

161 FERC ¶ 61,262
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

PJM Interconnection, L.L.C.

Docket No. EL17-84-000

ORDER REQUIRING PJM TO PERMIT CONVERSION OF FIRM TO NON-FIRM
TRANSMISSION WITHDRAWAL RIGHTS UNDER INTERCONNECTION
SERVICE AGREEMENT

(Issued December 15, 2017)

1. On September 8, 2017, the Commission instituted a proceeding pursuant to section 206 of the Federal Power Act (FPA) directing PJM Interconnection, L.L.C. (PJM) and Public Service Electric and Gas Company (PSEG or Interconnected Transmission Owner) to show cause: (1) why the existing Interconnection Service Agreement (Existing ISA) between Hudson Transmission Partners, LLC (HTP), PSEG, and PJM is not unjust and unreasonable and unduly discriminatory to the extent it fails to allow HTP to convert Firm Transmission Withdrawal Rights (TWRs) to Non-Firm TWRs; and (2) why PSEG's failure to consent to an amendment to the Existing ISA reflecting the same is not unjust, unreasonable, and unduly discriminatory.¹ As discussed below, and based on the filings described herein, we find that the Existing ISA is unjust and unreasonable insofar as it does not permit HTP to convert its Firm TWRs to Non-Firm TWR.

I. Background

2. PJM's Open Access Transmission tariff (tariff or OATT) provides merchant transmission facilities with the right to elect TWRs in lieu of other transmission rights²

¹ *PJM Interconnection, L.L.C.*, 160 FERC ¶ 61,056 (2017) (Show Cause Order).

² Interconnection customers can elect TWRs in lieu of Incremental Deliverability Rights, Incremental Auction Revenue Rights, Incremental Capacity Transfer Rights, and Incremental Available Transfer Capability Revenue Rights. See PJM OATT § 232, Transmission Injection Rights and Transmission Withdrawal Rights.

and to request either Firm or Non-Firm TWRs. Firm TWRs allow the merchant transmission facility to schedule energy and capacity withdrawals from the PJM system.³ In contrast, Non-Firm TWRs only allow the merchant transmission facility to schedule energy and, as such, are similar to Non-Firm Point-to-Point Transmission Service in that Non-Firm TWRs allow the merchant transmission facility to schedule transmission service on an as-available basis and are subject to curtailment.⁴

3. Once a merchant transmission facility has elected to obtain TWRs rather than another type of transmission right, PJM determines the necessary upgrades to support the Firm or Non-Firm TWRs requested through its interconnection process.⁵ Upon receiving an interconnection request, PJM undertakes feasibility and system impact studies, and based on these costs, the merchant transmission facility decides the level of Firm or Non-Firm TWRs it wishes to obtain. The interconnecting merchant transmission facility is assigned the costs of the Merchant Network Upgrades that would not have been incurred “but for” the interconnection request.⁶ The merchant transmission facility, PJM, and the transmission owner to which the facility will be interconnected enter into a three-party ISA establishing the costs and conditions of the interconnection. In addition, a merchant

³ Firm TWRs have rights similar to those under Firm Point-to-Point Transmission Service. Firm TWRs are rights to schedule energy and capacity withdrawals between a Point of Interconnection of merchant transmission facility with the transmission system that can only be awarded to a merchant transmission facility, whereas Firm Point-to-Point Transmission Service is reserved or scheduled energy between specified Points of Receipt and Points of Delivery for transmission customers generally. *See* PJM OATT § I, OATT Definitions 1.13A, E-F, 5.0.1 and Definitions L-M-N, 14.0.0. *See also* PJM OATT § II, Point-to-Point Transmission Service.

⁴ *See* PJM OATT § I, OATT Definitions L-M-N, 14.0.0, Non-Firm Transmission Withdrawal Rights.

⁵ PJM OATT § 232.3, Determination of Transmission Injection Rights and Transmission Withdrawal Rights to be Provided to Interconnection Customer.

⁶ *PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,277, at P 4 (2003). Merchant Network Upgrades are additions or upgrades to, or replacement of, existing transmission system facilities by or on behalf of a merchant transmission facility developer. *See* PJM OATT, § I, OATT Definitions - L - M - N, 11.0.0. In exchange for their Merchant Network Upgrades, merchant transmission facilities receive Firm TWRs and Financial Transmission Rights. *See* PJM Filing, ER03-405-000 at 12 (identifying transmission-related rights to which merchant transmission facility developers may be entitled), PJM Interconnection, L.L.C./Intra-PJM Tariffs, OATT 206.5 Estimates of Certain Upgrade-Related Rights.

transmission facility is responsible, on an annual basis, for the costs of any post-interconnection network upgrades to the transmission system necessary to support the merchant transmission facility's Firm TWRs.⁷

Filing in Docket No. ER17-2073-000

4. The Existing ISA sets out the rights and responsibilities of PJM, HTP, and PSEG with respect to the interconnection to the PJM system of the Hudson Line,⁸ a 660 MW high voltage direct current (HVDC) fully controllable merchant transmission facility that connects PJM in Northern New Jersey and the New York Independent System Operator, Inc. (NYISO) in New York City via a 345 kV undersea cable.⁹ On July 10, 2017, at the request of HTP, PJM filed, under section 205 of the FPA, an unexecuted amended ISA (Amended ISA) among PJM, HTP, and PSEG, to be effective June 2, 2017.¹⁰ PJM filed the Amended ISA unexecuted as PSEG, a party to the agreement, did not consent. Under the Amended ISA, HTP sought to convert its 320 megawatts (MW) of Firm TWRs to Non-Firm TWRs, resulting in 673 MW of Non-Firm TWRs and 0 MW of Firm TWRs. PJM stated that the proposed amendment to the Existing ISA comported with the 673 MW Nominal Rated Capability of the facility specified in the Existing ISA and that

⁷ See PJM OATT § Schedule 12 (b), and PJM OATT § 232.2, Right of Interconnection Customer to Transmission Injection Rights and Transmission Withdrawal Rights. See also, *PJM Interconnection, L.L.C.*, Opinion No. 503, 129 FERC ¶ 61,161 (2009) (finding that merchant transmission facilities should be responsible for the costs of maintaining network reliability, including costs for RTEP responsibility assignments, based on their Firm TWRs).

⁸ HTP states that the Hudson Line, over which PJM has operational control, went into service in June of 2013. HTP Response, Docket No. EL14-84-000, at 5.

⁹ HTP states that, pursuant to a long-term offtake contract, it transferred all of its Firm TWRs on the Hudson Line to the New York Power Authority (NYPA) for the purpose of exporting energy and capacity from PJM to NYISO. HTP states that NYPA pays for the rights that it receives under the long-term offtake contract, including costs of network upgrades required for the interconnection of the Hudson Line to PJM and for PJM RTEP transmission enhancement costs allocated to HTP under the existing Schedule 12 of the PJM OATT. Show Cause Order, 160 FERC ¶ 61,056 at P5; HTP Response, Docket No. EL14-84-000, at 5-6.

¹⁰ PJM made this filing in Docket No. ER17-2073-000.

