

113 FERC ¶ 61,050
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

American Electric Power Service Corporation on
Behalf of:

Docket Nos. EL05-74-001
EL05-74-002

Appalachian Power Company
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.

Dayton Power and Light Company

ORDER GRANTING REHEARING, DISMISSING COMPLIANCE FILING, AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued October 17, 2005)

1. This order grants rehearing of an order issued May 6, 2005, in this proceeding.¹ The May 6 Order rejected a filing made under section 206 of the Federal Power Act (FPA)² that sought to amend PJM Interconnection, L.L.C.'s (PJM) Open Access Transmission Tariff (OATT) to permit American Electric Power Service Corporation (AEP), Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc. (ComEd), and the Dayton Power and Light Company (Dayton) (collectively, the Companies) to recover from all of PJM load expenses incurred by PJM,

¹ *American Electric Power Service Corporation*, 111 FERC ¶ 61,180 (2005) (May 6 Order).

² 16 U.S.C. § 824e (2000), as amended by section 1285 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

and billed to the Companies, that were required to develop the systems and infrastructure necessary to integrate the Companies into PJM. The May 6 Order found that it was not unjust and unreasonable to require that these costs be recovered only from load within the Companies' zones, rather than through a surcharge applied to all energy deliveries to load within the PJM region, as the Companies had proposed. Upon further consideration, we will set for hearing the issue of whether the PJM OATT is unjust and unreasonable without region-wide recovery of these integration expenses.

2. The May 6 Order also required that carrying charges on the implementation costs be computed using the Commission's maximum refund rate, rejecting the Companies' proposal to use a 9 percent carrying charge. We will grant rehearing of this determination, leaving the Companies free to justify their proposed carrying charge in the hearing. The May 6 Order required that the Companies make a compliance filing to recover these costs from load within their respective zones. Given that we are granting rehearing and setting this issue for hearing, we will dismiss the compliance filing as moot.

Background

3. On March 8, 2005, the Companies jointly filed under FPA section 206 to recover approximately \$31.6 million of expansion expenses incurred by PJM and reimbursed by the Companies, as set forth in newly proposed Schedule 13 to the PJM OATT. The Companies explained that they filed under section 206, rather than section 205, to recover these costs because, pursuant to the allocation of filing rights among transmission owners, they had not received the requisite percentage vote of the transmission owners that is necessary to permit a utility to file under section 205 to increase rates to customers located outside the filing company's zone.³

4. Proposed Schedule 13 was designed to recover the non-capital expenses incurred by PJM, and funded by the Companies, including costs associated with additions and modifications to PJM's systems and facilities in connection with the Companies' integration, plus carrying charges. Under proposed Schedule 13, the expansion costs would be collected by charging point-to-point and network transmission customers serving load a charge of \$0.007 per MWh times the total quantity of energy delivered to all load within the PJM footprint.

5. According to an Agreement to Implement Expansion of PJM West Region (Implementation Agreement), PJM was required to incur expansion costs associated with additions and modifications to its systems and facilities in connection with the Companies' integration. The Implementation Agreement also required the Companies to fund the non-capital costs of the project to enable PJM to avoid carrying those costs

³ See PJM OATT, § 9.1, and Transmission Owners Agreement, § 6.5.1.

pending rate recovery after the Companies were integrated.⁴ In accordance with the Implementation Agreement, PJM began billing the Companies in September 2002; a total of \$31,661,263 was billed to the Companies as of March 2005.

6. The Companies sought recovery of Directly Assigned Expansion Costs and Expensed Expansion Costs.⁵ The Companies asserted that the expansion of PJM would bring a significant decrease in the administrative costs for PJM load-serving entities (LSEs). They also explained that the expansion would result in significant benefits to customers region-wide, such as increased generating capacity located within PJM and increased transmission access and competition, and proposed to spread the costs among all PJM LSEs. The Companies claimed that the proposed methodology was consistent with the methodology approved by the Commission for Allegheny Power's application to recover its share of PJM start-up costs,⁶ and stated that the Commission permitted region-wide recovery of the original PJM start-up costs incurred by PJM associated with the purchase of computer hardware and software. They further noted that the Commission approved rates under the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) Open Access Transmission and Energy Market Tariff (TEMT) that effectively permitted members of the former Alliance Regional Transmission Organization (RTO) to recover their Alliance RTO start-up costs.⁷

