

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

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Re: American Electric Power Company, Inc.)	EC98-40-000
Central and South West Corporation)	ER98-2770-000
)	ER98-2786-000
)	
The New PJM Companies and PJM)	ER03-262-000
Interconnection, L.L.C.)	ER03-262-001
)	
(Cases Not Consolidated))	
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**ANSWER AND MOTION FOR LATE INTERVENTION OF
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL
IN SUPPORT OF MOTION FOR RELIEF AND
MOTION FOR EXPEDITED CONSIDERATION**

Pursuant to Rule 213 of the Federal Energy Regulatory Commission, the Electricity Consumers Resource Council (ELCON), a party to Docket No. ER98-2786, submits this supplemental filing in the above-captioned dockets. ELCON joined the Answer of Industrial Coalitions filed on March 25, 2003, in support of the Motion for Relief filed by the Michigan, Ohio, and Pennsylvania state commissions and the Motion for Expedited Consideration filed by Exelon Corporation.

As pointed out in the Industrial Coalitions' Answer, Commission enforcement of the Merger Condition requiring AEP to participate in a FERC-approved RTO is long overdue. The

condition that AEP join an RTO was an express condition of AEP/CSW merger approval¹ and is necessary to mitigate AEP's market power.²

ELCON submits this supplemental filing to address two issues in greater detail than were presented in Industrial Coalitions' comments: (i) FERC must order AEP to join one, and possibly more RTOs, to avoid disintegration of the Commission's RTO initiative, and (ii) the Virginia law fails to pass constitutional muster under the Supremacy Clause and Commerce Clause case law.

SUMMARY

FERC must order AEP to join an RTO to avoid disintegration of RTOs in the Eastern Interconnection. The Virginia legislature's overreaching action stymies wholesale market development in the PJM-MISO-SPP "Super-Region." MISO and SPP have called off their proposed merger, further devastating prospects for seamless markets. Immediate FERC action is needed to avoid a "domino effect" that will scuttle FERC's most important policy initiative. (See Part I).

Virginia's actions are problematic under two Constitutional doctrines. First, the Virginia legislation impermissibly burdens 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 and ComEd are precluded from joining PJM, the detrimental impact on the interconnected utilities, their customers, and the economies of other states is real and substantial. A long line of Supreme

¹ 90 FERC ¶ 61,242 (2000).

² 90 FERC ¶ 61,219 (2001).

Court jurisprudence has invalidated protectionist state legislation aimed at providing in-state residents with favored access to natural resources. (See Part II).

In addition, the Virginia state law is preempted under the Supremacy Clause because FERC has exclusive authority over interstate transmission. In at least two proceedings, FERC has recognized that state actions taken in the name of protecting their own retail customers are preempted where inconsistent with FERC regulation of interstate transmission. In proceedings involving California ISO, FERC has found that state laws establishing residency requirements and vesting CAISO oversight authority in the California Electricity Oversight Board conflicted with FERC's jurisdiction and were vulnerable under the Supremacy Clause. (Part IIIA). In the Northern States Power case, FERC filed briefs protesting a court decision on TLR curtailment which make the point that FERC may exercise its jurisdictional authority under the Federal Power Act even if the exercise of that authority affects state regulation of utility service to native load. (Part IIIB). 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. (Part IIIC).

I. With The Prospect Of A Seamless PJM/MISO/SPP Crumbling Away, FERC Must Take Immediate Action

As FERC is well aware, the vision of a 27-state Super-Region is in dire jeopardy. Exelon's filing advised FERC that Virginia's initiative to thwart AEP and Virginia Power membership in PJM affected ComEd as well, given that ComEd is physically interconnected with PJM only through the ComEd-AEP interconnection. Then, in a March 18, 2003 filing (Docket EL02-65), MISO and PJM warned FERC that uncertainty concerning AEP's RTO membership endangered the accomplishment of a seamless MISO-PJM common market. The

MISO and PJM “status report” filing goes on to say that given this uncertainty, the two RTOs cannot submit a new timetable for implementation of a functional common market.

The latest body blow to the reeling Super-Region concept was the March 20, 2003 announcement by MISO and SPP that they are calling off their proposed merger at this time. Thus, seams will remain between MISO and SPP.

Without immediate and forceful FERC action, development of a PJM/MISO/SPP Super-Region will be aborted. FERC cannot allow AEP to sit on the sidelines any longer and, indeed, AEP may need to join more than one RTO to achieve workably competitive markets in the Eastern Interconnection.