HTP's request would not adversely impact the operation or reliability of the PJM system.¹¹

5. In the September 8, 2017 order, the Commission rejected the Amended ISA, finding that neither the Existing ISA nor PJM's tariff permitted PJM to file, under section 205, an unexecuted amended ISA with modifications requested by an interconnection customer.¹² While the Commission rejected PJM's filing, the Commission also found that, based on the evidence in the proceeding, the Existing ISA may be unjust and unreasonable and unduly discriminatory to the extent that it fails to permit HTP to convert Firm TWRs to Non-Firm and that PSEG's withholding of consent to the Amended ISA may also be unjust and unreasonable. Accordingly, the Commission instituted a proceeding, in Docket No. EL17-84-000, pursuant to section 206 of the FPA, requiring PSEG and PJM to show cause why the Existing ISA and PSEG's failure to consent to the Amended ISA is not unjust and unreasonable and unduly discriminatory.

6. In instituting the section 206 proceeding, the Commission stated that not permitting HTP to reduce the quality of its service from Firm TWRs to Non-Firm TWRs appeared to be unjust and unreasonable in these factual circumstances. The Commission reasoned that (1) HTP had fully paid for the network upgrades necessary for its Firm TWRs and therefore the reduction would not affect payments for previously constructed facilities;¹³ (2) the conversion would not exceed the nominal rated capability of the Hudson Line and therefore system withdrawals would not increase; (3) HTP operates a DC line that is fully controllable by PJM, so PJM can shut off flows, consistent with applicable rules and procedures, in the event that a reliability or other operational

¹¹ Show Cause Order, 160 FERC ¶ 61,056 at P 5.

¹² The Commission found that, under PJM's tariff and the Existing ISA, without the consent of all parties to the Amended ISA, HTP was required to file under section 206 of the FPA to amend the Existing ISA. Show Cause Order, 160 FERC ¶ 61,056 at PP 34-40.

¹³ See Opinion No. 503, 129 FERC ¶ 61,161 at P 80 & n.84 ("PJM would not need to incur the upgrades since it has *no obligation to plan for Non-Firm Transmission Withdrawal Rights in the RTEP process*") (emphasis added) and P 110 ("As the system changes for a variety of reasons (e.g., retirements and load growth), it may be necessary to construct additional facilities in order for PJM to be able to provide the level of *Firm Transmission Withdrawal Rights* to which the customers subscribed. In those circumstances, we find it just and reasonable and not unduly discriminatory or preferential for PJM to charge the Merchant Transmission Facilities for the costs of assuring their service.") (emphasis added).

problem arises; and (4) HTP's relinquishing of Firm TWRs would not adversely impact the operation or reliability of the PJM system.¹⁴

7. In response to a PSEG argument, the Commission also stated that requiring HTP to terminate the Existing ISA and disconnect an already constructed transmission line, rather than permitting an amendment of the Existing ISA to convert Firm TWRs to Non-Firm TWRs, appeared to be unjust and unreasonable. The Commission noted that Non-Firm TWRs impose less of a burden on the system than HTP's Firm TWRs and that PJM, as the system operator, finds that such a conversion will not have adverse reliability or operational impacts.¹⁵

8. The Commission also found that the protestors' arguments related to cost allocation were beyond the scope of the proceeding because such arguments challenged the justness and reasonableness of PJM's RTEP cost allocation method, not whether HTP should be able to convert its Firm TWRs to Non-Firm.¹⁶

9. On September 8, 2017, Linden VFT, L.L.C. (Linden) filed a request for rehearing of the Show Cause Order, which is still pending before the Commission.

II. Notice of Filing and Responsive Pleadings

10. Notice of the Show Cause Order was published in the *Federal Register*, 82 Fed. Reg. 43,535 (Sept. 18, 2017), with interventions due on or before September 29, 2017.

11. Timely motions to intervene were filed by Duke Energy Corporation; PPL Electric Utilities Corporation; Exelon Corporation; FirstEnergy Service Company (FirstEnergy), ITC Lake Erie Connector, LLC; American Electric Power Service Corporation; Monitoring Analytics, LLC, acting in its capacity as Independent Market Monitor for PJM (Market Monitor); NYPA; HTP; New Jersey Board of Public Utilities (NJBPU); and Consolidated Edison Energy, Inc. Out-of-time motions to intervene were filed by Consolidated Edison Company of New York (Con Edison); Long Island Power Authority and its operating subsidiary, Long Island Lighting Company d/b/a LIPA; City of New York, New York (New York City); and Linden VFT, L.L.C. (Linden).

12. On October 25, 2017, and October 30, 2017, respectively, NYPA and HTP each filed answers to PSEG's response to the Show Cause Order. NJBPU filed comments on

¹⁴ Show Cause Order, 160 FERC ¶ 61,056 at P 43.

¹⁵ *Id.* P 44.

¹⁶ *Id.* P 45.

October 10, 2017 and on October 25, 2017, Linden filed an answer to PSEG's response to the Show Cause Order and NJBPU's comments. The Market Monitor filed comments on November 1, 2017. On November 3, 2017, Linden filed an answer to the Market Monitor's November 1st comments. On November 9, 2017, HTP filed an answer to the Market Monitor's November 1st comments. On November 10, 2017, the Market Monitor filed an answer to Linden's November 3rd and HTP's November 9th answers and a motion to lodge information in the related but non-consolidated complaint filed by Linden against PJM in order to provide a more complete record in that proceeding. On November 13, 2017, Linden filed an answer to the Market Monitor's November 10th comments and motion to lodge. On November 14, 2017, NYPA filed an answer to the Market Monitor's November 1st and 13th comments. On November 17, 2017, FirstEnergy, on behalf of the PJM Transmission Owners, filed comments in response to Linden's November 3rd and November 13th answers.

III. Show Cause Order Responses, Comments, and Answers

13. In its response, PJM agrees that, given the unique facts of this case, it is reasonable for the Commission to consider whether the Existing ISA is unjust and unreasonable and unduly discriminatory if HTP is not permitted to reduce the quality of its service from Firm to Non-Firm TWRs. As noted by the Commission, PJM states that those relevant facts include: (1) HTP has fully paid for the network upgrades required to receive Firm TWRs (therefore the reduction of service from Firm to Non-Firm TWRs will not affect HTP's responsibility to fund previously constructed facilities); (2) the conversion will not exceed the nominal rated capability of the Hudson Line (because system withdrawals will not increase); (3) HTP's line is fully controllable by PJM (so PJM can shut off flows in the event that a reliability or operational problem arises), and (4) allowing HTP to convert its Firm TWRs to Non-firm TWRs will not adversely impact the operation or reliability of the PJM transmission system. Should the Commission allow HTP to amend its ISA to convert its Firm TWRs to Non-Firm TWRs, PJM contends that the termination of the Firm TWRs should not relieve HTP of its cost responsibility obligations under Schedule 12 of the PJM tariff that were incurred prior to termination of its Firm TWRs and that any future cost responsibility obligations should terminate in accordance with existing tariff processes.

14. In its response, PSEG argues cost allocation is not beyond the scope of this proceeding, and the amendment to the Existing ISA will result in preferential rates for New York customers as HTP will avoid a share of cost responsibility that it caused. PSEG further argues that it reasonably relied upon the long-term duration of the Existing ISA, and permitting an unilateral amendment of ISAs will undermine the interconnection process. PSEG adds that the provisions of the Existing ISA are protected by the *Mobile-*

Sierra doctrine.¹⁷ Finally, PSEG argues HTP's amendment to its Existing ISA raises issues of material fact that require that this matter be set for hearing and settlement procedures. NJBPU also filed comments arguing cost allocation is not beyond the scope of this proceeding.

