

129 FERC ¶ 61,161
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.

Docket Nos. ER06-456-006
ER06-954-002
ER06-1271-001
ER07-424-000
EL07-57-000

OPINION NO. 503

ORDER ON INITIAL DECISION

(Issued November 19, 2009)

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1. This case is before the Commission on exceptions to the September 18, 2008 Initial Decision issued in these proceedings.¹ The central issue before the Commission is the allocation of transmission upgrade costs to Merchant Transmission Facilities in PJM Interconnection, L.L.C. (PJM). This proceeding relates to PJM's proposal to allocate certain Regional Transmission Expansion Plan (RTEP) upgrade costs to Merchant Transmission Facilities with Firm Transmission Withdrawal Rights.² In this order, we largely affirm the Initial Decision's determination that PJM's proposal for allocating the costs of transmission upgrades approved as part of PJM's RTEP to Merchant Transmission Facilities is just and reasonable, and not unduly discriminatory or preferential, with certain modifications as discussed below.

I. Background

A. Merchant Transmission Facilities

2. Under PJM's Open Access Transmission Tariff (OATT or Tariff), Merchant Transmission Facilities³ are transmission projects funded outside of traditional cost of

¹ *PJM Interconnection, L.L.C.*, 124 FERC ¶ 63,022 (2008) (Initial Decision).

² This proceeding applies only to Merchant Transmission Facilities which have Firm Transmission Withdrawal Rights. Firm Transmission Withdrawal Rights are defined in section 1.13A of the PJM OATT as the rights to schedule energy and capacity withdrawals from a Point of Interconnection of a Merchant Transmission Facility with the Transmission System. It does not apply to a Merchant Transmission Facility with Non-Firm Transmission Withdrawal Rights, which would not be allocated RTEP charges. PJM Tariff § 1.27A; *infra*, n. 83.

³ Merchant Transmission Facilities are defined in section 1.18E of the PJM OATT as alternating current or direct current transmission facilities that are interconnected with or added to the Transmission System pursuant to Part IV and Part VI of the Tariff and that are so identified on Attachment T to the Tariff, provided, however, that Merchant Transmission Facilities shall not include (i) any Customer Interconnection Facilities; (ii) any physical facilities of the Transmission System that were in existence on or before March 20, 2003; (iii) any expansions or enhancements of the Transmission System that are not identified as Merchant Transmission Facilities in the Regional Transmission Expansion Plan and Attachment T to the Tariff; or (iv) any transmission facilities that are included in the rate base of a public utility and on which a regulated return is earned.

service ratemaking. The project may be funded by particular parties that will benefit from constructing a transmission line that reduces congestion or makes less expensive power available to them. For example, a transmission line connecting PJM to New York may make financial sense if the projected savings on power purchases in PJM relative to New York offset the costs of the Merchant Transmission Facilities.⁴ Because Merchant Transmission Facilities are self-funded, they may receive a variety of financial transmission rights (i.e., Auction Revenue Rights and Capacity Transfer Rights) under the PJM OATT that entitle the project to the payment of funds relating to congestion. Merchant Transmission Facilities may also request Firm Transmission Withdrawal Rights that create a long-term right to withdraw capacity and energy at a specific point on the system.

3. Under PJM's OATT, a Merchant Transmission Facility is included in the interconnection process under conditions similar to those that apply to generation projects under Order No. 2003.⁵ However, while the studies for interconnecting a generator or Merchant Transmission Facility are similar, Merchant Transmission Facilities differ from generators in terms of their impact on the PJM system. Generators inject energy into PJM, thus requiring PJM to study deliverability of energy to the PJM system, whereas Merchant Transmission Facilities with Firm Transmission Withdrawal Rights are like loads in that they remove energy from PJM, thus requiring PJM to study deliverability of energy from the PJM system to the point of interconnection.

4. According to the interconnection process set forth in the PJM OATT, the proposed Merchant Transmission Facility is placed in the PJM interconnection queue and is studied as part of the queue, based on conditions in effect at the time of the request. As a result

⁴ See *Neptune Regional Transmission System, LLC v. PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,098, *aff'd on rehearing*, 111 FERC ¶ 61,455 (2005), *aff'd*, *Public Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164 (D.C. Cir. 2007).

⁵ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007). However, as discussed in greater depth in the Executive Summary, while the interconnection studies for a generator or a Merchant Transmission Facility are similar, the two entities' impacts on the PJM system are different.

of the study process, a Merchant Transmission Facility will be assigned 100 percent of the costs of network upgrades which, based on the interconnection process, are needed to ensure that PJM can reliably honor the firm transmission rights to withdraw capacity and energy that the project requests. These costs are known as “but for” costs, because they would not have been incurred but for the Merchant Transmission Facility’s interconnection with PJM’s transmission system.⁶

5. If the Merchant Transmission Facility decides to proceed with the interconnection, it will execute an interconnection service agreement. The interconnection service agreement specifies, among other things, the amount of Firm Transmission Withdrawal Rights the Merchant Transmission Facility has a conditional right to receive. The holder of Firm Transmission Withdrawal Rights has the expectation that it will be able to secure firm point-to-point service without paying for additional network upgrades.⁷

6. As a result of changes to the PJM transmission grid, however, future upgrades beyond those studied as part of the interconnection process may be needed in order for PJM to assure that such a Merchant Transmission Facility receives reliable service. For example, PJM determines, through its RTEP process, whether there are reliability criteria violations in future years and, if there are, what transmission system upgrades are required to resolve those violations.⁸ If the RTEP process determines that certain upgrades are necessary, either for reliability or to remove economic constraints, PJM will allocate these costs to the appropriate parties based on their contribution to the need for the upgrade, including Merchant Transmission Facilities with Firm Transmission Withdrawal Rights. This proceeding concerns the justness and reasonableness of a

⁶ As part of this calculation, PJM subtracts the costs of any upgrades already approved through its RTEP process, because these upgrades would have been constructed regardless of the Merchant Transmission Facility’s request.

⁷ A Merchant Transmission Facility may also request Non-Firm Transmission Withdrawal Rights; however, additional network upgrades may be required in order for the holder of such rights to obtain firm point-to-point service.

⁸ PJM recommends reliability upgrades to ensure that these reliability criteria violations are resolved. Also as part of the RTEP process, PJM recommends economic upgrades to remove transmission constraints that do not violate reliability criteria, but nonetheless impede efficient transmission on its system.

proposal by PJM to recover a portion of those RTEP upgrade costs from the Merchant Transmission Facilities.

B. Procedural History

7. On January 5, 2006, May 4, 2006, July 21, 2006, and January 11, 2007, pursuant to section 205 of the Federal Power Act (FPA),⁹ PJM filed: (1) reports containing assignments of cost responsibility for certain transmission projects approved by the PJM Board of Managers as part of PJM's RTEP; and (2) revised tariff sheets incorporating into Schedule 12-Appendix of the PJM OATT the assignments of cost responsibility for approved projects. The Commission accepted and suspended the filed tariff sheet revisions, made them effective subject to refund, established hearing and settlement judge procedures, and consolidated the proceedings (Docket Nos. ER06-456, *et al.*).¹⁰ The first three orders also set for hearing determinations of whether PJM's proposed method for allocating RTEP costs to two Merchant Transmission Facilities, Neptune Regional Transmission System, LLC (Neptune) and East Coast Power, was unduly discriminatory or preferential, and whether the proposed allocation of costs to those two projects "directly correlate[d] to their contribution to the need for such reliability upgrades."¹¹

8. On April 21, 2006, PJM Transmission Owners filed modifications to Schedule 12 of the OATT to clarify provisions regarding (1) the allocation of transmission costs to Merchant Transmission Facility owners, and (2) the calculation of transmission enhancement charges for point-to-point transmission customers. Specifically, this filing designated a Merchant Transmission Facility owner as the entity responsible for paying transmission enhancement charges allocated to a Merchant Transmission Facility, and directed calculation of each such transmission enhancement charge as a monthly charge.

⁹ 16 U.S.C. § 824d (2006).

¹⁰ *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,261 (2006) (May 2006 Order); *PJM Interconnection, L.L.C.*, 116 FERC ¶ 61,118 (2006) (August 2006 Order); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,058 (2006) (October 2006 Order), *order on reh'g*, 119 FERC ¶ 61,067 (2007) (April 2007 Order); *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,033, *order on reh'g*, 120 FERC ¶ 61,193 (2007) (collectively, RTEP orders).

¹¹ May 2006 Order, 115 FERC ¶ 61,261 at P 51; August 2006 Order, 116 FERC ¶ 61,118 at P 35; October 2006 Order, 117 FERC ¶ 61,058 at P 48.

The Commission docketed this matter as ER06-880-000 and consolidated this matter with Docket Nos. ER06-456, *et al.*¹²

9. On March 16, 2007, as amended on April 4, 2007 and April 13, 2007, PJM filed revisions to the OATT to reflect the participation of Neptune in PJM, and include the terms and conditions of transmission service over the Neptune Merchant Transmission Facility in the OATT (Schedule 14). The Commission docketed this matter as ER07-632-000. On May 3, 2007, the Commission approved a settlement (included with the April 4, 2007 amendment) in this docket, which also resolved matters raised in Neptune's protest in Docket No. ER06-880-000.¹³

10. On April 19, 2007, the Commission expanded the scope of the proceedings in Docket Nos. ER06-456, *et al.* to include the appropriate methodology to be added to the OATT to implement a beneficiary-pays approach for the allocation of costs for new transmission facilities that operate below 500 kV.¹⁴ In addition, the Commission established an investigation under section 206 of the FPA¹⁵ regarding PJM's cost allocation methodology for economic upgrades (Docket No. EL07-57-000), which was consolidated with the proceeding in Docket Nos. ER06-456, *et al.*

11. The parties subsequently filed a settlement with the Commission on September 14, 2007 (Partial Settlement), which resolved all issues set for hearing regarding the assignment of cost responsibility for below 500 kV RTEP upgrades to PJM transmission zones. Specifically, the Partial Settlement established that PJM will use a distribution

¹² *PJM Transmission Owners*, 115 FERC ¶ 61,345 (2006), *order on reh'g*, 120 FERC ¶ 61,013 (2007).

¹³ *PJM Interconnection, L.L.C.*, Docket No. ER07-632-000, *et al.*, (unpublished letter order, May 3, 2007).

¹⁴ April 2007 Order, 119 FERC ¶ 61,067 at P 16. In a companion order, the Commission accepted a methodology that allocates, on a region-wide basis, the costs of new, centrally-planned transmission facilities that operate at or above 500 kV. *PJM Interconnection, L.L.C.*, Opinion No. 494, 119 FERC ¶ 61,063 (2007); *order on reh'g*, Opinion No. 494-A, 122 FERC ¶ 61,082; *order on reh'g*, 124 FERC ¶ 61,033 (2008); *remanded, Illinois Commerce Commission v. FERC*, 2009 U.S. App. Lexis 18311 (7th Cir., Aug. 6, 2009).

¹⁵ 16 U.S.C. § 824e (2006).

factor (DFAX) analysis based methodology for determining the beneficiaries of a below 500 kV upgrade and therefore, who should pay.¹⁶ Additionally, the Partial Settlement set forth the methodology for assigning cost responsibility for three types of economic projects.¹⁷ Further, the Partial Settlement resolved all issues in Docket Nos. ER06-880 and ER07-632, but reserved for hearing issues pertaining to assignments of cost responsibility to Merchant Transmission Facilities. On July 29, 2008, the Commission accepted the Partial Settlement.¹⁸

12. The issues reserved for hearing by the Partial Settlement included: (1) whether Merchant Transmission Facilities should be assigned any cost responsibility for below 500 kV RTEP upgrades; (2) if it is determined that Merchant Transmission Facilities should be assigned such cost responsibility, how they should be included in the DFAX analysis; (3) whether any assignment of cost responsibility to Merchant Transmission

¹⁶ PJM calculates distribution factors, represented as decimal values or percentages, which express the portions of a transfer of energy from a defined source to a defined sink that will flow across a particular transmission facility or group of transmission facilities. These distribution factors represent a measure of the effect of the load of each transmission zone or Merchant Transmission Facility on the transmission constraint that requires the facility. PJM Tariff, Schedule 12 § (b)(iii)(C)(1).

¹⁷ Under the Partial Settlement, cost responsibility for economic-based enhancements or expansions that are modifications of reliability upgrades already included in RTEP shall be assigned based on a DFAX analysis. For economic-based enhancements or expansions that are accelerations of reliability upgrades already included in RTEP, PJM shall assign costs based on either a DFAX analysis or a Locational Marginal Prices (LMP) benefits methodology. For economic upgrades implemented solely for the purpose of relieving one or more economic transmission constraints, the Partial Settlement provided that no later than one year after the Commission approves the Partial Settlement, PJM will make a section 205 filing prescribing the methodology for assigning cost responsibility for such upgrades. PJM submitted this filing on July 28, 2009, and the Commission accepted the filing by delegated letter. *PJM Interconnection, L.L.C.*, Docket Nos. ER06-456-020, *et al.* (unpublished letter order, Sept. 3, 2009); Exh. No. PJM-2 (Partial Settlement).

¹⁸ *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,112 (2008); *see also PJM Interconnection, L.L.C.*, Docket No. ER06-456-015, *et al.* (unpublished letter order, Oct. 15, 2008).

Facilities for reliability upgrades should be based on planned (versus existing) Firm Transmission Withdrawal Rights; (4) whether any assignment of cost responsibility to Merchant Transmission Facilities for economic upgrades should be based on Firm Transmission Withdrawal Rights or other values and, if based on Firm Transmission Withdrawal Rights, whether such assignment should be based on planned (versus existing) Firm Transmission Withdrawal Rights; and (5) whether Merchant Transmission Facilities should be assigned cost responsibility for reliability upgrades costing less than \$5 million. Additionally, Opinion No. 494-A reserved the issue of how PJM is to allocate RTEP costs for 500 kV and above upgrades to Merchant Transmission Facilities.¹⁹

C. PJM's Proposal

13. PJM proposed to assign Merchant Transmission Facilities cost responsibility for RTEP reliability and economic upgrades. PJM asserted that it is appropriate that Merchant Transmission Facilities be assigned cost responsibility for future RTEP reliability upgrades because, just as any network service transmission customer's load withdraws energy from the PJM system, Merchant Transmission Facilities withdraw energy from the PJM system and therefore, like load, contribute to the need for reliability-based upgrades. Similarly, PJM asserted that assigning cost responsibility to Merchant Transmission Facilities for economic-based upgrades is also appropriate because, to the extent that the Merchant Transmission Facility or its customers purchase power from the PJM system at the location of the Merchant Transmission Facility, the benefits of lower locational marginal prices resulting from the economic-based upgrades accrue to them just as they accrue to all other similarly located loads.²⁰

14. PJM proposed that, for purposes of cost allocation, a Merchant Transmission Facility should be treated as a separate zone, and not as part of the transmission owner's zone where the Merchant Transmission Facility interconnects.²¹ For below 500 kV reliability and economic upgrades, PJM proposed to assign costs to Merchant Transmission Facilities pursuant to the DFAX methodology accepted in the Partial Settlement, using the Merchant Transmission Facility's existing or planned Firm

¹⁹ Opinion No. 494-A, 122 FERC ¶ 61,082 at P 92.

²⁰ *Initial Brief of PJM Interconnection, L.L.C.* at 8-10, Docket No. ER06-456 (June 16, 2008).

²¹ *Id.* at 34.

