

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, LLC

Docket Nos. ER03-262-010,
ER03-262-009,
ER03-262-013,
EC98-40-008,
ER98-2770-009,
ER98-2786-009

ORDER DENYING EMERGENCY MOTION FOR STAY

(Issued July 15, 2004)

1. On June 29, 2004, the Virginia State Corporation Commission (VSCC) filed an emergency motion for a temporary stay of the Commission's Opinion No. 472 issued June 17, 2004.¹ The Commission denies the motion as discussed in this order. This order benefits the public because it helps bring about the integration of a utility into an RTO.

Background

2. In Opinion No. 472, the Commission affirmed an initial decision finding under section 205(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA) that the laws and actions of the Commonwealth of Virginia would, within a very short time, prohibit or prevent American Electric Power Service Corporation (AEP) from integrating into PJM Interconnection, LLC (PJM) by October 1, 2004, the date on which integration is to take place.² As a result, the Commission may exercise its authority under section 205(a) to override the laws, regulations, or actions of Virginia that block AEP from

¹ *Opinion on Initial Decision and Order on Rehearing*, Opinion No. 472, 107 FERC ¶ 61,271 (2004).

² 107 FERC ¶ 61,271 at P 74, 76, and 128.

integrating into PJM. The Commission made AEP's filing in Docket No. ER03-262-000 to integrate into PJM effective October 1, 2004, subject to conditions. The Commission stated that if the VSCC has not reached a decision in time to bring about integration on October 1, 2004, or if it denies AEP's application, Opinion No. 472 will nevertheless require the integration of AEP into PJM on that date.³

3. On June 29, 2004, the VSCC filed an Emergency Motion for Temporary Stay (Motion) of Opinion No. 472 and a request for an expedited ruling on its Stay Motion. The VSCC asks the Commission to stay Opinion No. 472 until at least thirty days after the Commission has acted on the merits of a rehearing request which the VSCC will file on or before July 19, 2004. The VSCC asks the Commission to issue an order on its Motion no later than July 15, 2004 and states it will seek a judicial stay of Opinion No. 472 on July 16, 2004, should the Commission not issue a ruling on its Motion by that date.

4. The VSCC states that Virginia law requires AEP to join an RTO no later than January 1, 2005, subject to VSCC approval, and that the VSCC hearing on AEP's application to join PJM will begin on July 27, 2004. The VSCC states the likelihood of a VSCC order disposing of the matter before October 1, 2004, is very high and also that a settlement comparable to that between the Public Service Commission of the Commonwealth of Kentucky (KPSC) and AEP might be reached.⁴ If the stay is granted, the VSCC states these events may render Opinion No. 472 moot.

5. The VSCC asserts the Commission has granted stays in other proceedings and that justice requires granting a stay in this case.⁵ The VSCC asserts the Commission considers the following factors in determining whether justice requires granting a stay:

³ 107 FERC ¶ 61,271 at P 74.

⁴ New PJM Companies and PJM Interconnection, L.L.C., *Order Approving Contested Settlement*, 107 FERC ¶ 61,272 (June 17, 2004).

⁵ The VSCC cites *Blumenthal v. NRG Power Marketing, Inc.*, 104 FERC ¶ 61,046 at P 7-9, 11-14 (2003) (citing 5 U.S.C. § 705) (*Blumenthal*).

- (1) whether the moving party would be irreparably injured in the absence of a stay,
- (2) whether other parties would be substantially harmed if the stay is granted, and
- (3) whether granting the stay would be in the public interest.⁶

6. The VSCC states it will suffer irreparable harm if a stay is not granted because it will be prevented from fully administering the laws of Virginia to protect the public interest. It asserts Opinion No. 472 may allow AEP to integrate into PJM without Virginia approval, contrary to Virginia law.⁷ The VSCC contends that its hearing on AEP's application is rendered meaningless because it can only approve the application or approve it with unspecified reasonable conditions, but may not disapprove the application, approve with conditions not acceptable to the Commission, or defer decision while requiring additional information. The VSCC asserts Opinion No. 472 denies the rights of Virginia citizens to petition their government, protest the proposed transfer, and suggest meaningful conditions for transfer. The VSCC also asserts Opinion No. 472 provides no guidance or explanation as to what the reasonable conditions are that it may impose, nor does it indicate what would constitute timely action for the VSCC.

