

140 FERC ¶ 61,053
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Central Transmission, LLC
v.
PJM Interconnection L.L.C.

Docket No. EL10-52-001

ORDER ON REHEARING

(Issued July 19, 2012)

1. In this order, the Commission denies the July 19, 2011 Request for Rehearing filed by Public Service Gas and Electric Company (PSEG)¹ of the of the Commission's June 17, 2010 order in this docket.² On the basis of our denial of rehearing on similar issues in *Primary Power*,³ the Commission denies PSEG's Request for Rehearing for the same reasons we are denying rehearing in *Primary Power*. In its Request for Rehearing, PSEG claims that the June 17 Order (1) erred in finding that the PJM Interconnection, LLC (PJM) Operating Agreement authorizes PJM to designate an independent transmission developer to construct and own transmission facilities to be included in the regional transmission expansion plan (RTEP) and (2) that the Commission's finding is inconsistent with the RTEP procedures found in Schedule 6 of the Operating Agreement.⁴

¹ On behalf of PSEG, PSEG Energy Resource & Trade LLC and PSEG Power LLC (collectively PSEG).

² *Central Transmission, LLC v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,243 (2010) (June 17 Order).

³ *Primary Power, LLC*, 131 FERC ¶ 61,015 (2010), *order on reh'g and clarification*, 140 FERC ¶ 61,052 (2012) (*Primary Power*).

⁴ PJM Interconnection, LLC, Amended and Restated Operating Agreement, FERC Rate Schedule FERC No. 24 (Operating Agreement), Schedule 6, Regional Transmission Expansion Planning Protocol (RTEP procedures).

2. In the June 17 Order, the Commission dismissed Central Transmission, LLC's (Central Transmission) March 25, 2010 Complaint against PJM, which requested revisions to the PJM Operating Agreement and open access transmission tariff (OATT).⁵ The Commission found, based on its holdings in *Primary Power*, that the PJM Operating Agreement, Schedule 6 and OATT, Schedule 12 permit PJM to designate Central Transmission to construct and own its proposed economic upgrade through the Regional Transmission Expansion Plan (RTEP) procedures as a cost-based project. Consequently, the Commission dismissed the Complaint, because no revisions to the PJM OATT or Operating Agreement were required to grant Central Transmission the relief it sought – to be permitted to build its project and seek cost-based rates.

I. Background

A. Central Transmission Complaint

3. Central Transmission is a member of the LS Power Group, a group involved in the development of power generation and transmission, including over 1,000 miles of transmission planned to deliver renewable resources to load, including projects in Idaho, Nevada, Texas, Wyoming and Colorado. At the time of its Complaint, Central Transmission proposed the LaSalle Project, an approximately 160-mile double circuit 345 kV transmission line connecting three PJM 345-kV substations: Commonwealth Edison Company's (Commonwealth Edison) Pontiac-Midpoint substation in Pontiac, Illinois; a proposed American Electric Power Company (AEP) substation to be constructed near the existing Reynolds, Indiana substation; and AEP's Dumont substation in Indiana.⁶

4. Central Transmission anticipated that the LaSalle Project would meet PJM's criteria as a market efficiency project by relieving congestion in Illinois and Indiana and reducing costs for customers. The LaSalle Project would connect the Commonwealth Edison and AEP zones, which are physically separated by an area served by several utilities, mostly cooperatives, operating in the Midwest Independent Transmission System Operator, Inc. (MISO) system. Central Transmission predicted that LaSalle

⁵ PJM Interconnection, LLC, FERC Electric Tariff, Sixth Rev. Vol. No. 1 (OATT).

⁶ Central Transmission intends to interconnect to the high-side of the bus at Reynolds, which it describes as "the PJM side."

