



## **BACKGROUND**

### **I. Prior Orders**

2. After the issuance of the Commission's Order No. 2000,<sup>3</sup> several midwestern utilities sought to form the Alliance RTO. Because the Alliance proposal lacked sufficient scope to exist as a stand-alone RTO, the Commission did not permit Alliance to go forward, and it required the companies forming Alliance to make compliance filings as to their plans to join an RTO in the future.<sup>4</sup> In a subsequent order, issued on July 31, 2002, the Commission accepted proposals by the New PJM Companies to join PJM.<sup>5</sup>

### **II. The April 1 Order**

3. On December 11, 2002, in Docket Nos. ER03-262-000 and ER03-262-001, the New PJM Companies proposed revisions to the PJM and PJM West Operating Agreements (OAs) and the PJM Open Access Transmission Tariff (OATT) to include the New Companies as transmission owners within PJM. The New PJM Companies also filed transitional rate proposals which would apply for a transitional period for service in the AEP and ComEd zones. Initially, AEP and ComEd proposed to transfer functional control of their transmission facilities to PJM, and PJM to begin providing transmission service over those facilities, on either February 1 or March 1, 2003, with DP&L and VEPCO transferring their facilities to PJM's control on a later date.<sup>6</sup>

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<sup>3</sup> Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000 A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom.* Public Utility District No. 1 of Snohomish County, Washington v. FERC (D.C. Cir. 2001).

<sup>4</sup> Alliance Companies, 97 FERC ¶ 61,327 (2001).

<sup>5</sup> Alliance Companies, 100 FERC ¶ 61,137 at P 35 (2002) (July 31 Order).

<sup>6</sup> ComEd also made a filing in Docket No. ER03-263-000 to cancel its OATT, effective as of the date that PJM began operating ComEd's transmission facilities, since at that point service would be provided under PJM's tariff.

4. On April 1, 2003, the Commission accepted, suspended for a nominal period subject to refund, and set for hearing the rates proposed by the New PJM Companies, effective as of the date that AEP's and ComEd's facilities are transferred to PJM's operational control.<sup>7</sup>

5. The Commission also directed New PJM Companies and PJM, inter alia, to recalculate and refile the proposed rate design without assuming the participation of VEPCO.<sup>8</sup> The Commission also set for hearing multiple issues raised by protesters.

### **III. Requests for Rehearing of the April 1 Order**

6. Requests for rehearing and/or clarification were filed in Docket No. ER03-262-003 by the New PJM Companies,<sup>9</sup> AEP, Cinergy, DP&L, Detroit Edison Company (Detroit Edison), Duke Energy Corporation (Duke), Edison Mission Energy, et al. (Edison Mission), Exelon Corporation and ComEd (collectively, Exelon), Illinois Industrial Energy Consumers (IIEC), Midwest Independent Transmission System Operator (MISO), MISO Transmission Owners (MISO TOs), Old Dominion Electric Cooperative (ODEC), Reliant Energy Northeast Generation (Reliant), Wisconsin Electric Power Company, et al. (WEPCO), Wolverine Power Supply Cooperative (Wolverine), the Virginia State Corporation Commission (Virginia Commission), and the Louisiana Public Service Commission (Louisiana Commission).

7. Wisconsin Public Service Corporation and Upper Peninsula Power Company (collectively, WPSC) filed an answer to the New PJM Companies' answer to the requests for rehearing and clarification. Detroit Edison filed an answer to DP&L's request for clarification, and subsequently filed a motion to lodge a decision that it asserted was

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<sup>7</sup> American Electric Power Service Corp., *et al.* (New PJM Companies), 103 FERC ¶ 61,008 (2003) (April 1 Order). The Commission also found that AEP's and ComEd's transfer of control of their facilities to PJM was consistent with the public interest, as required under section 203 of the Federal Power Act (FPA). However, the Commission required the New PJM Companies to comply with the requirements of 18 C.F.R. Part 33 by providing a description of the transmission facilities that will be placed under PJM's operational control.

<sup>8</sup> In the April 1 Order, the Commission also accepted ComEd's Notice of Cancellation of its OATT, effective as of the date that its transmission facilities are integrated into PJM and PJM begins providing service over those facilities pursuant to PJM's OATT.

<sup>9</sup> The New PJM Companies also filed two motions to lodge recent decisions that they assert are relevant to their rehearing request.

relevant to its answer to DP&L's motion for clarification. The Coalition of Municipal and Cooperative Users of the New PJM Companies' Transmission (Muni-Coop Coalition) also filed an answer to DP&L's request for clarification. The MISO TOs filed comments in support of MISO's request for clarification.

