

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

PJM Interconnection, LLC
PJM Interconnection, LLC

Docket Nos. ER06-407-001 and
ER06-408-001

ORDER DENYING REHEARING AND CLARIFICATION

(Issued July 31, 2006)

1. GSG, LLC (GSG) seeks rehearing of the Commission's order dated February 22, 2006 (February 22 Order) rejecting PJM Interconnection, LLC's (PJM) filings and finding that the Commission lacked jurisdiction over proposed interconnections and related service agreements to which GSG, PJM, and Commonwealth Edison Company (ComEd) were parties.¹ American Wind Energy Association (AWEA) filed a motion to intervene out-of-time to support and join in the Request for Rehearing filed by GSG. For the reasons discussed below, we deny AWEA's motion to intervene out-of-time and GSG's request for rehearing.

2. Mendota Hills, LLC (Mendota) also filed a motion to intervene out-of-time and seeks clarification that the Commission, in its February 22 Order, did not intend to issue a binding legal ruling as to the jurisdictional status of Mendota's Interconnection Agreement with ComEd. As discussed below, we deny Mendota's request for late intervention.

I. Background

3. On December 28, 2005, PJM submitted for filing two unexecuted Interconnection Service Agreements (ISAs) among PJM, GSG, and ComEd. The ISAs facilitate the interconnection of GSG wind generating plants, a 53 MW generating facility (West Brooklyn Facility) and a 30 MW generating facility (Sublette Facility), which are to be

¹ *PJM Interconnection, LLC*, 114 FERC ¶ 61,191 (2006).

located in Lee County, Illinois, to ComEd's local distribution facilities. These ISAs also provide that GSG is to pay an annual Wholesale Distribution Charge (WDC) for its use of the ComEd local distribution system to deliver power from the wind plants into the PJM transmission system.

4. The West Brooklyn Facility will be interconnected to a radial 34 kV line that runs three miles to a ComEd substation, where the output will be transformed to 138 kV and connected to a 138 kV radial distribution line that runs 19 miles to a substation that forms part of the PJM transmission system.

5. The Sublette Facility will be interconnected to a 34 kV line that runs 20 miles in one direction to a substation that forms part of the PJM transmission system and seven miles in the other direction to a ComEd substation, where the Sublette output will be transformed to 138 kV and connect to a 138 kV radial distribution line that runs 19 miles to a substation that forms part of the PJM transmission system. Mendota, a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA),² is interconnected to the same 138 kV line as the West Brooklyn and Sublette Facilities. In addition, Zahren Alternative Power Corporation (ZAPCO), a waste gas QF, is interconnected to the same 34 kV line to which the Sublette Facility will connect.

6. The ISAs were filed in unexecuted form because GSG disputed the WDC included in the ISAs. Exelon Corporation (Exelon) filed comments in support of its subsidiary, ComEd, recovering a WDC, while GSG filed a protest arguing that the WDC is inconsistent with PJM's market structure and contrary to Order No. 2003.³ GSG also insisted that PJM's tariff does not provide for a WDC.

7. Exelon, in its answer to GSG's protest, reiterated that ComEd is entitled to compensation for GSG's use of its "distribution facilities" and stated that, while it believed that Order No. 2003 did not require ComEd to file the WDCs as part of the PJM

² See 16 U.S.C. § 2601 et seq. (2000).

³ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,661 (Jun. 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005), *appeal docketed sub nom. National Association of Regulatory Utility Commissioners, et al. v. FERC*, Nos. 04-1148, et al. (D.C. Cir. filed Apr. 29, 2004 and later).

Open Access Transmission Tariff (OATT), it would do so if directed by the Commission. Exelon further argued that the Commission had not asserted jurisdiction over the ComEd distribution facilities at issue. GSG, in its response to Exelon's answer, reiterated that the proposed WDC should not be charged by ComEd and argued that the Commission had jurisdiction over ComEd's local distribution facilities because they were already used for resale sales of energy from a QF and because these sales were being conducted under Commission-approved market-based rate authority. Additionally, GSG argued that these interconnections were governed by the terms and conditions of the PJM OATT to which ComEd, as a member of the PJM transmission system, had agreed to be bound.