Project will create additional internal PJM transfer capacity between these zones and provide economic and reliability benefits.⁷

5. At the time of the filing, PJM was conducting interconnection studies in response to its December 1, 2009 interconnection request for the LaSalle Project. Also, Central Transmission reported that, on December 17, 2009, it submitted the LaSalle Project to PJM for study as an economic upgrade, in accordance with the procedures set forth in the PJM Operating Agreement, specifying that Central Transmission was seeking approval in the RTEP and to be eligible for construction, ownership and regulated rate-based recovery. Based on information and discussions with PJM, Central Transmission asserted that no similar projects have been proposed.⁸ Central Transmission states its belief that two wind generator interconnection requests have been submitted to PJM's interconnection queue identifying the proposed LaSalle Project as their proposed point of interconnection.⁹

B. Procedural History and the June 17 Order

6. On March 25, 2010, Central Transmission, LLC filed a complaint (Complaint) against PJM under section 206 of the Federal Power Act (FPA)¹⁰ alleging that Schedule 6 of the PJM Operating Agreement and Schedule 12 of the PJM OATT were unjust and unreasonable and unduly discriminatory insofar as these provisions could prevent PJM from designating Central Transmission to construct and own a transmission project that it proposes. Central Transmission's complaint sought a finding that the PJM Operating Agreement, Schedule 6 and OATT, Schedule 12 were unjust and unreasonable to the extent that the provisions contained therein would assign cost responsibility for any project owned by an entity other than a transmission owner to that entity, while allowing regulated, rate-based recovery to incumbent transmission owners. Central Transmission requested the Commission strike the language from Schedule 6, section 1.5.6(g) that states:

Notwithstanding the foregoing, with respect to any facilities that the [RTEP] designates to be owned by an entity other

⁷ Central Transmission Complaint at 6-7.

⁸ *But see* June 17 Order, 131 FERC ¶ 61,243 at P 31 (noting potential competing project).

⁹ Central Transmission Complaint at 7-8.

¹⁰ 16 U.S.C. § 824e (2006).

than a Transmission Owner, the plan shall designate that entity as responsible for the cost of such facilities.

7. In the June 17 Order, the Commission dismissed the Complaint as moot in light of *Primary Power* and found that that Central Transmission was eligible to be designated by PJM to build the facilities and seek cost-of-service rates. Specifically, the Commission stated:

In the recent Primary Power order, in response to a request for a declaratory order, the Commission determined that the OATT and Operating Agreement as written permit PJM to designate non-incumbent transmission developers to build RTEP projects and that non-incumbent developers are eligible to seek cost-of-service rate treatment under Schedule 12 similar to other transmission owners providing service under Schedule 12. Based on that finding, we similarly find in this proceeding that Central Transmission is eligible to be designated to build the facilities under the OATT and Operating Agreement and eligible to seek cost of service rate treatment for the facilities.¹¹

8. The Commission further justified this conclusion on the ground that that in *Primary Power* it had previously “found that PJM’s OATT and Operating Agreement contain no prohibition on a non-incumbent party becoming a transmission owner eligible to receive cost-based rates.” It was on this basis then that the Commission in turn found that the Operating Agreement, Schedule 6 and OATT, Schedule 12 permit PJM to consider Central Transmission’s proposal through the RTEP process and thus no revisions to the PJM OATT and Operating Agreement, were needed.¹²

II. Request for Rehearing

9. In its request for rehearing, PSEG takes no issue with the Commission dismissal of Central Transmission’s complaint.¹³ PSEG does, however, object to the legal findings underlying the dismissal, namely the reiteration of the Commission’s conclusion in *Primary Power*¹⁴ that the PJM governing documents do not provide transmission owners

¹¹ June 17 Order, 131 FERC ¶ 61,243 at P 46.

¹² *Id.*

¹³ PSEG Rehearing at 1.

¹⁴ *Primary Power*, 131 FERC ¶ 61,015.

with a right of first refusal. Specifically, it disagrees with the Commission's finding that the PJM Operating Agreement and OATT allow PJM to designate party other than the zonal transmission owner to build a non-merchant transmission upgrade in the zone of such an owner. Finally, PSEG argues that the Commission acted arbitrarily and capriciously and has failed to engage in reasoned decision-making in its failure to address the arguments put forth by the PJM Transmission Owners in its protest.

