

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

)	
The New PJM Companies	)	ER03-262-001
American Electric Power Service Corp.	)	ER03-262-004
On behalf of its operating companies	)	ER03-262-005
Appalachian Power Company	)	ER03-262-007
Columbus Southern Power Company)	
Indiana Michigan Power Company)	
Kentucky Power Company)	
Kingsport Power Company)	
Ohio Power Company)	
Wheeling Power Company)	
Commonwealth Edison Company, and)	
Commonwealth Edison Company of)	
Indiana, Inc.)	
The Dayton Power and Light Co., and)	
PJM Interconnection, LLC)	
)	
American Electric Power Company, Inc.	)	EC98-40-000
Central and South West Corporation	)	ER98-2770-000
	)	ER98-2786-000
)	
Ameren Services Company	)	EL02-65-006
)	
Illinois Power Company	)	EL02-65-000 et al.
	)	RT01-88-016
)	

**MOTION FOR LEAVE TO FILE
POST-HEARING COMMENTS AND COMMENTS OF
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL**

Pursuant to Rule 212 of the Federal Energy Regulatory Commission, the Electricity Consumers Resource Council (ELCON), a party to dockets ER03-262 et al., EC98-40-000, ER98-2770-000, and ER98-2786, submits this Motion and Comments in the above-captioned dockets.

DESCRIPTION OF THE PROCEEDING

FERC issued an “inquiry” on September 12, 2003, for The New PJM Companies, AEP, Ameren and Illinois Power RTO dockets wherein FERC will address RTO issues related to PJM and Midwest ISO (MISO). Hearings were held on September 29 and 30 to discuss impediments to AEP, Ameren, Commonwealth Edison Company (ComEd), Dayton Power and Light Company (DP&L), and Illinois Power joining RTOs and possible solutions.

MOTION TO FOR LEAVE TO FILE POST-HEARING COMMENTS

Pursuant to Rule 212 of the Federal Energy Regulatory Commission, ELCON moves to submit post-hearing comments. ELCON staff attended the Commission’s hearings on September 29 and 30. ELCON’s motion for leave to file post-hearing comments will not delay the Commission’s consideration of the evidence and comments submitted in this docket because ALJ Cowan provided hearing participants 10 days to file supplementary or rebuttal testimony. ELCON, a party to The New PJM Companies and AEP dockets, represents industrial consumers of electricity throughout the Midwest and Mid-Atlantic who have an interest in the establishment of a joint and common market in the Midwest and PJM region.

COMMENTS

FERC’s July 31, 2002 Order assumed that AEP, ComEd, DP&L and Illinois Power would join PJM together. Furthermore, FERC was willing to live with the suboptimal RTO configuration proposed by the former Alliance companies because it relied on the following conditions coming to fruition prior to their integration: 1) NERC approval of a PJM/MISO reliability plans; 2) the adoption of a Joint Operating agreement between PJM and MISO to reduce seams; 3) implementation of a common PJM/MISO market by October 1, 2004;

4) elimination of the through and out rates between MISO and PJM; and 5) adoption of a hold harmless plan to protect Wisconsin and Michigan from the loop flows and congestion that result from the RTO configuration proposed by the former Alliance companies. None of these conditions precedent have been achieved, yet ComEd submitted a compliance filing that contemplates its membership in PJM without AEP. Despite the plea from ComEd's parent company that "arguing about ComEd's choice of RTO must stop,"¹ the facts as they stood on July 31, 2002, when FERC approved ComEd's choice to join PJM, have changed significantly. FERC owes consumers a second-look under Section 205 of the Federal Power Act to ensure that ComEd's and AEP's proposed arrangements comply with Order No. 2000 and are just and reasonable.² ELCON believes the RTO configurations in the Midwest will only meet the just and reasonable standard if ComEd and AEP are both ordered to simultaneously join the same RTO.

The continuous switching, posturing and delays accompanying the proposed membership of AEP, ComEd, Ameren, Illinois Power, and various other Midwest utilities in either PJM or MISO are at bottom a game in market power. The obstacles to RTO membership enacted by Kentucky and Virginia exacerbate the effect of vacillation by the former Alliance companies between joining MISO and PJM.³ In the wake of the August 14 Blackout, ELCON

¹ Pre-Filed Testimony of Elizabeth Anne Moler on Behalf of Exelon Corporation and Commonwealth Edison Company, at 11 (Sept. 23, 2003).