15. In their answers, HTP, NYPA, and Linden argue that PSEG fails to provide a reasonable basis for PSEG's refusal to consent to HTP's request to reduce the quality of its service under the Existing ISA by converting its Firm TWRs to Non-Firm TWRs and therefore, PSEG's refusal to consent to amending the Existing ISA is unjust, unreasonable, and unduly discriminatory and preferential. They also argue that, regardless of PSEG's unreasonable refusal to consent, the Existing ISA is unjust and unreasonable and unduly discriminatory to the extent that it fails to permit HTP to reduce the quality of its service under the Existing ISA by relinquishing its Firm TWRs and retaining only Non-Firm TWRs. HTP also requests that the Commission act on the Show Cause Order and grant the relief requested by no later than December 15, 2017.

16. As further detailed below, the PJM Market Monitor and PJM Transmission Owners filed comments concerning the allocation of costs for RTEP projects to Firm Point-to-Point transmission customers as it may relate to a merchant transmission facility's request for Firm Point-to-Point transmission service.

A. Mobile Sierra

17. PSEG contends that the provisions of the Existing ISA are protected by the *Mobile-Sierra* doctrine. PSEG states that the Existing ISA was filed and accepted by the Commission and as such it has the force of a filed rate.¹⁸ PSEG argues that the *Mobile-Sierra* doctrine requires that the Commission presume that the contract rates and terms contained in the Existing ISA are just and reasonable, unless otherwise shown to be contrary to the public interest.¹⁹ PSEG states that the presumption may be overcome only if the Commission concludes that the contract seriously harms the public interest,²⁰ which

¹⁷ *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 344 (1956) (*Mobile-Sierra*).

¹⁸ PSEG Response, Docket No. EL17-84-000 at 7 (citing *Town of Norwood v. F.E.R.C.*, 217 F.3d 24, 28 (1st Cir 2000), *cert. denied*, 532 U.S. 993 (2001)).

¹⁹ *Id.* (citing *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 167 (2010)).

²⁰ *Id.* (citing *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 128 S.Ct. 2733, 2736 171 L.Ed.2d 607 (2008)).

generally requires “a finding that the existing rate or term ‘might impair the financial ability of [a] public utility to continue its service,’ or that the rate would ‘cast upon other consumers an excessive burden, or be unduly discriminatory,’ [or that there are] other ‘circumstances of unequivocal public necessity.’”²¹ PSEG states that is not the case here and the Existing ISA must not be disturbed.

18. HTP and Linden argue that the limited revisions in the Amended ISA are not protected by the *Mobile-Sierra* doctrine. Linden states that in order to determine whether the *Mobile-Sierra* presumption applies to a contract, the Commission considers whether a contract “embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations.”²² Linden states that contracts that have the characteristics of the first category may be eligible to qualify for the *Mobile-Sierra* presumption, but contracts that have the characteristics of the latter “constitute tariff rates, terms, or conditions to which the *Mobile-Sierra* presumption does not apply.”²³ Linden states that the Commission has further explained that terms of an agreement that are “incorporated into the service agreements of all present and future customers...are properly classified as tariff rates and the *Mobile-Sierra* presumption would not apply.”²⁴ Linden argues that the Existing ISA is a form agreement, the *pro forma* for which is attached to the PJM tariff as Attachment O. Thus, Linden concludes, it constitutes a tariff rate that is not eligible for the *Mobile-Sierra* presumption. Linden states that, as the relevant language is in the form agreement, the parties were not in a position to negotiate the terms and conditions of this agreement “freely at arm’s length.” HTP also points out that PSEG did not seek

²¹ *Id.* (citing *Wis. Pub. Power*, 493 F.3d at 271 (quoting *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355, 76 S.Ct. 368, 100 L.Ed. 388 (1956); *Permian Basin Area Rate Cases*, 390 U.S. 747, 822, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968)).

²² Linden Answer, Docket No. EL17-84-000, at 13 (citing *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 183 (2013) (*PJM*)).

²³ *Id.* (citing *PJM*, 142 FERC ¶ 61,214 at P 183 (citing *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364 (D.C. Cir. 2013)).

²⁴ *Id.* (citing *PJM*, 142 FERC ¶ 61,214 at P 184 (citing *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 at P 17 (2011) (*Carolina Gas*)).

rehearing of the Commission's conclusion in the Show Cause Order that the changes in this proceeding are not contract rates and are instead "non-rate" terms of service.²⁵

19. Linden and NYPA argue that, even if the *Mobile-Sierra* presumption were to apply, the Commission may overcome the *Mobile-Sierra* presumption by determining that the Existing ISA and PSEG's refusal to consent to the Amended ISA is not consistent with the public interest. Linden states that U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has held that "a *Mobile-Sierra* contract will not automatically shield any and all discriminatory treatment from attack under Section 205(b) of the Federal Power Act. Rather, that section remains an independent force which must be accommodated."²⁶

20. NYPA contends that the Commission has previously determined that any presumption of *Mobile-Sierra* protection created by inclusion of a *Mobile-Sierra* clause may be overcome by a reservation of rights provision and in such instances, the just and reasonable standard of review applies.²⁷ NYPA states that section 22.3 of the Existing ISA specifically reserves to all parties their rights "with respect to changes in applicable rates or charges under Section 205 of the Federal Power Act . . . or any of the rights of any Interconnection Party under Section 206 of the Federal Power Act." NYPA states that such language unambiguously preserves all parties' section 206 rights under the ordinary just and reasonable standard.

B. Cost Allocation

21. PSEG and NJBPU disagree with the Commission determination that cost allocation is beyond the scope of this proceeding. PSEG argues that allowing HTP to unilaterally change terms by converting its Firm TWRs to Non-Firm, so it can escape its cost responsibilities and continue to benefit from needed infrastructure investment while

²⁵ HTP Answer, Docket No. EL17-84-000, at 18 (citing Show Cause Order, 160 FERC ¶ 61,056 at P 39).

²⁶ Linden Answer, Docket No. EL17-84-000, at 14 (citing *Town of Norwood*, 587 F.2d at 1311).

²⁷ NYPA Answer, Docket No. EL17-84-000, at 14 (citing *Ontelaunee Power Operating Co., LLC v. Metropolitan Edison Co.*, 119 FERC ¶ 61,181, at PP 21, 24- 25, n.19 (2007) (*Ontelaunee Power*) (citing *Kiowa Power Partners, LLC v. Pub. Serv. Co. of Okla.*, 110 FERC ¶ 61,118, at P 10 (2005)); *Duke Energy Hinds, LLC*, 102 FERC ¶ 61,068, at P 21 (2003); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,168, at PP 8, 38-39 (2006)).

passing a portion of its legitimate transmission cost obligation on to New Jersey ratepayers would be unjust and unreasonable.

