

107 FERC ¶ 61,271
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New PJM Companies	Docket Nos.
American Electric Power Service Corp.	ER03-262-010,
On behalf of its operating companies	ER03-262-009,
Appalachian Power Company	ER03-262-013,
Columbus Southern Power Company	EC98-40-008,
Indiana Michigan Power Company	ER98-2770-009,
Kentucky Power Company	ER98-2786-009
Kingsport Power Company	
Ohio Power Company, and	
Wheeling Power Company	
Commonwealth Edison Company, and	
Commonwealth Edison Company of Indiana, Inc.	
The Dayton Power and Light Company,	

and

PJM Interconnection, LLC

OPINION NO. 472

OPINION ON INITIAL DECISION AND ORDER ON REHEARING

(Issued June 17, 2004)

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1. In this order the Commission affirms an initial decision finding that the Commission may act under section 205(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹ and permit American Electric Power Service Corporation (AEP or AEP-East) to integrate into PJM Interconnection, LLC (PJM) over the objection of the Commonwealth of Virginia. The Commission additionally grants in part and denies in part requests for rehearing of a prior order in this proceeding.

2. This case, as the ALJ pointed out, requires the Commission to reconcile conflicting state positions.² AEP-East operates in Pennsylvania, Ohio, Michigan, Indiana, Virginia, and Kentucky. Pennsylvania, Ohio, Michigan, and Indiana support AEP's integration into PJM. Kentucky initially opposed AEP's integration into PJM, but, pursuant to a settlement also being approved today, is now withdrawing its opposition to integration. Virginia's laws, rules and regulations, however, continue to stand in the way of AEP's integration into PJM, although the Virginia Attorney General has indicated that its office may support integration in hearings before the Virginia State Corporation Commission (Virginia Commission). Thus, the Commission is required to arbitrate between these state interests as it also seeks to fulfill its mandate under the FPA to ensure

¹ 16 U.S.C. § 824a-1(a) (2000).

² "This case presents a dispute between conflicting views of different groups of states," and involves the question of whether the actions of some states "may effectively preempt other states from enforcing their own orders, which would frustrate state initiatives designed to achieve the benefits of regional coordination." The ALJ further noted that "this is not a case where two states are being pressured by a federal agency to comply with a federal scheme that might prove disadvantageous to them. It is, instead, one that is attempting to decide whether the legal actions of two states are impeding and frustrating the desires of other states in a particular region . . . to improve regional coordination for the benefit of the entire region." Initial Decision at P 9-11.

just and reasonable rates, terms, and conditions of service, and under PURPA to facilitate the voluntary coordination of utilities to enable the economic utilization of their facilities on a region-wide basis.

3. In a companion order also issued today,³ the Commission is approving a settlement among PJM, AEP and the Public Service Commission of the Commonwealth of Kentucky (Kentucky Commission), pursuant to which Kentucky will approve the application of AEP's Kentucky operating company, Kentucky Power Company (AEP-Kentucky) to transfer control of its transmission facilities to PJM. Thus, the Kentucky Commission is withdrawing the exceptions it earlier filed to the Initial Decision being affirmed here.

4. The Commission recognizes that the Virginia Commission is considering whether Appalachian Power Company (AEP-Virginia), which is owned by AEP, should join PJM. While we would prefer that Virginia complete its state proceeding prior to our decision in this case, the current schedule does not provide for the Virginia Commission's hearing to begin until July 27, 2004.⁴ We are concerned that such a schedule will not provide adequate notice to the market participants to permit AEP to join PJM as of October 1, 2004, the date set forth in our November 25, 2003 Order.⁵ The Commission believes that AEP, PJM, and their customers need greater certainty for the integration to be able to proceed on that date, and therefore the Commission is invoking its authority under PURPA section 205 at this time. However, to the extent that the Virginia Commission is able to complete its proceedings prior to the date of integration 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. By taking this action at this time, however, we are ensuring that integration can occur on October 1.

³ New PJM Companies, 107 FERC ¶ 61,272 (2004).

⁴ The Virginia Commission denied a request to accelerate that schedule. Virginia State Corporation Commission, In re Application of Appalachian Power Company d/b/a American Electric Power-Virginia, Order Denying Motion, Docket No. PUE-2000-00550 (Feb. 18, 2004), available at <http://docket.scc.state.va.us:8080/vaprod/main.asp> (last visited June 17, 2004).

⁵ New PJM Companies, et al., 105 FERC ¶ 61,251 (2003) (November 25 Order).

I. BACKGROUND

A. Order No. 2000

5. On December 20, 1999, the Commission issued Order No. 2000, in which the Commission found that there remained important transmission-related impediments to a competitive wholesale market, falling into two broad categories: (1) the engineering and economic inefficiencies inherent in traditional operation and expansion of the grid, and (2) continuing opportunities for transmission owners to unduly discriminate with regard to the operation of their systems to favor their own or affiliated interests.⁶

6. The Commission found that independent, regionally-operated transmission grids would enhance the benefits of competitive electricity markets by improving efficiencies in grid management and grid reliability, by removing remaining opportunities for discriminatory transmission practices, and by improving market performance.⁷

7. The Commission's objective in Order No. 2000 was for all transmission-owning entities to place their transmission facilities under the control of an appropriate Regional Transmission Organization (RTO) in a timely manner. The Commission recognized that there may be no "one size fits all" solution, and therefore adopted a voluntary process of RTO formation: it established minimum characteristics and functions that an RTO must satisfy and retained flexibility for future improvements.⁸

B. AEP Merger Proceedings

8. On April 30, 1998, AEP and Central and South West Corporation (CSW) filed an application with the Commission for approval of a proposal to consolidate their jurisdictional facilities through a merger. The proposal raised numerous concerns that the

⁶ Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 at 31,033 (1999), order on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (Feb. 25, 2000), FERC Stats. & Regs. ¶31,092, petitions for review dismissed sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

⁷ Id. at 30,993.

⁸ Id. at 31,221.

merged company could frustrate competition. On November 10, 1998, the Commission issued an order setting the merger application for hearing.⁹

9. On May 24, 1999, and July 13, 1999, AEP and Commission Staff filed stipulations which resolved certain issues raised by the merger proposal. In particular, to resolve market power concerns, AEP agreed to transfer the operation and control of the bulk transmission facilities in its east zone (i.e., AEP-East) and west zone (the former CSW system) to a Commission-approved RTO or RTOs. On March 15, 2000, the Commission issued an order finding that AEP's commitment to join an RTO removed the concerns that AEP would be able to use transmission to frustrate competition or favor marketing affiliates.¹⁰ The Commission also noted that the state commissions of eight states had either reached settlements with AEP and CSW or had no objections to the merger.¹¹ The Commission therefore approved the merger of AEP and CSW, conditioned upon AEP's transferring operational control of its transmission facilities to a Commission-approved RTO by December 15, 2001.¹²

C. AEP's Attempts To Join an RTO

10. On June 3, 1999, AEP and other applicants (collectively, Alliance Companies) filed an application to create the Alliance RTO.¹³ On December 20, 2001, however, the

⁹ American Electric Power Co., et al., 85 FERC ¶ 61,201 (1998), reh'g denied, 87 FERC ¶ 61,274 (1999).

¹⁰ American Electric Power Co., et al., Opinion No. 442, 90 FERC ¶ 61,242 (2000), order on reh'g, 91 FERC ¶ 61,129 (2000) (affirming in relevant part), appeal denied sub nom. Wabash Valley Power Ass'n v. FERC, 268 F.3d 1105 (D.C. Cir. 2001) (Court denied Wabash's petition for review of FERC's order).

¹¹ Missouri, Ohio, and Michigan Commissions reached a settlement or withdrew their objections to the merger. Louisiana, Arkansas, Indiana, Kentucky, Oklahoma, and Texas Commissions conditionally approved the merger, pending the outcome of the Commission's proceeding and final action by other relevant authorities. Opinion No. 442 at 61,778-79.

¹² Opinion No. 442 at 61,788-89.

¹³ The original Alliance Companies were AEP, Consumers Energy Company, The Detroit Edison Company, First Energy Corporation, and Virginia Electric and Power Company.

Commission ruled that Alliance could not meet the necessary criteria for an RTO.¹⁴ On April 25, 2002, the Commission issued an order directing the former Alliance Companies to make a filing stating which RTO they intended to join.¹⁵ AEP, on May 28, 2002, submitted a filing stating its intent to join PJM, and the Commission conditionally approved AEP's filing on July 31, 2002.¹⁶ On December 11, 2002, AEP filed for approval to transfer control of its transmission facilities to PJM, and the Commission approved that application on April 1, 2003.¹⁷

11. On December 19, 2002, AEP (or its operating companies) filed with the state commissions of Virginia, Kentucky, Indiana, and Ohio for permission to transfer functional control of transmission facilities to PJM.¹⁸ As discussed below, these applications have been addressed but not yet fully resolved. Three of the four state commissions have timely addressed the AEP applications.¹⁹

12. In March 1999, the Commonwealth of Virginia enacted the Virginia Electric Restructuring Act, which, among other things, required Virginia electric utilities to join regional transmission entities on or before January 1, 2001.²⁰ In April 2003, however, the Virginia General Assembly passed HB 2453, which amended this statute to prohibit Virginia electric utilities from transferring control of their transmission facilities to RTOs until July 1, 2004. The amended Virginia legislation provides that electric utilities must transfer control of their facilities to RTOs by January 1, 2005, but only after approval of

¹⁴ Alliance Companies, et al., 97 FERC ¶ 61,327 (2001).

¹⁵ Alliance Companies, et al., 99 FERC ¶ 61,105 (2002).

¹⁶ Alliance Companies, et al., 100 FERC ¶ 61,137 (2002).

¹⁷ American Electric Power Service Corp., et al., 103 FERC ¶ 61,008 (2003).

¹⁸ Ex. AEP-1 at 11.

¹⁹ Ex. AEP-1 at 13-14. The Kentucky Commission issued its first order on AEP's application on July 17, 2003 (and Kentucky's concerns have been ultimately resolved by the settlement also approved today by the Commission). Indiana conditionally approved AEP's application on September 10, 2003. Ohio ruled on February 20, 2003, that it could not meaningfully review Ohio utilities' RTO applications at that time due to unresolved issues, but "Ohio has been supportive of utilities joining RTOs and has urged FERC to facilitate AEP's entry into PJM." Id.

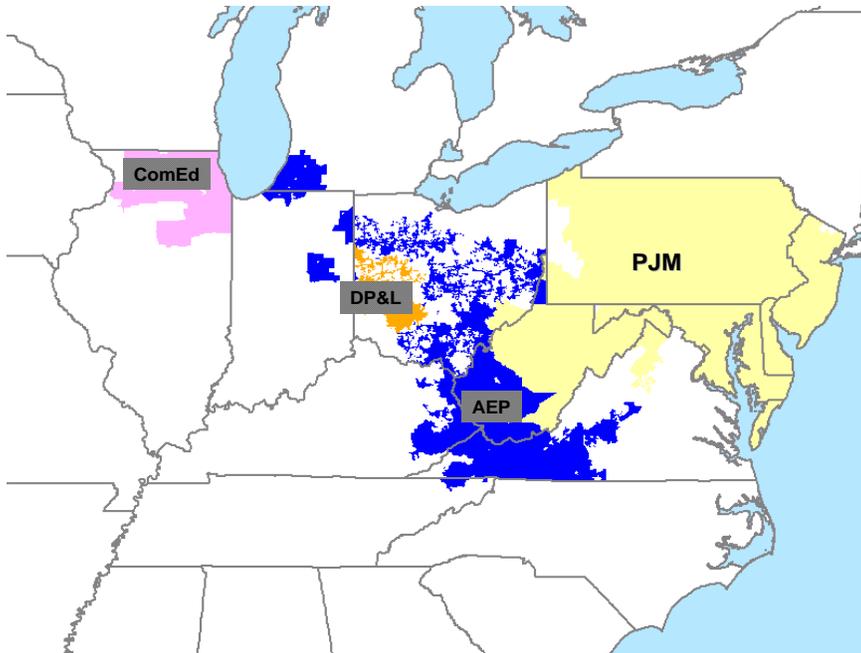
²⁰ Va. Code Ann. §§ 56-576 to 56-595.

the Virginia Commission. Additionally, on July 17, 2003, the Kentucky Public Service Commission (Kentucky Commission) initially denied a request made by AEP-Kentucky, to transfer control of its transmission facilities to PJM, but as more fully described below, the Commission is today approving a settlement that will enable Kentucky to withdraw its objections to the integration of AEP-Kentucky into PJM.

