

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pennsylvania-New Jersey-Maryland
Interconnection

Docket Nos. OA97-261-006
and ER97-1082-008

Atlantic City Electric Company, Baltimore
Gas and Electric Company, Delmarva Power
& Light Company, Jersey Central Power &
Light Company, and Metropolitan Edison
Company

Docket No. ER97-3189-034

Pennsylvania Electric Company, Pennsylvania
Power & Light Company, Potomac Electric
Power Company, Public Service Electric and
Gas Company, Atlantic City Electric Company,
Baltimore Gas and Electric Company, Delmarva
Power & Light Company, Jersey Central Power
& Light Company, and Metropolitan Edison
Company

Docket No. EC97-38-005

Pennsylvania Electric Company, Pennsylvania
Power & Light Company, Potomac Electric
Power Company, Public Service Electric and Gas
Company, and Pennsylvania-New Jersey-
Maryland Interconnection Restructuring

Docket No. ER97-3273-005

Pennsylvania-New Jersey-Maryland
Interconnection Restructuring

Docket No. EL97-44-005

PJM Interconnection, L.L.C.

Docket No. OA97-678-005

Atlantic City Electric Company, Baltimore
Gas and Electric Company, Delmarva Power
& Light Company, Jersey Central Power &
Light Company, Metropolitan Edison

Docket Nos. ER96-2516-007,
EC96-28-007 and EL96-69-007

Company, Pennsylvania Electric Company,
Pennsylvania Power & Light Company,
Potomac Electric Power Company, and
Public Service Electric and Gas Company

PECO Energy Company

Docket Nos. ER96-2668-007
and EC96-29-007

ORDER APPROVING SETTLEMENT
WITH MODIFICATION

(Issued December 18, 2003)

1. On October 3, 2003, PJM Interconnection, L.L.C. (PJM) and certain of the transmission owners which comprise it (PJM TOs)¹ (collectively, the Settling Parties) filed a Settlement Agreement in the above-captioned proceeding pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.² The Settlement Agreement addresses the rights of the Settling Parties to make filings under Section 205 of the Federal Power Act (FPA)³ concerning their respective interests in transmission facilities operated (but not owned) by PJM. The Settlement Agreement also addresses the rights of the PJM TOs to withdraw from PJM. The Settlement Agreement is intended to resolve issues raised by the PJM TOs and addressed in a long series of orders concerning PJM's establishment, beginning in 1997, as an independent system operator (ISO). These issues were most recently addressed by the Commission in an order on rehearing issued in this proceeding on May 14, 2003.⁴ For the reasons discussed below, we will approve the Settlement

¹ The PJM TOs consist of the following entities: Baltimore Gas & Electric Company; Jersey Central Power & Light Company; Metropolitan Electric Company; Pennsylvania Electric Company; PPL Electric Utilities Corporation; PECO Energy Company (PECO), Public Service Electric and Gas Company, and Allegheny Power.

² 18 C.F.R. § 385.602 (2003).

³ 16 U.S.C. § 824d (2000).

⁴ Pennsylvania-New Jersey-Maryland Interconnection, et al., 103 FERC ¶ 61,170 (2003) (May 14 Order).

Agreement, as modified, and dismiss as moot the requests for rehearing of the May 14 Order.

Background

A. PJM's Establishment as an ISO

2. In an order issued by the Commission on November 25, 1997, we conditionally authorized the establishment of PJM as an ISO.⁵ We also addressed a number of issues related to the start up of the ISO, including the issue of whether, as proposed, PJM's transmission owners should be given the authority to make Section 205 filings concerning the transmission facilities they own, subject only to a veto by a majority of the PJM Board. We rejected this proposal, holding that these filings rights should be subject to the ISO governance process and thus should be independent of any individual transmission owner.

3. We also addressed the issue of whether, as proposed, PJM's members should be permitted to unilaterally terminate their participation in the PJM ISO or any of the individual agreements relating to the operation of the PJM ISO without prior Commission approval. We required that the PJM's operating agreements, including the TO Agreement, be modified to require that any proposed termination or withdrawal from these agreements be filed with the Commission and not become effective prior to Commission approval under Section 203 of the FPA.⁶

⁵ See Pennsylvania-New Jersey-Maryland Interconnection, et al., 81 FERC ¶ 61,257 (1997), order on reh'g, 92 FERC ¶ 61,282 (2000). Among other things, we authorized PJM to operate the transmission facilities under its control, administer the PJM open access transmission tariff (OATT), operate PJM's spot energy market, and administer certain aspects of the Transmission Owners Agreement (TO Agreement). We also approved the PJM Office of Interconnection as an independent entity to operate the ISO, an independent Board of Managers responsible for day-to-day operations, and a Members Committee comprised of market participants.