Transmission Withdrawal Rights, as specified in its interconnection service agreement, to represent the impact of merchant load in the DFAX analysis. However, for below 500 kV reliability upgrades estimated to cost less than \$5 million, PJM supported allocating costs of such upgrades solely to the transmission zone in which they are located, since they are typically local in nature,²² meaning that Merchant Transmission Facilities would not be responsible for any costs of such upgrades because they are considered a separate zone. For 500 kV or above reliability and economic upgrades, PJM proposed to allocate these costs across the whole region on an annual load ratio share basis. PJM proposed to use the Merchant Transmission Facility's existing or planned Firm Transmission Withdrawal Rights to determine the Merchant Transmission Facility's pro rata share of these regional upgrades.²³

D. Initial Decision

15. On September 18, 2008, the Presiding Administrative Law Judge (Presiding Judge) issued an Initial Decision. The Initial Decision, with one exception, upheld PJM's proposal to allocate RTEP costs to Merchant Transmission Facilities, when such costs are allocated to Merchant Transmission Facilities and zones in a comparable manner. However, the Initial Decision directed PJM to modify the parts of its proposal that do not allocate RTEP costs to Merchant Transmission Facilities and zones in a comparable manner. The Initial Decision rejected claims that PJM's proposal violates the Commission's prohibition against "and" pricing. The Initial Decision reasoned that just as the Commission's policy does not exempt Merchant Transmission Facilities that have paid for "but-for" upgrades from having to pay transmission rates, it does not exempt Merchant Transmission Facilities from having to pay RTEP charges. Finding that it is reasonable for Merchant Transmission Facilities to pay "but-for" charges and RTEP charges, the Initial Decision rejected a crediting proposal by New York Power Authority.

16. The Initial Decision also dismissed allegations that PJM's proposed treatment of Merchant Transmission Facilities is unduly discriminatory, finding that PJM should treat Merchant Transmission Facilities and zones comparably because Merchant Transmission Facilities and zones withdraw energy from PJM's system in the same way. Further, the

²² Exh. No. PJM-1 at 24.

²³ *Id.* at 20-23. As noted above, PJM's allocation method for at or above 500 kV facilities was recently remanded to the Commission. *Illinois Commerce Commission v. FERC*, 2009 U.S. App. Lexis 18311 (7th Cir., Aug. 6, 2009).

Initial Decision rejected claims that PJM unduly discriminates against Merchant Transmission Facilities because PJM does not allocate costs to other projected exports of energy. The Initial Decision also rejected a proposal that cost allocations to Merchant Transmission Facilities be adjusted to account for the fact that a Merchant Transmission Facility's load is "static." When Merchant Transmission Facilities interconnect with the PJM system, they use existing Available Transfer Capability (ATC or "headroom"); therefore, the Initial Decision held, Merchant Transmission Facilities' use of existing ATC will inevitably accelerate the need for RTEP upgrades.

17. The Initial Decision found it appropriate to assign cost responsibility to Merchant Transmission Facilities for below 500 kV reliability upgrades based on the DFAX methodology. Further, the Initial Decision found it appropriate that PJM measures the benefits that a Merchant Transmission Facility derives from an upgrade by using a Merchant Transmission Facility's planned or existing Firm Transmission Withdrawal Rights as a proxy for projected zonal load. While the Initial Decision determined that RTEP costs should be allocated to each Merchant Transmission Facility as if it were a separate zone, it made an exception for reliability upgrades costing less than \$5 million. For these upgrades, the Presiding Judge directed PJM to permit transmission owners that construct reliability upgrades costing less than \$5 million in zones containing Merchant Transmission Facilities to allocate the costs of such upgrades to Merchant Transmission Facilities on a load-share basis.²⁴

18. The Initial Decision also found it appropriate that Merchant Transmission Facilities be assigned cost responsibility for below 500 kV economic upgrades. For economic upgrades that are modifications of previously scheduled reliability upgrades, the Initial Decision determined that PJM's proposal to use the DFAX methodology is just and reasonable. However, for economic upgrades that accelerate the in-service date of an upgrade, the Initial Decision found that when PJM uses an LMP benefits methodology to allocate costs to zones, PJM must also use it for Merchant Transmission Facilities (instead of the DFAX methodology).

19. Regarding at or above 500 kV reliability and economic upgrades, the Initial Decision found that PJM's proposal to allocate costs to Merchant Transmission Facilities on a load-ratio share basis using a Merchant Transmission Facility's planned or existing

²⁴ Initial Decision, 124 FERC ¶ 63,022 at P 181-186. The Presiding Judge rejected PJM's proposal to exempt Merchant Transmission Facilities from such costs and recommended that the New Jersey Rate Counsel's allocation methodology be adopted.

Firm Transmission Withdrawal Rights was unduly discriminatory. Thus, the Initial Decision directed PJM to allocate costs of 500 kV projects on an annual, load-share basis based on the Merchant Transmission Facility's actual peak load in any given hour of the applicable prior year. For the Merchant Transmission Facility's first year of operation, PJM must allocate costs to Merchant Transmission Facilities based on the amount of Firm Transmission Withdrawal Rights actually awarded to the Merchant Transmission Facility by PJM.

E. Exceptions

20. On October 20, 2008, four parties filed briefs on exceptions, including Commission Trial Staff, PJM, the New York Power Authority (NYPA), and the MTF Parties.²⁵ On November 10, 2008, four parties filed briefs opposing exceptions, including Commission Trial Staff, PJM, the PTO Group²⁶ and the New Jersey Division of Rate Counsel (NJ Rate Counsel). The parties' exceptions are discussed by issue below.

II. Discussion

A. Executive Summary

21. We find, based on the record before us, that PJM's proposal, as modified in certain regards by the Initial Decision,²⁷ is just and reasonable, and not unduly discriminatory or

²⁵ The MTF Parties are East Coast Power, L.L.C., the Long Island Power Authority and its operating subsidiary, LIPA.

²⁶ The PTO Group includes Public Service Electric and Gas Company, Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Baltimore Gas and Electric Company, and Allegheny Power.

²⁷ *See infra*, section H (collection of RTEP costs when a Merchant Transmission Facility is late going into service). The Initial Decision also directed PJM to calculate a Merchant Transmission Facility's load-ratio share for 500 kV and above RTEP upgrades based on the Merchant Transmission Facility's actual peak load in any given hour of the applicable prior year, or for the Merchant Transmission Facility's first year of operation, the amount of Firm Transmission Withdrawal Rights actually awarded to the Merchant Transmission Facility by PJM. No party excepted to the Initial Decision's finding regarding at or above 500 kV upgrades, and we affirm the Initial Decision's determination on this issue. However, PJM's allocation method for at or above 500 kV

(continued...)

preferential. The Commission has sought throughout this proceeding to create an appropriate and fair methodology to allocate the costs of RTEP upgrades to Merchant Transmission Facilities, taking into account their unique function and their impact on the PJM system. Underlying our approach is the recognition that there may be a reliability impact when Merchant Transmission Facilities withdraw energy from the PJM transmission system, and it is PJM's duty as a Regional Transmission Organization (RTO) to determine whether it is necessary to construct upgrades to maintain reliability and to allocate the costs of such upgrades. In previous orders, the Commission has found that the appropriate measure for determining cost allocation considers who benefits from the facilities.²⁸

22. As noted above, the Commission previously approved PJM's proposal to treat Merchant Transmission Facilities comparably to generators for interconnection purposes. Accordingly, under the PJM OATT, Merchant Transmission Facilities are responsible for paying 100 percent of the "but for" costs of their interconnection based on the project's position in the interconnection queue. These are simply the minimum upgrades needed at the time of the study process.²⁹ In return, the Merchant Transmission Facility may request Firm Transmission Withdrawal Rights that obligate PJM to permit the Merchant Transmission Facility to acquire its maximum amount of energy from the system. The Merchant Transmission Facility may also receive financial transmission rights over the network facilities it constructs, which entitle it to receive payment when the facilities become congested.³⁰

facilities was recently remanded to the Commission. *See supra* n. 23.

²⁸ Opinion No. 494, 119 FERC ¶ 61,063 at P 45.

²⁹ Tr. at 589:1-12 (PTO Group Witness Napoli); *see Neptune Regional Transmission System, LLC v. PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,098, *aff'd on rehearing*, 111 FERC ¶ 61,455 (2005), *aff'd*, *Public Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164 (D.C. Cir. 2007) (*Neptune*) (interconnection process allocates only costs imposed at the date of the interconnection queue).

³⁰ PJM OATT, Attachment K – Appendix § 5.2.1. If the Merchant Transmission Facility or its customers are using the facility, such payment will eliminate the congestion charges imposed under the PJM Tariff. If other customers are using the facility, the Merchant Transmission Facility will receive payment for the congestion charges paid by these customers. *See Initial Decision* at P 200-202.

23. In Order No. 2003, the Commission determined that this system of funding “but for” network upgrades promotes efficiency by ensuring that Merchant Transmission Facilities take into account the full cost of their projects in determining the financial viability and by providing an incentive for the Merchant Transmission Facility to interconnect to the PJM system at a point that will minimize its cost responsibility.³¹ This system directs the financial benefit of the upgrade to the Merchant Transmission Facility funding the upgrade.

24. As we discuss in more detail below, the PJM system, however, is constantly changing due to a multiplicity of factors, such as generator retirements and additions, changes in the use and flow of the system, and load growth. Thus, as part of its RTEP process, PJM continually reviews these changes and decides whether additional upgrades need to be constructed due to the use of the transmission system by all customers’ load, including its need to provide service to the Merchant Transmission Facility.³² The RTEP process uses a 15 year time horizon, much longer than that of interconnection studies. Also, unlike interconnection requests where PJM can isolate the upgrades needed for the individual request, these reliability upgrades are due to many factors that cannot easily be attributed to individual zones or load. Under PJM’s OATT, PJM allocates these costs to those parties causing the need for the upgrade and benefitting from the upgrade.³³

25. In this opinion, we find that PJM’s proposal to allocate to Merchant Transmission Facilities the costs of RTEP projects on a comparable basis as costs are allocated to other zones in PJM, is just and reasonable and not unduly discriminatory or preferential. As we discuss further below, there are times when the functions performed by Merchant Transmission Facilities more closely resemble load than generation. Load generally removes energy from the system, while generation generally adds energy to the system. A Merchant Transmission Facility with Firm Transmission Withdrawal Rights withdraws energy from one system, in this case PJM, and injects it into another, such as the New York Independent System Operator (NYISO). Accordingly, PJM must plan so that it can provide safe and reliable service to the Merchant Transmission Facilities just as it does

³¹ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 695.

³² PJM’s RTEP process is set forth in Schedule 12 of the PJM OATT and Schedule 6 of the PJM Operating Agreement.

³³ The costs are first allocated among the PJM zones, and the zones allocate these costs to their customers.

for other customers. Therefore, it is appropriate that, like load, Merchant Transmission Facilities are responsible for a portion of the costs of PJM providing this service. While the initial interconnection process allocates all the costs to the Merchant Transmission Facility that are known at the time of its interconnection request, it does not address the costs to receive the separate benefit of future reliable service as transmission system needs evolve over the life of the Merchant Transmission Facility.

26. While we will adopt almost all of the Initial Decision's determinations, we reverse the Initial Decision on two issues: (1) that Merchant Transmission Facilities be allocated a portion of the costs of reliability upgrades costing less than \$5 million constructed in the Merchant Transmission Facility's host zone, and (2) that PJM use an LMP benefits methodology to allocate costs of below 500 kV acceleration upgrades to Merchant Transmission Facilities when PJM uses this methodology to allocate costs to zones. We find that these conditions need not be included in the PJM OATT. We address below the specific issues raised in the briefs on exception.

B. Whether Allocating Costs to Merchant Transmission Facilities Violates the Commission's "And" Pricing Policy

Initial Decision

27. The Initial Decision rejects NYPA's contentions that PJM's proposal violates the Commission's transmission pricing policy, explaining that the Commission set forth its interconnection pricing policy in Order No. 2003. While the Commission had previously allowed a generator to credit the costs of its "but for" network upgrades against the transmission rate charged to deliver its energy, Order No. 2003 concluded that independent transmission providers, such as RTOs, could implement a pricing arrangement which did not include crediting, as long as that arrangement did not constitute "and" pricing. For example, transmission providers could provide customers certain well-defined capacity rights, such as Firm Transmission Rights and Capacity Interconnection Rights, in exchange for "but for" payments.

28. The Initial Decision notes that the Commission has found the provisions of PJM's OATT governing PJM's interconnection charges to generators to be consistent with Order No. 2003. Further, the Initial Decision asserts that while Order No. 2003 involved generators, its principles are equally applicable to Merchant Transmission Facilities. Accordingly, the Initial Decision states that just as the receipt of rights to incremental capacity compensates generators for their "but for" payments, the receipt of Auction

Revenue Rights and Capacity Transfer Rights compensates Merchant Transmission Facilities for such payments.

29. The Initial Decision rejects claims that PJM is not sufficiently neutral with respect to Merchant Transmission Facilities, noting that the Commission addressed the issue when it approved PJM's Order No. 2003 compliance filing.³⁴ Moreover, the Initial Decision asserts that NYPA fails to support its claim that PJM will prefer its internal load over Merchant Transmission Facility load. Additionally, the Initial Decision dismisses the argument that PJM's proposal fails to treat Merchant Transmission Facilities and other transmission customers comparably.

30. The Initial Decision notes that the cases cited by NYPA in support of its explanation of "and" pricing address the interaction of interconnection costs and transmission rates. According to the Initial Decision, for NYPA to establish that the transmission pricing policy exempts a Merchant Transmission Facility that has paid for "but for" upgrades from having to pay RTEP costs, NYPA would first have to establish that such payments exempt Merchant Transmission Facilities from having to pay an additional rate for transmission. However, the OATT does not exempt such customers from having to pay a transmission rate, so the Initial Decision reasons that Merchant Transmission Facilities are also not excused from paying RTEP charges.

31. Additionally, the Initial Decision states that the record shows that Merchant Transmission Facilities are not paying twice for the same service by paying "but for" charges and RTEP charges. Interconnection costs are incurred when upgrades are required to ensure the reliable interconnection of a Merchant Transmission Facility to the transmission grid. In contrast, Merchant Transmission Facilities incur RTEP costs to pay for upgrades needed to ensure the continued reliability of the entire transmission system. Accordingly, the Initial Decision states that "[r]ecovery of both types of costs" is required to guarantee "the reliability of the system."³⁵

³⁴ See *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,025 (2004); *order on reh'g*, 110 FERC ¶ 61,099 (2005).

³⁵ Initial Decision, 124 FERC ¶ 63,022 at P 101, *citing* Exh. No. PJM-3 at 9:21-22 (PJM Witness Herling).

Exceptions

32. NYPA contends that the Initial Decision unduly discriminates against Merchant Transmission Facilities by requiring Merchant Transmission Facilities to pay the “but for” costs of upgrades to serve their own load growth, as well as a share of network load growth through RTEP allocations. According to NYPA, network customers will only pay for the share of upgrades needed to accommodate network load growth not paid by Merchant Transmission Facilities through RTEP cost allocations, and for none of the upgrades needed to support Merchant Transmission Facilities’ load growth.

33. NYPA disagrees with the Initial Decision’s distinction between interconnection costs as necessary “to ensure the reliable interconnection of [a Merchant Transmission Facility] to the transmission grid,” and RTEP costs as the ongoing costs of maintaining “continued reliability of the entire transmission system.”³⁶ NYPA asserts that this distinction fails to account for the fact that the “but for” upgrades paid for by Merchant Transmission Facilities provide reliability benefits to the entire system. NYPA also asserts that load growth within a PJM zone may result in new withdrawal points that place the same initial demand on the system as a new interconnection for a Merchant Transmission Facility. NYPA states that because there is no substantive difference in the costs to the system attributable to Merchant Transmission Facilities and load growth in PJM zones, there is no evidentiary support for charging disparate rates based on these similar uses of the system.

