

A MAP WITHOUT A LEGEND: LEAVING FERC WITHOUT DIRECTION

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I. INTRODUCTION

How much discretion should the Federal Energy Regulatory Commission (FERC or Commission) have to modify a proposed rate change to protect the vitality of the utility market? Recently, in *NRG Power Marketing, LLC v. FERC* (*NRG Power Marketing*), the United States Court of Appeals for the D.C. Circuit in an opinion by then Circuit Judge Kavanaugh overturned FERC’s modified rate change acceptance for a utility company.¹ Unfortunately, the court did not provide enhanced guidance to FERC to clarify the boundaries of its authority. This decision may restrict FERC’s discretionary power to ensure that proposed rate changes are “*just and reasonable*,” because without providing clearer guidance, the court’s decision may result in FERC simply denying rate-change proposals, rather than accept them with modifications, which could lead to the Commission wasting its resources defending its decisions or providing for additional lengthy Commission proceedings.

This case note will discuss the background leading up to the case. It will also discuss the particular system that the involved Regional Transmission Organization (RTO) used at the time of this writing to regulate its regional electricity market, and the rate changes that it proposed to that system. Additionally, this Note will examine the statutory and legal precedent that the D.C. Court relied on in its

1. *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017), reh’g denied, *NRG Power Mktg., LLC v. FERC*, No. 15-1452 (D.C. Cir. Sept. 20, 2017) (per curiam); order on remand, *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 (2017).

holding. Finally, this case note will discuss how the court's decision could lead to significantly less flexibility for FERC.

II. BACKGROUND

On July 7, 2017, the United States Court of Appeals for the D.C. Circuit ruled in favor of several electricity generators and against FERC in *NRG Power Marketing*.² The court reviewed FERC's modification of a rate structure under the Federal Power Act (FPA).³ The FPA empowers FERC to regulate the interstate transmission and wholesale sale of electricity.⁴ FERC is tasked with ensuring that the rates for the transmission or sale of electric energy are "*just and reasonable*."⁵ In the wholesale market for electricity there are three types of organizations: the energy producers, the RTOs, and the utility companies.⁶ In *NRG Power Marketing*, the court examined FERC actions involving RTOs.

A. *The Formation and Structure of Regional Transmission Organizations*

Regional Transmission Organizations serve as an operational regulator of electrical generators and the utility companies that sell that electricity to consumers.⁷ FERC created RTOs in 1999 to respond to the view that traditional vertically-integrated utilities were engaging in discriminatory practices and were, thus, not delivering an efficient market.⁸ FERC gave Independent Services Operators wishing to form RTOs about two years, or until January 2001, to file with the Commission.⁹ Under these new rules, RTOs must have the following characteristics to comply with FERC's regulation: (1) they must be independent, (2) they must have a defined scope, and (3) they "must have operational authority."¹⁰

For RTOs to be independent, their electricity rate decision-making processes must function separately from the market participants within the region.¹¹ RTOs' scope must be restricted to a specified geographic region and oversee the interstate transmission of energy across several states.¹² Additionally, RTOs' operational

2. *NRG Power Marketing*, 862 F.3d at 110.

3. *Id.*

4. Federal Power Act, 16 U.S.C. § 824 (2015).

5. *See, e.g.*, Federal Power Act, 16 U.S.C. § 824d; FERC, STRATEGIC PLAN FY 2014 – FY 2018 7 (Mar. 2014), <https://www.ferc.gov/about/strat-docs/FY-2014-FY-2018-strat-plan.pdf>.

6. *NRG Power Marketing*, 862 F.3d at 110.

7. *Id.*

8. Final Rule, *Regional Transmission Organizations*, 65 Fed. Reg. 810 (2000) (to be codified at 18 C.F.R. pt. 35); Coley Girouard & Danny Waggoer, *How Much Do You Know About Your Electric Utility*, ADVANCE ENERGY ECON. (Mar. 9, 2018), <https://blog.aee.net/how-much-do-you-know-about-your-electric-utility> (explaining that vertically-integrated utilities are utility companies that are responsible for all generation, transmission, and distribution of electricity in a specific jurisdiction and were traditionally the dominant form of energy distribution).

9. Regional Transmission Organizations, 18 C.F.R. § 35.34(h) (2006) (stating that Independent Services Operators are similar to RTOs in form, but generally operate at the state level).

10. 18 C.F.R. § 35.34(j)(1)-(3).