II. Virginia’s Protectionist Law Is Subject To Serious Challenge Under The Interstate Commerce Clause

As Exelon points out:

To be sure, the states have a legitimate right to regulate public utilities within their jurisdictions that are performing retail services. But the actions of Virginia are aimed at stopping transfer of *interstate* transmission operations and development of *wholesale* energy markets, not retail distribution or sales, which are the legitimate jurisdiction of the states. The impact of Virginia’s actions undeniably extends far beyond its own citizens and the borders of its jurisdiction. Indeed, Virginia’s actions, if allowed to prevail, would impede efficient interstate transmission and wholesale sales service to citizens in twenty-six states beyond Virginia.

Motion of Exelon Corp. at 8-9 (emphasis in original). The Commerce Clause precludes states from regulating electric utilities if such regulation imposes a direct burden on interstate commerce. See Public Util. Comm’n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89-90 (1927) (the State could not regulate the wholesale rates charged by a Rhode Island utility selling

to a Massachusetts utility because it imposed “a direct burden on interstate commerce,” which could be regulated “only by the exercise of the power vested in Congress”).³

Several Supreme Court decisions have preempted state statutes that give in-state residents access to natural resources under more favorable conditions than out-of-state customers. As the U.S. Supreme Court observed in Camps Newfound/Owatonna v. Town of Harrison Maine, 520 U.S. 564 (1997):

We have “consistently . . . held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom.” New England Power Co. v. New Hampshire, 455 U.S. 331, 338, 71 L. Ed. 2d 188, 102 S. Ct. 1096 (1982). Our authorities on this point date to the early part of the century. Petitioner’s “product” is in part the natural beauty of Maine itself, and in addition the special services that the camp provides. In this way, the Maine statute is like a law that burdens out-of-state access to domestically generated hydroelectric power, New England Power, or to local landfills, Philadelphia v. New Jersey, 437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978). In those cases, as in this case, the burden fell on out-of-state access both to a natural resource, and to related services provided by state residents.

520 U.S. at 576-77. The Supreme Court cited several cases as examples of its precedent invalidating protectionist state natural resources legislation:

In West v. Kansas Natural Gas Co., 221 U.S. 229, 55 L. Ed. 716, 31 S. Ct. 564 (1911), we held invalid under the Commerce Clause an Oklahoma statute that had the effect of preventing out-of-state consumers from purchasing Oklahoma natural gas. We ruled similarly in Pennsylvania v. West Virginia, 262 U.S. 553, 67 L. Ed. 1117, 43 S. Ct. 658 (1923), that a West Virginia statute limiting out-of-state users’ access to West Virginia gas to that not “required to meet the local needs for all purposes,” *id.*, at 594, violated the Commerce Clause. We found those cases directly

³ It is this “Attleboro gap” that led to enactment of the FPA in 1935 to provide for federal regulation of wholesale power transmission in interstate commerce.

analogous in New England Power, ruling invalid a state law that reserved for state citizens domestically generated hydroelectric power. In Philadelphia v. New Jersey, 437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978), we struck down a New Jersey statute prohibiting certain categories of out-of-state waste from flowing into the State's landfills, noting that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." Id., at 627. And, in Hughes v. Oklahoma, 441 U.S. 322, 338, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979), we ruled that a statute prohibiting the export of minnows for sale out of state violated the Commerce Clause. We held similarly in Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 958, 73 L. Ed. 2d 1254, 102 S. Ct. 3456 (1982), that a provision preventing the export of ground water to States not allowing reciprocal export rights was an impermissible barrier to commerce. Insofar as Sporhase suggests certain narrow circumstances in which the reservation of natural resources for State citizens may be permissible, see id., at 956-957, these concerns are not implicated here.

520 U.S. at 577, fn 9. In language highly relevant to the instant proceeding, the Court cautioned against allowing individual states to enact protectionist legislation that could balkanize interstate markets:

Avoiding this sort of "economic Balkanization," Hughes v. Oklahoma, 441 U.S. 322, 325, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979), and the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence. See ibid.; West v. Kansas Natural Gas Co., 221 U.S. 229, 255, 55 L. Ed. 716, 31 S. Ct. 564 (1911) (expressing concern that "embargo may be retaliated by embargo, and commerce will be halted at state lines"). And, as we noted in Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 580, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986): "Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States." By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent.

Here too it is obvious that if the State of Virginia's anti-RTO legislation is allowed to stand, there will be no end of additional single state bars of RTO membership, making a hash of FERC's RTO policy and balkanizing the interstate power grid.

III. State Actions That Interfere With FERC's Exercise Of Jurisdiction Over Interstate Transmission Are Preempted Under The Supremacy Clause

Under the Supremacy Clause,⁴ state laws that conflict with FERC's exercise of its jurisdiction under the Federal Power Act are preempted.

