

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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| PJM Interconnection, LLC                                  | Docket No. ER04-521-002 |
| PJM Interconnection, LLC                                  | ER04-375-004            |
| Midwest Independent Transmission System<br>Operator, Inc. | ER04-521-004            |
| Commonwealth Edison Company                               | ER04-718-002            |
| PJM Interconnection, LLC                                  | ER04-375-002            |
|   | ER04-521-001            |
|   | ER04-718-000            |

ORDER ON REQUESTS FOR REHEARING AND ON REQUEST FOR  
CONFIDENTIAL TREATMENT

(Issued October 28, 2004)

1. In this order, the Commission denies in part and grants in part requests for rehearing of two Commission orders relating to the integration of Commonwealth Edison Company (ComEd) into PJM Interconnection, LLC (PJM). The Commission also grants confidential treatment to certain information contained in a report filed by PJM. This order benefits customers because it furthers the process of bringing the benefits of regional transmission organization (RTO) membership to ComEd's customers.

**I. BACKGROUND**

**A. The Commission's July 31 Alliance Order**

2. In response to the Commission's RTO initiative, several utilities in the midwestern and central United States sought to establish the Alliance RTO. Ultimately, however, the Commission did not authorize Alliance as an RTO, and the majority of the Alliance

companies chose either to join PJM, or to join the newly-forming Midwest Independent Transmission System Operator (Midwest ISO).

3. In an order issued on July 31, 2002, the Commission accepted proposals by a group of former Alliance companies, including American Electric Power Service Corporation (AEP), ComEd, Dayton Power and Light Company (DP&L) and Virginia Power and Light Company (collectively, the New PJM Companies), to join PJM.<sup>1</sup>

4. In the July 31 Alliance Order, the Commission expressed its concern that the particular RTO choices of some of the Alliance companies might cause operational or reliability problems in the Alliance region. The Commission therefore imposed certain conditions on its approval of the New PJM Companies' choice to join PJM. The Commission stated that PJM and Midwest ISO must establish a joint and common market spanning both RTOs, the parties must address reliability concerns through obtaining approval of both RTOs' Reliability Plans by the North American Electric Reliability Council (NERC), and must resolve the problem of "islanding" certain utilities in Wisconsin and Michigan. To address this last concern, the Commission directed AEP, ComEd, Midwest ISO and PJM to propose a solution that would effectively hold harmless utilities in Wisconsin and Michigan from any loop flows or congestion that would result from the proposed new configuration of PJM.<sup>2</sup>

## **B. The Commission's Orders Addressing ComEd's Integration into PJM**

### **1. First ComEd Integration Order**

5. On March 18, 2004, the Commission issued an order in Docket No. ER04-521-000 enabling ComEd to integrate into PJM.<sup>3</sup> In this order, the Commission conditionally accepted the tariff provisions filed by ComEd that were required for ComEd to integrate into PJM, subject to NERC's approval of the two RTOs' reliability plans.

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<sup>1</sup> *Alliance Companies*, 100 FERC ¶ 61,137 at P 35 (2002) (July 31 Alliance Order). Subsequently, on April 1, 2003, the Commission accepted tariff filings by AEP, ComEd and DP&L to effectuate those companies' integration into PJM. *American Electric Power Service Corporation, et al. (New PJM Companies)*, 103 FERC ¶ 61,008 (2003) (April 1 Order).

<sup>2</sup> *Id.* at P 53, 57.

<sup>3</sup> *PJM Interconnection, LLC*, 106 FERC ¶ 61,253 (2004) (First ComEd Integration Order).

6. The Commission also addressed the fact that, while initially all parties had assumed that AEP and ComEd would integrate into PJM at the same time – on May 1, 2003 – AEP and PJM had submitted a compliance filing explaining that due to the regulatory delays in AEP's integration, ComEd would now be the first of the New PJM Companies integrated into PJM. Therefore, the filing provided for a dynamic generation transfer between ComEd's system (the Northern Illinois Control Area (NICA)), and PJM. PJM stated that 500 MW of firm service in both directions had already been committed to this transfer pathway.<sup>4</sup>

## **2. JOA and Hold Harmless Orders**

7. Also on March 18, 2004, the Commission issued two further orders relating to the integration of ComEd into PJM. The Commission conditionally accepted a Joint Operating Agreement (JOA) filed by PJM and Midwest ISO, with Phase I contingent on, among other things, NERC review and approval of PJM's and Midwest ISO's reliability plans.<sup>5</sup> The Commission also rejected the proposal filed by AEP and ComEd to comply with the Wisconsin and Michigan hold harmless condition, because ComEd and AEP had not provided the analysis required to demonstrate that their proposal held utilities in Wisconsin and Michigan harmless from all adverse impacts associated with loop flow or congestion resulting from ComEd's and AEP's choosing to join PJM; the Commission did, however, provide guidance as to how an acceptable hold harmless order could be crafted so as to permit the timely integration of ComEd into PJM.<sup>6</sup>

## **3. The Second ComEd Integration Order**

8. On April 27, 2004, the Commission issued an order enabling ComEd to integrate into PJM on May 1, 2004.<sup>7</sup> In that order, the Commission found that PJM had demonstrated that NERC had approved PJM's and Midwest ISO's reliability plans. It

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<sup>4</sup> First ComEd Integration Order at P 9.

<sup>5</sup> *Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C.*, 106 FERC ¶ 61,251 (2004) (JOA Order).

<sup>6</sup> *Commonwealth Edison Company and American Electric Power Service Corporation*, 106 FERC ¶ 61,250 (2004) (Hold Harmless Order).