#### **IV. Compliance Filings Made on May 1 and Protests**

8. In response to the Commission's directive in the April 1 Order, the parties made two compliance filings. On May 1, 2003, as amended on May 6, 2003 and May 7, 2003, in Docket No. ER03-262-004, the New PJM Companies made a compliance filing providing revised tariff sheets that reflect only ComEd's participation as a transmission owner in PJM effective October 1, 2003. The revised tariff sheets do not reflect AEP's participation in PJM, as AEP was at that time unable to integrate its transmission facilities into PJM due to state actions discussed below. The filing was noticed in the *Federal Register*, with comments, protests, and motions to intervene due on or before May 28, 2003.<sup>10</sup> Protests of that compliance filing were filed by multiple parties.

9. Also on May 1, 2003, in Docket No. ER03-262-002, PJM filed information under 18 C.F.R. Part 33 of the Commission's regulations to support its request to transfer control of transmission facilities under section 203.<sup>11</sup> The filing was noticed in the *Federal Register*, with comments, protests, and motions to intervene due on or before May 14, 2004.<sup>12</sup> Protests of that compliance filing were filed by several parties.

#### **V. Commission Data Requests to PJM and AEP**

10. On June 10, 2003, in Docket No. ER03-262-007, the Commission issued data requests to AEP and to PJM, requesting, in general, that each address whether there are operational barriers to having AEP's facilities in some states transferred to PJM's control within the near future while facilities in other states are not transferred. A response to the data requests was filed by AEP on June 25, 2003 and by PJM on June 26, 2003.

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<sup>10</sup> 68 Fed. Reg. 27994 (2003).

<sup>11</sup> ComEd subsequently amended its list of the facilities that would be placed under PJM's control on December 22, 2003 (Docket No. ER03-262-012).

<sup>12</sup> 68 Fed. Reg. 24450 (2003).

## **VI. Later Proceedings Relating to AEP's and ComEd's Integration into PJM**

11. After the issuance of the Commission's April 1 Order, AEP was initially prevented from integrating its transmission facilities into PJM's system due to objections from the Commonwealths of Kentucky and Virginia. Therefore, ComEd proceeded to integrate its transmission facilities into PJM ahead of AEP, on May 1, 2004.<sup>13</sup> Recently, however, the Commission issued orders that resolved the Commonwealth of Kentucky's objections, and provided that, pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA), AEP's application to integrate into PJM would become effective on October 1, 2004.<sup>14</sup>

## **DISCUSSION**

### **I. Procedural Issues**

12. Rule 213 (a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed in Docket Nos. ER03-262-002, ER03-262-003, and ER03-262-004, and will, therefore, reject them.

### **II. Analysis**

#### **A. Issues Raised on Rehearing**

##### **1. ComEd Should Not be Allowed to Join PJM on a Standalone Basis**

13. Edison Mission, Alliant Energy, WEPCO and IIEC argue that the Commission should not permit ComEd to join PJM until AEP can also join PJM. Edison Mission states that, unless AEP also joins PJM, the benefits of ComEd's membership in PJM will flow solely to ComEd's affiliate Exelon Generation, and IIEC states that retail competition in Illinois will be harmed if ComEd joins PJM on a standalone basis. MISO states that if ComEd joins PJM without AEP, ComEd will be an island within the midwest, and that this situation will create possibilities for abuse. Reliant asks the Commission to clarify that ComEd has not been authorized to join PJM on a standalone basis.

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<sup>13</sup> PJM Interconnection, LLC, *et al.*, 107 FERC ¶ 61,087 (2004) (April 27 Order).

<sup>14</sup> New PJM Companies, *et al.*, 107 FERC ¶ 61,272 (2004); New PJM Companies, *et al.*, 107 FERC ¶ 61,271 (2004) (June 17 Order).

### **Commission Response**

14. The Commission denies the requests. In a prior order issued on March 18, 2004,<sup>15</sup> the Commission addressed the question of whether ComEd should be permitted to integrate its system into PJM separately from AEP. In that order, the Commission acknowledged that when it originally approved the RTO choices of the former Alliance Companies, all parties had anticipated that AEP would be integrated into PJM ahead of ComEd, and that "there cannot be a complete integration of the markets of ComEd and PJM if AEP is not also part of PJM."<sup>16</sup> The Commission also noted, however, that there is already an ongoing proceeding to determine whether the Commission should override state actions to permit the voluntary integration of AEP into PJM,<sup>17</sup> and that parties have provided evidence to show that even the integration of ComEd without PJM will bring about benefits to customers. Thus, the question of whether ComEd may proceed to join PJM, with AEP's status still outstanding, has already been decided in that order.