D. Commission Inquiry

13. On September 12, 2003, the Commission initiated a proceeding to resolve issues relating to AEP's entry into PJM. Because of the geographic location of the parties – AEP is located between the service territory of the classic PJM companies to the east of AEP and Commonwealth Edison Company's (ComEd) and Dayton Power and Light's (DP&L) service territory to the west of AEP²¹ – parties objected to ComEd's participation in PJM without AEP. Additionally, DP&L has stated that the regulatory and legal

²¹ See map below.



Source: PowerMap

uncertainty delaying AEP's integration into PJM also delays DP&L's integration into PJM.²² Hearings were held before the Commission and an administrative law judge (ALJ) on September 29 and 30, 2003.

14. The majority of parties testifying at the inquiry supported the integration of AEP into PJM. For example, the Indiana Commission maintained that the public interest is best served by having AEP as a member of an RTO, and the Illinois, Indiana, Michigan, and Pennsylvania Commissions joined in urging the Commission to require AEP to fulfill its merger conditions and promptly join an RTO.²³ However, the Virginia and Kentucky Commissions, along with other parties, opposed the entry of AEP into PJM, asserting that the Commission was seeking to preempt the appropriate exercise of state jurisdiction over the question of whether utilities in those states should become RTO members.²⁴

15. A number of parties argue that the Commission alone can address regulatory conflicts between state and federal jurisdiction over RTO membership, and that until it acts to do so, state commissions will continue to raise barriers to RTO membership and "target dates will become moving targets."²⁵ The Public Utilities Commission of Ohio (Ohio Commission) stated that the August 14, 2003 outage demonstrates that it is time for the Commission to act to resolve differences in the Midwest by ensuring creation of a complete joint and common market between PJM and Midwest Independent Transmission System Operator, Inc. (Midwest ISO).²⁶

E. The Commission's November 25 Order

16. On November 25, 2003, the Commission issued an order finding that the market power concerns that resulted in AEP's merger commitment in 2000 are still present, and that until AEP fulfills its commitment to join an RTO, these potential market power

²² November 25 Order at P 21.

²³ The referenced state utility commissions are: Illinois Commerce Commission, Indiana Utility Regulatory Commission, Michigan Public Service Commission, and Pennsylvania Public Utility Commission.

²⁴ November 25 Order at P 33-38.

²⁵ Id. P 44.

²⁶ Id. P 49.

concerns would prevent the Commission from ensuring that rates, terms, and conditions of service are just and reasonable and not unduly discriminatory or preferential,²⁷ as required by the Federal Power Act (FPA).²⁸

17. The Commission further stated that, absent AEP's integration into PJM, reliability problems may be created by the fact that AEP uses Transmission Loading Relief (TLR), a non-market mechanism, to manage congestion, while PJM manages congestion on its system through the use of Locational Marginal Pricing (LMP) and Midwest ISO anticipated adopting LMP when its markets progress to the next phase of operation. PJM's market monitor has stated that there are significant loop flows at the PJM-AEP seam that could be better managed if AEP fully integrates into PJM's markets.²⁹

18. The Commission also expressed concern that AEP's exclusion from PJM's markets and its inability to fulfill its voluntary commitment would result in (1) market dysfunctions, (2) opportunities for gaming, or (3) perceptions in the marketplace that market dysfunctions or gaming exist, because any of these will interfere with both developing and existing competitive electricity markets.³⁰

19. Finally, the Commission recognized that markets in the Midwest and Mid-Atlantic were in a state of significant uncertainty as a result of conflicting state views and shifting decisions by companies as to which RTO to join, and that absent some definitive resolution, both states and affected companies would continue to reevaluate the choices of utilities to join or not join an RTO, and which RTO to join. The Commission found that with such uncertainty, RTOs would never fully deliver their potential benefits to customers. It cited the Chairman of the Ohio Commission, who stated: "The overwhelming message that has come through in this proceeding is that this stuff can go on and on and on, a classic clash between public policy and private interests... Now I have to tell you it's time to pull the trigger. I implore you to do that very quickly, because this will go on for a very, very long time otherwise."³¹

²⁷ Id. P 56-58.

²⁸ 16 U.S.C. § 824b (2000).

²⁹ November 25 Order at P 71-77.

³⁰ Id. P 78-84.

³¹ Id. P 87 (citing inquiry transcript at pages 286-90).

20. The Commission therefore found that AEP's application to join PJM needed to go forward.³² The Commission cited its authority under section 203(b) of the FPA, which allows the Commission to impose "such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission," and, if necessary, issue further orders "supplemental to" orders made under this section. Under this authority, the Commission preliminarily found that, unless AEP was able to fulfill its commitment to join an RTO, it would be operating in a manner that could allow for the exercise of significant market power through its control of transmission, to the detriment of customers. The Commission ruled that AEP's commitment to join PJM needed to be accomplished quickly, and established the October 1, 2004 date for that integration to occur.

21. The Commission also concluded that, under the circumstances of this case, it was appropriate to use its authority under section 205(a) of PURPA to override the objections of the Kentucky and Virginia Commissions and to permit AEP to complete its integration into PJM. Section 205(a) provides:

The Commission may, on its own motion, and shall, on application of any person or governmental entity, after public notice and notice to the Governor of the affected State and after affording an opportunity for public hearing, exempt electric utilities, in whole or in part, from any provision of State law, or from any State rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area.

22. Section 205(a) sets forth two exceptions to the Commission's authority to exempt utilities from state law. The Commission may not grant an exemption if it finds that the relevant provision of state law, rule, or regulation is either (1) required by any authority of federal law, or (2) designed to protect public health, safety, or welfare, or the environment or conserve energy or is designed to mitigate the effects of emergencies resulting from fuel shortages.

23. The Commission therefore made preliminary findings that (1) AEP's voluntary commitment to join PJM was designed to obtain economical utilization of facilities and resources in the Midwest and Mid-Atlantic areas, as set forth in section 205(a) of

³² Id. P 93-97.

PURPA; (2) the laws, rules, or regulations of Virginia and Kentucky are preventing AEP from fulfilling both its voluntary commitment to join an RTO; and (3) the provisions of Kentucky and Virginia laws, rules or regulations are neither required by any authority of federal law, nor designed to protect public health, safety, or welfare, or the environment or conserve energy or to mitigate the effects of emergencies resulting from fuel shortages.³³

24. Pursuant to PURPA section 205(b), the Commission then set for public hearing the following three questions: (1) whether AEP's voluntary commitment to join PJM is designed to obtain economical utilization of facilities and resources in the Midwest and Mid-Atlantic areas; (2) whether the laws, rules, or regulations of Virginia and Kentucky are preventing AEP from fulfilling both its voluntary commitment in 1999, as part of merger proceedings, to join an RTO, and its application to join an RTO pursuant to the Commission's Order No. 2000; and (3) whether the aforementioned provisions of Kentucky and Virginia law or rule or regulation (a) are required by any authority of federal law, or (b) are designed to protect public health, safety, or welfare, or the environment or conserve energy or are designed to mitigate the effects of emergencies resulting from fuel shortages.³⁴

F. The Initial Decision

25. After a public hearing, on March 12, 2004, the ALJ issued his Initial Decision on the questions above.³⁵ In that decision, the ALJ stated that this was a case in which it must be determined whether two states are impeding desires of other states within the region.³⁶

26. The ALJ found that AEP's commitment to join PJM was voluntary,³⁷ and that its choice was designed to obtain economic utilization of facilities and resources within an area, as set forth in section 205(a) of PURPA.³⁸ The ALJ also found that the laws, rules,

³³ November 25 Order at P 105-26.

³⁴ Id. P 127-30.

³⁵ New PJM Companies, 106 FERC ¶ 63,029 (2004) (Initial Decision).

³⁶ Initial Decision at P 11.

³⁷ Id. P 55.

³⁸ Id. P 95, 101.

or regulations of Kentucky and Virginia were preventing AEP from joining an RTO.³⁹ Finally, the ALJ found that those Virginia and Kentucky laws, rules, or regulations were not required to protect public health, safety, or welfare.⁴⁰

G. Integration of ComEd

27. On April 27, 2004, the Commission issued an order which permitted the integration of ComEd into PJM to go forward, on the basis that, even absent AEP's integration, "[t]here are still significant benefits to integrating ComEd into PJM as previously planned."⁴¹ ComEd integrated into PJM on May 1, 2004, although the Commission had previously noted that "the Commission recognizes that there cannot be a complete integration of the markets of ComEd and PJM if AEP is not also part of PJM."⁴²

H. Withdrawal of Kentucky's Exceptions

28. On April 19, 2004, two days prior to the scheduled hearing date, all of the parties in the AEP-Kentucky case entered into a stipulation, recommending that the Kentucky PSC approve AEP-Kentucky's application, subject to specified terms and conditions. On May 19, 2004, the Kentucky PSC granted conditional authority to AEP-Kentucky to transfer functional control of its transmission assets to PJM, subject to the Commission accepting the Stipulation without any additions, modifications or conditions. On June 1, 2004, PJM, AEP, and the Kentucky Commission submitted an Offer of Settlement, to which the April 19 stipulation was attached. In a companion order also issued today, the Commission is approving that Offer of Settlement without condition or modification and thus rendering moot that portion of this proceeding which addresses the laws, rules, and regulations of Kentucky.⁴³ Pursuant to the Settlement, Kentucky is withdrawing the exceptions it filed here. Therefore, the Commission will not consider here any of the exceptions filed by Kentucky.

³⁹ Id. P 178, 194.

⁴⁰ Id. P 301, 309.

⁴¹ PJM Interconnection, LLC, et al., 107 FERC ¶ 61,087, at P 66 (2004).

⁴² PJM Interconnection, LLC, 106 FERC ¶ 61,253, at P 22 (2004).

⁴³ New PJM Companies, et al., 107 FERC ¶ 61,272 (2004) (Docket No. ER03-262-009).

I. Exceptions to the Initial Decision

29. Exceptions to the Initial Decision were filed by the Virginia Commission and the Commonwealth of Virginia (collectively, Virginia);⁴⁴ the Kentucky Commission; the North Carolina Utilities Commission, Public Staff of the North Carolina Utilities Commission, and the Attorney General of North Carolina (collectively, North Carolina); the Washington Utilities and Transportation Commission and New Mexico Attorney General's Office (Washington/New Mexico); the Mississippi and Louisiana Public Service Commissions (Mississippi/Louisiana); the Ohio Commission; the Coalition of Municipal and Cooperative Users (Muni-Coop Coalition); and AEP. The Alabama Public Service Commission (Alabama Commission) moved to intervene. Virginia filed a brief adopting exceptions filed by other parties and opposing exceptions. North Carolina filed a brief adopting exceptions filed by other parties.

30. Briefs opposing exceptions were filed by PJM; Edison Mission Energy, Edison Mission Marketing & Trading, Inc., and Midwest Generation, LLC (collectively, EME); Exelon Corporation (Exelon); Cinergy Services, Inc. (Cinergy); the Michigan Commission and the Pennsylvania Commission (Michigan/Pennsylvania); the Indiana Commission; Industrial Customers; and Commission Trial Staff (Trial Staff). The Muni-Coop Coalition filed a motion to file a response, and a response, to AEP's exceptions.

II. DISCUSSION

31. PURPA section 205 provides that the Commission can override state laws, rules, or regulations that prohibit or prevent the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area. At the hearing, the parties litigated issues related to this provision; namely, whether AEP's voluntary commitment to join PJM is designed to obtain economic utilization of facilities and resources in the Midwest and Mid-Atlantic areas, as set forth in PURPA section 205(a); whether the laws, rules, or regulations of Virginia are prohibiting or preventing AEP from joining PJM; and whether such Virginia laws, rules or regulations fail to meet the terms of the savings clause of PURPA section 205(a) and thus may not be overridden by the Commission. We now affirm the ALJ's decision on each of those issues.⁴⁵

⁴⁴ Virginia also filed a motion to accept its late-filed brief.

⁴⁵ Additionally, we hereby grant the Alabama Commission's motion to intervene, and Virginia's motion to accept its late-filed brief.

A. ISSUE ONE: Whether AEP's Voluntary Commitment To Join PJM Is Designed To Obtain Economic Utilization of Facilities and Resources in the Midwest and Mid-Atlantic Areas, As Set Forth in section 205(a) of PURPA

1. Whether AEP's joining PJM constitutes the "coordination of electric utilities, including any agreement for central dispatch," within the meaning of section 205(a) of PURPA

a. ALJ Decision

32. Virginia, North Carolina, and others argued that in enacting PURPA section 205(a) to encourage the voluntary coordination of electric utilities, Congress did not have in mind a competitive, bid-based arrangement such as PJM. These parties asserted that by "coordination" Congress meant the formation of cost-based tight power pools.⁴⁶

33. Other parties, however, argued that AEP's integration into PJM falls within the plain meaning of the phrase, "coordination of electric utilities, including any agreement for central dispatch."⁴⁷

34. The ALJ ruled that, "[c]onsidering the plain meaning of Section 205(a) and the historical context in which PURPA was enacted, the record evidence demonstrates" that the integration of AEP into PJM is the "coordination of electric utilities," within the meaning of PURPA section 205(a).⁴⁸ The ALJ stated that the underlying policy rationales for PJM in the 1970s and in 2004 are the same – to achieve more efficient utilization of facilities. He stated that:

Section 205(a) states that any agreement for central dispatch or other voluntary coordination of electric utilities is acceptable if it meets the economic utilization standard. [Virginia] and its supporters have failed to provide adequate justification for deviating from the text's literal meaning nor have they offered persuasive evidence to support their particular view of the statute.⁴⁹

⁴⁶ Id. P 22.