<sup>7</sup> *PJM Interconnection, LLC*, 107 FERC ¶ 61,087 (2004) (Second ComEd Integration Order).

also accepted the Hold Harmless Service Agreement filed by ComEd and PJM, subject to refund and the outcome of a hearing.

9. Additionally, the Commission noted that the parties had originally represented that energy could be transmitted between ComEd and PJM by means of a 500 MW transmission pathway in both directions across AEP's system. On April 13, 2004, however, PJM informed the Commission that while the capacity of the pathway from east to west would remain 500 MW, the capacity of the west to east pathway would be reduced from 500 MW to 300 MW, starting June 1, 2004.<sup>8</sup> While the Commission did not find that the reduction in the pathway warranted postponing ComEd's integration into PJM, it instructed PJM and ComEd to investigate and report to the Commission on how such misinformation was provided, and on what mechanisms and procedures they would adopt to prevent such inaccurate disclosures from occurring in the future.<sup>9</sup>

#### **4. Petitions for Rehearing**

10. Timely requests for rehearing and/or clarification of the First ComEd Integration Order were filed by the Illinois Commerce Commission (Illinois Commission), the Illinois Municipal Electric Agency (IMEA), Illinois Industrial Energy Consumers (Illinois Industrials) and Edison Mission Energy, Edison Mission Marketing & Trading, Inc., and Midwest Generation EME, LLC (collectively, EME).

11. Timely requests for rehearing of the Second ComEd Integration Order were filed by ComEd<sup>10</sup> and EME. Midwest ISO filed a motion for leave to answer and answer to ComEd's rehearing petition.

#### **5. Confidential Treatment of PJM's Internal Investigation Report**

12. ComEd, on July 8, 2004, and PJM, on July 22, 2004, filed their reports on their investigations of misinformation communicated to the Commission regarding the reduction in pathway capacity. Both ComEd and PJM filed public and non-public versions of their investigation reports, and requested confidential treatment of certain

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<sup>8</sup> Second ComEd Integration Order at P 9.

<sup>9</sup> *Id.* at P 64-65.

<sup>10</sup> The rehearing petition was filed by ComEd's parent, Exelon Corporation (Exelon).

information in the non-public versions. The Delaware Municipal Electric Corporation (DEMEC) filed comments and a motion for rejection of PJM's request for confidential treatment. PJM filed an answer to DEMEC's motion.

## **II. DISCUSSION**

### **A. Rehearing of the First ComEd Integration Order**

13. In the First ComEd Integration Order, the Commission found that PJM and ComEd had sufficiently complied with the conditions for integration established by the July 31 Alliance Order and permitted ComEd to proceed with its integration into PJM. Several parties raise challenges to the Commission's conclusions.

#### **1. Joint and common market between PJM and Midwest ISO**

##### **a. Petitions for rehearing**

14. The Commission found that PJM and Midwest ISO had filed the required JOA 60 days prior to the integration of ComEd and, therefore, satisfied that condition of the integration.

15. In their petitions for rehearing or clarification of the First ComEd Integration Order, the Illinois Commission and Illinois Industrials ask the Commission to clarify that PJM and Midwest ISO are still required to implement a joint and common market.<sup>11</sup> The Illinois Commission stresses the importance of timely implementation of the joint and common market and asks the Commission to state that the joint and common market should be implemented nine months from the date that Midwest ISO begins market operations. Illinois Industrials ask the Commission to require PJM and Midwest ISO to provide a timetable as to when the joint and common market will be operational in a joint status report.

##### **b. Commission decision**

16. We clarify that PJM and Midwest ISO are still required to implement a joint and common market. The Commission finds that, although the joint and common market between the two RTOs has been delayed, the parties are making satisfactory progress toward that goal, as evidenced by the coordination achieved in the JOA, and the Commission will therefore not hold up or reverse the integration of any of the New PJM

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<sup>11</sup> The Illinois Commission also requests clarification as to its party status. The Commission here states that the Illinois Commission is a party to this proceeding.

Companies into PJM because the joint and common market is not yet in operation. We note that a major step towards the goal of a joint and common market will occur on March 1, 2005, the day when Midwest ISO is scheduled to begin market operations. Sixty days prior to the March 1 start date of the market, PJM and Midwest ISO must file specific plans for Phase 2 of the JOA (market-to-market operations).<sup>12</sup> As part of the filing they will make to implement Phase 2, we hereby order PJM and Midwest ISO to include a detailed timeline of the steps they will take to achieve the joint and common market and a date certain on which they expect the commencement of the joint and common market to occur.

## **2. RTOR rates**

### **a. Petition for rehearing**

17. EME asserts that the Commission has erred in finding that the issue of through and out rates (RTORs) had been adequately addressed by the issuance of an order setting forth principles to resolve the RTOR issue. EME argues that that order does not settle the question of RTORs, but rather simply provides going-forward principles and procedures for further settlement discussions, provides that RTORs will remain in place until December 1, 2004, and does not provide for any default mechanism or other permanent solution if settlement discussions do not resolve the issue by December 1.

### **b. Commission decision**

18. In the July 31 Alliance Order, the resolution of RTOR issues was not a condition predicate to integration. Rather, the Commission established a section 206 investigation to seek to resolve the issue of through and out rates. This proceeding is currently ongoing and has resulted in the development of principles that will guide the Commission and the parties in this area.<sup>13</sup> Further, contrary to EME's representation, the going

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<sup>12</sup> JOA Order at P 81.