34. Further, NYPA asserts that requiring Merchant Transmission Facilities to pay both “but for” charges to obtain Firm Transmission Withdrawal Rights and RTEP costs for ongoing planning violates the Commission’s pricing policy. Under the transmission pricing policy, a transmission provider may charge the higher of the average cost of the grid, or the incremental cost of expanding the grid. NYPA states that while Order No. 2003 does provide an exception to this requirement, the exception only applies in the large generator interconnection context if an independent RTO applies this policy in a non-discriminatory manner “to all new Interconnection Requests, whether the Generating Facility is owned by the Transmission Provider, its Affiliates, or a merchant developer,” and if the customer receives “substantial value” in exchange for directly assigned upgrade

³⁶ NYPA Brief on Exception at 37, *citing* Initial Decision, 124 FERC ¶ 63,022 at P 99-100.

costs.³⁷ NYPA states that while the Commission accepted incremental pricing for generator interconnections in PJM, PJM has not met the burden of showing the requisite comparability and independence here. Instead, NYPA contends that there is ample evidence to show that PJM is not an unbiased neutral towards Merchant Transmission Facilities, asserting that PJM treats Merchant Transmission Facilities like “outsiders.” For example, NYPA argues, load serving entities receive Capacity Transfer Rights and Auction Revenue Rights in return for their contributions to RTEP upgrades, but these rights are not available to Merchant Transmission Facilities.

35. PJM disagrees with NYPA that Order No. 2003 does not apply to Merchant Transmission Facilities, pointing out that the Commission applied Order No. 2003’s exception to Merchant Transmission Facilities when it approved PJM’s Order No. 2003 compliance filing.³⁸

36. Trial Staff contends that PJM’s recovery of RTEP costs from Merchant Transmission Facilities does not violate the Commission’s prohibition against “and” pricing. In response to NYPA’s assertions that PJM has failed to show that it has the requisite independence to implement its proposal in a non-discriminatory manner, Trial Staff states that PJM’s status as an RTO entitles it to a rebuttable presumption that it can fairly administer its interconnection policies without undue preference or discrimination. Trial Staff contends that NYPA must demonstrate how PJM’s actions are preferential and discriminatory, and NYPA has failed to meet this burden. Further, Trial Staff argues that the fact that load serving entities obtain Capacity Transfer Rights and Auction Revenue Rights in return for their contribution to RTEP upgrades while Merchant Transmission Facilities obtain Firm Transmission Withdrawal Rights, is a consequence of the PJM stakeholder process and not evidence of partiality or preference by PJM. Also, in response to NYPA’s assertion that Order No. 2003 does not apply to Merchant Transmission Facilities, Trial Staff notes that the Commission has stated that its generator interconnection policy provides useful guidance for Merchant Transmission Facilities.³⁹

³⁷ NYPA Brief on Exception at 59, *citing* Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 at P 40; *Entergy Services, Inc.*, 116 FERC ¶ 61,275, at P 108 (2006).

³⁸ PJM Brief Opposing Exception at 18, *citing* *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,025 (2004); *order on reh’g*, 110 FERC ¶ 61,099 (2005).

³⁹ Trial Staff Brief Opposing Exceptions at 17, *citing* *Neptune*, 110 FERC ¶ 61,098 at P 27.

37. Thus, Trial Staff asserts that the charges PJM allocates to Merchant Transmission Facilities do not constitute “and” pricing; rather, RTEP payments and interconnection payments are for different services. Specifically, Trial Staff states that Merchant Transmission Facilities pay “but for” costs in exchange for Firm Transmission Withdrawal Rights, and RTEP charges for grid access.⁴⁰ Further, Trial Staff notes that NYPA appears to concede that Firm Transmission Withdrawal Rights are valuable capacity rights, and that this position undermines its argument that Merchant Transmission Facilities are being charged “and” pricing.

38. Likewise, PTO Group asserts that there is no double collection of costs. PTO Group states that the “but for” charges are the costs of receiving interconnection to the grid, while RTEP charges are incurred for delivery service. In support, PTO Group notes that the study periods for “but for” interconnection upgrades and RTEP upgrades are dramatically different. Specifically, the planning horizon for “but for” interconnection upgrades is 5 years, while the planning horizon for RTEP upgrades is 15 years.⁴¹ Additionally, PTO Group states that “but for” interconnection upgrades are generally the least cost option necessary to allow a Merchant Transmission Facility to interconnect.⁴²

Commission Determination

39. We find that PJM’s assignment of both “but for” costs and RTEP costs to Merchant Transmission Facilities does not violate the Commission’s transmission pricing policy. The Commission has a longstanding policy of prohibiting transmission providers from charging customers both incremental costs and an embedded cost rate which includes expansion costs. However, in Order No. 2003, the Commission made an exception to its policy of prohibiting the direct assignment of network upgrade costs in cases where the transmission provider is independent of market participants. The Commission stated that, unlike a non-independent transmission provider, an independent

⁴⁰ We note that Trial Staff uses the phrase “grid access” to mean the continued reliability of the entire transmission system.

⁴¹ PTO Group Brief Opposing Exceptions at 26, *citing* Tr. 671:8-12 (PTO Group Witness Khadr).

⁴² *Id.*, *citing* Tr. 671:2-6 (PTO Group Witness Khadr).

transmission provider has no incentive to use the cost determination and allocation process to unfairly advantage its own generation.⁴³

40. The Commission reasoned that permitting RTOs to require interconnecting customers to pay for “but for” interconnection costs encourages efficient siting decisions for new facilities.⁴⁴ Further, the Commission stated that the “but for” approach is not “and” pricing if, for example, the interconnection customer is allowed to receive well-defined capacity rights created by the upgrades. Even if the interconnection customer or its power sales customer subsequently is required to pay an embedded, cost-based transmission charge, this is not “and” pricing because the customer is not paying twice for the same service.⁴⁵

41. In applying Order No. 2003, the Commission dismissed a complaint by Old Dominion Electric Cooperative (ODEC), which asserted that because it was both a transmission customer and the owner of a new generator project, PJM violated the Commission’s prohibition against “and” pricing by requiring ODEC to pay for both network upgrades required to interconnect the generator to the grid as well as transmission service charges for service.⁴⁶ The Commission reasoned that PJM appropriately applied the “but for” provisions of its OATT, which conformed to Order No. 2003; therefore, PJM did not violate the policy against “and” pricing. Simply because ODEC is a transmission customer that decides to build its own generation facility, the Commission reasoned, it is not relieved of cost responsibility for transmission upgrades that would not have been needed “but for” ODEC’s interconnection request.⁴⁷ Further, the Commission considered whether it is necessary for an interconnection customer to receive certain well-defined capacity rights in order to avoid “and” pricing,

⁴³ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 698-703.

⁴⁴ *Id.* P 695.

⁴⁵ *Id.* P 700.

⁴⁶ *Old Dominion Electric Cooperative v. PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,094 (2005); *order denying reh’g*, 119 FERC ¶ 61,052 (2007) (*ODEC*).

⁴⁷ *ODEC*, 119 FERC ¶ 61,052 at P 12.

and held that where network upgrades create no additional transmission capability, it would be inappropriate to award capacity rights.⁴⁸

42. We disagree, as did the Presiding Judge, with NYPA's contention that Order No. 2003's exception to the transmission pricing policy applies only to large generator interconnections.⁴⁹ The Commission accepted revisions to PJM's OATT that apply to Merchant Transmission Facility interconnections the same study procedures and, except where physical differences between transmission and generation facilities dictate otherwise, the same standard terms and conditions of interconnection as those applicable to the interconnection of new and expanded generation resources.⁵⁰ In *Neptune*, the Commission determined that, since PJM intended to apply the same procedures, terms and conditions to interconnections by both Merchant Transmission Facilities and generation facilities, the principles of Order No. 2003 provide useful guidance.⁵¹ Consistent with this finding, the Commission determined that a Merchant Transmission Facility can be responsible for both "but for" charges and RTEP charges. For example, the Commission found that paying the costs of an interconnection did not exempt Merchant Transmission Facilities from paying upgrade costs triggered by a future transmission service request. The Commission stated that upgrade costs imposed pursuant to PJM's RTEP "which are solely reliability upgrade costs, are allocated to Transmission Owners and then assigned to transmission customers (i.e., load) through PJM's Transmission Enhancement Charge specified in Schedule 12 of the PJM tariff."⁵² Additionally, in the RTEP orders, the Commission reiterated that Merchant Transmission Facility providers and their customers should be allocated an appropriate share of network upgrade costs, and set for hearing the limited issue of whether PJM allocated appropriate costs to these entities or has done so in an unduly discriminatory manner.⁵³

⁴⁸ *Id.* P 18.

⁴⁹ Initial Decision, 124 FERC ¶ 63,022 at P 119.

⁵⁰ *PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,277 (2003).

⁵¹ *Neptune*, 110 FERC ¶ 61,098 at P 27.

⁵² *Neptune*, 111 FERC ¶ 61,455 at P 25.

⁵³ May 2006 Order, 115 FERC ¶ 61,261 at P 51; August 2006 Order, 116 FERC ¶ 61,118 at P 35; and October 2006 Order, 117 FERC ¶ 61,058 at P 48.

43. It is true that while generators must pay “but for” charges under the PJM OATT, they do not pay RTEP charges. This is because, although generators and Merchant Transmission Facilities bear some similarities and are studied similarly for interconnection purposes, as discussed above, these projects differ in fundamental respects. Specifically, a generator within PJM contributes additional energy to PJM, while a Merchant Transmission Facility, as the Presiding Judge notes, principally withdraws energy from the RTO, as does any other load.⁵⁴ Therefore, we cannot find it unreasonable or a violation of “and” pricing for PJM to treat a Merchant Transmission Facility comparably to load when assigning cost responsibility for RTEP upgrades.

44. When the Merchant Transmission Facility is studied during the interconnection process, it is required to bear the “but for” costs of its upgrade that can be measured based on its position in the queue at the time of the interconnection. However, as the Commission recognized in *Neptune*, the interconnection study process cannot measure the on-going effect of the Merchant Transmission Facility load on the RTO’s system. As an example, the Commission found that the Neptune project could be assessed “but for” costs only for the costs determined as of the time of the study process, even though the Commission recognized that if generators did retire, the actual costs imposed by the Neptune project could be much greater.⁵⁵ The Commission, therefore, found that under PJM’s OATT, the Neptune project would have to bear its proportionate share of any future reliability upgrade costs to the extent that it caused PJM to make additional system configuration changes.

45. NYPA essentially is arguing that the only responsibility a Merchant Transmission Facility owes for upgrades related to its load is to pay the “but for” costs determined as of the date of its queue position, regardless of the longer term, perhaps not measurable at the time, impact of that project on the RTO. Adoption of such a position would have the unreasonable result of forcing other load to bear the cost of additional upgrades caused by the Merchant Transmission Facility and that benefit the Merchant Transmission Facility. We therefore find just and reasonable PJM’s proposal that upgrades be equitably allocated to all load, including Merchant Transmission Facilities.

⁵⁴ Initial Decision, 124 FERC ¶ 63,022 at P 67. The Merchant Transmission Facilities at issue in this proceeding withdraw energy from PJM and deliver it to markets served by NYISO. In other circumstances, such as a Merchant Transmission Facility that delivers energy into PJM from another market, the load analogy might not be applicable.

⁵⁵ *Neptune*, 111 FERC ¶ 61,455 at P 23, 25-26.

46. NYPA also contends that PJM bears the burden of showing that it meets the Commission's test for independence. We disagree. In accepting PJM's Order No. 2003 compliance filing, the Commission found the OATT provisions governing interconnection are consistent with Order No. 2003, including provisions governing Merchant Transmission Facility interconnections.⁵⁶ As mentioned above, the Commission permitted RTOs and ISOs to charge interconnecting customers "but for" interconnection costs because of their independence. Accordingly, the burden is now on NYPA to demonstrate that PJM is not independent, which NYPA has failed to do.

47. Further, contrary to NYPA's claims, PJM is not treating Merchant Transmission Facilities in an unduly discriminatory manner by charging them for interconnection upgrades. Under the terms of PJM's OATT, other customers may be responsible for interconnection costs, as well as RTEP costs. Part VI of the PJM OATT requires that "[e]ach New Service Customer shall be obligated to pay for 100 percent of the costs of the minimum amount of Local Upgrades and Network Upgrades necessary to accommodate its New Service Request and that would not have been incurred under the Regional Transmission Expansion Plan but for such New Service Request."⁵⁷ New Service Customers are defined in the PJM OATT as "[a]ll customers that submit an Interconnection Request, a Completed Application or an Upgrade Request that is pending in the New Services Queue."⁵⁸ Therefore, it is not just Merchant Transmission Facilities that must pay both "but for" costs and RTEP costs, but also any other comparably situated customer.⁵⁹

⁵⁶ *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,025 (2004); *order on reh'g*, 110 FERC ¶ 61,099 (2005).

⁵⁷ PJM OATT § 217.3(a).

⁵⁸ PJM OATT § 1.26B. Further, section 200 of the Tariff specifically states that the provisions of Part VI apply to an Interconnection Request, to a Completed Application for new transmission service, and to an Upgrade Request.

⁵⁹ In fact, other customers have been charged such costs. For example, FirstEnergy Solutions Corp. was charged \$3.2 million worth of network upgrades on the PJM system in order to accommodate a request for transmission service. *See PJM Interconnection, L.L.C.*, 116 FERC ¶ 61,228 (2006). Pursuant to Schedule 12 of the PJM OATT, as a firm transmission customer, FirstEnergy Solutions Corp. may also be allocated RTEP costs through transmission enhancement charges.

48. Accordingly, we find that PJM has appropriately applied the “but for” provisions of its OATT to Merchant Transmission Facilities. As established in Order No. 2003, there is no “and” pricing because Merchant Transmission Facilities are not being charged twice for the same service. Merchant Transmission Facilities pay for any network upgrades, which would not be built “but for” the Merchant Transmission Facility’s request to interconnect to the transmission system, and Merchant Transmission Facilities receive Firm Transmission Withdrawal Rights and financial transmission rights in exchange for their upgrades.⁶⁰ Moreover, in exchange for access to the grid, Merchant Transmission Facilities, like other load, need to pay RTEP charges for the subsequent costs of maintaining network reliability. The costs of RTEP network upgrades are included in RTEP charges by definition.

C. **Whether PJM Met Its Burden of Proof Under Section 205 of the Federal Power Act**

Initial Decision

49. At the outset, the Initial Decision notes that no parties dispute that PJM bears the burden of proving that its proposed application of the OATT sections at issue in this proceeding to Merchant Transmission Facilities is just, reasonable and not unduly discriminatory or preferential. The Initial Decision notes that the MTF Parties and NYPA assert that PJM failed to meet this burden, and seek rejection of PJM’s proposal. According to the Initial Decision, these parties argue that because PJM’s proposed methodology does not measure the Merchant Transmission Facility’s direct contribution to the need for the upgrade through its contribution to the system changes that necessitate the upgrade, the proposal fails to meet the statutory requirement.

50. After reviewing the Commission orders preceding the Initial Decision, the Initial Decision holds that this argument fails on the merits because “the issue is not whether

⁶⁰ We will not address NYPA’s claims that Merchant Transmission Facilities are being treated unfairly because they do not receive Capacity Transfer Rights and Auction Revenue Rights in return for their contribution to RTEP upgrades, because the Commission previously found that the allocation of such rights is beyond the scope of this proceeding. April 2007 Order, 119 FERC ¶ 61,067 at P 19. Further, MTFs may receive Capacity Transfer Rights and Auction Revenue Rights as part of PJM’s allocation process. *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,280 (2009); *see also PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,083 (2009).

PJM's methodology properly measures [a Merchant Transmission Facility's] contributions to system changes that necessitate new upgrades, as NYPA and the MTF Parties contend. Rather, the issue is whether the methodology reasonably measures the benefit [a Merchant Transmission Facility] receives from an upgrade, and allocates that [Merchant Transmission Facility] costs that are commensurate with that benefit."⁶¹ The Initial Decision reviews the evidence produced by PJM in support of its proposal and holds that PJM satisfied its burden of proof under section 205.