² Guidance on Regional Transmission Organization and Independent System Operator Filing Requirements under the Federal Power Act, 104 FERC ¶ 61,248 (Sept. 10, 2003) ("Public utilities making Section 205 filings will continue to be required to demonstrate that they meet the principles of Order No. 2000. In undertaking our review of such Section 205 filings, the Commission will consider whether all of the elements contained in the filed arrangements meet the principles of Order No. 2000 and are just and reasonable pursuant to Section 205 of the FPA.").

³ Illinois Power has changed its RTO membership plans multiple times – starting with MISO, then working with Alliance, then looking toward PJM, then considering MISO when Illinois Power was almost sold to Trans-Elect. On September 26, Exelon announced that it was considering buying Illinois Power from Dynegy. If Illinois Power is purchased by Exelon, Exelon will want both ComEd and Illinois Power to join

urges the Commission to cut past the excuses and insist on RTO membership that reduces rather than exacerbates seams between MISO and PJM.

In the past, ELCON has been agnostic about which RTO ComEd or AEP should join, and has suggested that membership in multiple RTOs should be contemplated. In the wake of the September 29 and 30 hearings, ELCON strongly recommends that FERC require PJM and MISO to institute a joint and common market as soon as possible. As the recent August 14 Blackout illustrated, it is of the utmost urgency that the seams between the two RTOs be eliminated. The Commission has the authority under Section 205 of PURPA, in addition to the Commerce Clause and Supremacy Clause, to revive the voluntary RTO formation process in the Midwest, ensuring a joint and common market for the benefit of all Midwest and Mid-Atlantic consumers.

I. AEP's and ComEd's Proposed Membership in PJM Creates the Potential for Exercises of Market Power, Exacerbates Seams with MISO, and Threatens Reliability

A. FERC Must Order AEP and ComEd to Simultaneously Join the Same RTO to Eliminate Seams and Curb Market Power

ELCON has urged the Commission in prior filings in The New PJM Companies and AEP dockets to order RTO membership over the discriminatory concerns of Virginia and Kentucky. The condition that AEP join an RTO was an express condition of AEP/CSW merger approval⁴ and is necessary to mitigate AEP's market power.⁵ The current RTO membership selections in the Midwest, however, create an awkward geographic seam between PJM and MISO, which will result in significant loop flows between the two RTOs, a situation which

PJM. If Illinois Power joins PJM, then Ameren's plans to join MISO could be on the rocks because a major seam would be created between Ameren's assets in Illinois and Illinois Power's assets.

⁴ 90 FERC ¶ 61,242 (2000).

⁵ 90 FERC ¶ 61,219 (2001).

raises a number of efficiency concerns and increases the potential for strategic gaming, particularly if AEP's participation in PJM is uncertain.⁶ The Market Monitors explain:

When two areas are connected by more than one proxy bus, as will likely be necessary between PJM and the Midwest ISO, participants can schedule transactions over one interface that will largely flow over other interfaces. This can facilitate gaming because the price at each interface represents that value of power flowing into or out of the RTO system at that point. ... [T]he participant may be paid more for an import (or pay less for an export) than true value of the power based on the points where it actually flows into (or out of) the system. ...

A second gaming issue that could be a concern if the power flows are not well coordinated would be associated with the dispatch of generation. Given two RTOs with a high degree of electrical interaction, a generation owner in one RTO may have the ability to dispatch its units to cause congestion in a neighboring RTO. Having dispatched its units to create this congestion, the supplier could then schedule external transactions across the neighboring system that would apparently relieve the congestion and be compensated accordingly. [This] issue arises because, absent coordination, the locational prices in the two areas will not be consistent -i.e., the prices in the first RTO will not reflect the congestion occurring on the second RTO.

Market Monitors' Assessment of RTO Seams Issues in the Midwest, Docket No. EL03-35-002, at 8-9 (July 28, 2003). The Market Monitors conclude that these concerns can only be minimized by the development and implementation of detailed protocols for handling coordination between PJM and MISO. Id. at 16.