<sup>13</sup> On March 19, 2004, the Commission accepted the agreement establishing the going-forward principles and procedures for the elimination of RTORs and establishment of a new long-term transmission pricing structure that eliminates seams throughout the regions effective December 1, 2004. *Midwest Independent Transmission System Operator, Inc., et al.*, 106 FERC ¶ 61,262 at P6, P19 and P23 (2004) (Going Forward Principles Order).

forward principles and procedures do provide a default mechanism, in the event of the Commission's being unable to arrive at a long-term transmission pricing structure by December 1, 2004.<sup>14</sup>

### **3. Seams issues**

#### **a. Petition for rehearing**

19. EME similarly argues that the Commission erred in finding that the PJM/Midwest ISO JOA resolves seams problems between the two RTOs, given that AEP is not a signatory to the JOA; thus, according to EME, the JOA will not alleviate the loop flows and congestion occurring along the AEP-PJM and AEP-Midwest ISO seams, and AEP's non-participation poses other dangers to reliability.

#### **b. Commission decision**

20. The Commission finds that the JOA provided adequate resolution of seams issues during the period prior to AEP's integration into PJM. Additionally, at this point, the difficulty projected by EME has been rendered moot, because as of October 1, 2004, AEP integrated into PJM, and its transmission system is now being operated by PJM in coordination with Midwest ISO under the JOA.

### **4. PJM and Midwest ISO reliability plans**

#### **a. Petition for rehearing**

21. In the Second ComEd Integration Order, the Commission stated that, based on NERC's approval, it found PJM and Midwest ISO to be in full compliance with the directive of the July 31 Alliance Order that NERC approve those plans.<sup>15</sup> In its petition for rehearing of that order, EME argues that the Commission did not sufficiently ensure the adequacy of PJM's and Midwest ISO's reliability plans, since it relied on NERC to certify those plans rather than independently assessing those plans.

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<sup>14</sup> "The agreement also contains a so-called 'backstop' process for making [Seams Elimination Charge/Cost Adjustments/Assignment] SECA compliance filings to take effect in the 'unanticipated contingency' that the Commission is unable to 'fulfill this commitment.'" Going Forward Principles Order at P 6 fn. 12, *citing* paragraph 2 of the parties' agreement.

<sup>15</sup> Second ComEd Integration Order at P 26.

**b. Commission decision**

22. We deny rehearing. In the July 31 Alliance Order, the Commission sought to ensure that the New PJM Companies' RTO choices would not jeopardize reliability by expressly conditioning its acceptance of those RTO choices on NERC certification of PJM and Midwest ISO's reliability plans.<sup>16</sup> EME did not protest or seek rehearing of this determination at that time. Such a challenge is therefore a collateral attack on the July 31 Order and should have been filed as a rehearing of the order establishing that condition, rather than as a rehearing request of the Second ComEd Order, which simply accepted the RTOs' compliance with that condition.

23. Further, we disagree with EME's suggestion that the Commission did not ensure the adequacy of PJM and Midwest ISO's reliability plans by relying on NERC's review. NERC's mission is to ensure the reliability of the bulk electric system, and the Commission relies on NERC's expertise and judgment on reliability issues.<sup>17</sup> As we explained in the JOA Order, Commission staff was a full participant with NERC in conducting audits on PJM and Midwest ISO's readiness to implement their reliability plans.<sup>18</sup>

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<sup>16</sup> July 31 Alliance Order at P 48 ("our conditional acceptance is subject to NERC approval of the [PJM and Midwest ISO] Reliability Plans").

<sup>17</sup> See *Policy Statement on Matters Related to Bulk Power System Reliability*, 107 FERC ¶ 61,052 at P 25 (2004) ("the Commission expects public utilities to comply with NERC reliability standards and to remedy any deficiencies identified in NERC compliance audit reports and recommendations"); *Carolina Power & Light Co.*, 93 FERC ¶ 61,032 at 61,071 (2000) (Commission rejects proposal to trip generators off-line as inconsistent with NERC planning standards); *North American Electric Reliability Council*, 85 FERC ¶ 61,353 at 62,356 (1998) (Commission concludes that NERC's Transmission Loading Relief (TLR) procedures are generally consistent with or superior to the pro forma tariff adopted in Order No. 888, although further efforts to develop congestion management methods are necessary).

<sup>18</sup> JOA Order at P 102.

## **5. Hold Harmless proposal**

### **a. Petitions for rehearing**

24. In its petition for rehearing of the First ComEd Integration Order, EME asserts that the Commission erred in finding that ComEd's hold harmless proposal satisfies the Commission's condition that AEP and ComEd hold Michigan and Wisconsin utilities harmless from impacts related to ComEd's and AEP's RTO choices, given that AEP is not a participant in the current hold harmless service agreement between ComEd and PJM.

25. On rehearing of the Second ComEd Integration Order, EME again argues that the Commission did not show how ComEd's hold harmless proposal satisfied the condition previously imposed by the Commission that AEP and ComEd hold Michigan and Wisconsin utilities harmless for ComEd's and AEP's RTO choices, given that AEP is not a participant in the current hold harmless service agreement between ComEd and PJM.

### **b. Commission decision**

26. Acceptance of the ComEd hold harmless plan, without AEP, was appropriate since only ComEd was integrating in May. Before AEP integrated on October 1, it filed, and the Commission accepted, an agreement between AEP and PJM that is virtually identical to the hold harmless agreement between PJM and ComEd that was accepted in the Second ComEd Integration Order.<sup>19</sup> This agreement resolves EME's concern as to ensuring AEP's obligation to hold Michigan and Wisconsin utilities harmless from negative impacts of AEP's RTO choice.

## **B. Application of PJM Capacity and Deliverability Rules to Customers in Illinois**

### **1. First ComEd Integration Order**

27. In the First ComEd Integration Order, the Commission approved transitional capacity rules for NICA, to be effective from May 1, 2004 to May 31, 2005. Under this transitional scheme, load within NICA would be required to move from the Mid-America Interconnected Network (MAIN) capacity adequacy requirements to the capacity adequacy requirements of PJM West.<sup>20</sup> In approving the move from MAIN's to PJM's capacity rules, the Commission noted that, according to PJM, it was necessary for NICA

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<sup>19</sup> *PJM Interconnection, LLC, et al.*, 108 FERC ¶ 61,317 (2004).