8. On February 22, 2006, the Commission issued an order rejecting PJM's filings. The Commission found that it lacked jurisdiction over the ISAs because the preexisting interconnection to ComEd's local distribution facilities between Mendota and ComEd was determined not to meet the conditions of Order No. 2003 for establishing jurisdiction. The Commission found that the local distribution facilities, to which GSG seeks to interconnect, were not being used by Mendota for sales for resale. Because Mendota sells all of its output to ComEd and ComEd takes title to the output at the point of interconnection to its local distribution system, the Commission concluded that there was no jurisdictional delivery service associated with the QF's sales and that GSG's proposed interconnections to these local distribution facilities were not subject to Commission jurisdiction under Order No. 2003. The Commission found that the granting of market-based rates to Mendota does not confer Commission jurisdiction over ComEd's local distribution facilities and, as a consequence, does not convey jurisdiction over the ISAs. The Commission determined that PJM's OATT can neither determine Commission jurisdiction, nor confer jurisdiction where the Commission otherwise lacks jurisdiction. Further, the Commission declined to address the issue of whether the WDC was appropriate, but stated that the ruling was "without prejudice to ComEd filing for a wholesale distribution charge as part of a separate delivery service, rather than generator interconnection service . . . if ComEd's distribution system is used subsequently to provide wholesale delivery service."⁴

9. A timely request for rehearing of the February 22 Order was filed by GSG on March 24, 2006. Also on March 24, 2006, Mendota and AWEA filed motions to intervene out of time. Additionally, Mendota filed a request for clarification,⁵ or in the

⁴ February 22 Order at P 18. On June 30, 2006, ComEd filed a revised tariff sheet incorporating a new Fixed Charge Rate for wholesale distribution service over ComEd's distribution facilities in Docket No. ER06-1194-000.

⁵ Mendota seeks clarification as to whether the Commission intended, in the February 22 Order, to issue a jurisdictional ruling as to the Mendota Interconnection Agreement (Mendota IA).

alternative, a request for rehearing of the February 22 Order. AWEA also filed a request for rehearing of the February 22 Order.

II. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. We are not satisfied that Mendota and AWEA have met the higher burden of justifying late intervention and will therefore deny their motions to intervene out-of-time based on their failure to demonstrate good cause supporting their late intervention.

B. GSG's Request for Rehearing

11. GSG requests rehearing of the Commission's determination rejecting PJM's filings for lack of Commission jurisdiction over the ISAs. GSG argues that the Commission incorrectly determined that it lacked jurisdiction over the interconnections proposed in the ISAs. GSG asserts that the distribution lines at issue are subject to the Commission's jurisdiction because the QFs are making sales for resale using distribution lines that will interconnect with GSG's projects. GSG states that ComEd purchases the output of Mendota and ZAPCO, which it then resells to its customers. According to GSG, Mendota's wholesale sales to ComEd are made under market-based rate authority granted to Mendota by the Commission, while ZAPCO's wholesale sales to ComEd are made pursuant to avoided cost rates determined under state authority delegated to it by the Commission.

12. GSG argues that the Commission's conclusion that ComEd's facilities are not being used to transmit electric energy in interstate commerce, conflicts with numerous Supreme Court decisions dating back to the 1940s, as well as long-standing Commission precedent. According to GSG, in view of the well-settled principle that it is an engineering and scientific test that controls whether energy is transmitted in interstate commerce, the Commission's reliance on a "legalistic or governmental" test for determining that facilities that are used to transmit electric energy in interstate commerce are not Commission jurisdictional is unsupportable.