⁴⁷ Id. P 24-25.

⁴⁸ Id. P 33.

⁴⁹ Id. P 38 (emphasis in original).

35. The ALJ held, based on the legislative history of PURPA, that PURPA section 205(a) is "a tool that would enable improvements in the bulk power transmission system where a state may disagree with FERC's judgment."⁵⁰

b. Exceptions and Opposition to Exceptions

36. Virginia, North Carolina, and Washington/New Mexico allege that the Initial Decision errs in finding that AEP's integration into PJM constitutes the "coordination of electric utilities," within the meaning of section 205(a) of PURPA.

37. Virginia and North Carolina argue that the Initial Decision disregards the plain meaning of the statutory term "coordination," namely, a "harmonious adjustment or interaction," a meaning that conflicts with the internally competitive nature of PJM. North Carolina and Washington/New Mexico argue that the term "coordination" cannot include bid-based markets such as PJM's; Washington/New Mexico argues that rather, when Congress enacted PURPA, it envisioned a model under which utilities would coordinate operation of their facilities to achieve joint economic efficiencies to obtain the lowest cost for their ultimate customers.

c. Commission Determination

38. The Commission upholds the ALJ's ruling that AEP's integration into PJM is "coordination" within the meaning of PURPA section 205(a). The ALJ properly analyzed the evidence and arguments, and we add only the following discussion in response to the exceptions.

39. We find no merit in the assertion that, because generators within PJM "compete" against one another to be selected to sell energy, a utility's entry into PJM is not "coordination." The statute does not prohibit competition among sellers, given that the overall result of "competition" among generators is a more efficient use of facilities. Rather, the statute focuses on the outcome of the integration. As the ALJ found, the PJM market creates coordination based on merit order in the same way as tight power pools based on cost:

⁵⁰ Id. P 41.

According to Dr. Henderson, the PJM merit order based on bids "comes very close to reflecting the same merit order stack that you would have if you stacked them by cost." Moreover, competition ensures that bid prices approach marginal costs.⁵¹

40. The primary goal of the competitive market established in PJM is to improve the efficiency of the electric grid and there is no statutory basis, or logical argument, to support an interpretation of the Act as eschewing the use of competition as the most effective method to coordinate the use of resources.⁵² Indeed, PJM's market, by paying, and making transparent, the market clearing prices at each node, provides a much clearer price signal for efficient dispatch and investment than the previous methods of coordination. Under the PJM market rules, generators choose to participate in centralized dispatch in PJM, which means that they bid their generation into the energy and ancillary services markets and PJM selects the lowest bids to serve the necessary load. Thus, we find that integration into the PJM market falls within the meaning of "coordination" in PURPA section 205.

2. Whether AEP's joining PJM constitutes "voluntary" coordination within the meaning of PURPA section 205(a)

41. The ALJ found that AEP's commitment to join PJM was "voluntary," within the meaning of PURPA section 205(a). He stated that AEP's witness Baker testified that AEP has, since at least September 1999, continuously and conscientiously pursued membership in an RTO.⁵³ The ALJ noted that "there has been no statement from AEP that its commitment to join a Commission-approved RTO was anything but voluntary."⁵⁴

⁵¹ Id. P 111 (citations omitted).

⁵² For example, under the PJM market structure, generators are all paid the market clearing price and, therefore, have incentives to bid into the market. In contrast, in tight power pools with share-the-savings provisions, generators would not receive, and buyers would not pay, a market clearing price for energy, and in at least some instances, would be better off selling or buying power out of the pool, leading to less efficient dispatch.

⁵³ Initial Decision at P 44 (citing Ex. AEP-1 at 7-11 (Baker testimony)).

⁵⁴ Id. P 55.

42. The ALJ rejected Virginia's and Kentucky's arguments that AEP's "partial integration" proposal demonstrates AEP's unwillingness to fully integrate into PJM. The ALJ found that "it is far more reasonable to view this [partial integration proposal] as an attempt, albeit unsuccessful, to devise a means of avoiding jurisdictional conflict."⁵⁵

43. The ALJ stated that "the fact that AEP apparently believes that it committed to something different in 2000" may change what needs to be done to fulfill that commitment, but does not change the voluntary nature of that commitment. The ALJ found that nothing in the record suggested that AEP's "commitment to join a Commission-approved RTO was made involuntarily or with a hidden agenda to delay and oppose its implementation."⁵⁶ Finally, the ALJ pointed to the prior statements of the Virginia and Kentucky Commissions recognizing that AEP made a voluntary commitment to join PJM. The ALJ held that these prior statements "confirm what the record here demonstrates, namely, that AEP's commitment to pursue membership in a Commission-approved RTO was voluntary."⁵⁷

44. The exceptions to the ALJ's ruling on this issue raise no new considerations, and merely reiterate arguments that the ALJ addressed fully and appropriately. We summarily affirm the ALJ's ruling on this issue.

3. Whether the coordination of AEP's and PJM's facilities is "designed to obtain economic utilization of facilities and resources in any area" within the meaning of PURPA section 205(a)

a. ALJ Decision

45. The ALJ found that "there is in this record an impressive array of consistent expert testimony as to the benefits of the planned integration of AEP into PJM, all of which support the finding that the integration of AEP into PJM is designed to obtain economic utilization of facilities and resources."⁵⁸ He stated that many of the benefits of the AEP integration are quantifiable, such as annual production cost savings and increased system sales profits, but that there were also many benefits that are not easily quantified, such as

⁵⁵ Id. P 56.

⁵⁶ Id. P 57.

⁵⁷ Id. P 59.

⁵⁸ Id. P 95.

improved system reliability, reduced capacity reserve requirements, and incentives for the construction and proper location of new investment.

46. The ALJ found that Witnesses Tabors, Ott, Henderson, Schnitzer, and Baker demonstrated that the quantifiable benefits of the proposed integration were substantial, pointing to \$333 million in increased system sales profits to the AEP subsidiaries in the AEP-East Zone, and \$149 million in reduced wholesale power costs to load in the year 2005 alone for the East Central Area Reliability Council and PJM areas. The ALJ also cited evidence that "PJM would realize annual production cost savings of \$300 million if AEP, DP&L, and ComEd join PJM."⁵⁹

47. The ALJ then noted that PJM estimated that it will incur a one-time expense of approximately \$63 million in capitalized project costs to integrate AEP, ComEd, DP&L, and Dominion Resources (Dominion), which would be borne by all PJM members, and will be depreciated over the useful lives of the assets, which is projected to be three years. PJM also expects that the integration of the four companies will result in an increase in annual PJM expenses (for staff, new facilities, and similar costs) of approximately \$95 million for 2005, and AEP's share of PJM's annual administrative costs was estimated at approximately \$51 million. However, PJM estimated that its unit cost of providing its services to all of its members will decrease as a result of the integration of AEP, ComEd, DP&L, and Dominion, so that its current bundled equivalent rate of \$0.54 per MWh will decrease to \$0.43 per MWh after the integration of these four companies.⁶⁰

48. The ALJ found that when the \$95 million in annual incremental expenses are offset against the projected savings under the Tabors and Ott studies and increased system sales profits, the proposed integration would result in a net efficiency gain in each scenario. Moreover, the \$95 million figure would be reduced by approximately one-third after the one-time capitalized project costs were fully depreciated. The ALJ stated that "[c]onsequently, the record shows beyond a preponderance of the evidence that the quantifiable benefits to integration far outweigh the costs of implementation."⁶¹

49. The ALJ rejected the argument that, because bids accepted in PJM can exceed marginal cost, the implementation of a bid-based LMP system will result in strategic bidding. He found that Virginia and its supporters had produced little evidence to

⁵⁹ Id. P 99 (footnote omitted).

⁶⁰ Id. P 66 (citing Ex. PJM-1 at 21 (Wodyka testimony)).

⁶¹ Id. P 103. See id. P 102.

support their contention that PJM's market monitor is ineffective.⁶² Finally, the ALJ pointed to the testimony of Witness Fahey to the effect that gaming could result if AEP did not integrate into PJM, in that if AEP is not subject to a market monitor, transactions scheduled within AEP could artificially create congestion within PJM, but without LMP price signals the party within AEP causing the congestion would not face the associated costs of congestion;⁶³ thus, that party would have no incentive to curtail its transaction.

50. The ALJ rejected the Muni-Coop Coalition's recommendation that the Commission should condition its finding that the economic utilization standard has been met on steps being taken to identify and mitigate the impacts of the proposed integration on individual sub-groups. He noted that customers can seek to obtain FTRs and ARRs to hedge against possible congestion costs.⁶⁴ He further stated that, when shaping policy, the Commission strives to obtain results that are consistent with the collective public interest, and is cognizant that there may be "winners" and "losers." Here, however, the ALJ found that the estimated production cost savings will serve to make everyone collectively better off and that the longer-term benefits, although difficult to quantify, will yield widespread social benefits in the future.⁶⁵

51. Finally, the ALJ stated that, in addition to the benefits that AEP's integration into PJM alone would create, AEP's membership in PJM was critical to the successful integration of other market participants and the success of the region as a whole. AEP is the largest generator in the region, owning approximately 24,000 MW of generation, and also owning a 765 kV transmission line that represents the highest voltage pathway across PJM and Midwest ISO. Serving as the major interconnection between PJM and Midwest ISO, AEP has the ability to transfer over 40,000 MW to members in the Midwest and Mid-Atlantic regions. The ALJ noted that Witness Fahey persuasively argues that AEP's inability to join PJM could hamper the viability of the RTO choices of other former Alliance Companies.⁶⁶

⁶² See id. P 111-12.

⁶³ Id. P 112 n.34.

⁶⁴ Id. P 113.

⁶⁵ Id. P 114 (citations omitted).

⁶⁶ Id. P 115 & n.35.

b. Commission Determination

52. The Commission will affirm the ALJ's ruling, with the additional discussion below. While the ALJ made extensive findings of fact on the quantifiable benefits of the integration of AEP into PJM, and we adopt those findings, we find that the statute does not require such a factual determination. The statute requires only that the Commission determine that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area. The statute does not state that before ordering the voluntary coordination the Commission must find that the coordination would satisfy any and all requirements that a state may desire for a cost-benefit analysis. Rather, the language looks to the purpose and intent of the coordination in which the utilities engage. Through the use of market bids, PJM dispatches the least costly generators necessary to meet load, and provides accurate price signals for the least costly and most efficient investment in generation and transmission infrastructure that is needed to improve market performance. Thus, the PJM market is clearly "designed to obtain economical utilization of facilities and resources."

53. In any event, if a cost-benefit analysis is determined to be required, we affirm the ALJ's findings establishing that the benefits of integration exceed the costs.⁶⁷

54. Virginia argues that a bid-based market may not lead to "economic utilization" within the meaning of PURPA section 205. It maintains that PJM's market may not produce efficient dispatch, because the market may not be competitive, and generators may engage in strategic bidding by bidding higher than their marginal costs into PJM's energy markets. Washington/New Mexico similarly argues that the use of a bid-based system does not ensure that the lowest cost generators are dispatched first, as Congress intended.

⁶⁷ In addition to the cost benefit analysis, the ALJ further found in his decision that some of the benefits of integrating other parties into PJM, such as ComEd and DP&L, will not be fully realized absent AEP's integration, stating, for example, that if ComEd integrated into PJM before AEP, ComEd's control area would be "a virtual island," connected to the rest of PJM by only a 500 MW pre-existing contractual pathway, and "[t]hus, without AEP's membership in PJM, other market participants such as ComEd will be unable to bring the benefits of an integrated market to customers within their service area." Initial Decision at P 115 (citations omitted). As noted above, ComEd did, in fact, integrate into PJM on May 1, 2004.

55. These arguments are an extension of the argument discussed earlier that only a cost-based integration falls under PURPA. As we explained, PURPA does not mandate a cost-based determination of which generators are the most efficient. Nor does it require that the mode of coordination be superior to cost-based dispatch or meet some other test of effectiveness. The statute requires only that the coordination be designed to achieve coordination and efficient dispatch, as the PJM market is. The issues raised with respect to strategic bidding also go beyond the scope of PURPA section 205(a), and are, in effect, an attack on the use of market-based rates under the PJM market design already approved by the Commission.⁶⁸ PURPA section 205 requires only that the coordination be designed to improve coordination and dispatch under the rate design method employed under the FPA; it does not dictate that any particular type of rate design be employed.