51. The Initial Decision finds that PJM met its burden of proving that its proposal is not unduly discriminatory or preferential because it has shown that it plans to treat Merchant Transmission Facilities comparably to zones by applying the same DFAX methodology to allocate costs to both. PJM and others produced evidence, according to the Initial Decision, that demonstrated that this comparable treatment is appropriate because, for RTEP planning purposes, Merchant Transmission Facilities and zones are similarly situated. As such, the Initial Decision finds that PJM had met its burden, showing that it meets Order No. 890's general standards of treating similarly-situated customers comparably.⁶²

Exceptions

52. NYPA asserts that the Initial Decision erred by finding that PJM has met its burden of proof under section 205. According to NYPA, the Initial Decision specifically erred by: (1) finding the DFAX methodology not unduly discriminatory or preferential as applied to Merchant Transmission Facilities; (2) not taking PJM's entire OATT into account when assessing the potential discriminatory effects of PJM's proposal; (3) finding that Merchant Transmission Facilities and zones are similarly situated for purposes of RTEP allocations; (4) finding that the Commission's approval of the Partial Settlement as a whole creates the irrebuttable presumption that DFAX is just and reasonable, and not unduly discriminatory or preferential; (5) holding that the Merchant

⁶¹ Initial Decision, 124 FERC ¶ 63,022 at P 63.

⁶² Initial Decision, 124 FERC ¶ 63,022 at P 72, *citing Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, FERC Stats & Regs ¶ 31,241, at P 494 (2007), *order on reh 'g*, Order No. 890-A, FERC Stats & Regs ¶ 31,261 (2007) (requiring transmission providers to treat similarly-situated customers on a comparable basis in transmission system planning); *see also* Initial Decision, 124 FERC ¶ 63,022 at P 78.

Transmission Facilities' use of ATC renders them causally responsible for RTEP upgrades; and (6) finding that the use of planned Firm Transmission Withdrawal Rights as the sole means to project Merchant Transmission Facility load is just and reasonable. These specific errors asserted by NYPA will be discussed below.

53. PJM asserts that it demonstrated that its proposal treats Merchant Transmission Facilities and zones comparably by applying the same methodology to both, and that comparable treatment is appropriate. As such, PJM asserts that it met its burden under section 205, thus shifting the burden to the parties challenging the justness and reasonableness of its proposal. Trial Staff responds that NYPA raised its arguments regarding burden of proof at hearing and the Initial Decision rejected this contention. Trial Staff asserts that NYPA's arguments regarding burden of proof are largely conclusory statements, without evidentiary support.

Commission Determination

54. Section 205 places the burden of proof on the public utility to show that its proposed tariff change is just and reasonable and not unduly discriminatory or preferential.⁶³ As discussed in greater detail below, the Commission affirms the Initial Decision's determination that the evidence put forward by PJM meets that burden. By showing that it will treat Merchant Transmission Facilities in a manner similar to comparable customers on its system, specifically zones, and that such comparable treatment is justified because the two classes of customers are similarly situated, PJM has provided substantial evidence sufficient to meet its burden of proof. Since PJM was already using the DFAX methodology for zones as a result of the Partial Settlement, it needed only to demonstrate that Merchant Transmission Facilities are similarly situated to zones to warrant extension of the methodology to them. As discussed in greater detail below, PJM put forth evidence on this point. We agree with PJM that the two classes of customers, Merchant Transmission Facilities and zones, are similarly situated because they both withdraw energy from the transmission grid in the same way and have the same effect on the transmission grid when they withdraw energy. We discuss below the specific issues raised by the parties.

⁶³ *Allegheny Power v. FERC*, 437 F.3d 1215, 1219 (D.C. Cir. 2006); *see also Winnfield v. FERC*, 744 F.2d 871, 874-75 (D.C. Cir. 1984).

1. **Relitigation of the Justness and Reasonableness of the DFAX Methodology**

Initial Decision

55. The Initial Decision starts from the irrebuttable presumption that the DFAX methodology allocates RTEP costs to zones in a just, reasonable and non-discriminatory or preferential manner because the Commission approved the Partial Settlement, thus applying the DFAX methodology to PJM zones and incorporating it into PJM's OATT. The Initial Decision held that this presumption is irrebuttable because the Partial Settlement stipulated that “‘use of a DFAX-based methodology’ [is] one of the issues that is ‘finally resolved’ and ‘shall not be the subject of litigation at the hearing regarding assignment of cost responsibility to [M]erchant [T]ransmission [F]acilities.’”⁶⁴ The Initial Decision further noted that although the Partial Settlement reserves the issue of how Merchant Transmission Facilities should be incorporated into the DFAX analysis, “this reservation does not permit challenges to the justness and reasonableness of DFAX as a means of allocating costs to zones.”⁶⁵

56. Having established the presumption regarding the justness and reasonableness of the DFAX methodology as applied to zones, the Initial Decision analyzes PJM's evidence that Merchant Transmission Facilities and zones are similarly situated, thus meriting comparable treatment, and reviews PJM's proposal to slightly modify the DFAX methodology as applied to Merchant Transmission Facilities, by using the Merchant Transmission Facility's planned or existing Firm Transmission Withdrawal Rights as a proxy for its projected load. The Initial Decision then finds that PJM has provided evidence supporting these steps, thus meeting its burden of proof and shifting the burden to the challenging parties.

Exceptions

57. NYPA asserts that the Initial Decision erred because the DFAX methodology is unduly discriminatory or preferential as applied to Merchant Transmission Facilities, and PJM failed to demonstrate that the DFAX methodology is not unduly discriminatory. Further, according to NYPA, the Initial Decision erred by equating Commission approval of the Partial Settlement with a finding that the DFAX methodology is not unduly

⁶⁴ Initial Decision, 124 FERC ¶ 63,022 at P 64.

⁶⁵ *Id.*

discriminatory or preferential, and is a just and reasonable method to measure the benefits of an RTEP upgrade. Citing to the Commission's order approving the Partial Settlement, NYPA argues that the Partial Settlement expressly prohibited its use as precedential.⁶⁶

58. PJM asserts that the Presiding Judge correctly found that its application of the DFAX methodology to both zones and Merchant Transmission Facilities is just, reasonable and not unduly discriminatory or preferential, based on the evidence presented. Trial Staff similarly responds that the Presiding Judge correctly found that the Partial Settlement established a presumption as to the justness and reasonableness of the DFAX methodology.

Commission Determination

59. We affirm the Initial Decision's determination that the Partial Settlement resolved the issue of whether to apply the DFAX methodology. As the Initial Decision found, the Partial "Settlement specifies 'use of a DFAX-based methodology' as one of the issues that is 'finally resolved' and 'shall not be the subject of litigation at the hearing regarding assignments of cost responsibility to merchant transmission facilities.'"⁶⁷ Further, the Initial Decision finds that although the Partial Settlement reserved the issue of how Merchant Transmission Facilities would be included into the DFAX methodology, this reservation did not allow parties to challenge the justness and reasonableness of applying the DFAX methodology to zones.⁶⁸ We agree on both points.

60. Prior to this proceeding, PJM had been using the DFAX methodology in its modeling assumptions (although it was not explicitly included in its Tariff). In Opinion No. 494, the Commission established a section 206 proceeding to inquire into the justness and reasonableness of PJM's existing methodology for allocating costs.⁶⁹ In the Partial Settlement, the parties, including NYPA: "agreed that issues that are finally resolved by the Settlement are: (1) the use of a DFAX based methodology for assigning cost

⁶⁶ NYPA Brief on Exceptions at 45, citing *PJM Interconnection, LLC*, 124 FERC ¶ 61,112, at P 19 (2008).

⁶⁷ Initial Decision, 124 FERC ¶ 63,022 at P 64, citing Exh. No. PJM-2 at 66 (Partial Settlement § 10(a)).

⁶⁸ *Id.*, citing Exh. No. PJM-2 at 66-67 (Partial Settlement § 10(b)).

⁶⁹ Opinion No. 494, 119 FERC ¶ 61,063 at P 75.

responsibility for enhancements or expansions that as planned will operate below 500 kV for the purposes of, and as described in, paragraphs 16 through 27 of the Settlement.”⁷⁰ While the Settlement reserved issues with respect to the allocation of costs to Merchant Transmission Providers, it stated that the use of DFAX had been decided, and the only reserved issue is “how [M]erchant [T]ransmission [F]acilities should be included in the DFAX analysis and any other cost responsibility assignment.”⁷¹ While as discussed below, NYPA may raise issues as to how the DFAX methodology is applied to Merchant Transmission Facilities, we find that the use of DFAX as the methodology for allocation is beyond the scope of this proceeding.

61. We reject NYPA’s argument that since the Partial Settlement includes language stating that it may not be used as precedent, that the terms of the Partial Settlement may not now preclude litigation of those issues. Section 42 of the Partial Settlement provides, in relevant part:

This Settlement shall be binding on the Settling Parties only with respect to the subject matter of this Settlement and shall not bind the Settling Parties to apply the principles or provisions of this Settlement to any other agreement, arrangement, or proceeding. The Settlement establishes no principles and no precedent with respect to any issue in this proceeding.⁷²

62. We find that this language restricts the parties from using the agreements reached in the Partial Settlement in any other proceeding, agreement or arrangement. It does not obviate the specific provision of the Partial Settlement which precludes re-litigation of the applicability of DFAX to Merchant Transmission Facilities.⁷³

63. Having found that the DFAX methodology is just and reasonable as applied to transmission zones, we next must consider whether it is just and reasonable as applied to Merchant Transmission Facilities. As discussed in greater depth below, we find that since Merchant Transmission Facilities and zones are similarly situated, they should be

⁷⁰ Exh. No. PJM-2 at 11 (Partial Settlement Explanatory Statement).

⁷¹ *Id.* at 12.

⁷² *Id.* at 94 (Partial Settlement § 42).

⁷³ *Id.* at 62 (Partial Settlement § 5).

comparably treated and such comparable treatment is not unduly discriminatory or preferential.

2. **Whether Merchant Transmission Facilities and Zones Are Similarly Situated**

Initial Decision

64. The Initial Decision found that PJM showed that it plans to treat Merchant Transmission Facilities comparably to zones by applying the same DFAX methodology to allocate costs to both, with only the modification of using existing or planned Firm Transmission Withdrawal Rights as a proxy for projected load for Merchant Transmission Facilities. PJM and others produced evidence, according to the Initial Decision, that demonstrated that this comparable treatment is appropriate because, for RTEP planning purposes, Merchant Transmission Facilities and zones are similarly situated. The Initial Decision cites to testimony by PJM's witness, Mr. Steven Herling, who states that Merchant Transmission Facilities act like load because they withdraw megawatts from the PJM system in the same way as load. As discussed below, the Initial Decision further finds that PJM supported its use of a Merchant Transmission Facility's existing or planned Firm Transmission Withdrawal Rights as a proxy for projected load.

Exceptions

65. NYPA asserts that the Initial Decision finds that Merchant Transmission Facilities and zones place similar demands on the PJM system, but does not consider the nature of the rights and obligations with respect to such withdrawals and in fact, according to NYPA, finds that consideration of rights and obligations is not necessary to determine if Merchant Transmission Facilities and zones are similarly situated. NYPA asserts that, although the system impacts of Merchant Transmission Facilities and zones may be identical, Merchant Transmission Facilities' withdrawals are not firm, and may be less firm as compared to zonal customers. NYPA asserts that Merchant Transmission Facilities must pay for both Firm Transmission Withdrawal Rights and network service in order to receive the same benefits as zonal customers receiving network service.

66. NYPA further asserts that the Initial Decision recognizes that, in terms of system impacts, Merchant Transmission Facilities and zones place "virtually identical" demands on the system, but the Initial Decision seeks to distinguish these demands. According to NYPA, the Initial Decision finds that the costs related to Merchant Transmission Facilities' initial withdrawals are interconnection costs, while the upgrades resulting from zonal load growth relate to ongoing system maintenance and improvement. NYPA argues that the interconnection costs paid by a Merchant Transmission Facility do not simply cover the radial lines involved in the interconnection, but also include network upgrades that benefit the grid as a whole. NYPA also notes that although a Merchant Transmission Facility can increase its withdrawals over time, it can only do so by

purchasing additional Firm Transmission Withdrawal Rights and paying upgrade costs, unlike a zone which can simply increase its load.

67. NYPA also argues that even if the DFAX methodology were just and reasonable as applied to zones, it is not just and reasonable when applied to Merchant Transmission Facilities because they are not similarly situated.⁷⁴ As such, NYPA argues that applying the DFAX methodology to both Merchant Transmission Facilities and zones does not result in comparable treatment, as the Initial Decision finds.

68. MTF Parties assert that Merchant Transmission Facilities are not equivalent to PJM network load for several reasons. First, they argue, Merchant Transmission Facilities are treated as a separate class of customers under the PJM OATT, where they have separate interconnection procedures and are treated differently in the allocation of rights. Second, Merchant Transmission Facility load is static and will not change without a new interconnection request and payment of potential interconnection upgrade costs, while network load can grow.⁷⁵ As such, MTF Parties assert that the Commission must conduct an inquiry of whether this application of a single rate treatment to two disparate entities is unduly discriminatory or preferential.⁷⁶ MTF Parties argue that PJM bears the burden of supporting its decision to ignore the “meaningful differences” between Merchant Transmission Facilities and zones.

69. PJM responds that the Initial Decision finds that any disparities between Merchant Transmission Facilities and zones do not negate PJM’s showing that, for purposes of the RTEP planning process, Merchant Transmission Facilities and zones are similarly situated. Further, PJM notes that the Initial Decision finds that MTF Parties do not explain why these disparities should result in different treatment for Merchant

⁷⁴ For example, NYPA argues that zones and Merchant Transmission Facilities are not similarly situated because, among other things, a Merchant Transmission Facility’s withdrawals are no more firm, and may even be less firm, than zonal withdrawals. NYPA asserts that Merchant Transmission Facilities must pay for both Firm Transmission Withdrawal Rights and network service in order to receive the same benefits as zonal customers receiving network service. These alleged differences are discussed further below.

⁷⁵ Exh. No. MTF-4 at 16-17.

⁷⁶ *Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20 (D.C. Cir. 1982).

Transmission Facilities and zones, while PJM has demonstrated why they should be treated comparably.

70. PTO Group asserts that the Initial Decision properly finds that Merchant Transmission Facilities have the same effect on the system as load, because Merchant Transmission Facilities are designed to withdraw energy from the system at a single point to be sold to customers in another region, with a long-term right to withdraw that energy. Therefore, according to PTO Group, modeling Merchant Transmission Facilities as load within the DFAX methodology is both necessary and appropriate given the demands a Merchant Transmission Facility places on the system. PTO Group further asserts that the static nature of a Merchant Transmission Facility's load is irrelevant; if anything, to the extent that a Merchant Transmission Facility's load does not grow, it will receive a decreasing percentage of RTEP costs over time under the DFAX methodology, in relation to load growth in other parts of the system. They note that the Initial Decision reviews the *Alabama Electric* decision, and finds that the cause of RTEP cost expenditures and the benefits of those expenditures are the same for Merchant Transmission Facilities as for other PJM load. PTO Group states that the Initial Decision found that not only is there no factual distinction warranting disparate rate treatment, but also that such disparate rate treatment would itself impose undue discrimination.

71. Trial Staff asserts that Merchant Transmission Facilities withdraw energy from PJM in the same manner as load, and quote Mr. Herling's testimony on the impact of a Merchant Transmission Facility on the need for system improvements. Trial Staff further argues that since Merchant Transmission Facilities and LSEs are similarly situated, it is not unduly discriminatory or preferential to allocate RTEP costs on a comparable basis between them under the *Alabama Electric* decision's analysis.

