

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

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

Maryland Public Service Commission Docket No. EL08-34-000

v.

PJM Interconnection, L.L.C.

PJM Interconnection, L.L.C. Docket No. EL08-47-000

ORDER GRANTING IN PART AND DISMISSING IN PART COMPLAINT, AND
ESTABLISHING SECTION 206 HEARING

(Issued May 16, 2008)

1. In this Order, the Commission addresses the Maryland Public Service Commission (Maryland PSC) complaint against PJM Interconnection, L.L.C. (PJM) (Complaint). Maryland PSC requests that the Commission remove PJM's market rule provisions that exempt certain generation resources from energy offer price mitigation. Maryland PSC also requests that the Commission initiate an investigation to determine whether generators exempt from mitigation have exercised market power and provide retroactive relief where appropriate. This order grants the request to remove the mitigation exemptions and denies the request for retroactive relief. We also are establishing a Federal Power Act (FPA) section 206 hearing in a separate docket to consider the justness and reasonableness of PJM's existing market power screen.¹

I. Background

A. Mitigation and Exemptions

2. Under PJM's market power mitigation rules, a generator is subject to offer price mitigation whenever a transmission constraint arises that creates two conditions. The first condition is that the generation within the transmission constraint fails a market power screen. The second is that PJM is required to commit the unit out of merit. There are two exemptions to this general rule. These exemptions apply to generation resources

¹ 16 U.S.C. § 824e (2000 and Supp. V. 2005).

used to relieve limits on certain interfaces (interface exemptions), and to generation resources whose construction began during certain time periods (construction exemption). The interface exemptions are the West, Central, and East in the Mid-Atlantic Area Council (MAAC) control zone, and the AP South interface (between the former Allegheny Power System and PJM). With regard to the construction exemption, generators that were built between April 1, 1999 and September 30, 2003, are always exempt from unit-specific offer caps regardless of the extent of any transmission constraints.

B. Complaint

3. On January 15, 2008, Maryland PSC filed, pursuant to sections 206, 306, and 309 of the FPA,² and Rule 206 of the Commission's Rules of Practice and Procedure,³ a complaint against PJM.⁴ In its complaint, Maryland PSC requests that the Commission remove PJM's market rule provisions that exempt certain generation resources from energy offer price mitigation during hours when the PJM market is structurally noncompetitive, and apply mitigation to these resources. Maryland PSC states that the mitigation exemptions are preferential, discriminatory, and produce unjust and unreasonable energy prices.

4. In support for its request, Maryland PSC cites the PJM Market Monitoring Unit's (MMU) recommendation for across-the-board elimination of the mitigation exemptions in its 2006 State of the Market Report.⁵ The MMU cites the implementation and effectiveness of the market power screen⁶ as support for its recommendation.⁷ In addition, Maryland PSC contends that implementation of the Reliability Pricing Model (RPM) capacity pricing mechanism makes the mitigation exemptions for recently constructed units unjust and unreasonable.⁸ Finally, Maryland PSC notes that the enhancement of scarcity pricing and special mitigation rules for frequently mitigated

² 16 U.S.C. §§ 824e, 825e, 825h (2000 and Supp. V. 2005).

³ 18 C.F.R. § 385.206 (2007).

⁴ Maryland PSC requests fast track processing of its Complaint.

⁵ Maryland PSC Complaint at 22-24, citing 2006 State of the Market Report at 9.

⁶ The current market power screen is referred to as the three-pivotal-supplier test.

⁷ Maryland PSC Complaint at 24-29.

⁸ *Id.*

units needed for reliability have caused an increase in revenues for generators, and further eliminate the need for offer-cap exemptions for generators.

5. The basis for Maryland PSC's request for retroactive relief is its contention that PJM violated its Open Access Transmission Tariff (tariff) by not publishing MMU reports analyzing offer cap exemptions. Maryland PSC requests that the Commission, pursuant to FPA section 309, order refunds beginning September 8, 2006, the date when it contends that the MMU advised PJM to eliminate the interface exemptions, or the first date which the Commission determines PJM violated its tariff.⁹ Maryland PSC also requests that the Commission initiate an investigation to determine whether generators exempt from mitigation have exercised market power, and upon such a finding, order disgorgement of monies from generating resources where price manipulation is found.

1. Interface Exemptions

6. Maryland PSC states that four interfaces are exempt from PJM's mitigation rules that automatically cap generation resources' energy offers in local market power conditions. Maryland PSC alleges that the interface exemptions raise congestion costs when offers are not mitigated,¹⁰ even if their bids indicate they are exercising local market power. Maryland PSC states that the mitigation exemptions for the three MAAC interfaces have been in place since 2004, and that the Commission approved the exemption for the AP South interface in 2006. According to the Maryland PSC, approximately \$166 million of congestion costs occur on the interfaces that are exempt from mitigation.¹¹

7. Maryland PSC contends that PJM's market rules require the MMU to monitor bidding behavior and report quarterly whether the existing mitigation exemptions for these interfaces should be terminated. In support of its request, Maryland PSC relies on the recommendations of the MMU included in the 2006 State of the Market Report, recommending that the interface exemptions be removed so that generating resources used to relieve transmission constraints would be mitigated if their offers failed the market power screen.

⁹ *Id.* at 43.

¹⁰ Congestion costs occur when available energy cannot be delivered to all loads without violating established reliability criteria.

¹¹ Maryland PSC Complaint at 11, citing the MMU's 2006 State of the Market Report, Vol. II at 279.

2. Construction Exemptions

8. Maryland PSC contends that the construction exemption applies to a significant portion of the generation resources in PJM. Maryland PSC states that exempt units can and do exercise market power that would be mitigated if the units were not exempt.¹² Maryland PSC states that in 2006, 43 of the 56 construction-exempt generators in PJM were among the 710 marginal generating units (that set the energy clearing price).¹³ Further, Maryland PSC argues that these construction-exempt generating resources set the price in 2,720 hours of operation, nearly one-third of all hours in 2006.¹⁴ According to Maryland PSC, the exercise of market power by exempt units added \$87.5 million to Maryland's 2006 real-time energy charges.¹⁵

3. Retroactive Relief

9. The basis for Maryland PSC's request for retroactive relief is that PJM violated its tariff by not timely posting the MMU's analysis recommending termination of the interface exemptions. According to Maryland PSC, the MMU is required to evaluate whether competition on the interfaces is sufficient to warrant either application or removal of mitigation exemptions, and PJM is required to report quarterly on the MMU recommendations.¹⁶ Further, Maryland PSC contends that PJM violated its tariff by refusing to publish the MMU's evidence of market power abuse by a construction-exempt generator. Maryland PSC contends that the MMU requested that PJM make a FPA section 205 filing, and that PJM refused to make such a filing.

10. Maryland PSC states that the failure of PJM to publish the MMU analysis recommending removal of the interface exemptions, and its refusal to disclose the MMU's evidence of market power abuse, prevented stakeholders from pursuing their available remedies and also prevented the Commission from investigating these issues. Maryland PSC contends that because of PJM's refusal to post and make public the information the tariff requires to be public, stakeholders, state commissions and the

¹² *Id.* at 14, citing MMU response to questions from Maryland PSC (Maryland Report) at 23 (October 12, 2007).