⁶ 16 U.S.C. § 824b (2000).

B. Atlantic City I and The PJM Remand Order

4. On judicial review of these findings, the Court of Appeals for the District Columbia Circuit determined that the Commission's decision to prohibit PJM's TOs from unilaterally filing for tariff and rate design changes violated the rights of these entities under Section 205.⁷ The court also determined that the Commission's decision to prohibit PJM's TOs from leaving the ISO, without first securing the Commission's authorization under Section 203 was inconsistent with the structure and meaning of Section 203.⁸

5. In an order on remand issued December 19, 2002, we addressed each of these rulings.⁹ First, we sought to explain our understanding of the balance of rights under Section 205 between a transmission-owning public utility, such as a PJM TO, and a public utility ISO or regional transmission organization (RTO), such as PJM.¹⁰ We also sought to explain more fully than we had in our prior orders our understanding of the obligation that PJM's TOs have to apply for and receive authorization from the Commission under Section 203 prior to withdrawing from PJM should they choose to do so. We found that in PJM's case, involving the establishment of a new public utility and the transfer of operating authority over jurisdictional transmission facilities to that public utility, the Commission has the authority to approve under Section 203 any subsequent transfer of control of jurisdictional transmission facilities back to a transmission owner leaving PJM.

⁷ See Atlantic City Electric Company, et al. v. FERC, 295 F.3d 1 (D.C. Cir. 2002) (Atlantic City I).

⁸ Section 203(a) provides in relevant part, that “[n]o public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission . . . without first having secured an order of the Commission authorizing it to do so.” See 16 U.S.C. § 824b(a) (2000).

⁹ See Pennsylvania-New Jersey-Maryland Interconnection, et al., 101 FERC ¶ 61,318 (2002) (PJM Remand Order).

¹⁰ PJM's status as an RTO was approved by the Commission in PJM Interconnection, L.L.C., 101 FERC ¶ 61,345 (2002).

C. The May 14 Order and Atlantic City II

6. The PJM TOs and PECO, individually, sought rehearing of the PJM Remand Order. The PJM TOs asserted as error the Commission's failure to vest exclusive Section 205 filing authority in PJM's TOs, subject to the terms and conditions originally proposed by the PJM TOs at the outset of this proceeding.¹¹ PECO also sought clarification that the Commission cannot require the TOs to relinquish their Section 205 filing rights if a TO has not voluntarily consented to such an arrangement. Finally, the PJM TOs asserted as error the Commission's interpretation of its Section 203 authority.

7. In the May 14 Order, we granted in part and denied in part the PJM TOs' request for rehearing. First, we acknowledged that PJM's transmission owners should be permitted to formulate Section 205 proposals regarding the public utility assets they own, but that PJM, as a public utility in its own right, would also have the right to make its own Section 205 filings. In addition, we held that in the context of PJM's restructuring (which was voluntary), we need not address the issue of whether participation in an ISO or an RTO is mandatory. Accordingly, we denied PECO's request for clarification. We also denied the PJM TOs' request for rehearing regarding our Section 203 authority for the reasons previously enunciated in the PJM Remand Order.¹²

8. Following the issuance of the PJM Remand Order (but prior to the issuance of the May 14 Order), a mandamus petition was filed with the court by certain of the PJM TOs, in which it was argued that our rulings in the PJM Remand Order were inconsistent with the court's mandate in Atlantic City I. In a ruling issued by the court on May 20, 2003, the court concurred.¹³ With respect to the Commission's Section 205 authority, the court reiterated its ruling in Atlantic City I that the Commission "can point to no statute authorizing its requirement that the utility petitioners cede their statutory rights under Section 205 of the Federal Power Act to file changes in rate design with the Commission."¹⁴ In addition, the court held that no "disposition" within the meaning of Section 203 is contemplated by the ISO agreements at issue in this proceeding, and that,

¹¹ See supra P 2.

¹² See supra P 5.

¹³ See Atlantic City Electric Company, et al. v. FERC, 329 F.3d 856 (D.C. Cir. 2003) (Atlantic City II).