ComEd's current proposal to join PJM in the absence of AEP increases opportunities for the exercise of market power. For example, the PJM Market Monitoring Unit recently concluded that the energy, capacity, regulation and spinning reserves markets may be ripe for exercise of market power after ComEd is integrated into PJM. See Report Regarding the

⁶ See Market Monitor's Assessment of RTO Seams Issues in the Midwest, Docket No. EL03-35-002, at 6

Expected Competitiveness of Markets in the Northern Illinois Control Area After Integration into PJM, PJM Market Monitoring Unit, August 7, 2003. ComEd is only linked to PJM through a 500 MW bi-directional transmission path through AEP. So while ComEd may reap the financial benefits of instituting locational marginal pricing (LMP) within its own system, it will remain an island that is not truly connected to PJM. ELCON disagrees with Exelon testimony that ComEd's membership in PJM will "enlarge the energy market within PJM's footprint," "enhance coordination within the expanded PJM footprint," and "facilitate greater coordination between MISO and PJM." Rather, ComEd's membership in PJM in the absence of AEP would enhance seams and separate ComEd from the rest of the Midwest market.

ComEd's proposal to join PJM without AEP surfaced as part of its May 1, 2003 compliance filing in the New PJM Companies docket.⁷ This proposal deserves the Commission's full analysis under Section 205 of the Federal Power Act, including consideration of opportunities for ComEd to exercise market power through the proposed arrangement. In the wake of the abuses that have come to light in the Western markets, similar potential gaming opportunities which may be created as a result of the use of proxy interfaces physical interconnection must be closely examined. If ComEd joins PJM without AEP, there will be two PJM/AEP interfaces: one between AEP and PJM West, and another between AEP and ComEd. Moreover, the physical interconnection of ComEd with the rest of PJM solely by means of a bi-directional transmission path across AEP's transmission system also creates opportunities for the exercise of market power and raises the potential that this additional seam through the middle of PJM may not effectively be controlled by either MISO or PJM. In addition, the testimony of

(July 28, 2003).

⁷ Docket No. ER03-262.

Edison Mission Energy, submitted prior to the Commission's hearings, recognizes the potential for monopsony power in ComEd's markets:

The 500 MW bi-directional transmission path cannot provide adequate integration between ComEd and PJM. In fact, the proposed 500 MW path between ComEd and PJM represents less than 3% of the ComEd control area's total export capability of 16,785 MW for the summer of 2003. This lack of integration is apparent from PJM's "Report Regarding the Expected Competitiveness of Markets in the Northern Illinois Control Area after Integration into PJM" which was circulated to PJM's stakeholders on August 7, 2003. In its report, PJM proposed separate (PJM and ComEd only) markets for several services, including capacity, regulation and spinning reserve markets. By proposing separate markets for such services, PJM (in effect) admitted that effective integration could not be achieved between ComEd and PJM. Further, without effective integration, PJM acknowledged the potential for monopsony power in such ComEd only markets. However, PJM has not proposed mitigation rules to protect against the potential exercise of this monopsony power.⁸

ComEd's status as an outpost of PJM is not likely to be temporary. AEP is unlikely to get approval to join PJM from the Virginia State Corporation Commission (VSCC) in July 2004, when the state commission is permitted by state law to consider AEP's application, because the VSCC recently recommended the state continue its ban on RTO membership. Furthermore, the Kentucky PSC's rejection of AEP's RTO application will not be resolved in the near term given the conflict between state and federal law at the heart of the dispute.

The upshot of the AEP or ComEd proposals is an exacerbation of the seams that already exist between MISO and PJM. Given ComEd's separation from PJM by more than two states (Indiana and Ohio), ComEd's membership in PJM without AEP will create a seam within PJM. The resulting highly awkward configuration certainly cannot be what the Commission had in mind in Order No. 2000. As described by NERC, "[t]he ... entities proposing to join PJM are not geographically contiguous with the ... PJM system.... [The] transmission lines overlay the service territories of the MISO companies." Letter from NERC General Counsel David N. Cook

to Secretary Salas of FERC, July 15, 2002, *Alliance Companies*, Docket Nos. EL02-65-000 and RT01-88-016 (“NERC Letter”). “The MISO transmission system is ... contiguous in this area, crossing ‘over,’ ‘under,’ or ‘around’ the parties proposing to join PJM.” *Id.*, at 7. The Michigan Public Service Commission, citing a FERC staff witness, described the proposed configuration as “Swiss Cheese.”⁹

Given the inherent possibilities for exercises of market power as a result of the seams between MISO and PJM, ELCON believes a more rational arrangement of utilities between PJM and MISO is needed. Further, since FERC has the responsibility both to monitor and to mitigate market power, it must be especially vigilant in exercising these responsibilities as AEP and ComEd are integrated into PJM.