7. In the May 6 Order, the Commission explained that "[t]he threshold question raised by this proceeding is whether the costs should be applied throughout the PJM region or whether the costs should be applied only to the 'new class' of members, *i.e.*, AEP, ComEd, and Dayton."⁸ Whereas the Companies preferred that the costs be socialized among all load within PJM, other parties wanted the costs directly assigned to the Companies, for whom the costs were incurred. The Commission determined that the recovery of non-capital costs associated with the integration of new members into PJM should be limited to the "new class" of PJM members for a number of reasons, discussed below. We directed the Companies to make a compliance filing limiting the applicability of the surcharge as discussed in the order.

⁴ See Application at 5, Appendix A at 15.

⁵ Another category of expenses, Capitalized Expansion Costs, is being recovered by PJM under Schedule 9 of the PJM OATT.

⁶ See Application at 1-2 and 22, *citing PJM Interconnection, L.L.C. and Allegheny Power*, 96 FERC ¶ 61,060 (2001) (*Allegheny*).

⁷ Application at 9, *citing Ameren Services Company*, 101 FERC ¶ 61,320 (2002) (*Ameren*), *order on reh'g*, 103 FERC ¶ 61,178 at P 9 and 20 (2003).

⁸ May 6 Order at P 26.

8. The May 6 Order also agreed with one protester that the proposed carrying charge, 9 percent, was excessive, and directed the Companies to recalculate the surcharge in their compliance filing using the refund rate in section 35.19a(a)(2)(iii) of the Commission's regulations.⁹ Finally, we discussed other parties' opposition to the proposal to assess the surcharge only to load; these parties had argued that the surcharge should also be applied to marketers and generators in addition to load. We found that these protesters had not explained why the surcharge, as proposed, was not reasonable nor had they provided an alternative describing how marketers and generators should be charged.

Requests For Rehearing

9. The Companies and the Public Utilities Commission of Ohio (Ohio Commission) seek rehearing of our determination that the non-capital costs associated with the integration of the new members into PJM should be recovered from only the new class of members. The Companies also challenge our application of the Commission's refund rate, rather than each Company's authorized carrying charge, to the amounts in question. In addition, the North Carolina Electric Membership Corporation (NCEMC) requests rehearing of our decision to reject the allocation of a portion of the expansion costs to generators, marketers and transmission owners.

Compliance Filing

10. On May 27, 2005, the Companies submitted revisions to Schedule 13, as directed in the May 6 Order. They state that they have recalculated the charge under Schedule 13, spreading collection of the \$31,661,263 of expansion charges over load within the Companies' zones, and applying the Commission's refund rate to the amount to be recovered. These modifications result in a revised charge of \$0.0156/MWh. The Companies note that, consistent with the May 6 Order, revised Schedule 13 would become effective as of May 1, 2005.

11. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 34,118 (2005), with comments and interventions due on or before June 27, 2005. None was filed.

⁹ 18 C.F.R. § 35a(a)(2)(iii) (2005).

Discussion

A. Geographic Scope of Recovery

1. May 6 Order

12. The May 6 Order found that the costs at issue in this proceeding “were ‘incurred’ in connection with the integration of a new class of customers into PJM”¹⁰ as the costs would not have been incurred except for their integration. We found that “[o]ur determination properly assigns the non-capital costs associated with the integration to those parties directly responsible for such costs.”¹¹ We also noted, “. . . in accordance with PJM’s Operating Agreement and Implementation Agreement, the costs are to be directly assigned to the party for which they were incurred.”¹²

2. Rehearing Requests

13. On rehearing, the Companies attack each of the bases on which the May 6 Order relies in limiting recovery of non-capital expenses to load within the Companies’ zones. They assert that a finding that the costs were incurred in connection with the Companies’ integration is not supported by substantial evidence. Rather, they contend, the non-capital expenses were incurred directly by PJM; while the Companies may have funded those costs, nothing in the Implementation Agreement obligated the Companies themselves to incur any project costs. According to the Companies, under the Implementation Agreement, PJM was solely responsible for the expansion project and the costs incurred therein.