11. 65 Fed. Reg. 810, at 850; 18 C.F.R. § 35.34(j)(1)(i)-(iii).

12. 18 C.F.R. § 35.34(j)(2).

authority means they are the sole operators of transmission in that defined region.¹³ Primarily, the RTOs “often set the rate that generators charge and that Load Serving Entities [utilities companies] pay [for electricity].”¹⁴ PJM Interconnection, LLC (PJM) is one such RTO. PJM is the “largest RTO in the world,” overseeing a region including all or parts of: New Jersey, Pennsylvania, Delaware, Maryland, Virginia, D.C., West Virginia, Ohio, North Carolina, South Carolina, Indiana, Michigan, Kentucky, Tennessee and Illinois.¹⁵ PJM services more than 65 million Americans.¹⁶

B. PJM Uses Market Capacity Auctions to Meet Market Demand

PJM seeks to ensure consistent delivery of electricity to utilities using a Market Capacity Auction to meet the region’s electricity demands by taking bids for the needed capacity.¹⁷ In the Market Capacity Auction, PJM determines future demand of its region, taking into account local developments.¹⁸ PJM estimates its market’s electricity demands three years in advance.¹⁹ It then has electrical generators submit bids for their capacity to fill any portion of the demand they are capable of meeting.²⁰ PJM reviews and accepts bids from the lowest bid to the highest until it has fulfilled the estimated demand.²¹ PJM then sets the price, called the “clearing price,” for each unit of energy based on the highest accepted bid so that all accepted generators are paid the same for each unit, regardless of which price the generators bid themselves.²² This method means that PJM can ensure that there is enough supply of energy for markets as new generators will be attracted to the market when demand, and thus price, is higher.²³ As an illustration, the D.C. Circuit described the process in the following way:

[I]magine that four electricity generators each bid to sell 10 units of capacity to PJM. The four generators respectively bid at \$100 per unit, \$120 per unit, and \$130 per unit. If PJM projects that it will need 25 units of electricity three years from now, it will purchase 10 units of capacity at \$100 per unit, 10 units at \$110 per unit, and 5 units at \$120 per unit. The “clearing price” in the market is set by the highest accepted bid – \$120 per unit. The three electricity generators that had their bids accepted in the auction will all receive \$120 per unit from PJM. Load Serving Entities [Utility Companies] will pay PJM \$120 per unit to purchase electricity.²⁴

13. 65 Fed. Reg. 810, at 955; 18 C.F.R. § 35.34(j)(3).

14. *NRG Power Marketing*, 862 F.3d at 110.

15. 2017 PJM ANNUAL REPORT, PJM INTERCONNECTION, p 11, 24, (Apr. 2018) <https://www.pjm.com/-/media/about-pjm/newsroom/annual-reports/2017-annual-report.ashx?la=en>.

16. *Who We Are*, PJM INTERCONNECTION, <http://www.pjm.com/about-pjm/who-we-are.aspx> (last visited Feb. 5, 2019).

17. *Capacity Market (RPM)*, PJM INTERCONNECTION, <https://www.pjm.com/markets-and-operations/rpm.aspx> (last visited Feb. 15, 2019).

18. *Id.*; *NRG Power Marketing*, 862 F.3d at 111.

19. *NRG Power Marketing*, 862 F.3d at 111; NAT’L ENERGY TECH. LAB., *supra* note 16, at 3.

20. *NRG Power Marketing*, 862 F.3d at 111.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

But there is a weakness in this market capacity setup. This setup incentivizes generators to bid below the cost necessary to produce the energy to ensure that they receive a bid and then they can benefit from the higher clearing price.²⁵ This is especially true of new generators that might receive state subsidies that might lower the generators' cost of production.²⁶ This incentive drives the ultimate clearing price lower and lower as generators begin to exit those markets with depressed prices.²⁷ Such a system risks lowering the available supply in the long run, and can result in power outages.²⁸

As a consequence of this risk, PJM has set a policy to address generators from underbidding the market, especially new generators by instituting a Minimum Offer Price Rule for new generators.²⁹ Under this rule, PJM sets a minimum floor price that new entrants to the market are required to bid at or above.³⁰ There are two important aspects to this rule. The first is that it applies to new generators for the first year after PJM accepts its bid.³¹ The second is that PJM is able to make an exception offer to individual generators, called a "unit-specific review" if a new generator can demonstrate to PJM that its costs of production are truly below the minimum bid floor.³² If a generator successfully proves that its costs are below the bid floor, then PJM will allow it to place a bid below the minimum price.³³