¹⁴ Id. at 858, citing Atlantic City I, 295 F.3d at 15.

accordingly, the Commission has no jurisdiction to require Section 203 pre-approval with respect to a TO's withdrawal from PJM.

D. Requests for Rehearing of the May 14 Order

9. On rehearing of the May 14 Order, the PJM TOs and PECO argue that the Commission's ruling requiring that PJM have independent filing authority under Section 205 violates the court's mandate in Atlantic City II. PECO further asserts that the Commission erred by subjecting PECO's exercise of its Section 205 rights to any limitation, including the PJM Board veto voluntarily proposed by the PJM TOs (including PECO) at the outset of this proceeding. The PJM TOs also argue that the May 14 Order, by refusing to implement the court's interpretation of the Commission's Section 203 authority, failed to adhere to the requirements of Atlantic City II.

E. The Settlement Agreement

10. The Settling Parties state that the Settlement Agreement is intended to resolve all issues presented on rehearing of the May 14 Order – both the Section 205 issue (relating to the respective filing rights of PJM and the PJM TOs) and the Section 203 issue (relating to the rights of the PJM TOs to withdraw from PJM).

11. With respect to the Settling Parties' Section 205 filing rights, the Settlement Agreement provides that the TOs, pursuant to the joint action provisions of the TO Agreement,¹⁵ and subject to an obligation to consult with PJM and the PJM Members Committee, shall have the exclusive and unilateral right to make Section 205 filings regarding: (i) the establishment and recovery of the TOs' transmission revenue requirements; (ii) the transmission rate design under the PJM OATT; and (iii) incentive and performance-based rates. PJM would have the exclusive right to make Section 205 filings, subject to the obligation to consult with the TOs and the PJM Members Committee, regarding: (i) the terms and conditions of the PJM OATT; and (ii) the recovery of the RTO's own costs. The Settlement Agreement also clarifies that its terms will not alter the existing right of individual TOs, under Section 2.2.1 of the PJM OATT, to make Section 205 filings to change the transmission revenue requirement within their own zones, including the right to file for zonal transmission revenue requirements based on incentive or performance factors.

¹⁵ See TO Agreement at Section 6.5 (specifying a two-thirds majority requirement relating to issues requiring revision of the TO Agreement).

12. The Settlement Agreement identifies the following non-exclusive tariff provisions as rate-related and thus subject to the filing rights authority of the TOs: (i) Section 34 (network transmission service charges); (ii) Schedule 1A (scheduling, system control, and dispatch service); (iii) Schedule 7 (long and short-term firm point to point transmission service, except for congestion charges, as provided for in Attachment K); (iv) Schedule 8 (non-firm point to point transmission service, except for congestion charges, as provided for in Attachment K); (v) Schedule 11 (transitional market expansion charge); (vi) Schedule 12 (transmission enhancement charges); (vii) Attachment H13 (network integration transmission service to non-zone network load); (viii) Attachment J (PJM transmission zones); and (ix) Attachment R (transitional revenue collection). In addition, matters relating to creditworthiness, billing and defaults would be treated as matters relating to terms and conditions under the Settlement Agreement and thus subject to the filing rights authority of PJM.

13. In the case of filing rights disputes, the Settlement Agreement provides for informal resolution procedures and the deferral of a proposed filing for a specified period pending these negotiations.¹⁶ In the event the filing rights dispute is not resolved, the Settlement Agreement provides that the dispute shall be presented to and resolved by a neutral party chosen in advance by PJM and the TOs, whose decision would be binding and final.

14. The Settlement Agreement also proposes that its terms be subject to Mobile Sierra protection. The provisions of the Settlement Agreement would be subject to revision only by a written agreement of PJM and the TOs, with the TOs required to act in accordance with the super-majority voting requirements set forth in the existing provisions of the TO Agreement.¹⁷ Revisions to the Settlement Agreement could not be made (whether sought by a party on a unilateral basis, or by the Commission), absent a Mobile-Sierra “public interest” showing.

¹⁶ The Settlement Agreement requires TOs to consult with PJM and the PJM Members Committee not less than 30 days prior to making any Section 205 filing and requires PJM to consult with the TOs and the PJM Members Committee not less than 7 days prior to taking such action. In the event of a filing rights dispute, these pre-filing review periods could be extended by as much as 10-days, if so requested, provided that either PJM or the TOs would be authorized to make emergency filings in circumstances where imminent harm to system reliability or imminent severe economic harm to electric consumers requires them to do so.

