

139 FERC ¶ 61,243
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

PJM Interconnection, L.L.C.

Docket Nos. ER06-456-021
ER06-954-017
ER06-1271-016
ER07-424-012
EL07-57-007

OPINION NO. 503-A

ORDER ON REHEARING

(Issued June 21, 2012)

1. On November 19, 2009, the Commission issued an order addressing an initial decision¹ concerning the allocation of Regional Transmission Expansion Plan (RTEP) upgrade costs to Merchant Transmission Facilities with Firm Transmission Withdrawal Rights in PJM Interconnection, L.L.C. (PJM).² In Opinion No. 503, the Commission largely affirmed 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 with Firm Transmission Withdrawal Rights was just and reasonable, and not unduly discriminatory or preferential, with certain modifications.³ Timely requests for rehearing of Opinion No. 503 were filed by the Long Island Power Authority and East Coast Power, L.L.C. (MTF Parties), Public Service Electric and Gas Company (PSEG), and the New York Power Authority (NYPA). This order denies the requests for rehearing.

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

² *PJM Interconnection, L.L.C.*, Opinion No. 503, 129 FERC ¶ 61,161 (2009).

³ The Commission directed PJM to submit revisions to its Open Access Transmission Tariff (OATT or Tariff) to implement Opinion No. 503. These revisions are discussed in a separate order.

I. Background

2. The background of this proceeding is set out in greater detail in the Commission's prior orders in this proceeding. A brief overview is provided below, however.
3. On January 5, 2006, May 4, 2006, July 21, 2006, and January 11, 2007, 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 the approved projects. The Commission accepted and suspended the filed tariff revisions, made them effective subject to refund, established hearing and settlement judge procedures, and consolidated the proceedings (Docket Nos. ER06-456, *et al.*).⁴ 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.⁵
4. On September 14, 2007, the parties filed a settlement with the Commission, which resolved all issues set for hearing regarding the assignment of cost responsibility for below 500 kV RTEP upgrades to PJM transmission zones (Partial Settlement). Specifically, the Partial Settlement established that PJM will use a distribution factor (DFAX) analysis based methodology for determining the beneficiaries of a below 500 kV upgrade and therefore, who should pay.⁶ However, the Partial Settlement reserved for

⁴ *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,261 (2006) (May 26, 2006 Order); *PJM Interconnection, L.L.C.*, 116 FERC ¶ 61,118 (2006); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,058 (2006), *order on reh'g*, 119 FERC ¶ 61,067 (2007); *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,033, *order on reh'g*, 120 FERC ¶ 61,193 (2007).

⁵ *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,067 (2007); *see also 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), *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009), *order on remand*, 138 FERC ¶ 61,230 (2012).

⁶ 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: Transmission Enhancement Charges § (b)(iii)(C)(1).

hearing issues pertaining to assignments of cost responsibility to Merchant Transmission Facilities.⁷ Additionally, the issue of how PJM is to allocate RTEP costs for 500 kV and above upgrades to Merchant Transmission Facilities was later included as a hearing issue.⁸

5. PJM proposed to assign Merchant Transmission Facilities with Firm Transmission Withdrawal Rights cost responsibility for RTEP reliability and economic upgrades. PJM asserted that it is appropriate that Merchant Transmission Facilities with Firm Transmission Withdrawal Rights 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 with Firm Transmission Withdrawal Rights 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 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 (LMPs) resulting from the economic upgrades accrue to them just as they accrue to all other similarly located loads.⁹

6. PJM proposed that, for purposes of cost allocation, a Merchant Transmission Facility with Firm Transmission Withdrawal Rights should be treated as a separate zone. 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 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. 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

⁷ The Commission accepted the Partial Settlement on July 29, 2008. *See PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,112 (2008); *see also PJM Interconnection, L.L.C.*, Docket No. ER06-456-015, *et al.* (Oct. 15, 2008) (unpublished letter order).

⁸ Opinion No. 494-A, 122 FERC ¶ 61,082, at P 92 (2008).

⁹ *Initial Brief of PJM Interconnection, L.L.C.* at 8-10, Docket No. ER06-456 (June 16, 2008).

Rights to determine the Merchant Transmission Facility's *pro rata* share of these regional upgrades.

7. On September 18, 2008, the Presiding Administrative Law Judge (ALJ) issued an initial decision generally upholding PJM's proposal to allocate RTEP costs to Merchant Transmission Facilities with Firm Transmission Withdrawal Rights.¹⁰ On November 19, 2009, the Commission issued Opinion No. 503 adopting almost all of the Initial Decision's determinations.

8. In brief, the Commission determined in Opinion No. 503 that PJM's proposal to assign Merchant Transmission Facilities cost responsibility for RTEP upgrades is just and reasonable and not unduly discriminatory or preferential. The Commission found that, just as load generally removes energy from the system, a Merchant Transmission Facility with Firm Transmission Withdrawal Rights withdraws energy from one system and injects it into another. Accordingly, the Commission determined that it is appropriate that Merchant Transmission Facilities be responsible for a portion of the costs of PJM providing service to accommodate such withdrawals through RTEP charges. The Commission noted that, under the PJM OATT, Merchant Transmission Facilities are also responsible for paying 100 percent of the "but for" costs associated with their interconnection. However, the Commission found 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 because such charges are for different services.

9. The Commission determined that PJM's proposal was not unjust and unreasonable for failing to include two alternative proposals: a crediting mechanism supported by NYPA, which was intended to address the fact that Merchant Transmission Facilities pay both "but for" charges and RTEP charges; and a proposal supported by MTF Parties, which was intended to address the fact that Merchant Transmission Facilities have static loads (i.e., the energy demand that Merchant Transmission Facilities can place on the PJM system is fixed at the time of interconnection). As to the latter claim, in particular, the Commission found that even the static load of Merchant Transmission Facilities with Firm Transmission Withdrawal Rights contribute to potential reliability violations.

10. The Commission affirmed the Initial Decision's determination that PJM met the burden under section 205 of the Federal Power Act (FPA) to show that its proposal is just and reasonable and not unduly discriminatory or preferential. Regarding below 500 kV reliability facilities, the Commission recognized that the Partial Settlement specified that the "use of a DFAX-based methodology" is one of the issues that is "finally resolved"

¹⁰ Initial Decision, 124 FERC ¶ 63,022.

and that “shall not be the subject of litigation at the hearing regarding assignments of cost responsibility to merchant transmission facilities.”¹¹ Additionally, the Commission found that PJM provided sufficient evidence to show that Merchant Transmission Facilities with Firm Transmission Withdrawal Rights are similarly situated to zones, thus warranting the extension of the DFAX methodology to Merchant Transmission Facilities. Regarding below 500 kV economic projects, the Commission accepted PJM’s proposal to use a DFAX methodology based on maximum demand to determine a Merchant Transmission Facility’s allocation of costs. For 500 kV and above facilities, the Commission found it appropriate that a Merchant Transmission Facility be assigned a portion of the costs of such a facility based on its load-ratio share.

11. Although the Commission found that Merchant Transmission Facilities with Firm Transmission Withdrawal Rights are similarly situated to zones, it rejected arguments that Merchant Transmission Facilities are similarly situated to PJM exports, noting that PJM will not know if it will be providing service to these exports in the long term. Accordingly, the Commission found that allocating RTEP costs to Merchant Transmission Facilities, but not to exports, does not amount to undue discrimination or preference.

12. While the Commission adopted almost all of the Initial Decision’s determinations, it reversed 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 a LMP benefits methodology to allocate the costs of certain below 500 kV economic upgrades to Merchant Transmission Facilities when PJM uses this methodology to allocate costs to zones.¹²

13. Timely requests for rehearing were submitted by NYPA, MTF Parties, and PSEG.

II. Discussion

14. As discussed below, we affirm our findings in Opinion No. 503 and deny rehearing.

¹¹ Opinion No. 503, 129 FERC ¶ 61,161 at P 98.

¹² Opinion No. 503’s findings, as relevant here, are discussed in further detail below.

A. **PJM's allocation of RTEP costs to Merchant Transmission Facilities is just and reasonable and not unduly discriminatory or preferential**

1. **Opinion No. 503**

15. As noted previously, in Opinion No. 503, the Commission found PJM's proposal allocating the costs of RTEP projects to Merchant Transmission Facilities with Firm Transmission Withdrawal Rights to be just and reasonable and not unduly discriminatory or preferential. The Commission noted that, under the PJM OATT, Merchant Transmission Facilities are treated comparably to generators for interconnection purposes and are responsible for paying 100 percent of the "but for" costs of their interconnection based on the project's position in the interconnection queue. This represents the minimum upgrades needed at the time of the interconnection study.¹³

16. However, Opinion No. 503 also noted that the PJM system 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. As part of the RTEP process, PJM reviews these changes and decides whether additional upgrades need to be constructed.¹⁴ Although Merchant Transmission Facilities are treated comparably to generators for interconnection purposes, Opinion No. 503 noted that, after interconnection, Merchant Transmission Facilities with Firm Transmission Withdrawal Rights more closely resemble load than generation. While generation typically adds energy to the system, load generally removes energy from the system. Specifically, a Merchant Transmission Facility with Firm Transmission Withdrawal Rights withdraws energy from one system and injects it into another. Accordingly, PJM must plan so that it can provide safe and reliable service to the Merchant Transmission Facilities just as it does for other customers. Thus, the Commission determined that Merchant Transmission Facilities with Firm Transmission Withdrawal Rights, like load, should be responsible for a portion of the costs of PJM providing this service.¹⁵

17. Opinion No. 503 recognized that there are differences between Merchant Transmission Facilities and zones; in particular, Merchant Transmission Facilities have static loads. However, the Commission determined that such differences are not significant enough to warrant different treatment for transmission planning purposes.¹⁶

¹³ Opinion No. 503, 129 FERC ¶ 61,161 at P 22.

¹⁴ *Id.* P 24.

¹⁵ *Id.* P 25.

¹⁶ *Id.* P 73.

Opinion No. 503 found that Merchant Transmission Facilities do not pay for all upgrades necessary when they interconnect, but only construct “but for” upgrades to the extent that PJM requires capacity in addition to existing Available Transfer Capability (ATC or “headroom”).¹⁷ Further, Opinion No. 503 noted that, while a Merchant Transmission Facility’s Firm Transmission Withdrawal Rights are static, the PJM system overall is not static, and 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 Merchant Transmission Facility subscribed. Accordingly, Opinion No. 503 found that it is just, reasonable, and not unduly discriminatory or preferential for PJM to charge Merchant Transmission Facilities for the costs of assuring service.¹⁸ Additionally, Opinion No. 503 noted that, in conducting the RTEP process, PJM does not segregate load growth from other factors affecting the need for an upgrade.¹⁹

2. Requests for rehearing

18. NYPA and MTF Parties argue in their rehearing requests that, by accepting PJM’s proposal, Opinion No. 503 treats Merchant Transmission Facilities in an unduly discriminatory manner. In particular, NYPA and MTF Parties contend that Opinion No. 503 fails to account for the fact that a Merchant Transmission Facility’s load is static. Under PJM’s Tariff, a Merchant Transmission Facility cannot establish a new firm interconnection or increase its firm load without going through PJM’s interconnection process, which directly assigns to the Merchant Transmission Facility the costs of “but for” network upgrades needed to ensure system reliability. NYPA and MTF Parties further assert that such undue discrimination will discourage the development of Merchant Transmission Facilities in PJM, thus undermining the Commission’s previous efforts to encourage the construction of new transmission.

