

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Virginia Electric and Power Company

Docket No. ER05-978-000

ORDER DISCLAIMING JURISDICTION

(Issued June 27, 2005)

1. In this order, we disclaim jurisdiction over Dominion Virginia Power's (Dominion) Balancing Authority Area Services Agreement with J. Aron & Company (J. Aron) (Service Agreement). This action benefits customers by clarifying the jurisdictional issues with respect to the subject Service Agreement.

Background

2. Dominion filed the Service Agreement with the Commission on May 17, 2005. Dominion asks that the Commission either (a) disclaim jurisdiction over the Service Agreement; or (b) accept the Service Agreement for filing and permit it to become effective on May 18, 2005, or such later date as J. Aron assumes the rights and obligations of Dominion under a Power Purchase Agreement (Power Purchase Agreement) that Dominion entered into with LSP Energy Limited Partnership (LSP Energy) on May 18, 1998.¹

3. Dominion is a public utility engaged in the generation, transmission, and sale of electric energy at wholesale and retail primarily in Virginia and North Carolina. LSP Energy owns a three-unit gas-fired, combined-cycle generating facility located in Batesville, MS. J. Aron is a power marketer and a wholly-owned subsidiary of The Goldman Sachs Group, Inc.

4. In the Power Purchase Agreement, Dominion agreed to purchase the electric energy that Units 1 and 2 of the Batesville, MS generating facility generate. Dominion executed the Service Agreement with J. Aron, on April 25, 2005. Under the Service

¹ Transmittal Letter at 1.

Agreement, J. Aron will assume Dominion's rights and obligations under the Power Purchase Agreement. The Service Agreement further provides that Dominion will continue to operate the Balancing Authority for about one year after J. Aron assumes Dominion's rights and obligations under the Power Purchase Agreement.

5. The Balancing Authority is a North American Reliability Council (NERC)-certified control area that is interconnected with the transmission systems of both Entergy Corp. (Entergy) and the Tennessee Valley Authority (TVA).² Dominion is responsible for the Balancing Authority's compliance with NERC and Southeastern Electric Reliability Council (SERC) reliability standards.

6. Under the Service Agreement, Dominion will, among other things (a) dispatch Units 1 and 2 of the Batesville, MS generating facility pursuant to J. Aron's dispatch orders; (b) control the generation within its metered connections; (c) match net actual interchange to net scheduled interchange; and (d) comply with all aspects of interchange scheduling and operations in accordance with TVA's and Entergy's open access transmission tariffs and business practices.³

7. Dominion contends that, under the Commission's order in *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*,⁴ the Service Agreement is not a Commission-jurisdictional rate schedule, because it does not provide that (a) Dominion will either transmit electric energy or sell electric energy at wholesale; or (b) Dominion will have control or decision-making authority over major matters affecting the operation of Units 1 and 2 of the Batesville, MS generating facility.⁵

8. Dominion states that there are no loads within the Balancing Authority,⁶ and that the Service Agreement does not require Dominion to provide unbundled transmission

² In addition to Units 1 and 2 of the Batesville, MS generating facility, the Balancing Authority includes interconnection metering and telemetry that controls the generation located within its boundaries by directly maintaining its interchange schedule with other interchange areas.

³ Transmittal Letter at 3.

⁴ 64 FERC ¶ 61,139 (1993) (*Prior Notice*).

⁵ Transmittal Letter at 2-4.

⁶ Transmittal Letter at 3.

service.⁷ Instead, the adjacent Entergy and TVA transmission systems will transmit electric energy from the Batesville, MS generating facility to the customers that J. Aron designates. That is, LSP Energy will sell all of the electric energy from Units 1 and 2 of the Batesville, MS generating facility to J. Aron, which, in turn, will re-sell the energy to its customers. Dominion submits, therefore, that the Service Agreement does not provide that Dominion will either transmit electric energy, or sell electric energy at wholesale.⁸

9. Dominion further argues that it will not have control or decision-making authority over major matters affecting the operation of Units 1 and 2 of the Batesville, MS generating facility. Dominion states that J. Aron will be responsible for the sale of electric energy from Units 1 and 2 of the Batesville, MS generating facility and for establishing the dispatch schedule that Dominion will follow. Dominion concludes, therefore, that “it is J. Aron and not Dominion that will be wielding authority to make the main operational decisions; Dominion will simply be following instructions given to it by J. Aron.”⁹

Notice of Filing and Responsive Pleading

10. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 30,431 (2005), with interventions and protests due on or before June 7, 2005. On June 7, 2005, Constellation Energy Commodities Group, Inc. (Constellation) filed a motion to intervene and comments.

11. Constellation submits that the Service Agreement is not jurisdictional. It asks that, if the Commission finds that the Service Agreement is jurisdictional, the Commission limit its finding to this particular Service Agreement and not make generalized findings concerning Balancing Authority Service Agreements in general. Constellation maintains that the determination of whether a Service Agreement is jurisdictional is case-specific and contends that the Commission should not, in its order with respect to the Service

⁷ *Id.*

⁸ *Id.* Dominion Power further argues that, because J. Aron will sell the electric energy at market-based rates, the Balancing Authority area service fee incorporated in the Agreement will not, in any event, affect the rates or charges for the supply of electric energy. The Balancing Authority area service fee is \$81,000 per month. *Id.* at 3-4.