Commission Determination

72. We agree with the Initial Decision that PJM demonstrated that Merchant Transmission Facilities and zones are similar because they withdraw energy from the transmission grid in the same way and have the same effect on the transmission grid as a result.⁷⁷ MTF Parties assert that, under *Alabama Electric*, PJM bears the burden of supporting its decision to ignore "meaningful distinctions" between the parties. The court held in that case that in applying the same rate to two classes of customers, the

⁷⁷ Initial Decision, 124 FERC ¶ 63,022 at P 72, 78.

utility must “justify the disparity or, absent such justification, that the disparity be reduced, by whatever method or designs may be necessary or appropriate.”⁷⁸

73. We find that PJM has satisfied this burden through its demonstration that any differences between Merchant Transmission Facilities and zones are not meaningful for transmission planning purposes. PJM demonstrated that both Merchant Transmission Facilities and zones withdraw energy from the PJM system in a similar manner and thus place similar demands on the system.⁷⁹ The burden of proceeding then shifted to MTF Parties, to show why any alleged disparities are relevant. Although MTF Parties assert that the static nature of a Merchant Transmission Facility’s load distinguishes it from a transmission zone, PJM and other parties adequately demonstrated that the static nature of a Merchant Transmission Facility’s load is not relevant for transmission planning purposes. As they point out, the DFAX methodology will account for a Merchant Transmission Facility’s lack of load growth by decreasing its RTEP costs over time as compared to a zone with load growth.⁸⁰ Additionally, while MTF Parties assert that their withdrawals may be less firm than those of zonal customers, this argument does not show that they are not comparable to zones. PJM must plan its system to meet peak load on its system, including the full amount of the Firm Transmission Withdrawal Rights allocated to Merchant Transmission Facilities.⁸¹ Thus, these facilities legitimately can be charged their proportionate share of the upgrade costs needed to ensure such deliveries. Further, MTF Parties repeat their contention that Merchant Transmission Facilities differ from other load because they are required to pay “but for” costs for network upgrades. However, as we discussed earlier, the payment of “but for” costs for upgrades made necessary by the interconnection of Merchant Transmission Facilities does not excuse the Merchant Transmission Facility from paying its share of RTEP charges if there are measurable benefits from the subsequent upgrade costs.

74. We therefore agree with the Initial Decision’s finding that MTF Parties failed to carry their burden and did not demonstrate how any alleged disparities between Merchant Transmission Facilities and zones are relevant for transmission planning purposes.

⁷⁸ *Alabama Electric Cooperative*, 684 F.2d 20, 33.

⁷⁹ Initial Decision, 124 FERC ¶ 63,022 at P 65, citing Exh. No. PJM-1 at 30:16-20 (PJM Witness Herling).

⁸⁰ *Id.* P 143, citing Exh. No. PTO-9 at 23:6-18 (PTO Group Witness Reed).

⁸¹ *Id.* P 66, citing Exh. No. PJM-3 at 7:4-23 (PJM Witness Herling).

3. Whether PJM Exports Are Comparable to Merchant Transmission Facilities

Initial Decision

75. The Initial Decision notes that evidence in the record demonstrates that 8,652 MW of exports in PJM by load serving entities, their affiliates, and others (PJM exports) are projected for 2013 in the RTEP process, and PJM modeled these exports in its planning but did not allocate RTEP costs to any exporting entity. The Initial Decision notes that Mr. Herling explained that the PJM exports do not represent commitments by PJM to provide specific, long-term service, but set out a level of system use by current users or other users that PJM assumes will continue in the future.

76. The Initial Decision holds that the PJM exports and the Merchant Transmission Facilities are not similarly situated for purposes of the RTEP process, since the PJM exports have no contractual right to long-term service from PJM. Thus, PJM cannot allocate costs to these exporters because it does not know if it will be providing service to them in five years. In contrast, Merchant Transmission Facilities that are parties to interconnection service agreements with PJM have a contractual right to Firm Transmission Withdrawal Rights upon satisfaction of specified conditions, and holders of Firm Transmission Withdrawal Rights possess long-term rights to withdraw capacity and energy at a specific point on the system. Therefore, the Initial Decision finds that allocating RTEP costs to Merchant Transmission Facilities but not to exporters does not amount to undue discrimination or preference.

Exceptions

77. NYPA asserts that while the Initial Decision finds that PJM exports are not similarly situated to Merchant Transmission Facilities, because Merchant Transmission Facilities who have paid for network upgrades have a contractual right to Firm Transmission Withdrawal Rights and PJM exports have no such right, the Initial Decision does not explain why the absence of a contractual right is relevant to the process of allocating costs based on the level of withdrawals the transmission system is designed to support. NYPA also argues that the Initial Decision does not explain why it is not unduly discriminatory or preferential to give these PJM exports the “planned-for” status in the RTEP process without requiring them to purchase Firm Transmission Withdrawal Rights, and thus pay incremental costs.

78. NYPA states that, although the Initial Decision finds that allocating RTEP costs to Merchant Transmission Facilities is justified because Merchant Transmission Facilities withdraw energy from the PJM system like any load, the Initial Decision declines to make the same finding with respect to PJM exports based solely on the absence of a contract that has no practical significance to the planned-for status of PJM exports in the RTEP process. According to NYPA, PJM exports are treated in the RTEP process

exactly the same as Merchant Transmission Facilities and zonal customers, but PJM exports enjoy the benefits of RTEP at no cost, while Merchant Transmission Facilities and zonal customers must pay the RTEP costs allocated to them, as well as the RTEP costs that should be allocated to the PJM exports. According to NYPA, the distinction between Merchant Transmission Facilities and PJM exports on which the Initial Decision relies is nothing more than another example of undue discrimination against Merchant Transmission Facilities.

Commission Determination

79. We find that it is not unduly discriminatory or preferential to allocate RTEP costs to Merchant Transmission Facilities and not to exports. As PJM's witness demonstrated, PJM exports do not represent commitments by PJM to provide specific, long-term service. The Initial Decision notes that by modeling these exports during the planning stage, PJM is "not preserving these rights for anyone," but rather is merely "including this level of interchange in its assessment of the reliability of the system."⁸² We agree.

80. NYPA argues that while the Initial Decision finds that PJM exports are not similarly situated to Merchant Transmission Facilities, the Initial Decision does not explain why the absence of a "contractual right" is relevant to the process of allocating costs. We reject NYPA's argument. As the Initial Decision states, since exports have no contractual right to long-term service, PJM cannot allocate costs to these exports because it does not know if it will be providing them service five years forward.⁸³ In contrast, the reason for allocating RTEP upgrade costs to Merchant Transmission Facilities is that PJM is required to provide reliable service up to the Firm Transmission Withdrawal Rights held by these customers. In order to provide such rights, PJM must require the construction of RTEP upgrades. The Merchant Transmission Facilities can avoid these costs if instead of opting for Firm Transmission Withdrawal Rights, they opt only for Non-Firm Transmission Withdrawal Rights under the tariff.⁸⁴ Accordingly, we hold that

⁸² Initial Decision, 124 FERC ¶ 63,022 at P 86, citing Tr. 326:5-9.

⁸³ *Id.* P 87.

⁸⁴ If the customer obtained Non-Firm Transmission Withdrawal Rights, PJM would not need to incur the upgrades since it has no obligation to plan for Non-Firm Transmission Withdrawal Rights in the RTEP process. Tr. 278:5 – 280:15 (PJM Witness Herling); *see also* Exh. No. PJM-3 at 14:1-11 (PJM Witness Herling); PJM OATT § 1.27A.

allocating RTEP costs to Merchant Transmission Facilities and not exports does not amount to undue discrimination or preference.

81. NYPA also challenges as unduly discriminatory or preferential PJM's planning process that assigns "planned-for" status to exports. The need for possible changes to PJM's planning process is beyond the scope of this proceeding, which is limited to the allocation of RTEP costs to Merchant Transmission Facilities paying for Firm Transmission Withdrawal Rights.

4. Whether Using Actual or Planned Firm Transmission Withdrawal Rights Is Just and Reasonable

Initial Decision

82. PJM proposed to measure the benefits derived by a Merchant Transmission Facility from an upgrade by using its planned or existing Firm Transmission Withdrawal Rights as a proxy for projected zonal load,⁸⁵ asserting that Merchant Transmission Facilities act like load in that they withdraw energy from the PJM system. As such, PJM argued that the Merchant Transmission Facility's projected Firm Transmission Withdrawal Rights are an appropriate equivalent to projected zonal load, because their impact is equivalent to load and PJM models a Merchant Transmission Facility's projected Firm Transmission Withdrawal Rights in its planning and allocation processes.

83. The Initial Decision finds that PJM makes the same projections regarding a Merchant Transmission Facility's use of the system in both the planning and allocation stages, and noted that no party challenged the accuracy of such projections for planning purposes. As such, the Initial Decision finds that there is no reason to question the accuracy of the projections for allocation purposes.

⁸⁵ PJM plans for Firm Transmission Withdrawal Rights once the Merchant Transmission Facility has signed an interconnection service agreement that specifies the amount of Firm Transmission Withdrawal Rights that the Merchant Transmission Facility is expected to receive. PJM plans for Firm Transmission Withdrawal Rights based either on the Merchant Transmission Facility's existing Firm Transmission Withdrawal Rights if the Merchant Transmission Facility is in service, or if the Merchant Transmission Facility is not yet in service, then PJM plans for the Merchant Transmission Facility's planned Firm Transmission Withdrawal Rights, as specified in its interconnection service agreement.

Exceptions

84. NYPA asserts that the use of planned Firm Transmission Withdrawal Rights is not the same as using the projected load for a zone, nor is it a reasonable proxy, because it does not take into account that the planned Firm Transmission Withdrawal Rights may not be correct. They may not, according to NYPA, represent the level of withdrawals by the Merchant Transmission Facilities in the upcoming year, and the Firm Transmission Withdrawal Rights the Merchant Transmission Facilities use may be less than the amount on which the system is planned. In essence, NYPA asserts that the Initial Decision has conflated planning with projection. NYPA argues that the Commission should direct PJM to modify its proposal so that if Firm Transmission Withdrawal Rights have not yet been awarded when the planning process begins, the amount of Firm Transmission Withdrawal Rights projected to be in effect and utilized should be the number used to calculate the Merchant Transmission Facility's DFAX share.

85. PJM objects to NYPA's proposal that the amount of Firm Transmission Withdrawal Rights projected to be in effect should be used to calculate a Merchant Transmission Facility's DFAX share since according to PJM, the Initial Decision has already established a mechanism to address the situation where in the first year of operation, only partial Firm Transmission Withdrawal Rights are awarded if required upgrades have not been completed by the transmission owner. PJM asserts that the Initial Decision's methodology is equitable and ensures full cost recovery, while NYPA's suggestion is inaccurate and may be impossible to implement.

86. Trial Staff asserts that the Initial Decision's finding that using full Firm Transmission Withdrawal Rights to allocate costs to Merchant Transmission Facilities is just and reasonable is fully supported, in part since no party challenged the inclusion of a Merchant Transmission Facility's full Firm Transmission Withdrawal Rights in PJM's long-term planning process. Trial Staff also argues that NYPA's statements regarding the possibility of a Merchant Transmission Facility's projected withdrawals being less than its full Firm Transmission Withdrawal Rights is based on speculation. Trial Staff asserts that projecting a Merchant Transmission Facility's future energy use is difficult because such use is discretionary and dependent on factors external to PJM.

Commission Determination

87. We agree with the Initial Decision's finding that using a Merchant Transmission Facility's planned or existing Firm Transmission Withdrawal Rights as its load projection is just and reasonable and not unduly discriminatory or preferential. We reject NYPA's argument that planned Firm Transmission Withdrawal Rights should not be used because they may not reflect correct measures of usage. PJM is required to support the level of service represented by the maximum Firm Transmission Withdrawal Rights of the Merchant Transmission Facilities, and it must plan RTEP projects that ensure its ability

to meet that requirement.⁸⁶ We agree with PJM's witness Mr. Herling that using projected Firm Transmission Withdrawal Rights for a specific planning year is:

entirely appropriate because [F]irm [T]ransmission [W]ithdrawal [R]ights must be preserved in the planning process and withheld from other uses. The planned [Firm Transmission Withdrawal Rights] that PJM proposes to use in cost allocations are those that are contained in a binding interconnection service agreement. Because by contract PJM must preserve these planned [F]irm [T]ransmission [W]ithdrawal [R]ights in the planning process, they properly are and should be the basis for allocation of the cost of upgrades needed to ensure that those [F]irm [T]ransmission [W]ithdrawal [R]ights remain viable.⁸⁷

We find that the use of the same planning metric for both cost allocation and planning purposes therefore is just and reasonable and not unduly discriminatory or preferential.

88. NYPA expresses concerns that, if certain required upgrades have not been completed by a transmission owner, a Merchant Transmission Facility may only be awarded partial Firm Transmission Withdrawal Rights for its first year of operation. Thus, NYPA argues that the amount of Firm Transmission Withdrawal Rights may not be the correct amount to use for cost allocation purposes. However, we note that the Initial Decision recognized this possibility, and developed a methodology to address it.⁸⁸

⁸⁶ Initial Decision, 124 FERC ¶ 63,022 at P 66, citing Exh. No. PJM-3 at 7:4-23 (PJM Witness Herling).

⁸⁷ Exh. No. PJM-3 at 22:22 – 23:3 (PJM Witness Herling). Moreover, it would be difficult to project a Merchant Transmission Facility's future energy use, as urged by NYPA. A Merchant Transmission Facility's future energy use is both discretionary and dependent on factors external to PJM. Trial Staff's Brief Opposing Exceptions at 49. This supports our determination that the use of Firm Transmission Withdrawal Rights is a just and reasonable representation of peak usage for Merchant Transmission Facilities that should be used for both planning purposes and cost allocation.

⁸⁸ *See infra*, Section H.

D. Whether the Commission Should Accept NYPA's Proposed Crediting Mechanism

Initial Decision

89. The Initial Decision rejects a proposed crediting mechanism set forth by Dr. David W. DeRamus and supported by NYPA. Under this proposal, Merchant Transmission Facilities would pay “but for” costs prior to interconnection and RTEP costs subsequently. However, during the interconnection process, PJM would perform a DFAX analysis to determine the extent to which individual zones benefit from the “but for” upgrades. PJM would assign the Merchant Transmission Facility a credit equal to the value of any benefit that the Merchant Transmission Facility’s “but for” upgrades provide to PJM zones, and the Merchant Transmission Facility could use the credit to offset RTEP costs allocated to it. The “but for” credits would earn interest, be freely transferable, and have a “cash out” option at a point in the future.

90. The Initial Decision finds that this proposal is outside the scope of this proceeding and that its adoption would require revisions to parts of PJM’s OATT that govern interconnection, which PJM has not proposed to change. Additionally, the Initial Decision holds that the proposal could undermine interconnection policies that are also outside the scope of this proceeding. Specifically, the Initial Decision finds, awarding Merchant Transmission Facilities “but for” credits could dilute the incentives created to encourage interconnection customers to site their facilities efficiently.⁸⁹

91. The Initial Decision also finds that the proposal purports to address “and” pricing that does not exist in PJM’s proposal. The Initial Decision reasons that PJM may charge Merchant Transmission Facilities the full costs of “but for” upgrades because PJM awards Merchant Transmission Facilities rights to incremental capacity created by such upgrades.

Exceptions

92. NYPA contends that if Merchant Transmission Facilities are assigned both interconnection costs and RTEP costs, then at a minimum, the costs of the Merchant Transmission Facility’s “but for” network upgrades that benefit other users of PJM’s transmission system should be credited against the Merchant Transmission Facility’s

⁸⁹ Initial Decision, 124 FERC ¶ 63,022 at P 110, citing *ODEC*, 119 FERC ¶ 61,052 at P 11.

allocated RTEP costs, as proposed by Dr. DeRamus. Under Dr. DeRamus' proposal, such credits would be determined by applying the DFAX analysis to Merchant Transmission Facilities' "but for" network upgrades, and the cost of the credits would be paid by the PJM load that benefits from the upgrades.

93. NYPA asserts that Dr. DeRamus' proposal is consistent with the Partial Settlement and within the scope of this proceeding. According to NYPA, the Partial Settlement anticipates modifications to the DFAX methodology to reflect differences between Merchant Transmission Facilities and load serving entities. NYPA asserts that the fact that only Merchant Transmission Facilities pay for their use of the PJM system on an incremental basis is a relevant and significant difference between the two groups of customers, and that Dr. DeRamus' crediting proposal is a straight-forward modification of the DFAX methodology to account for this difference. Further, NYPA states that the proposal would change only the tariff provisions at issue in this proceeding.

