the September 19 Order that market participants may act to address deficiencies they see in PJM's capacity markets through PJM stakeholder processes or through seeking relief from the Commission.

3.6. Request for Trial-Type Hearing

38. RPM Buyers state that the Commission should either grant rehearing, or else "find that the complaint raises substantial questions of fact that require further investigation to determine whether the transition auctions produced unjust and unreasonable rates and

⁴⁰ 117 FERC ¶ 61,331 P 147 (2006).

whether those capacity prices should be modified, and order a full evidentiary hearing." ⁴¹ Among other things, RPM Buyers argue that PJM's process of setting the CETO and CETL parameters is insufficiently transparent or verifiable, in that PJM fixes CETL and CETO through models based on various parameters, assumptions, and proprietary data that RPM Buyers claim cannot be replicated from publicly available data. RPM Buyers similarly assert that PJM has not provided enough information to determine that the mitigation measures in the RPM market rules limited offers to marginal costs, and that, although in their complaint RPM Buyers asked the Commission to order PJM to provide additional information as to this question, the Commission did not do so.

39. With regard to CETO and CETL, RPM Buyers do not allege or suggest that the procedures used by PJM violated its tariff. Rather, they argue that PJM did not reveal the procedures used to calculate CETO and CETL, or the underlying data. This is incorrect. PJM's Manual 14b sets forth in detail the manner in which PJM arrives at its CETO and CETL parameters.⁴² Manual 14b first states that "[t]he CETO for each sub-area in PJM is determined separately using PJM's reliability software to perform a single area reliability study for each load area. The system models are based on the latest RTEP load and capacity data available at the time of the study" (Manual 14b at 42). The manual further provides directions on how PJM calculates CETL by performing load deliverability studies, including the assumptions that PJM will use in different circumstances, and notes that if it performs a zonal study, it will include all load and generation in the service territory of each PJM transmission provider, generally connected at 230 kV and lower (Manual 14b at 43-45), and if it performs a global study, it will include all load and generation connected at 500 kV and lower in the broader PJM reliability regions (Eastern Mid-Atlantic, Southern Mid-Atlantic, Western Mid-Atlantic, Mid-Atlantic and Western Region).

40. RPM Buyers offer no explanation of how those methods, which were in place prior to RPM, became unjust and unreasonable. Much, if not all, of this information is publicly available. But even beyond the question of availability, because an RTO is not a market participant, we rely on the RTO to establish reasonable provisions for applying formulas, parameters, and assumptions to make such determinations. RPM Buyers were involved in the RPM settlement negotiations that led to these provisions; they have not

⁴¹ Request for Rehearing at 6-7.

⁴² See Manual 14b, <http://www.pjm.com/documents/~media/documents/manuals/m14b.ashx>.

shown that PJM refused a reasonable request for information as to how these calculations are performed, and they have not specifically alleged what particular aspects of the CETL and CETO calculations they failed to understand. Nor have RPM Buyers made a proffer to suggest anything amiss in the manner in which these determinations were made. Moreover, the Market Monitor has the opportunity to examine the data used to determine CETO and CETL.

41. With regard to RPM Buyers' allegations regarding the insufficiency of the market power mitigation procedures in RPM, the Market Monitor has validated the mitigation procedures used by PJM. RPM Buyers reiterate their position that existing resources' offers in some LDAs increased dramatically in the 2009-2010 auction, indicating that those resources were able to take exercise market power by taking advantage of the default offer cap rules to inflate their offers and thereby drive up the clearing price. But, as we found in the September 19 Order, the Market Monitor found that the increase in offer prices could be due to other aspects of the market: "Dr. Bowring thus concluded that the results of the RPM auctions were competitive, and added that in the view of the Market Monitor, multiple factors led to the increase in the clearing price, including unit deratings and an increase in [the Capacity Emergency Transfer Objective, or] CETO."⁴³

⁴³ September 19 Order at P 30. Dr. Bowring stated:

A combination of factors led to the increase in the clearing price. A 781.0 MW increase in [the Capacity Emergency Transfer Limit, or] CETL from 5,610.0 MW to 6,391.0 MW, which would normally lower LDA prices due to the import of more lower priced generation, was partially offset by a corresponding 220.0 MW increase in CETO from 5,940.0 MW to 6,160.0 MW. Unit derations, 144.3 MW of 13 which were for environmental regulations, resulted in less available capacity, which when combined with increased offer prices due to higher APIR to meet environmental regulations and the higher CETO resulted in the higher clearing price.