56. Integration of AEP into PJM will achieve more efficient utilization of facilities than if AEP remains outside PJM. If AEP remains outside PJM, the dispatch between PJM and AEP will not be improved at all. But, if AEP joins PJM, economic utilization of resources in AEP and PJM will be improved even with the possibility of some strategic bidding. In fact, integration of AEP into PJM should reduce the potential for the exercise of market power, and the use of strategic bidding, because such integration will make it easier for customers to gain access to competing suppliers. Any question as to whether the PJM market might be the perfect or best market design does not undermine the finding that AEP's joining PJM will produce more efficient utilization of facilities than having AEP remain outside PJM.⁶⁹

⁶⁸ In approving the PJM market design, using market-based rates, the Commission found that this market design would produce efficient and coordinated dispatch:

We believe that the LMP model will promote efficient trading and be compatible with competitive market mechanisms. In this regard, we find that the LMP approach will reflect the opportunity costs of using congested transmission paths, encourage efficient use of the transmission system, and facilitate the development of competitive electricity markets. By pricing the use of constrained transmission capacity on the basis of opportunity costs, the proposal will also send price signals that are likely to encourage efficient location of new generating resources, dispatch of new and existing generating resources, and expansion of the transmission system.

PJM Interconnection LLC, 81 FERC ¶ 61,257, at 62,253 (1997).

⁶⁹ Indeed, the Commission moved away from a cost-based dispatch approach to the LMP model used in PJM because the cost-based ratemaking approaches did not

(continued)

57. Parties filing exceptions have also not shown that the integration of AEP into PJM would result in an increase in strategic bidding or the exercise of market power, compared with AEP's operation if it remained outside of PJM. In fact, one of the reasons that the Commission conditioned AEP's merger is that unless AEP joined an RTO, it could potentially exercise market power.⁷⁰ By integrating into PJM, competition should be increased as customers' supply options increase, and therefore, such integration will not only improve economic dispatch, but will reduce the ability of AEP to exercise market power and lessen opportunities for strategic bidding.

58. In any event, the ALJ found, based on the record in this proceeding, that PJM's markets are competitive and that strategic bidding is not a sufficient problem to vitiate the finding that PJM's market design does provide for more efficient dispatch. The ALJ found that in PJM bids "comes very close to reflecting the same merit order stack that you would have if you stacked them by cost" Moreover, as the ALJ noted, competition ensures that bid prices approach marginal costs.⁷¹ For example, the ALJ

provide good price signals for efficient and cost-effective construction and location of generation plants. As discussed earlier, the share the savings approach to cost-based dispatch may not provide an incentive for efficient dispatch since generators would not receive, and buyers would not pay, a market clearing price for energy, and in at least some instances, would be better off selling or buying power out of the pool, leading to less efficient dispatch.

⁷⁰ As the Commission noted in its order approving the AEP-CSW merger, "[w]e are concerned that Applicants would be able to use their combined transmission and generation to frustrate competition," and therefore, "an adequate remedy to the market power concerns arising from the proposed merger would be for Applicants to transfer operational control of their transmission facilities to a Commission-approved RTO." Opinion No. 442 at 61,788. Additionally, the ALJ noted that EME witness Fahey testified that the PJM and MISO market monitors concluded that full integration of AEP is necessary a partial integration approach will allow the continued existence of gaming and inefficient dispatch opportunities along the company's seams with the two RTOs, a fact which the ALJ took into consideration in later rejecting AEP's partial integration proposal. Initial Decision at P 122, 130-31.

⁷¹ Initial Decision at P 111 (citations omitted).

relied on a number of years analysis by PJM's market monitor, who found, based on his analysis of relevant price cost data, that the behavior of the PJM market is essentially competitive.⁷²

59. In this decision, the Commission reverses the ALJ and permits Virginia to place into evidence rebuttal testimony and an exhibit sponsored by Virginia witness Spinner discussing bid curves taken from the PJM web site which, in his view, may suggest that some generators are engaging in strategic bidding.⁷³ Mr. Spinner himself recognized that this evidence simply suggested that strategic bidding might be occurring; it was not dispositive of that question.⁷⁴ The Commission finds that this exhibit does not contradict the evidence on which the ALJ relied finding that the market is competitive.

60. The newly admitted material (i.e., Ex. VCC-30 at 10, line 23 through 12, line 22; Ex. VCC-32; Ex. VCC-33) consists of a comparison between the bids offered by the 512 PJM generators on January 1, 2003 (on which date the system-wide average LMP was \$12.48/MWh), and January 23, 2003 (on which date the system-wide average LMP was \$90.33/MWh). Mr. Spinner asserted that, if generators were basing their bids solely on their marginal costs and not engaging in strategic bidding, he would expect any individual generator's bids for those two dates to be "closer in magnitude" than was the case, even allowing for legitimate differences for such reasons as variations in the price of fuel.⁷⁵

⁷² See Ex. PJM-6 at 8-10; Ex. MCC-16 at 2. See also Tr. at 555 (Ott testimony).

⁷³ See infra P 120; Ex. VCC-30 at 10-12; Ex. VCC-32; Ex. VCC-33.

⁷⁴ Mr. Spinner noted that "this question of the impact of the exercise of market power and the existence of bids in excess of marginal cost in PJM specifically should be subjected to independent research" and that because, due to confidentiality concerns, PJM only provides this data in a fashion which conceals the identity of each generator studied, "this confidentiality severely limits [Mr. Spinner's] ability to systematically study the PJM market and arrive at independent conclusions as to the functioning of PJM's competitive generation markets." Ex. VCC-30 at 12. Mr. Spinner further noted that, while he was aware that he could have obtained generator-specific information by seeking a protective order, he did not do so due to the constraints of the procedural schedule here, and his expectation that "had such information been sought here, any resulting discovery dispute could have further stretched [the Virginia Commission's] resources." Id.

⁷⁵ Ex. VCC-30 at 11.

61. These data fail to demonstrate that strategic bidding is occurring. Mr. Spinner does not offer any evidence that either bids or prices on January 1 should be at all similar to prices 22 days later. Untold numbers of factors could account for such bidding differences, such as higher demand that would result in PJM's acceptance of bids that are higher on the generators' cost curves, or differences in natural gas prices that would be paid for the marginal units that were dispatched.⁷⁶ In fact, a review of natural gas prices for these dates shows significant price differences that the exhibit failed to take into account.⁷⁷ Thus, our reversal of the ALJ's exclusion of this material does not cause us to alter our view that the ALJ correctly ruled that markets in PJM are competitive, and that there is insufficient evidence of strategic bidding to show that it is a significant problem in PJM.

62. Further, to the extent that strategic bidding becomes significant, the PJM market design includes market monitoring and mitigation to protect against the exercise of market power that may result in unjust and unreasonable rates or skewed dispatch. Given

⁷⁶ In any event, even if one puts aside such significant omissions and compares the data for these two dates, these data do not even suggest the existence of a significant amount of strategic bidding. Of the 512 generators studied, only 36 offered bids on January 23 that were more than \$50 higher than the bids they offered on January 1. The majority (397 generators) offered bids on January 23 that were between \$0 and \$50 greater than the bids they offered on January 1. And 79 generators offered bids on January 23 that were actually lower than the bids they offered on January 1. See generally Ex. VCC-32.

⁷⁷ For example, the natural gas prices for Transco Zone 6 (non-NY) increased by almost 250% from January 2, 2003, when compared with January 23, 2003 (\$5.310 on January 2 to \$18.130 on January 23). At the same time, the Henry Hub price increased by nearly 25% (\$4.595 on January 2 to \$5.685 on January 23). Gas Daily, Platts, at 1-2 (The McGraw Hill Cos. Inc., Jan. 2, 2003); Gas Daily, Platts, at 1-2 (The McGraw Hill Cos. Inc., Jan. 23, 2003). See Regulation of Short-Term Natural Gas Transportation Services, Order No. 637, 65 Fed. Reg. 10,156 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,091, at 31,273-74, figures 6 & 7 (2000), aff'd, Interstate Natural Gas Association of America v. FERC, 285 F.3d 18, 31-32 (D.C. Cir. 2002) (discussing volatility of natural gas prices). The effect of such changes on any specific generator could depend on whether it has locked in a natural gas price, is buying spot gas at the Henry Hub and using firm transportation service for delivery, or is buying gas at the city-gate price. But, in any event, the exhibit cannot be used to show that these bids reflect significant occurrences of so-called strategic bidding.

these facts, the Commission cannot find that the possibility of some strategic bidding dissipates the positive effects on efficient dispatch and utilization that AEP's joining PJM is designed to produce.

B. ISSUE TWO: Whether the Laws, Rules, or Regulations of Virginia Are Prohibiting or Preventing AEP from Joining PJM within the Meaning of PURPA Section 205(a)

63. The second question set for hearing was whether the laws, rules, or regulations of Virginia are preventing AEP from joining PJM.

1. ALJ Decision

64. The Virginia Electric Restructuring Act, section 56-579(A)(1), states:

No such incumbent electric utility shall transfer to any person any ownership or control of, or any responsibility to operate, any portion of any transmission system located in the Commonwealth prior to July 1, 2004....⁷⁸

The state statute then provides that each such incumbent electric utility shall transfer control of its transmission system to a regional transmission entity by January 1, 2005, subject to the approval of the Virginia Commission.

65. The ALJ found that the plain meaning of the above language prohibits any Virginia electric utility from joining an RTO until at least July 1, 2004, and that it has had the effect of prohibiting any Virginia electric utility from joining an RTO since its enactment into law on April 3, 2003.⁷⁹ Thus, he stated, this Virginia law is precisely the kind of state action that PURPA section 205(a) was enacted to prevent – a state law, rule, or regulation that prohibits or prevents the voluntary coordination of electric utilities for the benefit of regional and national interests. The ALJ therefore found that AEP-Virginia should be exempted from the provisions of section 56-579 of the Virginia Code, as amended in 2003, that prohibits it from transferring to PJM any ownership or control of, or any responsibility to operate, any portion of any transmission system located in Virginia prior to July 1, 2004.⁸⁰

⁷⁸ Va. Code Ann. § 56-579(A)(1).

⁷⁹ Initial Decision at P 169-70.

⁸⁰ Id. P 178.

2. Exceptions

66. Virginia, North Carolina, and Mississippi/Louisiana take exception to the ALJ's finding that Virginia law currently prohibits or prevents AEP-Virginia from joining AEP.

67. The parties first contend that Virginia law is not "currently" prohibiting or preventing AEP-Virginia from joining AEP, since the date on which AEP-Virginia seeks to integrate into PJM is October 1, 2004 – a date still several months into the future. North Carolina argues that the Commission has no authority to impose absolute target dates and then use those dates to override otherwise applicable state law. The parties also contend that the Virginia law does not prohibit participation in an RTO; it only delays participation to a date certain.

68. Mississippi/Louisiana argues that the Virginia law does not prevent utilities from joining RTOs, but merely requires certain analyses (e.g., cost-benefit analyses) before that integration can occur.⁸¹ North Carolina contends that when viewed in the 1978 regulatory and historical context, Congress did not intend to empower the Commission with the broad preemption brush that the ALJ found in PURPA section 205(a), particularly if that broad brush would be used to prevent state commissions from proceeding with long-established procedures for lawful reviews of the proposed transfer of control or ownership of a public utility's jurisdictional assets.⁸²

3. Commission Determination

69. We affirm the ALJ, and provide some additional analysis.

70. The Commission approved the merger of AEP and CSW in March 2000, accepting AEP's commitment to join an RTO to mitigate the market power concerns of that merger. The original deadline for AEP to fulfill this commitment was December 15, 2001. When AEP's subsequent efforts to join the Alliance RTO proved unsuccessful, it sought to join PJM. AEP's amended application to join PJM has been pending before the Virginia Commission since December 19, 2002. On April 2, 2003, Virginia passed the amended Virginia Electric Restructuring Act, section 56-579(A)(1), which prohibited AEP-Virginia from joining PJM until July 1, 2004.⁸³ Although on its face the law requires Virginia electric utilities to join an RTO by January 1, 2005, participation in an RTO

⁸¹ Mississippi/Louisiana Brief on Exceptions at 27-28.

⁸² North Carolina Brief on Exceptions at 24.