13. GSG also argues that the Commission misapplied the *WMECO*⁶ decision in the February 22 Order. GSG asserts that, contrary to the February 22 Order, the *WMECO* decision holds that the Commission has exclusive jurisdiction over interconnection agreements between a utility and a QF if the agreements involve the transmission of the QF's electrical output to a third party. GSG further asserts that, unlike the Commission's determination, *WMECO* makes no finding as to whether a jurisdictional delivery service occurs when a QF sells all of its output to the host utility. GSG describes how, in dictum, the Commission commented that the agreements would not be Commission jurisdictional if the utility were purchasing the entire output of the QF, as opposed to transmitting the output to another utility. GSG contends that the dictum in *WMECO* incorrectly suggests that whether or not the host utility purchases all of the QF's output somehow determines the jurisdictional status of the delivery facilities owned by the purchasing utility that are used to transmit the QF's output. GSG asserts that, in either situation, the Commission has jurisdiction over the delivery facilities to the extent that they are used to deliver energy produced by a generator that interconnects with those facilities for resale in interstate commerce.

14. While acknowledging that the Commission generally lacks jurisdiction over "local distribution" facilities, GSG claims that ComEd's local distribution facilities are jurisdictional dual use facilities within the meaning of Commission precedent, including Order No. 2003, its progeny, and *Detroit Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003). GSG highlights how Order No. 888⁷ recognized the dual use potential of local distribution lines and concluded that a public utility's facilities, used to deliver electric energy to a wholesale purchaser, whether labeled "transmission," "distribution," or "local distribution," are subject to the Commission's exclusive jurisdiction.

⁶ *Western Massachusetts Electric Co.*, 61 FERC ¶ 61,182 at 61,662 (1992), *aff'd*, *Western Massachusetts Electric Co. v. FERC*, 165 F.3d 922, 925-27 (D.C. Cir. 1999) (*WMECO*).

⁷ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997); *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

15. GSG further argues that the Commission erred when it rejected the ISAs on the basis that the PJM Tariff “cannot determine Commission jurisdiction, nor can it confer jurisdiction where the Commission otherwise lacks jurisdiction.” GSG argues that the right of generators to interconnect to distribution facilities within PJM, as described in section 52.4 of the PJM Tariff, is not limited to preexisting interconnections involving wholesale transactions. GSG asserts that by joining PJM, ComEd knowingly committed to have its facilities governed by the Commission-approved tariff and the Commission has the authority to review and accept the ISAs pursuant to provisions in the PJM Tariff.

16. Finally, GSG argues that the February 22 Order’s conclusion that ComEd's local distribution lines are not subject to the Commission's jurisdiction will lead to unreasonable results, so that, for example, a utility would be able to avoid Commission-approved charges and to shift costs to other market participants by “netting” against local load to “hide” generation.

Commission Determination

17. As discussed more fully below, we deny GSG’s request for rehearing and reaffirm our determination that the Commission lacks jurisdiction over the ISAs and interconnections proposed in the ISAs.

18. Under Order No. 2003, the Commission may assert jurisdiction over interconnections to local distribution facilities where two requirements are met: (1) there is a preexisting interconnection and (2) there is a wholesale transaction over these local distribution facilities prior to the new interconnection request being made.⁸ While there is a preexisting interconnection to ComEd’s local distribution facilities between Mendota and ComEd, we continue to find that this interconnection does not meet the conditions of Order No. 2003 for establishing jurisdiction over GSG’s proposed interconnections.⁹ We affirm our finding that the local distribution facilities to which GSG seeks to interconnect have yet to be used by Mendota for sales for resale and, thus, we cannot conclude that GSG’s proposed interconnections fall under the Commission’s jurisdiction.

19. As we discuss more fully below, ComEd’s facilities are local distribution facilities currently serving local retail load, and therefore fall outside our jurisdiction. While the FPA gives the Commission “the authority to regulate ‘all facilities’ used for transmission and for the wholesale sale of electric energy in interstate commerce,”¹⁰ the “same FPA

⁸ February 22 Order at 14, citing Order No. 2003 at P 804.

⁹ February 22 Order at 15.