### **2. The Commission Should Enforce the Conditions of the July 31 Order Before Allowing the New PJM Companies to Join PJM**

15. Detroit Edison and Wolverine request that the Commission state that it will require the New PJM Companies to comply with the conditions imposed in the July 31 Order, including a hold harmless provision for parties in Michigan and Wisconsin, and a resolution of the inter-RTO rates between PJM and MISO. MISO TOs also request that the Commission clarify issues relating to reliability, seams, the hold harmless condition, and the requirement that PJM and MISO create a seamless common market.

### **Commission response**

16. In its July 31 Order, the Commission found that, to render the New PJM Companies' RTO choices just and reasonable, it was necessary to impose certain conditions.<sup>18</sup> Thus, the Commission ordered PJM and MISO to form a "functional common market" across the two organizations by October 1, 2004.<sup>19</sup> The Commission

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<sup>15</sup> PJM Interconnection, LLC, 106 FERC ¶ 61,253 (2004) (March 18 Order).

<sup>16</sup> March 18 Order at P 22.

<sup>17</sup> As noted above, that issue was resolved in the Commission's June 17 Order.

<sup>18</sup> July 31 Order at P 35.

<sup>19</sup> *Id.* at P 40. This date has now been delayed. MISO will not begin operating its markets until December 1, 2004, and PJM and MISO will not be able to begin operating their joint and common market until 2005 at the earliest.

also required MISO and PJM to develop reliability plans to be approved by the North American Electric Reliability Council (NERC). In addition, to address concerns about the isolation of Wisconsin and Michigan from the rest of MISO due to the RTO choices of the New PJM Companies, the Commission required the RTOs and the New PJM Companies to propose a solution that would hold utilities in Wisconsin and Michigan harmless from loop flows or congestion that might result from the New PJM Companies' entry into PJM, and to file this "hold harmless" proposal as part of a joint operational plan addressing how the RTOs will manage the seam between them.

17. MISO and PJM have now entered into a proposed Joint Operating Agreement to address seams problems,<sup>20</sup> and the Commission has accepted a service agreement between PJM and ComEd that will ensure that customers in Michigan and Wisconsin are held harmless for loop flow or congestion impacts resulting from the RTO choices of ComEd and AEP.<sup>21</sup> Thus, those two conditions have been met.

18. As to the necessity of developing a joint and common market between PJM and MISO before any of the New PJM Companies can be integrated, the Commission stated in the March 18 Order that although the schedule for development of a common market has been delayed, "the systems for ComEd to join PJM are anticipated to be in place this spring" and "we do not believe it would be equitable to delay the ability of ComEd to join PJM because of these delays."<sup>22</sup> We find that the same reasoning applies to the integration of all of the New PJM Companies. [On April 27, the Commission issued an order permitting ComEd's integration to go forward as scheduled on May 1, 2004.<sup>23</sup> As noted above, PJM and MISO will not be able to begin operating their joint and common market until at least 2005, and given that we have already permitted ComEd customers to receive the benefits of RTO membership, we do not believe it equitable to deny those benefits to AEP customers due to the delay in developing the PJM/AEP common market.]

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<sup>20</sup> See Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C, 106 FERC ¶ 61,251 (2004).

<sup>21</sup> April 27 Order at P 2 (Commission accepts and suspends Hold Harmless Service Agreement subject to refund and to the outcome of hearing).

<sup>22</sup> March 18 Order at P 35.

<sup>23</sup> April 27 Order at P 26.

### 3. Recovery of FERC Annual Charges

19. In the April 1 Order, with regard to recovery of annual charges, the Commission stated:

The New PJM Companies propose terms and conditions allowing AEP and ComEd retroactively to collect FERC Annual Charges from their former transmission customers for service provided prior to the effective date of the tariff. Currently, AEP's tariff does not contain a specifically stated rate or a formula component which would allocate FERC Annual Charges to each customer, nor has it demonstrated that it is not currently collecting these charges from each transmission customer. (ComEd's tariff currently contains provisions in the various schedules stating "FERC annual charges (18 CFR § 382) shall apply in addition to the charges. . . .") . . . . The Commission does not allow retroactive ratemaking. Therefore, the New PJM Companies are directed to remove the provisions permitting the retroactive collection of annual charges.<sup>24</sup>

20. Exelon (ComEd's parent) and AEP seek rehearing of this ruling. Both AEP and Exelon assert that the Commission has misperceived their proposal as retroactive ratemaking, when in fact, they are proposing to collect FERC annual charges from their customers for service provided prior to AEP's and ComEd's integration into PJM.