A. In California ISO Proceedings, FERC Recognized That The Supremacy Clause Bars States From Intruding On FERC's Jurisdiction By Enacting Parochial Requirements

Like the Virginia legislature, the California legislature also passed parochial legislation with respect to ISOs. The California legislation imposed an in-state residency requirement on CAISO board membership and provided an overreaching role for the California Electricity Oversight Board. FERC appropriately regarded these features of the state legislation as preempted by its interstate jurisdiction. In Pacific Gas & Elec., 81 FERC ¶61,122 (1997), FERC rejected CAISO's arguments that these state law requirements "were necessary to serve the interests of California consumers":

We deny reconsideration of our ruling rejecting the California residency requirement. We acknowledge the ISO/PX representations that the ISO and PX Governing Boards are "policy bodies accountable to the State Government." However, these entities direct and control public utilities subject to the Commission's jurisdiction and therefore affect rates, terms and conditions of jurisdictional service (see FPA section 205(c)). Therefore, the State of California's expressed purpose that these entities represent primarily the interests of California consumers is

⁴ "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding." United States Constitution, Article VI.

not controlling when that purpose may result in unduly discriminatory or preferential treatment of Market Participants.

...

The ISO/PX and the California letter both assert that the residency requirement is consistent with the purpose of the ISO and PX set forth in the Restructuring Legislation to promote the interests of California consumers. However, we believe this stated purpose may place the interests of California consumers ahead of the interests of non-California entities that participate in ISO and PX operations.

...

Accordingly, we deny the motions for reconsideration of the residency requirement. The ISO and PX must remove the residency requirements from their respective Bylaws.

FERC also insisted that the California Electricity Oversight Board must be subordinated to FERC's jurisdictional authority:

We also deny the ISO/PX request for reconsideration of the Commission's limitation on the role of the California Oversight Board. ... [T]he Commission rejected the continuing role of the Oversight Board in governance and operations, because these duties, which would be conducted by a State-created Oversight Board consisting of appointees of the State legislature and the Governor of California, would conflict with the Commission's statutory duties under the FPA. Moreover, the Commission found that the continued role of the Oversight Board may delay or conflict with the Commission's stated intention to regulate ISOs.

As FERC stated in Calif. Power Exch. Corp., 85 FERC ¶ 61,263 (1998), California legislation that conflicts with FERC's exercise of its jurisdiction under the FPA is preempted under the Supremacy Clause:

As discussed in the November 26, 1996 Order, Congress has the power under the Supremacy Clause of Article VI of the Constitution to preempt state law,⁵ and the States may not legislate or promulgate regulations in areas that have been preempted by Federal Law or regulation. Furthermore, the preemption may result from federal agency action taken within the scope of its congressionally delegated authority.⁶ The Commission has determined that the continuing functions of the Oversight Board established by the Restructuring Legislation conflict with our statutory duties under the FPA and should not remain a part of the ISO structure, governance, and operations proposal. The ISO's and Oversight Board's claim that the Oversight Board is precluded under Article III of the California constitution from approving the changes we have required is misplaced. The Supremacy Clause expressly includes State Constitutional provisions.

Moreover, our directives are to the public utilities within this Commission's jurisdiction (the ISO and the PX), and no argument has been presented that the ISO and PX are prevented by Article 3.5 of the California Constitution, which applies to "administrative agencies," from complying with our orders. Thus, there may not be any conflict between the California Constitution and the FPA with respect to the two public utilities. Even if there were a conflict, as noted above, the FPA prevails under the Supremacy Clause.

As in the California ISO proceedings, FERC should be vigilant to preempt state law that would vitiate its RTO initiative and intrude on FERC's statutory jurisdiction.

B. In The *Northern States Power* Case, FERC Recognized That Its Jurisdiction Over Transmission Was Plenary Even Where Exercise Of Jurisdiction Affected A Utility's Service To Its In-State Customers

In *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), at issue was whether FERC exceeded its FPA jurisdiction over transmission of electric energy in interstate

⁵ *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493, 509 (1989). See also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (congressional intent to preempt will be inferred where, among other things, a "state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress").