94. As discussed above, PJM, Trial Staff, and PTO Group disagree that PJM's proposal violates the Commission's transmission pricing policy. Additionally, PJM asserts that Dr. DeRamus' crediting proposal is outside the scope of this proceeding because it cannot be implemented without amending PJM's approved interconnection procedures. PJM points to section 217 of the OATT which specifies that Merchant Transmission Facilities are responsible for 100 percent of the network upgrades required for their interconnections, and notes that the OATT also states what rights are accorded to interconnection customers as a result of funding upgrades.⁹⁰ PJM states that it would be inappropriate in this proceeding to provide additional rights to Merchant Transmission Facilities. Further, PJM contends that the changes proposed by Dr. DeRamus go beyond what was set for hearing following the Partial Settlement (i.e., "how [M]erchant [T]ransmission [F]acilities should be included in the DFAX methodology.")⁹¹

95. Trial Staff contends that crediting is not required because PJM's proposal does not violate the Commission's transmission pricing policy. Trial Staff states that allowing Merchant Transmission Facilities to credit their interconnection payments against their

⁹⁰ PJM Brief Opposing Exceptions at 15 n. 47, citing PJM OATT § 231, 232, 233, 234, and 235.

⁹¹ PJM Brief Opposing Exceptions at 16, citing Exh. No. PJM-2 at 67-68 (Partial Settlement ¶ 10(b)(ii)).

RTEP responsibility, in addition to receiving Firm Transmission Withdrawal Rights and potentially incremental Auction Revenue Rights, would constitute an unjust windfall.

96. PTO Group contends that RTEP costs not allocated to Merchant Transmission Facilities would be reallocated to all other load in PJM, resulting in a subsidy to Merchant Transmission Facilities. PTO Group argues that such a subsidy is unfair, since the Merchant Transmission Facilities' interconnection upgrades would not have been needed or built "but for" the Merchant Transmission Facilities' interconnection to the PJM system. Further, PTO Group contends that the operation of Merchant Transmission Facilities will actually harm PJM customers because the Merchant Transmission Facilities will be withdrawing energy from PJM, which will result in higher energy and capacity charges to customers in PJM. Moreover, PTO Group argues that under Dr. DeRamus' proposal, Merchant Transmission Facilities would be exempt from RTEP allocations for the entire life of the Merchant Transmission Facility project regardless of the magnitude of the Merchant Transmission Facilities' ongoing use of the system. PTO Group states that Merchant Transmission Facilities are already compensated for the interconnection upgrades they fund, and if the Commission grants NYPA's request for a credit, Merchant Transmission Facilities would receive a much better deal than any other transmission customer on the PJM system.

Commission Determination

97. Since PJM's proposal in this proceeding is just and reasonable, the Commission rejects NYPA's proposal to adopt Dr. DeRamus' crediting mechanism. The predicate for the crediting mechanism is that it is needed because PJM proposes that Merchant Transmission Facilities, but not other load, pay for transmission service using the incremental "but for" test for interconnection and the DFAX test for subsequent RTEP upgrades. The crediting mechanism is needed, NYPA argues, as an adjustment to rectify such disparate treatment. We disagree. First, this argument essentially repeats the contention that PJM's proposal violates the Commission's prohibition against "and pricing." As discussed above, it is just and reasonable and not unduly discriminatory or preferential to use the "but for" test as permitted by Order No. 2003 for initial interconnection, but the RTEP methodology for subsequent reliability related upgrades that benefit Merchant Transmission Facilities. These two approaches address different costs incurred at different times under different circumstances. In short, the "but for" test measures the specific impact of the merchant transmission project on the PJM system and the Merchant Transmission Facility is assigned financial transmission rights for building those upgrades. In contrast, the assignment of RTEP related costs measure the cost of

subsequent RTEP upgrades that are related to the Merchant Transmission Facility's ongoing use of the system.⁹²

98. Second, we find that Dr. DeRamus' proposed crediting mechanism goes beyond a proposed adjustment to the DFAX methodology, as contemplated by the Partial Settlement. Specifically, PJM's OATT requires that an interconnection customer pay 100 percent of the network upgrades required for interconnection, and the OATT further provides that interconnection customers will receive certain rights in return. Dr. DeRamus is proposing that in place of the "but for" test currently used in the PJM interconnection procedures, PJM instead apply a DFAX methodology to measure the beneficiaries from all interconnection upgrades. An adjustment of the treatment of interconnection would necessarily affect the rights and other obligations assigned to Merchant Transmission Facilities in OATT provisions. Dr. DeRamus, however, does not discuss how his proposed crediting mechanism should or would affect the financial transmission rights acquired by Merchant Transmission Facilities during the interconnection process.

E. Whether the Commission Should Accept MTF Parties' Proposed Static Load Methodology

Initial Decision

99. The Initial Decision rejected a proposal by MTF Parties' witness, Mr. Kenneth C. Lotterhos, that cost allocations to Merchant Transmission Facilities be adjusted to account for the fact that a Merchant Transmission Facility's load is "static."⁹³ The Initial Decision rejected MTF Parties' argument that Merchant Transmission Facilities are discriminated against because they are treated, like load serving entities, as if they did not have to pay for the upgrades necessitated by their additions to system load prior to the RTEP process. The Initial Decision reasoned that this argument fails because, prior to

⁹² Initial Decision at 99-101; *see also* Exh. No. S-1 at 17-18 (Staff Witness Savitski) (application of both tests is necessary to send proper price signals and is not unduly discriminatory).

⁹³ The Initial Decision also rejected two other remedies to account for the fact that MTF load is static – the "with-without" analysis proposed by MTF Parties' witness, Dr. Roy J. Shanker, and the "load-growth credit" proposed by Trial Staff's witness, Dr. David Savitski. Initial Decision, 124 FERC ¶ 63,022 at P 152, 155-156. No party excepted to these findings.

the RTEP process, Merchant Transmission Facilities do not pay for all upgrades caused by their receipt of Firm Transmission Withdrawal Rights. When Merchant Transmission Facilities interconnect to the PJM system, they use existing ATC; construction of “but for” upgrades only becomes necessary to the extent that PJM requires additional capacity to serve Firm Transmission Withdrawal Rights. The Initial Decision concluded that Merchant Transmission Facilities’ cost-free use of existing ATC will inevitably accelerate the need for RTEP upgrades.

100. The Initial Decision states that, even setting ATC aside, load serving entities and Merchant Transmission Facilities are similarly situated for purposes of RTEP costs. The Initial Decision notes that there is substantial disparity between the growth rates of different zones in PJM’s system; however, under the Partial Settlement, a zone with low projected load growth is required to pay for load-growth related upgrades that it did not cause. The Initial Decision determines that it would be inequitable to make a load-growth adjustment for Merchant Transmission Facilities, but not for these zones. Moreover, the Initial Decision notes that a Merchant Transmission Facility’s static load inevitably will cause its share of PJM load to decrease, and as that share decreases, the Merchant Transmission Facility’s share of RTEP allocations will also decrease. Finally, the Initial Decision finds that the burden of implementing the static load methodology would be considerable.

Exceptions

101. MTF Parties contend that the Initial Decision’s failure to adopt the static load methodology will distort pricing signals for evaluation of transmission expansion opportunities, discouraging merchant transmission development. MTF Parties assert that the differences between the physical, operating, and tariff characteristics of Merchant Transmission Facilities and PJM network load translate to meaningful differences in the benefits derived from, and causal relationship to, RTEP upgrades. Specifically, MTF Parties assert that Merchant Transmission Facilities and their associated Firm Transmission Withdrawal Rights are static, while PJM’s network load has the ability to increase their actual withdrawals from the PJM system. Further, MTF Parties assert that a low projected load growth zone is still different from a Merchant Transmission Facility because the zone has the ability to use the new transmission capability created by a PJM RTEP upgrade. Additionally, MTF Parties contend that in the settlement process, other trade-offs were made that ameliorated this disparity for low projected load growth zones. According to MTF Parties, because Merchant Transmission Facilities and network load are not similarly situated, the use of a single rate design is unduly discriminatory.

102. MTF Parties also contend that the Initial Decision’s reliance on testimony regarding the use of ATC by Merchant Transmission Facilities is not a basis for justifying the allocation of PJM load growth costs to Merchant Transmission Facilities. MTF Parties state that use of ATC by Merchant Transmission Facilities cannot be measured,

and that therefore, there is no basis to extrapolate a causal relationship between a Merchant Transmission Facility's use of ATC and reliability violations that occur five, ten or twenty years later. Further, MTF Parties assert that Merchant Transmission Facilities do not use ATC for free; rather, the cost of ATC is included in the existing embedded cost transmission service rates charged by PJM. Similarly, NYPA takes issue with the Initial Decision's discussion of ATC.

103. PJM, Trial Staff, and PTO Group state that the Initial Decision correctly rejected the static load methodology because the undue discrimination that this methodology purports to remedy does not exist. PJM and PTO Group note that Merchant Transmission Facilities are treated the same as low load growth zones because both have lower projected growth rates than other zones, but are still allocated RTEP costs. PJM states that the fact that a low load growth zone has the ability to use the new transmission capability created by an RTEP upgrade does not negate that, with regard to RTEP cost allocations, low load growth zones and Merchant Transmission Facilities are similarly situated.

104. Further, PJM asserts that load growth cannot be segregated from other drivers for RTEP upgrades. PJM explains that, in determining whether a reliability violation will occur, it takes into account all load, including Firm Transmission Withdrawal Rights, both existing and new. Therefore, even the static load of a Merchant Transmission Facility contributes to load growth-related reliability violations. Specifically, Mr. Herling testified:

[T]o classify any particular reliability violation as 'load growth-related' is an over-simplification. Reliability criteria violations are identified at a point in time. There are many factors over time that cause a reliability violation to become imminent. Load growth and infrastructure modifications change the flow on limiting facilities over periods of years and in differing relative amounts until a violation is experienced. When PJM determines whether there is a reliability criteria violation, it takes into account all of the load, including FTWRs, both existing and new, to determine whether a reliability violation will occur. Simply put, it is not only the new load or load growth that is considered to contribute to the reliability violation, but rather all of the load existing at the time of the violation.⁹⁴

⁹⁴ Ex. No. PJM-3 at 15-16.

105. Likewise, PTO Group notes that load growth is just one consideration in PJM's assessment of the reliability needs of its system. PTO Group states that, as with any load on the system, a Merchant Transmission Facility with Firm Transmission Withdrawal Rights places certain continuing stresses on PJM's transmission system. For example, PTO Group notes that the PJM market monitor has identified the continued operation of the Neptune line as a factor contributing to an increase in PJM's purchase of spinning reserves for local needs in New Jersey in 2007.

106. Trial Staff argues that MTF Parties fail to consider that transmission investment is "lumpy," meaning that if PJM's flow studies identify the necessity of constructing an upgrade to prevent a violation expected to occur in the near future, and of later constructing a larger upgrade in the same location to prevent a similar violation in the more distant future, PJM may find it less expensive to immediately begin constructing the larger upgrade, thus creating excess capacity that will not be used in the near term. Accordingly, Trial Staff states that accommodating LSEs' load growth is not a goal of the RTEP upgrades but an indirect result of economically performing those upgrades.

107. PJM, Trial Staff, and PTO Group contend that although the amount of ATC used by Merchant Transmission Facilities is not specifically quantifiable, there is ample evidence in the record to demonstrate that significant ATC is used by Merchant Transmission Facilities, contributing to the need for future transmission upgrades. Moreover, Trial Staff and PTO Group assert that Merchant Transmission Facilities will benefit from the static nature of their load under PJM's DFAX methodology, because Merchant Transmission Facilities will receive a decreasing percentage of RTEP costs over time in relation to other increasing loads on the system.

Commission Determination

108. While there are differences between Merchant Transmission Facilities and zones, the fact that Merchant Transmission Facilities have static loads, measured by their Firm Transmission Withdrawal Rights, is insufficient for us to find that PJM's proposed allocation method is unjust and unreasonable.

109. To begin with, we reject, as did the Initial Decision, the argument that assigning cost responsibility for RTEP upgrades to Merchant Transmission Facilities is inappropriate because the Merchant Transmission Facilities have already paid for all upgrades caused by their receipt of Firm Transmission Withdrawal Rights.⁹⁵ Under the

⁹⁵ Initial Decision, 124 FERC ¶ 63,022 at P 135-136.

PJM interconnection process, when Merchant Transmission Facilities interconnect with the PJM system, they will only be required to construct “but for” upgrades to the extent that PJM requires capacity in addition to existing ATC (i.e., capacity that is not required to serve firm transmission customers or existing Firm Transmission Withdrawal Rights in the near term).⁹⁶ For example, the record indicates that Neptune had to pay only approximately \$9 million in upgrade costs for its interconnection based on the timing of its position in the queue, while Hudson Transmission Partners’ network upgrade costs for a slightly smaller project were estimated at approximately \$450 million.⁹⁷ This occurred because at the time of the studies, PJM had more ATC available that could be utilized by the Neptune project. It is appropriate that Merchant Transmission Facilities pay for such “but for” upgrades because this encourages Merchant Transmission Facilities to site their projects efficiently.⁹⁸ However, as discussed earlier, the payment of network upgrade costs as part of the interconnection process covers the costs imposed by that project at the time it is studied. It does not cover the potential future RTEP upgrades that PJM must incur in order to provide the project with the level of firm service PJM is required to provide.

110. While a Merchant Transmission Facility’s Firm Transmission Withdrawal Rights are static, the PJM system overall is not static. As the system changes for a variety of reasons (e.g., retirements and load growth), it may be necessary to construct additional facilities in order for PJM to be able to provide the level of Firm Transmission Withdrawal Rights to which the customers subscribed. In those circumstances, we find it just and reasonable and not unduly discriminatory or preferential for PJM to charge the Merchant Transmission Facilities for the costs of assuring their service. NYPA and the

⁹⁶ ATC is created, for example, by RTEP upgrades. Because PJM’s RTEP process includes a 15-year planning dimension, RTEP upgrades constructed to address reliability violations during these 15 years create ATC in the system. Tr. at 670:8-11; 14-25 (PTO Group Witness Khadr). ATC will also be created by an MTF’s “but for” network upgrades. Initial Decision at P 134 n. 34, *citing* Tr. at 670:8-11 (PTO Group Witness Khadr); *see also* Tr. at 589:1-12 (PTO Group Witness Khadr).

⁹⁷ Initial Decision, 124 FERC ¶ 63,022 at P 135, *citing* Exh. No. PJM-3 at 14:12-19 (PJM Witness Herling).

⁹⁸ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 695; Exh. No. S-1 at 17-18 (Staff Witness Savitski) (interconnection pricing is designed to promote efficient construction decisions).

MTF Parties have offered no basis for requiring other customers to pay for upgrades made necessary by the Merchant Transmission Facility.⁹⁹ Merchant Transmission Facilities have the same effect on the system as load, and we find treating them similarly to load just and reasonable and not unduly discriminatory or preferential. We, therefore, agree with the Initial Decision that the extent to which Merchant Transmission Facilities pay for “but for” upgrades during the interconnection process does not determine their responsibility for future RTEP upgrade costs.¹⁰⁰

111. PJM’s witness Mr. Herling stated that “[w]hen PJM determines whether there is a reliability criteria violation, it takes into account all of the load, including [Firm Transmission Withdrawal Rights], both existing and new, to determine whether a reliability violation will occur. Simply put, it is not only the new load or load growth that is considered to contribute to the reliability violation, but rather all of the load existing at the time of the violation.”¹⁰¹ Therefore, PJM stated that “even ... the ‘static load of a [M]erchant [T]ransmission [F]acility,’ like existing network load, can contribute to a ‘load-growth related’ reliability violation.”¹⁰² Further, as explained in Mr. Herling’s testimony, MTF Parties’ static load methodology is inconsistent with how PJM conducts the RTEP process. PJM does not segregate load growth from the other factors affecting

⁹⁹ The record in this proceeding demonstrates that Merchant Transmission Facilities’ use of ATC accelerates the identification of future RTEP upgrades to satisfy the aggregate of system needs, including load growth. Initial Decision, 124 FERC ¶ 63,022 at P 134; Exh. No. PJM-3 at 15:1-5 (PJM Witness Herling).