<sup>20</sup> PJM West is the portion of PJM consisting of Allegheny Power.

and PJM to have compatible capacity rules so that resources in both control areas can participate in centralized dispatch and so that no part of the system "leans on" other parts (*i.e.*, uses capacity resources provided by other system members without compensation).<sup>21</sup> It further stated that "the existing MAIN capacity procedures do not provide the individual [Load Serving Entity (LSE)] commitments and specific resource identification needed for loads in NICA to participate in the PJM market on the same basis as other LSEs in PJM."<sup>22</sup> The Commission also found that PJM's current deliverability rules should also apply to NICA, stating that "[u]nder PJM's rules, external resources may qualify as capacity resources, so long as there is firm transmission to the border and the deliverability test is met from the border injection point," and that "[a]s the [PJM West Resource Adequacy Agreement] will eventually apply to NICA, the Commission finds that capacity resources designated by NICA LSEs should be deliverable to NICA."<sup>23</sup>

## **2. Rehearing Request**

28. IMEA seeks rehearing of these rulings on capacity and deliverability. IMEA states that it currently meets its capacity obligation through a combination of self supply from "behind the meter" generation and through bilateral agreements with utilities outside of NICA that do not specify the generation units that will provide the capacity.<sup>24</sup> IMEA asserts that it will no longer be able to meet its capacity obligation in this fashion under PJM's capacity construct and deliverability rules, and that the Commission has failed to address this problem, stating only that "[t]he Commission urges any affected parties to work with PJM through its stakeholder processes to resolve any problems concerning generation outside of NICA."<sup>25</sup> IMEA states that the Commission's reasoning is inadequate with regard to the use of behind the meter generation, because it relied on new rules that, at the time of the First ComEd Integration Order, PJM was shortly to file; but when PJM did file those rules, they did not allow municipally-owned behind-the-

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<sup>21</sup> First ComEd Integration Order at P 44.

<sup>22</sup> *Id.* at P 45.

<sup>23</sup> *Id.* at P 50.

<sup>24</sup> IMEA protest, January 21, 2004, at 5.

<sup>25</sup> First ComEd Integration Order at 50, footnote omitted.

meter generation to meet municipalities' capacity obligations,<sup>26</sup> and that the Commission should explain why PJM's more stringent market rules should be in effect in NICA given that PJM's behind-the-meter rules will not provide IMEA with relief.

29. IMEA further argues that PJM's deliverability rules, which will make only generation that can deliver directly to ComEd able to qualify as deliverable, will render IMEA unable to meet its capacity obligations using its existing contracts for capacity outside of NICA: IMEA argues that this ruling unfairly limits competition to the benefit of the large generators selling into PJM's capacity market. IMEA further states that the Commission's reasoning is based solely on the basis that, now that NICA is part of PJM, PJM's rules must be applied to NICA, and that the Commission has never explained why those rules must be applied to new regions like NICA when (a) the rules were not designed for those reasons, (b) were created through a stakeholder process that did not include customers in the new regions, and (c) ignore the existing practices of the new regions.

### **3. Commission decision**

30. The Commission denies IMEA's rehearing request. We find that PJM's stated reason for applying its capacity construct and deliverability rules throughout PJM – namely, that NICA and PJM must have compatible capacity rules so that resources in both control areas can participate in centralized dispatch and no PJM participant or group of participants "lean[s] on" the capacity provided by the rest of the system, and so that all PJM participants are treated equally – to be valid. PJM is responsible for the reliability of the entire PJM footprint, which now includes NICA, and must be able to access the generation provided through each member's capacity obligation in the event of an emergency or capacity shortage, which it would be unable to do if that capacity obligation is satisfied through bilateral agreements outside of NICA.

31. We recognize that this means that IMEA's former capacity arrangements may have to be revised. But that is true every time that new members or groups of members join PJM, or any other RTO. The PJM capacity requirements have been found just and reasonable, and IMEA is not being treated differently from other new participants in the PJM market. The alternative – that PJM, or any RTO, should permit new control areas to retain their capacity and deliverability rules even when those rules conflict with those of classic PJM – would make PJM a group of individual control areas with differing

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<sup>26</sup> See *PJM Interconnection, LLC*, 107 FERC ¶ 61,113 (Behind the Meter Order), *order denying rehearing*. 108 FERC ¶ 61,302 (2004).

capacity rules rather than a single coherent regional organization, and would deny members the benefits of centralized dispatch, centralized access to capacity, and the lower generation costs and enhanced reliability that comes with such centralization

### **C. Objections to the Standalone Integration of ComEd into PJM**

#### **1. Petitions for rehearing**

32. EME, in its petition for rehearing of the First ComEd Integration Order, states that the Commission erred in finding that ComEd's integration into PJM on a standalone basis would benefit customers in Illinois. EME claims the Commission did not have valid evidentiary support for this proposition, and that the only evidence to which the Commission points is a study by PJM estimating \$70 million of benefits, which EME alleges is not in the record. EME asserts that its expert disputes many of the bases for this determination.