¹³ *Id.* at 19, citing Maryland Report at 23-25.

¹⁴ *Id.* at Attachment G.

¹⁵ *Id.* at 15, citing Maryland Report at 25.

¹⁶ *Id.* at 38, citing PJM tariff § 6.4.1(d)(ii), Second Revised Sheet No. 402.

Commission had no access to expert, knowledgeable analysis on issues that affect electric rates.

11. Maryland PSC also contends that generation resources exempt from mitigation have exercised market power for the period from September 2006 to present.¹⁷ Maryland PSC requests that the Commission, by its authority under FPA section 309, order disgorgement of monies from generating resources where price manipulation is found.¹⁸

C. Notice

12. Notice of Maryland PSC's Complaint was published in the *Federal Register*, 73 Fed. Reg. 4,204 (2008), with interventions and protests due on or before February 4, 2008, later extended to February 19, 2008.

D. Answer

13. In its answer, PJM states that it is "not convinced that eliminating the construction exemption is warranted."¹⁹ PJM also states that, while it does not object to the Commission revisiting its policy decision to continue the construction exemption, PJM believes that the Complaint has not established that any construction-exempt generation resource has exercised market power. PJM notes that the Complaint is based on MMU reports and analysis and questions the cost-estimating abilities and assumptions of the MMU.²⁰ PJM asserts that the lack of evidence of the exercise of market power, and the limitations in the proffered analysis do not offer support for elimination of the exemption.²¹ While not opposing reassessment of the construction exemption, PJM asserts that, consistent with the tariff and Commission policy against re-running markets, any changes to the construction exemption should be made only on a prospective basis.²² PJM notes that the only remedy provided for in the tariff, even if significant market

¹⁷ *Id.* at 43.

¹⁸ *Id.*

¹⁹ PJM Answer at 10.

²⁰ *Id.* at 11-14.

²¹ *Id.* at 14, stating that PJM believes it is more reasonable to assume that the MMU does not have sufficient unit-specific operating cost information available to determine that these units are marking up their offers in order to exercise market power.

²² *Id.* at 17.

power is found, is prospective elimination of the exemption for the involved unit.²³ Should the Commission retain the construction exemption, PJM states that the Commission could provide greater certainty to it and market participants by clarifying the significant market power standard.²⁴

14. PJM states that the Commission should dismiss the Complaint with regard to the elimination of the interface exemptions. PJM argues that neither the MMU nor PJM has identified any exercise of market power by any generating unit related to the control of these large, regional transmission interfaces. PJM states that congestion on these interfaces can be controlled by a large number of generators, and that they are among the most liquid in PJM.²⁵ PJM states that the percentage of time that the market power screen is failed is less than one half of one percent for the exempt East, West, and Central interfaces.²⁶ PJM also questions the MMU analysis of the AP South interface.

15. PJM argues for deferring the evaluation of the exempt interfaces to the ongoing stakeholder process and, as the MMU has suggested, “linking the issue to the development of a more comprehensive scarcity pricing regime.”²⁷ PJM notes that several parties previously had requested that the Commission commence a FPA section 206 proceeding to investigate mitigation and scarcity pricing rules upon the filing of the 2006 State of the Market Report, and that the Commission determined that it should not preempt the ongoing stakeholder process.²⁸

16. In response to the contention that revenues earned by generators committed as capacity through the RPM mechanism eliminate the need for mitigation exemptions, PJM acknowledges that RPM revenues may be a relevant consideration in the decision whether to eliminate the construction exemption,²⁹ but also contends that Maryland PSC misconstrues the relationship between energy prices and RPM revenues. PJM contends that revenues earned in RPM should be viewed as a revenue supplement to the energy

²³ *Id.* at 5.

²⁴ *Id.* at 10.

²⁵ *Id.* at 18.

²⁶ *Id.* at 19.

²⁷ *Id.* at 22.

²⁸ *PJM Interconnection, L.L.C.*, 120 FERC ¶ 61,092, at P 10 (2007).

²⁹ PJM Answer at 23.

market, which can be reduced as the energy market is reformed to reflect market efficiency.³⁰

17. PJM states that it complied with its tariff and posted all MMU recommendations concerning exempt interfaces. PJM argues that stakeholders have been aware of the MMU recommendations since at least December 2006. PJM explains that the MMU provided its first report on interface exemptions in September 2006, and that while it was considering its response to that report, the MMU provided its second report one month later. PJM states that it posted the second MMU report in December 2006, along with its response and support for its decision to not make a filing with the Commission to terminate all interface exemptions. The MMU provided its third quarterly report on interface exemptions to PJM in May 2007. PJM states that it posted that report and its response to that report on May 31, 2007. Finally, PJM states that it posted the MMU's fourth report on interface exemptions and its response to that report on August 28, 2007.³¹

18. PJM states that Maryland PSC offers no support for its assertion that PJM's decision not to make a FPA section 205 filing to eliminate the construction exemption is a tariff violation. PJM argues that it, not the MMU, decides whether to make a FPA section 205 filing to change the PJM tariff, and it is not a tariff violation if PJM declines to proceed with the MMU's recommended course of action. PJM explains that it was not convinced that a tariff filing seeking to terminate the construction exemption was the proper course to address what appeared to be an enforcement matter, and therefore recommended to the MMU that it refer the matter to the Commission.³²

E. Interventions

19. Notices of intervention and motions to intervene are listed in Appendix A.

F. Comments/Protests

20. Comments in support of the Complaint were submitted by Joint Consumer Advocates, PJM Industrial Customers Coalition, Southern Maryland Electric Cooperative, and Old Dominion Electric Cooperative (ODEC). Commenters supporting the Complaint state that the mitigation exemptions are leading to unjust, unreasonable, discriminatory and preferential prices, and that Maryland PSC has provided substantial

³⁰ *Id.* at 25.

³¹ *Id.* at 30-33.

³² *Id.* at 33-35.

evidence to support that conclusion. Joint Consumer Advocates also contend that Maryland PSC has identified a violation of the PJM tariff.³³

21. ODEC states that mitigation should apply to all generators that fail the market screen test, and that the three-pivotal-supplier test provides for an effective mitigation of market power, without arbitrary geographic distinctions and without discretion afforded to the MMU.³⁴

22. Protests and comments opposing the Complaint were submitted by PJM Power Providers Group (PJMPPG), Electric Power Supply Association, PPL Companies (PPL), Dayton Companies (Dayton), Bear Subsidiaries (Bear), PSEG Companies (PSEG),³⁵ Mirant, Coral, Reliant, Dominion, CED/Ocean, and Exelon (Protesters). Protesters contend that a complainant must show, on a case-by-case basis, that an individual construction-exempt generator has exercised market power, and that Maryland PSC has not met this burden of proof. Protesters argue that it would be fundamentally unfair, and undermine regulatory certainty, and deter efficient new entry, to eliminate the exemption relied upon by construction-exempt generators when they were built.

