157 FERC ¶ 61,131
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

TranSource, LLC — Docket Nos. EL15-79-000
EL15-79-001

v.

PJM Interconnection, L.L.C.

ORDER GRANTING INTERLOCUTORY APPEAL

(Issued November 21, 2016)

1. On October 28, 2016, the PJM Transmission Owner Intervenors (PJM TOs)[1] filed an Interlocutory Appeal of an order by the Presiding Administrative Law Judge (ALJ) issued from the bench on October 26, 2016.[2] The bench ruling grants TranSource, LLC's (TranSource) motion to compel discovery of PJM TOs' Power Line Systems Computer Aided Design and Drafting files (PLS-CADD files).[3] On November 4, 2016, the Chairman, as motions Commissioner, referred the matter to the full Commission.[4]

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[1] PJM Transmission Owner Intervenors are, collectively, First Energy Services Company, Delmarva Power & Light, Public Service Electric and Gas Company and PPL Electric Utilities.

[2] PJM TOs' Appeal of Presiding Officer's Order Denying Motion to Permit Interlocutory Appeal in Docket Nos. EL15-79-000 & EL15-79-001 (October 28, 2016) (Interlocutory Appeal).

[3] The PLS-CADD files "consist of three-dimensional engineering models of transmission lines and associated structures. They are used to assist in the engineering and construction of transmission lines in much the way that a scale drawing of an existing building would be used by builders to assist in making renovations to the building. They are not used to perform preliminary cost estimates, such as System Impact Studies." *Id.* at n.2.

[4] Notice of Determination by the Chairman, Docket Nos. EL15-79-000; EL15-79-001 (November 4, 2016) (Notice of Determination).

2. In this order, the Commission grants PJM TOs' Interlocutory Appeal. As explained below, we vacate the ALJ's October 26, 2016 ruling granting the TranSource motion to compel discovery of PJM TOs PLS-CADD files. We do not bar the ALJ from structuring the hearing so that he may make an initial and separate determination in an initial decision on the relief requested by TranSource regarding the PLS-CADD files.

I. Background

3. On September 24, 2015, the Commission established a trial-type evidentiary hearing and settlement judge procedures for all issues raised in a complaint filed by TranSource, pursuant to section 206 of the Federal Power Act (FPA),[5] against PJM Interconnection, LLC (PJM) (Complaint).[6] On February 10, 2016, TranSource filed an Amended Complaint that, in part, restated the contents of the initial Complaint but also raised additional issues. On May 10, 2016, the Commission determined that the issues raised in the Amended Complaint should be addressed in the already-established trial-type evidentiary hearing.[7]

4. The Complaint arises from TranSource's plan to build three network upgrades to the PJM transmission system. At the core of the Complaint is an allegation that PJM and the transmission owners have substantially inflated the scope of the system enhancements needed to accommodate TranSource's requested upgrades. TranSource alleges that PJM violated its Open Access Transmission Tariff (Tariff) by refusing to provide TranSource work papers that underlie the System Impact Studies that PJM prepared to evaluate the upgrades necessary to accommodate TranSource's interconnection request. TranSource also contends that the scope of mitigation in the system impact studies is excessive and intended to stymie its requested network upgrades. In response, TranSource requests that the Commission order PJM to provide to TranSource all of the work papers used to determine the cost estimates associated with each circuit, including the PLS-CADD model.[8]

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[5] 16 U.S.C. § 824e (2012); *see also* 18 C.F.R. § 385.206 (2016).

[6] *TranSource, LLC v. PJM Interconnection, L.L.C.*, 152 FERC ¶ 61,229 (2015) (September 2015 Order).

[7] *TranSource, LLC v. PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,154, at P 37 (2016) (May 2016 Order).

[8] TranSource June 23, 2015 Complaint at 5-6.

