

154 FERC ¶ 61,108  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Public Service Company of Colorado	Docket Nos. ER15-237-004 ER15-326-001
Black Hills/Colorado Electric Utility Company, LP	ER15-295-003 ER15-348-003

ORDER DENYING REHEARING AND GRANTING CLARIFICATION

(Issued February 18, 2016)

1. In this order, we deny Public Service Company of Colorado's (PSCo) request for rehearing of the Commission's June 23, 2015 order rejecting the proposed Joint Dispatch Agreement between PSCo, Black Hills/Colorado Electric Utility Company, LP (Black Hills), and Platte River Power Authority (Platte River) (collectively, Parties) and corresponding tariff revisions implementing Joint Dispatch Transmission Service under the Open Access Transmission Tariffs of Black Hills and the Xcel Energy Operating Companies.<sup>1</sup> For the reasons discussed below, we will deny rehearing and grant clarification of the June 23 Order.

**I. Background**

2. PSCo filed tariff revisions to implement Joint Dispatch Transmission Service and a proposed Joint Dispatch Agreement, and Black Hills filed tariff revisions to implement Joint Dispatch Transmission Service and a Joint Dispatch Concurrence Filing. Together, these filings sought authority to implement centralized energy dispatch to use pooled generation to serve the combined participating native load requirements.

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<sup>1</sup> *Public Service Company of Colorado*, 151 FERC ¶ 61,248 (2015) (June 23 Order).

3. In the June 23 Order, the Commission rejected the proposed tariff revisions filed by PSCo and Black Hills and the Joint Dispatch Agreement. The Commission found that PSCo had not shown that its proposed payment structure for resources dispatched as Joint Dispatch Energy under the Joint Dispatch Agreement would result in rates that are just and reasonable. The Commission found that, given that PSCo has the ability to exercise market power through the costs of the units that it commits to serve load in its balancing authority area, and because Joint Dispatch Energy would be dispatched and priced based on system-wide marginal cost under the Joint Dispatch Agreement, there were insufficient protections to mitigate against the potential market power in the relevant balancing authority area.<sup>2</sup>

4. The Commission also found that, as proposed, participation in the Joint Dispatch Agreement “requires the Parties to grant PSCo’s merchant function access to non-public information that, under the Standards of Conduct, should be restricted to PSCo’s transmission function.”<sup>3</sup> The Commission determined that, because the Joint Dispatch Agreement is administered by PSCo’s merchant function, it is not possible to prevent PSCo’s merchant function from using the commercially sensitive, non-public information to its own competitive advantage.

## **II. Requests for Rehearing and Clarification**

5. On July 23, 2015, pursuant to Rule 713 of the Commission’s Rules of Practice and Procedure,<sup>4</sup> PSCo submitted a request for rehearing and clarification of the June 23 Order.<sup>5</sup> On rehearing, PSCo asserts that the Commission’s findings regarding: (1) PSCo’s ability to exercise market power through the costs of the units it commits to serve load under the Joint Dispatch Agreement; and (2) the applicability of the Standards of Conduct to the exchange of information under the Joint Dispatch Agreement are unclear and inconsistent with precedent, policy, and the record in this case.<sup>6</sup>

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<sup>2</sup> *Id.* P 99.

<sup>3</sup> *Id.* P 100.

<sup>4</sup> 18 C.F.R. § 385.713 (2015).

<sup>5</sup> Xcel Energy Services Inc. filed the request for hearing on behalf of its utility operating company affiliate, PSCo.

<sup>6</sup> PSCo Rehearing Request at 6.

6. PSCo contends that the Commission erred in concluding that the Joint Dispatch Agreement will not provide just and reasonable rates because PSCo could exercise market power. PSCo requests that the Commission grant rehearing of its finding that PSCo's proposal to pay resources dispatched as Joint Dispatch Energy at a system-wide price derived from the system-wide marginal cost would allow PSCo to exercise market power through costs of the units it commits to serve load.<sup>7</sup> PSCo argues that the Commission's finding on this issue appears to reflect a misunderstanding of the Joint Dispatch Agreement. According to PSCo, the Parties to the Joint Dispatch Agreement concluded that a split-the-savings arrangement would provide less transparency than the Joint Dispatch Agreement, and would result in substantial administrative burdens.<sup>8</sup>

