

124 FERC ¶ 61,276
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. EL08-67-000
Delaware Public Service Commission,
Pennsylvania Public Utility
Commission, New Jersey Board of
Public Utilities, Public Power
Association of New Jersey, Maryland
Office of the People's Counsel, Office
of the People's Counsel of the District
of Columbia, Southern Maryland
Electric Cooperative, Inc., Blue Ridge
Power Agency, Allegheny Electric
Cooperative, Inc., Office of the Ohio
Consumers' Counsel, New Jersey
Department of the Public Advocate,
Division of Rate Counsel, Pennsylvania
Officer of Consumer Advocate, PJM
Industrial Customer Coalition,
American Forest and Paper
Association, Portland Cement
Association, Duquesne Light
Company, and United States
Department of Defense and other
affected Federal Executive Agencies,

v.

PJM Interconnection, L.L.C.

ORDER DISMISSING COMPLAINT

(Issued September 19, 2008)

1. In this order, the Commission denies a complaint filed by RPM Buyers¹ against PJM Interconnection, L.L.C. (PJM) under section 206 of the Federal Power Act (FPA),² alleging that PJM's Reliability Pricing Model (RPM) produced unjust and unreasonable capacity prices for the Delivery Years governed by the first four RPM auctions. The Commission denies the complaint for the reasons stated below.

I. Background

A. Initiation of RPM

2. As discussed extensively in prior orders in this proceeding,³ the Commission found PJM's prior capacity market to be unjust and unreasonable because the market revenues received by capacity providers were likely to be insufficient to sustain the continued and future investment in capacity resources, potentially causing multiple reliability violations. The Commission accepted certain elements of a proposal made by PJM to replace its existing capacity construct and ultimately accepted the RPM Settlement Agreement (Settlement) to establish a forward-looking locational capacity market.

B. Details of RPM

3. RPM is designed to improve price stability, enhance reliability, and enable a potentially large supply of new resources to compete with existing resources. RPM

¹ RPM Buyers are Maryland Public Service Commission, Delaware Public Service Commission, Pennsylvania Public Utility Commission, New Jersey Board of Public Utilities, Public Power Association of New Jersey, Maryland Office of the People's Counsel, Office of the People's Counsel of the District of Columbia, Southern Maryland Electric Cooperative, Inc., Blue Ridge Power Agency, Allegheny Electric Cooperative, Inc., Office of the Ohio Consumers' Counsel, New Jersey Department of the Public Advocate, Division of Rate Counsel, Pennsylvania Officer of Consumer Advocate, PJM Industrial Customer Coalition, American Forest and Paper Association, Portland Cement Association, Duquesne Light Company, and United States Department of Defense and other affected Federal Executive Agencies.

² 16 U.S.C. § 824e (2006).

³ *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at P 5-15 (2007) (June 25 Order); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 44-50 (2006) (December 22 Order); *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, at P 9-17 (2006) (April 20 Order).

represents a capacity market design based on three-year forward-looking, annual obligations for locational capacity under which supply offers are cleared against a downward sloping demand curve, also called the Variable Resource Requirement curve (the VRR curve). The VRR curve establishes the amount of capacity that PJM requires its Load Serving Entity (LSE) customers to purchase, and the price for that capacity, in each capacity zone (Locational Delivery Area).⁴ Under RPM, only in cases where a Locational Delivery Area is transmission-constrained in the auction (i.e., limited in the amount of generation that can be imported into those areas) will capacity prices be higher in that area.⁵

4. RPM provides for base auctions to be conducted every year to procure capacity three years in advance of the year in which the capacity will be provided. Generators, transmission providers and demand resources may make offers to supply capacity to PJM in those auctions. The RPM Settlement also established a four-year transition period with: (1) an accelerated schedule for the transition auctions for capacity delivery years 2007-2008 through 2010-2011, and (2) a phase-in of the full complement of 23 Locational Delivery Areas for the 2010-2011 delivery year and beyond, with the PJM region divided into only four Locational Delivery Areas for the 2007-2008 through 2009-2010 delivery years.

5. RPM also includes measures to mitigate the exercise of market power. For each auction, the RPM market rules provide a test to determine whether each capacity seller has market power. If the seller fails that test (i.e., has market power), that seller's bid is capped so as to replicate that seller's avoidable or opportunity costs. A seller may either (1) obtain a bid cap specific to its unit, in which case it would be required to provide its actual costs to the PJM Market Monitoring Unit for evaluation, or (2) utilize a default bid cap designed for resources of its particular type.