⁸³ Ex. VCC-9.

requires the approval of the transfer by Virginia Commission, and it is possible that absent that approval Virginia electric utilities may not be able to transfer their facilities to an RTO despite the statutory deadline.⁸⁴

71. On November 7, 2003, nearly a year after AEP filed its amended application, the Virginia Commission ordered AEP to supplement its application with additional information, including a cost-benefit analysis. The Virginia Commission did not establish a procedural schedule for the application until January 2004 (after the issuance of this Commission's November 25 Order in which we found that AEP would be required to integrate into PJM by October 1, 2004). Moreover, the Virginia Commission scheduled the hearing to begin on July 27, 2004, a little over two months before the announced integration date. Today, it is still unclear when the Virginia Commission will issue a decision on this case, or whether such a decision will be issued sufficiently early so that integration can occur on October 1, 2004. This uncertainty has meant that AEP and Virginia have been hampered in preparing for integration of not just AEP-Virginia, but all of AEP, into PJM. The preparations required for such integration are considerable: they require planning, computer programming, physical interconnections, testing, operating procedure modifications, and tariff amendments. Further, for reliability reasons, PJM will only integrate new utilities during non-peak months. Thus, if PJM cannot integrate AEP on October 1, 2004, it is possible that the integration may not be able to take place until the spring of 2005.

72. Thus, Virginia, through the application of its statutes, rules, and regulations, since 2002 has prevented the integration of AEP into PJM, and there is no indication of when, or if, such integration will be approved. Under the circumstances here, we find that the delay and uncertainty caused by Virginia's statute and actions constitutes "prevention or prohibition" of integration within the meaning of PURPA section 205(a). The statute does not require that the state law, rule, or regulation constitute a final complete prohibition on integration for the Commission to preempt, so long as the state action has the effect of preventing or prohibiting integration.

73. While in some cases a certain amount of delay in integration may be appropriate, in this case the prohibition has such major and serious implications for the region that the Commission has determined to use its authority under PURPA section 205(a) to exempt the integration from Virginia's laws, rules, and regulations. As discussed earlier, the

⁸⁴ The debate on this legislation when it was enacted in February 2003 demonstrates the Virginia delegates' view that utilities could not transfer their facilities to RTOs absent the Virginia Commission's approval, notwithstanding the statutory January 1, 2004 deadline. See Ex. EXE-92 (transcript) and Ex. EXE-93 (video tape).

mitigation of the potential market power created by the AEP-CSW merger has not yet taken place. Further, the process of the integration of the AEP operating companies in five other states into PJM also has been placed on hold, delaying the benefits of integration in other states that wish to provide such benefits to their citizens. Finally, as the Commission noted in its November 25 Order, the continued uncertainty as to whether or not AEP may join PJM is threatening to destabilize RTO formation throughout the Midwest.⁸⁵

74. If the Virginia Commission timely finds that AEP should integrate into PJM on October 1, 2004, there will be no need for the Commission to use its authority under PURPA section 205(a) to permit the integration. Additionally, if the Virginia Commission is able to timely complete its proceedings, and reaches agreement as to reasonable conditions relating to integration that do not prevent or prohibit integration, the Commission is certainly open to considering such provisions. If, however, the Virginia Commission has not reached a decision in time to bring about integration on October 1, or if it denies AEP's application, the Commission's order here will nevertheless require the integration of AEP into PJM.

75. Some parties maintain that the Commission should not invoke PURPA section 205 against Virginia when other obstacles remain to the integration. The ALJ found, and we agree, that there is no requirement in PURPA that the challenged state law, rule, or regulation be the sole impediment to regional coordination, or that the Commission is precluded from moving against whichever state poses the primary impediment to the integration. He found that the statute provides the Commission, in clear and unambiguous language, with authority to exempt electric utilities "from any provision of State law, or from any State rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities...." The statute does not require that the Commission wait for a specified period to determine if a state law, rule, or regulation is prohibiting or preventing the coordination of electric utilities. Construing PURPA section 205(a) as applying only when a state's laws, rules, or regulations are the sole remaining impediment to integration would, as the ALJ stated, lead to the "two state dilemma," in which, if two

⁸⁵ See November 25 Order at P 87 ("As testimony and comments in this inquiry show, markets in the Midwest and Mid-Atlantic are in a state of significant uncertainty as a result of conflicting state views and shifting decisions by companies as to which RTO to join. Absent some definitive resolution [of AEP's status], both states and affected companies will continue to reevaluate the choices of utilities to join or not join an RTO, and which RTO to join. Under such conditions, RTOs will never fully deliver their potential benefits to customers."). See id. P 88-89.

states denied their approval, "gridlock would ensue as each state could point to the other as the final impediment." In addition, the ALJ found that other state proceedings did not impose impediments to AEP's integration.⁸⁶

76. Thus, we affirm the ALJ's holding that the laws of Virginia are prohibiting or preventing AEP from integrating into PJM,⁸⁷ and that there is no requirement in PURPA that the challenged state law, rule, or regulation be the sole impediment to regional coordination.⁸⁸

C. ISSUE THREE: Whether the Virginia and Kentucky Provisions Fail To Meet the Terms of the Savings Clause and Are Thus Eligible for Exemption Under PURPA Section 205(a)

1. ALJ Decision

77. The ALJ found that Virginia had not shown that its limitation on AEP joining PJM fell within the savings clause of section 205(a) because the limits are not designed to protect the public health, safety, or welfare, or the environment, or to conserve energy, or designed to mitigate the effects of emergencies resulting from fuel shortages.⁸⁹ The ALJ found that Virginia's justification for restricting RTO membership was principally to protect the economic interests of Virginia ratepayers and maintain preferential treatment for Virginia consumers in the operation of an interstate transmission grid.⁹⁰ The ALJ concluded that if the savings clause is interpreted broadly to include such economic and reliability considerations as urged by Virginia, it would "swallow" the effect of the principal text of PURPA section 205(a). The ALJ further found that this is actually a dispute between different groups of states rather than between the Commission and the Commonwealth of Virginia. The ALJ reasoned that, if the laws or regulations of any two states are in conflict, and each of those states argued that its law was designed to protect public health, safety, or welfare, an impasse would be created. He stated that this is

⁸⁶ Initial Decision at P 215-16.

⁸⁷ Id. P 178.

⁸⁸ Id. P 210.

⁸⁹ Id. P 301.

⁹⁰ Id. P 289.

precisely the situation where PURPA section 205(a) is applicable, and that under PURPA section 205(a), the Commission has the authority to break such an impasse for the voluntary coordination that results in economical utilization of facilities.⁹¹

2. Exceptions

78. Virginia, North Carolina, and Washington/New Mexico contend that the Initial Decision erred by interpreting the savings clause to require that the state law, rule, or regulation is "designed exclusively to protect public health, safety, or welfare, or the environment or conserve energy" and to do so only with reference to environmental safety issues while omitting health or welfare issues entirely.⁹² They assert that the Initial Decision defines "public health, safety, or welfare" too narrowly. Virginia states that the Initial Decision's narrow reading of "public health, safety, or welfare" is in error because it ignores the fact that, rather than listing traditional state utility regulation, economic regulation, or reliability as matters that fall within the savings clause, the statute uses very broad terms: "public health," "safety," "welfare." Virginia also alleges that reliance on the Conference Committee Report on PURPA (Conference Report) to narrow the phrase "public health, safety, or welfare" to exclude economics and reliability concerns would result in an unreasonable interpretation of that phrase in a manner inconsistent with Congress's use of that term in section 2 of PURPA.⁹³ Virginia argues that the phrase "public health, safety, or welfare" means that laws based on traditional public welfare considerations are immune from PURPA section 205's exemption power, but state laws outside that ambit are not.

79. Parties in opposition contend that the Virginia provisions do not fall within the savings clause. PJM argues that the "public health, safety, or welfare" exception to the Commission's section 205(a) authority to exempt electric utilities from state law cannot reasonably be read to allow the Virginia legislature flatly to ban implementation of federal RTO policies for more than a year. Parties in opposition argue that the savings clause should not be interpreted so broadly that it swallows the rule in PURPA section 205(a). PJM reasons that the general terms "public health, safety, or welfare" should be read to address things similar to the enunciated matters that follow; namely, laws concerning other similarly targeted health and safety matters. Further, PJM states that an

⁹¹ Id. P 294.

⁹² Virginia Brief on Exceptions at 79-80 (emphasis in original).

⁹³ See H.R. Conf. Rep. No. 95-1750, at 95 (1978), reprinted in 1978 U.S.C.C.A.N. 7797, 7829.

outright prohibition of the implementation of a federal RTO policy cannot reasonably be designed to protect health, safety, or welfare, within the meaning of PURPA section 205(a)(2). Exelon argues that legislative history shows the general focus of the savings clause to be environmental, land-use considerations.

3. Commission Determination

80. The Commission affirms the ALJ's findings and conclusions that the Virginia actions are not designed to protect public health, safety, or welfare, or the environment, or intended to conserve energy or mitigate the effects of emergencies resulting from fuel shortages. Thus, the Virginia provisions do not trigger the savings clause of PURPA section 205(a)(2). As the ALJ found, Virginia's principal contention is that its action is intended to protect the economic interests of Virginia. But such economic interests do not fall within the savings clause. The plain language of PURPA section 205(a) and the legislative history of the section show that states' reliability and economic considerations (as well as avoidance of the loss of state jurisdiction) were not the type of "protection of public welfare" that Congress contemplated when it enacted section 205 of PURPA. To the contrary, PURPA section 205 contemplates that the Commission, despite any objections by the states, will seek to facilitate voluntary coordination among utilities in order to obtain economic benefits for all parties within a region. Similarly, the Commission is acutely aware of the importance of ensuring reliability.⁹⁴ AEP's integration into PJM will enhance, not harm, reliability, and we cannot envision any circumstances under which this Commission would take actions that we believed would harm reliability, whether under PURPA section 205 or otherwise.

81. The statute's savings clause applies only if the state law, rule, or regulation "is designed to protect public health, safety, or welfare, or the environment or conserve energy or is designed to mitigate the effects of emergencies resulting from fuel shortages." Parties excepting to the Initial Decision contend that the word "welfare" should be interpreted broadly to apply to anything that might benefit the citizens of the state. However, the terms used in the statute must be interpreted in conjunction with other related terms and within the whole statutory scheme to ascertain their meaning. When the statute is read as a whole it shows that Congress did not intend a broad definition of the term "welfare" to include economic or reliability concerns. As the ALJ found, such an interpretation is at odds with the intent of the statute, which is to provide

⁹⁴ When the Commission recently addressed the integration of ComEd into PJM, it would not permit the integration until the North American Electric Reliability Council (NERC) approved the reliability plans developed by the parties for the integration. See PJM Interconnection, LLC, 106 FERC ¶ 61,253, at P 6 (2004).

for meaningful integration of facilities and resources, toward more efficient dispatch and a more reliable energy system, and thereby reduce electric costs for an entire region. If the phrase "public health, safety, or welfare" was construed as broadly as some parties advocate, the remainder of the savings clause – "or the environment or conserve energy or is designed to mitigate the effects of emergencies resulting from fuel shortages" – would be rendered mere surplusage.⁹⁵ As the ALJ emphasized, the broad construction that Virginia posits would allow the savings clause to swallow the general rule that the Commission may exempt electric utilities from state law, within the context of PURPA section 205(a).⁹⁶

82. General principles of statutory interpretation support this reading of the savings clause. The principle of eiusdem generis states that general terms in a list are defined by more specific terms.⁹⁷ A variation of this principle of statutory construction, noscitur a

⁹⁵ The primary purpose of PURPA section 205(a) is safeguarded only by reading meaning into all its individual parts and by rendering an interpretation that is consistent with the context of the whole statute and its legislative history. See *Fidelity Savs. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 163 (1982) ("[A]ll parts of a statute, if possible, are to be given effect.") (citations omitted).

⁹⁶ See *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989) ("In construing provisions ... in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision."); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savs. Bank.*, 510 U.S. 86, 97 n.12 (1993) (stating that, when considering regulatory statutes, the Court is "inclined, generally, to tight reading of exemptions from comprehensive [regulatory] schemes"); *Consarc Corp. Consarc Eng'g, Ltd. v. U.S. Treasury Dep't*, 71 F.3d 909, 915 (D.C. Cir. 1995) (citing the "general interpretative principle that exceptions to a broad regulatory scheme are to be read narrowly").

⁹⁷ *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001), which explains that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words"). See also *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 78 (1990) (while not specifically relying on the canon of eiusdem generis, the Court reasoned that one general term could not swallow a list of other, more specific terms, as such an interpretation would "render[] the preceding enumeration of specific subjects entirely superfluous").

sociis, states that such terms in a list can be known by the company they keep.⁹⁸ Under these principles, matters of health and safety, which pervade the statutory text, define "public welfare" by their relation to the term, and the specific types of regulation listed – environmental and land use regulations – delimit the possible meaning of "public welfare," so that excluding economic and reliability considerations is reasonable within the context of this regulatory scheme.