7. PSCo explains that the Joint Dispatch Agreement has many of the hallmarks of an energy imbalance type of market, but that it will not operate similarly to a bid price pool. Rather, PSCo states that under the Joint Dispatch Agreement a unit is offered at its incremental running cost. PSCo explains that, if the unit is dispatched, the unit is used first to serve the energy requirements of its owner, which bears the cost of its operation; in that circumstance, there is no Joint Dispatch Agreement transaction. According to PSCo, where a Joint Dispatch Agreement participant has offered units that are in excess of its needs, and those units are dispatched, such dispatch occurs only because the marginal cost of this excess energy is less than the cost of energy from the other participants' marginal units. PSCo explains that, in this circumstance, there is a Joint Dispatch Agreement transaction, at the marginal cost of the supplying unit. PSCo argues that, due to these mechanics and their application to resources offered by Joint Dispatch Agreement Parties, there is no ability for PSCo unilaterally to drive up or otherwise manipulate Joint Dispatch Agreement prices.<sup>9</sup> PSCo contends that, because the other Joint Dispatch Agreement Parties receive hourly dispatch reports the day following the operating day and have full rights to audit PSCo's dispatch, there is oversight to ensure the Joint Dispatch Agreement is operating pursuant to the terms of the agreement.

8. PSCo argues that, to the extent the Commission is concerned with the potential for PSCo to exercise market power through Joint Dispatch Agreement pricing, it may condition acceptance of the Joint Dispatch Agreement upon implementation of a cap on Joint Dispatch Agreement energy payments to PSCo at PSCo's existing cost-based cap established under the PSCo Electric Coordination Service Tariff. According to PSCo, such a cap would satisfy market power mitigation concerns because the Commission has explained that a mitigated market-based rate seller may use an existing cost-based rate on

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<sup>7</sup> *Id.* (citing June 23 Order, 151 FERC ¶ 61,248 at P 99).

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.*

file with the Commission to make mitigated sales.<sup>10</sup> PSCo requests that the Commission grant rehearing of the June 23 Order and accept the Joint Dispatch Agreement conditioned upon a compliance filing incorporating this cost-based cap on payments to PSCo under the Joint Dispatch Agreement.

9. The second issue that PSCo raises on rehearing is that the Commission's finding that the Standards of Conduct apply to the exchange of information under the Joint Dispatch Agreement is unclear and inconsistent with policy and precedent. Specifically, PSCo argues that the Commission erred in concluding that the Joint Dispatch Agreement requires the Parties to provide PSCo's marketing function with "non-public transmission information" that is subject to the Standards of Conduct. PSCo contends that this finding is erroneous and asserts that, contrary to the Commission's findings, the information provided to the PSCo merchant function is not "non-public transmission information." PSCo argues that the Commission defines "transmission function information" under the Standards of Conduct to be any information relating to the "planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests."<sup>11</sup> PSCo also asserts that transmission function information includes information about available transfer capability (ATC), price, curtailments, or storage.<sup>12</sup>

10. Further, PSCo argues that the Commission has also clarified that information about "unit economics" is not transmission function information, and that individuals that participate only in balancing generation with load are not engaging in a transmission function.<sup>13</sup> PSCo also asserts that the Commission previously clarified that information regarding a company's generation, load, and generation dispatch is not "per se" transmission function information, and has ruled that a customer can share its market information with a public utility marketing function directly, without involving the

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<sup>10</sup> *Id.* at 8 (citing *Tampa Electric Co.*, 113 FERC ¶ 61,159, at P 25 (2005)).

<sup>11</sup> *Id.* at 9 (quoting 18 C.F.R. § 358.3(h) (2015)).

<sup>12</sup> *Id.* (citing *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 275 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010), *order on reh'g*, Order No. 717-D, 135 FERC ¶ 61,017 (2011); *Indianapolis Power and Light Co.*, 90 FERC ¶ 61,174, at 61,575-76 (2000)).