23. Protesters state that the MMU analysis relied on by Maryland PSC is based on erroneous assumptions and fails to distinguish between exercises of market power and scarcity pricing. Dayton argues that Maryland PSC confuses the potential existence of structural market power with the actual and intentional exercise of market power.³⁶ Bear explains that Maryland PSC makes two flawed inferences: first, resources failing the three-pivotal-supplier test during certain intervals had the ability to exercise market power at those times; and second, that resources submitting bids in excess of their offer caps during such market conditions actually exercised market power.³⁷

24. Protesters also raise concerns with the three-pivotal-supplier test as an appropriate market screen. PPL states that the three-pivotal-supplier test suffers from numerous flaws.³⁸ PPL and PJMPPG argue that use of the three-pivotal-supplier test could lead to

³³ *Id.*

³⁴ ODEC Comments at 4.

³⁵ PSEG also included a motion to dismiss.

³⁶ Dayton Comments at 8 (emphasis omitted).

³⁷ Bear Comments at 9.

³⁸ PPL Protest at 30-31.

over-mitigation, which in turn will result in distortion of price signals necessary to encourage demand response and attract new entry.³⁹ Reliant argues that, should the Commission set the Complaint for hearing, the hearing must address the applicability of the three-pivotal-supplier test and whether other reasonable alternatives are available. PPL states that to the extent that the Commission investigates eliminating the mitigation exemptions, it should also investigate whether the continued use of the three-pivotal-supplier test results in rates that are just and reasonable.⁴⁰

25. Protesters raise concerns with Maryland PSC's reliance on the recently implemented RPM capacity mechanism. Bear states that Maryland PSC has made no demonstration that the levels of revenues in the RPM market are sufficient to recover costs.⁴¹ PJMPPG and PPL contend that Maryland PSC inappropriately represents the effect of RPM revenues.⁴² PJMPPG states that RPM revenues are not substitutes for the energy and ancillary service market revenues.⁴³ PJMPPG contends that the calculation determining RPM payments causes these payments to substantially, if indirectly, offset against any price increase caused by the mitigation exemptions.⁴⁴

26. Finally, Protesters contend that PJM did not violate its tariff. Protesters point out that the relevant tariff language requires PJM to post a summary of the relevant MMU reports without giving any specific timeframe for the posting. Protesters maintain that PJM did post the MMU analysis within a reasonable period of time. Protesters also note that Maryland PSC took over a year after the MMU analysis was posted to draft and file its Complaint; and contend that any delay was caused by Maryland PSC's own litigation strategies, not PJM's conduct. Protesters also note that it is inappropriate to equate the posting of the MMU recommendations with the automatic elimination of the mitigation exemptions.

³⁹ PPL Comments at 31; PJMPPG Comments at 40, citing Kalt/Cavicchi Affidavit at P 30.

⁴⁰ PPL Protest at 31.

⁴¹ Bear Comments at 12.

⁴² PPL Protest at 45; PJMPPG Comments at 49, citing Kalt/Cavicchi Affidavit at P 71.

⁴³ *Id.*

⁴⁴ PJMPPG Comments at 49.

27. Protesters also raise concerns with the application of retroactive relief. PSEG contends that refunds are barred by the filed rate doctrine as well as the Commission's prohibitions on retroactive ratemaking, and explains that a rate may change retroactively only by agreement of the parties, or where adequate notice was given that resolution of some specific issue may cause a later adjustment to the rate being collected.⁴⁵ PJMPPG explains that any remedy should be required directly of the responsible party, and not other parties who were complying with the rules in the market.⁴⁶ PJMPPG states that such reasoning is consistent with Commission policy.⁴⁷

G. Responsive Pleading

28. On March 5, 2008, Maryland PSC filed a motion to answer, and an answer to the answer of PJM and the comments/protests filed by parties to the proceeding.⁴⁸ Maryland PSC contends that the Commission is not precluded from reviewing a rate that previously had been found to be just and reasonable to determine whether it continues to be just and reasonable. Maryland PSC contends that the Commission's consideration of mitigation exemption provisions is necessary because new evidence and facts show the exemptions to be unjust and unreasonable.⁴⁹ In support of its argument, Maryland PSC states that its Complaint presents new evidence with regard to PJM's capacity pricing mechanism, changes to the scarcity pricing and mitigation rules for frequently mitigated units, MMU recommendations regarding elimination of the exemptions, and MMU analysis finding that exempt generators are exercising market power.⁵⁰ Maryland PSC requests that the Commission investigate this matter, and that the Commission should limit its investigation to the issues raised in its Complaint and not an investigation into scarcity pricing and market power screens.⁵¹

⁴⁵ PSEG Protest at 16, citing *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999); *City of Holyoke Gas & Elec. Dep't. v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992).

⁴⁶ PJMPPG Comments at 29.

⁴⁷ *Id.*, citing *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at P 241 (2007).

⁴⁸ On March 14, 2008, Maryland PSC filed a motion to lodge, and the MMU's 2007 State of the Market Report.

⁴⁹ Maryland PSC Answer at 6.

⁵⁰ *Id.*

⁵¹ *Id.* at 16.

II. Discussion

A. Procedural Issues

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁵² the notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,⁵³ prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept MD PSC's answer and its motion to lodge because they have provided information that assisted us in our decision-making process.

B. Complaint Issues

31. Pursuant to FPA section 206, the party seeking to change an existing rate, term or condition has the burden to demonstrate that the existing provision results in rates that are unjust and unreasonable, unduly discriminatory and/or preferential. The party advocating a new rate has the burden to demonstrate that the new rate is just and reasonable. Further, a tariff provision implementing a particular rate or practice that was found reasonable at one time does not preclude the Commission from later reviewing the provision to determine whether it continues to be just and reasonable.⁵⁴

32. As discussed below, we find that the construction and interface exemptions in PJM's existing tariff have become unjust and unreasonable, and that eliminating the construction and interface exemptions and applying the same mitigation measures to all generators is just and reasonable. We dismiss the Complaint's request to change rates retroactively, because we find no violation by any generation resources of their tariffs, no nexus between the alleged tariff violations by PJM and the rates charged by the generators, and no violation by PJM of its tariff that would justify retroactive relief.

33. To understand the issues presented here, background is needed as to the way in which mitigation is applied in PJM and how the current exemptions from mitigation arose. All generation in PJM is subject to a maximum bid cap of \$1,000. Generation also is subject to bids caps when transmission constraints occur such that generators are

⁵² 18 C.F.R. § 385.214 (2007).

⁵³ 18 C.F.R. § 385.213(a)(2) (2007).

⁵⁴ *Ameren Services Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,205, at P 33 (2007).

run out of merit order.⁵⁵ When units are dispatched out of merit, PJM applies the three-pivotal-supplier test to determine the potential for the exercise of market power.⁵⁶ If a generator fails the test, PJM mitigates the bid price of the generator. For most generators, the mitigated bid price is its incremental operating cost, plus a 10 percent adder. For generators that are frequently mitigated, the mitigated bid is set at a variety of levels depending on the extent of mitigation.⁵⁷ However, these mitigation rules do not apply during scarcity conditions⁵⁸ and to the two exemptions at issue in this proceeding, the construction cost and interface exemptions.

⁵⁵ PJM Tariff, § 6.4. Out of merit order means that a higher priced generator must be run due to a transmission constraint that prevents the use of available lower-priced generation.

⁵⁶ Under the three-pivotal-supplier test, PJM imposes bid capping when for any hour there are three or fewer generation suppliers available for redispatch that are jointly pivotal with respect to a transmission limit. If there are three such pivotal suppliers, PJM subjects to mitigation only those generation units whose owner, when combined with the two largest other generation suppliers, is jointly pivotal.