19. Specifically, NYPA objects to the fact that Merchant Transmission Facilities pay all of their own firm load growth-related network upgrade costs and a portion of the costs incurred to accommodate zones’ load growth (i.e., through costs related to interconnection and RTEP upgrades). In contrast, zones pay none of the Merchant Transmission Facilities’ interconnection costs and only a portion of their own load growth costs (i.e., zones only pay for RTEP upgrades). NYPA asserts that, as a result, Merchant Transmission Facilities are assigned more costs for load growth-related network upgrades than are zones. According to NYPA, the Commission approved this unduly discriminatory allocation of growth-related network upgrade costs to Merchant

¹⁷ *Id.* P 109.

¹⁸ *Id.* P 110.

¹⁹ *Id.* P 111.

Transmission Facilities and zones, despite the Commission's own finding that Merchant Transmission Facilities and zones are "similarly situated" for transmission planning purposes because they withdraw energy in the same way and have the same effects on the transmission system. NYPA argues that this different treatment of Merchant Transmission Facilities and zones violates the fundamental tenet of the Commission's transmission pricing policy: that a pricing regime "should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions as the transmission provider's uses of its system."²⁰

20. Further, NYPA objects to the Commission's focus on the "ongoing" effects of Merchant Transmission Facilities and argues that the Commission pays little attention to the upfront costs paid by Merchant Transmission Facilities. NYPA argues that Merchant Transmission Facilities' interconnection network upgrades may primarily benefit zones, as illustrated by its Hudson Transmission Partners, L.L.C. (HTP) example in which HTP was directly assigned costs for two network upgrades, even though PJM determined that zones would receive 90 percent and 99 percent of the DFAX-measured benefits of these facilities. NYPA argues that, while there is one part of "ongoing" RTEP costs that might merit assignment to Merchant Transmission Facilities by a means other than the assessment of initial interconnection costs, namely upgrade costs that are not load growth-related and that arise after the initial assessment of network upgrade costs to Merchant Transmission Facilities, the Commission should not lump all ongoing costs together and make Merchant Transmission Facilities responsible for them. Finally, NYPA states that Opinion No. 503 observes that the disparity in the allocation of RTEP costs will diminish over time as zones' loads grow faster than Merchant Transmission Facility loads. However, NYPA contends that this argument does not deny the existence of undue discrimination against Merchant Transmission Facilities in the first place; it only suggests that the degree of undue discrimination may lessen over time.

21. Taking a different approach, MTF Parties assert that Merchant Transmission Facilities and network load are not similarly situated; therefore, it is unjust, unreasonable, and unduly discriminatory to allocate RTEP load-growth costs to them and network load on a comparable basis. MTF Parties state that the Commission's own policies and precedent do not allow a Merchant Transmission Facility to unilaterally increase its Firm Transmission Withdrawal Rights (i.e., its load). Thus, to act consistently with its policies and precedent, the Commission must ensure that Merchant Transmission Facilities are only allocated RTEP charges associated with system topology changes and generator retirements. MTF Parties assert that the Commission may depart from its existing

²⁰ NYPA Rehearing Request at 19 (citing *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act; Policy Statement*, FERC Stats. & Regs. ¶ 31,005, at 31,142 (1994)).

policies only after acknowledging its former policy and explaining its rationale for departing from it so that a reviewing court will understand the basis of the agency's actions.

22. MTF Parties state that, while a Merchant Transmission Facility's contribution to load-growth is zero, 54 percent to 70 percent of all RTEP costs allocated to the Merchant Transmission Facilities in this proceeding are derived from load-growth upgrades. MTF Parties argue that because Merchant Transmission Facilities cannot physically or logically cause the need for these load-growth upgrades, the principles of cost causation cannot reasonably support the allocation of such significant load-growth RTEP costs to static Merchant Transmission Facilities.

23. MTF Parties state that generalized reliability benefits and vague assumptions regarding the use of ATC do not justify allocating load-growth related RTEP costs to Merchant Transmission Facilities. According to MTF Parties, Opinion No. 503 fails to cite any evidence demonstrating that any assumed generalized benefit of system reliability directly correlates and is "roughly commensurate" with the extent of load-growth related RTEP upgrade costs allocated to Merchant Transmission Facilities under the PJM methodology.²¹ Additionally, MTF Parties assert that reliance on ATC fails because PJM's witness Mr. Herling admitted on cross-examination that PJM does not measure ATC, nor is there any way to calculate its use. MTF Parties question how a condition that is not measured, is not linear, and changes from year to year can be the basis for justifying imposition of PJM network load-growth costs on static Merchant Transmission Facilities.²²

3. Commission Determination

24. After considering Merchant Transmission Facilities in the context of the PJM interconnection, planning, and cost allocation processes, we reaffirm our finding in Opinion No. 503 that PJM has shown that its proposal is just, reasonable, and not unduly discriminatory or preferential. When Merchant Transmission Facilities seek to interconnect with the PJM system, there is an immediate and determinable reliability impact that must be addressed and for which Merchant Transmission Facilities with Firm

²¹ MTF Parties refer to a finding by the Seventh Circuit that there must be "an articulable and plausible reason to believe that the benefits are at least roughly commensurate [to costs]." *See* MTF Parties Rehearing Request at 21 (citing *Ill. Commerce Comm'n*, 576 F.3d at 477).

²² MTF Parties also contend that the DFAX methodology is not equivalent to a measure of the contribution of causality for any associated upgrades. The DFAX methodology is discussed further in section D below.

Transmission Withdrawal Rights are assessed “but for” network upgrade costs. However, over time, Merchant Transmission Facilities with Firm Transmission Withdrawal Rights, like all load on the system, contribute to the need for additional upgrades to the PJM transmission system,²³ and therefore, it is appropriate that they be allocated a portion of the costs of RTEP upgrades.

25. To begin with, we reiterate that 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 an 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 the beneficiaries of the facilities.²⁴

26. The Commission previously approved PJM’s proposal that, like generators, Merchant Transmission Facilities be responsible for 100 percent of the “but for” costs associated with interconnecting to the PJM system.²⁵ These “but for” costs are simply the minimum upgrades needed to ensure that the Merchant Transmission Facility can be interconnected reliably at the time of the study process. (The Merchant Transmission Facility may also 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.) 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

²³ Initial Decision, 124 FERC ¶ 63,022 at P 65 (citing PJM-1 at 30:16-20 (Mr. Herling, explaining that “[j]ust as load withdraws its megawatt consumption at a point within the zone, so does a merchant D.C. transmission terminal. Thus, when a region in question needs reliability upgrades, which are equally caused by all loads in the zone, merchant transmission loads at merchant D.C. terminals are part of the cause of the upgrade.”)).

²⁴ Opinion No. 494, 119 FERC ¶ 61,063 at P 45.

²⁵ Opinion No. 503, 129 FERC ¶ 61,161 at PP 39-48.

Merchant Transmission Facility to interconnect to the PJM system at a point that will minimize its cost responsibility.²⁶

27. 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.²⁷ 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.²⁸

28. As we discuss further below, although Merchant Transmission Facilities are responsible for all costs associated with interconnecting to the PJM system, Merchant Transmission Facilities are not essentially similar to generation. While new generation adds energy to the system, Merchant Transmission Facilities with Firm Transmission Withdrawal Rights use those Firm Transmission Withdrawal Rights to take energy out of the system. Accordingly, PJM must plan so that it can provide safe and reliable service to the Merchant Transmission Facilities just as it does for other customers. Merchant Transmission Facilities with Firm Transmission Withdrawal Rights therefore more closely resemble load than generation and PJM's proposal to allocate transmission costs to such Merchant Transmission Facilities, as it does load, is just and reasonable.

29. NYPA's and MTF Parties' primary assertion on rehearing is that Merchant Transmission Facilities are being unduly discriminated against, and that such undue discrimination will discourage the development of Merchant Transmission Facilities in PJM. As a preliminary matter, we clarify that our finding here is not intended to discourage the development of Merchant Transmission Facilities, and NYPA and MTF Parties have not shown that such an impact will result. The Commission has consistently found that Merchant Transmission Facilities can play a useful role in expanding

²⁶ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 695.

²⁷ PJM's RTEP process is set forth in Schedule 12 of the PJM OATT and Schedule 6 of the PJM Operating Agreement.

²⁸ The costs are first allocated among the PJM zones, and the zones allocate these costs to their customers.

competitive generation alternatives for customers and meeting reliability needs.²⁹ However, the Commission has also consistently determined that Merchant Transmission Facilities should assume full market and financial risks for their projects.³⁰ As we stated in Opinion No. 503, our objective in this proceeding is “to create an appropriate and fair methodology to allocate the costs of RTEP upgrades to Merchant Transmission Facilities.”³¹

30. However, determining what is “an appropriate and fair methodology” is complicated by the fact that Merchant Transmission Facilities have a unique function. While Merchant Transmission Facilities are similarly situated to zones in many respects, they do have certain differences, and parties requesting rehearing of Opinion No. 503 highlight these differences in arguing that PJM’s proposal is not just and reasonable.

31. We consider the specific arguments on rehearing below.

32. NYPA objects to the assignment of *both* interconnection and RTEP costs to Merchant Transmission Facilities, stating that the “but for” interconnection upgrades of Merchant Transmission Facilities are no different from the upgrades of transmission zones planned through the RTEP process. NYPA argues that Merchant Transmission Facilities thus end up paying not only all of their own firm load growth-related network upgrade costs but also a portion of the costs incurred to accommodate transmission zones’ load growth.³² They maintain, however, that transmission zones pay none of the Merchant Transmission Facilities’ firm load growth-related costs and only a portion of their own costs.

²⁹ *Linden VFT, L.L.C.*, 119 FERC ¶ 61,066, at P 45 (2007); *Montana Alberta Tie, Ltd.*, 116 FERC ¶ 61,071, at P 24 (2006); *Sea Breeze Pacific Juan de Fuca Cable, L.P.*, 112 FERC ¶ 61,295, at P 21 (2005); *Neptune Regional Transmission System, L.L.C.*, 96 FERC ¶ 61,147, at 61,633 (2001); *TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230 at 61,838 (2000).

³⁰ *Northeast Utilities Service Co.*, 98 FERC ¶ 61,310 (2002); *TransEnergie U.S., Ltd. and Hydro One Delivery Services Inc.*, 98 FERC ¶ 61,147 (2002); *TransEnergie U.S., Ltd.*, 98 FERC ¶ 61,144 (2002); *Neptune Regional Transmission System, LLC*, 96 FERC ¶ 61,147, *order on reh’g*, 96 FERC ¶ 61,326 (2001); *TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230 (2000).

³¹ Opinion No. 503, 129 FERC ¶ 61,161 at P 21.

³² We discuss whether the assignment of both “but for” costs and RTEP costs to Merchant Transmission Facilities violates the Commission’s “and” pricing policy in further detail in section F of this order.

33. We disagree with NYPA, and deny its objections. Even though the physical equipment required for merchant transmission interconnection may be comparable to RTEP upgrades, the circumstances surrounding those upgrades are different, and thus Merchant Transmission Facilities are appropriately required to fully fund the upgrades necessary for their interconnection. When a Merchant Transmission Facility interconnects to the PJM system, there may be an immediate reliability impact, and therefore it is appropriate that the Merchant Transmission Facility pay the “but for” costs associated with interconnecting to the PJM system. Likewise, there may be an immediate reliability impact when a Merchant Transmission Facility seeks to increase its Firm Transmission Withdrawal Rights over an existing interconnection, and thus it is appropriate that the Merchant Transmission Facility be responsible for the associated “but for” network upgrades.