⁴ The VRR curve is based on two parameters – the net Cost of New Entry (CONE) and the Installed Reserve Margin. For each LSE, the Installed Reserve Margin is equal to a specified amount of capacity above its forecasted peak load. This additional amount is determined by the PJM Board, and is intended to ensure the availability of sufficient capacity to assure reliability. Under the VRR curve, the price of capacity is equal to the net CONE for a new peaking unit when the amount of capacity to be supplied is one percent greater than the Installed Reserve Margin.

⁵ LSEs that are able to fully supply their own capacity needs can choose not to participate in the VRR-based auctions, and instead choose a long-term Fixed Resource Requirement option.

C. Approval and implementation of RPM

6. After the Commission approved RPM, several parties, including some of the RPM Buyers, petitioned for review of those orders. That appeal is currently pending before the U.S. Court of Appeals for the District of Columbia Circuit.⁶ The first base auction took place in April 2007 and procured capacity for the 2007-2008 Delivery Year. Since then, four more base auctions have been conducted. The most recent auction, the May 2008 auction for the 2011-2012 delivery year, was the first to procure capacity under a full three-year forward commitment.

II. Complaint, Answers And Protests

7. On May 30, 2008, RPM Buyers filed the instant complaint. Notice of the complaint was published in the *Federal Register*, with answers, motions to intervene, notices of intervention, comments, and protests due by June 23, 2008,⁷ with a subsequent extension of time granted until July 11, 2008.

8. PJM filed a timely answer. Additionally, motions to intervene were filed by the parties listed in Appendix A to this order, and comments and answers were also filed by Constellation, the DRAM Coalition, Duke and Reliant, AE Supply, DP&L, Direct Companies, Dynegy, Edison Mission, EPSA, FPL Energy, J. P. Morgan, Liberty, NRG, P3, PPL, PSEG and Shell. RPM Buyers filed a motion for leave to file an answer, and an answer. P3 and PPL subsequently filed answers to RPM Buyers' answer.

A. General and Procedural Objections

9. RPM Buyers allege that the rates for the transition period, which resulted from the first four base auctions, are unjust and unreasonable, and they ask the Commission to alter those rates on that basis. RPM Buyers assert primarily that, during the transition period, "[t]he absence of price discipline provided by new capacity resources and the ability of existing resources to withhold some capacity within the RPM rules combined to produce capacity prices in the transition period that are not comparable to those that would be produced in a competitive market or determined under cost-based regulation."⁸

⁶ *Pub. Serv. Elec. & Gas Co. v. FERC*, No. 07-1336, *et al.* (D.C. Cir. filed Aug. 23, 2007).

⁷ 73 Fed. Reg. 32,568 (2008).

⁸ Complaint at 2.

Therefore, RPM Buyers assert, "even if RPM had some meager impact on reliability, its costs far outweigh any possible benefit."⁹

10. RPM Buyers also state that, when the Settlement was filed, the Commission limited parties' ability to challenge aspects of the Settlement, by only permitting the creation of a limited factual record,¹⁰ and by requiring allegations of specific instances of market manipulation before addressing the potential for that problem.¹¹ In their answer to the answers and protests, RPM Buyers state that they have met their burden under section 206 to establish a *prima facie* case that the transition-auction rates are unjust and unreasonable, and because PJM and other parties have failed to refute that case, the Commission should grant the complaint or institute an investigation under section 206.

11. Parties filing answers or protests opposing the complaint assert that the RPM Buyers did not make a *prima facie* case and did not meet the burden of proof under FPA for a section 206 filing, because the RPM Buyers did not present evidence that RPM is unjust and unreasonable. Liberty asserts that the fact that actual clearing prices in the transition period auctions were higher than those suggested in PJM's December 2006 simulations does not constitute new evidence. P3 states that the complaint is a collateral attack on the Commission's orders approving RPM, and thus should be dismissed because it "thwart[s] the finality and repose that are essential to administrative efficiency."¹² AE Supply similarly argues that "if the price ultimately derived from a litigated and approved rate design constitutes 'new evidence' for purposes of finding an exception to the principles of collateral estoppel, then every decision the Commission makes on rate design in any market would be nonfinal, nonbinding and subject to relitigation."¹³ In response to RPM Buyers' claim that the transitional auctions did almost nothing to improve or maintain reliability, the Direct Companies argue that "but for the transition clearing prices, the new capacity response in the [base auction] might not have

⁹ *Id.* at 7.

¹⁰ *Id.* at 23.