⁵⁷ (a) For units that are offer capped for 60 percent or more of their run hours, but less than 70 percent of their run hours, the offer price cap will be either (i) incremental cost plus 10 percent or (ii) incremental cost plus \$20 per megawatt-hour. (b) For units that are offer capped for 70 percent or more of their run hours, but less than 80 percent of their run hours, the offer price cap will be either (i) incremental cost plus 15 percent, not to exceed incremental cost plus \$40 per megawatt-hour, or (ii) incremental cost plus \$30 per megawatt-hour. (c) For units that are offer capped for 80 percent or more of their run hours, the offer price cap will be (i) incremental costs plus 10 percent; (ii) incremental cost plus \$40 per megawatt-hour; or (iii) the agreed unit-specific going forward costs of the affected unit as reflected in an agreement with Office of Interconnection.

⁵⁸ Under scarcity conditions (defined generally as the dispatch of maximum emergency generation, certain voltage reductions, emergency energy purchases, and manual load dumping), the price in the scarcity region is set equal to the highest market-based offer price of all generating units, and no mitigation is initiated or continued; provided however that all generation in the scarcity region remain subject to the overall \$1000 offer cap. PJM Tariff, § 6A.3

1. Construction Exemption

a. Background

34. The genesis of the construction exemption dates back to the inception of the PJM market. PJM market rules approved in 1997 included a cost-based offer mechanism for energy sales into the PJM system.⁵⁹ In response to a request by several generators, on March 10, 1999, the Commission issued an order lifting the cost-based offer caps and authorizing market-based pricing.⁶⁰ In addition, PJM implemented offer caps to address locational market power concerns. The offer-cap mechanism applied mitigation to units within a transmission constraint when the unit was dispatched out of merit order.

35. In accepting the generators' request for market-based authorization, the Commission balanced the opportunities for locational market power with the effect on new entry, and determined that while bid-caps are appropriate to mitigate opportunities for existing generators to exercise locational market power, offer caps should not apply to new generators--those constructed after July 9, 1996.

The argument for exempting new generation from price cap regulation is that, while entry will eliminate opportunities for locational market power, price cap regulation may deter some potential entry. We agree⁶¹

36. PJM itself revisited the offer-cap exemption. On September 30, 2003, PJM submitted a filing to revise its tariff to ensure that mitigated reliability must run generators were receiving just and reasonable compensation.⁶² As the Commission recognized, "market power mitigation (which impacts revenue received by units needed to ensure reliability) can conflict with the longer term goal of attracting and retaining necessary infrastructure to assure long-term reliability in such markets."⁶³ The

⁵⁹ *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257, at 62,239 (1997).

⁶⁰ *Atlantic City Electric Company*, 86 FERC 61,248 (1999). The Commission also issued an order approving a market monitoring plan. *Atlantic City Electric Company*, 86 FERC 61,247; *order on clarification*, 86 FERC 61,310; *order accepting compliance filing*, 88 FERC ¶ 61,039 (1999).

⁶¹ *Atlantic City Electric Company*, 86 FERC 61,248 at 61,904.

⁶² *PJM Interconnection, LLC*, 107 FERC ¶ 61,112 (2004) (May 6, 2004 Order).

⁶³ *Id.* P 14.

Commission required that PJM implement a number of changes to its market mitigation policies because some of the mitigation rules did not permit mitigated generators to earn just and reasonable compensation.

37. As part of the September 30, 2003 filing, PJM proposed to revise its tariff to eliminate the exemption for generating units constructed after July 9, 1996, and to apply a market power screen to all generation to determine whether offer caps could be removed. The Commission initially rejected PJM's proposal to eliminate the post-1996 generation exemption, finding that PJM had not established that any particular unit had exercised market power and that "removal of the exemption would likely result in lowered revenues and valuation, and would create regulatory uncertainty."⁶⁴

38. The Commission, however, granted rehearing with respect to most units within PJM finding that:

The fact that a generator is dispatched out of economic merit order due to transmission constraints means that there are few competitive options and the market is unlikely to be competitive. Under these conditions, it is reasonable that the same rules should be applied to all the units in the load pocket regardless of when they are constructed.⁶⁵

The Commission also found the exemption was unduly discriminatory because it "creates two groups of must run generators, one of which is offer capped and one of which is not."⁶⁶

39. The Commission, however, found that the exemption should be retained for certain generators that may have relied on the exemption when deciding to construct their units:

the Commission, as well as PJM, recognizes that some units were constructed based on the blanket exemption from mitigation in PJM's tariff. Thus, investors could reasonably have relied on the exemption after it went into effect in their zone. The Commission finds that this reliance interest needs

⁶⁴ *Id.* P 55.

⁶⁵ *PJM Interconnection, LLC*, 110 FERC ¶ 61,053, at P58 (2005).

⁶⁶ *Id.* P 59.

to be taken into account and these units will retain their exemption from mitigation.⁶⁷

The Commission, however, continued to recognize the possibility that these generators could exercise market power and found that “they will, however, still be subject to mitigation in the event that PJM or its market monitor concludes that these units exercised *significant* market power” (emphasis added). Before imposing mitigation on these units, PJM must make a FPA section 205 filing with the Commission documenting the exercise of market power.⁶⁸ Moreover, the Commission has made clear that the exemption itself may be eliminated, finding that once an appropriate test was developed for assessing market power within load pockets, “that test would be appropriate to determine when the grandfathered units have sufficient market power to warrant mitigation.”⁶⁹ On January 27, 2006, the Commission approved a settlement which accepted clarifications and modifications to the three-pivotal-supplier test, and established new scarcity pricing rules for PJM, including modifications to the offer-capping rules for frequently-mitigated units. (November 2005 Settlement).⁷⁰

b. Commission Determination

40. We find that based on the changes in the PJM market, it is no longer just and reasonable to retain the construction exemption. As shown in the prior discussion, the Commission was concerned about removing the exemption for pre-1996 units in 2004 because of a concern that the overall mitigation scheme in PJM was not producing just and reasonable revenues for mitigated generators and that “removal of the exemption would likely result in lowered revenues and valuation, and would create regulatory uncertainty.”⁷¹ On rehearing, however, the Commission re-examined the balance between the mitigated generators’ need for sufficient revenue and the need to protect against the potential exercise of market power. The Commission therefore removed the construction exemption for all new generation but still retained this exemption for post-

⁶⁷ *Id.* P 60.

⁶⁸ *Id.* See also *PJM Interconnection, LLC*, 112 FERC ¶ 61,031, at P 45 (2005) (July 5, 2005 Order).

⁶⁹ *PJM Interconnection, LLC*, 112 FERC ¶ 61,031 at P 45.

⁷⁰ *PJM Interconnection, L.L.C.*, 114 FERC ¶ 61,076 (2006). On April 27, 2007, PJM filed the 2006 State of the Market Report in response to the reporting requirement provision of the November 2005 Settlement.

⁷¹ *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 at P 55.

1996 units that may have been built in reliance on the exemption. The Commission recognized the possibility that generation could exercise market power and required that PJM retain the ability to make FPA section 205 filings with the Commission to mitigate generators exercising “significant” market power.