22. PSEG also argues that allowing amendment of the ISA will result in preferential rates for New York customers to the detriment of New Jersey ratepayers. PSEG states that both the New York Independent System Operator, Inc. (NYISO) and New York Public Service Commission (NYPSC) concede that there are benefits to New York, such as operational, reliability, and resource adequacy support for the New York Control Area (NYCA). PSEG states that New York customers will continue to receive these benefits even after the conversion to Non-Firm TWRs without any responsibility for the continued costs which will then fall to New Jersey ratepayers. Further, PSEG states that HTP's withdrawal requirement has, in some instances, driven the need for RTEP projects in the Northern PSEG zone. Similarly, PSEG states that, but for HTP's Firm TWRs, some of these projects may not have been built or at the least may have been delayed for many years, or the system may have been planned in a different way.²⁸ PSEG contends that, if HTP is permitted to escape from the market and financial risks associated with its project and does not continue to bear its appropriate share of cost responsibility for PJM transmission facilities, then the cost allocation to customers in PJM will need to be increased to cover the costs, while HTP and the load that they are serving in New York unjustly and unreasonably get a "free ride."

23. PSEG also argues that opening the door to unilateral amendment of ISAs will undermine the entire RTO interconnection process. PSEG states that it reasonably relied upon the long-term duration of the Existing ISA. PSEG states that allowing HTP to circumvent the PJM documented interconnection procedures is prejudicial to other transmission customers seeking to interconnect, disruptive of the orderly nature of the PJM queue process and has absolutely no basis in the PJM Tariff. PSEG explains that the PJM transmission system is planned and designed to accommodate a planned MW quantity, both at the time of a facility's interconnection, and in subsequent studies to maintain the reliability of the transmission system.

24. With respect to PSEG's RTEP cost allocation arguments, HTP, NYPA, and Linden argue that PSEG's arguments do not provide a reasonable basis for PSEG's refusal to consent to the Amended ISA. Those arguments, they contend, reflect a challenge to the justness and reasonableness of PJM's cost allocation, which must be raised in a separate section 206 complaint. HTP states that Schedule 12 is not the subject of this proceeding and the existing cost allocation methodology in Schedule 12 is not modified or changed in any way by the Amended ISA. Similarly, HTP states that the Amended ISA does not propose any changes to PJM's existing transmission expansion

²⁸ PSEG Response, Docket No. EL17-84-000, at 13 (citing Khadr Affidavit at P 23).

planning methodology in the PJM Operating Agreement. HTP states that it will not continue to benefit from PJM transmission planning for new RTEP expansion projects because PJM will no longer plan for HTP in its RTEP transmission expansion planning.²⁹

25. Linden also points out that PSEG made the same arguments in *New York Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,033 (2017) with respect to Con Edison and the Commission rejected PSEG's arguments. Linden states that PSEG's fear of cost reallocations to the New Jersey ratepayers resulting from the operation of the Schedule 12 reallocation process cannot be a just and reasonable basis for PSEG to refuse to consent to HTP reducing the service level of its Firm TWRs.

26. HTP also disputes PSEG's argument that permitting HTP to reduce the quality of its service in the Amended ISA would result in preferential rates for New York customers. HTP states that it has assumed the full market and financial risks for its project and has paid approximately \$650 million in capital costs to construct the Hudson Line. HTP also states that it and NYPA have paid approximately \$320 million for network upgrades to the PJM system for the interconnection of the Hudson Line to the PJM system. HTP states that, as a merchant transmission facility, HTP is not allowed to recover the costs for these transmission facilities through the PJM transmission rates. HTP states that, in addition, all HTP customers using the Hudson Line, including NYPA, are required by PJM to use Point-to-Point transmission service and pay PJM for it. HTP states that this includes ancillary services associated with Point-to-Point transmission service, including Scheduling service, Reactive Support and Voltage Control service, and Black Start service. For these reasons, HTP asserts that it and NYPA have paid, and will continue to pay, for the Hudson Line and use of the Hudson Line and the benefits that it provides. However, HTP notes that following a reduction in service level, it will no longer enjoy the right to schedule capacity withdrawals across the Hudson Line using Firm TWRs and PJM will no longer include HTP's Firm TWRs in its transmission expansion planning under the PJM Operating Agreement.

27. HTP and NYPA also argue that reducing the quality of its service in the Amended ISA will not open the door to unilateral amendment of ISAs or undermine the entire RTO interconnection process. HTP argues that this proceeding concerns a narrow, single issue that only applies to three merchant transmission facilities in PJM, two of which are parties to the proceeding. NYPA states that the anticompetitive behavior of interconnecting transmission owners that refuse to consent to changes in interconnection

²⁹ HTP Answer, Docket No. EL17-84-000, at 14 (citing PJM Operating Agreement, Schedule 6, Sect. 1.1. PJM Manual 14B: PJM Regional Transmission Expansion Planning Process, Att. C.7.3 (Rev. 39, Sept. 28, 2017) (Firm TWRs are included in the RTEP planning model); Opinion No. 503, 129 FERC ¶ 61,161 at P 80, n.84 ("PJM ... has no obligation to plan for Non-Firm Transmission Withdrawal Rights in the RTEP process. Citing Tr. 278:5 – 280:15 (PJM Witness Herling)).

service elections is what threatens to undermine the RTO interconnection process. Contrary to PSEG, HTP also asserts that, under the PJM Operating Agreement and PJM Manual 14-B, PJM performs its RTEP transmission expansion planning only for load and for Firm TWRs that are held by merchant transmission facilities. HTP states that under the terms of the PJM Operating Agreement and PJM Manual 14B, PJM will no longer perform its RTEP transmission expansion planning taking into account Firm TWRs held by HTP, and will no longer plan the PJM system to accommodate any such Firm TWRs.

28. HTP, NYPA, and Linden also dispute PSEG's claim that it relied on HTP's Firm TWRs being included in PJM's transmission planning and cost allocation for a "long-term duration." They contend that there is no reasonable basis for such reliance in light of the Existing ISA, the PJM tariff and the Commission's prior decisions. They argue that PSEG's claim is undercut by PSEG's acknowledgement that HTP is permitted to terminate the Existing ISA without the consent of PSEG, which would terminate all of HTP's interconnection rights, including the Firm TWRs. Linden states that, under Schedule 12 of the PJM tariff, cost allocation for regional transmission upgrades is based solely on firm use of an upgrade and shifts over time as different upgrade users change their firm service. Linden also claims that having a methodology that purports to update PJM-determined "beneficiaries" of RTEP projects each year was touted by the PJM Transmission Owners, including PSEG, as a primary benefit of the Solution-based DFAX methodology (as compared to its predecessor, Violation-based DFAX) because it theoretically allocates costs of projects to the use of those projects over time throughout their life, rather than only at the time of the upgrade.³⁰ Linden also asserts that there is nothing in the PJM tariff that requires or even suggests that merchant transmission facilities would or could be allocated costs for the life of an upgrade under Solution-based DFAX based on the number of Firm TWRs they hold when the RTEP project is first proposed.