21. Both parties point out that the Commission assesses annual charges against transmission providers once a year (and transmission providers then charge their customers for those annual charges), and those charges are based on the amount of MWh of transmission usage in the prior year. (Thus, the Commission will send annual charge notices to transmission providers in August 2004, and those charges will be based on each company's usage in 2003.)

22. Exelon argues that this is not retroactive ratemaking, but simply delayed billing, caused by the fact that the Commission itself does not bill for annual charges until the year after the transmission takes place. Exelon states that ComEd's tariff currently allows it to collect annual charges separately from its transmission rates, and to do so on a delayed basis. Thus, when the Commission assessed an annual charge against ComEd in 2002, ComEd in turn assessed its transmission customers for the 2001 annual charges in 2002, based on each customer's 2001 usage. Exelon states that ComEd now proposes to continue to collect annual charges from its customers "on the same basis as under its OATT after ComEd joins PJM,"<sup>25</sup> and asks the Commission to permit this collection.

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<sup>24</sup> April 1 Order at P 42.

<sup>25</sup> ComEd rehearing request at 21.

23. AEP, on the other hand, asserts that the Commission's annual charge is a charge for the current year, not the prior year, and that, while the amount AEP is required to pay in FERC annual charges each year is based on the amount of transmission service provided on AEP's facilities in the prior year, this prior year usage is, in effect, simply a proxy used to assess the current year's annual charges. AEP claims the annual charge is thus a current cost to AEP and its customers, not a retroactive cost.

24. AEP asserts that it is seeking to recover the amount that it will be assessed by the Commission in annual charges after PJM begins providing transmission service over AEP's facilities. As the Commission understands AEP's argument, the situation is as follows: AEP will integrate into PJM in October 2004, and in August 2005, the Commission will issue AEP an annual charge for 2005 – in other words, a current charge since it is assessed by the Commission in 2005, but which will be based on the usage of AEP's system in 2004. At that point, however, AEP will no longer have any mechanism to recover that charge from customers, since there will no longer be any "AEP customers."<sup>26</sup> AEP states that this will be a transitional surcharge which will disappear once AEP is no longer assessed an annual charge and PJM begins paying the full annual charge as transmission provider for its expanded region. AEP further asserts that, contrary to the Commission's statement that its tariff currently does not contain a rate or formula allocating FERC Annual Charges to each customer, its current transmission rates were previously established through a "black box" settlement, so that the total rates there do not break out individual costs.

### **Commission Response**

25. We will grant Exelon's and AEP's requests for rehearing, as discussed below. Because the situations of ComEd and AEP differ significantly, we discuss each separately.

26. The Commission finds that it was in error in concluding that ComEd's tariff filing represented retroactive ratemaking or a violation of the filed rate doctrine. Prior to its integration with PJM, ComEd had an approved tracker in its tariff that allowed it to collect annual charges billed by the Commission in the year following the bill. The ComEd/PJM filing in this proceeding would permit ComEd to continue this tracker after

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<sup>26</sup> In other words, those AEP transmission customers who formerly took service on AEP's transmission facilities under AEP's OATT will now be taking service on those same facilities under PJM's OATT, once AEP transfers control of its facilities to PJM, and will, at that point, have become PJM customers. AEP states that its reference in the initial filing to "former transmission customers" was intended to mean such customers, rather than customers who have left AEP's system.

joining PJM to collect the remaining annual charges billed by the Commission. Since ComEd's tracker was in place as part of ComEd's filed rates prior to ComEd joining PJM and all parties, therefore, have had notice of ComEd's method of collecting annual charges, and all parties also have had notice that ComEd proposed to continue that tracker after joining PJM, there is no issue here of violation of the filed rate doctrine or retroactive ratemaking.<sup>27</sup>