41. The Maryland PSC Complaint requires that we look again at the balance we struck in 2004. While we are still concerned about new entry and any impact of rule changes on generators that may have relied on the prior exemption, we have concluded that the balance we established in our May 6, 2004 Order has now become unjust and unreasonable for two reasons. First, the July 5, 2005 Order continuing the exemption from mitigation for grandfathered generating units put these customers on notice that “once the Commission determines the appropriate test for market power within load pockets, that test also would be appropriate to determine when the grandfathered units have sufficient market power to warrant mitigation”⁷² Second, we no longer find that the provision under which PJM can make a filing to mitigate “significant” market power is just and reasonable. Third, the PJM market has changed to such a degree since 2004, including the implementation of RPM, that our original concern with the lowered revenues and valuation resulting from removal has been addressed.

42. As we made clear in the July 5, 2005 Order, exemption from mitigation was subject to reconsideration once the Commission determined the appropriate test for market power within load pockets.⁷³ In subsequently accepting the November 2005 Settlement, the Commission allowed the three-pivotal-supplier test for determining market power within load pockets.⁷⁴ Therefore, the condition that we established for imposing mitigation on the previously exempt units has been satisfied, i.e., adoption of a test for market power within load pockets, and we find that the three-pivotal-supplier test should be applied to all generators, including the previously exempt units. We recognize that generators have raised issues with application of the three-pivotal-supplier test. As a result, as discussed below, we are establishing a proceeding under FPA section 206 to look further at whether the three-pivotal-supplier test should be revised. Nonetheless, during the period while we are examining whether revisions to the three-pivotal-supplier test may be necessary, the three-pivotal-supplier test remains in effect as the existing

⁷² *PJM Interconnection, LLC*, 112 FERC ¶ 61,031 at P 45.

⁷³ *PJM Interconnection, LLC*, 112 FERC ¶ 61,031 at P 45. *See also New York Independent System Operator, Inc.*, 122 FERC 61,211, at P 58 (2008) (finding that the approved market and mitigation rules were not a guarantee in perpetuity, and that proposed changes could be filed with the Commission).

⁷⁴ Prior to the three-pivotal-supplier test, PJM mitigated all units required to resolve a transmission constraint.

screen for identifying the potential for any generator on the PJM system to exercise market power.

43. We find that imposition of mitigation on the previously exempt units is appropriate because we find the existing standard for whether to mitigate these particular units is no longer just and reasonable. The currently effective tariff language permits PJM to mitigate the previously exempt units by making a filing under section 205 when it concludes that these generators exercise “significant” market power. PJM states that the “significant” market power standard has not been defined by the Commission, and that this standard is difficult to apply, adding that if the Commission determines to continue the construction exemption it could provide “greater certainty to PJM, state regulators, and market participants by clarifying the ‘significant market power’ standard.”⁷⁵ We recognize that the current standard does not specify a methodology for assessing market power and does not define when such exercise should be deemed “significant.” Rather than having PJM establish an entirely new market power standard for these 56 generators, we find that PJM should apply the same market power test to these generators as to all other generation. In sum, we find that the uncertainty and difficulty inherent in the administration of the currently effective “significant” market power standard can result in rates that are unjust and unreasonable and that this standard should be replaced with the standard used by PJM for assessing market power for all generators.

44. Finally, the original exemption was predicated on our conclusion that the existing mitigation scheme was not providing just and reasonable compensation to generation.⁷⁶ But since our July 5, 2005 Order continuing the exemption, improvements have been made to the PJM markets, and the PJM market has changed to such a degree, that our concern with mitigated generators not receiving just and reasonable compensation has been assuaged. The mitigation scheme itself is now more targeted. Generation dispatched during scarcity conditions is now exempt from mitigation and the mitigated bid caps have been increased for those generators that are frequently mitigated. Moreover, as MD PSC argues, the initiation of RPM provides all generators, including the previously construction-exempt generators with a new, additional source of revenue that was not available at the time the exemption was first permitted. PJM filed to propose

⁷⁵ PJM Answer at 10.

⁷⁶ *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 at P 16, 55 (reliability compensation issues “relate principally to the appropriate compensation for units that are needed for reliability and are subject to mitigation with the result that the units are receiving non-compensatory revenue impacting their ability to provide service” and “removal of the exemption would likely result in lowered revenues and valuation for the [exempt] units.”).

RPM in 2005, and it was accepted by the Commission in 2006 to be implemented on June 1, 2007.⁷⁷ Generators eligible for the construction exemption were built before September 30, 2003, prior to the date that RPM was proposed to the Commission. As such, they did not rely on RPM revenues in their decisions to enter the PJM market. In determining to remove the construction exemption, we are balancing the exempt generators' reliance interest on the exemption as a source of revenue with the need to protect against the potential exercise of market power, and find that given the development of a capacity market, as well as the other changes that reduce the scope of mitigation, the balance has shifted in favor of mitigating these units on the same basis as all other generation in PJM.

45. We, therefore, direct PJM to file, no later than thirty days after the issuance of this order, revisions to its tariff eliminating the construction exemption to be effective as of the day after the issuance of this order.

2. Interface Exemption

46. We also grant Maryland PSC's Complaint to eliminate the interface exemptions. These exemptions were initially approved in 1999.⁷⁸ The market analysis at that time used data from 1994 and 1995 to show that with the then-existing configuration of PJM, mitigation need not be applied when constraints occurred across the identified interfaces. But since the time of that study, PJM's configuration has changed significantly with the addition of AEP and ComEd, and its market design and market monitoring capabilities also have changed. Thus, we are unwilling to continue relying on the original market power analysis as satisfying our obligation to ensure just and reasonable rates.

47. In its report on the November 2005 Settlement,⁷⁹ the MMU recommended elimination of the interface exemptions, citing the ability to perform real-time structural testing for market power.⁸⁰ The November 2005 Settlement continued the blanket

⁷⁷ *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006); *order on reh'g and clarification*, 119 FERC ¶ 61,318; *order on reh'g*, 121 FERC ¶ 61,173 (2007).

⁷⁸ *Atlantic City Electric Co.*, 86 FERC 61,248 at 61,905. The interface exemptions were continued as a result of the November 2005 Settlement, with the addition of the AP South interface. *PJM Interconnection, L.L.C.*, 114 FERC ¶ 61,076 (2006).

⁷⁹ 2006 State of the Market Report.

⁸⁰ The MMU cites the dynamic implementation of the three-pivotal-supplier test as applying mitigation only as necessary on a non-discriminatory basis for all units on all constraints. 2006 State of the Markets Report at 14.

exemptions and provides for only periodic review of the appropriateness of the interface exemptions. We conclude that because PJM can apply a market power screen on an hourly basis in real time, it is not just and reasonable for PJM to provide a blanket exemption for all hours on the four currently exempt interfaces. Tying the market power screen to a real-time application provides for more precise analyses. We therefore find that continuing the interface exemptions is unjust and unreasonable and that the same test for market power should be applied in these circumstances as is applied to all other generators in PJM. As we discussed above, we are establishing a proceeding to see whether the existing screen used by PJM should be changed. In the meantime, however, we conclude that we should not leave the interfaces exempt from mitigation. Further, to the extent that the interface exemption is designed to ensure just and reasonable revenues to generators, the implementation of RPM, as discussed above, provides a reasonable opportunity to offset the revenues that would be lost with elimination of the exemption. The MMU recommendations, in addition to the additional revenues provided by the RPM mechanism, support our conclusion that the existing interface exemption is unjust and unreasonable.