5. PJM responds that TranSource has failed to state a claim upon which to base a cause of action.[9] PJM asserts that TranSource failed to satisfy the requirements of section 206 of the FPA and Rule 206 of the Commission's Rules of Practice and Procedure because the Complaint was based on inaccurate and unsubstantiated facts and allegations and was procedurally flawed. Further, PJM represents that, in full compliance with the Tariff, all data and work papers underlying the System Impact Studies have been previously provided by PJM to TranSource. Therefore, PJM argues that the PLS-CADD files are not related work papers which must be provided to TranSource under section 205.4.2 (Materials for Customers) of the PJM Tariff.[10]

II. Rulings by the ALJ

6. On October 13, 2016, TranSource filed a Motion to Compel discovery from the PJM TOs of the PLS-CADD files. On October 26, 2016, oral argument was held and the ALJ granted, in part, TranSource's Motion to Compel. Specifically, the ALJ authorized discovery of the PLS-CADD files regarding circuits owned by PJM TOs prepared on or after March 1, 2014 for every facility listed in two System Impact Study Reports prepared by PJM.[11] In response, PJM TOs made an oral Motion to Permit Interlocutory Appeal.[12] In a bench ruling, the ALJ denied PJM TOs' motion.[13] The ALJ also ruled that, with regard to the PLS-CADD files, "out of an abundance of caution I will require that they be submitted under the highly sensitive protected material document."[14] In addition, the ALJ stayed the requirement to provide the PLS-CADD files and deferred the requirement to file direct testimony, scheduled for October 31, 2016, pending the outcome of the Interlocutory Appeal.[15]

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[9] September 2015 Order, 152 FERC ¶ 61,229 at P 13 (citing PJM's July 10, 2015 Answer at 2).

[10] September 2015 Order, 152 FERC ¶ 61,229 at P 14 (citing PJM's July 10, 2015 Answer at 8).

[11] Interlocutory Appeal at 1-2.

[12] Transcript at 166-169.

[13] *Id.* at 162-165.

[14] *Id.* at 163-164.

[15] *Id.* 169-170.

III. Interlocutory Appeal

7. On October 28, 2016, PJM TOs filed the instant Interlocutory Appeal, seeking Commission review of the October 26, 2016 bench ruling that permitted (but stayed) discovery of the PJM TOs' PLS-CADD files. Specifically, PJM TOs argue that the issue of whether TranSource is entitled to receive PLS-CADD files is among the issues set for hearing by the Commission, and therefore should not be decided in a bench ruling on a motion to compel discovery.[16] PJM TOs further argue that TranSource has failed to demonstrate that the PJM TOs' PLS-CADD files are relevant to PJM's performance of the TranSource System Impact Studies.[17] By contrast, PJM TOs unequivocally assert that they do not use PLS-CADD files as part of the System Impact Study process.[18]

8. PJM TOs argue that TranSource is improperly and prematurely attempting to utilize the discovery process in this proceeding to obtain the very relief that TranSource sought in its Complaint well in advance of the completion of the hearing process ordered by the Commission. Specifically, PJM TOs state:

> TranSource seeks to obtain through discovery the exact files that it sought as relief in its First Complaint and the first count of its Amended Complaint. Permitting TranSource to obtain those files through discovery grants TranSource the relief it sought in its complaint, contrary to the hearing orders that set the issue of whether TranSource could obtain the files for hearing. Thus, irreparable harm occurs once the files are provided in discovery because the files are trade secrets and/or proprietary information.[19] Only after hearing and a determination that TranSource

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[16] Interlocutory Appeal at 7-12. As PJM notes in its November 2, 2016 Answer at 2, "PJM did not use the [PLS-CADD] files to prepare the Impact Studies. The [PJM TOs] did not use the [PLS-CADD] files to prepare the information they provided PJM for use in the Impact Studies. These facts are not contested. TranSource nonetheless argued that it requires the [PLS-CADD] files in discovery because they provide detailed information that TranSource could use to challenge the estimates in PJM's [System] Impact Studies."

[17] *Id.*at 12-17.