14. The Companies and the Ohio Commission argue that the provision of the PJM Operating Agreement cited by the Commission is not relevant to recovery of the expenses sought by the Companies. Schedule 3(e) of the Agreement requires a PJM member to pay the expenses that it incurs to modify its own metering, communication, computer and other facilities, and they assert that none of the expenses included in the filing were incurred to modify the Companies’ own systems. These parties also contend that the Implementation Agreement does not support limiting recovery of non-capital expenses to the Companies’ zones. While the Implementation Agreement states that the Companies will “fund” Expensed Expansion Costs and Directly Assigned Expansion Costs, they assert that nothing in the agreement obligates them to incur any project costs.

¹⁰ May 6 Order at P 27.

¹¹ *Id.*

¹² *Id.* at P 30.

15. The Companies further allege that the Commission erred in its interpretation of *Allegheny*, asserting that that order did not deny region-wide recovery of capital expenses incurred by PJM. Further, they argue that Allegheny Power's compliance filing in that proceeding explicitly included charges incurred by PJM for inclusion in region-wide charges, yet the Commission accepted the compliance filing, subject to suspension and hearing.¹³ Thus, the Companies conclude that the Commission in *Allegheny* did not preclude region-wide recovery of non-capital expenses incurred by PJM during Allegheny Power's integration, and in *Allegheny II* accepted and made effective a regional recovery mechanism for those costs, subject to hearing.

16. The Companies also complain that the Commission erroneously allocated the non-capital expenses on the basis of an "except for" standard, rather than on the basis of who benefits from the expansion. According to the Companies, by focusing on the fact that the costs would not have been incurred except for the integration, the Commission failed to consider the benefits flowing to customers in the pre-expansion portions of PJM. The Companies conclude that this unduly discriminates among PJM customers on the basis of their location. The Companies note that customers in the Companies' zones already began contributing to previous PJM start-up costs, and have paid charges incurred by PJM in integrating Allegheny Power into the system; they assert that these customers should not have to pay the entire amount for non-capital expenses for their own integration. They also contend that the Commission erroneously applied inconsistent rate recovery treatment for the capital and non-capital costs incurred as part of the same expansion project.

17. As a matter of policy, the Companies and the Ohio Commission assert that the May 6 Order is inconsistent with the Commission's stated policy of encouraging transmission owners to join RTOs. The consequences of the May 6 Order, according to these parties, is to send a message to entities in states that have not yet joined RTOs that is directly at odds with that policy. The Ohio Commission states that, "[h]ad we known that costs were to [be] borne solely by the 'new' PJM companies . . . Ohio may have had second thoughts about AEP joining PJM."¹⁴

3. Commission Determination

18. The Companies submitted this rate filing pursuant to FPA section 206. Under this section, the Companies must bear the burden of establishing that PJM's OATT is unjust and unreasonable in not providing for the recovery of the Companies' integration expenses from all load within PJM and must establish that their proposed allocation is

¹³ Companies' Request for Rehearing at 9, citing *PJM Interconnection, L.L.C. and Allegheny Power*, 98 FERC ¶ 61,072 (2002) (*Allegheny II*).

¹⁴ Ohio Commission Request for Rehearing at 7.

just and reasonable. The May 6 Order made a summary determination that PJM's existing OATT was not unjust and unreasonable insofar as it did not permit the recovery of the non-capital costs associated with the integration from all load within PJM. Upon further consideration, however, we have determined that we cannot make such a summary finding based on the record evidence. Thus, we will grant rehearing and set the matter for hearing, as discussed below.