83. The Conference Report further supports this reading of the savings clause. The Report lists examples of the types of state regulations that would fall within the savings clause, including state siting laws, regulations under the Clean Air Act, and zoning laws, "among others." This congressional report clarifies the intent of the section 205(a)(2) savings clause; the phrase "among others" indicates that the list is not exhaustive, but this phrase does not reduce the list to an open-ended catch-all. As can be seen from the Conference Report, Congress primarily intended to prohibit the Commission from overriding "State siting laws, regulations under the Clean Air Act, and zoning laws, among others." Otherwise, the specific section 205(a)(2) exception would undermine the Commission's general authority under PURPA section 205(a) to bring about the congressional intent of "providing for increased conservation of electric energy, increased efficiency in the use of facilities and resources by utilities, . . . wholesale distribution of electric energy, [and] the reliability of electric service", among others.⁹⁹

84. In different statutory contexts, the terms "public health, safety, or welfare" may be interpreted to include economic concerns. But as explained above, such an interpretation of "welfare" does not comport with the regulatory scheme set forth in PURPA section 205(a). Under PURPA section 205, the Commission has exclusive authority over the interstate issues that arise when, as here, states disagree on the voluntary coordination of electric facilities. Thus, Congress authorized the Commission to preempt state laws that prohibit or prevent such coordination.¹⁰⁰

⁹⁸ See Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384-85 (2003) (citing Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961)); Gutierrez v. Ada, 528 U.S. 250, 255 (2000) (applying "an interpretive rule as familiar outside the law as it is within, for words and people are known by their companions").

⁹⁹ PURPA § 2(1), (2) (Findings), 16 U.S.C. § 2601(1), (2) (2000).

¹⁰⁰ The purpose of PURPA section 205(a) is consistent with that of the Commerce Clause, which is "to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in

(continued)

85. Indeed, reading the savings clause to include economic considerations would permit the states to prevent meaningful economic integration and lower regional costs in favor of their parochial interests.¹⁰¹ As Justice Cardozo points out with respect to a similar argument that pricing limitations on interstate transport of goods can be justified as serving the welfare of state citizens:

This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity.¹⁰²

The purpose of PURPA section 205 was to permit the Commission to preempt certain state actions found antithetical to the national interest in efficient, safe, and economical

regulation. It means that in the matter of interstate commerce we are a single nation – one and the same people." *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923).

¹⁰¹ Again, the goal of PURPA section 205(a) is similar to the Commerce Clause, which the Supreme Court has construed as meaning that a state cannot absolutely prevent the exportation of privately-owned scarce natural resources. In *New England Power v. New Hampshire*, 455 U.S. 331 (1982), the Court found unconstitutional a state statute that empowered the New Hampshire Commission to prohibit the exportation of energy upon determination that the energy was required for use within the state and that the "public good" required that it be delivered for such use. The Court stated, "[o]ur cases consistently have held that the Commerce Clause of the Constitution, Art. I, § 8, cl. 3, precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *New England Power Co.*, 455 U.S. at 338 (citations omitted). See *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928): "[A] State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders.").

¹⁰² *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

distribution of power.¹⁰³ A broad interpretation of the savings clause would be at odds with such an interpretation.

86. Virginia argues that the Initial Decision's interpretation of the scope of the Commission's authority under PURPA section 205(a) and the section 205(a)(2) savings clause is contrary to Central Power and Light Company.¹⁰⁴ The Commission finds this argument misreads the CP&L line of cases. In CP&L, the Commission did not recognize limits on its authority under PURPA section 205. Rather, the Commission found that examining PURPA section 205 was unnecessary because the action taken by the state in that case represented an unconstitutional exercise of its police power. As the Commission stated: "Section 205 was intended to deal only with constitutionally permissible state regulation that prevents voluntary coordination. This is not this case."¹⁰⁵ In the present case, the Commission is not questioning whether the states' actions are in themselves constitutional; it is simply applying PURPA section 205 to overturn state actions that are not within the scope of the savings clause.

87. In any event, Virginia's argument is unavailing. In the CP&L case, the Commission found that PURPA section 205 did not apply only because the state act in

¹⁰³ In FERC v. Mississippi, 456 U.S. 742 (1982), the Supreme Court rejected assertions that PURPA represented an unconstitutional expansion of federal power, and affirmed PURPA section 210(e), which, like PURPA section 205(a), gives the Commission the express authority to exempt utilities "from State laws or regulations . . . if the Commission determines that such exemption is necessary to encourage cogeneration and small power production." 16 U.S.C. § 824a-3 (2000). The Court stated that "Congress can pre-empt the States completely in the regulation of retail sales by electricity and gas utilities and in the regulation of transactions between such utilities and cogenerators.... [T]he Federal Government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important.'" Mississippi, 456 U.S. at 759 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 290 (1981)) (citation omitted).

¹⁰⁴ Central Power and Light Co., 8 FERC ¶ 61,065 (CP&L I), modifying order and denying reh'g, 9 FERC ¶ 61,011 (1979) (CP&L II), reh'g denied, 10 FERC ¶ 61,131 (1980) (CP&L III).

¹⁰⁵ CP&L II, 9 FERC at 61,037 (emphasis added).

that case was unconstitutional.¹⁰⁶ Thus, to come within the CP&L ruling, Virginia would have to concede its actions are unconstitutional, in which case it would be unable to prevent AEP's integration into PJM in any event.

D. Proposals for Partial Integration

88. AEP and Muni-Coop Coalition filed proposals for partial integration, which the ALJ rejected. AEP asked the Commission to reconsider a partial integration proposal, under which AEP would transfer functional control of its East Zone transmission facilities to PJM, but would not integrate into PJM's voluntary markets, pending a consensual resolution of the pending disagreements among parties. AEP also proposed that a greater share of administrative costs be allocated to the customers who benefit the most from expanding the PJM markets to include AEP. Muni-Coop Coalition proposed a "staged implementation" proposal whereby AEP would be brought under PJM tariff for transmission scheduling and other non-market functions, while the entry into PJM markets would be deferred pending identification of load pockets, evaluations of potential economic impacts on customers in load pockets, and development of mitigation strategies. AEP filed a motion to respond and a response to AEP's brief on exceptions.

89. The ALJ rejected these proposals. With respect to AEP's proposal, he found that, while consensual resolution would appear superior, even AEP admitted that such a dialogue would be difficult at this juncture, and that the partial integration proposal is unlikely to be a rallying point for parties. The ALJ stated that the partial integration proposal did not satisfy Order No. 2000's requirements in that it does not require market-based congestion management or RTO-provided ancillary services, and did not provide dates for AEP's eventual total compliance with these requirements.¹⁰⁷ The ALJ also found troubling the continued opportunities for gaming and inefficient dispatch associated with seams issues; thus, he concluded that the partial integration proposal should be rejected. As to AEP's cost reallocation proposal, the ALJ stated that he was persuaded by PJM and Trial Staff that it was impractical, likely unacceptable by other parties, and must be rejected as a means to further dialogue with the states.¹⁰⁸

¹⁰⁶ Since PURPA section 205 directly applies here, the Commission did not choose to consider whether Virginia's actions also would be unconstitutional.

¹⁰⁷ As noted above, AEP committed to join a Commission-approved RTO. See supra Part I.B.

¹⁰⁸ Initial Decision at P 129-32.

90. The ALJ similarly found that the Muni-Coop Coalition's proposal insufficient. He concluded that region-wide benefits for all should not be delayed by excessive concern for impacts on subgroups, the determination of which may be an impossible or time consuming task. The ALJ was further troubled that Muni-Coop Coalition refused to acknowledge the inefficiencies and costs of the current TLR system and current potential for gaming opportunities, and found Muni-Coop Coalition's proposal to be no more acceptable than AEP's partial integration plan.

91. AEP and Muni-Coop Coalition filed exceptions to the ALJ's rejection of their respective proposals. The Commission affirms the ALJ's determination that such proposals go beyond the scope of this hearing. The question set for hearing is whether to exempt AEP's voluntary commitment to join PJM from state efforts to prevent such integration. Indeed, it appears from the record that these proposals would not resolve this issue in any event. PJM states that neither PJM nor its members would agree to an integration in which the full benefits that the PJM region derives from the integration are eliminated or unduly delayed – a distinct possibility if AEP is exempted from integral PJM functions under this proposal – and Virginia has not indicated support for the proposal.¹⁰⁹ While parties can certainly continue settlement negotiations, the Commission agrees with the ALJ that there is no basis for delaying the full integration of AEP to see whether such discussions will be fruitful.

E. Procedural Issues

1. Due Process Issues

92. In its November 25 Order, the Commission required the ALJ to rule on the issues set for hearing by March 15, 2004. Virginia asserts that the expedited procedures under which the hearing was conducted denied it due process. As discussed below, the Commission denies Virginia's exceptions.

a. Background and Initial Decision

93. When the Commission originally found that AEP was required to join an RTO as a condition of its merger with CSW, the effective date of the merger was to be June 15, 2000 and AEP was to have joined an RTO by December 15, 2001.¹¹⁰ In the November 25 Order, the Commission found that decisive action was needed to move the AEP integration forward, not only because of market power concerns related to the merged

¹⁰⁹ PJM Brief Opposing Exceptions at 30-32.

¹¹⁰ November 25 Order at P 6.

entity, but also because of the benefits to be gained from RTO membership and the need for certainty in the Midwest and Mid-Atlantic energy markets.¹¹¹ Consequently, the Commission set the matter for hearing and required the ALJ to render an Initial Decision by March 15, 2004. The ALJ established a procedural schedule with the parties on December 2, 2003, at a pre-hearing conference.¹¹²

94. At the prehearing conference on December 2, 2003, Virginia asked the ALJ to specify what party had the burden of proof on each of the issues set for hearing to assist it in filing direct testimony and taking discovery.¹¹³ The ALJ, however, declined to specify what party bore the burden of proof as to each issue, and required the parties to address all of the issues in their testimony.

95. On December 10, 2003, Virginia and Kentucky filed an "Emergency Motion" to extend the date for the Initial Decision from March 15, 2004, to October 19, 2004,¹¹⁴ under a Track II schedule.¹¹⁵ The North Carolina Agencies¹¹⁶ filed an Answer in support of the Emergency Motion. These parties pleaded that the time allotted for hearing was too short and violated their due process rights.

¹¹¹ Id. P 91, 94-96.

¹¹² Order Establishing Procedural Schedule and Rules for the Case, Docket No. ER03-262-009, et al. (Dec. 3, 2003) (unpublished order).

¹¹³ Tr. 43, 53-57.

¹¹⁴ Emergency Motion of the Virginia State Corporation Commission and the Kentucky Public Service Commission to Extend the Date for Initial Decision and Request for Shortened Response Time and Expedited Consideration at 14, Docket No. ER03-262-009, et al. (Dec. 10, 2003) (unpublished order).

¹¹⁵ A Track II case is a Complex Case in the "Summary of Procedural Time Standards for Hearing Cases," available at www.ferc.gov/admin-lit/time-sum.asp (updated Aug. 20, 2003).

¹¹⁶ The North Carolina Agencies are the North Carolina Utilities Commission, the Public Trial Staff-North Carolina Utilities Commission, and the Attorney General of the State of North Carolina.

96. On December 17, 2003, the Chief Administrative Law Judge (Chief ALJ) denied the Emergency Motion on the grounds that two of the three issues raised by the parties were legal in nature and would require few, if any, findings of fact.¹¹⁷ In addition, the Chief ALJ stated that there should be little discovery because more than two years had passed since AEP was to voluntarily join an RTO as a condition of the merger with CSW so that the facts were generally known. The Chief ALJ also stated that any delay in the procedural schedule would most likely result in a delay in the October 1, 2004 date for AEP's full integration into PJM and delay bringing a joint and common market to the region. Virginia, Kentucky, and North Carolina then filed motions for interlocutory appeals of the Chief ALJ's denial, again seeking an extension of the date for the Initial Decision to October 19, 2004.¹¹⁸ On January 7, 2004, the Chief ALJ denied the motions on the same grounds on which he denied the Emergency Motion.¹¹⁹

97. In accordance with the ALJ's procedural schedule, discovery commenced December 3, 2003. The parties filed testimony on January 7, 2004, and rebuttal testimony and pre-trial briefs on January 22, 2004. The ALJ held the hearing beginning January 26, 2004, and continuing until February 2, 2004. The parties filed post-hearing

¹¹⁷Order of Chief Judge Denying Emergency Motion of the Virginia State Corporation Commission and the Kentucky Public Service Commission to Extend the Date for Initial Decision, Docket No. ER03-262-009, et al. (Dec. 17, 2003) (unpublished order).