48. Protesters argue that Maryland PSC has not established that any generator affected by this exemption has actually exercised market power. PJM contends that the level of congestion costs on the exempt interfaces is the result of frequency of the transmission constraints, and does not establish that any generator has exercised market power. PJM states that these interfaces are among the most liquid in PJM. While these interfaces may be liquid as a general matter, when the interfaces are constrained, the possibility exists that such a constraint may lead to the exercise of market power during that period. We agree with Maryland PSC and the MMU that market conditions, and thus, the ability to exercise market power, can change from hour-to-hour as demand, supply, and transmission availability change, and that the current blanket-exemption does not provide any protection from the potential exercise of market power. We, therefore, can no longer find that the mere fact that a constraint occurs across the currently exempt interfaces, as compared to a constraint on any other line in PJM, provides a basis for treating such constraints differently. Indeed, the November 2005 Settlement provides for a periodic review of the appropriateness of the interface exemptions, using an analysis no less stringent than the three-pivotal-supplier test.⁸¹ We, therefore, direct PJM to file, no later than thirty days after the issuance of this order, revisions to its tariff eliminating the interface exemptions to be effective as of the day after the issuance of this order.

⁸¹ PJM Tariff §6.4(d)(ii).

3. Refund Effective Date

49. The Maryland PSC requests that, for the elimination of the mitigation exemptions, the Commission establish a refund effective date as of the date it filed its complaint. Upon the filing of a complaint, pursuant to FPA section 206(b), the Commission must establish a refund effective date that is no earlier than the date of the complaint and no later than five (5) months subsequent to the date of the complaint. In this case, we will set the refund effective date as the day after the issuance of this order. In a case involving changes in market design, we generally exercise our discretion over remedies and do not order refunds that require re-running a market.⁸² In this instance, application of mitigation to a previously exempt generator affects not only the rate it receives, but the entire dispatch of the PJM market, and payments to other generators which bid appropriately. Even if PJM could recalculate prices based on mitigating certain generators, it cannot retroactively change the output of plants or easily adjust for the differences in cost and output that would result. For these reasons, re-running the market would be unreasonable in these circumstances.

C. Retroactive Relief

50. The primary basis for Maryland PSC's request for retroactive relief is the contention that PJM violated its tariff by failing to publish the MMU's analyses and recommendations to eliminate the mitigation exemptions. Maryland PSC contends that had it known the information that PJM failed to make public, it could have filed an earlier FPA section 206 complaint and could have sought refunds for the period since as early as September 2006. Maryland PSC states that the Commission should investigate whether generation resources exempt from mitigation exercised market power, and upon such a finding, order refunds.

51. The Commission does not have authority to order retroactive relief unless a party violates its tariff by charging a rate other than the filed rate, parties agree to such relief, or "when parties have notice that a rate is tentative and may be later adjusted with retroactive effect."⁸³ In this case, Maryland PSC has provided no evidence that sellers of energy from which it is requesting refunds, charged an unauthorized rate. It failed to

⁸² See *Mirant Energy Trading, LLC v. PJM Interconnection, LLC*, 122 FERC ¶ 61,007 (2008) (setting refund effective date at 5 months because earlier refund would require changing a market determined result); *Bangor Hydro-Electric Company v. ISO New England Inc.* 97 FERC ¶ 61,339 (2001) (finding that re-running markets even when an error was made would do more harm to electric markets than is justifiable).

⁸³ *Consolidated Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 967-969 (D.C. Cir. 2003).

show that these generators violated any term of their market-based rate tariffs or committed any other violation of their filed rate.

52. Maryland PSC's contention is limited solely to arguable tariff violations caused by PJM in failing to post MMU studies, not tariff violations by the generators, as justification for retroactive relief from the generators. Moreover, it has failed to show that the granting of mitigation exemptions to generators was conditioned on compliance with the MMU posting provisions or that a nexus existed between these PJM tariff provisions and the rates that generators are permitted to charge under their tariffs. PJM's tariff provided no notice that the exemptions from mitigation were tentative and may later be adjusted, and the Maryland PSC points to no provision indicating that the PJM tariffs provisions provide for retroactive relief.⁸⁴

53. Even if a tariff violation by PJM could give rise to retroactive relief, Maryland PSC has failed to show that PJM violated its tariff or that such a violation would justify the ordering of the retroactive relief it seeks. The Maryland PSC alleges that PJM violated section 6.4.1(d)(ii) of its tariff, which requires that PJM "post a summary of the results of the PJM MMU's quarterly analyses." We find that PJM did not violate its tariff. PJM did post the MMU's quarterly analyses.⁸⁵ While PJM did not post the MMU's analysis of the three-pivotal-supplier test for March 1-May 31, 2006, provided by the MMU to PJM on September 8, 2006 (September 8, 2006 Analysis), PJM explained that it did not post the September 8 Analysis because it posted the subsequent analysis of the three-pivotal-supplier test for March 1-August 31, 2006 (October 18, 2006 Analysis), which included the findings from the September 8, 2006 Analysis, and that it was still "considering its response" to the September 8, 2006 Analysis when the MMU submitted the October 18, 2006 Analysis.

54. The tariff does not provide for a specific timeline by which PJM must post the analyses and its evaluations, and we believe that the time lag that PJM required to complete its evaluation of the October 18, 2006 Analysis and recommendations is

⁸⁴ *Id.* at 969 ("although the MMP authorizes NYISO to undertake remedial measures to correct problems associated with the exercise of market power, NYISO points to nothing in the MMP suggesting that such measures may have retroactive effect. ... We thus see no way that the MMP could have provided the requisite notice to market participants.")

⁸⁵ Analysis of the Three-Pivotal-Supplier Test: March 1-August 31, 2006: Issued October 18, 2006, posted by PJM on December 12, 2006; Analysis of the Three-Pivotal-Supplier Test: March 1-December 31, 2006: Issued May 7, 2007, posted by PJM on May 31, 2007.

reasonable given the complexity of the MMU report. Furthermore, the language of the tariff, stating that PJM “shall post a summary of the results of the PJM MMU’s quarterly analyses *and* the Office of the Interconnection’s determination whether to make a filing with the FERC” (emphasis added) suggests that the two items be posted concurrently, which PJM did.

55. Thus, even with the delay in the posting of one analysis, PJM posted other analyses of the same factual information. In any event, even the delay in posting was relatively insignificant consisting of only a couple of months. And, PJM posted the disputed analysis in December 2006 well prior to the date on which Maryland PSC filed its complaint. Thus, Maryland PSC’s position that this information was crucial to its ability to file a complaint is undermined by its delay in filing and hence even using Maryland PSC’s own criteria, its request for retroactive relief is not justified. Maryland PSC had sufficient information to file a complaint at an earlier date if it had chosen to do so.