19. We cannot find that PJM's existing tariff or the Implementation Agreement establishes a specific policy against recovery of non-capital costs from all load within PJM. It is true that the expansion expenses which are the subject of this proceeding would not have been incurred, by PJM or by anyone else, were it not for the Companies' integration into PJM. Nevertheless, the OATT and Implementation Agreement do not clearly provide for any particular method for recovering these costs, nor do they specifically require that these costs be funded by local load, rather than all of PJM's load. The Companies state that the Implementation Agreement recognition in section 4.1.1 that "most expansion costs will be incurred by PJM and recovered by PJM . . . and that the [Companies] will directly incur only relatively minor additional costs" suggests that the Companies should not be responsible for all of the integration expenses. Although the Implementation Agreement defines each category of expenses,¹⁵ it merely states that each new member agrees to fund its applicable Directly Assigned Expansion Costs and its share of Expensed Expansion Costs.¹⁶ This falls short of a determination as to how those costs can be recovered. Similarly, Schedule 3(e) of the PJM Operating Agreement requires that an integrating party "shall pay all costs and expenses associated with additions and modifications to its *own* metering, communication, computer, and other appropriate facilities and procedures. . . ." (emphasis added). But this provision does not directly address recovery of costs incurred by PJM with respect to its metering, communication, computer, or other facilities, such as those at issue here.

20. Moreover, the Commission does not have clear precedent regarding the scope of recovery of such costs.¹⁷ Although the Commission found in its first order in *Allegheny*

¹⁵ Implementation Agreement, §§ 4.1.4.1, 4.1.5.1.

¹⁶ Implementation Agreement, §§ 4.1.4.2, 4.1.5.2.

¹⁷ The Commission did specify in Order No. 2000 that the reasonable costs of developing an RTO may be included in transmission rates. *Regional Transmission Organizations*, Order No. 2000 at 31,196, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *petitions for review dismissed sub nom.*, *Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

that costs incurred by PJM to integrate a transmission owner (and billed to that transmission owner) were not recoverable from all of PJM's load, the Commission then accepted such costs in a compliance filing and set the issue of recovery for hearing (which eventually settled).¹⁸ In *Ameren*, we approved the collection of certain start-up costs from all Midwest ISO customers, although, as we noted in the May 6 Order, there may be reasonable distinctions between Midwest ISO's and PJM's methods of treating such costs.

21. The Companies also have raised material issues of fact with respect to the determination of the appropriateness of allocating these costs. The Companies contend that "[b]y allocating all of the Non-Capital Expenses to customers in the Companies' zones and none of those costs to customers in the pre-expansion zones who benefit from the administrative savings resulting from expansion, the Commission reaches a result that unduly discriminates among PJM customers on the basis of their location."¹⁹ They maintain that the savings in administrative costs to existing PJM customers is greater than the integration costs to be recovered here. They also maintain that load in the expansion zones has been paying the prior costs of integration through PJM's Schedule 9 charges.

22. Because we cannot resolve these issues summarily, we will establish hearing and settlement judge procedures to consider the appropriate allocation of these integration costs. As discussed earlier, the Companies, as the proponents of the rate change under section 206, have the burden of proof at the hearing to justify the change and should therefore prepare their case-in-chief in accordance with the Commission's regulations.²⁰ Among the issues to be considered at the hearing are how to interpret the Implementation Agreement with respect to cost recovery and whether the integration of the Companies is the principal cause of the claimed reduction in administrative expenses or whether these reductions are due to other causes.

23. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.²¹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding;

¹⁸ *Allegheny II*, 98 FERC at 61,204.

¹⁹ Companies' Request for Rehearing at 13.

²⁰ Due to the amount proposed to be recovered, the regulations governing abbreviated filing requirements do not apply. *See* 18 C.F.R. § 35.13(a)(2) (2005).

²¹ 18 C.F.R. § 385.603 (2005).

otherwise, the Chief Judge will select a judge for this purpose.²² The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

24. In cases where the Commission institutes a hearing on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date. Consistent with section 206(b), we will establish the refund effective date as of the effective date requested by the Companies, *i.e.*, May 1, 2005.

25. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. Based on our review of the record, we expect that the presiding judge would be able to issue an initial decision within approximately eight months of the commencement of hearing procedures, or, if hearing procedures were to commence immediately, by June 30, 2006. If the presiding judge is able to render a decision within that time, and assuming the case does not settle, we estimate that we will be able to issue our decision within approximately three months of the filing of briefs on and opposing exceptions, or, assuming the case goes to hearing immediately, by December 29, 2006.