10. PSEG argues that Section 1.5.6(f) of the Operating Agreement sets forth transmission owners' right of first refusal, such that although the zonal transmission owner can in turn designate another party to build, it is its choice to make. According to PSEG, this right was a key element of the contractual bargain where the transmission owners transferred planning responsibility to MISO and agreed to build RTEP projects in their respective zones.¹⁵ PSEG accuses the Commission of reading the right of first refusal out of the Operating Agreement.

11. PSEG asserts that the PJM transmission owners never delegated to PJM the right to decide who gets to build transmission in their respective zones. Further, PSEG states that language in the PJM Operating Agreement automatically triggers the right of first refusal when any person seeks to build transmission in one of the to transmission owners' zones. According to PSEG, under FERC-approved filings, no party can build transmission in PJM without in fact becoming a transmission owner and party to the

¹⁵ PSEG Rehearing at 6-7. Section 1.5.6(f) states in relevant part (emphasis added):

For each enhancement or expansion that is included in the recommended plan, the plan shall consider, based on the planning analysis: other input from participants, including any indications of a willingness to bear cost responsibility for such enhancement or expansion; and, when applicable, relevant projects being undertaken to ensure the simultaneous feasibility of Stage 1A [Auction Revenue Rights (ARRs)], to facilitate Incremental ARR's pursuant to the provisions of Section 7.8 of Schedule 1 of this Agreement or to facilitate upgrades pursuant to Parts II, III or IV of the PJM Tariff, **and designate one or more Transmission Owners or other entities to construct, own and, unless otherwise provided, finance the recommended transmission enhancement or expansion.**

Consolidated Transmission Owners Agreement (Owners Agreement), triggering the right of first refusal.¹⁶

12. Consequently, according to PSEG, the Commission's assertion that PJM could designate other parties to build transmission within zones of existing transmission owners is incorrect and amounts to a revision of filed PJM agreements. PSEG argues that such a revision violate the FPA, effectively abrogating the contractual bargain struck by the PJM Transmission Owners in the formation of PJM as an Regional Transmission Organization. PSEG further asserts that such an act amounts to an unconstitutional taking of property.¹⁷

13. PSEG presents these positions in a ten page pleading. However, PSEG proposes to incorporate by reference its larger request for rehearing in the *Primary Power* proceeding (30 pp.) and the PJM Transmission Owners' prior Protest in this proceeding (38 pp.). PSEG states that it will not repeat the legal arguments that it raised in its protest or those made in *Primary Power* but instead proposes to incorporate those arguments by reference and argue that the Commission's failure to address them underscores the arbitrary and capricious nature of the June 17 Order. According to PSEG, the Commission's failure to meaningfully consider the evidence provided by the PJM Transmission Owners thus fails to satisfy the legal requirements of reasoned decision-making.¹⁸

14. On August 2, 2010, Central Transmission filed an answer to the PSEG Rehearing.

III. Procedural Matters

15. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2012), provides that the Commission will not permit answers to requests for rehearing. Accordingly, we will reject Central Transmission's answer to the PSEG Rehearing.

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 7-8.

¹⁸ *Id.* at 8-9 (citing *Moraine Pipeline Co. v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990), which finds that reasoned decision-making requires that the Commission must not just acknowledge arguments made, but must "respond to [such] arguments and... articulate its decision based on evidence in the record" and *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) (holding that the Commission had to "engage the arguments before it"))).

IV. Commission Determination

16. Contemporaneously with this order, we deny rehearing based on our holdings in *Primary Power* that the PJM Operating Agreement permits PJM to designate an independent transmission developer, such as Central Transmission, to construct and own an economic project, such as the LaSalle Project, if the project is included in the RTEP.¹⁹ Specifically, the *Primary Power* rehearing order affirms the Commission's earlier findings that Schedule 6, section 1.5.7(c)(iii) specifically permits any market participant to propose to construct an economic upgrade. Furthermore, the language in the PJM Operating Agreement, Schedule 6, section 1.5.6(g) does not bar PJM from designating an independent transmission developer to build a project.