29. NJBPU contends that the issue of cost allocation is not beyond the scope of this proceeding, as cost allocation is primarily what HTP and Linden seek to avoid. NJBPU states that the Amended ISA cannot be viewed in a vacuum. NJBPU states that HTP has conceded that the Amended ISA is an attempt to gain relief from RTEP costs in this matter, when such relief has not been granted in other proceedings. NJBPU states that indulging this collateral attack sets a dangerous precedent likely to inundate the Commission with unwanted litigation from parties seeking a favorable decision by any means necessary. In addition, NJBPU argues that, if HTP is successful in avoiding its

³⁰ Linden Answer, Docket No. EL17-84-000, at 12 (citing PJM Transmission Owners Filing, Transmittal Letter at 11, Docket No. ER13-90-000 (filed Oct. 11, 2012) ("because Solution-Based DFAX is based on the analysis of flows on the new facility, the analysis can be updated annually to capture changes in the distribution of the benefits of the new transmission facility")).

share of cost responsibility for PJM transmission facilities, then the cost allocation to customers in PJM will be increased to cover the costs as load in New York continues to receive the same benefits. NJBPU argues that it is unjust and unreasonable for load in New York to receive such benefit for nothing—and that is precisely what is sought.

30. In its answer, the Market Monitor addresses an alleged discrepancy in the allocation of costs for merchant transmission providers which hold firm point to point transmission contracts and those that hold Firm TWRs. The Market Monitor contends that Linden seeks to substitute Firm Point-to-Point Transmission service coupled with Non-Firm TWRs to maintain the ability to export capacity to the NYISO from PJM with the same level of transmission service they have with Firm TWRs. The Market Monitor asserts that this creates a discrepancy in cost allocation between section 232.2 and Schedule 12 of the tariff in that Schedule 12 omits any reference to merchant transmission facilities that hold both firm transmission service to the PJM border and Non-Firm TWRs. The Market Monitor concludes that it would not be just and reasonable to merchant transmission providers to retain the same capacity export though firm point-to-point transmission service and avoid RTEP cost allocation.

31. The PJM Transmission Owners also filed an answer clarifying that Schedule 12 defines customers with Firm Point-to-Point Transmission Service as customers responsible for the costs of RTEP projects.³¹ The PJM Transmission Owners also state that Schedule 7 specifies that Firm Point-to-Point transmission customers should not be charged for the same RTEP costs under their applicable Point-to-Point service rate, and that Firm Point-to-Point customers can thus be assessed RTEP costs.³²

C. Reliability

32. PSEG requests that the matter be set for hearing and settlement procedures, if not summarily dismissed. PSEG asserts that the issue of the operational and reliability impacts, as well as changes in locational marginal price (LMP) changes due to HTP converting its Firm TWRs to Non-Firm TWRs raises a multitude of disputed material facts that require that this matter be set for hearing and settlement procedures.

33. HTP, NYPA, and Linden oppose PSEG's request for a hearing. HTP argues that none of the claims made in the affidavit of PSEG's expert, Mr. Khadr, identified a genuine issue of material fact that requires a hearing. Linden states that the NYISO Reliability Needs Assessment (RNA) upon which Mr. Khadr relies to support the claim

³¹ PJM Transmission Owners Response, Docket No. EL17-84-000, at 4 (citing PJM OATT, Schedule 12 § (b)(viii)).

³² *Id.* at 5 (citing PJM OATT, Schedule 7 § 7).

that there is a genuine reliability issue represents a resource adequacy study used in conjunction with ensuring that a Loss of Load Expectation does not exceed one event in 10 years; it is not a transmission planning study and does not address whether a transmission system component requires upgrades.³³ Further, Linden states that NYISO's RNA is (and has been) based on the entire 660 MW capability of the HTP facility since HTP went into service, rather than HTP's 320 MW of Firm TWRs.³⁴ HTP, NYPA, and Linden also point out that PJM and NYISO are parties to this proceeding and neither has identified any reliability concerns with HTP reducing the quality of its serviced in the Amended ISA and converting its Firm TWRs to Non-Firm TWRs. Rather, Linden notes that PJM determined that HTP's conversion of Firm TWRs would not have adverse reliability or operational impacts.

34. HTP also disputes Mr. Khadr's assertions that after the reduction in the quality of HTP's service, the Hudson Line will remain used and useful to HTP and NYISO, and "all costs associated with HTP's existence will exclusively be borne by New Jersey ratepayers."³⁵ HTP states that it (and NYPA) is responsible for (1) approximately \$650 million in capital costs for constructing the Hudson Line; (2) all of the costs to operate and maintain the Hudson Line and, because HTP is a merchant transmission facility; and (3) approximately \$320 million to PJM for network upgrades in the Existing ISA. HTP also points out that all of HTP's customers using the Hudson Line, including NYPA, are required by the PJM tariff to use and pay for PJM Point-to-Point transmission service and PJM ancillary service charges, including PJM scheduling charges, PJM reactive support and voltage control charges, and PJM black start service charges.

35. HTP also argues that PSEG's and Mr. Khadr's assertion that HTP's Firm TWRs might have contributed to, or in some cases driven, the need for RTEP projects, and such projects may not have been built or may have been delayed, is speculation and even it were true, that is how PJM's transmission expansion planning process works.

36. HTP argues that, in order for PSEG's refusal to consent to the Amended ISA to be reasonable, it would have to be within the objective criteria established in section 205 of the PJM tariff for the study and evaluation of facility interconnections' impact on operation and reliability of the PJM system. HTP states that any refusal of the interconnected transmission owner (i.e., PSEG) to refuse an interconnection request for reasons other than those objective criteria, as it has done here, is unjust, unreasonable,

³³ Linden Answer, Docket No. EL17-84-000, at 5-6.

³⁴ *Id.* at 5-6.

³⁵ HTP Answer, Docket No. EL17-84-000, at 29 (citing Khadr Affidavit at P 6).

and unduly discriminatory, a violation of the PJM tariff, and a violation of open access transmission service under Order No. 888.³⁶ NYPA agrees the basis of PSEG's interference contradicts the role of transmission owners in party interconnection agreements, and emphasizes that the Commission, in Order No. 2003, clarified: "It is our intent that, while the Transmission Owner is a necessary part of interconnecting to a facility under the operational control of an RTO or ISO, its role in negotiating the agreement will be a limited one."³⁷

37. HTP also contends that requiring HTP to terminate its ISA completely and, disconnect the Hudson Line from the PJM system, and reenter and restart the PJM interconnection process in order to permit HTP to reduce the quality of its service in the ISA, would be extraordinarily prejudicial to HTP. HTP contends that reentering the PJM interconnection queue process would require one to three years to complete, during which time the Hudson Line would be forcibly disconnected from the PJM system. Therefore, HTP asserts it would face the prospect of paying for interconnection upgrades twice for the same service under the PJM tariff.

38. HTP also argues that the Existing ISA should permit HTP to reduce the quality of its service under the Existing ISA by relinquishing its Firm TWRs and retaining only Non-Firm TWRs, and direct PJM to make the necessary changes to permit HTP to so reduce the quality of its service under the Existing ISA. HTP states that permitting HTP to reduce the quality of its service by relinquishing its Firm TWRs and retaining only Non-Firm TWRs is consistent with other provisions of the PJM tariff and the Existing

³⁶ *Id.* at 32-34.

³⁷ NYPA Answer, Docket No. EL17-84-000, at 17 (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003-A, FERC Stats. & Regs., Regs. Preambles 2001-2005 ¶ 31,160, at PP 785-86 (2004) (emphasis added), *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs., Regs. Preambles 2001-2005 ¶ 31,171, *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs., Regs. Preambles 2001-2005 ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008)).