¹¹ *Id.* at 26 (citing December 22 Order, 117 FERC ¶ 61,331 at P 135-36. RPM Buyers note that in ISO New England (ISO-NE's) similar Forward Capacity Market mechanism, after an auction, ISO-NE is required to make a filing to permit stakeholders to comment on the auction, but the RPM rules do not contain this requirement).

¹² *NSTAR Elec. Co. v. ISO New England, Inc.*, 120 FERC ¶ 61,261, at P 33 (2007), cited in P3 answer at 17.

¹³ AE Supply at 18-19.

materialized, more interim retirements may have occurred, upgrades may not have proceeded, increases in delists may have occurred and demand response may not have materialized.”¹⁴ AE Supply argues that RPM Buyers failed to exhaust their other avenues to seek relief, such as the stakeholder process, before making the allegations in the complaint.

B. Rate Provisions

12. The complaint alleges the following specific deficiencies in the RPM transition rates:

- a. *VRR curve and creation of new Locational Delivery Areas during transition period:* RPM Buyers assert that, during the brief period in which the four auctions that would generate prices for the transition period were held, there was insufficient time for RPM to elicit entry by new competitors. Thus, RPM Buyers state, the supply curves for the transition-period auctions were steep and largely inelastic, causing prices to be volatile and giving incumbent generators strong incentives to withhold. RPM Buyers similarly allege that the creation of new Locational Delivery Areas within the transition period was flawed, since the creation of those Locational Delivery Areas could not have incited new entry in that short time period.
- b. *Inadequate mitigation:* According to RPM Buyers, RPM's mitigation measures proved insufficient to prevent the exercise of market power. RPM Buyers state that the results of the 2010-2011 base auction show that "some of the offers in the 2009-2010 base auction only three months earlier could not have reflected those resources' actual avoidable costs,"¹⁵ since some offers for the 2010-2011 auction were significantly lower than those same generators' offers for the 2009-2010 auction. According to RPM Buyers, suppliers have enough discretion regarding the structure and timing of their offers that they may "strategically raise RPM offer prices," without the Market Monitor being able to distinguish between offers reflecting "capital improvement plans with legitimate motivations" and offers "intended to inflate offer prices."¹⁶

¹⁴ Direct Companies at 14.

¹⁵ Complaint at 51.

¹⁶ *Id.* at 53.

- c. *Exclusion of certain capacity from base auctions:* RPM Buyers allege that the market rules created unjust and unreasonable rates because they excluded some capacity from participating in auctions, in that (a) some resources could not participate in the auctions because PJM could not complete some transmission interconnection studies in time, and (b) there are restrictions on the amount of capacity that Fixed Resource Requirement entities can sell in the RPM auctions.¹⁷
 - d. *Excessive value of CONE:* In determining the Cost of New Entry (CONE), which is designed to approximate the cost of building a new peaking plant to provide capacity, PJM offsets CONE by the revenues that plant's owner will earn by selling energy and ancillary services. RPM Buyers claim that PJM's use of historical data to calculate energy and ancillary services revenues results in a value for Net CONE that is too high, since energy and ancillary services revenues have increased dramatically since 2004.¹⁸
 - e. *Development of capacity requirements:* RPM Buyers assert that, in using a one-in-25 Loss of Load Expectation standard (i.e., the Locational Delivery Area is expected to need to shed load due to insufficient internal generation plus import capability no more than once in 25 years) as a reliability standard, PJM improperly applied an excessively stringent standard compared to the traditional one-in-ten years criterion, and this choice resulted in PJM being required to purchase more capacity than would otherwise have been the case. RPM Buyers further argue that PJM develops reliability requirements through models based on parameters, assumptions, and proprietary data that cannot be replicated from publicly available data, and that this lack of transparency violates the filed rate doctrine and permits PJM to exercise excessive discretion. RPM Buyers further argue that, in determining capacity requirements, PJM improperly failed to take into account local load reduction programs.¹⁹
13. In answers and protests, PJM and others assert that the RPM Buyers' complaint is an impermissible collateral attack on previous Commission orders. These parties argue that the principles of *res judicata* and collateral estoppel apply to the complaint, because

¹⁷ *Id.* at 55.

¹⁸ *Id.* at 64.

¹⁹ *Id.* at 57.

the complaint raises claims that relate to issues already decided by the Commission and RPM Buyers have not presented new evidence or circumstances regarding those issues: locational pricing, transition auctions, the VRR curves, and market mitigation were previously raised, litigated, and resolved. PJM further notes that the RPM mechanism was put into place to address significant capacity shortages in PJM that could threaten reliability, and that RPM Buyers offer no better solution to that problem. AE Supply also states that some of the complainants signed or did not oppose the Settlement and so the Commission should not encourage parties who have signed an agreement to seek new opportunities to undermine the principles set forth in such an agreement.