¹¹⁸ See, e.g., Motion of The Kentucky Public Service Commission, et al. For Leave to File Interlocutory Appeal of the January 7, 2004 Order of Chief Judge Denying Motions for Interlocutory Appeal at 14, Docket No. ER03-262-009, et al. (Jan. 14, 2004); Interlocutory Appeal of the North Carolina Utilities Commission, the Public Trial Staff-North Carolina Utilities Commission, and the Attorney General of the State of North Carolina of the Chief Judge's Denial of Motion to Permit Interlocutory Appeal, Docket No. ER03-262-009, et al. (Jan. 14, 2004).

These parties also filed motions for rehearing of the December 17, 2003 denial of the Emergency Motion. The requests for rehearing were dismissed on procedural grounds. *New PJM Companies*, et al., 105 FERC ¶ 61,404 (2003).

¹¹⁹ Order of Chief Judge Denying Motions for Interlocutory Appeal, Docket No. ER03-262-009, et al. (Jan. 7, 2004) (unpublished order); Notice of Determination by the Chairman, Docket Nos. ER03-262-009 and ER03-262-011 (Jan. 16, 2004).

briefs on February 12, 2004, and participated in an oral argument in lieu of post-hearing reply briefs on February 24, 2004. The ALJ issued his Initial Decision on March 12, 2004.

98. In the Initial Decision, the ALJ found that the procedural schedule he adopted provided an adequate opportunity for discovery, the development of evidentiary submissions, rebuttal presentations, and also provided two briefing opportunities for the parties to argue their cases.¹²⁰ In addition, he stated, an oral argument was held in lieu of post-hearing reply briefs to give the parties an opportunity to respond to arguments in the post-hearing initial briefs.¹²¹

99. Virginia filed exceptions to the procedural schedule and to specific procedural aspects of the hearing alleging that these matters denied it due process. Cinergy, EME, Exelon, PJM, and Trial Staff oppose Virginia's due process exceptions.

b. Procedural Schedule

i. Briefs on Exceptions

100. Virginia filed exceptions stating that the procedural schedule in this case denied it due process.¹²² It states that it needed more time to present its case because this is a case of first impression and also because this is a very complex case. It states that the Commission's "Summary of Procedural Time Standards for Hearing Cases" provides more time for complex cases.¹²³

101. Virginia states specifically that the time available to engage in meaningful discovery was only two weeks, from January 7, 2004 to January 21, 2004, and that this amount of time was inadequate. It objects that its attempts at discovery prior to the filing of direct testimony on January 7, 2004, were ineffective because opposing parties refused to provide meaningful discovery responses until they had filed their direct testimony. In

¹²⁰ Initial Decision at P 4.

¹²¹ Tr. 1117-1259 (oral argument).

¹²² North Carolina adopts this exception and incorporates it into its Brief on Exceptions. North Carolina Brief on Exceptions at 2.

¹²³ Available at www.ferc.gov/legal/admin-lit/time-sum.asp (updated Aug. 20, 2003).

addition, Virginia asserts that the lack of opportunity to conduct discovery and to review the 350 pages of rebuttal testimony impaired its ability to develop effective cross-examination questions.

102. In opposition, parties argue that public interest factors, including cost savings, increased reliability and connectivity, and the elimination of manipulation and gaming, warranted an expedited schedule and that an accelerated procedural schedule does not amount to a denial of due process,¹²⁴ particularly since the accelerated process is needed to bring closure to an issue that has been delaying the progress of Midwestern markets for years.¹²⁵

103. Trial Staff and Cinergy assert there was sufficient process. They state that the ALJ opened the case to discovery immediately and that depositions were taken and data requests were served and responded to. They also state the parties could file direct testimony, rebuttal testimony, and pre-hearing briefs. They note that the hearing lasted for six days and that the parties cross-examined seventeen witnesses. They state the parties then had the opportunity to file post-hearing briefs and to present oral arguments in lieu of reply briefs.

104. PJM and Trial Staff assert Virginia had due opportunity, seven and one half weeks, to gather facts before trial. Trial Staff asserts the ALJ shortened the response time to five business days instead of ten, thus allowing for additional discovery.¹²⁶ Trial Staff states Virginia served data requests on PJM, AEP, Exelon, Cinergy, and EME. Trial Staff states Virginia initiated oral depositions in December, 2003, and took the depositions of AEP's principal witness, J. Craig Baker on December 23, 2003, and of Exelon's principal witnesses, Elizabeth A. Moler and Phillip Sharp, prior to trial.

¹²⁴ See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity, 105 FERC ¶ 61,183 (2003) (finding accelerated ALJ proceeding provided adequate due process when participants engaged in discovery, prepared testimony, rebuttal testimony, cross-examination, post-hearing briefs, and filed additional comments).

¹²⁵ See Electric Generation LLC, 100 FERC ¶ 61,149, at P 8 (2002) (finding 120-day hearing schedule appropriate to avoid delay of any benefits that may accrue as a result of Commission action).

¹²⁶ Tr. 41-42.

105. Trial Staff, PJM, and Exelon contend there was no need for Virginia to conduct discovery on facts related to Issue Nos. II and III, i.e., whether Virginia laws prevented AEP from joining an RTO and whether those laws are required to protect the public health, safety, or welfare, or for other specified purposes, as these facts were known to the excepting parties.

ii. Commission determination

106. The Commission affirms the ALJ's determination that the hearing procedures he established provided the parties with adequate opportunity to litigate the issues involved in this case. The ALJ is given primary control over structuring the trial. The Commission does not find that the ALJ failed to afford all parties the reasonable ability to collect and present evidence or denied the parties fundamental due process. As the ALJ found, the majority of the issues involved in this case are legal, and the facts pertaining to this matter were well known.

107. Constitutional due process requires that a party affected by government action be given "the opportunity to be heard at a meaningful time and in a meaningful manner."¹²⁷ However, circumstances vary and the sufficiency of the procedures supplied must be decided in the light of the circumstances of each case.¹²⁸ Here, the hearing was not an isolated proceeding, but was part of a series of events that had begun in 1998 with AEP's merger application. At the time the Commission issued its November 25, 2003 Order, AEP had been a merged entity for three and one half years and its entry into an RTO had

¹²⁷ Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotation marks and citations omitted).

¹²⁸ Id. at 334 ("[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (citation omitted)); Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) (welfare termination proceeding); Southern California Edison Co. v. Lynch, 307 F.3d 794, 807-08 (9th Cir. 2002); 353 F.3d 648 (9th Cir. 2003) (given the totality of the circumstances, expedited briefing schedule did not deprive appellant of procedural due process). See also California v. FERC, 329 F.3d 700, 713 (9th Cir. 2003) ("[W]e hold that, under the circumstances of this case, the Commission's consideration of the petitioners' evidence and arguments in their motions to intervene and petitions for rehearing gave the petitioners all the procedural safeguards they were due under the Due Process Clause or the FPA.").

been delayed or postponed for almost two years.¹²⁹ As discussed above, there was a need to resolve the status of AEP as expeditiously as possible. Thus, while the Commission provided a full evidentiary hearing, it also required the ALJ to adopt an expedited schedule for that hearing, so that these issues could finally be resolved.¹³⁰

108. The ALJ provided opportunity for reasonable discovery, and, in fact, Virginia availed itself of the opportunity to conduct discovery through depositions and data requests.¹³¹ It deposed three witnesses and filed data requests. At the trial, Virginia sponsored two witnesses, Mr. Walker and Mr. Spinner. It filed direct testimony and exhibits and rebuttal testimony and exhibits for these witnesses. Virginia also filed a pre-trial brief. Virginia participated in a hearing which occupied five and one-half days, from January 26, 2004, through January 30, 2004, and the afternoon of February 2, 2004. During the hearing, Virginia presented its own witnesses for cross-examination and cross-examined thirteen witnesses of opposing parties. After the hearing, Virginia filed a Post-Hearing Brief and on February 24, 2004, Virginia participated in an oral argument in lieu of reply brief before the ALJ.¹³² On March 12, 2004, the ALJ issued a 115-page Initial Decision in which he reviewed and ruled on Virginia's evidence and arguments, as described in the Initial Decision itself and in the body of this order.

109. The Commission finds that in the circumstances of this case, where an expeditious resolution of AEP's ability to join PJM is needed, and most of the issues were legal rather than factual, the ALJ's procedures afforded due process to all parties, giving them the

¹²⁹ The effective date of the merger was June 15, 2000 and AEP was initially to have joined an RTO by December 15, 2001. November 25 Order at P6.

¹³⁰ Such a schedule is specifically provided for under the Commission's hearing guidelines which state that the time periods provided apply "unless the Commission order directs otherwise." Summary of Procedural Time Standards for Hearing Cases, available at www.ferc.gov/legal/admin-lit/time-sum.asp (updated Aug. 20, 2003).

¹³¹ The agency retains discretion as to the amount and nature of discovery. *Trailways Lines, Inc. v. Interstate Commerce Comm'n*, 766 F.2d 1537, 1546 (D.C. Cir. 1985) (route application proceeding in which discovery was limited). See also *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 545; *Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, 296 F.3d 1120, 1134 (D.C. Cir. 2002); *Pacific Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1387-88 (9th Cir. 1984).

¹³² Tr. 1145-66, 1198-1203, 1222-37, and 1255-58.

opportunity to conduct discovery, put forth arguments and evidence, and respond to the testimony of other parties. The record in this case provided a full airing of the relevant issues.

110. The legal authority cited by Virginia does not change the Commission's decision on the adequacy of the discovery provided. Trans-Alaska Pipeline System¹³³ involves an attempt by contractors to avoid any discovery at all on their charges to construct the pipeline. The case is not related to the amount of time permitted for discovery. Jenkins and Mosher, which concern termination of employment, are both unpublished decisions and, as such, of limited authority.¹³⁴ In any event, in both of these cases, the Court found that the plaintiff was given no opportunity to conduct discovery with regard to the issues in the case prior to a determination on the merits. That is not the case here. Virginia has been afforded the opportunity to conduct discovery prior to a determination on the merits.

c. Burden of Proof

111. Virginia asserts the ALJ also denied it due process by failing to rule on which parties had the burden of proof. Specifically, it asserts the ALJ failed to rule on which parties must make a prima facie showing on each of the issues and to limit the direct testimony of the parties to those issues on which they bear this burden and the rebuttal testimony to responding to the arguments in the direct testimony. Virginia contends that this failure imposed additional burdens on it because it had to prepare direct testimony on all three of the issues, instead of only Issue No. III, the one issue about which Virginia believes it may have had to prepare a prima facie case.

¹³³ 9 FERC ¶ 61,133 (1979).

¹³⁴ Jenkins v. County of Riverside, 25 Fed. Appx. 607, No. 00-56293 (9th Cir. 2002) (unpublished memorandum); Mosher v. Washington Gas Light Co., 18 Fed. Appx. 141, No. 01-1059 (4th Cir. 2001) (unpublished disposition). Circuit Rule 36-3 of the U.S. Court of Appeals for the Ninth Circuit (last amended Dec. 1, 2002) states that unpublished dispositions and orders are not binding precedent, except when relevant under the doctrines of law of the case, res judicata, and collateral estoppel. Local Rule 36(c) of the U.S. Court of Appeals for the Fourth Circuit (dated Dec. 1, 2003) states that citations of the Court's unpublished dispositions within the Circuit is disfavored except for the purpose of establishing res judicata, estoppel, or the law of the case.

112. Exelon asserts that the ALJ or the Commission could require all parties to go forward with their initial and rebuttal cases at the same time as this involves only the burden of going forward with the evidence, not the ultimate burden of persuasion.¹³⁵ Trial Staff asserts the ALJ was correct in denying Virginia's pre-trial request for a ruling on the burden of proof because, since this is a case of first impression, ultimately a reviewing tribunal will establish the burden of proof rather than the trier of fact.

113. The Commission finds that the ALJ's decision to require all parties to go forward at the same time on all issues did not deny the parties due process. In order to ensure that this proceeding was resolved expeditiously, it was not an undue burden on the parties to require them to put forward all their arguments upfront. As the ALJ found, the need to resolve the issues concerning AEP in an expeditious manner would have been compromised if he had considered motions and arguments and made rulings on burden of proof issues prior to the hearing.

d. Oral Argument in Lieu of Reply Briefs

114. Virginia asserts that the oral argument in lieu of reply briefs, which was ultimately a total of approximately three hours and twenty-five minutes,¹³⁶ was unjustifiably short.¹³⁷ It states this was its only opportunity to respond to the arguments in opposing parties' Post-Hearing Briefs and that it did not allow for adequate explication of its positions on the issues.