56. The Maryland PSC also alleges that PJM violated its tariff by refusing to publish the MMU’s analyses recommending removal of the interface exemptions and by refusing to disclose the MMU’s evidence of market power abuse by a construction-exempt generator. We find that PJM did not violate its tariff. We find that PJM’s decision to advise the MMU to refer its findings (that an exempt unit had exercised market power) to the Commission was consistent with the tariff. Moreover, under PJM’s tariff, referrals from the MMU to the Commission are non-public, meaning that PJM is not permitted to disclose them.⁸⁶

57. Maryland PSC maintains that retroactive relief is appropriate under section 309 of the Federal Power Act, citing to *Pub. Utils. Comm’n of Cal. v. FERC*.⁸⁷ Maryland PSC misreads this case. *Pub. Utils. Comm’n of Cal. v. FERC* (which is pending rehearing before the Ninth Circuit) dealt only with allegations that generators violated their tariffs.⁸⁸ As described above, the Maryland PSC did not even allege that generators violated their tariffs. As a result, Maryland PSC has not established that these amounts have been improperly collected.⁸⁹ Moreover, Maryland PSC has failed to show any

⁸⁶ See *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,263, at P 27 (2006).

⁸⁷ 462 F.3d 1027 (9th Cir. 2006).

⁸⁸ *Id.* at 1048 (finding the Commission failed to consider a section 309 remedy for “tariff violations”).

⁸⁹ *Town of Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992), citing *Niagara Mohawk Power Corp. v. FERC*, 379 F. 2d 153 (D.C. Cir 1966).

nexus between its alleged tariff violations by PJM and a generators' violation of a filed rate, or even a tariff violation by PJM that would justify retroactive relief.

D. Market Power Mitigation Screen

58. Protesters raise questions about whether PJM's existing market power screen, the three-pivotal-supplier test, is an accurate test for market power. The three-pivotal-supplier test was accepted by the Commission as part of a negotiated, uncontested settlement that included the mitigation exemptions, and changes to PJM scarcity pricing and frequently mitigated unit market rules. Suppliers argue that the three-pivotal-supplier test appears to conclude too frequently that market power exists. The test presumes that in a market with many different generators and more than enough capacity to meet demand, three generators could successfully collude to raise prices even though demand could be met without any of the capacity of two generators and only a small fraction of the third generator's capacity.

59. We agree with Protesters that the three-pivotal-supplier test may be unjust and unreasonable and we will institute a FPA section 206 proceeding to examine the issue. If the three-pivotal-supplier test is a poor indicator of market power, using the test to determine whether to mitigate generators (including those that are currently exempt from mitigation) could result in imposing offer caps more often than is justified. The result could be rates that are unjust and unreasonable, unduly discriminatory and/or preferential. We cannot make this determination on the record before us. We will therefore establish a FPA section 206 proceeding into the continued justness and reasonableness of the three-pivotal-supplier test. We find that a trial-type hearing is not needed and will therefore institute paper hearing procedures as discussed below.⁹⁰

60. PJM's stakeholders are currently conducting a reevaluation of the three-pivotal-supplier test and its application in PJM's energy and capacity markets, including the possibility of adopting an alternative or supplementary conduct and impact test. Within this framework, PJM's Three Pivotal Supplier Task Force (Task Force) is also reexamining mitigation with respect to the interface exemption and PJM's scarcity pricing mechanism. Because PJM's stakeholders are currently addressing this issue, PJM requests that we do not address the appropriateness of the three-pivotal-supplier test in this proceeding.

⁹⁰ A paper hearing procedure is appropriate where witness motive, intent and credibility are not at issue, and issues of material fact can be adequately addressed on the written record. *See Union Pac. Fuels v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997); *see also Central Maine Power Co. v. FERC*, 252 F.3d 34, 46 (1st Cir. 2001).

61. The Commission previously reviewed a request to investigate the recommendations of the MMU and decided not to preempt the efforts of the established stakeholder process.⁹¹ PJM states that the Task Force has been working on these issues since August 2007.⁹² To allow the stakeholder process a continued opportunity to complete discussions, the paper hearing procedures established herein will be held in abeyance until September 2, 2008. By the earlier of October 2, 2008, or thirty days from the date the stakeholder process concludes, PJM should file the results of the stakeholder process, and PJM and all interested participants should file briefs on the market power issue. Each presentation should separately state the analysis and arguments advanced by the participants and include any and all exhibits and affidavits upon which the party relies. In particular, participants should address whether a different market structure screen or whether conduct and impact tests as used in other RTO markets would be superior to the three-pivotal-supplier test.

62. Upon the establishment of a FPA section 206 hearing on its own motion, the Commission must establish a refund effective date that is no earlier than the date of publication of notice of the Commission's intent to institute a proceeding, and no later than five (5) months subsequent to that date. The Commission will establish a refund effective date upon publication of notice of this proceeding. However, as discussed previously, the Commission would expect to implement any change resulting from this hearing on a prospective basis. The Commission is also required by FPA section 206 to indicate when it expects to issue a final order. The Commission expects to issue a final order in this FPA section 206 investigation within 180 days of the date this order issues.

The Commission orders:

(A) Maryland PSC's Complaint requesting elimination of the exemptions from energy market offer mitigation is hereby granted and denied as discussed in the body of this order.

(B) PJM shall, within 30 days of the date of this order, make a compliance filing of tariff revisions implementing the elimination of the mitigation exemptions, as discussed in the body of this order, to be effective on the day after issuance of this order.

(C) The refund effective date established pursuant to section 206(b) of the FPA in Docket No. EL08-34-000 is established at the day after issuance of this order.

⁹¹ *PJM Interconnection, L.L.C.*, 120 FERC ¶ 61,092 (2007).

⁹² PJM Answer at 21.

(D) The Commission finds pursuant to section 206 of the FPA that the market screen methodology may be unjust, unreasonable, unduly discriminatory or preferential, as discussed in the body of this order.

(E) The Commission hereby institutes an investigation and paper hearing procedures in Docket No. EL08-47 under section 206 of the FPA to review evidence regarding a just and reasonable market screen test. This paper hearing will be held in abeyance, pending the conclusion of the ongoing stakeholder proceeding or September 2, 2008, whichever is earlier, as discussed in the body of this order.

(F) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of a proceeding under section 206 of the FPA in Docket No. EL08-47-000.

(G) The refund effective date established pursuant to section 206(b) of the FPA will be the date of publication in the *Federal Register* of notice of the section 206 hearing in Docket No. EL08-47-000.

By the Commission. Commissioners Spitzer and Moeller concurring with separate statements attached.

(S E A L)

Kimberly D. Bose,
Secretary.

APPENDIX A

Docket No. EL08-34-000

Complaint of Maryland Public Service Commission
Answer of PJM Interconnection, L.L.C.

Notices of Intervention

Illinois Commerce Commission
New Jersey Board of Public Utilities

Motions to Intervene

NRG Companies:

NRG Power Marketing LLC, Conemaugh Power LLC, Indian River Power LLC,
Keystone Power LLC, NRG Energy Center Dover LLC, NRG Energy Center
Paxton LLC, NRG Rockford LLC, NRG Rockford II LLC, Vienna Power LLC

CPV Companies:

Competitive Power Ventures, Inc., CPV Power Development, Inc.