14. Specifically with regard to mitigation issues, the commenters in opposition to the complaint assert that PJM followed its market rules and that the RPM mechanism operated as designed and approved. DP&L points out that none of the prices established under any of the auctions for any zone exceeded the negotiated cap for capacity offers, that was established at 1.5 times CONE. P3 states, in response to RPM Buyers' challenge to PJM's "one-occurrence-in 25 years standard" for CETO,²⁰ that that standard is set out in the tariff and Reliability Assurance Agreement (RAA). Commenters further state that RPM Buyers have not been able to point to any misconduct by any specific seller.

15. Other parties support RPM Buyers' complaint. AMP-Ohio states that the prices produced by the transitional base auctions reflect neither the workings of a competitive market nor an administrative process that aims to approximate competitive market results. ELCON asserts that the RPM transition auctions have failed to achieve any of the stated objectives, and that rather, (1) customers have experienced sudden dramatic price spikes, (2) market mitigation was required in every zone to address the lack of competition, and (3) the new resources that the incentive payments were supposed to attract were unable to fully participate in the auctions.

²⁰ RPM considers local reliability requirements in its auctions only for "constrained Locational Delivery Areas." A constrained Locational Delivery Area is one in which the Capacity Emergency Transfer Limit (CETL) is less than 1.05 times the Capacity Emergency Transfer Objective (CETO). CETO is the level of resources needed, in addition to the projected internal capacity, in order to achieve a conditional Loss of Load Expectation of one occurrence in 25 years in the Locational Delivery Area. CETL is the amount of energy that can be transferred on an intact system such that no element would be overloaded under the single worst contingency.

C. **Retroactive Ratemaking and Collateral Attack Arguments**

16. RPM Buyers allege that granting this relief will not constitute retroactive ratemaking, because PJM has not yet begun collecting the rates at issue; thus, according to RPM Buyers, the Commission is not engaging in the prohibited practice of "adjusting current rates to make up for a utility's over- or under-collection in prior periods."²¹ RPM Buyers further assert that the complaint itself gives notice of the possibility that the Commission may change the rates.²² RPM Buyers also argue that the complaint is not a collateral attack on the Commission's orders approving the RPM mechanism, because "[t]he Settlement did not contain any moratoria on the filing of such a complaint" and the Commission, in fact, in its orders approving the RPM Settlement "invited" complaints if parties considered the resulting rates to be unjust and unreasonable.²³ In support of this position, RPM Buyers point to the Commission's statement, in the December 22 Order, that "PJM's market participants may and should act to address deficiencies that they see in PJM's capacity markets, whether through PJM stakeholder processes or through seeking relief from the Commission."²⁴

17. A majority of the parties opposing the complaint allege that RPM Buyers' complaint violates the filed rate doctrine and the rule against retroactive ratemaking. According to AE Supply, the complainants have not alleged a tariff violation, the parties have not agreed to retroactive ratemaking, and the parties had no notice of a potential rate change. Several parties cite to *Borough of Chambersburg, PA v. PJM Interconnection, LLC*²⁵ in their arguments that retroactive ratemaking would upset parties' expectations and reliance on filed rates. DP&L alleges that market participants have relied on the market outcomes to make other contractual commitments to meet capacity obligations and recover anticipated costs. In addition, DP&L claims that "the entire rationale for having a forward price signal is destroyed if the filed rates are considered to be mere

²¹ Complaint at 75, citing *Consolidated Edison Co. of NY, Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (quoting *Towns of Concord v. FERC*, 955 F.2d 67, 71 n.2 (D.C. Cir. 1992) (internal quotes omitted).

²² Complaint at 75.

²³ RPM Buyers answer at 17.

²⁴ *Id.*, citing December 22 Order, 117 FERC ¶ 61,331 at P 147.

²⁵ 117 FERC ¶ 61,219 (2006) (*Borough of Chambersburg*), *reh'g denied*, 119 FERC ¶ 61,166 (2007).

suggestions for what those future rates might look like if no one objects to them.”²⁶ Other commenters cite to *Duquesne Light Company*²⁷ to support their view that the Commission has previously stated obligations are fixed at the time of the auction, arguing that even though PJM hasn’t collected rates on the auctions, the *Duquesne* standard should apply here as well. Also, P3 points to the precedent that, even though the Commission found PJM’s capacity construct prior to RPM to be unjust and unreasonable, the Commission denied requests for refunds for capacity prices resulting from that construct.