33. EME further asserts that the Commission has not addressed the problems that might result from ComEd's integration ahead of AEP, such as the potential for gaming (given the additional interfaces between a contract path system and a Locational Marginal Pricing (LMP)-based system that would be created by integration of ComEd into PJM ahead of AEP), and fails to consider the fact that customers who cannot obtain transmission service across AEP (whether on the PJM/ComEd pathway or otherwise) will be paying higher transmission rates. EME also states that, because AEP is not a signatory to the JOA between PJM and ComEd, PJM and Midwest ISO will not be able to manage loop flows along their seams with AEP in the way that they can along the PJM-Midwest ISO seams. EME further argues that the Commission has not shown how retail suppliers in Illinois will benefit from RTO integration, and that the Commission improperly ignored such retail suppliers' arguments that they required 60 days before integration to modify their business arrangements.

34. In its petition for rehearing of the Second ComEd Integration Order, EME later argues that the Commission failed to consider the effect of the reduction in transmission capacity between NICA and PJM (from 500 MW to 300 MW) on its finding that ComEd's standalone integration into PJM was in the public interest.

#### **2. Commission decision**

35. We deny rehearing with respect to EME's claim of error in finding that ComEd's integration into PJM on a standalone basis would benefit customers in Illinois. First, this issue is now moot because AEP has now integrated with PJM so that ComEd is no longer integrating on a standalone basis. Moreover, we affirm the determination based on the record in this proceeding that ComEd's standalone integration provided sufficient

benefits to permit the integration to proceed. As the Commission found in the last order, the integration of ComEd into PJM, even on a standalone basis, will bring about significant benefits by expanding competitive alternatives to the ComEd market, allowing Illinois wholesale and retail customers for the first time to access a voluntary spot market with price transparency for both day-ahead and real-time energy, as well as for capacity and ancillary services, improve congestion management because PJM will be able to address congestion through redispatch rather than through Transmission Loading Relief (TLRs), enhance reliability because reliability would be enforced by an independent and neutral organization, and benefit Illinois retail suppliers by enabling them immediately to avoid penalties on energy imbalances.

36. EME contends the Commission should not have relied on the PJM cost-benefit study filed by Mr. Ott.<sup>27</sup> But this study reasonably reinforces the benefits to be derived from Com Ed's integration. Any such cost-benefit analyses must rely on various judgments, and we find the framework and the assumptions in the PJM study as reasonable as the alternatives recommended by EME's Dr. Shanker. Dr. Shanker argues that different assumptions coupled with an expanded framework for calculating costs could have translated into fewer benefits or possibly net costs. Dr. Shanker did not produce a fully study of his own to show the effect of his changed assumptions, and we cannot find that the judgments in the PJM are so unreasonable as to disregard the conclusion.

37. As to EME's concerns regarding the reduction in transmission capacity on the pathway between ComEd and PJM through AEP, that issue is moot because, according to Exelon's report submitted to the Commission on July 30, 2004, no reduction in capacity occurred after all.<sup>28</sup> We therefore deny rehearing on this issue.

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<sup>27</sup> EME is incorrect in stating that the Commission is inappropriately relying on this study, because it is not in the record of this proceeding. PJM filed this study in Docket No. ER03-262 (Exhibit No. PJM-2, Prepared Direct Testimony of Andrew L. Ott on behalf of PJM Interconnection, L.L.C., filed on January 28, 2004 in Docket No. ER03-262-009). PJM initially submitted the tariff revisions here as a compliance filing in Docket No. ER03-262. However, the Commission, on its own motion, redocketed PJM's filing as ER04-521. ComEd expressly relied on the Ott testimony in its submission in Docket No. ER04-521. Accordingly, all the parties had ample opportunity to review and comment on Mr. Ott's study, as is evidenced by the information provided by EME.

<sup>28</sup> Report of Exelon Corporation on Pathway Capacity submitted in Docket No. ER04-521, July 30, 2004, at 1.

## **D. Changes to the PJM Operating Agreement**

### **1. Petition for rehearing**

38. PJM filed the changes to its Open Access Transmission Tariff (OATT) and the West Resource Adequacy Agreement under section 205 of the FPA, but filed the changes to its Operating Agreement necessary to permit ComEd's integration into PJM under section 206 of the Federal Power Act (FPA),<sup>29</sup> because it did not receive a two-thirds vote of its members. In the First ComEd Integration Order, the Commission found that EME's challenge to this filing to be a collateral attack on the Commission's July 31 Alliance Order which permitted the integration of ComEd into PJM. The Commission reasoned that "to accept Edison Mission's argument here would, in essence, allow the lack of a supermajority in the PJM members' vote on the amendments to the Operating Agreement to become a collateral attack on a decision made by the Commission eighteen months ago."<sup>30</sup>

39. EME argues on rehearing of the First ComEd Integration Order that its challenge is not a collateral attack on the July 31 Alliance Order, which approved the former Alliance Companies' RTO choices, because the July 31 Alliance Order did not address ComEd's standalone integration into PJM, but rather, approved the RTO choices of all of the former Alliance Companies, and that the issues associated with ComEd's standalone integration did not exist until it became apparent at a later date that ComEd was going to integrate into PJM ahead of AEP. Thus, EME argues, the Commission should not have accepted PJM's filing of the changes to its Operating Agreement unless PJM demonstrates, in accordance with section 206, that absent those changes, the Operating Agreement is unjust, unreasonable, unduly discriminatory or preferential, and PJM has failed to do so.

### **2. Commission decision**

40. The Commission denies the rehearing. As discussed above, we have found that the integration of ComEd into PJM benefited customers and, therefore, find that PJM has demonstrated that its existing operating agreement was unjust and unreasonable insofar as it would not accommodate the ComEd integration. Moreover, this aspect of EME's rehearing request has also been mooted by intervening events. EME states that it is not objecting to the integration of ComEd into PJM, but rather to the integration of ComEd

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<sup>29</sup> 16 U.S.C. § 824e (2000).