27. However, the Commission is not clear why ComEd and PJM should not recover any annual charges assessed to ComEd through the PJM tracking mechanism. Under Order No. 641,<sup>28</sup> after joining PJM, ComEd would no longer be responsible for collecting payment for annual charges from its customers. In Order No. 641, the Commission stated that when RTOs or ISOs take over providing transmission services, they should collect, in their rates, amounts to cover the annual charges: "If an ISO or RTO public utility has taken over from individual public utilities the function of providing transmission service and has, accordingly, a tariff or rate schedule (and thus rates) on file for such service, then it is the ISO or RTO public utility that will be responsible for paying annual charges, and it will be assessed annual charges based on all transmission that it provides pursuant to its tariff or rate schedule."<sup>29</sup> PJM has a tariff provision providing for collection of amounts intended to reimburse it for annual charges, and that tariff provision should be used to collect the annual charges attributable to ComEd now that ComEd has joined PJM. These annual charges are now a cost of the PJM system and should be recovered according to PJM's tariff. Thus, with respect to the 2004 annual charges to be billed and any unrecovered annual charges from May 2004 (when ComEd joined PJM), it would appear that PJM/ComEd should recover those charges according to the PJM tracker.<sup>30</sup> PJM and ComEd, therefore, should file a revised tariff provision providing for recovery of annual charges through the PJM mechanism, including data justifying any unrecovered 2003 annual charges to be included, or to explain why the

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<sup>27</sup> See *Transwestern Pipeline Co v. FERC*, 897 F.2d 570, 577-79 (D.C. Cir. 1990) (formula rate or tracker does not violate filed rate doctrine or retroactive ratemaking when customers have notice in advance of the tracker).

<sup>28</sup> Revision of Annual Charges Assessed to Public Utilities, 65 Fed. Reg. 65757 (Nov. 2, 2000), FERC Stats. & Regs. Regulations Preambles ¶ 31,109 (October 26, 2000), *reh'g denied*, Order No. 641-A, 94FERC ¶ 61,290 (2001).

<sup>29</sup> Order No. 641, FERC Stats. & Regs. Regulations Preambles ¶ 31,109, at 31,855.

<sup>30</sup> ComEd's 2004 annual charge allocation will be included in PJM's 2004 annual charge bill.

proposed separate tracker should be used. If the parties seek to justify the separate tracker, they justify what costs are to be recovered through that tracker, and when such a tracker should end.

28. The situation with respect to AEP is different. AEP has no current tracker for collecting annual charges. These charges are collected through AEP's fixed transmission rates that were based on a so-called "black box" settlement. However, AEP's current method of collection of annual charges should not prevent AEP, together with PJM, from filing under section 205 of the FPA, to change the collection method prospectively to a tracking system upon AEP's integration with PJM in October 2004.<sup>31</sup> As discussed above, the Commission sees no reason to set up a separate tracking system for the annual charges to be billed to AEP in 2004. Rather than setting up a tracking system for these costs, when AEP joins PJM, PJM should include the appropriate amount of unrecovered 2004 annual charges in its annual charge assessment or explain why a separate tracker is justified.

29. However, under AEP's current cost-of-service approach, AEP may be collecting some amount attributable to annual charges through its transmission rates, which will be carried over to its PJM revenue requirements. Therefore, the Commission will set for hearing the issue of whether AEP's cost-of-service once it joins PJM should be reduced to reflect the fact that its annual charges will now be collected through PJM's tracking mechanism.

#### **4. State Jurisdiction.**

30. AEP states that Virginia legislation currently prohibits it from transferring ownership or control of its transmission system to an RTO, and that Kentucky, Indiana and Virginia are also conducting proceedings regarding the transfer of AEP's facilities to PJM's control. AEP asks the Commission to state that the April 1 Order does not require AEP to transfer control of its facilities to PJM until AEP receives the requested state approvals. Exelon asks the Commission to rule that Virginia state law is preempted by federal law, and that Virginia may not prevent utilities from joining an RTO once the Commission has approved their doing so. The Louisiana Commission asks the Commission to find that the FPA does not preempt Virginia state law, and that the Commission does not have the power to require utilities to participate in RTOs or to order divestiture of control over transmission.

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<sup>31</sup> Since this is a prospective change in AEP's tariff, there is no filed rate or retroactive rate making issues involved.

**Commission response**

31. As noted above, on June 17 the Commission issued an order finding that the Commission may act under federal law to permit AEP to integrate its facilities into PJM over the objections of states. Thus, that issue is no longer open to question here.