ISA regarding interconnection rights.³⁸ For example, HTP states that section 232.7 of the PJM tariff allows PJM to unilaterally reduce the amount of HTP's TWRs without terminating the Existing ISA, and without the consent of PSEG or HTP. HTP states that, under section 232.7 of the PJM tariff, "Loss of ... Transmission Withdrawal Rights," PJM has the unilateral right to make a partial reduction in the amount of TWRs in the Existing ISA, without the consent of PSEG (or HTP) and without termination of the ISA, in the event that the Hudson Line fails to operate or be capable of operating at the capacity level associated with the TWRs for any consecutive three-year period. HTP states that it is unduly discriminatory for the PJM Tariff to permit PJM to unilaterally reduce the quality of HTP's service under the Existing ISA without terminating the ISA and without the consent of PSEG, but not to permit HTP to reduce the quality of its service under the Existing ISA without terminating the ISA and without the consent of PSEG.

IV. Discussion

A. Procedural Matters

39. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,³⁹ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures,⁴⁰ the Commission will grant the late-filed motions to intervene given their interest in the proceeding, the early stages of the proceeding, and the absence of undue prejudice or delay.

³⁸ HTP Answer, Docket No. EL17-84-000, at 36-41. HTP also cites section 230.3.3 of the PJM OATT (permitting an existing generator to replace its generating facility, using "a portion or all" of its existing capacity interconnection rights, without the consent of its Interconnected Transmission Owner and without terminating its interconnection agreement), section 16.1.2 of the Existing ISA (permitting HTP, at any time, to "unilaterally terminate the Interconnection Service Agreement" without the consent of PJM or PSEG, upon sixty days prior written notice), and section 3.1 of the Existing ISA (providing that HTP "may undertake modifications to its facilities" without the consent of PSEG, provided that the modifications do not have a permanent adverse impact on the Interconnection Transmission Owner's (i.e., PSEG's) facilities).

³⁹ 18 C.F.R. § 385.214 (2017).

⁴⁰ 18 C.F.R. § 385.214(d) (2017).

40. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority.⁴¹ We will accept the answers filed in this docket because they provide information that assisted us in our decision-making process.

B. Substantive Matters

41. As discussed below, and based on the filings described herein, we find that the Existing ISA is unjust and unreasonable insofar as it does not permit HTP to convert its Firm TWRs to Non-Firm TWRs.⁴² Accordingly, PJM shall make a compliance filing within 7 days of the date of this order amending the section 2.2 of Specifications for the Existing ISA to reflect the conversion of 320 MW Firm TWRs to a total of 0 MW of Firm TWRs and 673 MW Non-Firm TWRs, effective the date of this order.

42. We see no reasonable basis for barring HTP from converting from higher quality Firm TWRs to lower quality Non-Firm TWRs by amending the Existing ISA. ISAs establish the requirements and upgrades necessary for interconnection. Once a merchant transmission facility has elected to obtain Firm TWRs, PJM determines the necessary upgrades to support the Firm TWRs requested through its interconnection process. HTP already has satisfied the interconnection requirements, and we find that requiring it to maintain such Firm TWRs for the life of the merchant transmission facility is unjust and unreasonable in the absence of any operational or reliability basis for doing so.

43. Under the Existing ISA and PJM's tariff, PJM must guarantee that its transmission system is robust enough to permit HTP to use its Firm TWRs to export 320 MWs of power from its source in PJM across the river to New York at all times. Converting those Firm TWRs to Non-Firm TWRs imposes no additional obligation on PJM and, in fact, is less burdensome in that PJM will no longer have to guarantee that its transmission system can support such use. In terms of reliability, PJM states that "the conversion will not exceed the nominal rated capability of the HTP line (because system withdrawals will not

⁴¹ 18 C.F.R. § 385.213(a)(2) (2017).

⁴² In the Show Cause Order, the Commission required PSEG and PJM to show cause (1) why the Existing ISA is not unjust and unreasonable and unduly discriminatory to the extent it fails to allow HTP to convert Firm TWRs to Non-Firm TWRs and (2) why PSEG's failure to consent to an amendment to the Existing ISA reflecting the same is not unjust, unreasonable, and unduly discriminatory. Because we have found that the Existing ISA is unjust and reasonable insofar as it does not permit HTP to convert its Firm TWRs to Non-Firm TWRs, we need not address whether PSEG acted unreasonably in withholding consent to an amendment to the Existing ISA reflecting the same.

increase,”⁴³ and no additional facilities would be necessary to support HTP’s conversion from Firm TWRs to Non-Firm TWRs. In any case, HTP’s line is fully controllable by PJM so that PJM can shut off flows if those flows jeopardize reliability or cause operational problems in New Jersey or elsewhere on the PJM system. PJM recognizes in its response to the Show Cause Order that for these reasons, the conversion to Non-Firm TWRs will not affect the operation or reliability of the PJM system,⁴⁴ and PSEG has offered no evidence to the contrary.

44. PSEG argues that, under section 16.1.2 and 16.2.1 of Appendix 2 of the Existing ISA,⁴⁵ HTP could effectuate such a reduction in Firm TWRs by exercising its unilateral right to terminate the Existing ISA and disconnecting its line. HTP could then reapply for Non-Firm TWRs. However, interpreting the Existing ISA, as PSEG did in its protest in Docket No. ER17-2073-000, to require that HTP terminate the Existing ISA and disconnect an already operational merchant transmission facility, rather than amending the Existing ISA to convert Firm TWRs to Non-Firm TWRs, would be unjust and unreasonable. As PJM states, “HTP has fully paid for the network upgrades required to receive Firm TWRs (therefore the reduction of service from Firm to Non-Firm TWRs

⁴³ PJM Response, Docket No. EL17-84-000, at 3. *See also* PJM Transmittal, Docket No. ER17-2073-000, at 3-4 (PJM stated that the conversion “corresponds to the nominal rated capability of the facility of 673 MW”).

⁴⁴ PJM Response, Docket No. EL17-84-000, at 3.

⁴⁵ Section 16.1.2 of Appendix 2 of the Existing ISA provides as follows:

Interconnection Customer may unilaterally terminate the Interconnection Service Agreement pursuant to Applicable Laws and Regulations upon providing Transmission Provider and the Interconnected Transmission Owner sixty (60) days prior written notice thereof, provided that Interconnection Customer is not then in Default under the Interconnection Service Agreement.

Section 16.2.1 of Appendix 2 of the Existing ISA provides as follows:

Disconnection: Upon termination of the Interconnection Service Agreement in accordance with this Section 16, Transmission Provider and/or the Interconnected Transmission Owner shall, in coordination with Interconnection Customer, physically disconnect the Customer Facility from the Transmission System, except to the extent otherwise allowed by this Appendix 2.

will not affect HTP's responsibility to fund previously constructed facilities)."⁴⁶ We also do not find, as PSEG alleges, that allowing HTP to convert its Firm TWRs to Non-Firm TWRs will undermine the interconnection process as HTP has already fulfilled its interconnection requirements. As discussed above, Non-Firm TWRs impose less of a burden on the transmission system than do Firm TWRs, and HTP's conversion of Firm TWRs to Non-Firm TWRs does not, as PJM points out, require any additional system upgrades as the Non-Firm TWRs do not increase system withdrawals.⁴⁷ Moreover, PJM, as the system operator, finds that such a conversion will not have adverse reliability or operational impacts, and HTP's amendment to the Existing ISA will not affect payments for previously constructed facilities.⁴⁸ Thus, we find that it is unjust and unreasonable not to allow HTP to amend the Existing ISA to convert its Firm TWRs to Non-Firm TWRs.⁴⁹

45. PSEG makes three arguments against finding the Existing ISA unjust and unreasonable: that the Existing ISA is a bilateral contract governed by the public interest *Mobile-Sierra* standard; the issue of operational and reliability impacts raises a multitude of disputed material facts regarding the effect on the NYISO system warranting a hearing; and cost allocation is not beyond the scope of the proceeding. We address each of these arguments in turn.