⁹ *Id.* at 4.

Agreement, depart from its usual approach of determining jurisdiction on a case-by-case basis.¹⁰

Discussion

Procedural matter

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), Constellation's timely, unopposed motion to intervene serves to make it a party to this proceeding.

Commission Precedent

13. As set forth in section 201(e) of the Federal Power Act (FPA), a public utility is "any person who owns or operates facilities subject to the jurisdiction of the Commission" under Part II of the FPA.¹¹ Section 201(b) of the FPA provides for Commission jurisdiction over all facilities for the transmission of electric energy in interstate commerce and wholesale sales of electric energy in interstate commerce, with certain exceptions not relevant here.¹²

14. *Bechtel Power Corporation*¹³ throws light on whether we should consider Dominion an owner or operator of jurisdictional facilities and, thus, find that it is a public utility.¹⁴ In *Bechtel* the issue was whether the entity (Bechtel) that had contracted to provide operation and maintenance services was an "operator" of jurisdictional facilities. The Commission found that Bechtel's contract with the owner of the jurisdictional

¹⁰ Constellation Comments at 3.

¹¹ 16 U.S.C. §824(e) (2000).

¹² 16 U.S.C. §824(b) (2000).

¹³ *Bechtel Power Corporation*, 60 FERC ¶61,156 (1992) (*Bechtel*); see also, e.g., *Ogden Martin Systems of Clark Limited Partnership*, 66 FERC ¶ 61,152 at 61,295 (1994) (*Ogden*).

¹⁴ Dominion is, of course, a public utility for other purposes. The question is whether Dominion is functioning as a public utility when it operates the Balancing Authority on behalf of J. Aron.

facilities called for it to perform specific services that another party (in this case the owner of the facilities) ordered and directed. Consequently, the Commission determined that Bechtel had no control or decision-making authority over the operations of the facilities. In essence, Bechtel was functioning merely as the owner's agent with respect to the operation of jurisdictional facilities. The Commission found that the owner, as the entity with the power to make all significant decisions and approve Bechtel's actions and activities, was the operator of the facilities, and not Bechtel. The Commission added that, because Bechtel had no control or decision-making authority over the sale of electric energy, no regulatory purpose would be served by asserting jurisdiction over Bechtel. Thus, the Commission declined to assert jurisdiction over Bechtel.

Commission Determination

15. We find that the situation here is similar to that in *Bechtel*.¹⁵ Here, as in *Bechtel*, there is no question that Dominion will not be either selling or transmitting electric energy. There are no loads within the Balancing Authority¹⁶ and Dominion will not be providing unbundled transmission service under the Service Agreement. Instead, the adjacent Entergy and TVA transmission systems will transmit electric energy from Units 1 and 2 of the Batesville, MS generating facility to those customers that J. Aron designates.¹⁷ That is, LSP Energy will sell all of the electric energy from Units 1 and 2 of the Batesville, MS generating facility to J. Aron, which, in turn, will re-sell the energy to its customers.¹⁸

16. It is true that Dominion will (a) be responsible for compliance with NERC and SERC reliability standards; (b) control the generation within its metered connections;

¹⁵ To the same effect as *Bechtel*, see *Ogden*, at 61,295 (because entity supplying operation and maintenance services had no control or decision-making authority, it was not an "operator" of the facility); *Duke Energy Corporation*, 97 FERC ¶ 61,177 at 61,823-24 (2001); *Puget Sound Power & Light Company*, 64 FERC ¶ 61,335 at 63,428 (1993) (entity supplying operation and maintenance services that must have permission for actions beyond those that are routine or emergency in nature does not "operate" a facility). See also *Prior Notice* at 61,993-94 (Commission explained how it analyzes "ownership" and "operation" of facilities).

¹⁶ *Id.* at 3.

¹⁷ *Id.*

¹⁸ *Id.* at 3-4.

(c) match net actual interchange to net scheduled interchange; and (d) comply with all aspects of interchange scheduling and operations in accordance with TVA's and Entergy's open access transmission tariffs and business practices. But these are merely routine activities necessary to keep the Balancing Authority in readiness for the dispatch of electric energy. Dominion will have no control over the dispatch schedule, but will merely respond to J. Aron's directions. Therefore it is J. Aron and not Dominion that will be making the major operational decisions. As Dominion has no control or decision-making authority concerning the sale or transmission of electric energy from the Balancing Authority, no regulatory purpose would be served by asserting jurisdiction over Dominion under the facts presented.

17. We find, therefore, that, under the Service Agreement, Dominion is neither an owner nor an operator of jurisdictional facilities. As such, we find that Dominion, in its activities under the Service Agreement, is not subject to the Commission's jurisdiction. We further find that we have no jurisdiction over the Service Agreement. Accordingly, Dominion need not file the Service Agreement with us.

18. We agree with Constellation¹⁹ that jurisdictional findings are case-specific. This finding is specific to the Service Agreement before us here; it does not affect or pre-judge the jurisdictional status of Balancing Authority Service Agreements in general.

The Commission orders:

Dominion's request that the Commission disclaim jurisdiction over the Service Agreement is hereby granted.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

¹⁹ See Constellation Comments at 3.