34. As the Commission recognized in Order No. 2003, such “but for” pricing administered by independent RTOs has the potential to provide more efficient price signals and equitable allocation of costs. Moreover, although an application of the DFAX methodology may show that zonal load flows take place over Merchant Transmission Facilities’ interconnection upgrades, this does not change the fact that such network upgrades would not be necessary “but for” the Merchant Transmission Facility’s decision to interconnect. As the Commission explained in Order No. 2003, permitting RTOs to require interconnecting customers to pay “but for” interconnection costs encourages those customers to site their new facilities where the overall costs of interconnecting are the lowest.³³ Further, in arguing that other load does not compensate a Merchant Transmission Facility for the benefits they receive from “but for” network upgrades, NYPA ignores the compensation, in the form of financial transmission rights (i.e., Auction Revenue Rights and Capacity Transfer Rights) that a Merchant Transmission Facility receives from its interconnection upgrades. These Financial Transmission Rights, which entitle a project to the payment of funds related to congestion, are ultimately funded by the load using the lines through congestion charges. Thus, while load does not share in the initial costs of the network upgrades assessed under the “but for” test, the load (other than the Merchant Transmission Facilities) that

³³ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at PP 695-96. As the Commission explained, sharing the costs among all those that might benefit from the network facilities “mutes somewhat the Interconnection Customer’s incentive to make an efficient siting decision.” *See Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 51 (D.C. Cir. 2008) (affirming the use of the “but for” test despite allegations that the facilities provided benefits to other customers).

uses the paths across these facilities pays the merchant transmission provider the congestion costs resulting from such use.³⁴

35. While, for these reasons, “but for” interconnection charges are appropriately assigned to Merchant Transmission Facilities, PJM reasonably proposed that such “but for” interconnection charges should not be the only obligations of Merchant Transmission Facilities. As stated in Opinion No. 503, for planning purposes Merchant Transmission Facilities more closely resemble load, because both Merchant Transmission Facilities with Firm Transmission Withdrawal Rights and load withdraw energy from the PJM system.³⁵ PJM must plan its system to accommodate both the full Firm Transmission Withdrawal Rights of a Merchant Transmission Facility and a zone’s projected peak load.³⁶ Moreover, PJM must consider more than just load growth in its planning process; PJM must also consider generator retirements and additions, as well as changes in the use and flow of the system.³⁷ The new RTEP facilities that are constructed for all of these reasons as a result of PJM’s planning process provide both load and Merchant Transmission Facilities with access to a reliable and economic source of electricity. Because PJM considers a Merchant Transmission Facility’s Firm

³⁴ In Order No. 2003, the Commission found that, in the context of an independently administered tariff by an RTO, the payment of congestion charges to the Interconnection Customer (as opposed to the receipt of credits for the upgrade) was appropriate. Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 700 (“even though the “but for” approach allows the cost of certain Network Upgrades to be assigned to the Interconnection Customer, it is not “and” pricing if, for example, the Interconnection Customer is allowed to receive well-defined capacity rights that are created by the upgrades. For example, PJM, which uses locational pricing, gives Firm Transmission Rights (FTRs) and Capacity Interconnection Rights (CIRs) to the Interconnection Customer in exchange for a “but for” cost payment. These are rights that are created by the Network Upgrades for which the Interconnection Customer pays, and they are well defined”).

³⁵ Opinion No. 503, 129 FERC ¶ 61,161 at PP 72-73.

³⁶ *Id.* P 73 (citing Exh. No. PTO-9 at 23:6-18).

³⁷ Because the reasons for RTEP upgrades are based on a variety of factors, not simply load growth, it would not be practical or appropriate to exclude from the RTEP allocation merchant transmission providers, as suggested by NYPA, and other load that do not experience load growth. The lack of load growth does operate to reduce the allocation to these parties since those parties with no load growth will be allocated a smaller percentage of the costs than those whose load has increased.

Transmission Withdrawal Rights in its planning process, and plans upgrades to ensure that there is adequate capacity to allow a Merchant Transmission Facility to withdraw up to its full Firm Transmission Withdrawal Rights, it is appropriate that PJM allocate a portion of the costs of any necessary upgrades to the Merchant Transmission Facility.³⁸

36. The MTF Parties cite to the fact that Merchant Transmission Facilities are static load as a characteristic that distinguishes Merchant Transmission Facilities from network load. It is correct that Merchant Transmission Facilities are static load, and Opinion No. 503 recognized this fact.³⁹ However, MTF Parties' statement that Merchant Transmission Facilities should therefore not pay any portion of RTEP upgrades attributable to load growth assumes that a Merchant Transmission Facility pays all of the costs to accommodate the addition of its load to the PJM system at the time it interconnects. As noted in Opinion No. 503, the record shows that this assumption is untrue.⁴⁰ A Merchant Transmission Facility only pays interconnection costs to the extent that there is not sufficient ATC on the system to accommodate its interconnection.⁴¹ But that cost does not fully compensate for the transmission network that will need to be constructed to support Merchant Transmission Facilities' withdrawals from the system. Even though, as MTF Parties note, PJM does not quantify ATC, this does not change the fact that Merchant Transmission Facilities can make substantial use of existing ATC. This is demonstrated by the example cited in Opinion No. 503 of the estimated interconnection costs for Neptune Regional Transmission System, LLC (Neptune) and

³⁸ This is consistent with the Commission's finding in *Neptune Regional Transmission System, LLC v. PJM Interconnection, L.L.C.*, 111 FERC ¶ 61,455, at P 25, 29 (2005). In that proceeding, the Commission recognized that the determination of interconnection costs would not necessarily be the limit of a Transmission Owner's responsibility, and that Merchant Transmission Owners could be held responsible for future reliability upgrade costs that might be imposed pursuant to PJM's regional expansion plan. ("[T]o the extent that First Energy is raising questions about the necessity for and allocation of costs for upgrades necessary to ensure reliability of service for all firm loads, those issues were discussed above and will be resolved pursuant to PJM's RTEP, and the costs allocated pursuant to filings under Schedule 12 of PJM's tariff").

³⁹ Opinion No. 503, 129 FERC ¶ 61,161 at P 108.

⁴⁰ *Id.* PP 44-45, 109-110.

⁴¹ *Id.* P 109 (citing Initial Decision, 124 FERC ¶ 63,022 at P 134 n. 34 (citing Tr. at 670:8-11); Tr. at 670:8-11, 14-25; Tr. at 589:1-12).

HTP.⁴² While Neptune's network upgrade costs were estimated at approximately \$9 million, the network upgrade costs for HTP, a slightly smaller project, were estimated at approximately \$450 million.⁴³ The difference in upgrade costs for these projects is largely a result of the substantially greater amount of ATC available to the Neptune project.

37. The fact that a Merchant Transmission Facility's load cannot grow does not render the allocation of RTEP costs to it unjust and unreasonable. Static load is just as responsible for upgrade costs as is a zone with an increase in load.⁴⁴ Accordingly, a Merchant Transmission Facility can be responsible for reliability upgrades caused by load growth since, as the PJM system and use of the system changes after the Merchant Transmission Facility's initial interconnection due to various factors, including but certainly not limited to load growth, the Merchant Transmission Facility's use of ATC contributes to the need for these reliability upgrades and thus should contribute to the cost of these reliability upgrades. In a like manner, zones with low projected load growth are also still allocated RTEP costs under the PJM OATT, since these zones also still contribute to the need for reliability upgrades through their use of the transmission system.

38. NYPA claims that Opinion No. 503's observation that a Merchant Transmission Facility's allocation of RTEP costs will diminish over time as zones' loads grow does not mean that there is no undue discrimination. As discussed above, however, it is appropriate that a Merchant Transmission Facility be allocated a portion of the costs of RTEP upgrades because its load, even though a static load, contributes to the need for such upgrades. Furthermore, the statement to which NYPA refers was taken out of context, and was instead primarily intended to recognize that the DFAX methodology inherently accounts for changes in load growth.⁴⁵

⁴² *Id.* (citing Initial Decision, 124 FERC ¶ 63,022 at P 135; Exh. No. PJM-3 at 14:12-19).

⁴³ *Id.*

⁴⁴ *Southeastern Michigan Gas Company v. FERC*, 133 F.3d 34, 41 (D.C. Cir 1998) ("the costs of increased demand may equitably be attributed to every user" since each user is economically marginal).

⁴⁵ Specifically, since distribution factors represent a measure of the effect of the load of a transmission zone or Merchant Transmission Facility on a transmission constraint, Merchant Transmission Facilities or zones with lower projected load growth will have a lesser effect on future transmission constraints over time.

39. The MTF Parties list a number of differences between Merchant Transmission Facilities and network load; however, these differences are not significant when considered in the context of PJM's planning process. These differences include: PJM treats Merchant Transmission Facilities as a separate class of customers; Merchant Transmission Facilities with Firm Transmission Withdrawal Rights have a lower priority than network load for interruption and curtailment; holders of Firm Transmission Withdrawal Rights over Merchant Transmission Facilities are not treated as equivalent to PJM network load in the allocation of incremental rights; and PJM adjusts network loads in RTEP to reflect normal and emergency conditions, yet makes no similar adjustment to a Merchant Transmission Facility's Firm Transmission Withdrawal Rights. MTF Parties have not shown why these distinctions should cause PJM to not include a Merchant Transmission Facility's full Firm Transmission Withdrawal Rights in the planning process.⁴⁶ In fact, it is the physical impact of a Merchant Transmission Facility withdrawing energy from the PJM system, measured through the Merchant Transmission Facility's Firm Transmission Withdrawal Rights, that PJM considers in the planning process when determining the need for RTEP upgrades and, thus, Firm Transmission Withdrawal Rights are the most relevant consideration in deciding whether a Merchant Transmission Facility should be assessed RTEP costs. Additionally, MTF Parties have not shown how the Firm Transmission Withdrawal Rights of a Merchant Transmission Facility are affected by normal or emergency weather conditions. We maintain that, as stated in Opinion No. 503, because PJM is required to support the level of service represented by the maximum Firm Transmission Withdrawal Rights of Merchant Transmission Facilities, it is appropriate to use this same measure for planning and cost allocation purposes.⁴⁷

40. For these reasons, we reaffirm our finding that it is not unduly discriminatory for Merchant Transmission Facilities to be allocated both interconnection costs and some portion of RTEP upgrade costs. These two requirements reflect different considerations. The "but for" network upgrades reflect the costs of interconnecting with the grid, and are necessary to address the immediate reliability impact of Merchant Transmission Facilities on the PJM system. The Merchant Transmission Facility receives compensation for such upgrades in the form of financial transmission rights. The allocation of future reliability upgrade costs reflects the fact that Merchant Transmission Facilities with Firm

⁴⁶ Moreover, Opinion No. 503 noted that Merchant Transmission Facilities may receive Capacity Transfer Rights and Auction Revenue Rights as part of PJM's allocation process. Opinion No. 503, 129 FERC ¶ 61,161 at n.60 (citing *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,280 (2009); *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,083 (2009)).

⁴⁷ Opinion No. 503, 129 FERC ¶ 61,161 at P 87.

Transmission Withdrawal Rights act like load on the PJM system and thereby contribute to the need for reliability upgrades to ensure that the system can perform reliably and deliver the Merchant Transmission Facility's Firm Transmission Withdrawal Rights. While Merchant Transmission Facilities may not be comparable to zones in all respects, they are sufficiently comparable in terms of their ongoing impact on the PJM system, and this is the factor that is most important in PJM's planning process. Just as load's impact on the PJM system directly correlates to the allocation of RTEP costs to zones, the withdrawal of energy by Merchant Transmission Facilities should correlate to their allocation of RTEP costs.

B. PJM met its burden of proof under section 205 of the Federal Power Act

1. Opinion No. 503

41. In Opinion No. 503, the Commission affirmed the Initial Decision's determination that PJM met its burden under section 205 of the FPA to show that its proposal is just and reasonable and not unduly discriminatory or preferential.⁴⁸ The Commission reasoned that, 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. The Commission found that PJM had provided sufficient evidence to show that 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.