**5. Interaction with ER03-242 Rates**

32. At roughly the same time that the New PJM Companies filed their initial filing in this docket, AEP filed new transmission rates in Docket No. ER03-242-000, which the Commission accepted in part with modifications and suspended, rejected in part, and set for hearing.<sup>32</sup> AEP subsequently withdrew those rates, based in part on the fact that due to state action in Virginia, AEP would not be able to integrate into PJM on the date then scheduled. AEP stated that it expected to make a future rate filing to reflect more current test year data.<sup>33</sup> The Virginia Commission seeks rehearing of the Commission's April 1 Order in this docket on the basis that, because the only support for the rates in this docket was the new rates set forth in Docket No. ER03-242, now that AEP has withdrawn the rates it filed in Docket No. ER03-242, there is no longer sufficient support for the rates in this docket.

**Commission response**

33. Since AEP has withdrawn its filing in Docket No. ER03-242-000, the Commission agrees with the Virginia Commission that AEP that the rates filed in Docket No. ER03-242-000 are moot. However, the rates filed in Docket No. ER03-262-000 were not withdrawn and are currently subject to the outcome of a hearing.

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<sup>32</sup> American Electric Power Service Corp., 103 FERC ¶ 61, 009 (2003).

<sup>33</sup> American Electric Power Service Corp., 103 FERC ¶ 61, 369 (2003).

34. In the June 17 Order, the Commission recognized that due to the delay in integration, AEP may need to update its rates,<sup>34</sup> and directed the Chief ALJ to “recommence the hearings regarding AEP’s rates.” Further, the Commission stated that the ALJ assigned to this case should establish a process under which such rates can be updated, if necessary.

#### **6. What Issues Were Set for Hearing by the April 1 Order**

35. DP&L asks the Commission to clarify what issues were set for hearing by the April 1 Order, and specifically to clarify that DP&L’s revenue requirement is not set for hearing. Detroit Edison and the Muni-Coop Coalition state in their answers that DP&L’s rates should be considered at hearing.

36. The New PJM Companies assert that the Commission set issues for hearing that are outside scope of whether the rates were just and reasonable, particularly issues relating to transmission owner revenue requirements and capital costs. They argue that the Commission should have explicitly accepted the rate design proposed in their December 11 filing, on the basis that the rate design will ensure revenue neutrality for transmission owners that join RTOs and will minimize cost shifts during the transition period, as is the Commission’s policy. The New PJM Companies state that the Commission accepted rate designs filed by other companies without hearing, on the basis that the proposals were consistent with Commission precedent and policy, and that the Commission’s failure to treat New PJM Companies’ filing in the same fashion is arbitrary and capricious.

37. The New PJM Companies further assert that the Commission erred by failing to limit the hearing to issues directly related to determining the justness and reasonableness of the proposed rate change. The New PJM Companies argue in particular that the Commission should not have set the transmission owners’ revenue requirements and capital costs for hearing, as the Commission does not require transmission owners to file updated cost of service studies or otherwise support their existing revenue requirements when an RTO is formed or expanded or when a revenue-neutral rate design is

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<sup>34</sup> See Footnote 152 of June 17 Order. 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 tariff sheets filed in Docket No. ER03-262-004. Response of AEP-East at 2, Docket No. ER03-262-004 (May 6, 2003).

implemented. To support their argument, the New PJM Companies cite to an order issued by the Commission on April 30, 2003 allowing the OATTs of individual companies within MISO to establish rates under the MISO OATT and not requiring updated cost-of-service analyses to be filed.<sup>35</sup>

### **Commission response**

38. The Commission grants DP&L's request for clarification, and states that its revenue requirement was not set for hearing in the April 1 Order. When the Commission stated at P 33 of the April 1 Order that "[w]e are setting for hearing issues raised by the protesters related to the rates, including but not limited to . . . each company's revenue requirement," the phrase "each company" referred to AEP and ComEd (the two companies that had made new rate filings); it did not include DP&L.

39. The Commission denies the New PJM Companies' two rehearing requests. New PJM Companies' argument that the Commission should have explicitly accepted the rate design proposed in their December 11 filing does not take into account the fact that both ComEd and AEP proposed revisions to their accepted rates on file in their OATTs. These changes include new transitional elements, such as Zonal Transitional Adjustment and the Transitional Market Expansion Charge; as well as changes in their currently approved rates. For example, AEP proposed a new revenue requirement of \$446,557,142 and a charge of \$1,420/MW-month for Network Integration Transmission Service while ComEd's revenue requirement stated in Attachment H remained at its current level of \$169,800,000, however ComEd also proposed a charge of \$699.75/MW-month for Network Integration Transmission Service.