C. *How FERC Uses Section 205 of the FPA to Regulate Electricity Rates*

Utilities, including RTOs, may propose rate changes to FERC under Section 205 of the Federal Power Act (FPA).³⁴ Generally, the Commission is the regulatory entity that must either accept or reject these rate-change proposals, but in the process of accepting them, it may introduce its own changes to the proposals.³⁵ In order for FERC to accept a rate change, the utility must show that its rate changes are "*just and reasonable*" for all affected parties.³⁶ If the proposal fails to do so, FERC must reject it.³⁷ But several courts have held that FERC may offer small changes to proposals, so long as the changes are "similar to the previous in effect"

25. *NRG Power Marketing*, 862 F.3d at 111.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 111-12.

30. *NRG Power Marketing*, 862 F.3d at 112.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 114.

35. *NRG Power Marketing*, 862 F.3d at 114; *City of Winfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984).

36. Federal Power Act, 16 U.S.C. § 824d(a); *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, Wash., 554 U.S. 527, 532 (2008) (quoting *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) that the term "*just and reasonable*" does not have one precise judicial definition and FERC, thus, has leeway to determine what is "*just and reasonable*" so long as it balances "investor and consumer interests.").

37. Federal Power Act, 16 U.S.C. § 824d(a).

and the changes are accepted by the proposing party.³⁸ This system allows the Commission to conditionally accept a rate change proposal rather than having to reject the proposal outright, which would force the utility to resubmit a new or adjusted proposal.³⁹

There is a process in Section 206 of the FPA whereby FERC may make unilateral changes to any rate structure.⁴⁰ However, this process requires that the Commission first find that the current rate structure is unjust or unreasonable before it is may act to correct it through adjudication.⁴¹ This Note analyzes the holding in *NRG Power Marketing*, in which the United States Court of Appeals for the D.C. Circuit ruled a FERC decision conditionally accepting a modification to proposed rate structure violated Section 205 of the FPA.⁴²

D. The D.C. Circuit Ruled that FERC's Modification of a Proposal was Improper Under Section 205

Before *NRG Power Marketing* reached federal court, a group of generator and utility companies operating in PJM's region convinced PJM to petition FERC for a rule change.⁴³ This group did so because it was not satisfied with the then-current form of the Minimum Offer Price Rule, particularly the unit-specific exception.⁴⁴ These generators and utility companies came together and proposed changes to the rule to PJM.⁴⁵ PJM put it to a vote of its stakeholders, who approved the changes by a two-thirds margin.⁴⁶ This was the first time the shareholders voted to approve a rule change by such a large margin in PJM's history.⁴⁷ PJM then presented the proposal to FERC.⁴⁸ Although the proposal was multifaceted, only two terms of the proposal were at issue when the case reached federal court: (1) eliminating the unit-specific review process, and (2) increasing the mitigation period for new generators from one year to three years.⁴⁹

The first term of the proposed rule change eliminated the unit-specific review process.⁵⁰ PJM argued that the unit-specific review risked price suppression, which a broader set of exceptions could better mitigate.⁵¹ Such exceptions would go to generators that had no subsidies or were subsidized in a "non-discriminatory, state-sponsored procurement process," or to utility companies with limited ability

38. *City of Winfield*, 744 F.2d at 876.

39. *Id.*

40. Federal Power Act, 16 U.S.C. § 824e(a) (2005).

41. *Id.*

42. *NRG Power Marketing*, 862 F.3d at 110.

43. *Id.* at 112.

44. *Id.*

45. *Id.*

46. *NRG Power Marketing*, 862 F.3d at 112.

47. *Id.*

48. *Id.* at 113.

49. *Id.* at 112-13.

50. *Id.* at 112; Order Conditionally Accepting in Part, and Rejecting in Part, Proposed Tariff Provisions, Subject to Conditions, *PJM Interconnection, LLC*, 143 F.E.R.C. ¶ 61,090 at P 116 (2013).