2. Requests for Rehearing

42. MTF Parties assert that PJM did not meet its burden to demonstrate that its proposed rate methodology is just and reasonable. MTF Parties assert that the testimony of Mr. Steven Herling does not demonstrate whether PJM's RTEP upgrade cost-allocations directly correlate to the causes of such costs, but merely asserts parity between Merchant Transmission Facilities and network load in how they withdraw energy from the system. MTF Parties contend that they provided substantial documentary evidence and data showing differences in physical and legal characteristics between static Merchant Transmission Facilities and PJM network load that contradict any assertion of comparability.⁴⁹ Further, MTF Parties argue that, in setting this matter

⁴⁸ *Id.* P 54.

⁴⁹ MTF Parties Rehearing Request at 14-15.

for hearing, the Commission directed an inquiry into whether PJM's "proposed allocation *directly* correlates to [the MTF's] contribution to the need for such reliability upgrades."⁵⁰ MTF Parties argue that Opinion No. 503 fails to meet these fundamental principles of cost causation.

43. According to MTF Parties, the Commission arbitrarily relies upon the *ipse dixit*, or "an assertion without supporting proof," 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."⁵¹ MTF Parties state that the Commission compounded its error by then using its *ipse dixit* as a basis for shifting the burden of proof from PJM to the MTF Parties. MTF Parties further state that the Commission made a final error in its application of the burden of proof by acknowledging that Merchant Transmission Facilities are different from network load, but attempting to bury the significance of the static versus dynamic characteristics of Merchant Transmission Facilities and network load by asserting that the difference is not "relevant" to the RTEP process.

3. Commission Determination

44. MTF Parties argue that PJM did not meet its burden of proof because it did not meet a burden imposed by the May 26, 2006 Order in this proceeding to show "that the proposed allocation directly correlates to their contribution to the need for such reliability upgrades."⁵² We affirm our finding in Opinion No. 503 that PJM has indeed met its statutory section 205 burden of proof. The MTF Parties argue that the statement from the May 25, 2006 Order changes PJM's burden of proof to a standard other than the just and reasonable standard under section 205. The statement in the May 25, 2006 Order simply described the object of the hearing⁵³ and did not alter PJM's statutory section 205 burden of proof, which is to show that its proposal is just and reasonable. As discussed above,

⁵⁰ *Id.* at 20 (citing May 26, 2006 Order, 115 FERC ¶ 61,261, at P 51 (2006)) (emphasis added).

⁵¹ *Id.* at 17 (citing Opinion No. 503, 129 FERC ¶ 61,161 at PP 54, 72).

⁵² May 26, 2006 Order, 115 FERC ¶ 61,261 at P 51.

⁵³ In the May 26, 2006 Order, the Commission "set for hearing PJM's proposed cost allocations to the merchant transmission projects" in order "to ensure that the method by which PJM has allocated costs to these Responsible Customers is not unduly discriminatory or preferential, and that the proposed allocation directly correlates to their contribution to the need for such reliability upgrades." *Id.*

PJM met its section 205 burden of proof by demonstrating that Merchant Transmission Facilities and zones are similar and that any differences between them are not meaningful for transmission planning and thus RTEP upgrade cost allocation purposes.

45. Furthermore, PJM has provided persuasive testimony on the correlation between RTEP upgrade cost-allocations and the causes of such costs, including testimony refuting MTF Parties' contention that static load cannot contribute to a load-growth reliability violation. Mr. Herling stated that PJM takes into account all of the existing and new load when it determines whether there is a reliability criteria violation, such that even the "static load" of a Merchant Transmission Facility "can contribute to a 'load-growth related' reliability violation."⁵⁴ Mr. Herling also testified that the use by Merchant Transmission Facilities of existing headroom accelerates the need for future transmission upgrades to satisfy system needs, including but certainly not limited to load growth.⁵⁵

46. MTF Parties also argue that the Commission arbitrarily relied upon an *ipse dixit* 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 the result, and that the Commission relied on this *ipse dixit* to improperly shift the burden of proof. We disagree. The Commission found that Merchant Transmission Facilities and zones are similarly situated for the purpose of RTEP upgrades after examining how Merchant Transmission Facilities withdraw energy from the system.⁵⁶ Therefore, the Commission did not rely on an *ipse dixit* in making its determination. Furthermore, the Commission considered the characteristics of Merchant Transmission Facilities and network load, including their respective static and dynamic characteristics, in determining that the differences between them were not significant when considered in the context of PJM's planning process and thus for purposes of cost allocation.

⁵⁴ Opinion No. 503, 129 FERC ¶ 61,161 at P 111 (citing Exh. No. PJM-3 at 15:15-16:3).

⁵⁵ *Id.* P 110 n. 99 (citing Initial Decision, 124 FERC ¶ 63,022 at P 134; Exh. No. PJM-3 at 15:1-5).

⁵⁶ Opinion No. 503, 129 FERC ¶ 61,161 at PP 72-74 (citing Initial Decision, 124 FERC ¶ 63,022 at P 65; Exh. No. PJM-1 at 30:16-20; Exh. No. PTO-9 at 23:6-18; Exh. No. PJM-3 at 7:4-23).

C. The Commission did not err by not requiring alternative methodologies

1. Opinion No. 503

47. In Opinion No. 503, the Commission did not find PJM's proposal unjust and unreasonable for failing to include an adjustment proposed by MTF Parties' witness, Mr. Kenneth C. Lotterhos, to account for the fact that a Merchant Transmission Facility's load is static.⁵⁷ The MTF Parties' static load adjustment would have: (1) identified all RTEP projects that involve an allocation of costs to a Merchant Transmission Facility; (2) undertaken a supplemental analysis to determine the percentage of each applicable reliability violation that was due to system load growth; and (3) reduced the allocation to the Merchant Transmission Facility by that percentage.

48. In Opinion No. 503, the Commission found that the fact that Merchant Transmission Facilities have static loads is insufficient for the Commission to conclude that PJM's proposed allocation method is unjust and unreasonable.⁵⁸ The Commission stated that, while a point load may in fact be static compared to the load of a zone, the PJM system itself is not static.⁵⁹ The Commission further found that the static load of Merchant Transmission Facilities with Firm Transmission Withdrawal Rights nevertheless contribute to potential reliability violations, just like existing network load, since energy withdrawals by a Merchant Transmission Facility can accelerate the need for additional reliability upgrades. Moreover, the Commission explained that MTF Parties' static load methodology is inconsistent with how PJM conducts the RTEP process, as PJM does not segregate load growth from other factors affecting the need for an upgrade.⁶⁰ Therefore, the Commission concluded that MTF Parties' proposed static load adjustment was not necessary.

49. The Commission also did not find PJM's proposal unjust and unreasonable for not incorporating NYPA's proposed crediting mechanism.⁶¹ Under NYPA's proposal, Merchant Transmission Facilities would pay "but for" costs prior to interconnection and

⁵⁷ *Id.* P 112.

⁵⁸ *Id.* P 108.

⁵⁹ *Id.* PP 108-112.

⁶⁰ *Id.* P 111.

⁶¹ *Id.* P 89.

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 then 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.

50. The Commission found that PJM’s proposal was not unjust and unreasonable for failing to rectify NYPA’s claim of disparate treatment of Merchant Transmission Facilities compared to other load. The Commission stated that NYPA’s argument essentially repeated the contention that PJM’s proposal violates the Commission’s prohibition against “and” pricing.⁶² In addition, the Commission stated that NYPA’s crediting proposal went beyond a proposed adjustment to the DFAX methodology, as contemplated by the Partial Settlement.⁶³

2. Requests for Rehearing

51. MTF Parties assert that their static load methodology would have addressed the static nature of Merchant Transmission Facilities by culling out RTEP upgrade costs attributable to zonal load growth and ameliorating the disparity between network load and Merchant Transmission Facilities. MTF Parties argue that the Commission improperly characterized the position of the MTF Parties as seeming to require “other customers to pay for upgrades made necessary by the Merchant Transmission Facility.”⁶⁴ MTF Parties argue that, on the contrary, MTF Parties have stated that they will accept their appropriate share of RTEP upgrades. MTF Parties state that the “entire purpose of the [s]tatic [l]oad [m]ethodology is to ensure that MTF Parties are allocated the costs of

⁶² The Commission has a longstanding policy of prohibiting transmission providers from charging customers both incremental costs *and* an embedded cost rate which includes those expansion costs. In Opinion No. 503, the Commission found that there was no “and” pricing because Merchant Transmission Facilities were not being charged twice for the same service. *Id.* P 48. This issue is further addressed in section E below.

⁶³ *Id.* PP 97-98.

⁶⁴ MTF Parties Rehearing Request at 26 (citing Opinion No. 503, 129 FERC ¶ 61,161 at P 153).

RTEP upgrade projects for which there is a direct correlation to their use of [F]irm [T]ransmission [W]ithdrawal [R]ights.”⁶⁵

52. MTF Parties also assert that the Commission ignores the question of whether RTEP upgrade costs directly correlate to Merchant Transmission Facilities as the driver of such costs when it justifies its rejection of the static load methodology. According to MTF Parties, it is not reasoned decision-making to simply rely on PJM’s statement that it does not segregate load growth from other factors in its identification of RTEP projects.⁶⁶

53. Further, MTF Parties contend that the Commission does not explain its departure from the ALJ’s finding that the static load methodology is not “unworkable or unduly burdensome” and “accurately culls out RTEP upgrade costs attributable to zonal load growth.”⁶⁷ MTF Parties argue that the ALJ’s finding directly contradicts the testimony that the Commission relies upon in Opinion No. 503, which stated that “[t]rying to separate load growth from other drivers of RTEP projects at any phase of the process is like trying to unscramble an omelet.”⁶⁸ MTF Parties point out that, in response to this same testimony, the ALJ found: “[the MTF Parties’] rebuttal testimony thoroughly refuted Staff’s attempt—the only attempt made in this regard—to discredit the accuracy and validity of [its] calculations, and no party, including Staff, further challenged the validity of [their] calculations on cross-examination.”⁶⁹ MTF Parties argue that the Commission may not depart from the reasoned finding of its own ALJ without providing a rationale, and “[a]n agency’s departure from the ALJ’s finding is vulnerable if it fails to reflect attentive consideration to the ALJ’s decision.”⁷⁰

54. NYPA states that MTF Parties’ proposal would have eliminated the unduly discriminatory effect of PJM’s Filing on the allocation of growth-related network upgrade costs. NYPA adds that, while there may be an expense involved in performing

⁶⁵ *Id.* at 27.

⁶⁶ *Id.* at 28.

⁶⁷ *Id.* (citing Initial Decision, 124 FERC ¶ 63,022 at P 153).

⁶⁸ *Id.* at 28-29 (citing Opinion No. 503, 129 FERC ¶ 61,161 at P 111).

⁶⁹ *Id.* at 29 (citing Initial Decision, 124 FERC ¶ 63,022 at P 153).

⁷⁰ *Id.* (citing *E. Tenn. Natural Gas Co. v. FERC*, 953 F.2d 675, 681 (D.C. Cir. 1992)).

the static load analysis, it is the kind of analysis that the Commission has routinely approved in other contexts.

55. Alternatively, NYPA contends that the Commission erred in rejecting its crediting proposal. NYPA argues that the Commission erroneously adopted the misreading of the Partial Settlement in the Initial Decision and is incorrect that the adjustment proposed by NYPA is beyond the scope of the proceeding. NYPA argues that its proposal falls within the category of “other cost responsibility assignment procedures” contemplated in the Partial Settlement.⁷¹

3. Commission Determination

56. We reaffirm our finding in Opinion No. 503 that MTF Parties’ static load adjustment is unnecessary to make PJM’s proposal just and reasonable. As discussed above, the fact that Merchant Transmission Facilities have static loads is insufficient for the Commission to find that PJM’s proposed allocation method is unjust and unreasonable. Therefore, a static load adjustment is not necessary.