¹⁰⁰ Initial Decision at P 138. We also dismiss the assertions by MTF Parties and NYPA that Merchant Transmission Facilities pay for the ATC they use through the existing embedded cost transmission service rates charged by the PJM transmission owners and should not have to pay additional costs for RTEP upgrades. All customers with firm transmission service, network service customers and firm point-to-point transmission customers also pay for transmission service, and are responsible for paying a proportionate share of RTEP upgrade costs. Merchant Transmission Facilities are similarly situated, as discussed; thus they can reasonably be assessed their proportionate share of these costs.

¹⁰¹ Exh. No. PJM-3 at 15:15-16:3 (PJM Witness Herling).

¹⁰² *Id.* at 16:1-3.

the need for an upgrade, such as generator retirements and additions and changes in usage patterns.¹⁰³ Trial Staff's witness James Ballard testified to the same effect:

Trying to separate load growth from other drivers of RTEP projects at any phase of the process is like trying to unscramble an omelet. For cost allocation purposes, PJM does not identify the drivers of RTEP upgrades and then allocate the cost of the upgrades according to how much each drove the need... . Precisely evaluating the relative impact of each driver on the need for an RTEP upgrade would require an immense amount of effort to restudy the system by isolating every change in each driver. In addition, the synergistic impact of the combination of drivers would need to be considered. The amount of studies needed to correctly identify and assign responsibility to drivers could increase exponentially. Assumptions and assessments would need to be made as to the importance of each driver and combination of drivers to the need for RTEP upgrades. Implementing such a process would place PJM in a nearly impossible position, as it would effectively require it to defend a highly arbitrary and speculative result in litigation.¹⁰⁴

112. We find Trial Staff's testimony to be persuasive. For the reasons discussed above, we affirm the Initial Decision's finding that a static load adjustment is not necessary.

F. Whether RTEP Costs Should Be Allocated to Merchant Transmission Facilities for Below 500 kV Reliability Upgrades Costing Less Than \$5 Million

Initial Decision

113. Under the Partial Settlement, the costs of reliability upgrades costing less than \$5 million are allocated to the zone in which the upgrade is to be located. PJM proposes to apply this rule to Merchant Transmission Facilities, exempting them from paying such costs, since this approach avoids the time and expense of running DFAX studies for numerous small projects.

¹⁰³ Mr. Herling testified that PJM does not "in the RTEP process, in any way try to segregate those drivers in the determination of whether violations exist or what upgrades may be required." Tr. at 310:16-19 (PJM Witness Herling).

¹⁰⁴ Exh. No. S-8 at 11:6-9, 11:21-12:8 (Staff Witness Ballard).

114. The Initial Decision notes that PJM’s proposal allows Merchant Transmission Facilities to escape cost responsibility for *any* reliability upgrades costing less than \$5 million. The Initial Decision finds that this is unfair, because Merchant Transmission Facilities benefit from some of these upgrades and the proposal is particularly unfair to load serving entities that operate in a Merchant Transmission Facility’s host zone, because they are likely to bear the bulk of the upgrade costs avoided by the Merchant Transmission Facility. Although the Initial Decision concludes that a separate DFAX analysis for each such reliability upgrade would provide the most accurate match between cost responsibility and benefits, it finds that requiring such calculations would put an undue burden on PJM.

115. The Initial Decision then finds that a better alternative is available, accepting the proposal by NJ Rate Counsel that PJM require Merchant Transmission Facilities to pay for a portion of such costs based on the Merchant Transmission Facility’s share of load in the Merchant Transmission Facility’s host zone, and orders PJM to revise its proposal accordingly. The Initial Decision asserts that Merchant Transmission Facilities are unique with respect to such upgrades, because Merchant Transmission Facilities are the only entity that the cost threshold would exempt from ever having to pay for such upgrades. Thus, it is appropriate to treat Merchant Transmission Facilities differently.

Exceptions

116. MTF Parties ask the Commission to reject this revision to PJM’s proposal as inconsistent with the Partial Settlement, which provided that the cost responsibility for RTEP reliability projects under a \$5 million threshold “shall be assigned to the zone of the PJM transmission owner where the Lower Voltage Facility is located,”¹⁰⁵ and did not provide for any allocation of below threshold project costs to Merchant Transmission Facilities. MTF Parties contend that even if the Commission determines that Merchant Transmission Facilities should be allocated a share of below-threshold RTEP upgrade projects, the Initial Decision’s direction that Merchant Transmission Facilities be incorporated into the neighboring transmission zone for the purpose of allocation of such costs is improper and must be rejected. MTF Parties conclude that if Merchant Transmission Facilities are to be treated as a separate zone for below 500 kV projects, then that treatment must flow to all below 500 kV projects—including those that are below the \$5 million threshold. Accordingly, any application of below threshold costs to

¹⁰⁵ MTF Parties Brief on Exceptions at 29, citing Exh. No. PJM-2 at 70-71 (Partial Settlement ¶ 14).

Merchant Transmission Facilities must be made through use of a DFAX methodology that includes the static load methodology.

117. NYPA asserts that the Initial Decision lacks authority to direct PJM to modify this portion of its proposal. Rather, NYPA argues that PJM has presented substantial evidence to justify this particular component of its proposal. According to NYPA, the Initial Decision fails to appreciate PJM's reasoning that performing the DFAX analysis on these smaller projects would be overly burdensome because it would result in allocations to Merchant Transmission Facilities in so few cases. Under similar circumstances, NYPA argues, the Commission recently found that excluding projects costing \$5 million or less from regional cost sharing was reasonable, given the time and expense necessary to measure and bill associated costs, and the low likelihood that these "smallest projects" would have regional benefits.¹⁰⁶

118. In contrast, NYPA asserts that the record evidence shows that the Initial Decision's revision would be unjust and unreasonable, because it would use an entirely different methodology from the DFAX methodology, which the Initial Decision finds to be the proper measure of benefits from RTEP upgrades. According to NYPA, an MTF's load share in a zone bears no rational relation to PJM's chosen measure of contribution to the reliability violation necessitating the upgrade. Given PJM's conclusion that "in most cases [reliability upgrades costing less than \$5 million] would be assigned in large percent to the local transmission owner under the DFAX methodology and [M]erchant [T]ransmission [F]acilities would not receive any assignment,"¹⁰⁷ NYPA asserts that assigning Merchant Transmission Facilities a share of these costs based on load ratio will certainly, in light of these facts, over-allocate these costs to Merchant Transmission Facilities. Finally, NYPA concludes that if Merchant Transmission Facilities' "unique" configurations are relevant when they require Merchant Transmission Facilities to pay for RTEP costs, they should likewise be relevant when they would excuse Merchant Transmission Facilities from paying for RTEP costs.

¹⁰⁶ NYPA Brief on Exceptions at 63, citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,209 at P 99; *order on reh'g*, 120 FERC ¶ 61,080 at PP 95, 97 (2007) (*MISO*).

¹⁰⁷ NYPA Brief on Exceptions at 64, citing Exh. No. PJM-1 at 24:6-9 (PJM Witness Herling).

119. PTO Group contends that MTF Parties and NYPA misrepresent the record with respect to reliability upgrades costing less than \$5 million. PTO Group asserts that the portion of the Partial Settlement that requires the costs of reliability upgrades costing less than \$5 million to be assigned to the zone of the PJM transmission owner where the facility is located does not apply to Merchant Transmission Facilities. Further, PTO Group argues that PJM's proposal does not carry any additional weight given that it came from PJM rather than any other party. Additionally, PTO Group concludes that NYPA's contention that the Initial Decision's ruling is discriminatory and over-allocates RTEP costs to Merchant Transmission Facilities is nothing more than circular logic, as NYPA cites to no authority for its theory that a methodology can be discriminatory merely because it allocates a higher percentage of costs than another methodology. While PTO Group disagrees that conducting a DFAX analysis for each reliability upgrade that costs less than \$5 million would be unduly burdensome, they agree that the Initial Decision's solution is reasonable.

120. Trial Staff opposes the undue discrimination arguments by the MTF Parties and NYPA. Trial Staff states that as the Presiding Judge observed, "merchant transmission facilities *are* unique with respect to \$5 million reliability upgrades" because they are the only entities that "the cost threshold would exempt from ever having to pay for such upgrades."¹⁰⁸ Trial Staff believes that since another entity would otherwise have to pay a Merchant Transmission Facility's share of costs for a project that may confer benefits on both, the Presiding Judge correctly recognized that there was nothing unduly discriminatory in requiring Merchant Transmission Facilities to pay a share of threshold upgrade costs. Further, Trial Staff argues that NYPA's reliance on the *MISO* case is misplaced.¹⁰⁹ Trial Staff states that the similarity of the projects involved in the *MISO* case to the threshold upgrades at issue here ends with their \$5 million size. Because there was little likelihood that the *MISO* projects conferred any regional benefits, the Commission did not require the entire region to pay for them.¹¹⁰ Trial Staff concludes that the threshold upgrades here, by contrast, are primarily local in nature and as such some of them confer benefits, measurable by a DFAX analysis, on the Merchant

¹⁰⁸ Trial Staff Brief Opposing Exceptions at 55-56, citing Initial Decision at P 186.

¹⁰⁹ Trial Staff Brief Opposing Exceptions at 57, citing NYPA Brief On Exceptions at 63; *see also MISO*, 118 FERC ¶ 61,209 at P 99, 120 FERC ¶ 61,080 at P 95, 97.

¹¹⁰ The Commission ordered the Midwest ISO to conduct an ongoing evaluation on "whether the inclusion of such projects can be justified in the future," a fact omitted by NYPA. *MISO*, 118 FERC ¶ 61,209 at P 99.

Transmission Facilities. While Trial Staff believes that the DFAX methodology is the most accurate allocator of the costs of such below \$5 million upgrades despite PJM's burdens, Trial Staff states that the record supports the Initial Decision's solution.

121. NJ Rate Counsel asserts that exempting Merchant Transmission Facilities from any cost responsibility for reliability upgrades costing less than \$5 million is unfair because Merchant Transmission Facilities benefit from some upgrades and it would be especially unfair to load serving entities operating in an Merchant Transmission Facility's host zone because they are likely to bear the bulk of the upgrade costs that the Merchant Transmission Facility does not pay. Accordingly, NJ Rate Counsel states that all Merchant Transmission Facilities should be allocated the costs of such RTEP reliability projects. NJ Rate Counsel contends that Merchant Transmission Facilities contribute to the need for reliability projects with estimated costs below \$5 million in the same way they contribute to the need for those above that amount, thus it is inappropriate to distinguish cost responsibility based on the cost of particular facilities. They further contend that since Merchant Transmission Facilities are equivalent to network load, there is no technical reason they should be excused from cost allocation just because the project in question happens to cost less than \$5 million. Finally, NJ Rate Counsel notes that MTF Parties voluntarily chose not to participate in the portion of the Partial Settlement dealing with reliability upgrades costing less than \$5 million.

Commission Determination

122. We reverse the Initial Decision's finding that Merchant Transmission Facilities should be allocated a portion of the costs of below reliability upgrades costing less than \$5 million constructed in the Merchant Transmission Facility's host zone, and find that PJM's initial proposal to exempt Merchant Transmission Facilities from such costs is just and reasonable and not unduly discriminatory or preferential.

123. One of the issues raised in the RTEP orders was whether RTEP costs should be allocated to Merchant Transmission Facilities as if they are separate zones, or whether these costs should be first allocated to zones, of which the Merchant Transmission Facilities (or their customers) would be a part. The Commission found that "while merchant transmission facilities and their customers should be allocated an appropriate share of network upgrades, we cannot determine based on this record whether PJM has allocated appropriate costs to these entities or has done so in an unduly discriminatory manner."¹¹¹ This issue was addressed in the hearing proceedings, and for the most part,

¹¹¹ May 2006 Order, 115 FERC ¶ 61,261 at P 51.

the Initial Decision treats each Merchant Transmission Facility as a separate zone for cost allocation purposes.¹¹² However, on one specific issue, the allocation of reliability upgrades costing less than \$5 million, the Initial Decision states that it is just and reasonable for a Merchant Transmission Facility to be allocated costs of such upgrades constructed in the Merchant Transmission Facility's host zone on a load-share basis. The Presiding Judge's determination to treat Merchant Transmission Facilities as part of a host zone in this one instance treats Merchant Transmission Facilities inconsistently, since Merchant Transmission Facilities are treated as a separate zone for all other purposes. Treating Merchant Transmission Facilities as zones has implications for the amount of costs allocated, and we cannot find that once having chosen this method of allocation, it is just and reasonable to treat Merchant Transmission Facilities as other than zones.

124. The Initial Decision concludes that treating Merchant Transmission Facilities as part of a host zone in allocating the costs of reliability upgrades costing less than \$5 million is appropriate because, otherwise, Merchant Transmission Facilities would be the only entity exempt from ever having to pay for such upgrades. We disagree. We find that it is not unduly discriminatory for PJM to exclude Merchant Transmission Facilities from the allocation of the costs of reliability upgrades costing less than \$5 million, because this properly reflects the fact that Merchant Transmission Facilities are considered a separate zone.

125. Trial Staff and PTO Group propose that PJM allocate costs of reliability upgrades costing less than \$5 million to Merchant Transmission Facilities using the DFAX methodology. But this proposal also does not treat Merchant Transmission Facilities comparably to other zones, which do not have to pay the DFAX determined costs of upgrades of \$5 million or less. The purpose of the \$5 million ceiling was to eliminate the need for the DFAX analysis for upgrades that are generally local in nature, and for which the costs "would be assigned in large percent (if not 100 percent) to the local transmission owner under the DFAX methodology,"¹¹³ and we find that Merchant Transmission Facilities should not be singled out for disparate treatment. Thus, we find PJM's proposed treatment of Merchant Transmission is just and reasonable and we will

¹¹² Initial Decision, 124 FERC ¶ 63,022 at P 196-197. No party objected to the treatment of Merchant Transmission Facilities as separate zones.

¹¹³ Exh. No. PJM-1 at 24:6-9 (PJM Witness Herling).

not require PJM to use the DFAX methodology to allocate the costs of reliability upgrades costing less than \$5 million to Merchant Transmission Facilities.

G. Below 500 kV Economic Upgrades

126. The Initial Decision notes that the Partial Settlement addresses assignment of cost responsibility for two types of economic upgrades to zones: (1) modifications of previously scheduled reliability upgrades (modification upgrades); and (2) accelerations of the in-service date of an upgrade (acceleration upgrades).

1. What Measure Should be Used to Allocate a Merchant Transmission Facility's Share of Below 500 kV Economic Projects

Initial Decision

127. Regarding modification upgrades, the Initial Decision finds that the Partial Settlement's use of the DFAX methodology to allocate costs to Merchant Transmission Facilities is just and reasonable. The Initial Decision dismisses a proposal by Trial Staff to allocate the costs of such upgrades among zones and Merchant Transmission Facilities with positive DFAX values based on an annual calculation that replaces Firm Transmission Withdrawal Rights and projected loads with actual energy usage for a previous 12-month period. The Initial Decision states that the Partial Settlement precludes adoption of Trial Staff's proposal with respect to zones, and Trial Staff has not justified applying its method solely to Merchant Transmission Facilities. Further, the Initial Decision finds that applying this method solely to Merchant Transmission Facilities would not be fair to load serving entities because any prudent system planner will err on the side of over-projecting the demands on the system; thus, adjusting the overstated projections for Merchant Transmission Facilities would result in a DFAX calculation that understates the percentage of the constrained facility used by the Merchant Transmission Facility. Additionally, the Initial Decision finds that Trial Staff's proposal to annually reallocate the costs of the economics-related portion of an upgrade would impose burdens that outweigh its benefits.