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<sup>35</sup> Midwest Independent Transmission System Operator, 103 FERC ¶ 61, 090 at P 20 (2003) (April 30 Order) ("Consistent with our prior orders on proposals by transmission owners to utilize existing individual-company OATT rates to establish initial rates, including transitional surcharges, under an RTO OATT, we will accept Applicants' proposal to use the revenue requirement and rates in GridAmerica Companies' individual-company OATTs to establish rates under the Midwest ISO OATT and will not require updated cost-of-service analysis to be filed. If a customer believes that a transmission owners' existing rates are no longer just and reasonable, it can file a complaint under section 206 of the FPA. However, protestors have not provided evidence that persuades us to invoke section 206 of the FPA to institute an investigation of GridAmerica Companies' rates on our own motion, at this time").

40. As the parties note, the Commission has accepted license plate rate designs for new RTO entrants on a transitional basis,<sup>36</sup> and in a recent order regarding through and out rates between MISO and PJM, we reaffirmed our commitment to retaining revenue neutrality for companies that join RTOs.<sup>37</sup> This does not mean, however, that the Commission must find any license plate rate, or any rate mechanism submitted by a company with proposed revisions to their cost of service just and reasonable simply because the company claims that it maintains revenue neutrality. The April 30 Order cited by the New PJM Companies does not compel that result, because the New PJM Companies are not seeking to use existing rates to establish their RTO rates; rather, as stated above, the parties have proposed changes in their rates. The Commission thus denies rehearing on this issue, and directs the parties to examine at hearing the particular license plate rate, and rate mechanisms proposed by the New PJM Companies to ensure revenue neutrality.

## **7. Through and Out Rates**

41. Cinergy asks the Commission to clarify whether the parties are required to relitigate the Inter-RTO rates issue. The MISO TOs also request that the Commission clarify issues relating to through and out rates between MISO and PJM. WEPCO further asserts that the Commission erred by accepting the through and out rates proposed by the New PJM Companies.

### **Commission response**

42. In the July 31 Order the Commission instituted, in Docket No. EL02-111-000, an investigation and hearing before a presiding administrative law judge with regard to the rates for through and out service under the Midwest ISO and PJM tariffs.

43. In an order in that docket issued on March 19, 2004, the Commission accepted an agreement among multiple parties in the MISO and PJM regions that establishes going-forward principles and procedures that retain the through and out rates until December 1, 2004 (and thus keeps transmission providers revenue neutral until that date), at which time through and out rates will be eliminated entirely. The agreement also provides for continued negotiations aimed at developing a long-term transmission pricing structure

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<sup>36</sup> PJM Interconnection, LLC and Allegheny Power, 96 FERC ¶ 61,060 (2001).

<sup>37</sup> The Commission accepted a settlement agreement establishing going-forward principles and procedures that retains the through and out rates (and thus keeps transmission providers revenue neutral) until December 1, 2004, at which time they will be eliminated entirely. Midwest Independent Transmission System Operator, Inc., 106 FERC ¶ 61,262 at P 6, 18 (2004) (March 19 Order).

that eliminates seams in the PJM and MISO regions.<sup>38</sup> Thus, no further litigation of this issue in this docket will be necessary, and WEPCO's request for rehearing has become moot.

## 8. Section 203 Issues.

44. New PJM Companies state that the Commission erred by asserting jurisdiction over the transfer of control of AEP's and ComEd's transmission facilities under section 203. In contrast, the Virginia Commission seeks rehearing on the basis that the Commission improperly exercised its jurisdiction under section 203 to transfer AEP's facilities to PJM's control without any of the showings required by section 203 having been made by AEP.

### Commission response

45. Both of these requests for rehearing have been rendered moot by a May 20, 2003 decision of the U.S. Court of Appeals for the D.C. Circuit finding that section 203 empowers FERC to act only upon "the disposition of . . . facilities" subject to the Commission's jurisdiction, and that no "disposition" within the meaning of section 203 is contemplated by a utility's decision to transfer operational control of jurisdictional facilities, or to take back that operational control, from an Independent System Operator (ISO).<sup>39</sup> The Court therefore held that the Commission could not require utilities to seek our approval under section 203 before engaging in such transfers of operational control.

46. It is our view that this holding applies to RTOs as well, and we will therefore reverse our earlier ruling that in cases where the Commission is considering "the transfer of operating authority over jurisdictional transmission facilities to [a] public utility, the Commission has the authority to approve the transfer under section 203."<sup>40</sup> We thus find that the compliance filings made to comply with section 203 in Docket Nos. ER03-262-002 and ER03-262-012, and any petitions for clarification or rehearing or protests relating to those compliance filings, have become moot.