<sup>13</sup> *Id.* at 10 (citing Order No. 717-A, FERC Stats. & Regs. ¶ 31,297 at PP 24, 136, and 131-132).

transmission provider and the Standards of Conduct.<sup>14</sup> PSCo asserts that the Commission has explained that “information related to unit commitment is not ‘non-public transmission function information per se.’”<sup>15</sup>

11. PSCo also contends that the Commission did not specify which information caused it concern in the June 23 Order. According to PSCo, the Joint Dispatch Agreement contemplates that the Parties will share information with the PSCo merchant function, and each other, that is characteristic of the types of information that the Commission has previously explained is not transmission function information. PSCo states that the Joint Dispatch Agreement provides that the Joint Dispatch Agreement Parties will share the cost of data to facilitate economic dispatch.<sup>16</sup> PSCo also states that the information to be shared includes: variable operation and maintenance cost, heat rate I/O coefficients; automatic generation control status; economic dispatch maximum capacity; economic dispatch minimum capacity; and ramp rate. PSCo argues that this type of information is unit economics and generation dispatch information, which the Commission has found is not transmission function information.

12. In addition, PSCo asserts that the Parties do not share transmission function information such as non-public information about outages, transmission equipment states, results of security applications, state estimators, load, flows, scheduled transmission outages, transmission operating procedures, transmission historical data, or transmission marketing studies and costs. Rather, PSCo states that the only transmission-related information that would be used under the Joint Dispatch Agreement is public ATC information drawn from postings on the Open Access Same Time Information System (OASIS).<sup>17</sup> PSCo states that its merchant function has no special access to this information, and argues that there is no restriction under the Standards of Conduct on the PSCo marketing function accessing publicly-available information posted on the OASIS. PSCo reiterates that no non-public coordination between the transmission and marketing functions of PSCo will occur because such coordination is not necessary for, nor was ever contemplated to be any part of, performance under the Joint Dispatch Agreement.

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<sup>14</sup> *Id.* (citing *Atlantic City Electric Co.*, 82 FERC ¶ 61,028, at 61,087 (1998) (*Atlantic City*)).

<sup>15</sup> *Id.* at 10 (citing Order No. 717-A, FERC Stats. & Regs. ¶ 31,297 at P 132).

<sup>16</sup> *Id.* (citing Joint Dispatch Agreement, Art. 3.4; Appx. A).

<sup>17</sup> *Id.* at 11 (citing Joint Dispatch Agreement, Art. 5.4; PSCo April 24, 2015 Response to Joint Dispatch Agreement Deficiency Letter at 4-5).

13. PSCo argues that the non-public economic dispatch data contemplated by the Joint Dispatch Agreement is communicated directly from other Joint Dispatch Agreement participants to the PSCo merchant function, not the PSCo transmission function, and that the Standards of Conduct do not regulate such communications. PSCo asserts that the Commission's purpose in regulating the transmission provider and marketing function affiliate relationship under the Standards of Conduct is to prevent preferential treatment of an affiliated marketer by a transmission provider in the provision of transmission services.<sup>18</sup> PSCo also argues that the Standards of Conduct do not regulate the relationship between a public utility's marketing function and the marketing functions of other public utilities or the customers of the public utility's marketing function. According to PSCo, there is nothing in the Standards of Conduct regulations that addresses or otherwise prohibits the exchange of economic dispatch information between such entities. In fact, PSCo asserts that the Commission has specifically found that a customer can share market information with a public utility marketing function directly, without involving the transmission provider and the Standards of Conduct.<sup>19</sup>

14. PSCo also argues that the Commission did not indicate in the June 23 Order that it intended to broaden the scope of entities and communications to which the Standards of Conduct apply, and in the June 23 Order gave no indication that the Commission intended to redefine transmission function information under the Standards of Conduct. PSCo contends that, if the Commission intended to broaden the scope of entities and communications to which the Standards of Conduct apply, it must satisfy the standards in *National Fuel Gas Supply Corp. v. FERC*.<sup>20</sup> PSCo asserts that the effect of the June 23 Order is to broaden the reach of the Standards of Conduct to economic dispatch information not within the possession of the transmission provider, but shared directly between marketing function affiliates and customers. PSCo requests that the Commission grant rehearing and clarify that the information exchanged under the Joint Dispatch Agreement is not transmission function information and that the Standards of Conduct do not apply to the information.