51. 143 F.E.R.C. ¶ 61,090 at P 116.

to produce their own energy.⁵² The first exemption would eliminate new generators that received the benefit of state subsidies from entering the market and depressing the prices.⁵³

The second term increased the mitigation period for new generators from one year to three years.⁵⁴ PJM argued that new generators posed the highest risk of causing price depression, because PJM's price floor was only an estimate, and therefore, PJM could not know which new generators might underbid and cause future problems.⁵⁵ Therefore, PJM argued, it was reasonable to hold these generators at minimum for a longer timeframe.⁵⁶

FERC determined that the proposal was not "*just and reasonable*" and offered several changes that it believed would make the proposal "*just and reasonable*."⁵⁷ First, the Commission recommended that under the new scheme, generators that would have once qualified for the exemption under the old scheme because they legitimately had costs lower than the minimum would no longer qualify because there would be no process that allowed for cost-efficient generators to avoid the mitigation period.⁵⁸ FERC asserted that they ought to be allowed to do so.⁵⁹ Further, because PJM had conceded that the then-in-place scheme of unit-specific review was "*just and reasonable*," the Commission was unpersuaded to approve the new scheme.⁶⁰ FERC proposed accepting the new exceptions while keeping the old unit-specific review, but rejected the new three year probation period, up from one-year, because it had determined that the one-year period was more economical for the market.⁶¹ FERC reasoned that an additional two years would have added a significant burden on the new generators and that PJM's plan would discourage new generators from entering the market, risking future available capacity.⁶²

PJM accepted the modifications from FERC.⁶³ Several generators requested a rehearing on the issue, but in October 2015, the Commission denied their request.⁶⁴ These generators then petitioned the United States Court of Appeals for the District of Columbia for review, which overturned the Commission's determination.⁶⁵

52. *NRG Power Marketing*, 862 F.3d at 112-13.

53. *Id.* at 113.

54. *Id.*; 143 F.E.R.C. ¶ 61,090 at P 199.

55. *NRG Power Marketing*, 862 F.3d at 113; 143 F.E.R.C. ¶ 61,090 at P 200.

56. 143 F.E.R.C. ¶ 61,090 at P 200.

57. *NRG Power Marketing*, 862 F.3d at 113-14.

58. 143 F.E.R.C. ¶ 61,090 at PP 141-44.

59. *Id.* at P 141.

60. *Id.* at P 143.

61. *Id.* at PP 143, 211; *NRG Power Marketing LLC*, 862 F.3d at 114.

62. 143 F.E.R.C. ¶ 61,090 at P 212.

63. *NRG Power Marketing LLC*, 862 F.3d at 114.

64. *Id.*

65. *Id.*; Federal Power Act, 16 U.S.C. § 8251(b) (2005) (stating that an aggrieved party appeals an order from FERC to "the United States Court of Appeals for any circuit . . . or in the United States Court of Appeals for the District of Columbia.").

E. The Court Reasoned that the Modifications Were Not Minor Enough to be Proper Under Section 205 of the FPA

The Court of Appeals reasoned that the modified changes were not minor because the changes completely reversed the original proposal's goals.⁶⁶ Citing *Western Resources, Inc. v. FERC (Western Resources)*, the court held that FERC may not make an "entirely different rate design."⁶⁷ PJM's proposal would have limited the number of exceptions available, but the Commission's modification created a whole new class of exceptions of generators with state subsidies, in addition to the generators exempted through the unit-specific review in place at the time.⁶⁸ Additionally, this new class of exemptions gave PJM less control, because the new class would apply without needing to get PJM's approval.⁶⁹ The modification, thus, amounted to an "entirely different rate design" which Section 205 of the FPA does not allow.⁷⁰ Finally, the court reasoned that changes by the utility under Section 205 provide customers and other intervenors "early notice" and opportunity for review and comment, by making modifications in an order accepting a filing under Section 205, FERC did not give enough notice for comments from PJM's customers.⁷¹ For the foregoing reasons, the court overturned FERC's order and remanded it back to the Commission for reconsideration.⁷²

III. ANALYSIS

Following the D.C. Circuit's decision in *NRG Power Marketing*, FERC may have less flexibility in its dealings with public utilities. This, in turn, may result in utilities finding it more difficult to make efficient proposals for the modification of rate structures.

A. The D.C. Circuit Has Effectively Limited FERC's Discretion

The court's language indicates that it is open to accepting minor modifications that the Commission makes when conditionally accepting an RTO's rate change proposal. The court relied on previous cases in acknowledging that FERC was allowed to make minor changes and stated that "it would be 'empty formalism' to require the utility to make a new filing in order to implement minor changes proposed by FERC."⁷³ Yet, the court's reasoning did not offer much guidance to the Commission to help it understand what types of "minor proposals" would be acceptable. Instead, the court merely stated that FERC proposals must be "*just and*

66. *NRG Power Marketing*, 862 F.3d at 115.