115. Trial Staff and PJM assert the time permitted for the oral argument in lieu of reply post-hearing briefs was sufficient. Exelon asserts the amount of time allotted was sufficient, even generous, compared to argument time in the federal courts. Exelon asserts the excepting parties did not object to reliance on oral argument in lieu of reply briefs as part of the procedural schedule. PJM asserts the ALJ has discretion as to the length of oral argument and may even deny an opportunity for a reply to post-hearing briefs if there is good cause.¹³⁸

¹³⁵ Exelon cites Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 271-76 (1994).

¹³⁶ Virginia Brief on Exceptions at 27 n.32.

¹³⁷ North Carolina adopts this exception. North Carolina Brief on Exceptions at 2.

¹³⁸ PJM cites 18 C.F.R. §§ 385.704(b)(2) and 385.707(a) (2003).

116. The Commission denies Virginia's exception that oral argument in lieu of reply briefs was too short. The ALJ was well within his discretion to require oral argument instead of reply briefs and to set time limits for that oral argument.¹³⁹ This oral argument followed Post-Hearing briefs, so that the arguments of the other parties were known to Virginia. Moreover, the oral argument was limited to responding to the Post-Hearing briefs. The Commission has reviewed the oral argument in lieu of reply briefs as contained in the Transcript¹⁴⁰ and finds that it provided an adequate opportunity to reply to the Post-Hearing briefs both for the parties in general and Virginia in particular.¹⁴¹

2. Evidentiary Rulings on Rebuttal Testimony

117. The ALJ made several evidentiary rulings regarding rebuttal testimony. He denied a motion by Virginia to strike certain rebuttal testimony of EME's witness Mathis. He granted a motion by PJM to strike certain rebuttal testimony of Virginia's witness Spinner. Virginia excepts to both of these rulings. EME, PJM, and Trial Staff oppose Virginia's exceptions. The Commission reverses the ruling of the ALJ with respect to the admission of Virginia's rebuttal testimony, as explained below.

118. During the hearing, Virginia moved to strike portions of the rebuttal testimony of EME's witness Mathis – EME-15 at 1:10-13 and 2:1 through 11:2 and the associated exhibits.¹⁴² Virginia asserted Mr. Mathis had submitted no testimony on Issue No. III in his direct testimony and that this violated the ALJ's rule against withholding relevant evidence until rebuttal, known as sandbagging.¹⁴³

¹³⁹ See 18 C.F.R. §§ 385.704(b)(2) and 385.707(a) (2003).

¹⁴⁰ Tr. 1117-1259.

¹⁴¹ See Virginia's arguments at Tr. 1145-66, 1198-1203, 1222-37, and 1255-58.

¹⁴² Tr. 610-20; Tr. 734-38; Motion to Strike and for Oral Argument in Lieu of Answers of the Virginia State Corporation Commission at 1, Docket No. ER03-262-009, et al. (Jan. 29, 2004).

¹⁴³ In his Order Confirming Rulings on Motions at 2, Docket No. ER03-262-009, et al. (Feb. 3, 2004) (unpublished order), the ALJ refers to "sandbagging" as that testimony which is deferred to the rebuttal phase of the case in order to gain a tactical advantage.

119. On January 29, 2004, during the hearing, the ALJ denied Virginia's motion to strike Mr. Mathis's Issue No. III rebuttal testimony, finding it to be fair rebuttal testimony. The ALJ stated he would allow Virginia witness Walker to provide oral surrebuttal on Mr. Mathis's Issue No. III rebuttal testimony if Virginia thought it was necessary.¹⁴⁴ In addition, the ALJ found that there was no prejudice to Virginia because both statutes, HB 2453 and SB 1269, were referenced frequently in the evidence offered by other parties. The ALJ stated that, in addition, the statutes at issue are those of the Commonwealth of Virginia itself and that representatives of entities of Virginia state government should be familiar with those statutes, their history, and how they should be analyzed.

120. During the hearing, PJM moved to strike portions of Virginia witness Spinner's rebuttal testimony.¹⁴⁵ The ALJ granted PJM's motion at the hearing, finding that Mr. Spinner could have put his study in his direct testimony.¹⁴⁶ In his Order Confirming Rulings on Motions issued after the hearing, the ALJ stated Mr. Spinner had covered bid curves in his direct testimony, had his study available at the time of filing of direct testimony, and should have included it in his direct testimony. The ALJ found it would have been prejudicial to PJM's interests to have included the study only during the hearing. In addition, the ALJ found that some of the testimony was hearsay, which the ALJ did not consider to be reliable without an opportunity for cross-examination, and some of it was previously available studies from a non-witness. The ALJ found that these elements of Mr. Spinner's rebuttal testimony represented a violation of the rule against sandbagging. The ALJ stated that, accordingly, he had ruled during the hearing that these portions of Mr. Spinner's rebuttal testimony would not be received in evidence.

121. The Commission will reverse the ALJ's decision striking the testimony of Mr. Spinner. The ALJ adopted unusual procedures in this proceeding by asking the parties to file testimony on all of the issues and to do so in their direct testimony. He told the parties they ignored an issue at their peril, and advised strongly against withholding testimony until rebuttal. He characterized this practice as sandbagging, described it as unfair, and said that he would not permit it. At the same time, the ALJ stated that the usual rule concerning rebuttal testimony would be observed, that is, rebuttal testimony would be permitted if it was responsive to direct testimony. The unusual rule on putting

¹⁴⁴ Tr. 737-38.

¹⁴⁵ Ex. VCC-30 at 10, line 23 through 12, line 22; Ex. VCC-32; Ex. VCC-33. See also Tr. 445-46; 650-56.

¹⁴⁶ Tr. 656.

forward all positions in direct testimony conflicted with the usual rule allowing rebuttal testimony that responds to direct testimony. Under the first rule, testimony was expected to come in as direct testimony, yet under the second, it could come in as rebuttal testimony.

122. The Commission finds the determinations that resulted from the combination of these rulings to be troublesome. EME witness Mathis presented no direct testimony on Issue No. III, yet all of his rebuttal testimony on Issue No. III was admitted because the ALJ found it was responsive to the direct testimony of other parties.¹⁴⁷ In contrast, Virginia's witness Spinner did file direct testimony on Issue No. I, but not all of his rebuttal testimony on Issue No. I was admitted because the ALJ found some of it could have been filed as direct testimony.

123. Virginia in this case attempted to follow the instructions and admonitions of the ALJ and filed its case on Issue No. I in the direct testimony of Mr. Spinner rather than waiting to counter the direct testimony of the opposing parties in rebuttal testimony. The Commission finds that Virginia should not be penalized for filing direct testimony in accordance with the strictures of the ALJ. Virginia's filing its Issue No. I case in direct testimony aided the proceeding by providing the parties and the ALJ with Virginia's positions on the complex factual matters in this issue. Mr. Spinner did not put forward a new theory of the case in his rebuttal testimony. He had raised the issue of whether bids would be greater than marginal costs in the PJM RTO in his direct testimony,¹⁴⁸ so that opposing parties had notice of this argument. Mr. Spinner's bid curve study addressed an omission in the direct testimony of the opposing parties by showing the type and results of such a study and, as such, could be regarded as proper rebuttal testimony.

¹⁴⁷ Mr. Brown's rebuttal testimony on behalf of the Muni-Coop Coalition concerning a staged integration approach for AEP was admitted in a similar fashion. Tr. 215-22. In Mr. Brown's case, no direct testimony had been filed. The ALJ admitted Mr. Brown's rebuttal testimony subject to surrebuttal which he found eliminated any prejudice.

¹⁴⁸ See Ex. VCC-19 at 28-39, in which Mr. Spinner includes lack of consideration of strategic bidding (*i.e.*, bids greater than marginal cost) and tenuous assumptions that generator bids will equal marginal cost as reasons why existing studies do not show that the integration of AEP into PJM is designed to obtain the economic utilization of facilities and resources under section 205(a) of PURPA.

124. Thus, the Commission will reverse the ALJ and permit the bid curve study and the other related, stricken testimony, listed above in footnote 145, to be included as evidence in this proceeding. However, the addition of this evidence does not change any of the Commission's conclusions as to whether the requirements of PURPA section 205 have been met. As discussed earlier, an examination of the Commission's rate design policies is beyond the scope of this proceeding, and, in any event, the admission of this evidence does not undermine the ALJ's findings that the integration here is designed to obtain economic utilization of facilities.

125. With respect to Virginia's motion to strike the rebuttal testimony of Mr. Mathis concerning Virginia legislation, the Commission affirms the holding of the ALJ to admit this testimony on the grounds he cited, that it was responsive to direct testimony.

F. Rehearing Requests

126. We deny the request for clarification or rehearing of our November 25 Order by Multiple Transmission-Dependent Utilities¹⁴⁹ in Docket No. ER03-262-010 that the Commission clarify that projects currently included in AEP's transmission expansion plans will be carried over into the PJM Regional Transmission Expansion Plan once AEP integrates into PJM. This request is beyond the scope of this proceeding. We dismiss the remaining requests for rehearing and/or clarification in Docket No. ER03-262-010, wherein Exelon argued that the Commission failed to invoke its exclusive power under sections 205 and 206 of the FPA to regulate interstate commerce, and Virginia and other state parties argued that the Commission erred in seeking to assert its authority under PURPA section 205, and erred in setting March 15 as the date for the Initial Decision. In response to Exelon's petition for rehearing, we opted to proceed under PURPA section 205 and having determined to override Virginia's laws and regulations preventing the integration, we see no need to exercise our authority under sections 205 and 206 of the FPA. In response to the state parties, we find that the issues they raise in their rehearing petitions were also raised in their exceptions to the ALJ's decision, and have been addressed by this order.

¹⁴⁹ Indiana Municipal Power Agency; Cities of Crosswell, Dowagiac, Sebawaing, and Sturgis, Michigan; Nordic Energy; Thumb Electric Cooperative; ElectriCities of North Carolina, Inc.; Blue Ridge Power Agency; Central Virginia Electric Cooperative; Craig-Botetourt Electric Cooperative; Old Dominion Electric Cooperative; and Virginia Municipal Electric Association No. 1.

127. We further deny the pending request for rehearing in Docket No. ER03-262-013 of our order of December 31, 2003 seeking revisions to the procedural schedule in this case.¹⁵⁰ Similar to the requests for rehearing by state parties in Docket No. ER03-262-010 above, the parties' concerns with respect to the procedural schedule were raised in their exceptions here, and we have addressed those issues in our order here.

III. CONCLUSIONS

128. The Commission finds that it may exercise its authority under PURPA section 205(a) to override the laws and regulations of Virginia in order to allow AEP to integrate into PJM by October 1, 2004.

129. This action permits AEP's application to integrate into PJM in ER03-262-000, that we accepted on April 1, 2003, and suspended subject to refund and conditions, to proceed, and we establish October 1, 2004, as the effective date for the integration to take place. In the April 1, 2003 order, we accepted transitional rates to become effective as of the date of transfer of control of the facilities, suspended those rates for a nominal period, and set them for hearing. We further suspended that hearing pending settlement procedures.¹⁵¹ Those settlement discussions proved unfruitful, however, and on May 7, 2004, the Chief ALJ issued a report stating that the hearing in this proceeding appeared to be moot, and he therefore returned this proceeding to the Commission for such further action as it deemed appropriate.

130. We therefore direct the Chief ALJ to recommence the hearings regarding AEP's rates. We recognize that due to the delay in integration, AEP may need to update its rates,¹⁵² and the ALJ to be assigned to this case should establish a process under which such rates can be updated, if necessary.

¹⁵⁰ New PJM Companies, 105 FERC ¶ 61,404 (2003).

¹⁵¹ American Electric Power Corp., et al., 103 FERC ¶ 61,008, at Ordering Paragraphs A & E.

¹⁵² On May 1, 2003, AEP made a compliance filing providing new rates in Docket No. ER03-262-004. Since then, PJM has also made a subsequent filing with the Commission stating that "all PJM Tariff and Operating Agreement revisions submitted on . . . May 1, 2003 in Docket No. ER03-262-004 have been superseded, or were rendered moot by other orders or filings." Amended Application of PJM Interconnection, LLC, Transmittal letter at 3, Docket No. ER04-807-001 (May 20, 2004). Additionally, AEP has stated that integration of AEP into PJM will require new rate filings superseding the

(continued)

The Commission orders:

(A) The Commission affirms the Initial Decision as discussed in the body of this order, except that Exhibits VCC-30 at 10, line 23 through 12, line 22; VCC-32; and VCC-33, which were stricken by the ALJ, are hereby allowed into the record.

(B) AEP's filing in ER03-262-000 will become effective October 1, 2004, subject to the conditions established in that order.

(C) The Commission returns the issues set for hearing in our April 1 Order in ER03-262-000 to the Chief ALJ to continue hearing proceedings as appropriate.

(D) The Commission denies the requests for rehearing in Docket Nos. ER03-262-010 and ER03-262-013, as discussed above.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.