⁶ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986).

commerce and impermissibly encroached on state jurisdiction over direct sales to retail customers by imposing curtailment rules in a way that might affect the transmission provider's service to its in-state retail customers. FERC sought rehearing of an Eighth Circuit decision that certain TLR curtailment rules intruded on state jurisdiction. FERC's June 23, 1999 Petition for Rehearing emphasized that the "Supreme Court has construed Section 201(b) to sustain Commission actions within its jurisdiction notwithstanding effects on state regulated activities," citing Mississippi Power & Light Co. v. Miss. Ex. Rel. Moore, 487 U.S. 354 (1988); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); Public Service Co. of New Hampshire v. Patch, 167 F.3d 29 (1st Cir. 1998). FERC Rehearing Brief at 12. In a brief filed with the U.S. Supreme Court in the same case, FERC reiterated its view that FERC can exercise statutory authority even where it trenches on transactions within the authority of the states:

Under the decisions of this Court and of the District of Columbia Circuit in Conway Corp. v. FPC, 510 F.2d 1264 (1975), aff'd, 426 U.S. 271 (1976), FERC has plenary authority to regulate transactions within its jurisdiction even when the exercise of that authority affects other transactions within the regulatory jurisdiction of the States. See 510 F.2d at 1271-1272; 426 U.S. at 272; see also Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 509 (1989); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988); cf. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). We agree with petitioner (Pet. 18-19) that the decision below is difficult, if not impossible, to reconcile with that principle. FERC may validly take measures to ensure equal treatment for a utility's firm, jurisdictional transmission customers even if those measures may incidentally affect the terms on which the utility provides service to its retail customers.⁷

⁷ Brief of FERC in Opposition to Writ at 15. While FERC opposed certiorari in NSP on the grounds of mootness, it continued to oppose the Eighth Circuit's ruling.

C. New York v. FERC Removes Every Shadow Of A Doubt About the Extent Of FERC's Jurisdiction Over Interstate Transmission

In New York v. FERC, 535 U.S. 1 (2002), the Supreme Court expressly rejected the State of New York's argument that FERC exceeded its statutory authority by exercising jurisdiction over unbundled retail transmission. The Majority Opinion agreed with the D.C. Circuit that the plain language of the FPA readily supports FERC's claim of jurisdiction over interstate transmission and that "the statutory text thus unambiguously authorizes FERC to assert jurisdiction over two separate activities -- transmitting and selling." Id. at 19. While the Court observed that FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market, "FERC's jurisdiction over electricity transmissions contains no such limitation. Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid." Id.

The majority in New York v. FERC ruled that since Order No. 888 was directed at addressing the problem of discrimination in wholesale transmission, FERC in Order No. 888 made an appropriate policy choice to defer addressing discrimination in retail transmission unless and until it develops a record on such discrimination. The dissenting Justices believed that, having found discrimination in interstate transmission, FERC had an imminent duty to remedy bundled retail discrimination or explain why it did not do so. However, the dissent concurred with the majority with respect to FERC's plenary authority over interstate transmission. Id. at 29. The take-home point is that the entire Supreme Court has affirmed FERC's authority to address discrimination in transmission if it finds that such discrimination exists.

In exercise of its statutory authority, FERC has embarked on a restructuring of bulk power markets. FERC has taken a series of incremental steps – from functional unbundling (Order No. 888), to operational unbundling (Order No. 2000), to the SMD NOPR – in an effort to provide efficiency in bulk power markets and redress undue discrimination by transmission monopolists who have an incentive to favor their own generation.

Several states may prefer the old regime whereby the transmission-owning utility served captive customers with little or no competition. However, FERC has made a reasonable policy choice to move to competitive bulk power markets. Where FERC finds that there is residual inefficiency and discrimination in bulk power markets, it may take action to rectify such discrimination provided that its focus is directed at jurisdictional facilities (e.g., interstate transmission).

MOTION FOR LATE INTERVENTION
IN DOCKET NO. ER03-262 ET AL. SHOULD BE GRANTED

ELCON is already an intervenor in the AEP Docket, ER98-2786, et al. Pursuant to 18 C.F.R. § 385.214(d), ELCON's motion for late intervention in the New PJM Companies docket should be granted. ELCON represents a number of substantial industrial facilities in the Eastern Interconnection, including PJM, and also represents the general interests of industrial consumers throughout the country seeking the implementation of standardized markets that promote effective competition on the wholesale and retail level. Good cause exists for ELCON's failure to timely intervene in the New PJM Companies docket. ELCON's intervention in the New PJM Companies docket is triggered by the enactment of the Virginia state law forestalling AEP's RTO participation. The unconstitutional Virginia law raises the important legal and policy

concerns addressed in this filing. ELCON believes that its late intervention will not be disruptive or prejudice any parties given that ELCON will take the record as it finds it.

DESCRIPTION OF INTERVENOR

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

Notices and communications should be addressed to:

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Dated: March 27, 2003

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer And Motion For Late Intervention Of The Electricity Consumers Resource Council In Support Of Motion For Relief And Motion For Expedited Consideration were today mailed to parties on the service lists of these proceedings by U.S. mail, postage prepaid.

Dated at Washington, D.C., this 27th day of March, 2003.

/s/ Kari Vander Stoep

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