D. Relief Requested

18. RPM Buyers request that the Commission find that the implementation of RPM has produced unjust and unreasonable prices resulting from the transition period auctions, and modify the prices accordingly. The scope of relief sought by RPM Buyers, however, is not entirely clear. They initially ask the Commission to "set the date of this Complaint as the refund effective date in order to protect the RPM Buyers and other PJM customers from paying unjust and unreasonable capacity charges for Delivery Years 2008-2009,"²⁸ and note that they "reserve the right to file additional complaints to address Delivery Years 2009-2010, 2010-2011, or 2011-2012 to ensure that all Delivery Years will be covered by a refund obligation."²⁹ Subsequently, RPM Buyers appear to seek relief for capacity prices for Delivery Years 2008-2009 through 2010-2011.³⁰

19. RPM Buyers ask the Commission to order refunds of the transition-period capacity payments, and to develop transition payments that are just and reasonable. RPM Buyers also assert that, to do so, the Commission should require PJM to make refunds to

²⁶ DP&L at 6.

²⁷ 122 FERC ¶ 61,039 (2008) (*Duquesne*), *reh'g pending*. See also *Midwest Independent Transmission System Operator and Duquesne Light Company*, 124 FERC ¶ 61,219 (2008).

²⁸ Complaint at 72.

²⁹ *Id.* at 73.

³⁰ *Id.* at 78.

LSEs for the difference between payments based on transitional base auctions, and payments that are just and reasonable.³¹

20. Commenters opposing the complaint urge the Commission to deny RPM Buyers' complaint because re-running the auctions, or developing new prices, would introduce unacceptable levels of uncertainty into the market. Direct Companies state that the damage to the markets will deter investment. In addition, the DRAM Coalition believes that RPM Buyers' proposed remedy will dramatically reduce the amount of demand response that is provided in PJM, to the detriment to its members, utilities, and customers. Liberty explains that LSEs are not obligated to rely on RPM auctions to meet their capacity requirements, but once an LSE chooses to participate in an RPM auction, it assumes a contractual obligation to pay the auction clearing price as reflected in the locational reliability charge.

III. Discussion

A. Procedural Issues

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2008)), the timely notices of intervention and unopposed motions to intervene serve to make the entities filing them parties to this proceeding. The motions to intervene out of time are granted, given the early stage of the proceedings, the parties' interest and the absence of undue prejudice or delay.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by RPM Buyers, P3 and PPL because they have provided information that assisted us in our decision-making process.

B. Substantive Issues

23. The Commission dismisses the RPM Buyers' complaint, finding that, for the transition auctions,³² no party violated PJM's tariff and the prices determined during the

³¹ *Id.* at 75, 80. RPM Buyers state that, since section 206 permits refunds only for 15 months after the refund effective date, they reserve their right to file additional complaints for the subsequent portion of the transition period.

³² It is not clear for what years the RPM Buyers are seeking relief. Regardless of whether RPM Buyers are seeking relief for delivery year 2008-2009 or for all the

(continued...)

auctions were in accord with the tariff provisions governing the auctions. As discussed below, we do not find a sufficient basis to re-run the past auctions or change the prices that resulted from those auctions.

24. RPM Buyers allege that various RPM tariff provisions should be found unjust and unreasonable as applied to those auctions that have already taken place. As we recognized in our RPM orders, the design and implementation of a forward market should be continually evaluated and changes made when necessary.³³ There have been several such analyses of RPM provided by both RPM Buyers and by PJM: (1) the Wilson Report;³⁴ (2) the Brattle Report, an analysis of the RPM mechanism commissioned by PJM as an initial step in its review process;³⁵ and (3) reports by PJM's Market Monitor, assessing the overall competitiveness of the base auctions conducted

delivery years covered by the transition auctions, the Commission denies the requested relief.

³³ December 22 Order, 117 FERC ¶ 61,331 at P 147:

The Settlement leaves in place the originally-filed Tariff provisions that require PJM to evaluate the need for changes to the Variable Resource Requirement Curve or its parameters at least every three years. . . . [I]f available evidence indicates that RPM is not working as intended to promote reliability, PJM will investigate the causes and exercise its section 205 rights to file any necessary changes if warranted. Additionally, PJM's market participants may and should act to address deficiencies that they see in PJM's capacity markets, whether through PJM stakeholder processes or through seeking relief from the Commission.