¹⁷ See TO Agreement at Section 6.5.1 (requiring action by a two-thirds majority for revisions to the TO Agreement).

15. The Settlement Agreement also addresses the rights of the PJM TOs to withdraw from PJM. The Settlement Agreement specifies that the withdrawal rights provision originally proposed by the PJM Supporting Companies on June 2, 1997 shall be adopted, as proposed, by deleting from that provision the requirement that a TO, as a condition to withdrawal from PJM, receive “FERC’s approval or acceptance without suspension or hearing.”¹⁸ Thus, the PJM TOs would simply be required to adhere to the provisions of the TO Agreement in order to withdraw from PJM, pursuant to terms that would be subject to the aforementioned Mobile-Sierra “public interest” clause.

16. As noted above, the Settling Parties state that the Settlement Agreement, if accepted without modification or condition, will resolve all issues raised on rehearing of the May 14 Order. In addition, the Settling Parties state that if the Settlement Agreement is not approved in its entirety it shall be deemed withdrawn. The Settling Parties request that the Settlement Agreement be made effective October 6, 2003.

F. Responsive Pleadings

17. Pursuant to Rule 602(f) of the Commission’s Rules of Practice and Procedure,¹⁹ comments and reply comments on the Settlement Agreement were due October 23, 2003 and November 3, 2003, respectively. Comments were filed by Exelon Corporation (Exelon) and Old Dominion Electric Cooperative (ODEC). Reply Comments were filed by ODEC, PJM, and the PJM TOs. In addition, motions to intervene out-of-time were filed by certain entities associated with the expansion of PJM, namely, American Electric Power Service Corporation (AEP), Dayton Power and Light Company (Dayton) and the TDU Coalition (American Municipal Power – Ohio; Blue Ridge Power Agency; ElectricCities of North Carolina, Inc.; and Virginia Municipal Electric Association No. 1).

¹⁸ As modified by the Settlement Agreement, Section 3.2 of the TO Agreement would provide in relevant part:

Any Party may withdraw from this [TO] Agreement upon ninety (90) days advance written notice to the other Parties; provided that such withdrawal shall not be effective until the withdrawing Party has (1) satisfied all applicable MAAC and NERC requirements for operating a control area or being included within an existing control are, and (2) put in place alternative arrangements for satisfaction of the FERC’s requirements with respect to comparable transmission services.

¹⁹ 18 C.F.R. § 385.602(f) (2003).

18. Exelon, whose subsidiary, PECO, is a Settling Party, filed comments attempting to allay the concerns of any new TOs seeking to join PJM regarding the power of PJM's existing TOs and their potentially divergent interests relative to the PJM West TOs.²⁰ Specifically, Exelon notes that the Settlement Agreement does not give PJM's existing TOs a veto power over a new TO's ability to join PJM because, in fact, the rights of these new TOs to join PJM is governed by the PJM West Transmission Owners Agreement (West TO Agreement).²¹ Exelon also points out that, regardless, the Settlement Agreement permits any individual TO to make its own unilateral filings to recover its own revenue requirements.

19. ODEC asserts that the Settlement Agreement should be rejected, as filed, because it violates the provisions of Order No. 2000.²² ODEC asserts that the RTO independence requirement adopted by the Commission in Order No. 2000 mandates that PJM be given the exclusive authority to make all Section 205 filings relating to the transmission facilities it operates.²³ ODEC also asserts that this exclusivity requirement does not violate the court's ruling in Atlantic City I because, in that ruling, the court acknowledged that a TO can agree to cede its Section 205 filing rights to another entity, such as PJM. ODEC concludes that when the PJM TOs agreed to establish PJM as an

²⁰ While Allegheny Power (a Settling Party) is a TO whose facilities are located within the PJM West control area, other TOs now seeking to join PJM are not a party to the Settlement Agreement (e.g., AEP, Commonwealth Edison Company, Dayton, and Virginia Electric and Power Company). See generally American Electric Power Service Corporations, et al., 103 FERC ¶ 61,008 (2003).

²¹ Exelon points to Section 3.1 of the West TO Agreement, which states that “[a]ny entity that that owns, or has rights equivalent to ownership in, electric transmission facilities and has in place all equipment and facilities necessary for safe and reliable operation of such Transmission Facilities as part of te PJM West Region, shall be eligible to become a Party to this Agreement and, upon executing this Agreement, shall become a Party to this Agreement. See PJM Rate Schedule FERC No. 33.