7. VSCC claims irreparable harm, arguing that, absent a stay the citizens of Virginia will be forced to pay administrative costs due solely to AEP's integration into PJM, and that costs exceed benefits to ratepayers of integration. These costs, it states, include a portion of AEP's \$85 million to integrate seven utilities into PJM and a portion of PJM's \$63 million to integrate AEP and three other utilities. The VSCC asserts refund of these costs is unlikely even if the integration is reversed on rehearing.

8. The VSCC asserts granting the stay will not substantially harm other parties as the delay requested is only temporary and customers would benefit from preventing the incurrence of administrative costs in the event Opinion No. 472 is later reversed. The VSCC also asserts granting a stay would be in the public interest because it would: preserve states' sovereign authority to protect the public health, safety, welfare, and the environment; maintain AEP's obligation to comply with Virginia's Restructuring Act; allow the VSCC to exercise its authority; and prevent the incurrence of integration-related costs.

⁶ The VSCC cites *CMS Midland, Inc.* 56 FERC ¶ 61,177 at 61,631 (1991) (*Midland*), *aff'd sub nom.* *Michigan Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir.), *cert. denied*, 510 U.S. 990 (1993); *Kansas Pipeline Co.*, 81 FERC ¶ 61,250 at 62,133 (1997).

⁷ The VSCC cites section 56-579.A.1 of the Virginia Electric Utility Restructuring Act, Chapter 23, §§ 56-576 through 56-595 of Title 56 of the Code of Virginia.

9. The Commission shortened the comment period on the VSCC's Motion to and including July 6, 2004. Edison Mission Energy, Edison Mission Marketing & Trading, Inc. and Midwest Generation EME, LLC (collectively, Edison Mission); Exelon Corporation (Exelon); the Pennsylvania Public Utility Commission (PA PUC); and PJM filed answers opposing the Motion. The Commonwealth of Virginia filed an answer in support of the Motion.

Discussion

10. The Commission denies the VSCC's emergency motion for temporary stay of Opinion No. 472. Under the Administrative Procedure Act, the Commission may grant a stay when justice so requires.⁸ In deciding whether to grant a stay, the Commission has in some cases considered factors such as whether the moving party would be irreparably harmed absent a stay, whether other parties will be harmed if a stay is granted, and whether granting the stay is in the public interest.⁹ In this case, the Commission finds justice does not require granting a stay.

11. The Commission has already considered the issues of harm and the public interest in Opinion No. 472. In the Opinion, the Commission determined that it would be necessary to preempt the exercise of Virginia law insofar as it seeks to prevent or delay the integration of AEP into PJM. As discussed in prior orders in this proceeding, the Commission had determined that AEP's integration with PJM should go forward.¹⁰ This decision was based on the need for certainty by all parties in the Midwest and Mid-Atlantic markets, the necessity of implementing the merger conditions placed on AEP to join an RTO, operational concerns, and also on the Commission's policy of bringing the benefits of RTOs to the public. In addition, at the time Opinion No. 472 was issued, to the extent a conflict existed among the states as to whether AEP should join PJM, most of the concerned states were in favor, and, ultimately, only Virginia opposed. Thus, the Commission in finding that it may exercise its authority under section 205(a) of PURPA, has determined that the integration of AEP into PJM is in the public interest because any claimed harm to Virginia will be outweighed by the benefits to the customers of Virginia and other states.

⁸ 5 U.S.C. § 705.

⁹ California Independent System Operator Corp., 105 FERC ¶ 61,181 at P 5 (2003); *Blumenthal*, 104 FERC ¶ 61,046 at P 7-9, 11-14 (2003).

¹⁰ 107 FERC ¶ 61,271 citing *New PJM Companies*, 105 FERC ¶ 61,251 at P 93-97 (2003).