American Electric Power Service Corporation, on behalf of:

Appalachian Power Company, Columbus Southern Power Company, Indiana
Michigan Power Company, Kentucky Power Company, Kingsport Power
Company, Wheeling Power Company

Dynegy Power Marketing, Inc.

Blue Ridge Power Agency

FPL Energy Generators:

FPL Marcus Hook, L.P., North Jersey Energy Associates, L.P., Doswell Limited
Partnership, Backbone Mountain Windpower LLC, Mill Run Windpower LLC,
Somerset Windpower LLC, Meyersdale Windpower LLC, Waymart Wind Farm,
LP, Pennsylvania Windfarms, Inc.

PHI Companies:

Pepco Holdings, Inc., Potomac Electric Power Company, Atlantic City Electric
Company, Delmarva Power & Light Company, Conectiv Energy Supply, Inc., and
Pepco Energy Services, Inc.

CEG Companies:

Constellation Power Source Generation Inc. and Constellation Energy
Commodities Group, Inc.

Liberty Electric Power

Borough of Chambersburg, Pennsylvania

North Carolina Electric Membership Corporation

Tenaska Power Services Company

Tyr Chesapeake, LLC

American Municipal Power-Ohio, Inc.

Duke Companies:

Duke Energy Corporation, Duke Energy Ohio, Inc., Duke Energy Indiana, Inc.,

Duke Energy Kentucky, Inc., Duke Energy Carolinas, LLC, Duke Energy Marketing America, LLC
Baltimore Gas and Electric Company

Comments Supporting MD Complaint

Joint Consumer Advocates:

Maryland Office of People's Counsel, Office of People's Counsel for the District of Columbia, Pennsylvania Office of Consumer Advocate

PJM Industrial Customer Coalition

Southern Maryland Electric Cooperative, Inc.

Old Dominion Electric Cooperative

Comments Opposing MD Complaint

PJM Power Providers Group

Electric Power Supply Association

PPL Companies:

PPL Electric Utilities Corporation, PPL EnergyPlus, LLC, PPL Brunner Island, LLC, PPL Holtwood, LLC, PPL Martins Creek, LLC, PPL Montour, LLC, PPL Susquehanna, LLC, PPL University Park, LLC, Lower Mount Bethel Energy, LLC

Dayton Companies:

Dayton Power and Light Company, DPL Energy, LLC

Bear Subsidiaries:

Bear Energy LP, BE Allegheny LLC, BE Ironwood LLC, BE Red Oak LLC

PSEG Companies:

Public Service Electric & Gas Company, PSEG Power LLC, PSEG Energy Resources & Trade LLC

Mirant Parties:

Mirant Energy Trading, LLC, Mirant Potomac River, LLC, Mirant chalk Point, LLC, Mirant Mid-Atlantic, LLC

Coral Power, L.L.C.

Reliant Energy, Inc.

Dominion Resources Services, Inc.

CED Rock Springs, LLC and Ocean Peaking Power, LLC

Exelon Corporation

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Maryland Public Service Commission

Docket No. EL08-34-000

v.

PJM Interconnection, L.L.C.

PJM Interconnection, L.L.C.

Docket No. EL08-47-000

(Issued May 16, 2008)

SPITZER, Commissioner, *concurring*:

I concur in the outcome of today's Order granting the request of the Maryland Public Service Commission to erase the mitigation exemption for generators built between April 1, 1999 and September 30, 2003. I write separately, however, to stress the following points regarding the elimination of the construction exemption.

Today's Order is not a retreat from our commitments to new investment in generation and to regulatory certainty. Instead, the Order should be seen for what it is -- the exercise of our duty to continually balance the interests of sellers and buyers to ensure plentiful electricity at just and reasonable rates. It must be recognized, given our obligation under the Federal Power Act to ensure just and reasonable rates, that the "construction exemption" was never intended to be absolute. The need to reevaluate our balance of buyer and seller interests over time is particularly important as the market structures evolve, as in the case of PJM. Our prior orders put "exempt" generators on notice that the exemption would not last forever. For example, we have subjected "exempt" generators to the \$1,000 bid cap imposed on all generators in PJM. Further, under our most recent effort to balance the interests of buyers and sellers, we directed PJM to adopt a tariff provision that provides that these "exempt" generators may be mitigated if "significant" market power is found. PJM OATT section 6.5. Unfortunately, our prior orders never defined "significant" market power. In the years the tariff provision has been in place, PJM has made no section 205 filings under this provision asserting the exercise of "significant" market power. In fact,

PJM now urges the Commission to clarify what the term means. Thus, it appears that our prior attempt at balancing the interests of buyers and sellers achieved no real balance at all.

This Order brings needed regulatory certainty to the operation of the PJM market, which benefits buyers and sellers – as well as investors. Presently, section 6.5 of the PJM tariff is unclear as to when or how PJM may seek to eliminate the exemption because the “significant” market power standard is so nebulous. In today’s Order, we essentially put “exempt” generators in the position they were in under section 6.5 of the PJM tariff. By granting the complaint, we ensure that a currently “exempt” generator can be mitigated only if market power is found. However, by seeking to clarify the appropriate market power test, the Commission for the first time brings certainty as to how, whether and when an “exempt” generator will be mitigated.

I recognize that granting the complaint eliminates the requirement that PJM make a section 205 filing prior to any mitigation (as required by section 6.5 of the PJM tariff) and instead allows PJM to mitigate a generator “automatically.” However, PJM will impose that mitigation only under criteria previously approved by the Commission. Thus, under this Order, the Commission maintains adequate oversight of the application of mitigation to these generators. More important, PJM will now impose any mitigation under a market power test that truly balances the interests of buyers and sellers and ensures fair and predictable rules regarding mitigation. In the long run, imposition of fair and predictable rules will encourage additional investment in the energy sector.

On balance, the facts of this case support granting the complaint as set forth in the Order.

For these reasons, I respectfully concur in the outcome of the Order.

Marc Spitzer

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Maryland Public Service Commission

Docket No. EL08-34-000

v.

PJM Interconnection, L.L.C.

PJM Interconnection, L.L.C.

Docket No. EL08-47-000

(Issued May 16, 2008)

MOELLER, Commissioner concurring:

I have previously expressed concern with the Commission's decision to rescind the exemption granted to generation that was constructed on or after July 9, 1996.⁹³ As in any industry, investors in the utilities sector will rely on the commitments made by this agency to finance and build new energy infrastructure. However, while I stress the significance of the Commission's commitment to provide regulatory certainty, in this particular case the changes that have transpired in PJM do not warrant continuing this exemption in perpetuity. Moreover, I believe that generators who relied on the construction exemption will find themselves in a no worse off position, and likely in a better overall position, as a result of the recent changes that have occurred in the market.

In its complaint, the Maryland PSC claims that the market power mitigation exemptions are preferential, discriminatory, and produce unjust and unreasonable energy prices. The advent of a new test for determining market power and the creation of the RPM capacity construct which now provides new sources of revenue to generators have convinced me that the exemptions have outlived their purpose. While I do not take lightly my decision to eliminate the exemptions, I believe that our decision to apply uniform market power standards to all generators in PJM will promote market certainty by assuring a consistent application of the market mitigation rules to all participants.

Philip D. Moeller
Commissioner

⁹³ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (Jul. 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007).