²² See Regional Transmission Organizations, Order No. 2000, 65 Fed. Red. 809 (2000), FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (2000), FERC Stats. & Regs. ¶ 31,092 (2000), aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001) (Snohomish).

²³ ODEC Protest at 7, citing 18 C.F.R. § 35.34(j)(1)(iii) (2003).

RTO, they did so voluntarily, and that the D.C. Circuit upheld this allocation of filing rights when it upheld Order No. 2000.²⁴

20. ODEC further argues that there is a compelling reason to vest with an RTO, and not the TOs, authority to make Section 205 filings concerning rate design matters affecting the RTO. ODEC asserts that, when this authority rests with the RTO, it can adopt a rate design for the region that accomplishes cost recovery in a market-neutral fashion, neither advantaging nor disadvantaging any particular customer or class of customers. ODEC adds that conversely, giving this authority to the TOs alone would permit TO factions within PJM to favor their own generation interests and/or disfavor their competitors. ODEC submits that so long as TOs have the right to secure their own transmission revenue requirements (as they currently do), there can be no additional need or justification to confer the added entitlement to dictate the terms of PJM's rate design.

21. ODEC also takes issue with the Settlement Agreement's provisions relating to incentive and performance-based rate proposals. ODEC asserts that proposals of this sort are unjustified because any savings or efficiencies in the electricity or ancillary services markets resulting from the construction, operation, or maintenance of transmission facilities (the proffered rationale for such a filing under the Settlement Agreement), would be attributable to the actions of PJM, not the TOs. ODEC notes, in this regard, that in Southern Company Services, Inc.,²⁵ the Commission made it clear that "it is inappropriate to send a price signal to a passive owner that cannot respond to the price signal."²⁶

22. ODEC also objects to the Settlement Agreement's provisions regarding the resolution of Section 205 filing rights disputes. ODEC states that the ultimate decision concerning these filing rights should be made by the Commission should any interested party seek that review. Finally, ODEC asserts that the Settlement Agreement should not be read as binding on new members of PJM who have not participated as parties to this proceeding.

23. In its reply comments, PJM asserts that the Settlement Agreement has broad support within the PJM control area. PJM also states that the Settlement Agreement's

²⁴ ODEC Protest at 6-7, citing Snohomish, 272 F.3d at 607.

²⁵ 94 FERC ¶ 61,271 (2001).

²⁶ Id. at 61,965.

allocation of Section 205 filing rights should not affect PJM's RTO status. This is so, PJM notes, because PJM will continue to have the exclusive, unilateral right to make filings under Section 205 relating to the terms and conditions of the PJM OATT – the fundamental reason for RTO independence. PJM further notes that the Settlement Agreement is consistent with Atlantic City I, in which the court stated that Section 205 “was designed to protect the ability of the utility owner to ‘set the rates it will charge prospective customers, and change them at will,’ subject to review by the Commission.”²⁷

24. The PJM TOs underscore many of these same points in their comments, noting, among other things that the independence requirement, as set forth in Order No. 2000, should be applied by the Commission with flexibility, consistent with the court's ruling in Atlantic City I. The PJM TOs further argue that, contrary to ODEC's assertions, the PJM TOs have never “voluntarily” relinquished their filing rights to PJM, given the pendency of this issue in this proceeding. The PJM TOs also take issue with ODEC's assertion that the PJM TOs should not possess authority over incentive rate proposals. The PJM TOs assert that this authority, if exercised, would be subject to public notice and Commission review. The PJM TOs also dispute ODEC's suggestion that the Settlement Agreement can and should be applied to PJM's existing TOs alone. The PJM TOs assert that such an arrangement would lead to a balkanization of PJM's markets and would also create seams issues across RTO markets.

25. On November 13, 2003, ODEC filed an answer to PJM's reply comments. On November 19, 2003, the PJM TOs filed an answer to ODEC's answer.

Discussion

Procedural Matters

26. We will deny AEP's, Dayton's, and the TDU Coalition's motions for intervention out-of-time. Under Rule 214(d)(1) of the Commission's Rules of Practice and Procedure,²⁸ the movant must show good cause for filing late interventions. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting late intervention may be substantial. Thus, movants bear a high burden to demonstrate good cause for granting such late

²⁷ See PJM Reply Comments at 4, citing Atlantic City I, 295 F.3d at 10.