Bowring Declaration at P 13. CETO is the amount of transmission capacity that PJM finds must be available for imports into the area in an emergency situation, in order to meet reliability standards. CETL is the amount of transmission capacity that PJM finds is actually available for imports in an emergency situation.

Otherwise, as noted above, RPM Buyers' position boils down to the argument that suppliers would have had a strong incentive and ability to exercise market power, and that, therefore, despite the extensive mitigation that was applied, and the lack of any specific evidence that this mitigation was insufficient, the Commission needs to hold a trial-type hearing to allow further examination of the possibility that suppliers exercised market power.

42. The Commission is not required to hold trial-type evidentiary proceedings unless such proceedings are required to resolve disputed material issues of fact involving witness credibility.⁴⁴ The proponent of a trial-type hearing also must make a proffer of evidence as to those disputed facts that it alleges requires a hearing.⁴⁵ RPM Buyers have not provided a sufficient record for requiring a trial-type hearing. We have an extensive paper record, including analyses by both the PJM Market Monitor and an outside consulting group which evaluated RPM. RPM Buyers have not shown that any issues of witness credibility are at issue or that the factual record is incomplete. We therefore do not find RPM Buyers' "bare allegations" of supplier misconduct sufficient to warrant the establishment of such a wide-ranging inquiry.⁴⁶ Moreover, while we recognize that the RPM tariff provisions applied during the transitional auctions are subject to revision on a forward basis to improve the performance of the RPM auctions, we do not find that the possibility of such changes is sufficient to undo the results of past auctions, and the effects of such an action, for the reasons we stated in the September 19 Order.

4. Request for Oral Argument

43. In addition to their request for rehearing, RPM Buyers filed a separate request seeking oral argument of their rehearing request. They allege that oral argument would assist the Commission because: (1) the RPM Buyers are "intimately familiar with the complexities of the RPM transition auctions and their defects, and an opportunity to present their views orally would serve the Commission well and enhance its understanding of those deficiencies so that it could properly evaluate and decide the RPM

⁴⁴ *Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997).

⁴⁵ *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982); *Woolen Mill Ass'n v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990).

⁴⁶ *See Holyoke Gas & Electric Dep't v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992) ("Commission quite properly refused to hold a hearing solely upon the basis of Holyoke's 'bare allegations'").

Buyers' claims"; (2) the Commission should examine the questionable and affirmatively harmful aspects of the RPM transition auctions; (3) an opportunity for the parties to be heard before the Commission is warranted because the unjust and unreasonable results of the RPM transition auctions has spawned opposition from numerous parties; and (4) all of the issues necessary to determine whether the RPM transition auctions produced just and reasonable capacity prices were not sufficiently discussed in the Commission's September 19 Order.

44. Whether to provide for oral argument is at the discretion of the Commission,⁴⁷ and we do not find sufficient reason to entertain an oral argument as to whether to change the results of past auctions. As discussed above, we have considered all the evidence put forward by RPM Buyers and cannot conclude that they put forward sufficient evidence to warrant a decision to overturn the results of past auctions. The necessary evidence needs to be adduced on the record of the proceeding and we do not find that oral argument will improve our understanding of the positions taken in this case. We therefore deny RPM Buyers' request for oral argument on this petition for rehearing.

The Commission orders:

The request for rehearing and request for oral argument are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴⁷ See Rule 385.711 (c)(4); §385.711 (c)(4); *Great Lakes Gas Transmission Limited Partnership*, 75 FERC ¶ 61,089, at 61,295 (1996) (denying request for oral argument); *The Washington Water Power Company*, 25 FERC ¶ 61,002, at 61,022 (1983) (oral argument within the Commission's discretion).