³⁴ James F. Wilson, "Raising the Stakes on Capacity Incentives: PJM's Reliability Pricing Model (RPM)," March 14, 2008, prepared for the American Public Power Association (Wilson Report), *referenced in* Affidavit of James F. Wilson, Attachment A to Complaint at P 5.

³⁵ "Review of PJM's Reliability Pricing Model (RPM)," report by Brattle Group (Brattle Report), Attachment A to June 30, 2008 informational filing by PJM in Docket Nos. ER05-1410-000 *et al.*

during the transition period.³⁶ These reports identify certain issues with respect to RPM design that are and should be examined with respect to future auctions and the Commission is issuing, concurrently with this order, an order establishing procedures to facilitate PJM's on-going review of these provisions.³⁷ However, the fact that certain RPM provisions are being examined for future changes does not justify the relief sought by RPM Buyers – namely, changing the results of past auctions.

25. While RPM Buyers object to the results obtained under the PJM tariff provisions then in effect (i.e., at the time of those auctions), they do not assert that those already-conducted auctions violated PJM's tariff. Rather, RPM Buyers point specifically to the phasing-in of RPM during the transition period (including the creation of new Locational Delivery Areas within that time), the steepness of the VRR curve, the methodology for determining Net CONE, the mitigation provisions of RPM (which RPM Buyers consider inadequate), the fact that certain resources cannot participate in RPM, and the manner in which PJM determines CETO/CETL (which RPM Buyers consider to be insufficiently transparent). But each of these elements of RPM was part of the RPM Settlement and was explicitly incorporated into the RPM provisions of PJM's tariff and RAA that were accepted by the Commission.³⁸ And, no one has alleged that PJM violated these tariff provisions.

26. As we have explained in other cases dealing with RPM, the purpose of RPM was to obtain forward binding commitments from capacity resources to be available in order to ensure reliability, and to create sufficient incentives for new generation projects and

³⁶ See Declaration of Joseph Bowring, Attachment A to PJM answer (Bowring Declaration) and analyses of the RPM auctions posted at: <http://www.pjm.com/markets/market-monitor/reports.html> (MMU Reports).

³⁷ See *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,272 (2008).

³⁸ See generally, PJM Open Access Transmission, FERC Electric Tariff, Sixth Revised Volume No. 1 (Tariff), Attachment DD, and PJM Reliability Assurance Agreement among Load-Serving Entities in the PJM Region (RAA), Schedules 4, 4.1, 8, 10 and 10.1. With regard to the determination of CETO and CETL, see Tariff, Attachment DD at § 2.9 (stating that CETO shall have the meaning set forth in the RAA); RAA at § 1.6 (CETO “shall mean the amount of electric energy that a given area must be able to import to remain within a loss of load expectation of one event in 25 years when the area is experiencing a localized capacity emergency, as determined in accordance with the PJM Manuals”). The RAA further allows PJM to calculate both CETO and CETL “in accordance with the PJM Manuals.” RAA at §§ 1.6, 1.7.

demand resources to participate in the program. The tariff provisions at issue, therefore, set the rate and quantity that will be paid to capacity resources that are selected in the auction to provide future service. Changing a rate and quantity already determined in accordance with existing tariff provisions on which parties have relied would defeat the purpose of the forward binding commitment, and undo the incentives for new capacity resources.³⁹

27. RPM Buyers argue that the Commission reserved the right to make changes to the RPM Settlement when it stated that “PJM’s market participants may and should act to address deficiencies that they see in PJM’s capacity markets, whether through PJM stakeholder processes or through seeking relief from the Commission.”⁴⁰ In making that statement, the Commission was not suggesting that the rates for past auctions were tentative. The Commission merely reminded the parties of their right to raise concerns about and seek prospective review of potential market deficiencies. For the reasons discussed herein, we do not find a sufficient basis in the RPM Buyers’ complaint to re-run the past auctions or change the prices that resulted from those auctions.

28. The purpose of the auctions during the transition period was to establish capacity prices for those years leading up to the implementation of the full three-year-ahead auctions established under RPM. The prices and obligations set in those auctions became set as of the date of the auctions, and PJM and the capacity resource providers had every right to rely on those prices and obligations in making their decisions, including any capacity commitments and investment decisions. RPM Buyers have not established that any such investments were not, in fact, made. But even if resource providers had not yet made new investments in plant and equipment as a result of those auctions, each supplier of necessity would have had to forgo other opportunities to use its generating capacity, as a result of its commitment to serve PJM at the rates established in the auction. Indeed, capacity resource providers that participated in the transitional auctions gave up the opportunity to use their capacity to make bilateral sales of capacity or to participate in other RTO capacity markets.