²⁸ 18 C.F.R. § 385.214(d)(1) (2003).

intervention. The Commission finds that AEP, Dayton, and the TDU Coalition have not met this burden here. The issues in this proceeding relate to the establishment of PJM as an ISO, in 1997, and its existing structure, and thus do not directly address issues relating to PJM's expansion. Other proceedings have and will address these issues. Accordingly, the motions for late intervention of AEP, Dayton, and the TDU Coalition will be denied and so they are not parties to this proceeding.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure²⁹ prohibits an answer to an answer unless otherwise permitted by the decisional authority. We are not persuaded to accept ODEC's and the PJM TOs' answers and therefore will reject them.

Analysis

28. We will approve the Settlement Agreement as it relates to the Settling Parties' division of their respective Section 205 filing rights. However, we will modify that portion of the Settlement Agreement precluding Commission review of a neutral party's determinations regarding filing rights disputes.

29. In addition, we will modify the Settlement Agreement as it relates to a TO's withdrawal rights from PJM. As discussed below, withdrawal from PJM can only be effectuated pursuant to a revision of the operating agreements giving rise to PJM and thus must be subject to a Section 205 filing.³⁰ Withdrawal from PJM cannot be shielded from all review under Section 205. Finally, for the reasons discussed below, we will dismiss as moot the requests for rehearing of the May 14 Order.

A. Section 205 Filing Rights

30. On balance, the Settlement Agreement provides for a reasonable allocation of Section 205 filing rights as between PJM and the PJM TOs, consistent with our recognition in our prior orders in this proceeding (especially the May 14 Order, as we explain below) that both RTOs/ISOs and TOs are public utilities under the FPA and thus

²⁹ Id. at § 385.213(a)(2).

³⁰ See Guidance on Regional Transmission Organization and Independent System Operator Filing Requirements under the Federal Power Act, 104 FERC ¶ 61,248 (2003) (RTO/ISO Access and Withdrawal Rights Policy Statement).

both have Section 205 filing rights.³¹ Under these circumstances, we agree that voluntary filing rights arrangements among the public utilities within PJM, whose rights would otherwise overlap, is consistent with Commission policy where, as discussed below, the interests of market participants are safeguarded.

31. In the May 14 Order, we noted that Section 201(e) of the FPA defines a “public utility” subject to our regulation as “any person who owns or operates” jurisdictional facilities.³² We noted that, applying this statutory standard in this proceeding, PJM is a public utility under the FPA because it operates jurisdictional facilities; we also acknowledged that PJM’s TOs, even after the establishment of PJM as an ISO (now an RTO), continue to be public utilities as well because of the TOs’ ownership interests in jurisdictional facilities.³³ The Settlement Agreement recognizes this duality of interests by granting both PJM’s TOs and PJM specified filing rights.

32. The Settlement Agreement constitutes a voluntary, compromise agreement of the sort found permissible by the court. While Atlantic City I does not require us, as a matter of law, to limit RTO filing rights to the extent they are limited in the Settlement Agreement, voluntary agreements to allocate these rights may be acceptable where, as here, the interests of market participants are protected. We note, in this regard, that the Commission’s Section 206 authority under the Settlement Agreement is limited only as to the extent of the Settlement Agreement, which addresses only the allocation of these rights. In other words, the Commission retains its authority to find a given rate to be unjust and unreasonable and to establish a just and reasonable rate.

33. We also clarify that, while we accept the proposed Mobile-Sierra “public interest” clause governing revisions to the parties’ voluntary agreement (as to the division between, essentially, rate-related filings and terms and conditions-related filings – with the PJM TOs filing the former and PJM the latter), if TOs use their filing rights in a way that compromises RTO independence or functions or causes undue discrimination between or among RTO members or customers, the Commission will consider whether

³¹ The court, in Atlantic City I, acknowledged this point when it held that “[o]f course, utilities may choose to voluntarily give up, by contract, some of their rate-filing freedom under Section 205.” Id., 295 F.3d at 10.

³² May 14 Order, 103 FERC ¶ 61,170 at P 17, citing 16 U.S.C. § 824(e) (2000).

³³ Id.

the Settlement Agreement is contrary to the public interest.³⁴ We also intend to exercise careful oversight in connection with these matters and, if appropriate, institute a Section 206 proceeding to do so.