<sup>30</sup> First ComEd Integration Order at P 67.

on a standalone basis, and that PJM has failed to show the justness and reasonableness of only this aspect of its filing. As of October 1, 2004, however, both AEP and ComEd were integrated into PJM. The Commission therefore denies EME's request for rehearing in this regard.

## **E. ComEd's Indemnification of Midwest ISO and PJM**

### **1. Petition for rehearing**

41. In its original comments on the Hold Harmless Service Agreement, Midwest ISO noted that it would have to perform calculations relating to the hold harmless commitment (even though it was not a signatory), and it was concerned that it might become a respondent in the PJM dispute resolution process if ComEd or the Wisconsin or Michigan utilities elect to challenge these calculations. Midwest ISO asked the Commission to state that ComEd will hold harmless and indemnify PJM and Midwest ISO for funds allegedly owed to any other party arising from incorrect loss calculations or financial computations that are later corrected, adjusted, or trued-up. The Commission agreed and, in the Second ComEd Integration Order, required PJM and ComEd to make a compliance filing including appropriate indemnification language protecting Midwest ISO to the Hold Harmless Service Agreement.<sup>31</sup>

42. In its petition for rehearing of the Second ComEd Integration Order, ComEd asks the Commission to reverse its holding that ComEd is obligated to indemnify Midwest ISO and PJM against their own errors in providing data and calculating amounts owed by ComEd to Michigan and Wisconsin utilities. ComEd argues that the indemnification of a party against its own negligence, or even its own wrongdoing, creates perverse incentives, and that Midwest ISO will have no incentive to perform the calculations correctly if it is not held accountable for its errors. ComEd also notes that under section 10.2 of Midwest ISO's OATT, Midwest ISO's transmission customers indemnify Midwest ISO for damages "except in cases of negligence or intentional wrongdoing," and argues that ComEd should not be required to indemnify Midwest ISO more generously than Midwest ISO's own customers. In the alternative, ComEd asks the Commission to require the Michigan and Wisconsin utilities, as a condition of receiving payments from ComEd under the Hold Harmless Service Agreement, to file rate schedules obliging them to refund any overpayments by ComEd.

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<sup>31</sup> Second ComEd Integration Order at P 40.

43. Midwest ISO, in its answer, states that ComEd is confusing the public policy against two parties contracting with each other to shield themselves from third party claims with the commonplace and acceptable practice of allocating commercial risk among the parties to an agreement. Midwest ISO further states that there is a difference between a tariff to provide transmission service, in which the rate charged reflects the cost of insurance against claims for negligence and other damage, and the obligation to make financial calculations that the Hold Harmless Service Agreement places on Midwest ISO. Midwest ISO states that, if the Midwest ISO transmission owners should be subjected to the additional risk proposed here by ComEd, Midwest ISO would need to file a separate service agreement to collect the additional revenues it will need to offset the risks of having to pay for calculation mistakes. Midwest ISO also notes that Midwest ISO is not a party to the ComEd/PJM service agreement and does not benefit from it: the obligations at issue here have been thrust on Midwest ISO as a result of ComEd's RTO choice, rather than from any voluntary contractual commitments by Midwest ISO, and Midwest ISO argues that those who benefit from a transaction should bear the commercial risks of that bargain.

44. Midwest ISO points out that Exelon need not fear a situation in which one entity is overcompensated and another entity is undercompensated, and Exelon finds itself having to pay the undercompensated entity without being able to recoup from the overcompensated entity, given that the Hold Harmless Service Agreements gives ComEd and the Michigan and Wisconsin utilities the right of audit and the right to pursue the results of that audit through dispute resolution. Midwest ISO additionally states that there would be no bar under the FPA or the doctrine against retroactive ratemaking to recovery through such proceedings. Additionally, if Exelon undercompensates one entity without being able to recover that amount from another overcompensated entity, Midwest ISO still considers this a fair result, since Exelon will have benefited from retaining that entity's funds until the true-up.

## **2. Commission decision**

45. The Commission will grant ComEd's rehearing request in part. As ComEd points out, Midwest ISO's OATT requires transmission customers to indemnify Midwest ISO for damages except in instances of negligence or intentional wrongdoing. We agree with ComEd that the same liability standard should apply to ComEd's and AEP's indemnification of Midwest ISO. The same standard of care should apply to an RTO that performs calculations or other acts related to its regulatory functions, even if it is not a

party to a specific agreement, as is applied to its other activities. ComEd and AEP,<sup>32</sup> therefore, must modify the indemnification provision of their Hold Harmless Service Agreements to refer to the provisions of the Midwest ISO's OATT with respect to indemnification obligations; any such change must be filed with us within 30 days of the date of this order.<sup>33</sup>

## **F. Confidential Treatment of PJM's Report**

### **1. Submission of reports**

46. On July 8, 2004, in compliance with the Commission's directive in the Second ComEd Integration Order, Exelon filed its investigative report as to how and why misinformation was provided to the Commission with regard to the amount of capacity on the pathway being used to integrate ComEd with PJM until the integration of AEP. Exelon stated that it found no evidence indicating any intent to misrepresent facts or mislead the Commission. Instead, it found that the incorrect statements at issue resulted from a series of miscommunications and misunderstandings, both within Exelon, and between Exelon and PJM. Exelon states that it is adjusting internal controls and communication protocols to ensure timely and correct communication of regulatory requirements.

47. On July 22, 2004, PJM filed the report of its investigation. The investigation, which was conducted by PJM's Internal Audit Department, found that there was no evidence of malicious intent related to the incorrect assertion in the December 31, 2003 filing that 500 MW of firm service had been reserved and committed to the PJM – NICA pathway. Further, the report concluded that incorrect assumptions, lack of adequate program management, weaknesses in the FERC filing process and communication disconnects all contributed to PJM's failure to detect in advance an error of material fact in the filing. PJM also committed to implementing the PJM report's recommendations on PJM's project management and regulatory filing processes.