³⁹ Moreover, as a result of those auctions, the capacity resources must start to make whatever commitments are needed so they will be available on the delivery date. RPM Buyers are therefore asking the Commission to change a rate and quantity already determined in accordance with tariff provisions, when parties have relied on such provisions.

⁴⁰ December 22 Order, 117 FERC ¶ 61,331 at P 147.

29. RPM Buyers propose a method for re-determining RPM rates that is based on the rate calculated for the 2007-2008 delivery year of \$40.80 for the entire PJM zone and making certain adjustments to that rate for subsequent years. But RPM Buyers identify no basis for the Commission to change the rate paid to the capacity resources while not providing them with the opportunity to reevaluate their decision to commit capacity to PJM.⁴¹ Any such changes by capacity resources could undermine PJM's reliability, the preservation of which is a principal focus of RPM. We do not find that upsetting past arrangements that could well jeopardize the commitment of capacity providers to assure reliability is just and reasonable.

30. RPM Buyers further contend that sellers exercised market power and that the Commission ought to reset prices as a result. This contention ignores the fact that the mitigation framework in effect during the transition period auctions included detailed and specific provisions to fully mitigate any potential to exercise market power. In fact, during these auctions, every offer by capacity resources was subject to these mitigation procedures. In addition, as further protection against any attempt to exercise market power in the capacity market auctions, the PJM market monitor, Joseph Bowring, reviewed the results of each auction.

The [Market Monitoring Unit] checked every MW of capacity in the PJM footprint and validated that the capacity was offered into each auction or that there was a valid reason for not offering. For example, a valid reason for not offering a unit is that the unit was not expected to be in operation for the delivery year and that such unavailability could be documented. Another valid reason for not offering a unit is a documented, externally imposed environmental restriction. There was no physical withholding in any RPM auction to date.⁴²

* * *

The deratings of units were consistent with the physical facts at the units. The forced outage rates of units were based on

⁴¹ As the Commission has previously found, PJM does not have authority to require generators to operate or provide power. *PJM Interconnection, LLC*, 110 FERC ¶ 61,053, at P 137 (2005).

⁴² Bowring Declaration at P 4, footnotes omitted.

the actual forced outage rates. Such mechanisms were not used to physically withhold. The Market Monitor's report on the 2009-2010 base residual auction explains the exact reasons for the 431.9 MW reduction in unforced capacity in SWMAAC for this auction.⁴³

Dr. Bowring further stated "[t]he data do not support the claim that suppliers could offer prices well in excess of avoidable costs. The Market Monitor reviewed the offers in detail and the offers were not above avoidable costs."⁴⁴ Dr. Bowring thus concluded that the results of the RPM auctions were competitive, and added that in the view of the Market Monitor, multiple factors led to the increase in the clearing price, including unit deratings and an increase in CETO.⁴⁵ Based on this evidence, we find that the PJM tariff provisions, and particularly the tariff's mechanisms for protecting customers from the exercise of market power, were followed, and we find no basis to overturn the auctions for the transition period.

31. RPM Buyers also failed to show that any seller violated the mitigation rules in place during the auctions. Rather, their complaint basically contends that the mitigated prices resulting from the existing tariff provisions should be found unjust and unreasonable, because of potential defects in the tariff provisions. These are issues that can be raised in the context of challenges to future auctions, but do not justify overturning the results of past auctions, including the commitments of generators to provide capacity and the commitments of PJM to pay for that capacity at the auction-determined prices.

32. Our determination not to revise auction-determined rates and service obligations is not only consistent with the FPA, and the structure of RPM, but is in accord with Commission precedent in dealing with other challenges to rates determined through bidding procedures – where the Commission has not granted such relief (although it

⁴³ *Id.* P 11, footnote omitted, *citing to* the Market Monitor's report on the 2009-2010 auction, "Analysis of the 2009 – 2010 RPM Auction" posted under "RPM Materials" at <http://www.pjm.com/markets/market-monitor/messages.html> at 24-25.

⁴⁴ *Id.* P 12.