57. We disagree that the Commission departed from the ALJ’s findings without an adequate explanation. Like the ALJ, we agree that, in theory, a methodology such as MTF Parties’ static load methodology could distinguish among RTEP upgrades associated with load growth, generation retirements, and changes in usage patterns. However, MTF Parties’ arguments for the static load methodology fail because they assume that Merchant Transmission Facilities cannot be responsible for any RTEP upgrades associated with load growth. The ALJ found, and we agree, that the static load of Merchant Transmission Facilities with Firm Transmission Withdrawal Rights contributes to the need for RTEP upgrades to construct the transmission network that will be needed to satisfy the aggregate of system needs, including load growth.⁷² We further find that MTF Parties’ static load methodology would be inconsistent with the PJM planning process, which considers all load (including the Firm Transmission Withdrawal Rights of a Merchant Transmission Facility) in determining how to address reliability violations on the PJM system. This methodology also would be inconsistent with PJM’s treatment of zones with low projected load growth, which are still assigned RTEP costs

⁷¹ NYPA Rehearing Request at 46 (citing Partial Settlement § 10(b)(ii)).

⁷² Initial Decision, 124 FERC ¶ 63,022 at P 65 (citing PJM-1 at 30:16-20 (Mr. Herling, explaining that “[j]ust as load withdraws its megawatt consumption at a point within the zone, so does a merchant D.C. transmission terminal. Thus, when a region in question needs reliability upgrades, which are equally caused by all loads in the zone, merchant transmission loads at merchant D.C. terminals are part of the cause of the upgrade.”)).

under the PJM OATT notwithstanding their low projected load growth. Furthermore, MTF Parties ignore crucial analysis from the Initial Decision, namely that the ALJ “rejected the ‘static load’ adjustment on the ground that the undue discrimination that the adjustment purports to remedy does not exist...”⁷³ The Commission will not depart from the ALJ’s core finding that MTF Parties’ static load adjustment is unnecessary because there is no problem to remedy.

58. MTF Parties argue that, in rejecting its static load methodology, the Commission ignores the problem of whether RTEP upgrade costs correlate to Merchant Transmission Facilities as the driver of such costs. MTF Parties argue that the Commission places too much emphasis on PJM’s statement that it does not segregate load growth from other factors in its identification of RTEP projects. As discussed above, though, we agree that the static load of Merchant Transmission Facilities with Firm Transmission Withdrawal Rights contribute to the need for “load growth-related” reliability upgrades, and therefore we disagree that PJM’s proposal fails to correlate RTEP costs to the driver of such costs.

59. We also reaffirm our finding that NYPA’s crediting proposal is unnecessary. As explained above, we find that PJM’s proposal even without NYPA’s crediting proposal is just, reasonable, and not unduly discriminatory or preferential. As the Commission stated in Opinion No. 503, NYPA’s argument that PJM’s proposal results in disparate treatment of Merchant Transmission Facilities and zones simply restates its argument that the proposal violates the Commission’s prohibition against “and” pricing.⁷⁴ The Commission found in Opinion No. 503 that it is just and reasonable to use the “but for” test for initial interconnections and the RTEP methodology for subsequent reliability upgrades because the two approaches address different costs incurred at different times under different circumstances.⁷⁵ In alleging unduly discriminatory treatment, NYPA also ignores the compensation in the form of financial transmission rights that Merchant Transmission Facilities receive. We do not find that PJM’s proposal produces disparate treatment of Merchant Transmission Facilities and zones that requires correction through a crediting mechanism.

60. In addition, we reaffirm our finding that NYPA’s crediting proposal is beyond the scope of the proceeding. The Partial Settlement reserved for hearing the issue of “how merchant transmission facilities should be included in the DFAX methodology and any other cost responsibility assignment procedures adopted in this Settlement (including but

⁷³ *Id.* P 153.

⁷⁴ Opinion No. 503, 129 FERC ¶ 61,161 at P 97.

⁷⁵ *Id.* This issue is further addressed in section E below.

not limited to whether to incorporate a methodology to address the ‘static load’ issue...).”⁷⁶ Thus, the Partial Settlement provided for the possibility that an adjustment to the DFAX methodology might be necessary, such as to address the static load issue identified by MTF Parties. However, even if the proposal is couched as falling under “other cost responsibility assignment procedures,” the crediting proposal would result in changing the rights and obligations assigned to Merchant Transmission Facilities in other Tariff provisions that are not at issue in this proceeding. As discussed in Opinion No. 503, the Tariff requires that an interconnection customer pay 100 percent of the network upgrades required for interconnection, and the Tariff provides that interconnection customers receive certain rights in return.⁷⁷ NYPA’s crediting proposal, however, would replace the “but for” test used in interconnection procedures with a DFAX methodology, which would necessarily result in changes to Merchant Transmission Facilities’ rights and obligations provided for in the Tariff. Therefore, we find that NYPA’s crediting proposal is beyond the scope of the proceeding.

D. The DFAX methodology is just, reasonable, and not unduly discriminatory or preferential as applied to Merchant Transmission Facilities with Firm Transmission Withdrawal Rights with respect to below 500 kV RTEP upgrades

1. Opinion No. 503

61. In Opinion No. 503, the Commission affirmed the Initial Decision’s determination that the Partial Settlement resolved the issue of whether to apply the DFAX methodology with respect to zones and Merchant Transmission Facilities with Firm Transmission Withdrawal Rights with respect to below 500 kV RTEP upgrades. The Commission agreed with the Initial Decision that the Partial Settlement specifies the “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.”⁷⁸ The Commission also agreed that, although the Partial Settlement reserved the issue of how Merchant Transmission Facilities with Firm Transmission Withdrawal Rights 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.⁷⁹ The Commission thus found that NYPA may raise

⁷⁶ Partial Settlement § 10(b)(ii).

⁷⁷ Opinion No. 503, 129 FERC ¶ 61,161 at P 98.

⁷⁸ *Id.* P 59 (citing Initial Decision, 124 FERC ¶ 63,022 at P 64).

⁷⁹ *Id.* (citing Exh. No. PJM-2 at 66-67 (Partial Settlement § 10(b))).

issues as to *how* the DFAX methodology is applied to Merchant Transmission Facilities with Firm Transmission Withdrawal Rights, but that the use of DFAX as the methodology for allocation is beyond the scope of the proceeding.⁸⁰

2. Requests for Rehearing

62. NYPA argues that, in Opinion No. 503, the Commission erroneously relied on the Partial Settlement as the basis for holding that the DFAX method is just and reasonable as applied to Merchant Transmission Facilities. NYPA contends that the Partial Settlement established only that the DFAX method would be used to allocate costs to zones and that no one would challenge such use, but *not* that the DFAX method was just and reasonable as applied to zones or Merchant Transmission Facilities.⁸¹ NYPA contends that nowhere does the Partial Settlement say the DFAX method is just and reasonable, and argues that the Partial Settlement even expressly disclaims its use to establish any principle in this proceeding.⁸² NYPA notes that the Commission has long held that settlements do not establish that any particular element of the settlement is just and reasonable.⁸³

63. MTF Parties also object to the use of the DFAX methodology, asserting that DFAX indicates a level of power flow over a transmission facility, but it is not equivalent to a measure of the contribution of causality for any associated upgrades. MTF Parties add that a DFAX value can be calculated regardless of whether there is a reliability violation—and if a violation occurs, the DFAX value will not indicate the cause of the violation. Further, MTF Parties assert that DFAX does not identify whether there is a

⁸⁰ *Id.* P 60.

⁸¹ In making this argument, NYPA reiterates that Merchant Transmission Facilities are being unduly discriminated against because they must pay both “but for” interconnection costs and RTEP costs. We address these arguments above.

⁸² NYPA Rehearing Request at 47 (citing Partial Settlement at P 42: “The Settlement establishes no principles and no precedent with respect to any issue in this proceeding. The acceptance of this Settlement by the Commission shall not in any respect constitute a determination by the Commission as to the merits of any allegation or contention made in this proceeding....”).

⁸³ *Id.* (citing *El Paso Natural Gas Co.*, 56 FERC ¶ 61,290, at 62,146-47 (1991); *Century Power Corp.*, 56 FERC ¶ 61,087, at 61,300 (1991); *Florida Power & Light Co.*, 73 FERC ¶ 63,018, at 65,194 (1995); *Wisconsin Power & Light Co.*, 40 FERC ¶ 61,316, at 61,975 (1987); and *Appalachian Power Co.*, 39 FERC ¶ 61,296, at 61,965 (1987)).

change within a zone or point of withdrawal that is contributing to the need for a particular reliability upgrade. Accordingly, MTF Parties contend that a DFAX will be associated with a Merchant Transmission Facility's system usage regardless of whether the facility contributed to a particular reliability violation. However, MTF Parties question whether the Merchant Transmission Facility actually caused the need for the upgrade.

3. Commission Determination

64. We reaffirm our determination in Opinion No. 503 that the Partial Settlement resolves the issue of whether to apply the DFAX methodology to both zones and Merchant Transmission Facilities with Firm Transmission Withdrawal Rights with respect to below 500 kV RTEP upgrades, and it likewise prohibits parties from challenging the justness and reasonableness of applying the DFAX methodology to zones. The Partial Settlement specifically lists "use of a DFAX-based methodology" as an issue that is "finally resolved" and "shall not be the subject of litigation at the hearing regarding assignments of cost responsibility to merchant transmission facilities."⁸⁴ The Partial Settlement reserved only the specific issue of "*how* [M]erchant [T]ransmission [F]acilities should be included in the DFAX analysis and any other cost responsibility assignment procedures."⁸⁵ NYPA and MTF Parties, we add, were both signatories to the Partial Settlement.

65. NYPA argues that nowhere does the Partial Settlement state that the DFAX method is just and reasonable. To begin with, we note that, prior to the Partial Settlement, PJM was using the DFAX method to allocate costs of new RTEP facilities to responsible customers. In Opinion No. 494, the Commission found that, with respect to below 500 kV facilities, PJM's continued use of a DFAX model would be just and reasonable, provided that PJM set forth in its Tariff a detailed methodology for cost recovery of investment in new facilities below 500 kV.⁸⁶ The Commission subsequently accepted the Partial Settlement, which set forth the details and assumptions used in applying the DFAX method to new facilities that operate below 500 kV in Schedule 12, section (b)(ii).

⁸⁴ Partial Settlement § 10(a).

⁸⁵ *Id.* § 10(b) (emphasis added).

⁸⁶ Opinion No. 494 at PP 69-72. The Commission also stated that the DFAX method failed to account for the system-wide benefits of new 500 kV and above facilities.

66. Further, we disagree with NYPA's characterization of the Partial Settlement. Whether a particular provision of a settlement is just and reasonable is neither established nor disproven by an explicit statement within the settlement that the provision is such or by the absence of such a statement. Rather, more important for present purposes, parties to the settlement agreed to be precluded from challenging the use of the DFAX methodology with respect to zones by virtue of the provision of the Partial Settlement that says expressly the use of the DFAX methodology is "finally resolved" and "shall not be subject to litigation." Parties cannot argue that the DFAX methodology is not just and reasonable while still complying with the provision prohibiting their litigation of whether the DFAX methodology should be used.

67. NYPA argues that the Partial Settlement expressly disclaims establishing any principle in this proceeding.⁸⁷ The statement cited by NYPA simply reflects the well-established principle that Commission-approved settlements do not have precedential effect in other proceedings.⁸⁸ The terms of a settlement however are binding with respect to the settlement proceeding itself. Thus, the Commission's acceptance of the Partial Settlement's determination that DFAX is not subject to litigation renders the Settlement's determination binding here. Interpreting the provision as NYPA argues would render the provision precluding re-litigation of the applicability of DFAX meaningless.