B. Improper RTO Configuration in the Midwest Threatens Reliability

Evidence gathered since the August 14, 2003 Blackout indicates the Blackout was triggered by the void created by the big seam between MISO and PJM. In particular, because PJM and MISO are built on different models, using different congestion management procedures, communication difficulties exist. Without seamless communication, reliability suffers. For example, NERC reported to FERC that “PJM stated that its current security-constrained dispatch model can, but presently does not, take into account external constraints. Given the overlapping nature of the electrical system that will result from the proposed MISO-PJM configuration, the ...models that each uses must take account of constraints on the other’s system.” NERC Letter, *supra*, at 4. As other commentators have pointed out, on the afternoon

⁸ Join Testimony of John P. Mathis and Reem J. Fahey on Behalf of Edison Mission Energy, Edison Mission Marketing & Trading, Inc., and Midwest Generation EME, LLC, at 17-18 (Sept. 23, 2003).

⁹ Prepared Direct Testimony of Commissioner Laura Chappelle on behalf of Michigan Public Service Commission, at 5 (Sept. 23, 2003). See also Testimony of Terry S. Harvill on behalf of The Detroit Edison Company, at 7 (September 23, 2003) (arguing that the choice of AEP and ComEd to join PJM creates “a

of August 14, “had MISO known what was happening with PJM and/or PJM with MISO, the parties had plenty of time to have notified Michigan companies to either separate themselves from Ohio, or preferably, request assistance from Michigan. However, the communication did not occur and the potential mitigating assistance was not provided.”¹⁰

II. Section 205 of PURPA Authorizes FERC to Preempt Kentucky and Virginia Actions That Block RTO Membership

ELCON’s September 23, 2003 Comments reminded FERC that it has the authority and duty to prevent state actions that lead to discriminatory and inefficient uses of the interstate transmission system and wholesale electricity markets. Commerce Clause and Supremacy Clause precedent provide ample justification for FERC to order RTO membership. First, the Virginia legislation and actions of the Kentucky PSC impermissibly burden interstate commerce. By definition, transmission that would be performed by an RTO is transmission in interstate commerce. State regulation of this transmission would impose an impermissible burden on interstate commerce. If AEP is precluded from joining an RTO, the detrimental impact on the interconnected utilities, their customers, and the economies of other states is real

long irrational seam between the Midwest ISO and PJM that, among other things, isolated the state of Michigan from the rest of the Midwest ISO.”

¹⁰ Pre-Filed Direct Testimony of Richard A. Schultz on Behalf of Int’l Transmission Co., at 10 (Sept. 23, 2003). As Mr. Schultz explained:

On August 14, there were apparently overloads and low voltages on lines with First Energy, where MISO is the Reliability Authority. There were also overloads on lines within AEP, and lines between AEP and First Energy, where PJM was the Reliability Authority. In addition, there may have been overloads or low voltages within PJM...Appropriate actions would include but not be limited to shedding of load, curtailment of transactions, and other redispatch of generation resources throughout the grid, as well as communications with other grid operators and Reliability Authorities. Such communications would have enabled other entities to reconfigure their systems to minimize the effect of the impending events.... There was no evidence of such communications with the Michigan companies who bore the initial burden of the loop flows. Nor was there evidence that any appropriate electronic communications were provided for use by Reliability Authorities.

Id., at 8-9.

and substantial. A long line of Supreme Court jurisprudence has invalidated protectionist state legislation aimed at providing in-state residents with favored access to natural resources. Second, the Virginia state law and actions of the Kentucky PSC are preempted under the Supremacy Clause because FERC has exclusive authority over interstate transmission. There can be no doubt that FERC has plenary authority over interstate transmission in the aftermath of the decision by the U.S. Supreme Court in New York v. FERC.¹¹

Section 205 of PURPA provides further justification for decisive action by FERC in the face of state obstacles to RTO membership. Under Section 205, FERC can exempt utilities from state laws that prevent utilities from coordinating:

(a) State Laws. The Commission may, on its own motion, and shall, on application of any person or governmental entity, after public notice and notice to the Governor of the affected State and after affording an opportunity for public hearing, exempt electric utilities, in whole or in part, from any provision of State law, or from any State rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area. No such exemption may be granted if the Commission finds that such provision of State law, or rule or regulation --

- (1) is required by any authority of Federal law, or
- (2) is designed to protect public health, safety, or welfare, or the environment or conserve energy or is designed to mitigate the effects of emergencies resulting from fuel shortages.¹²

AEP need not be split into pieces to respond to the Kentucky and Virginia hurdles. In fact, Section 205 specifically references and promotes FERC intervention for the purpose of central dispatch.