67. *Id.* at 115-16 (citing *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993)).

68. *Id.*

69. *Id.* at 116.

70. *Id.*

71. *NRG Power Marketing*, 862 F.3d at 116 (quoting *City of Winnfield*, 744 F.2d at 876).

72. *Id.* at 117.

73. *Id.* at 115 (citing *City of Winnfield*, 744 F.2d at 876). It is also notable that in *Western Resources*, a third party intervenor objected to the pipeline filing, whereas in *NRG Power Marketing* the Commission initiated the change in rate structure on its own.

reasonable” and not be an “entirely different rate scheme” than the RTOs originally proposed.⁷⁴ Perhaps, the clearest guidance provided by the court in *NRG Power Marketing* with respect to the interpretation of the scope of the Commission’s authority under Section 205 comes from its citation to *City of Winfield*, a 1984 D.C. Circuit opinion of then Circuit Judge Scalia. In *City of Winfield* the court distinguishes between changes proposed by the Commission to underlying components of an existing rate structure that are permitted under Section 205 and changes to the “type” of rate, that can only be made by the Commission pursuant to Section 206.⁷⁵ Rather than looking to the *NRG Power Marketing* opinion directly for hints as to what constitutes a minor modification that can be made by the Commission, pursuant to Section 205, the Commission, utilities and RTOs may do well to focus on the language and cases cited in *City of Winfield*.

However, in its decision in *NRG Power Marketing* the court also relied on the holding in its 1993 case, *Western Resources*.⁷⁶ There, two pipeline companies had proposed changes to the rates that would be charged to transport natural gas to and from a storage facility.⁷⁷ For the proposal, the companies’ calculations used to determine the rates distinguished between the costs to transport the gas to the storage facility and the costs to transport the gas from the facility.⁷⁸ FERC accepted the companies’ rate changes but, as a condition, adjusted the calculation for the return direction costs and ordered a refund by one of the companies for the cost discrepancy.⁷⁹ Both companies challenged the decision under Section 4 of the Natural Gas Act, an analogous provision to Section 205 of the FPA at issue in *NRG Power Marketing*.⁸⁰ The court remanded the decision to FERC, requiring that it justify substituting its own calculations for the companies’ calculations.⁸¹ In its holding, the court focused on FERC’s burden of proof for imposing its own adjustment to a company’s rate change proposal compared to the burden of proof the company had when making its proposal.⁸² The court found the Commission had used its own calculations to make rate changes such that it was acting beyond the scope of Section 4 of the Natural Gas Act. Therefore, FERC had the burden to show that its proposals were “*just and reasonable*,” under Section 5 of the Natural Gas Act, an analogous provision to Section 206 of the FPA.⁸³

Despite citing to *Western Resources* in its analysis, the court in *NRG Power Marketing* did not mention the burden of proof, a main issue in *Western Resources*.

74. *Id.* at 116.

75. *City of Winfield*, 744 F.2d at 873.

76. *Id.* at 115.

77. *Western Resources*, 9 F.3d at 1570-71.

78. *Id.*

79. *Id.* at 1571-72.

80. *Id.* at 1572, 1578.

81. *Id.* at 1581.

82. *Western Resources*, 9 F.3d at 1578; Natural Gas Act 15 U.S.C. §§ 717c(e), 717d(a) (1988) (The statute at issue in *Western Resources* governs the transportation of natural gas through pipelines).

83. *Western Resources*, 9 F.3d at 1579.

Instead, the court distinguished between FERC actively making proposals and passively accepting or denying company-initiated proposals made to the Commission.⁸⁴ In *Western Resources*, the two pipeline companies did not accept the Commission's modification, prompting an extensive legal challenge.⁸⁵ In *NRG Power Marketing*, on the other hand, PJM had accepted FERC's modifications, but there the court reasoned that utility acceptance did not bring the new proposal in line with Section 205 of the Federal Power Act and as the court noted; [a]ll parties agree that FERC did not rely on Section 206 as the basis for its decision in this case.⁸⁶