68. NYPA also cites various cases for the proposition that "the Commission has long held that settlements do not establish that any particular element of the settlement is just and reasonable."⁸⁹ However, NYPA's reliance on these cases is misplaced. In *El Paso*,

⁸⁷ NYPA Rehearing Request at 47 (citing Partial Settlement at P 42 ("The Settlement establishes no principles and no precedent with respect to any issue in this proceeding.")).

⁸⁸ *E.g., Florida Power & Light Co., et al.*, 73 FERC ¶ 63,018, at 65,194 (1995) (*Florida Power*); *Wisconsin Power & Light Co.*, 40 FERC ¶ 61,316, at 61,975 (1987) (*Wisconsin Power*); *Appalachian Power Co.*, 39 FERC ¶ 61,296, at 61,965 (1987) (*Appalachian Power*).

⁸⁹ Rehearing Request at 48 (citing *El Paso Natural Gas Co.*, 56 FERC ¶ 61, 290, at 61,146-47 (1991) (*El Paso*) ("The Commission cannot overlook particular elements of a settlement merely because they are agreed to by the parties, but the Commission does not have to ensure that settlements conform to Commission policy in all aspects. Rather, the Commission must examine this element as part of the entire agreement to see if, on the whole it is balanced by the other elements of the settlement."); *Century Power Corp.*, 56 FERC ¶ 61,087, at 61,300 (1991) (*Century*) ("[P]arties may compromise their differences. In fact, the Commission encourages such compromises, because settlements are important to the orderly and expeditious conduct of the Commission's business.");

(continued...)

the Commission considered whether the terms of a settlement were reasonable and determined that certain changes had to be made before it could be accepted. The Commission's statement that "the Commission does not have to ensure that settlements conform to Commission policy in all aspects" merely acknowledged the discretion that the Commission applies when considering the reasonableness of settlement terms. For example, in *El Paso*, the Commission required the settlement to be altered where it deviated from Commission policy "in ways the Commission found unreasonable" but did not require it to be altered where it deviated "in ways which the Commission did not find to be unreasonable" and where its stated policy was a preference and "not an absolute requirement."⁹⁰ The Commission scrutinized the terms of that settlement and required certain adjustments before accepting that settlement. The passage from *Century* cited by NYPA simply notes that the Commission encourages compromises and settlements. *Florida Power*, *Wisconsin Power*, and *Appalachian Power* stand for the proposition that matters resolved by settlement do not establish precedent for other proceedings.

69. Moreover, even if we did not find that the Partial Settlement resolved the issue of whether to apply the DFAX methodology to both zones and Merchant Transmission Facilities with Firm Transmission Withdrawal Rights, the use of DFAX to assign costs to Merchant Transmission Facilities with Firm Transmission Withdrawal Rights for below 500 kV RTEP facilities is just and reasonable. As discussed earlier, Merchant Transmission Facilities with Firm Transmission Withdrawal Rights should be appropriately allocated the costs of reliability upgrades because their energy withdrawals from the system under their Firm Transmission Withdrawal Rights contribute to the need for reliability upgrades. The DFAX methodology employed by PJM is a reasonable measure of load's and a Merchant Transmission Facility with Firm Transmission Withdrawal Rights' contribution to the need for a below 500 kV RTEP upgrade. Specifically, DFAX measures a distribution factor for zonal load and Merchant Transmission Providers that represents a measure of the effect of the load of each Zone or Merchant Transmission Facility on the transmission constraint that requires an upgrade, as determined by a power flow analysis. PJM then allocates the costs of that upgrade based on the distribution factor determined for each Merchant Transmission Provider and

Florida Power, 73 FERC ¶ 63,018 at 65,194 ("It is beyond peradventure that Commission-approved settlements have no precedential effect."); *Wisconsin Power*, 40 FERC ¶ 61,316 at 61,975 ("We note that the present rates were tendered as part of a comprehensive settlement and it is well settled that matters which are resolved by settlement do not establish any precedent."); *Appalachian Power*, 39 FERC ¶ 61,296 at 61,965 ("A settlement sets no precedent....").

⁹⁰ *El Paso*, 56 FERC ¶ 61, 290 at 62,146-7.

zonal load contributing to the need for the upgrade.⁹¹ Given that this model will allocate cost proportionally to a Merchant Transmission Facility's use of the line requiring the below 500 kV RTEP upgrade,⁹² we find this methodology just and reasonable as applied to Merchant Transmission Facilities with Firm Transmission Withdrawal Rights. As stated in Opinion No. 503, PJM must include a Merchant Transmission Facility's full Firm Transmission Withdrawal Rights in its planning process; thus, a Merchant Transmission Facility's full Firm Transmission Withdrawal Rights will influence the projects that are ultimately included in the RTEP.⁹³ We therefore disagree with MTF Parties' assertions that the DFAX methodology does not measure a Merchant Transmission Facility with Firm Transmission Withdrawal Rights' contribution to the need for a below 500 kV RTEP upgrade.

E. Allocating RTEP costs to Merchant Transmission Facilities does not violate the Commission's "and" pricing policy

1. Opinion No. 503

70. In Opinion No. 503, the Commission found 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.⁹⁴ The Commission reasoned that there is no

⁹¹ OATT, Schedule 12 § (b)(iii)(C)(1) ("For purposes of the assignment of cost responsibility under this section (b)(iii)(C) of Schedule 12, the Transmission Provider, based on a computer model of the electric network and using power flow modeling software, shall calculate 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 Zone or Merchant Transmission Facility on the transmission constraint that requires the Lower Voltage Facility, as determined by a power flow analysis.").

⁹² *Id.* § (b)(iii)(C)(4). "In the DFAX analysis, Transmission Provider shall calculate assignments of cost responsibility based on all reliability criteria violations that contribute to the need for a Lower Voltage Facility."

⁹³ Opinion No. 503, 129 FERC ¶ 61,161 at P 111 (citing Exh. No. PJM-3 at 15:15-16:3).

⁹⁴ As noted in Opinion No. 503, the Commission has a longstanding policy of prohibiting transmission providers from charging customers both incremental costs and an embedded cost rate which includes those expansion costs. *Accord Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States*, 96 FERC ¶ 61,155, at 61,673-75 (2001); *Public Service Co. of Colorado*,

(continued...)

“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 access to the grid, Merchant Transmission Facilities, like other load, need to pay RTEP charges for the subsequent costs of maintaining network reliability.⁹⁵

71. The Commission noted that, in Order No. 2003, the Commission made an exception to its policy of prohibiting the direct assignment of “but for” 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 transmission provider has no incentive to use the cost determination and allocation process to unfairly advantage its own generation.⁹⁶ The Commission determined that Order No. 2003’s exception to the transmission pricing policy applies to both large generator interconnections and Merchant Transmission Facilities, noting that the Commission had previously determined that the principles of Order No. 2003 provide useful guidance regarding the treatment of interconnections by Merchant Transmission Facilities.⁹⁷

72. Moreover, the Commission found that PJM did not bear the burden of showing that it meets the Commission’s test for independence; rather, the burden was on NYPA to demonstrate that PJM is not independent. The Commission explained that it had previously accepted PJM’s Order No. 2003 compliance filing, including provisions governing Merchant Transmission Facility interconnections.⁹⁸ The Commission permitted RTOs and ISOs to charge interconnecting customers “but for” interconnection costs given Order No. 2003’s provisions regarding independent RTOs.

62 FERC ¶ 61,013, at 61,060-62 (1993); *Public Service Electric & Gas Co.*, 62 FERC ¶ 61,014, at 61,060-62 (1993); *Pennsylvania Electric Co.*, 60 FERC ¶ 61,034 (1992).

⁹⁵ Opinion No. 503, 129 FERC ¶ 61,161 at P 48.

⁹⁶ *Id.* P 39 (citing Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at PP 698-703).

⁹⁷ *Id.* P 42 (citing *Neptune*, 110 FERC ¶ 61,098 at P 27).

⁹⁸ *Id.* P 46 (citing *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,025 (2004), *order on reh’g*, 110 FERC ¶ 61,099 (2005)).

2. Requests for Rehearing

73. According to NYPA, while Opinion No. 503 seeks to justify PJM's allegedly undue discrimination against Merchant Transmission Facilities based on the Commission's exception in Order No. 2003 to its "longstanding policy of prohibiting transmission providers from charging customers both incremental costs [for expansion] and an embedded cost rate which includes expansion costs," Order No. 2003 does not pre-approve every pricing proposal by an independent RTO.⁹⁹ Instead, NYPA states that the Commission must review the RTO's proposal under the standards of the FPA.

74. NYPA contends that the Commission erred by extending Order No. 2003's treatment of independent RTOs outside the context of generators. NYPA states that the *Neptune* order cited by Opinion No. 503 does not mention the application of Order No. 2003's "and" pricing exception to MTFs; for Opinion No. 503 to say that it did is an after-the-fact rationalization. NYPA also contends that the Commission has never found that PJM is sufficiently independent to administer an "and" pricing regime involving Merchant Transmission Facilities in PJM. Accordingly, NYPA contends that the Commission erroneously shifted the burden of proof with respect to PJM's independence to NYPA. Moreover, NYPA states that evidence of PJM's undue discrimination against Merchant Transmission Facilities includes PJM's unduly preferential treatment of PJM exports, as well as the fact that only PJM utilities were awarded Auction Revenue Rights and Capacity Transfer Rights associated with RTEP upgrades at the time of the hearing in this proceeding.

75. NYPA believes that, even if Order No. 2003's special treatment of independent RTOs was to be extended beyond the context of generators, nothing in Order No. 2003 would allow PJM to engage in undue discrimination by allocating "but for" network upgrade costs to a subset of similarly situated customers.¹⁰⁰ NYPA refers to Order No. 2003's statement that "independent RTOs may charge for generator interconnections on an incremental basis, and then for transmission on a rolled-in basis – but only if the transmission provider applies this pricing policy consistently among all customers,"¹⁰¹ as well as Order No. 2003-B's statement that the special treatment of RTOs is limited to

⁹⁹ NYPA Rehearing Request at 35 (citing Opinion No. 503, 129 FERC ¶ 61,161 at P 39).

¹⁰⁰ NYPA repeats its arguments that Merchant Transmission Facilities are being unduly discriminated against because they are required to pay both "but for" and RTEP costs. We address these arguments above.

¹⁰¹ NYPA Rehearing Request at 35 (citing Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 694).

pricing that applies to all similarly situated customers “whether the Generating Facility is owned by the Transmission Provider, its Affiliates, or a merchant developer.”¹⁰²

76. NYPA states that the undue discrimination against Merchant Transmission Facilities cannot be justified as charging a different rate for different service. NYPA states that PJM assigns interconnection costs and RTEP costs to Merchant Transmission Facilities for the same thing – the Merchant Transmission Facility’s Firm Transmission Withdrawal Rights. Moreover, NYPA argues that the Commission cannot find that Merchant Transmission Facilities are paying for interconnection just to receive “valuable” financial rights. According to NYPA, the record contains no evidence to suggest that such rights have any value.

3. Commission Determination

77. In Opinion No. 503, the Commission reviewed PJM’s proposal to assign both “but for” costs and RTEP costs to Merchant Transmission Facilities and determined that this proposal does not violate the Commission’s transmission pricing policy.¹⁰³ We reaffirm the Commission’s determination here.