17. Consistent with the *Primary Power* rehearing order, the Commission does not find on rehearing in this proceeding that the language in section 1.5.6(g) was intended to reassign proposals made by market participants to incumbent Transmission Owners, in light of section 1.5.7 that specifically permits a market participant to propose to construct an additional economic enhancement. After section 1.5.6(g) was incorporated into the Operating Agreement, section 1.5.7(c)(iii), permitting any market participant to propose to construct a project, was added to provide for greater participation by market participants.²⁰ Consistent with our explanation provided in the *Primary Power* rehearing order, we reject the arguments made by PSEG, that Schedule 6 limits participation to merchant transmission projects or grants incumbent transmission owners a right of first refusal that would prevent a non-incumbent transmission developer from building an economic project, such as the LaSalle Project. As discussed more fully in the companion order, we do not find that RTEP provisions limit participation to merchant transmission projects because section 1.5.7 provides for the designation of any market participant, which includes entities other than transmission owners, to construct economic projects. Furthermore, merchant transmission developers cannot be the entities referred to in section 1.5.7(c), because merchant projects are not economic projects, but instead are alternatives to the economic projects subject to the cost-benefit analysis under section 1.5.7(c). The merchant transmission projects are processed under a separate provision of the Operating Agreement – as market solutions under section 1.5.7(j). Furthermore, the orders reviewing the development of PJM's RTEP procedures demonstrate that section

¹⁹ Economic projects are enhancements included in the RTEP in accordance with the cost-benefit analysis established in the RTEP procedures, section 1.5.7.

²⁰ See *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,218, at P 6 (2006) (approving revisions to section 1.5.7 and noting potential for transmission developers to seek incentive, i.e. cost-based, rate treatments for economic upgrades).

1.5.7 was intended to permit participation in RTEP by independent transmission developers that did not wish to follow the merchant transmission business model.²¹

18. As for PSEG's suggestion that an economic project approved under section 1.5.7(c) is ineligible for cost-of-service rates, by operation of section 1.5.6, we note that section 1.5.7 contains separate cost allocation provisions. The section 1.5.7 cost allocation provisions authorize the PJM Board to designate "the entity or entities that will be responsible for constructing and owning or financing the additional economic-based enhancements and expansions," and "the market participants that will bear responsibility for the costs of the additional economic-based enhancements and expansions pursuant to section 1.5.6(g) of this Schedule 6." Thus, it is section 1.5.7 of the RTEP procedures that establish who is to build an economic project and that governs the cost allocation of economic projects such as the La Salle project, not the provisions of section 1.5.6 touted by PSEG.

19. Also, consistent with the *Primary Power* rehearing order, we reject PSEG's policy arguments suggesting that a right of first refusal should be recognized as promoting reliability or operational or economic efficiencies. Initially we note that the Commission is not revising the PJM OATT or Operating Agreement or making a policy change. Instead, the Commission is reading the PJM Operating Agreement as drafted and accepted by the Commission. Consequently, it is unclear to what extent these policy arguments apply. In addition, similar policy arguments were made in the Order No. 1000 proceeding, and did not convince the Commission to recognize a federal right of first refusal.²² As demonstrated in PSEG's Rehearing, PJM's OATT, Operating Agreement

²¹ See *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,345, at P 20 (2002) (noting Commission finding that PJM's pre-RTO planning process is driven transmission owner retail service needs rather than fostering competitive markets and directive to modify the RTEP procedures to identify expansions to support competition as well as reliability and include meaningful opportunities for participation by third parties); *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,061, at 61,240 (2001) (announcing policy to provide for third party participation in transmission planning, including constructing and owning new transmission facilities, as well as permit merchant projects).