34. In addition, we will modify the dispute resolution clause set forth in the Settlement Agreement. That clause provides that disputes over Section 205 filing rights will be resolved with finality by a “neutral party,” without any recourse, i.e., appeal rights, to the Commission. Interested parties must be permitted to have recourse, i.e., appeal rights, to the Commission on such a fundamental issue as whether a particular matter is rate-related or terms and conditions-related and thus who (the PJM TOs or PJM) is entitled under the Settlement Agreement to make a Section 205 filing regarding such matter. In addition, we will not limit our own authority to interpret the scope and meaning of the Settlement as it relates to these disputes. We direct the PJM TOs and PJM to make a compliance filing to reflect this determination, within 30 days of the date of this order. Given the Settling Parties’ voluntary agreement to assign Section 205 filing responsibilities to both PJM and the PJM TOs, we will dismiss as moot the PJM TO’s and PECO’s requests for rehearing regarding these issues.

B. RTO Withdrawal Rights

35. We will modify the Settlement Agreement as it relates to a TO’s rights to withdraw from PJM. As proposed, the Settlement Agreement would allow a TO to withdraw from PJM without seeking prior Commission approval under Section 203 of the FPA, which we agree is consistent with Atlantic City I, and so we will approve it.³⁵ However, the Settlement Agreement also would prohibit any review pursuant to Section 205, even in those instances where revisions to PJM’s operating agreements may be necessary or appropriate.³⁶ Moreover, the proposed conditions in the TO Agreement

³⁴ While, under Atlantic City I, we cannot take away the PJM TO’s filing rights under Section 205, the court did not bar the Commission from giving PJM additional Section 205 filing rights.

³⁵ In Atlantic City II, the court required the Commission to vacate that part of the PJM Remand Order which would have required pre-approval by the Commission for withdrawal from PJM pursuant to Section 203 of the FPA.

³⁶ This review would typically include agreements establishing the roles and responsibilities of the institutional participants within PJM and might include, but would not necessarily be limited to, the conditions specified in the Settlement Agreement
(continued...)

governing these withdrawals could be revised by the Commission subsequently only if they were found to be contrary to the public interest.

36. The proposal to prohibit Section 205 review of withdrawals from an RTO (or ISO) is inconsistent with the RTO/ISO Access and Withdrawal Rights Policy Statement, where the Commission held that “arrangements to join or exit an RTO or ISO will be reviewed [by the Commission] in the context of filings made under Section 205.”³⁷ This review is necessary, we indicated, in order to determine whether all of the elements contained in the filed arrangements meet the principles of Order No. 2000 and are just and reasonable pursuant to Section 205 of the FPA.³⁸ Given these requirements, the Settlement Agreement’s provisions relating to RTO withdrawal rights must be, and are, rejected. We direct the PJM TOs and PJM to make a compliance filing within 30 days of the date of this order (modifying those provisions of the TO Agreement that address withdrawal and its effects, including but not limited to Section 3.2 of the TO Agreement, and to make any additional conforming changes as may be required) to provide for Section 205 filings before any proposed withdrawals may become effective.

C. ODEC

37. Finally, with respect to ODEC’s concern regarding the applicability of the Settlement Agreement to new members seeking to join PJM, we clarify that such matters will be addressed with the filings required to modify PJM’s existing services, rates.

(continued...)

regarding reliability requirements across PJM’s markets and the provision of comparable transmission services. This review would be precluded by the proposed revision to Section 3.2 of the TO Agreement, were we to approve it, which would delete the existing requirement that a TO, as a condition to withdrawal from PJM, receive “FERC’s approval or acceptance without suspension or hearing.”

³⁷ See RTO/ISO Access and Withdrawal Rights Policy Statement, 104 FERC ¶ 61,248 at P 2. Section 205(c), in this context, requires public utilities to “file with the Commission . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.” See 16 U.S.C. §824d (2000).

³⁸ Moreover, the court, in Atlantic City I, did not adjudicate, and indeed the PJM TOs did not contest, “FERC’s authority to review a specific withdrawal under Section 205.” See Atlantic City I, 295 F.3d at 12.

Terms and conditions to reflect the addition of new members and/or to expand PJM's borders. We will not prejudge such matters here.

The Commission orders:

(A) The Settlement Agreement is hereby approved, subject to the modifications discussed in the body of this order.

(B) The PJM TOs and PJM are hereby directed to make a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

(C) The PJM TO's and PECO's requests for rehearing of the May 14 Order are hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.