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<sup>32</sup> Since the Commission has now accepted AEP's Hold Harmless Service Agreement, which is substantially identical to the ComEd Hold Harmless Service Agreement, the Commission's findings as to indemnification with regard to ComEd will apply to AEP as well.

<sup>33</sup> In Docket No. ER04-1160-000, the Commission is considering a change to the Midwest ISO's OATT with respect to the standard for indemnification. Such a change would also apply to ComEd's and AEP's indemnification obligation.

48. Both Exelon and PJM filed public and non-public versions of their reports. Pursuant to section 1b.20 of the Commission's General Rules, 18 C.F.R. § 1b.20 (2004) and section 388.112 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 388.112 (2004, both Exelon and PJM requested privileged and confidential treatment for the non-public versions of their reports. PJM states that the only things that it has redacted from the non-public versions are the names and titles of individuals employed by PJM.

49. PJM states in the transmittal letter of its report that the confidentiality of its employees' names and titles is justified because the report contains "critical self-evaluative assessments containing candid analyses, conclusions, and recommendations about certain PJM internal business processes" and "candid and frank assessments of PJM personnel," which PJM states is the type of information that companies do not customarily release to the public.<sup>34</sup> PJM seeks to protect this information under Exemption (b)(4) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4) (2000), as amended, which provides for confidential treatment for "commercial or financial information obtained from a person and privileged or confidential." PJM further states that, as a matter of business policy, it keeps information regarding personnel matters confidential, and that, as the report contains a critical assessment of PJM personnel, failure to keep such information confidential would impair PJM's ability to attract and retain employees, and thus to conduct business. PJM also seeks to protect this information under Exemption (b)(6), 5 U.S.C. § 552(b)(6) (2000), which protects from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

## **2. Opposition to confidential treatment**

50. DEMEC, in its comments, asks the Commission to deny PJM's request for confidential treatment for the redacted sections in the non-public version of PJM's report. DEMEC states that by seeking to keep this information hidden, PJM is further damaging its credibility, particularly with its own members and customers. DEMEC states that its confidence in PJM's employees has been shaken by PJM's misrepresentation as to the capacity of the ComEd-PJM pathway, and then further damaged by PJM's request for confidential treatment. DEMEC further states that it assumes that many of the employees involved in the investigation only provided information and were not in any way culpable, but that

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<sup>34</sup> Transmittal letter of PJM report at 2.

[t]he value of demonstrating integrity and transparency in this process far outweighs an unsubstantiated and general claim that the names and positions of the persons involved in the investigation should be kept confidential because the situation resulting from PJM's error is "painful and embarrassing."<sup>35</sup>

51. DEMEC further alleges that PJM may not rely on Rule 1b.20, because PJM is not a "person compelled to produce documents," as required by the rule,<sup>36</sup> since the Commission simply required PJM to conduct an investigation and file the results with the Commission; DEMEC states that there is no indication that the Commission's enforcement arm has begun a review of these events or that the Commission has subpoenaed or otherwise compelled the release of the report.

52. DEMEC further asserts that PJM cannot rely on Exemption (b)(4) of FOIA, regarding "commercial or financial information obtained from a person and privileged or confidential," because the PJM report must meet both prongs of the test, *i.e.*, both be "commercial or financial information obtained from a person" and "privileged or confidential." DEMEC claims that the names of the employees here are not "commercial or financial information," and are not "privileged or confidential" because PJM never reached agreement with the Commission previously that this information would be kept confidential, and because release of this information will neither impair the Government's ability to obtain necessary information in the future, nor cause substantial harm to PJM's competitive position.<sup>37</sup> DEMEC states that PJM is a non-profit entity and thus cannot

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<sup>35</sup> DEMEC comments at 6, quotation marks in original.

<sup>36</sup> Rule 1b.20 provides that:

Any person compelled to produce documents in an investigation may claim that some or all of the information contained in a particular document(s) is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552).

<sup>37</sup> DEMEC cites *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765,770 (D.C. Cir. 1974), footnote omitted, as stating that information is confidential if its disclosure "is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."

have a "competitive" position that can be impaired, and then asserts that "PJM's own actions . . . placed it in this position" and "to achieve the kind of protection that PJM seeks here, PJM should have avoided its error in the first place."<sup>38</sup>

53. Finally, DEMEC claims that PJM may similarly not rely on Exemption (b)(6), "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," in that not all filings or information submitted to a government agency that mentions particular individuals should be protected from disclosure.<sup>39</sup>

54. PJM filed a response to DEMEC's comments, stating that DEMEC's request is an unwarranted intrusion into internal personnel matters, which it considers to be within the exclusive purview of PJM management. PJM states that it is inaccurate for DEMEC to state that the non-public version of the PJM report is "sanitized," and thereby to suggest that critical information is missing. PJM reiterates that the only information redacted was the names and titles of individuals employed by PJM and ComEd.

### **3. Commission decision**

55. We accept the reports submitted by Exelon and PJM, and will deny DEMEC's request that we deny confidential treatment to the PJM report. We find that the names and titles of the employees that were redacted<sup>40</sup> would fall within Exemption (b)(4) of FOIA, and thus are appropriately kept non-public here. The only redacted information in the report is the names and titles of the employees, and the report is easily understood without access to those names and titles.

56. Since the names and titles were not necessary to understand the report, the Commission finds that providing confidentiality to this information is appropriate under sections 388.112 and 388.107(d). These provisions permit a filer to request, and the Commission to provide, confidentiality for "commercial or financial information obtained from a person and privileged or confidential." The PJM report is "commercial information . . . obtained from a person," because PJM is a regulated public utility and

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<sup>38</sup> DEMEC comments at 10.