1. Mobile-Sierra

46. As a threshold matter, we find that the Existing ISA is not eligible for the *Mobile-Sierra* "public interest" presumption. Aside from the fact that the Existing ISA was filed and accepted by the Commission, PSEG provides no other support for its contention that the Existing ISA is protected by the *Mobile-Sierra* doctrine.⁵⁰ As the Commission has explained, the *Mobile-Sierra* "public interest" presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on

⁴⁶ PJM Response, Docket No. EL17-84-000, at 3.

⁴⁷ *Id.* See also PJM Transmittal, Docket No. ER17-2073-000, at 3-4 (PJM stated that the conversion "corresponds to the nominal rated capability of the facility of 673 MW").

⁴⁸ Show Cause Order, 160 FERC ¶ 61,056 at P 43.

⁴⁹ See, e.g., *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 at (2015) (requiring that ISO be the entity that makes the determination whether a specific generator is needed to ensure reliable transmission service).

⁵⁰ PSEG Response, Docket No. EL17-84-000, at 7.

whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption.

47. We find that the terms and conditions of the Existing ISA at issue here are generally applicable and, therefore, are not protected by the *Mobile-Sierra* presumption. The granting of Firm and Non-Firm TWRs to a Transmission Interconnection Customer is governed by generally applicable provisions of the PJM tariff, namely section 232 of the PJM tariff.⁵¹ Once determined by PJM following a System Impact Study, such rights become available to the Transmission Interconnection Customer (e.g., HTP) pursuant to execution of an ISA based on the *pro forma* ISA attached to the PJM tariff as Attachment O. The terms and conditions in the Existing ISA, including the terms related to Amendments, Termination, and Disconnection, were identical in relevant part to the terms and conditions set forth in the *pro forma* ISA in PJM's tariff.⁵² The Commission has found that such generally applicable rates, terms and conditions are not the type of contract rates that qualify for the *Mobile-Sierra* presumption.⁵³

48. Another, independent reason why the *Mobile-Sierra* presumption does not apply in these circumstances is that the Existing ISA contains the same standard *Memphis*

⁵¹ See PJM Tariff, Section 232.3 (Determination of Transmission Injection Rights and Transmission Withdrawal Rights to be Provided to Customer) ("The Office of Interconnection [PJM] shall determine the ... Transmission Withdrawal Rights ... to be provided to eligible Transmission Interconnection Customer(s)").

⁵² Schedule F of the Existing ISA contains non-standard terms and conditions that set forth the terms and cost for HTP to acquire additional Firm TWRs above the 320 MW currently set forth in the Existing ISA.

⁵³ *Southwest Power Pool, Inc.*, 144 FERC ¶ 61,059 (2013), *on reh'g*, 149 FERC ¶ 61,048, at PP 100-104 (2014), *denying petition for review*, *Okla. Gas & Elec. Co. v. FERC*, 827 F.3d 75, 76 (D.C. Cir. 2016); *PJM*, 142 FERC ¶ 61,214 at P 184 (citing *Carolina Gas*, 136 FERC ¶ 61,014 at P 17 (holding that the terms of an agreement that are "incorporated into the service agreements of all present and future customers...are properly classified as tariff rates and the *Mobile-Sierra* presumption would not apply.")).

clause⁵⁴ as in the *pro forma* ISA. That provision preserves for PJM and PSEG their section 205 filing rights and preserves the rights of any Interconnection Party to bring complaints under section 206. Specifically, section 22.3 of the Existing ISA states in pertinent part:

This Interconnection Service Agreement may be amended or supplemented only by a written instrument duly executed by all Interconnection Parties. An amendment to the Interconnection Service Agreement shall become effective and a part of this Interconnection Service Agreement upon satisfaction of all Applicable Laws and Regulations. Notwithstanding the foregoing, nothing contained in this Interconnection Service Agreement shall be construed as affecting in any way any of the rights of any Interconnection Party with respect to changes in applicable rates or charges under Section 205 of the Federal Power Act and/or FERC's rules and regulations thereunder, or any of the rights of any Interconnection Party under Section 206 of the Federal Power Act and/or FERC's rules and regulations thereunder.

While section 22.3 states that the Existing ISA may be amended “only by a written instrument duly executed by all Interconnection Parties...”, the second sentence of the provision protects the parties’ unilateral filing rights. Consistent with court precedent, the Commission has found that such provisions apply the ordinary just and reasonable standard: “where provisions in an Interconnection Agreement allow either party to unilaterally request changes under FPA sections 205 or 206, the Commission has the authority to require changes to the contracts under the just and reasonable standard.”⁵⁵

2. Cost Allocation

49. PSEG and NJBPU argue that HTP should not be permitted to relinquish its Firm TWRs, because, under Schedule 12 of PJM’s tariff, HTP would no longer be allocated costs for RTEP projects that PSEG alleges were caused by HTP’s Firm TWRs and benefit HTP. However, as explained below, it is the cost allocation provisions in

⁵⁴ *United Gas Co. v. Memphis Gas Div.*, 358 U.S. 103 (1958) (contracts can preserve the rights of parties to revise rates under ordinary just and reasonable standard).

⁵⁵ *Ontelaunee Power*, 119 FERC ¶ 61,181 at P 24 (citing *Duke Energy Hinds*, 102 FERC ¶ 61,068 at P 21). See also *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983) (“specific acknowledgment of the possibility of future rate change is virtually meaningless unless it envisions a just-and-reasonable standard”).

Schedule 12 that provide that a Merchant Transmission Owner that does not own Firm TWRs does not receive cost responsibility assignments for RTEP projects.⁵⁶ Neither PSEG nor NJBPU have argued that those provisions are unjust and unreasonable. Accordingly, we find that their cost allocation argument does not provide a basis for precluding HTP from terminating its Firm TWRs under the Existing ISA.

50. Under Schedule 12 of the PJM tariff, a merchant transmission facility's cost responsibility assignments for RTEP projects are calculated based that facility's Firm TWRs.⁵⁷ As the Commission has explained, the reason that the costs of RTEP projects are allocated to merchant transmission facilities with Firm TWRs is that PJM is required to provide firm service to those facilities and therefore those facilities are responsible for contributing to facilities necessary to support that firm service:

PJM is required to provide reliable service up to the Firm Transmission Withdrawal Rights held by these customers. In order to provide such rights, PJM must require the construction of RTEP upgrades. The Merchant Transmission Facilities can avoid these costs if instead of opting for Firm Transmission Withdrawal Rights, they opt only for Non-Firm Transmission Withdrawal Rights under the tariff.⁵⁸

As of the effective date of HTP's conversion of its Firm TWRs to Non-Firm TWRs, PJM is no longer required to provide firm service and can curtail non-firm service whenever necessary to preserve reliability.⁵⁹ Under Schedule 12, therefore, RTEP upgrade costs would no longer be allocable to HTP. The cost responsibility assignments for RTEP projects are updated annually based on a range of inputs and values to determine

⁵⁶ Although PJM implements the cost allocation provisions of Schedule 12 of the Tariff, the cost allocation method is determined by the PJM Transmission Owners, and it is the PJM Transmission Owners, not PJM, that have the section 205 filing rights for the PJM cost allocation method. *See Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002).