⁴⁵ *Id.* P 13, *citing to* "Analysis of the 2009 – 2010 RPM Auction" posted under "RPM Materials" at <http://www.pjm.com/markets/market-monitor/messages.html> at 25-26.

considered prospective measures).⁴⁶ In determining whether to grant refunds with respect to a tariff violation, the Commission determined not to provide such refunds for a past violation after balancing the several interests at stake, including the tariff violation, market context, prices paid, expectations of affected entities, various tariff provisions, and the need to balance fair prices and system reliability.⁴⁷ In a case involving the implementation of ISO-NE's market rules, the Commission denied a request to recalculate market prices on the basis that those prices "were established in accordance with ISO-NE's market rules,"⁴⁸ even though ISO-NE had acknowledged that, in certain situations, its dispatch software had created clearing prices that were inconsistent with the dispatching principles of those market rules. Likewise, in *Borough of Chambersburg*, the Commission dismissed a complaint as to the past allocation of auction revenue rights, finding that "PJM has correctly applied its transmission tariff, and that it would not be appropriate to re-run the [Auction Revenue Rights (ARR)] allocation after parties already have made commitments based on that allocation,"⁴⁹ and stated that it would be more appropriate to address the complainants' concerns regarding the ARR allocation process on a prospective basis in a separate proceeding.

⁴⁶ *Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333, 340 (D.C. Cir. 2007) ("The fact that FERC approved prospective filings by the NYISO to change aspects of the reserves market in response to the market irregularities of early 2000 does not mean that it is also required to order retroactive relief Concluding otherwise would, as the NYISO has previously noted, open the gates to retroactive changes in tariffs any time the power markets' rules were adjusted").

⁴⁷ *New York Independent System Operator*, 110 FERC ¶ 61,244, at P 62 (2005), *reh'g denied*, 113 FERC ¶ 61,155, at P 47 (2005), *aff'd sub nom. Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007).

⁴⁸ *Bangor Hydro-Electric Co. v. ISO New England, Inc.*, 97 FERC ¶ 61,339 at 62,589 (2001), *reh'g denied*, 98 FERC ¶ 61,298 (2002).

⁴⁹ *Borough of Chambersburg*, 117 FERC ¶ 61,219 at P 1, *reh'g denied*, 119 FERC ¶ 61,166 at P 45-46.

The Commission orders:

The complaint is hereby dismissed.

By the Commission

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix A

Parties seeking intervention in Docket No. EL08-67-000

Allegheny Energy Supply Company (AE Supply),
Ameren Services Company,
American Electric Power Service Corporation (AEP),
American Municipal Power - Ohio, Inc. (AMP-Ohio),
American Public Power Association,
Arcelormittal USA Inc.,
Baltimore Gas and Electric Company,
Barclays Bank PLC,
Borough of Chambersburg, Pennsylvania,
Calpine Corporation,
Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company,
City and Towns of Hagerstown, Thurmont, and Williamsport, Maryland,
Commonwealth Chesapeake Company,
Consolidated Edison Energy, Inc, et. al.
Constellation Parties,
Dayton Power and Light Company (DP&L),
Direct Energy Services, LLC, Direct Energy Marketing Inc., Energy America LLC, and
Strategic Energy, LLC (Direct Companies),
District of Columbia Public Service Commission (D.C. Commission),
Dominion Resources Services, Inc.,
Demand Response and Advanced Metering Coalition (DRAM Coalition),
Duke Energy and Reliant,
Dynegy Power Marketing, Inc.,
Edison Mission Energy,
Electricity Consumers Resource Council (ELCON),
Electric Power Supply Association and Electric Power Generation Corporation,
EnerNOC, Inc.,
Exelon Corporation,
FirstEnergy Service Company,
FPL Energy Generators (FPL Energy),
GenPower Services L.L.C.,
Hess Corporation,

Illinois Commerce Commission (Illinois Commission),
Industrial Energy Consumers of Pennsylvania,
Industrial Energy Users-Ohio,
J.P. Morgan Ventures Energy Corporation et. al.,
Liberty Electric Power, LLC (Liberty),
Mirant Parties,
New Jersey Large Energy Users Coalition,
North American Energy Alliance, LLC,
North Carolina Electric Membership Corporation,
NRG Energy, Inc.,
Old Dominion Electric Cooperative,
Pennsylvania Department of Environmental Protection,
Pennsylvania Municipal Electric Association and the Boroughs of Berlin, et. al.,
Pepco Holdings Inc,
PJM Power Providers Group (P3),
PPL Companies (PPL),
PSEG Companies,
Public Service Electric and Gas Company, et. al.,
Rockland Electric Company,
Shell Energy North America (U.S.), L.P. (Shell) ,
Virginia Division of Consumer Counsel,
Virginia State Corporation Commission (Virginia Commission),
West Virginia Energy Users Group, and Illinois Industrial Energy Consumers,
Wisconsin Public Service Commission (Wisconsin Commission).