¹⁰ Order No. 2003-C at P 52, quoting 16 U.S.C. § 824a(b)(1) (2000).

section denies the Commission jurisdiction ‘over facilities used in local distribution,’¹¹ minus exceptions which are not relevant to the present case. According to ComEd, the “facilities [at issue], up to the substation that forms part of the PJM transmission system, are currently used to serve local retail load.”¹² GSG does not protest, but consistently acknowledges, that ComEd’s facilities are “local distribution facilities.”¹³

20. GSG contends that its proposed interconnections are subject to the Commission’s jurisdiction because Mendota makes sales for resale on the local distribution facilities to which GSG seeks to interconnect. However, GSG’s claims that the power injected into ComEd’s distribution lines by Mendota and ZAPCO and purchased by ComEd is subsequently resold to the PJM market are unsupported. In an integrated distribution and transmission network with multiple generators, it is impossible to establish the physical source and power that is sold into the wholesale market. Where a QF sells its entire output to the interconnected utility, the utility is presumed to use the power purchased from a QF to serve retail load. And where the utility-purchaser of the QF output is selling the QF output at retail, no jurisdictional use of the utility-purchaser’s distribution line takes place. Here, Mendota sells its entire output to ComEd and ComEd is presumed to use that power to serve retail load. Neither GSG nor the record in this proceeding present any evidence demonstrating that ComEd’s distribution line is being used for wholesale transactions. Therefore, because wholesale transactions are not being conducted on ComEd’s local distribution facilities pursuant to a Commission-approved OATT, the Commission does not have jurisdiction over GSG’s proposed interconnections.

21. Contrary to GSG’s assertions, *WMECO* was not misapplied by the Commission in its February 22 Order. In *WMECO*, the Commission found that certain service agreements were subject to the Commission’s jurisdiction. The service agreements at issue involved WMECO’s interconnection with Altresco, a QF, and the transmission of Altresco’s output over WMECO’s facilities to another utility. WMECO had argued that the service agreements were not subject to the Commission’s jurisdiction, but were subject to state jurisdiction under the Commission’s regulations implementing PURPA.

¹¹ *Id.*

¹² Exelon Answer at 2.

¹³ Although GSG at one point suggests that ComEd’s facilities might demonstrate certain characteristics of transmission facilities (GSG Rehearing Request at 17), GSG does not contend that ComEd’s facilities have been improperly classified as local distribution facilities or that they should be reclassified as jurisdictional transmission facilities. To the contrary, GSG’s rehearing request consistently characterizes ComEd’s facilities as “local distribution facilities.” GSG Rehearing Request at 2, 12, 18.

The PURPA regulation to which WMECO pointed was 18 C.F.R. § 292.306(a), which provides that QFs are obligated to pay the interconnection costs assessed by state regulatory authorities. The Commission reasoned that, when a utility transmits QF power in interstate commerce from its interconnection with a QF so that the QF can sell its power to a third party, more than just an interconnection to accomplish a sale under PURPA is involved. Instead, a Commission jurisdictional transaction takes place, and both the transmission in interstate commerce and the agreements affecting or relating to such service are subject to the Commission's exclusive jurisdiction. The Commission determined that it would have exclusive jurisdiction over agreements involving both the transmission of QF power in interstate commerce and the related interconnection costs. The February 22 Order cited *WMECO* to contrast the factual situation involved there and to demonstrate that "there is no Commission-jurisdictional delivery service associated with the QF's sales"¹⁴ in the present case.

22. We also disagree with GSG's contention that ComEd's local distribution facilities are dual use facilities within the meaning of Commission precedent. As explained in Order No. 2003-C, when a local distribution facility is used to transmit energy sold at wholesale as well as energy sold at retail, we previously called this a "dual use" facility.¹⁵ Because no wholesale transaction is being conducted on ComEd's distribution facilities, we find that there is no Commission-jurisdictional use of the facilities, so the Commission's jurisdiction under Order No. 2003 does not extend to the use of these facilities.

23. GSG misstates how the Commission determined its lack of jurisdiction in this proceeding. GSG claims that:

In this case, the Commission's determination regarding the jurisdictional status of the distribution lines relies on the fact that the Commission has delegated to state commissions the authority to determine QF interconnection costs and provided QFs exemptions from certain provisions of the FPA.¹⁶

Nowhere in the February 22 Order do we make such a statement. We agree with GSG's contention that, where sales are made by a QF exclusively to the interconnected utility,

¹⁴ February 22 Order at P 15.