⁵⁷ *See* PJM OATT, Schedule 12 § (b)(i) (3.0.0).

⁵⁸ Opinion No. 503, 129 FERC ¶ 61,161 at P 80.

⁵⁹ *See* PJM OATT, Schedule 12 § (b)(i) (3.0.0). *See* PJM OATT § I, OATT Definitions L-M-N, 14.0.0, Non-Firm Transmission Withdrawal Rights. *See also* PJM OATT § II, Point-to-Point Transmission Service.

beneficiaries of RTEP projects.⁶⁰ Thus, under Schedule 12, cost responsibility assignments for RTEP projects will shift over time as usage by transmission customers of a RTEP project changes over its lifespan.⁶¹ For example, HTP's cost responsibility assignment increased as a direct result of the termination of Con Edison's transmission service agreements.⁶² Contrary to PSEG's assertion, the PJM tariff does not require a merchant transmission facility, like HTP, to be allocated costs for an RTEP project over the life of that project based on the MWs of Firm TWRs the merchant transmission facility held at the time that the RTEP project was approved by PJM.⁶³ As noted, neither PSEG nor NJBPU has contended that these provisions are unjust and unreasonable.

51. Moreover, we also find unpersuasive PSEG's argument that it reasonably relied upon the long-term duration of the Existing ISA, and HTP maintaining its Firm TWRs, as providing for long-term cost responsibility assignments for RTEP projects to HTP. As PSEG itself acknowledged, HTP has the right unilaterally to terminate the Existing ISA, including its Firm TWRs, at any time.⁶⁴ As we explained earlier, requiring HTP to terminate its rights in order to convert its Firm TWRs to Non-Firm TWRs is unjust and unreasonable as making such changes will not result in reliability or operational difficulties for the PJM system.

52. Similarly, the PJM Market Monitor raises concerns with Schedule 12 and requests changes thereto in order to address an alleged discrepancy in the cost responsibility assignments for RTEP projects for merchant transmission providers that hold firm point-to-point transmission service and those that hold Firm TWRs. Those general concerns with Schedule 12 do not address whether HTP should be permitted to convert its Firm TWRs to Non-Firm TWRs. The PJM Transmission Owners also raise concerns regarding the cost responsibility assignments for RTEP projects to firm point-to-point transmission customers. We reject, as beyond the scope of this proceeding, these comments. The cost responsibility assignments for RTEP projects for firm point-to-point

⁶⁰ See PJM OATT, Schedule 12 § (b)(iii)(H).

⁶¹ Schedule 12 updates cost allocations annually based on changes to the system's topology, load changes, and other events such as termination of service. See PJM OATT, Schedule 12 § (b).

⁶² Show Cause Order, 160 FERC ¶ 61,056 at n.24.

⁶³ See PJM OATT, Schedule 12 § (b)(iii).

⁶⁴ Show Cause Order, 160 FERC ¶ 61,056 at P 6.

transmission customers under Schedule 12 are unrelated to the issue of whether HTP should be permitted to convert its Firm TWRs to Non-Firm TWRs.

3. Reliability

53. PSEG argues that allowing HTP to convert its Firm TWRs to Non-Firm TWRs will adversely affect the operation or reliability of the PJM transmission system, and raises a multitude of disputed material facts that require that the Commission set this matter for hearing and settlement procedures. In support of its contention, PSEG relies on the affidavit of Mr. Khadr, who asserts that there might be “critical reliability consequences” in NYISO as a result of HTP reducing the quality of its service under the Existing ISA and converting its Firm TWRs to Non-Firm TWR. Mr. Khadr bases his claim on NYISO’s 2016 RNA. Mr. Khadr contends that because the 2016 RNA models 660 MW of flows from the HTP facility, 320 MW of which is firm, the 2016 RNA “shows great dependency on the PJM system and the PSE&G system in particular.”⁶⁵ Mr. Khadr contends that if HTP is permitted to convert its Firm TWRs entirely to Non-Firm, “NYISO [will be] depending on an additional 320 MW across the Hudson Line that PJM will, properly, not be including in its planning assumption across the PJM/NYISO interface.”⁶⁶

54. PSEG, however, does not provide any evidence that the relinquishment of Firm TWRs would cause any reliability or operational problems for PJM, the region in which the service in dispute would actually be provided. With HTP’s conversion of its Firm TWRs to Non-Firm TWRs, PJM, with its operational control over the Hudson Line, may curtail firm exports on the facility when necessary to support PJM’s reliability or operational needs.⁶⁷ As to any potential effects on LMPs in PJM, such effects can result from any type of non-firm transmission service and are not a reason to require HTP to retain Firm TWRs.

55. Moreover, the studies cited by Mr. Khadr do not support that HTP’s maintenance of its Firm TWRs is critical to NYISO’s reliability. In his affidavit, Mr. Khadr references only a diagram of topology zones included in the RNA, which includes a reference to the capability of flowing 660 MW of flows from the Hudson Line into NYISO alongside other flows from PJM into NYISO. Contrary to Mr. Khadr’s claims, however, the diagram makes no reference to the 320 MWs of Firm TWRs, nor does it assert that those MWs are critical to NYISO’s reliability. Thus, the presence of Firm TWRs in PJM has

⁶⁵ Khadr Affidavit at P 7.

⁶⁶ *Id.* P 8.

⁶⁷ PJM Response, Docket No. EL17-84-000, at 3.

not led to capacity that NYISO relies upon in serving its resource adequacy needs. NYISO has also asserted that reliability would be negatively impacted only if the Hudson Line is taken out of service. Since these issues can be resolved based on the written record, we find no material issues of disputed fact and see no need for a trial-type hearing.⁶⁸

The Commission orders:

(A) As discussed in the body of this order, we find that the Existing ISA is unjust and unreasonable insofar as it does not permit HTP to convert its Firm TWRs to Non-Firm TWR.

(B) PJM shall make a compliance filing within 7 days of the date of this order amending section 2.2 of Specifications for the Existing ISA to reflect the conversion of 320 MW Firm TWRs to a total of 0 MWs Firm TWRs and 673 MW Non-Firm TWRs, effective the date of this order.

By the Commission. Chairman McIntyre is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁸ See, e.g., *Pennsylvania Pub. Util. Comm'n v. FERC*, 881 F.2d 1123, 1126 (D.C. Cir. 1989); *Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997). (“FERC may resolve factual issues on a written record unless motive, intent, or credibility are at issue or there is a dispute over a past event”). “Mere allegations of disputed fact are insufficient to mandate a hearing; a petitioner must make an adequate proffer of evidence to support them.” *Woolen Mill Ass'n v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (citing *Pennsylvania Pub. Utility Comm'n v. FERC*, 881 F.2d 1123, 1126 (D.C.Cir.1989) and *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 124 (D.C.Cir.1982)).