B. Refund Rate/Carrying Charge

26. In the May 6 Order, the Commission agreed with a protester who contended that the carrying charges on the implementation costs should be consistent with the Commission's maximum refund rate and that the proposed 9 percent carrying charge was excessive. We directed the Companies to recalculate the surcharge in a compliance filing using the Commission refund rate in section 35.19a(a)(2)(iii) of the Commission's regulations.²³

²² If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

²³ 18 C.F.R. § 35.19a(a)(2)(iii) (2005).

27. The Companies contend on rehearing that the proposed use of each Company's authorized carrying charges is consistent with Commission precedent.²⁴ They argue that the Commission rejected the Companies' authorized carrying charges without explanation, and assert that the Commission's refund rate applies to amounts that are collected in rates for jurisdictional service that are later determined to differ from the just and reasonable amounts. Thus, they conclude that there is no basis for applying the refund rate.

28. We grant rehearing on this issue and clarify that we are not mandating the use of the Commission's refund rate. Since the Commission's refund rate only reflects a proxy debt rate, it may not reflect the utility's capital structure or cost of financing. Utilities should not be required to accept a proxy debt rate if they have an approved carrying charge or rate of return or can establish that a different rate of return is just and reasonable. Thus, we conclude that the Companies need not use the Commission's refund rate. As discussed above, the Companies have the burden of demonstrating that their proposal is just and reasonable, and this applies as well to the proposed carrying charge. The hearing should develop a full record as to any claim that the Companies are relying on a pre-existing carrying charge including, for example, citations to orders in which such rates were accepted and an explanation of whether the carrying charges or rate of return are subject to a pending proceeding or were approved as part of a settlement.

C. Recovery from Participants Other Than Load

29. The Commission rejected protesters' arguments that the proposed charge should apply not just to load but also to additional market participants. We noted that the protesters had not explained why the proposal was not reasonable nor suggested an alternative how marketers and generators might be charged.

30. On rehearing, NCEMC charges that the Commission's decision was arbitrary and capricious, unduly discriminatory, departs from precedent, and is not reasoned decision-making because the Commission ignored arguments justifying allocation of a portion of the integration costs to all who benefit from the integration. NCEMC contends that the Commission disregarded the allocation methodology suggested by NCEMC in its protest. Further, NCEMC argues that the Commission erred by failing to determine whether the applicants had proposed a just and reasonable allocation methodology and by shifting to protesters the burden of establishing a just and reasonable method for the cost allocation.

²⁴ Companies' Request for Rehearing at 19-20, citing *Commonwealth Edison Co.*, 105 FERC ¶ 61,186 (2003); *American Electric Power Service Corp.*, 104 FERC ¶ 61,013 (2003); *Duke Energy Corp.*, 94 FERC ¶ 61,080 (2001).

31. As explained above, the Companies bear the burden in this proceeding of demonstrating that any departure from existing PJM rates, terms and conditions is just and reasonable. On the other hand, the Companies do not have any burden of proof with respect to aspects of the OATT that have already been found just and reasonable and that they do not propose to change. To the extent the Companies can establish that allocating expansion expenses to load alone is an established practice, NCEMC would have the burden of proving that such a practice is not just and reasonable and that recovery from other than load is just and reasonable. The parties are free to address these questions at the hearing.

D. Compliance Filing

32. The Companies made a compliance filing in Docket No. EL05-74-001 revising the tariff language to limit recovery from load within their respective zones, as required in the May 6 Order. However, given that we are granting rehearing and setting this issue for hearing, we will dismiss the compliance filing as moot.

The Commission orders:

(A) The requests for rehearing of the May 6 Order are hereby granted, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the Companies' proposed Schedule 13. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case

to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) The Companies' May 27 compliance filing is hereby dismissed as moot.

(G) The refund effective date established pursuant to section 206(b) of the Federal Power Act is May 1, 2005.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.