<sup>39</sup> DEMEC comments at 12-13.

<sup>40</sup> We note that, while PJM states that it only redacted the names of PJM and Exelon employees, it also redacted the name(s) of one or more individuals employed by Accenture.

the report is related to the way in which it conducts its business activity. We do not agree with DEMEC that "commercial status" cannot apply to a non-profit organization. PJM's members are commercial entities, and PJM has commercial interests such as minimizing its costs, attracting utility investment in its area, and attracting and retaining highly qualified employees. Disclosure of the confidential information contained in the PJM report could impact PJM's commercial operations as well as the commercial interests of its members.<sup>41</sup>

57. We further find that the material redacted by PJM is "confidential." The D.C. Circuit has stated that:

[C]ommercial or financial matter is "confidential" for purposes of [Exemption [b][4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.<sup>42</sup>

58. We find that the release of the names and titles of individuals contained in the PJM report is within both parts of this definition. If PJM and other parties knew that, in any reports they produced for the Commission of similar future investigations, they might be required to reveal the names and titles of individuals, they might be less inclined to be fully candid with the Commission or to prepare a report that gives the Commission as complete a picture as possible of the investigation in question. And, if PJM's employees are aware that their names and titles could be revealed to the public, clearly they may not feel as free to speak candidly to PJM's internal investigators, with the result that PJM's

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<sup>41</sup> DEMEC's distinction between for-profit and non-profit institutions would lead to the result that all information submitted by a non-profit hospital must be disclosed while the identical information submitted by a for-profit hospital could be protected. The term "commercial" should not be interpreted to lead to such an untenable result. *See Critical Mass Energy Project v. NRC*, 830 F.2d 278, 281 (D.C. Cir. 1987) (*Critical Mass I*), *vacated on other grounds by Critical Mass Energy Project v. Nuclear Regulatory Comm.*, 975 F.2d 871 (D.C. Cir. 1992) (*Critical Mass II*) (finding that safety reports submitted by the nonprofit Institute for Nuclear Power Operations were "commercial" because the Institute's member utility companies were commercial enterprises, and their commercial fortunes "could be materially affected by" the disclosure of those reports).

<sup>42</sup> *National Parks*, 498 F.2d at 770, footnote omitted, *reaffirmed in Critical Mass II*, 975 F.2d at 877.

internal investigation, and subsequent attempt to correct problems, may be impaired and PJM may become a less efficient transmission organization.<sup>43</sup> Additionally, the obloquy associated with the disclosure of individual's names make it more difficult for them to perform their duties, and PJM may have more difficulty competing against other employers for potential employees than would otherwise be the case.

59. In appropriate situations, the Commission can require disclosure of information obtained during an investigation, even if such information could be protected from disclosure, when such disclosure is "otherwise found appropriate in the public interest and permitted by law."<sup>44</sup> The Commission also has the ability to require disclosure of otherwise confidential information to the parties in a case, with a protective order, when such information is necessary for the parties' to participate in the proceeding.<sup>45</sup> Moreover, the Commission's rules show particular solicitude for the protection of information concerning individuals obtained during investigations, providing that confidentiality is appropriate when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."<sup>46</sup>

60. In this case, however, requiring public disclosure of the redacted names is not warranted by a countervailing public benefit. Such disclosure would not demonstrably aid the parties' or the public's ability to understand the report or appreciably aid in the ability of parties to participate in this proceeding. The events surrounding the 500 MW pathway are clearly understandable from the report, with the names and titles redacted.

61. DEMEC has not claimed that such disclosure is needed for it to participate in this proceeding. DEMEC asserts only that it will have less confidence in PJM unless the PJM report is fully "transparent," including the employee names and titles. But the PJM report already reveals the extent and parameters of PJM's investigation, and DEMEC has not shown how knowing the specific names of the employees with whom the PJM

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<sup>43</sup> Arguably, PJM does not "compete" for customers, as a for-profit business. But in another sense, PJM has "competed" against another RTO, Midwest ISO, to persuade new members to join PJM rather than Midwest ISO, and similar competitive scenarios may evolve in the future; in that situation, utilities contemplating joining one RTO rather than another could well be influenced by such efficiency considerations.

<sup>44</sup> 18 C.F.R. § 1b.9 (2004).

<sup>45</sup> *See* 18 C.F.R. 385.206 (e)(3) (2004).

<sup>46</sup> 18 C.F.R § 388.107 (g)(4).

investigators spoke would make DEMEC, or any other party, have more confidence in PJM. In balancing the need to protect individuals from the opprobrium that can be caused by the disclosure of their names against the limited benefits of such disclosure, the Commission finds that in this case, the interests in confidentiality weigh heavier on the scale.

The Commission orders:

(A) The Commission hereby grants in part and denies in part the petitions for rehearing and/or clarification of the First ComEd Integration Order and the Second ComEd Integration Order, as discussed above.

(B) ComEd, AEP and the Michigan and Wisconsin utilities must file amendments to the ComEd Hold Harmless Service Agreement and the AEP Hold Harmless Service Agreement, as discussed above, within 30 days of the date of this order. If the language of section 10.2 of Midwest ISO's tariff, which provides the standard for indemnification, is changed from "negligence or intentional wrongdoing" to "gross negligence or intentional wrongdoing," ComEd and AEP must modify the indemnification provision of their Hold Harmless Service Agreements to track the new language of Section 10.2 within 30 days of the date of the approval of the change in Midwest ISO's tariff.

(C) The Commission hereby accepts the PJM and ComEd reports.

(D) The Commission hereby denies DEMEC's request not to grant confidential treatment to PJM's report, as discussed above.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.