¹¹ 535 U.S. 1 (2002).

¹² 16 U.S.C. § 824a-1(a).

FERC rarely uses the authority conferred by Section 205 of PURPA. In Order No. 2000, however, FERC cited Section 205 as one of several statutory provisions that provide it the authority to facilitate voluntary RTO formation. In finding that Section 202(a) of the Federal Power Act¹³ provides the Commission the authority to promote voluntary RTO development, FERC cited Section 205 of PURPA as complementing the Section 202(a) authority:

Section 205 of PURPA also supports the Commission's authority to encourage and promote regional coordination. This section, which addresses power pooling, gives the Commission the authority to exempt electric utilities from state laws or regulations which prohibit or prevent voluntary coordination, and to recommend to electric utilities to enter voluntarily into negotiations for pooling arrangements where opportunities for conservation, efficiency, and increased reliability exist. The Commission has previously interpreted section 205 of PURPA as essentially complementing the functions under section 202(a).¹⁴

In Public Service Company of New Mexico, 25 FERC ¶ 61,469 (1983), FERC approved an experimental competitive market for two bulk power commodities among four investor-owned utilities in the Southwest. The Commission highlighted the voluntary effort as a positive first step toward achieving the regional coordination envisioned by the Federal Power Act and PURPA, emphasizing the importance of voluntary coordination between electric utilities to

¹³ 16 U.S.C. § 824a(a):

(a) Regional districts; establishment; notice to State commissions. For the purposes of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

¹⁴ Regional Transmission Organizations, 65 Fed. Reg. 809, 841 (Jan. 6, 2000) (footnotes omitted).

achieve “efficient use of facilities and resources” and “increased reliability.”¹⁵ The

Commission described the expansive authority it can exercise under Section 205 of PURPA:

We are mandated by Section 205(b) of the Public Utility Regulatory Policies Act to study the opportunities, through pooling arrangements, for achieving “increased reliability,” “conservation of energy” and “optimization in the efficiency of use of facilities and resources.” Where such opportunities exist, we are given the authority to recommend to electric utilities that they enter into negotiations to establish pooling arrangements. Congress thought this function so important that it expressly authorized us to override State laws and regulations which stand in the way of achieving economical utilization of facilities and resources in any area....

The [Federal Power Commission’s] power under Section 202(a) of the Power Act to promote voluntary interconnection and coordination was not transferred to this agency when it was created in 1977. However, by enacting Section 205 of PURPA in 1978, Congress increased our power to undertake this function and reaffirmed our duty to do so.¹⁶

A similar conclusion was reached in Pacific Gas and Electric Co.: “[S]ection 205 of the Public Utility regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-1(a) (1982), reaffirms the commission’s authority to promote voluntary coordination of electric utilities.” 38 FERC ¶61,242 (1987). Assuming arguendo that the actions taken by Kentucky and Virginia were to be found valid, Section 205 of PURPA authorizes the Commission to exempt AEP from compliance with state laws and regulations that are inconsistent with voluntary coordination of electric utilities. AEP made a voluntary commitment to join an RTO, a commitment that was memorialized in FERC’s approval of the merger. AEP represents that it would like to join PJM, but is thwarted by the actions of Kentucky and Virginia. Section 205 of PURPA provides FERC authority to clear away state statutes, rules and regulations impeding AEP’s voluntary coordination.

¹⁵ Public Service Company of New Mexico, 25 FERC ¶ 61,469 (1983).

¹⁶ Id. (footnotes omitted) (emphasis added).

DESCRIPTION OF ELCON

ELCON is an association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable, and efficient electricity supply for all users at competitive rates. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. The member companies of ELCON consume approximately five percent of all electricity in the United States.

NOTICES AND COMMUNICATIONS

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Dated: October 9, 2003

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion and Comments were today mailed to parties on the service lists of these proceedings by U.S. mail, postage prepaid.

Dated at Washington, D.C., this 9th day of October, 2003.

/s/ Kari Vander Stoep

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