[18] *Id.*, Attachment B (Declaration of David R. Kozy Jr. and Lawrence E. Hozempa) at 2-3 (October 27, 2016).

[19] *Id*. at 6 (referencing *Mojave Pipeline Co*., 38 FERC ¶ 61,249, at 61,842 (1987) ("a party claiming that confidential material should be withheld entirely will be expected to show that a protective order will not adequately safeguard its interests and that this concern outweighs the need for the material to develop the record").

should be granted its requested relief should TranSource obtain the PLS-CADD files.[20]

9. PJM TOs further explain that a protective order is not a sufficient safeguard because these models include trade secrets and are highly confidential. PJM TOs state that the PLS-CADD files are not shared with other entities, including other transmission owners, and that they are the exclusive intellectual property of each of the individual PJM TOs.[21] Thus, PJM TOs argue that TranSource must make its case on the record before any determination regarding TranSource's access to the PLS-CADD files can be made.[22] PJM TOs add that if TranSource alone is given access to the PLS-CADD files it could get "a leg up" on its competitors.[23]

IV. TranSource Answer

10. On November 9, 2016, TranSource filed an Answer to the Interlocutory Appeal. TranSource claims, *inter alia*, that the PLS-CADD files it seeks are directly relevant to the issues considered in this proceeding.[24] Moreover, TranSource argues that there is no need for TranSource to demonstrate that the PLS-CADD files "were directly used in developing the System Impact Studies," rather it must show "only that the PLS-CADD files are relevant to its Complaint."[25] TranSource further claims that the September 2015 Order and the May 2016 Orders do not limit discovery by TranSource regarding the PLS-CADD files.[26]

11. TranSource explains that the PLS-CADD files are (and always have been) one of several means to understanding and assessing the reasonableness of PJM's proposal to assign more than $1.5 billion in network upgrade costs to TranSource. TranSource argues that PLS-CADD files are not the "end game" of the litigation, as the PJM TOs have claimed. TranSource asserts that without the PLS-CADD files, it is being asked

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[20] *Id*.

[21] *Id*. at 7.

[22] *Id.*

[23] *Id.* at 16.

[24] TranSource Answer at 5.

[25] *Id.*

[26] *Id.* at 7-8

to fully litigate its case before obtaining the material it needs to fully litigate the case. TranSource claims that delaying resolution of this narrow discovery dispute until the completion of the evidentiary hearing would substantially hinder TranSource's efforts to prepare its direct testimony and thus prosecute its Complaint. According to TranSource, the production of the narrow set of requested PLS-CADD files is a decision appropriately made at this juncture of the litigation process, and the ALJ's determination that the PLS-CADD files are relevant and must be provided is eminently reasonable.[27]

12. TranSource also questions the credibility of the PJM TOs' claim that disclosure of the PLS-CADD files would cause "irreparable harm."[28] TranSource believes that PJM-TOs concerns are fully addressed by the ALJ's ruling that "PLS-CADD files are to be designated as highly sensitive protected materials, thus restricting access to the information to only qualified individuals subject to the Protective Order.[29] TranSource further argues that PJM TOs have provided no evidence that the Protective Order in place will fail to adequately safeguard their interests.[30]

13. TranSource asserts that there are two reasons that the PLS-CADD files are not trade secrets or proprietary. First, TranSource argues that the PLS-CADD files are used worldwide for transmission modeling and analysis. TranSource explains that the purpose of PLS-CADD files is to identify physical and electrical obstructions and limitations. TranSource argues that it is unclear what data within this narrow set of files is proprietary to the PJM TOs, other than the information needed to develop or confirm accurate facility ratings and information needed to determine whether System Impact Study reports that assign $1.5 billion in network upgrade costs are reasonable. TranSource states that it is not asking for PLS-CADD files for an indefinite time period or even for all of the facilities owned by each transmission owner. Rather, TranSource is only requesting the files related to the facilities listed in the disputed System Impact Studies, to analyze those specific circuits and facilities, and only for the time periods in question in this proceeding.[31]

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[27] *Id.* at 8.