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<sup>38</sup> March 19 Order at P 1, 6.

<sup>39</sup> *Atlantic City Electric Company, et al. v. FERC*, 329 F.3d 856, 859 (D.C. Cir. 2003) (*Atlantic City II*), *citing* *Atlantic City Electric Company, et al. v. FERC*, 295 F.3d 1, 11-13 (D.C. Cir. 2002) (*Atlantic City I*).

<sup>40</sup> April 1 Order at P 19, *citing* *Pennsylvania-New Jersey-Maryland Interconnection*, 101 FERC ¶ 61,318 at P 47 (2002).

## 9. Financial Transmission Rights (FTRs).

47. Duke in its rehearing petition asks the Commission to rule that transmission customers with preexisting point-to-point transmission service reservations should be permitted either to receive an allocation of FTRs or to annul those transactions (and, in return for not receiving FTRs, forego payment of access charges), on a case-by-case basis. Duke argues that this would be similar to the treatment accorded to the customers of Allegheny Power when Allegheny Power joined PJM, in which PJM proposed to make case-by-case determinations of transitional issues regarding point-to-point service with each affected customer.

48. Further, Duke asks the Commission to rule that the New PJM Companies are required to give appropriate consideration to potential operational impacts and reliability issues on its utility affiliate's transmission system if increasing parallel flows and similar operational considerations are not properly managed.

### Commission response

49. With regard to Duke's request that it be permitted to annul its transmission reservations and forego payment of access charges, the Commission stated in its March 18 Order that "[i]f PJM is not able to award FTRs to all existing firm customers, it . . . should also either give existing transmission customers the opportunity to terminate their existing transactions by foregoing payment of access charges in return for not receiving FTRs, as Duke suggests here, or else explain why such a provision would not be just and reasonable."<sup>41</sup> Thus, Duke's concerns have been addressed in that docket.

50. As to Duke's request for a ruling regarding appropriate consideration to potential impacts on transmission systems from parallel flows, the Commission will deny the clarification requested by Duke. Loop flows are a fact of interconnected utility networks and we expect utilities to coordinate to address reliability and economic impacts associated with loop flows.<sup>42</sup> As noted above, PJM and MISO have just entered into a Joint Operating Agreement, sections 6 and 11 of which address loop flows between them. We encourage Duke to negotiate a similar arrangement with PJM to coordinate their operations to address impacts of loop flows that each imposes on the other.

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<sup>41</sup> March 18 Order at P 41.

<sup>42</sup> See *Indiana and Michigan Power Company*, 64 FERC ¶ 61,184 (1993).

## 10. ODEC's Party Status

51. ODEC asks the Commission to clarify that it is a party to this proceeding. The Commission grants the requested clarification, and states that ODEC is a party to this proceeding.

### **B. Compliance with Section 203 and Part 33 Requirement**

52. As discussed above, the Commission finds that it does not have jurisdiction to consider the integration of the New PJM Companies into PJM under section 203 of the FPA. Therefore, the protests as to whether the New PJM Companies have complied with the Commission's regulations under 18 C.F.R. Part 33, which implements compliance with section 203, and all other pleadings filed in Docket No. ER03-262-002, are moot.

### **C. The New PJM Companies' Compliance Filing with Regard to Rates**

53. On May 20, 2004, PJM made a filing with the Commission in Docket No. ER04-807-001 stating that the tariff sheets it was filing in that docket superseded all the rate sheets it had filed in its May 1, 2003 compliance filing in Docket No. ER03-262-004. On June 22, the Commission issued a delegated order approving PJM's filing.<sup>43</sup> Thus, PJM's Docket No. ER03-262-004 rate filing has similarly been rendered moot.

The Commission orders:

(A) The requests for rehearing and/or clarification of the April 1 Order are granted in part and denied in part, as discussed above.

(B) The New PJM Companies' compliance filing in Docket Nos. ER03-262-002 and ER03-262-004, and any protests of those filings, are rendered moot, as discussed above.

(C) Within 60 days from the date of this order, New PJM Companies and PJM are directed to revise PJM's OATT with regard to annual charges and to remove the "retroactive" language from the OATT, as discussed above.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.

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<sup>43</sup> Delegated letter order accepting filing in PJM Interconnection, LLC, Docket Nos. ER04-807-000 and ER04-807-001 (June 22, 2004).