²² See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323, at PP 279-282 (reviewing comments filed by PJM transmission owners) (2011); *id.* at P 342 (rejecting argument that addition of independent transmission developers make it more difficult for system operators to maintain reliability), *order on reh'g*, Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012), 139 FERC ¶ 61,132 (2012).

and other relevant materials have long permitted merchant transmission projects to be constructed.²³ Yet, these projects have not caused any of the operational or difficulties identified by the rehearing requesters. The Commission made similar findings in Order No. 1000, concluding the presence of multiple transmission owners would not affect the reliability of the interconnected grid.²⁴ Furthermore, the Commission found there that participation by non-incumbent transmission owners could promote competition and lower costs.²⁵ Consequently, we deny rehearing based on policy goals, as argued by PSEG.

20. PSEG argues that the Commission's finding that PJM can designate entities other than incumbent transmission owners to build economic projects in an existing transmission owner's zone is a unilateral revision of the filed PJM Operating Agreement, OATT and other relevant materials.²⁶ We disagree. In fact, as explained above, our finding stems directly from our reading of the relevant language in the RTEP procedures, specifically, the Operating Agreement, Schedule 6, sections 1.5.6 and 1.5.7. As such, we are not revising the operative procedures. Because there is no revision, unilateral or otherwise, there is no denial of PSEG's rights under the Federal Power Act as a transmission owner. Likewise, as our finding arises from our reading of the operative contracts and agreements, there is no abrogation of any contractual bargain. Because the Commission has not altered the transmission owners' position under the relevant agreements, there is no taking. Moreover, even if the Commission were acting under section 206 to make a change in the transmission owner's rights under the relevant agreements, the Commission does not agree that such an action would constitute a taking, as discussed elsewhere.²⁷

²³ See *PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,277 (2003) (approving standard procedures for interconnecting merchant transmission facilities that complement existing PJM market structures and operational rules and include ongoing operations and maintenance provisions).

²⁴ See Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 266.

²⁵ See Order No. 1000, at PP 268, 286.

²⁶ PSEG Rehearing at 7.

²⁷ This issue is addressed more fully in the companion rehearing order in the *Primary Power* proceeding, Docket Nos. ER10-253-001, *et al.* See also Order No. 1000-A, 139 FERC ¶ 61,132 at PP 368-369 (addressing similar arguments).

21. PSEG faults the Commission's June 17 Order as arbitrary and capricious because, in applying its prior precedent in *Primary Power*, the Commission failed to address arguments in the Transmission Owner's protest. Other than the discussion in the bulk of its Request for Rehearing, PSEG does not specify which arguments in those pleadings warrant a different result than the June 17 Order. Furthermore, since PSEG proposes to incorporate its request for rehearing in *Primary Power*, it acknowledges that the two proceedings raise substantially similar issues and thus, our precedent in *Primary Power* applies. Thus, our reliance on that order in the June 17 Order is appropriate, not arbitrary and capricious or evidence of a lack of reasoned decision making.

22. The *Primary Power* rehearing order addresses PSEG's positions and affirms that PJM may designate a non-incumbent transmission developer to build an economic project in the RTEP and that the developer will thereby become eligible for cost-of-service rate recovery under the OATT. Because we uphold our findings in *Primary Power* on rehearing, we deny rehearing in this proceeding on the same basis. Except to that extent, we decline to address the arguments that PSEG fails to specify but that it proposes to incorporate by reference from the Transmission Owners' Protest in this proceeding and the request for rehearing in Docket No. ER10-253-001.²⁸

The Commission orders:

PSEG's request for rehearing of the Commission's June 17, 2009 Order is denied as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁸ The Commission's standard practice is not to allow parties to incorporate by reference arguments made in prior pleadings. *Southern California Edison, Co.*, 135 FERC ¶ 61,164, at P 13 (2011); *Duke Energy Guadalupe Pipeline, Inc.*, 116 FERC ¶ 61,080, at P 19 (2006). *See also* section 313 of the FPA, 16 U.S.C. § 8251 (2006) ("the application for rehearing shall set forth specifically the ground or grounds upon which such application is based"). *City of Santa Clara, California v. Enron Power Marketing, Inc.*, 112 FERC ¶ 61,280, at P 8 n.4 (2005).