15. Alternatively, PSCo believes that any concern regarding the information shared among Parties could be addressed by having only non-marketing function employees of PSCo receive the economic dispatch information from the other Parties, with a

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<sup>18</sup> *Id.* at 12 (citing *Tenneco Gas v. FERC*, 969 F.2d 1187, 1199 (D.C. Cir. 1992); *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 at 30,548, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997)).

<sup>19</sup> *Id.* (citing *Atlantic City*, 82 FERC at 61,087).

<sup>20</sup> 468 F.3d 831 (D.C. Cir. 2006).

prohibition on the information being provided to the PSCo marketing function.<sup>21</sup> PSCo requests that the Commission grant rehearing, and, if necessary, accept the Joint Dispatch Agreement conditioned upon a compliance filing that implements a revision that ensures that PSCo marketing function employees do not receive the non-public economic dispatch information.

16. Finally, PSCo requests that the Commission grant expedited consideration of its rehearing request because PSCo is exploring the feasibility of revising aspects of the Joint Dispatch Agreement to meet concerns raised in the June 23 Order. PSCo states that there is good cause to grant expedited consideration because the Joint Dispatch Agreement offers significant cost savings benefits to Joint Dispatch Agreement participants' native load that PSCo hopes to implement as soon as possible.<sup>22</sup>

17. Tri-State Generation and Transmission Association Inc. (Tri-State) filed a motion for leave to answer and answer to PSCo's request for rehearing. PSCo filed a motion for leave to answer and answer to Tri-State's answer.

18. On August 18, 2015, Edison Electric Institute (EEI) filed a motion to intervene out-of-time and motion for clarification of the June 23 Order. In support of its late-filed motion to intervene, EEI argues that the Standards of Conduct issue and more specifically, the Commission's potential expansion of information applicable under the Standards of Conduct, first arose in the June 23 Order. EEI requests that the Commission grant its motion, given that a shift in policy on this issue has the potential to significantly impact EEI's members. EEI argues that no disruption of the proceeding will result from granting its late-filed motion to intervene, nor will any of the parties be prejudiced or subject to additional burdens as a result of permitting EEI to intervene, and that it accepts the record in this proceeding as it stands. EEI further states, that given that a request for rehearing has already been filed and EEI will not raise any additional issues, EEI's intervention will not prolong the proceeding or impose additional burdens on the parties.<sup>23</sup> EEI also argues that its interest is not adequately represented in this proceeding, and that it represents the interests of its member utilities nationwide who routinely rely on the Commission's Standards of Conduct to ensure compliance.

19. EEI seeks clarification with respect to the non-public transmission information subject to the Standards of Conduct, and requests that the Commission clearly identify what information it deems to be non-public transmission information, arguing that the

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<sup>21</sup> PSCo Rehearing Request at 13.

<sup>22</sup> *Id.* at 14.

<sup>23</sup> EEI August 18 Motion at 3 (citing *Duke Power Co.*, 48 FERC ¶ 61,225 (1989)).

fact that the June 23 Order does not explain what “non-public transmission information” had raised concerns for the Commission creates ambiguity which has the potential to create confusion for EEI members and compliance risk moving forward.<sup>24</sup> EEI also seeks clarification that the June 23 Order is not intended to broaden the scope of communications to which the Standards of Conduct apply. In this regard, EEI states that its understanding is that unit economics and generation dispatch information are not transmission function information per se, and as a result, generally fall outside the scope of the Standards of Conduct.<sup>25</sup>

20. On August 27, 2015, the Colorado Public Utilities Commission (Colorado Commission) submitted comments in support of PSCo’s request for rehearing, and to inform the Commission that the concerns it raised initially in this proceeding have been resolved. The Colorado Commission also states that PSCo’s Joint Dispatch Agreement will benefit the electricity consumers of Colorado.<sup>26</sup>

### **III. Discussion**

#### **A. Procedural Matters**

21. Rule 713(d)(1) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2015), prohibits answers to a request for rehearing. Therefore, we reject the answers submitted by Tri-State and PSCo, and the comments submitted by the Colorado Commission.

22. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. EEI has not met this higher burden of justifying its late intervention.<sup>27</sup>

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<sup>24</sup> *Id.* at 4 (citing June 23 Order, 151 FERC ¶ 61,248 at P 101).

<sup>25</sup> *Id.* at 5 (citing Order No. 717-A, FERC Stats. & Regs. ¶ 31,297 at PP 132, 136).