The court's reasoning here and lack of detailed guidance may be problematic. It has not provided a clear path for FERC to offer modifications that the RTO could accept pursuant to Section 205 and when those modifications could only be made through the exercise of Section 206. Although it found that the Commission's modifications in this case went against the spirit of the original proposal, the court did not specify how it would evaluate future challenges to modifications, nor how it would weigh such factors.⁸⁷ This vagueness may leave the Commission two options: (1) to continuously probe the limit of its authority until it finds an acceptable path; or (2) to outright deny any company-submitted proposals that it does not find adequate. This second option would allow the Commission to act prospectively under Section 206 and avoid wasting resources on modifying a proposal only to have a court invalidate it later. The D.C. Circuit's opinion could also lead utility companies or RTOs after rejection of a proposal by the Commission to either resubmit the same proposal with minor adjustments or forego needed proposals until they are more certain that the Commission will accept them. Either of these responses may cause needless costs and delays to changes in the energy market and result in exactly the "empty formalism" the *NRG Power Marketing* court called wasteful when it conceded that FERC may make minor modifications to proposed rate changes within the provisions of Section 205.⁸⁸

In *Western Resources*, the D.C. Circuit Court highlighted that FERC had used a substantially different rate-calculation than the companies used when conditionally accepting the pipelines' rate change.⁸⁹ The court then determined that because the Commission had introduced its own method of calculation that it, and not the companies, had the burden of justifying the modification, and that its failure to meet that burden violated statutorily required procedures.⁹⁰ As stated by the court

84. *NRG Power Marketing*, 862 F.3d at 115-16.

85. *Western Resources*, 9 F.3d at 1572.

86. *NRG Power Marketing*, 862 F.3d at 114, fn 2; Federal Power Act, 16 U.S.C. § 824d(a)-(c) (stating that section 205 authorizes a regulated energy company to submit a proposal for a change to the currently accepted rates. If the proposal is "just and reasonable," FERC may accept the proposal without needing to determine if the old rate is no longer "just and reasonable," otherwise FERC must reject the proposal); Federal Power Act, 16 U.S.C. § 824e(a) (stating that under section 206, FERC may act on its authority to change the current rates and impose new ones when it determines the current rates are no longer "just and reasonable.").

87. *NRG Power Marketing*, 862 F.3d at 115-16.

88. *Id.* at 115 (citing *City of Winfield*, 744 F.2d at 876-77).

89. *Western Resources*, 9 F.3d at 1577-78.

90. *Id.* at 1578-79.

in *Western Resources*: “[w]e appreciate that minor deviations from the pipeline’s proposed rate based, for example, upon differences as to the extent of specific cost items, may be handled in a § 4 proceeding, but the imposition by the Commission of only half of a proposed rate surely requires more.”⁹¹ In this case, the court determined that the new proposal went with “an ‘entirely different rate design’” than the changes PJM proposed.⁹² However, the court did not identify what degree of a difference caused the FERC’s modification to qualify as a “completely different strategy” than the company’s proposed rate changes and, therefore, left the Commission to further define the limits of its authority to modify rate changes under Section 205.⁹³ In so holding, the court failed to specify a standard or provide a definitive sense of how much FERC’s modifications may differ from a company or RTO’s original proposals. It, therefore, seems unlikely that the Commission has been provided any certainty as a result of the court’s holding. Rather than accept a proposal conditioned on the company’s consent to modifications, the Commission may decide, under this court’s reasoning, to reject a company’s rate change proposal outright, determine the filed rates are unjust and unreasonable, and proceed pursuant to Section 206 rather than risk litigation.

IV. CONCLUSION

It remains to be seen to what degree, if any, FERC’s actions will be affected by the D.C. Circuit’s minimal direct guidance in *NRG Power Marketing*. The court made it clear that it would not consider rate changes that were too different from the original proposal under Section 205 of the FPA, but did not suggest what changes it *would* accept.⁹⁴ Without the court’s guidance regarding what is and is not acceptable under Section 205, it is reasonable to believe that FERC may play it safe and reject out of hand any proposal it finds to be not “*just and reasonable*,” and either utilities and RTOs will be forced to refile rejected filings pursuant to Section 205 at additional cost and reduced efficiency or additional lengthy proceedings will follow pursuant to Section 206.

Peter McVary*

91. *Id.* at 79.

92. *NRG Power Marketing*, 862 F.3d at 115-16 (quoting *Western Resources*, 9 F.3d at 1578).

93. *Id.* at 116-17 (quoting *Western Resources*, 9 F.3d at 1579).

94. *NRG Power Marketing*, 862 F.3d at 115.

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