78. NYPA argues that a Merchant Transmission Facility’s payment of both interconnection and RTEP costs amounts to “and” pricing. We disagree. As defined in Order No. 2003, “and” pricing refers to charging a customer a transmission rate that reflects both the sum of the embedded cost of the existing system, and the incremental rate, not payment of both interconnection costs and RTEP costs.¹⁰⁴ The record in this proceeding is clear that Merchant Transmission Facilities pay only minimal costs associated with existing facilities.¹⁰⁵ NYPA’s objections regarding “and” pricing are misplaced because they focus on a Merchant Transmission Facility’s payment of both interconnection and RTEP costs, when the definition of “and” pricing is charging both the embedded cost of the existing system and the incremental rate. PJM’s proposal is not “and” pricing as the Commission defined it in Order No. 2003.

¹⁰² *Id.* at 36 (citing Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 at P 40).

¹⁰³ Opinion No. 503, 129 FERC ¶ 61,161 at P 39.

¹⁰⁴ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 694, n.111.

¹⁰⁵ Initial Decision at PP 6; 139. PJM recovers the full revenue requirements of existing facilities (embedded costs) through its firm transmission rates. PJM’s non-firm transmission rates are discounted well below the embedded cost of the transmission system. The Initial Decision notes that, to date, Merchant Transmission Facilities have only used non-firm transmission service.

79. Furthermore, the Commission in Order No. 2003 found that there were certain exceptions to “and” pricing, which are present here.¹⁰⁶ The Commission reasoned that permitting RTOs to require interconnecting customers to pay “but for” interconnection costs encourages efficient siting decisions for new facilities.¹⁰⁷ 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.¹⁰⁸ In this case, Merchant Transmission Facilities receive financial transmission rights from PJM as compensation for their “but for” network upgrades.

80. As discussed above, it is reasonable for Merchant Transmission Facilities with Firm Transmission Withdrawal Rights to pay both interconnection costs and RTEP costs because these charges are for entirely different costs (i.e., interconnection costs cover only the costs of initially interconnecting with the system, and RTEP costs cover future RTEP upgrades that may become necessary to assure a Merchant Transmission Facility with Firm Transmission Withdrawal Rights of future reliable service). While Firm Transmission Withdrawal Rights will affect the calculations of both interconnection and RTEP costs, they do so in different ways. A Merchant Transmission Facility with Firm Transmission Withdrawal Rights pays “but for” charges to accommodate Firm Transmission Withdrawal Rights upon interconnection, while it pays RTEP charges to ensure that the system can serve the Firm Transmission Withdrawal Rights reliably over the life of the Merchant Transmission Facility.

81. We disagree with NYPA’s assertions that Order No. 2003 does not apply to Merchant Transmission Facilities. In *Neptune*, the Commission responded to a statement by PJM that Order No. 2003 was of limited relevance to that proceeding, since Neptune’s complaint involved merchant transmission projects rather than generator interconnections. The Commission noted that, in establishing provisions to accommodate merchant transmission projects, PJM largely applied the same study procedures, terms and conditions that it used for generator interconnections.¹⁰⁹ The Commission stated that since PJM itself “intended to apply the same procedures, terms and conditions for [Merchant Transmission Facilities] that it applies to interconnection of generation facilities, the principles of Order No. 2003 may provide useful guidance here.”¹¹⁰ On

¹⁰⁶ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at PP 698 -703.

¹⁰⁷ *Id.* P 695.

¹⁰⁸ *Id.* P 700.

¹⁰⁹ *Neptune*, 110 FERC ¶ 61,098 at P 26.

¹¹⁰ *Id.* P 27.

rehearing, the Commission noted that a Merchant Transmission Facility may be responsible for RTEP charges, in addition to the “but for” charges associated with its interconnection.¹¹¹ Moreover, we note that we did not accept PJM’s proposal in this proceeding simply by relying on Order No. 2003, but because of our determination that “but for” charges and RTEP charges are for two different services.

82. We also disagree with NYPA that the Commission improperly shifted the burden of proof with respect to PJM’s independence. As the Commission explained in Opinion No. 503, the Commission accepted PJM’s Order No. 2003 compliance filing, finding that the OATT provisions governing Merchant Transmission Facility interconnections were consistent with Order No. 2003, and permitted RTOs and ISOs to charge interconnecting customers “but for” costs given Order No. 2003’s provisions regarding independent RTOs.¹¹² Order No. 2003 repeatedly refers to RTOs as independent entities.¹¹³ Consistent with this, the Order No. 2003 compliance order explains that the “independent entity variation” standard in Order No. 2003 permits an RTO to adopt interconnection procedures that are responsive to specific regional needs because an RTO does not own generation and thus lacks the incentive to unduly discriminate in favor of certain generation.¹¹⁴ Because these orders make findings with respect to RTO independence broadly, they apply to the instant case despite the fact that they do not discuss PJM’s independence with respect to Merchant Transmission Facilities in particular. Accordingly, we affirm our finding that the burden is on NYPA to demonstrate that PJM is not independent.

83. We also do not find NYPA’s arguments that PJM lacks neutrality convincing. First, NYPA asserts that PJM’s unduly preferential treatment of exports provides evidence of PJM’s bias. However, as we explained in Opinion No. 503 and will discuss further below, exports are distinguishable from Merchant Transmission Facilities.

¹¹¹ *Neptune*, 111 FERC 61,455 at P 25. (“The Commission again emphasizes that its order here deals only with the costs that can be included in Neptune's Interconnection Agreement and that Neptune is required to pay upfront. [It] does not address subsequent upgrade costs (not included in the project's projection) that may be imposed pursuant to PJM's regional transmission expansion plan.”)

¹¹² Opinion No. 503, 129 FERC ¶ 61,161 at P 46.

¹¹³ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at PP 283, 677, 698.

¹¹⁴ *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,025, at P 7 (2004).

84. NYPA argues that PJM's lack of neutrality is evident because, at the time of the hearing, Merchant Transmission Facilities generally could not participate in the yearly allocation of Auction Revenue Rights and Capacity Transfer Rights on PJM's existing system. In the first place, this argument fails to show that PJM as an entity was biased in exercising its planning function or that it had a financial incentive to discriminate against Merchant Transmission Facilities. Second, while it is true that while the hearing was in progress, Merchant Transmission Facilities could only obtain financial transmission rights associated with RTEP upgrades during a lower priority stage of the allocation process, PJM and its stakeholders recognized and addressed this issue in a filing made in December of 2008, shortly after the Initial Decision was issued on September 18, 2008. PJM proposed, and the Commission subsequently accepted, revisions to the Tariff to provide that the parties that are assigned cost responsibility for certain RTEP facilities, including Merchant Transmission Facilities, would receive the incremental Auction Revenue Rights and incremental Capacity Transfer Rights associated with such facilities.¹¹⁵ Moreover, NYPA has not demonstrated that it was harmed by receiving a lower priority for financial transmission rights at the time of the hearing in this proceeding. Accordingly, NYPA fails to demonstrate that PJM is biased against Merchant Transmission Facilities, and that PJM as a result should not be entitled to the independent entity variation spelled out in Order No. 2003.

F. It is not unduly discriminatory to treat Merchant Transmission Facilities differently than exports

1. Opinion No. 503

85. In Opinion No. 503, the Commission found that it is not unduly discriminatory or preferential to allocate RTEP costs to Merchant Transmission Facilities but not to exports.¹¹⁶ The Commission explained that PJM exports do not represent commitments by PJM to provide specific, long-term service, and that, since exports have no contractual right to long-term service, PJM cannot allocate costs to these exports because PJM does not know if it will be providing them service five years forward.¹¹⁷ The Commission further explained that 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 and thus must construct RTEP upgrades.

¹¹⁵ *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,083 (2009).

¹¹⁶ Opinion No. 503, 129 FERC ¶ 61,161 at P 79.

¹¹⁷ *Id.* P 80 (citing Initial Decision, 124 FERC ¶ 63,022 at P 87).

2. Requests for Rehearing

86. NYPA argues that PJM exports have the same effects as Merchant Transmission Facility withdrawals on the PJM system, are as firm as Merchant Transmission Facility withdrawals, and receive “planned for” status in the RTEP, yet are not allocated any RTEP costs. NYPA states that, while the Commission found that PJM is not “committed” to maintaining long-term service to PJM exports, PJM plans for exports as if they represent an existing or contracted-for level of firm transmission service.¹¹⁸ NYPA states that, moreover, the firmness of PJM exports depends on the associated transmission service, and PJM exports have the option to rollover their transmission service indefinitely.

87. NYPA also asserts that the Commission should not have focused on Merchant Transmission Facilities’ contracts because in no other contest does the Commission consider contract status relevant to the allocation of costs under the RTEP. NYPA argues that contract status is irrelevant to the identification of reliability violations, the planning of upgrades, and the incurrence of network upgrade costs.

88. NYPA further argues that the Commission did not explain why the fact that some PJM exports might not continue in the future justifies exempting all PJM exports from the RTEP cost allocation process. NYPA concludes that if an export has ceased, PJM might need to fashion a mechanism to reallocate the RTEP costs, but that possibility is easily addressed if it occurs.

3. Commission Determination

89. We reaffirm our finding that it is not unduly discriminatory or preferential to allocate RTEP costs to Merchant Transmission Facilities with Firm Transmission Withdrawal Rights in PJM but not to PJM exports. PJM plans for exports differently than it plans for Merchant Transmission Facilities with Firm Transmission Withdrawal Rights. Firm Transmission Withdrawal Rights held by the merchant transmission providers represent firm commitments by PJM to provide that level of service. In contrast, PJM does not “preserve rights” for specific exports, because these exports do not represent commitments by PJM to provide specific, long-term service.¹¹⁹ While

¹¹⁸ NYPA Rehearing Request at 33 (citing Tr. at 325:19-327:13 (Mr. Herling, explaining that the PJM exports are “included in the base case that we perform our [RTEP] analysis on”)).

¹¹⁹ Opinion No. 503, 129 FERC ¶ 61,161 at P 79.

section 2.2 of the OATT¹²⁰ allows existing firm service customers with contract terms of five years or longer to continue to take transmission service when the contract expires, not all PJM exports will qualify for this option and PJM will not know which exporters will choose to continue service until near the end of the contract. Construction of upgrades may not have even started by the time a firm export contract expires, and the allocation of costs would go beyond the terms of these contracts. PJM, on the other hand, is required to provide reliable service to Merchant Transmission Facilities up to their Firm Transmission Withdrawal Rights as long as their facilities remain in service. As the ALJ found,¹²¹ these distinctions are sufficient to justify PJM's different treatment of these two classes of service.

90. Finally, NYPA concedes that, if an export has ceased, PJM might need to fashion a mechanism to reallocate the RTEP costs. This distinction highlights why PJM may reasonably treat these two classes of customers differently.¹²² In any event, the issue of why PJM exports are exempted from the RTEP and any proposed mechanism to reallocate RTEP costs to PJM exports is outside of the scope of this proceeding, which is limited to the allocation of RTEP costs to Merchant Transmission Facilities with Firm Transmission Withdrawal Rights.

G. The Commission did not err by approving allocation of costs to Merchant Transmission Facilities for economic upgrades based on a Merchant Transmission Facility's Firm Transmission Withdrawal Rights

1. Opinion No. 503

91. In Opinion No. 503, the Commission affirmed the Initial Decision's acceptance of PJM's proposal to allocate the costs of below 500 kV economic upgrades to Merchant Transmission Facilities using a DFAX methodology based on the Merchant Transmission

¹²⁰ PJM, OATT, Section 2.2, Reservation Priority for Existing Firm Service Customers, 0.0.0.

¹²¹ Initial Decision, 124 FERC ¶ 63,022 at P 87.

¹²² PJM plans facilities and allocates cost based on the information available at the time and does not re-examine cost allocations for below 500 kV facilities at a later date. Opinion No. 503, 129 FERC ¶ 61,161 at P 133; *accord* PJM Brief Opposing Exceptions at 19. *See also* PJM OATT, Schedule 12 § (b)(vi) (discussing the finality of cost responsibility assignments for below 500 kV RTEP upgrades).