[28] *Id.* at 9-10.

[29] *Id.* at 11-12.

[30] *Id.* at 11.

[31] *Id.* at 9.

14. TranSource further argues that it is striking that the PJM TOs are concerned about potentially giving TranSource a competitive advantage by handing over this narrow set of PLS-CADD files, but are not concerned with their own competitive advantage in the open transmission development market by refusing to provide the files – in so doing, working against the Commission's pro-competition policies. TranSource claims that the reason the PJM TOs have not stated with any particularity what kind of proprietary information is contained within the PLS-CADD files is because there are no trade secrets contained in PLS-CADD files.[32]

V. Determination by Motions Commissioner

15. On November 4, 2016, the Chairman, acting as Motions Commissioner pursuant to Rule 715 of the Commission's Rules of Practice and Procedure, determined "that the PJM TOs have demonstrated extraordinary circumstances, in accordance with Rule 715(c)(5) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.715(c)(5) (2016), that make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person."[33] Accordingly, the Chairman referred the Interlocutory Appeal to the full Commission.[34]

VI. Discussion

16. We find that the question of whether TranSource is entitled to receive the PLS-CADD files was specifically set by the Commission for a trial-type evidentiary hearing and is not merely a discovery issue.[35] As part of the relief requested in its initial Complaint,[36] TranSource asked that PJM be ordered to provide to TranSource the

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[32] *Id.* at 10.

[33] Notice of Determination.

[34] Once the matter is referred to the Commission, under 18 C.F.R. § 715(d) (2016), the Commission must act within 15 days of the referral, or the ruling will be reviewed by the Commission in the ordinary course of the proceeding as if the appeal had not been made, and the Judge's ruling will effectively be upheld.

[35] *See* September 2015 Order, 152 FERC ¶ 61,229 at P 29. The Commission set "the [c]omplaint for investigation and trial-type evidentiary hearing under section 206 of the FPA for all issues raised in this proceeding."*Id.*

[36] TranSource expressly incorporated its initial Complaint into its Amended Complaint. TranSource February 10, 2016 Amended Complaint at 1.

requested data, assumptions and working papers specified in the Appendix.[37] In Appendix A of its Complaint, TranSource seeks for each and every circuit listed:

> All work papers which were used to determine the cost estimates associated with each circuit. Including but not limited to:
>
> a. The PLS-CADD.BAK files associated within each circuit containing all classified LiDAR points, dates of collection, amperage and other customarily associated data supporting such files.[38]

17. The ALJ's ruling to allow discovery of the PLS-CADD files during the course of the hearing grants TranSource a portion of the relief it requested in its complaint and is among the issues the Commission set for hearing. In other words, providing TranSource with the PLS-CADD files before proper conclusion of the hearing would grant TranSource its requested relief, without the direct testimony, rebuttal testimony, cross examination or other steps to test in a trial-type evidentiary hearing whether such relief should be granted in the first place. We find that the parties' concerns, including those raised by TranSource in its answer, related to the relevance of the PLS-CADD files and any potential harm associated with their discovery can be reviewed through the more robust hearing process established by the September 2015 order.

18. Accordingly, we grant PJM TOs' Interlocutory Appeal and vacate the ALJ's ruling granting TranSource's motion to compel. By our doing so, however, we do not bar the ALJ from structuring the hearing so that he may make an initial and separate determination in an initial decision on the request by TranSource for access to the PLS-CADD files, before a hearing on the rest of the Complaint.

<u>The Commission Orders</u>:

(A) PJM TOs Interlocutory Appeal is hereby granted, as discussed in the body of this order.

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[37] TranSource June 23, 2015 Complaint at 6.

[38] *Id.* at Appendix A.

(B) The ALJ's ruling granting a motion to compel to TranSource is hereby vacated, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.