Exceptions

128. Trial Staff objects to the Initial Decision's dismissal of its proposal to allocate the costs of economic upgrades using a metric linked to actual energy usage, rather than the DFAX methodology based on maximum demand (i.e., peak load for load serving entities and Firm Transmission Withdrawal Rights for Merchant Transmission Facilities). Trial Staff contends that its method takes into account the different purposes served by economic-based and reliability upgrades. Specifically, Trial Staff argues that reliability upgrades ensure that PJM will meet its users' maximum demands, so allocating costs on a metric linked to maximum demand is appropriate, while an economic-based upgrade is

primarily intended to achieve savings in energy costs by reducing LMP. Thus, Trial Staff asserts that the benefits of an economic upgrade directly correlate with the units of energy withdrawn and the prices paid for it, which will vary from year to year.

129. Trial Staff contends that the Partial Settlement does not bar use of a different methodology to allocate the costs of economic upgrades to Merchant Transmission Facilities. Trial Staff agrees that the Partial Settlement prescribes a peak demand based DFAX analysis for allocating the costs of economic upgrades to zones, but asserts that the results of its proposed methodology would apply only to Merchant Transmission Facilities. Additionally, Trial Staff contends that the record contains no evidence establishing either the tendency of system planners to over-estimate demand or quantifying the extent of any such over-projected demand. Even if this inequity exists, Trial Staff argues that it is irrelevant because such an outcome is inherent when one group chooses to settle an issue while another chooses to litigate. Finally, Trial Staff disagrees that its methodology would be burdensome to PJM. If the Commission does not accept its proposed methodology, Trial Staff requests that the Commission require the parties to explore through the PJM stakeholder process whether any improved allocation methodology can be developed.

130. Similarly, MTF Parties state that, in order to be consistent with the purpose of RTEP economic upgrades, the allocation of RTEP economic upgrades should be made to Merchant Transmission Facilities based on their load factors.

131. PJM asserts that Trial Staff's alternative methodology was properly rejected. According to PJM, annual reallocations are problematic because they might result in allocations that do not total 100 percent. Since the results of Trial Staff's methodology apply only to Merchant Transmission Facilities, other zones would have a one-time fixed allocation, but if a Merchant Transmission Facility's annual allocation changes, the total allocation for a project may be more or less than 100 percent in any given year. Further, PJM states that the proposal is inconsistent with how the need for an economic upgrade is determined in PJM's planning process: PJM conducts a cost benefit analysis and once the upgrades are constructed, the benefits of the project are not reexamined. PJM states that a future change in a customer's usage does not change its initial planning decision and should not change the cost allocation.

132. Likewise, PTO Group asserts that Trial Staff provided no study or empirical analysis to support its claims that the costs of economic upgrades should be allocated based on an actual energy use metric. Instead, PTO Group contends that the DFAX methodology based on maximum demand is appropriate because a Merchant Transmission Facility may withdraw up to the maximum of its awarded Firm Transmission Withdrawal Rights, and PJM must plan and design its transmission system to support the Merchant Transmission Facility's withdrawal up to this maximum amount. Additionally, PTO Group objects to the complexity of Trial Staff's methodology, noting

that “[h]undreds of allocations, re-determined each year, would require man-months of effort” which would come “at the expense of other important planning process analyses.”¹¹⁴ PTO Group also objects to addressing this issue in PJM’s stakeholder process, as parties have already had ample opportunity to support their positions.

Commission Determination

133. We do not find that PJM’s proposal to allocate the costs of economic upgrades using a DFAX methodology based on maximum demand is unjust and unreasonable and therefore will not impose Trial Staff’s or MTF Parties’ proposals. As discussed above, in determining whether reliability upgrades are needed, PJM must consider a Merchant Transmission Facility’s maximum awarded Firm Transmission Withdrawal Rights.¹¹⁵ It follows that, in determining whether it is beneficial to construct an economic upgrade to accelerate or modify a planned reliability upgrade, PJM will use the same assumptions (i.e., peak load for load serving entities and Firm Transmission Withdrawal Rights for Merchant Transmission Facilities).¹¹⁶ Therefore, because a Merchant Transmission Facility’s maximum awarded Firm Transmission Withdrawal Rights will contribute to the determination of whether or not an economic upgrade is needed, it is appropriate that Firm Transmission Withdrawal Rights are considered in assigning cost responsibility for below 500 kV economic upgrades. Additionally, as PJM points out, Trial Staff’s proposal is inconsistent with the way in which it plans economic upgrades for projects below 500kV. PJM assigns cost responsibility once and does not re-evaluate such assignments.¹¹⁷ It would be inconsistent with this practice for PJM to annually recalculate cost allocations to Merchant Transmission Facilities for economic upgrades. Moreover, PJM does not recalculate usage on a year-to-year basis for other customers, and we can see no basis for treating Merchant Transmission Facilities differently.

¹¹⁴ PTO Group Brief Opposing Exceptions at 40-41, citing Exh. No. PJM-3 at 29 (PJM Witness Herling).

¹¹⁵ Initial Decision, 124 FERC ¶ 63,022 at P 65, citing Exh. No. PJM-3 at 7:4-23 (PJM Witness Herling).

¹¹⁶ PTO Group Brief Opposing Exceptions at 39 (“PJM must include the planned full allotment of [Firm Transmission Withdrawal Rights] in its planning for the system, which necessarily also includes PJM’s planning determinations for economic upgrades.”).

¹¹⁷ PJM Brief Opposing Exceptions at 19.

2. Cost Allocation Methodology for Accelerated Existing Reliability Projects

Initial Decision

134. For acceleration upgrades, the Initial Decision notes that, for zones, the Partial Settlement directed that PJM will use either the DFAX methodology or an LMP benefits methodology to allocate costs related to acceleration upgrades.¹¹⁸ However, for Merchant Transmission Facilities, PJM proposes to allocate the costs of acceleration upgrades using only the DFAX methodology. The Initial Decision finds that no party justified PJM's proposal to utilize a DFAX methodology to allocate costs to Merchant Transmission Facilities when PJM uses an LMP benefits methodology to allocate costs to zones. Accordingly, the Initial Decision finds that when PJM uses an LMP benefits methodology to allocate costs to zones, PJM must also use that methodology to allocate costs to Merchant Transmission Facilities.

Exceptions

135. Trial Staff notes that the Partial Settlement provides that the allocation of such costs to a Merchant Transmission Facility will be solely its percentage share derived using the DFAX analysis (subject to change in this proceeding.) Trial Staff states that the LMP benefits methodology is forward looking, based on projections of energy consumption, fuel costs and nodal LMP. While the LMP benefits methodology is appropriate for zones which have reasonably predictable future usage, Trial Staff states that it is ill-suited for allocating costs to a Merchant Transmission Facility, whose future energy usage is difficult to project because it is discretionary and depends on factors external to PJM. Trial Staff asserts that this difficulty will lead to additional RTEP litigation.

136. MTF Parties contend that the Initial Decision improperly modified the Partial Settlement by applying the LMP benefits methodology to Merchant Transmission

¹¹⁸ Under the Partial Settlement, PJM will evaluate acceleration upgrades using both the DFAX methodology and the LMP benefits methodology. If the results indicate a ten percentage point cost responsibility assignment differential between the two methods for any transmission zone, cost responsibility for the period of time the reliability-based enhancement or expansion is accelerated shall be assigned using the LMP benefits methodology. Exh. No. PJM-2 at 83-86 (Partial Settlement ¶ 31); Exh. No. PJM-1 at 27:13-22 (PJM Witness Herling).

Facilities in certain situations. PTO Group states that they interpret the Partial Settlement as setting forth the agreed-upon methodology for allocating costs of such upgrades to both zones and Merchant Transmission Facilities. Accordingly, PTO Group recommends that Merchant Transmission Facilities should be allocated their appropriate share of such costs based on the agreed-upon methodology.

Commission Determination

137. We reverse the Initial Decision and accept PJM's proposal to use the DFAX method exclusively to allocate the cost of acceleration upgrades to Merchant Transmission Facilities. No party supports the use of the LMP benefits methodology in this circumstance. Since the DFAX methodology is used for cost allocation with respect to all other provisions, we do not find its use here unjust and unreasonable. Moreover, the LMP benefits methodology is a forward looking methodology based on projections of energy consumption, fuel costs and nodal LMP. In contrast, a Merchant Transmission Facility's future energy usage is difficult to project because it is discretionary and depends on factors external to PJM, which makes the DFAX methodology more appropriate.¹¹⁹ Further, use of the DFAX methodology avoids the potential for disputes regarding a Merchant Transmission Facility's future energy usage under the LMP benefits methodology. For these reasons, we find that it is just and reasonable to apply the DFAX methodology to Merchant Transmission Facilities at all times.

H. Motion for Clarification Regarding Collection of RTEP Costs When a Merchant Transmission Facility Receives Fewer Firm Transmission Withdrawal Rights Than Anticipated

Initial Decision

138. Under PJM's proposal, once a Merchant Transmission Facility has executed an interconnection service agreement specifying the amount of Firm Transmission Withdrawal Rights the Merchant Transmission Facility has a conditional right to receive service, and in the year that the service is to commence, PJM will begin planning for the Merchant Transmission Facility in its RTEP process. PJM does not propose to allocate costs to a Merchant Transmission Facility for RTEP upgrades prior to the interconnection service agreement's in-service date. PJM only proposes to allocate such costs during the in-service year and in subsequent years, based on the Firm Transmission Withdrawal Rights specified in the interconnection service agreement. The Initial Decision concludes

¹¹⁹ Exh. No. S-3 at 16 (Staff Witness Siems).

that this is appropriate because PJM uses a Merchant Transmission Facility's Firm Transmission Withdrawal Rights for planning purposes.

139. However, the Initial Decision recognized that, if a Merchant Transmission Facility is late entering into service, the Merchant Transmission Facility may have to pay for upgrades before it begins to benefit from them. Further, the Merchant Transmission Facility may have no control over when it commences service, because transmission owners generally construct any necessary interconnection upgrades. To alleviate this situation, the Initial Decision ordered PJM to develop a mechanism to defer collection until the MTF goes into service:

PJM shall develop the following mechanism for both reliability upgrades and economic upgrades. If PJM allocates the costs of an upgrade to an MTF based on its planned firm transmission withdrawal rights, the constructing TO shall enter RTEP charges allocated to the MTF in the TO's AFUDC account, and PJM shall not collect revenues for the upgrade from the MTF until it goes into service. PJM may collect [transmission enhancement charges] from the MTF prior to its going into service only if PJM (or the constructing TO) can demonstrate that the MTF is at fault for the delayed in-service date. If the MTF receives fewer firm transmission withdrawal rights than the number specified in the [interconnection service agreement], PJM shall base its collections on the actual number of firm transmission withdrawal rights awarded. PJM may collect [transmission enhancement charges] from the MTF based on more than its actual firm transmission withdrawal rights only to the extent that PJM or the TO can demonstrate that the MTF is responsible for receiving fewer firm transmission withdrawal rights than are specified in the [interconnection service agreement].¹²⁰

140. The Initial Decision directed PJM to develop such a mechanism within thirty days of the issuance of a final Commission order in this proceeding.

Motion for Clarification

141. No party excepted to the Initial Decision's compliance directive. PJM, however, seeks clarification of the mechanism to be developed, questioning whether it should defer collection of RTEP costs or reallocate such costs to other market participants. Without

¹²⁰ Initial Decision, 124 FERC ¶ 63,022 at P 168.

such clarification, PJM argues, transmission owners responsible for building RTEP upgrades would not fully recover their costs. PJM states that while it does not oppose this ruling, the Presiding Judge did not state clearly how PJM is to recover the costs which are not collected from a Merchant Transmission Facility in the named circumstances.

142. PJM asserts that the Commission should clarify that, once the Merchant Transmission Facility has received its full amount of Firm Transmission Withdrawal Rights, PJM should collect from that Merchant Transmission Facility the deferred costs from the period that the Merchant Transmission Facility held fewer Firm Transmission Withdrawal Rights than specified in its interconnection service agreement and during which period PJM collected fewer charges based on the lower Firm Transmission Withdrawal Right amount. In the alternative, PJM proposes to reallocate the costs not collected from the Merchant Transmission Facility among other Merchant Transmission Facilities and responsible customers, for the period when it is collecting less charges based on fewer Firm Transmission Withdrawal Rights. PJM asserts that under this second option, the Commission should provide for reinstatement of full Merchant Transmission Facility cost responsibility based on the Firm Transmission Withdrawal Rights specified in the interconnection service agreement, once the Merchant Transmission Facility receives its full amount of Firm Transmission Withdrawal Rights.

143. PTO Group responds that in the event that a Merchant Transmission Facility receives fewer Firm Transmission Withdrawal Rights than specified in its interconnection service agreement, it is not the transmission owners which would under-pay, but rather, PJM as the billing agent would under-recover the proper costs, and would need to make up the difference from PJM members. Further PTO Group notes that a constructing transmission owner cannot enter a Merchant Transmission Facility's allocated charges in its Allowance for Funds Used During Construction (AFUDC) account once a project is in-service. Rather, at that point, the transmission owner must develop a revenue requirement for the project and PJM, as the billing agent, should set up appropriate accounts receivable and payable to track such expenses.

144. No party objected to PJM's motion for clarification.

Commission Determination

145. Merchant Transmission Facilities become responsible for upgrades because PJM plans the upgrades to support the Firm Transmission Withdrawal Rights given to the Merchant Transmission Facility. The fact that a project is delayed or not in-service does not change the fact that the upgrades were built in anticipation of the Merchant Transmission Facility being in-service. Therefore, the Merchant Transmission Facility should bear its proportionate level of costs. The Initial Decision, as well as the parties, however, recognized that from a practical standpoint, if a Merchant Transmission Facility

is not in service, it may not be receiving revenues to cover these costs. Thus, the Initial Decision required, and the parties did not object, to a deferral of collection of such costs until the Merchant Transmission Facility is in service. In response to PJM's motion for clarification, we will require PJM to include in a compliance filing a provision that establishes an appropriate account (whether AFUDC or another account) to hold deferred costs until the Merchant Transmission Facility's in-service date. However, PJM may bill the Merchant Transmission Facility at an earlier date if the Merchant Transmission Facility is determined to be responsible for a delay in the in-service date.

146. To the extent that the Merchant Transmission Facility receives less than the full allocation of Firm Transmission Withdrawal Rights on the in-service date, PJM should bill the Merchant Transmission Facility based on the actual Firm Transmission Withdrawal Rights available at that time while deferring further collections until the full Firm Transmission Withdrawal Rights are awarded. However, PJM may base its billing on the full amount of Firm Transmission Withdrawal Rights if the Merchant Transmission Facility is determined to be responsible for the delay resulting in its receipt of fewer Firm Transmission Withdrawal Rights.

III. Compliance Directives

147. The Presiding Judge directed PJM, within 30 days of the issuance of a final Commission order in this proceeding, to: "(1) modify its OATT as prescribed in Paragraphs 168, 180, 186, 191, 198, and 202 [of the Initial Decision]; and (2) recalculate the allocations in this proceeding in accordance with the foregoing OATT revisions and collect and/or refund the appropriate amounts, with interest."¹²¹ As discussed in this order, we affirm the Initial Decision's acceptance of PJM's proposal, as modified, except that as discussed above, we have rejected the Initial Decision modifications discussed in Paragraphs 180, 186, and 198 of the Initial Decision. Accordingly, PJM must submit, within 30 days of the date of this order, revisions to its OATT to implement this order, including revisions to Schedule 12-Appendix to recalculate the allocations to Merchant Transmission Facilities, as necessary.

The Commission orders:

(A) The Initial Decision is affirmed in part and reversed in part, as discussed in the body of this order.

¹²¹ Initial Decision, 124 FERC ¶ 63,022 at P 207.

(B) PJM must file, within 30 days of the date of this order, revisions to the PJM Open Access Transmission Tariff to replace its current interim tariff sheets.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.