Facility's maximum awarded Firm Transmission Withdrawal Rights.¹²³ The Commission noted 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 that are used to determine whether a reliability upgrade is needed (i.e., peak load for load serving entities and Firm Transmission Withdrawal Rights for Merchant Transmission Facilities). Therefore, the Commission reasoned, because a Merchant Transmission Facility's Firm Transmission Withdrawal Rights contribute to the determination of whether an economic upgrade is needed, it is appropriate that they be considered in assigning cost responsibility for the economic upgrade. Moreover, the Commission found that an alternative proposal, which would re-calculate annually a Merchant Transmission Facility's cost responsibility for economic upgrades based on actual energy usage, was inconsistent with PJM's practice of assigning cost responsibility for lower voltage upgrades once.¹²⁴

2. Requests for Rehearing

92. According to the MTF Parties, the purpose of an RTEP economic upgrade is to provide an economic benefit, such as the reduction of LMP within PJM. MTF Parties state that the benefit of energy price reduction is ultimately received based on a per-unit of energy consumed, so accordingly, to be consistent with cost causality, the allocation must be based on a measure of actual energy consumption, not peak demand or Firm Transmission Withdrawal Rights. The MTF Parties contend that PJM's allocation of RTEP economic upgrades based on a Merchant Transmission Facility's Firm Transmission Withdrawal Rights creates the scenario in which, even if withdrawals over the Merchant Transmission Facility were reduced to zero, the Merchant Transmission Facility rights-holders would be forced to pay for economic upgrades that do not benefit them (because they are not purchasing additional energy), but rather benefit purchasers of such additional energy. MTF Parties conclude that such results violate the Commission's standard for just and reasonable rates because the benefits will not correlate with the costs.

3. Commission Determination

93. We reaffirm the Commission's finding in Opinion No. 503 that PJM's proposal to allocate the costs of below 500 kV economic upgrades using a DFAX methodology based on maximum demand, rather than actual energy withdrawals, is just and reasonable. As

¹²³ Specifically, Opinion No. 503 addressed below 500 kV economic upgrades that are: (1) modifications of previously scheduled reliability upgrades, or (2) accelerations of the in-service date of a reliability upgrade.

¹²⁴ Opinion No. 503, 129 FERC ¶ 61,161 at P 133.

discussed throughout Opinion No. 503, a Merchant Transmission Facility has the right to withdraw up to its Firm Transmission Withdrawal Rights, and therefore PJM must plan its system to accommodate a Merchant Transmission Facility's maximum awarded Firm Transmission Withdrawal Rights.¹²⁵ In determining whether it is beneficial to construct an economic upgrade, PJM uses the same assumptions that it uses in determining whether reliability upgrades are needed (i.e., peak load for load serving entities and Firm Transmission Withdrawal Rights for Merchant Transmission Facilities).¹²⁶ Moreover, PJM plans facilities based on the information available at the time. Once facilities are constructed, the benefits of the project are not re-examined, nor are planning decisions re-evaluated.¹²⁷

94. The Merchant Transmission Facilities seek to contract and pay for network upgrades that guarantee the ability to withdraw energy up to the Firm Transmission Withdrawal Rights. The use of such rights is therefore a reasonable, market-determined value for projecting future usage.

95. Projecting future usage based on past usage, as MTF Parties urge, would be no more accurate and may, in fact, be less accurate. Merchant Transmission Facilities export energy either to another RTO or to a non-RTO area, and their usage in any year may well depend less on load growth projections in those areas than on variations of prices in those areas. PJM could thus reasonably conclude that past usage by a Merchant Transmission Facility at below its maximum awarded Firm Transmission Withdrawal Rights would not necessarily be a good predictor of future use, since that usage may change significantly due to changes in the market. Using the full amount of Firm Transmission Withdrawal Rights, in contrast, is consistent with PJM's planning model and is a just and reasonable method of determining the allocation of costs for an economic upgrade.

¹²⁵ *E.g., id.* P 111

¹²⁶ *Id.* P 133.

¹²⁷ *Id.* See also PJM Brief Opposing Exceptions at 19.

H. PJM’s proposal to exempt Merchant Transmission Facilities from RTEP costs associated with below 500 kV reliability upgrades that cost less than \$5 million is just, reasonable, and not unduly discriminatory or preferential

1. Opinion No. 503

96. In Opinion No. 503, the Commission reversed the Initial Decision’s finding that Merchant Transmission Facilities should be allocated a portion of the costs of below 500 kV reliability upgrades costing less than \$5 million constructed in the Merchant Transmission Facility’s host zone, and found that PJM’s proposal to exempt such Merchant Transmission Facilities from such costs is just, reasonable, and not unduly discriminatory or preferential.¹²⁸

97. The Commission noted that, for the most part, the Initial Decision treated each Merchant Transmission Facility as a separate zone for cost allocation purposes.¹²⁹ However, on one specific issue, the allocation of reliability upgrades costing less than \$5 million, the Initial Decision stated 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-ratio share basis. The Commission disagreed with the Initial Decision’s finding that it would be unduly discriminatory for PJM to exclude Merchant Transmission Facilities from the allocation of costs of reliability upgrades costing less than \$5 million because PJM’s proposal properly reflects the fact that Merchant Transmission Facilities are considered a separate zone.¹³⁰ The Commission also rejected Trial Staff and PTO Group’s proposal that PJM allocate the costs of reliability upgrades costing less than \$5 million to Merchant Transmission Facilities using the DFAX methodology, stating that their proposal did not treat Merchant Transmission Facilities comparably to other zones.¹³¹

2. Requests for Rehearing

98. PSEG contends that the Commission erred in reversing the Initial Decision’s finding that Merchant Transmission Facilities should be allocated a portion of the costs of

¹²⁸ Opinion No. 503, 129 FERC ¶ 61,161 at P 122.

¹²⁹ *Id.* P 123 (citing Initial Decision, 124 FERC ¶ 63,022 at PP 196-197). No party objected to the treatment of Merchant Transmission Facilities as separate zones.

¹³⁰ *Id.* P 124.

¹³¹ *Id.* P 125.

below 500 kV reliability upgrades costing less than \$5 million. PSEG argues that the Commission's decision to exempt Merchant Transmission Facilities from such costs is inconsistent with the rest of Opinion No. 503 and with cost causation principles. PSEG asserts that, regardless of the magnitude of the cost of an RTEP upgrade, if a Merchant Transmission Facility benefits from the upgrade, it should be required to pay an appropriate share of the costs of the upgrade. PSEG argues that the Commission's determination overlooks the fact that the only reason the less-than \$5 million upgrade costs are allocated to the zone in which the upgrade is located is because the settling parties agreed to this in the Partial Settlement. Further, PSEG argues that exempting Merchant Transmission Facilities from such costs gives them the benefit of the Partial Settlement, which the Merchant Transmission Facilities did not join.

99. PSEG states that the appropriate solution is to allocate the costs of upgrades costing less than \$5 million to Merchant Transmission Facilities based on the same DFAX methodology that the Commission approved for the \$5 million and greater RTEP upgrades. PSEG asserts that using the DFAX methodology would resolve the Commission's concern with the Initial Decision by treating Merchant Transmission Facilities as a separate zone instead of as part of the host zone.

3. Commission Determination

100. We reaffirm our finding in Opinion No. 503 that PJM's proposal to exempt Merchant Transmission Facilities from costs for below 500 kV reliability upgrades costing less than \$5 million is just, reasonable, and not unduly discriminatory or preferential. In this respect, Merchant Transmission Facilities are being treated consistently with load in other zones which do not receive an allocation for the cost of upgrades costing less than \$5 million.

101. PSEG argues that, regardless of the magnitude of the cost of an RTEP upgrade, if a Merchant Transmission Facility benefits from the upgrade, it should be required to pay an appropriate share of the costs of the upgrade. As we stated in Opinion No. 503, the ALJ's decision to treat Merchant Transmission Facilities as part of a host zone in order to be allocated costs of upgrades on a load-ratio share basis in this one instance treats Merchant Transmission Facilities inconsistently, since they are treated as a separate zone for all other purposes.¹³² Adopting the Initial Decision's ruling, as PSEG requests, would result in unjustified disparate treatment of Merchant Transmission Facilities and other zones. Instead, PJM's proposal properly reflects Merchant Transmission Facilities' status as separate zones. Therefore, we reaffirm our finding that PJM's proposal is just and reasonable.

¹³² *Id.* P 123.

102. With respect to directing PJM to use the DFAX methodology, PSEG contends that use of the DFAX methodology would resolve the Commission's concern of treating Merchant Transmission Facilities as part of the host zone. It states that, by using the DFAX methodology for determining whether Merchant Transmission Facilities should be allocated a share of the upgrade costs, PJM would be treating them as a separate zone.¹³³ As we stated in Opinion No. 503, the proposal to use the DFAX methodology 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.¹³⁴ Throughout Opinion No. 503 and this rehearing order, we have found that Merchant Transmission Facilities have the same impact on PJM's system as load, and thus should be treated like zones in the allocation of RTEP costs. Accordingly, we will not require PJM to use the DFAX methodology to allocate the costs of below 500 kV reliability upgrades costing less than \$5 million to Merchant Transmission Facilities, when this methodology is not used to allocate such costs to any other zone.

103. PSEG also argues that the Commission's determination overlooks the fact that the only reason the less than \$5 million upgrade costs are allocated to the zone in which the upgrade is located is because the settling parties agreed to this in the Partial Settlement. PSEG states that the Commission should not have afforded the Merchant Transmission Facilities the benefit of a settlement from which they opted-out.¹³⁵ PSEG is correct that "whether Merchant Transmission Facilities should be assigned cost responsibility for reliability upgrades costing less than \$5 million" was one of the issues reserved for hearing by the Partial Settlement.¹³⁶ However, even though this issue was reserved for hearing, we cannot find proposals that Merchant Transmission Facilities be treated as part of a host zone in this one instance, or that Merchant Transmission Facilities be treated inconsistently with other zones, to be just and reasonable.

¹³³ PSE&G Rehearing Request at 5.

¹³⁴ Opinion No. 503, 129 FERC ¶ 61,161 at P 125.

¹³⁵ *E.g.*, *Colorado Interstate Gas Co.*, 93 FERC ¶ 61,185, at 61,613 (2000) (holding that, in the case of partial settlement, the Commission may approve such settlements only for the consenting parties, while severing the contesting parties to continue to litigate a merits resolution); *Trailblazer Pipeline Co.*, 87 FERC ¶ 61,110, at 61,438-39 (1999) ("[t]he practice of severing contesting parties was adopted by the Commission as a method of giving the consenting parties the benefit of their bargain, while providing the contesting parties an opportunity to have their objections decided on the merits").

¹³⁶ Opinion No. 503, 129 FERC ¶ 61,161 at P 12.

104. Moreover, we disagree with PSEG that the Commission's decision in Opinion No. 503 is inconsistent with cost causation principles, given that below 500 kV reliability upgrades costing less than \$5 million are primarily local in nature. PJM's Witness Herling concludes 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 Merchant Transmission Facilities would not receive any assignment.'"¹³⁷ Accordingly, we find PJM's proposed treatment of Merchant Transmission Facilities to be just and reasonable, and we will not require PJM to use the DFAX methodology to allocate the costs of reliability upgrades costing less than \$5 million to Merchant Transmission Facilities.

The Commission orders:

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

By the Commission. Commissioner Clark voting present.

(S E A L)

Kimberly D. Bose,
Secretary.

¹³⁷ NYPA Brief on Exceptions at 64 (citing Exh. No. PJM-1 at 24:6-9 (PJM Witness Herling)).