12. Moreover, as PJM points out in its Answer, certainty remains a crucial issue for market participants. We agree with PJM that market participants would suffer substantial harm if there is insufficient time to prepare for the October 1, 2004 integration. We also agree with some of the comments that the VSCC may have been able to expedite its hearing and arrive at a disposition earlier.¹¹ Market participants must obtain Financial Transmission Rights/Auction Revenue Rights, undergo participant training, learn outage reporting, make OASIS reservations, and understand energy scheduling as part of the integration process. In addition, AEP's integration eliminates the current limited 500 MW pathway arrangement for Commonwealth Edison Company (ComEd), and creates a single, contiguous regional energy market encompassing the Mid-Atlantic, AEP, Dayton Power & Light, and ComEd. We found in Opinion No. 472 that we agree with PJM that the effects of AEP's integration into PJM are beneficial and far-reaching;¹² certainty is needed as to when integration will occur so that affected parties may plan accordingly.

13. Granting the stay also would not prevent the incurrence of the costs by PJM of which the VSCC complains.¹³ PJM states that it has already completed virtually all of the capital improvements needed for AEP's integration, in keeping with the Commission's approval of AEP's RTO choice on April 1, 2003.¹⁴ Much of the work was done in the fall of 2003 and virtually all of the remaining improvements have since been completed. PJM states the Commission's Chief Accountant has approved deferring depreciation of these assets and accrual of carrying charges on the deferred amounts until AEP's integration into PJM.¹⁵ PJM states that delaying AEP's integration only means that the carrying charges will continue to accrue and grow which means a stay could actually increase, rather than decrease, integration costs. PJM also states that under

¹¹ Answer of Exelon at 8 and n.5; Answer of Edison Mission at 11-12.

¹² 107 FERC ¶ 61,271 at P 45-46, 51-52, 56.

¹³ Edison Mission states that AEP has already incurred most of its integration costs as well. Answer of Edison Mission at 7.

¹⁴ American Electric Power Service Corp., *et al.*, 103 FERC ¶ 61,008 (2003).

¹⁵ PJM Interconnection, L.L.C., 105 FERC ¶ 61,166 (2003).

certain circumstances it may recover its AEP integration costs even if the integration does not go forward. In any event, claims of economic harm, in and of themselves, do not constitute irreparable harm¹⁶ and thus would ordinarily not be grounds for granting a stay.

14. As discussed in Opinion No. 472, the VSCC has not moved expeditiously to consider AEP's application to join PJM.¹⁷ It waited nearly a year after AEP filed its amended application to require AEP to supplement its application with additional information, including a cost-benefit analysis. Even after the issuance of this Commission's November 25 Order requiring AEP to integrate with PJM by October 1, 2004, the VSCC did not establish a procedural schedule for the application until January 2004, and did not schedule the hearing to begin until July 27, 2004. In balancing the interests of Virginia against other parties supporting the integration, this factor also militates against granting a stay at this stage, which will only delay the integration further.

15. However, as the Commission stated in Opinion No. 472, "to the extent the VSCC is able to complete its proceedings prior to the date of integration [i.e., October 1, 2004] and reaches agreement as to reasonable conditions relating to integration that do not prevent or prohibit integration, the Commission is open to considering such provisions."¹⁸ The VSCC asks for clarification of the reasonable conditions the Commission will consider. The Commission cannot specify what specific conditions it might find reasonable, depending on the circumstances, but will have to consider the

¹⁶ *Blumenthal*, 104 FERC ¶ 61,046 at P 9 (2003) (*citing* *Samson v. Murray*, 415 U.S. 61,90 (1974), which quoted *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F. 2d 921,925 (D.C. Cir. 1958)); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("It is also well settled that economic loss does not, in and of itself, constitute irreparable harm.").

¹⁷ 107 F.E.R.C. ¶ 61,271, at P 71.

¹⁸ 107 FERC ¶ 61,271 at P 4.

conditions on which the parties can reach agreement, when and if presented to it.¹⁹ The Commission, for example, is not seeking to interfere with the VSCC's exercise of its legitimate authority to regulate state-jurisdictional rates. .

The Commission orders:

The emergency motion for temporary stay is denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

¹⁹ Conditions that have previously been found acceptable in similar circumstances include provisions relating to voluntary participation in markets, curtailment, demand response programs, treatment of rate base assets, bundled retail service, and other matters. *New PJM Companies and PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,272 at P 8, 16-32 (2004).