<sup>26</sup> Colorado Commission August 27 Comments at 2.

<sup>27</sup> *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003). In addition, we note that EEI submitted its motion to intervene out-of-time and motion for clarification on August 18, 2015, more than 30 days after issuance of the June 23 Order.

23. In light of our decision to deny EEI's late motion to intervene, we will dismiss EEI's motion for clarification. Because EEI is not a party to this proceeding, it lacks standing to seek rehearing of the June 23 Order under the FPA and the Commission's regulations.<sup>28</sup> Nevertheless, we will provide clarification regarding the Standards of Conduct issues EEI raises, as discussed below.

### **B. Substantive Matters**

24. We will deny PSCo's request that we grant rehearing of the Commission's determination that PSCo's proposal to pay resources dispatched as Joint Dispatch Energy at a system-wide price derived from the system-wide marginal cost provides insufficient protections to mitigate against the potential for PSCo to exercise market power. Our concern that permitting PSCo to pay resources dispatched as Joint Dispatch Energy at a system-wide price provides insufficient protections to mitigate against the potential to exercise market power is heightened because the market would be administered by PSCo, and because PSCo does not have market-based rate authority within its balancing authority area.<sup>29</sup> We disagree with PSCo's argument on rehearing that, because Joint Dispatch Agreement transactions will be at the marginal cost of the supplying unit, as opposed to a market-based bid, PSCo's ability to exercise market power within its balancing authority area is mitigated. Indeed, PSCo could still exercise market power under its Joint Dispatch Agreement proposal because Joint Dispatch Energy would be dispatched at a system-wide marginal cost instead of at cost-based rates, and PSCo, the entity with market power, would be administering the market. PSCo's arguments that: (1) the Joint Dispatch Agreement does not operate similarly to a bid price pool; and (2) that the other Joint Dispatch Agreement Parties have full rights to audit PSCo's dispatch do not address the Commission's concerns that there are insufficient protections in place to mitigate against the potential for PSCo to exercise market power because resources would still be dispatched as Joint Dispatch Energy at a system-wide price derived from the system-wide marginal cost.

25. With regard to PSCo's suggestion that the Commission could direct PSCo to implement a cap on Joint Dispatch Energy payments to PSCo at PSCo's existing cost-based cap established under PSCo's Electric Coordination Service Tariff, we note that, in

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<sup>28</sup> See 16 U.S.C. § 825(a) (2012); 18 C.F.R. § 385.713(b) (2015); and *Southern Company Services, Inc.*, 92 FERC ¶ 61,167 (2000).

<sup>29</sup> PSCo would not satisfy the horizontal market power analysis in its balancing authority area, and therefore is presumed to have market power in its balancing authority area. *Public Service Company of Colorado*, 146 FERC ¶ 61,137, at P 4 (2014).

a separate order issued concurrently with this order, we address PSCo's proposal to implement a cap on Joint Dispatch Energy payments to PSCo.<sup>30</sup>

26. Because we deny PSCo's request for rehearing of the Commission's determination to reject the Joint Dispatch Agreement based on its finding that PSCo's proposal to dispatch Joint Dispatch Energy at the system-wide price would not provide sufficient protections to mitigate against the potential for PSCo to exercise market power in the relevant balancing authority area, we will dismiss PSCo's arguments on rehearing that the exchange of information under the Joint Dispatch Agreement would not violate the Standards of Conduct. Given that we deny rehearing of the just and reasonableness of the proposed Joint Dispatch Agreement, there is no need to address the secondary request for rehearing pertaining to the Standards of Conduct vis-à-vis the Joint Dispatch Agreement. In any event, we note that, in a separate order issued concurrently with this order, we accept PSCo's revised Joint Dispatch Agreement reflecting PSCo's alternative proposal.<sup>31</sup>

27. However, with respect to the applicability of the Standards of Conduct, we clarify that the Commission did not intend for the June 23 Order to broaden the scope of communications to which the Standards of Conduct apply, nor to change the policy articulated in Order No. 717 and relevant precedent.

The Commission orders:

PSCo's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>30</sup> *Public Service Company of Colorado*, 154 FERC ¶ 61,107 at P 81 (2016).

<sup>31</sup> *Id.* P 82.