¹⁵ Order No. 2003-C at P 53. The Commission now discourages the use of the "dual use" facility term because it suggests that the Commission has jurisdiction over the local distribution facility when in fact the Commission has jurisdiction only over a service provided over the facility.

¹⁶ GSG Rehearing Request at 14. *See also, id.* at 12.

the Commission's regulations under PURPA provide that the QF is obligated to pay the interconnections costs assessed by the state regulatory authority or nonregulated utility. 18 C.F.R. §292.306(a) (2005). However, our lack of jurisdiction in this case is not based on our regulations under PURPA, but on Order No. 2003 and its interpretation of the scope of the Commission's jurisdiction over interconnections to local distribution facilities.

24. Finally, we reject GSG's argument that the Commission erred in rejecting the ISAs on the basis that the PJM Tariff "cannot determine Commission jurisdiction, nor can it confer jurisdiction where the Commission otherwise lacks jurisdiction."¹⁷ We affirm our determination in the February 22 Order. To rule otherwise would violate established Commission precedent. As we stated in Order No. 2003-C:

. . . [O]ur assertion of jurisdiction over interconnections rested on two grounds: first, and primarily, our FPA jurisdiction over "transmission" facilities, which may be used for wholesale sales or unbundled retail sales and which are subject to an OATT; and, second, our FPA jurisdiction over wholesale sales which require the use of "local distribution" facilities and thus such facilities become subject to an OATT for purposes of the wholesale sales.¹⁸

Outside of either of these conditions being met, the Commission may not assert its jurisdiction over interconnections. As neither of these conditions is present in this proceeding, we decline to assert jurisdiction over GSG's proposed interconnections and their related ISAs.

25. Arguments by GSG that affirming the February 22 Order would lead to "unreasonable results," confusion, and disruption are unpersuasive. GSG argues that the Commission's February 22 Order will permit a transmission owner to:

thwart other elements of PJM rate design by claiming that generation resources connected at local distribution levels, being potentially non-jurisdictional, do not need to be "visible" to PJM and thus may be 'netted' against local load. Effectively, through "netting," the utility would be able to use its local distribution facilities to "hide" generators by reducing apparent load. In turn, because many charges in PJM are a function of total retail loads, the utility would be able to avoid Commission-approved charges, shift costs to other market participants, and as a result, impose unjust rate structures without any scrutiny by a governing body such as

¹⁷ February 22 Order at 6.

¹⁸ Order No. 2003-C at P 51.

PJM which seeks to promote fairness between generators and transmission owners by imposing standardized terms and conditions. Such “hiding” of generation also raises significant potential reliability problems as such facilities, in order to obtain the associated cost netting benefits, may not be “seen” by PJM, and thus not subject to the overall security constraints of the PJM dispatch.

GSG’s arguments are vague and unsupported. GSG provides no evidence that such results are possible within the context of PJM’s tariffs or manuals. However, if ComEd were to attempt to act as GSG charges, this would constitute a violation of the PJM tariff and PJM and other market participants would have remedies under the tariff and/or section 206 of the FPA. GSG’s allegation that generation would be hidden from PJM is not an issue that warrants an outcome different from the February 22 Order. We affirm our lack of jurisdiction over GSG’s proposed interconnections based on our conclusion that Order No. 2003’s requirement, that a jurisdictional use of a local distribution line exist prior to the new interconnection request being made, has not been met.

26. For these reasons, we deny GSG’s request for rehearing. As for AWEA’s request for rehearing, we decline to address its arguments since its motion for late intervention has been denied.

27. Additionally, although we have denied Mendota’s motion for late intervention, had Mendota been made a party to these proceedings, we would find that we did not intend to issue a binding legal ruling in our February 22 Order as to the jurisdictional status of the Mendota IA.

The Commission orders:

The requests for rehearing and clarification are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.