UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New PJM Companies	Docket Nos. ER03-262-016
American Electric Power Service Corp.	ER03-262-010
On behalf of its operating companies	ER03-262-016
Appalachian Power Company	EC98-40-10
Columbus Southern Power Company	ER98-2770-011
Indiana Michigan Power Company	ER98-2786-011
Kentucky Power Company	
Kingsport Power Company	
Ohio Power Company, and	
Wheeling Power Company	
Commonwealth Edison Company, and	
Commonwealth Edison Company of Indiana, Inc.	
The Dayton Power and Light Company,	
and	
PJM Interconnection, LLC	

ORDER DISMISSING REQUESTS FOR REHEARING AND REJECTING OFFER OF SETTLEMENT

(Issued January 7, 2005)

1. In this order the Commission dismisses the requests for rehearing of an order as to the Commission's authority under the Public Utility Regulatory Policies Act of 1978 (PURPA) to permit a utility to integrate into a regional transmission organization (RTO), because those rehearing requests are now moot. The Commission further rejects an offer of settlement made in that proceeding. This order benefits customers because it ensures appropriate application of Commission rulings and precedent.

Background

2. In an order issued on June 17, 2004,[1] the Commission affirmed a decision by an Administrative Law Judge (ALJ), pursuant to section 205(a) of PURPA,[2] to exempt American Electric Power Service Corporation's (AEP) application to integrate into PJM Interconnection, LLC (PJM) from the laws, rules, or regulations of the Commonwealth of Virginia that had prevented or prohibited AEP's voluntary coordination with PJM.

3. At the time of issuance of Opinion No. 472, AEP's application to integrate into PJM was pending before the Virginia State Corporation Commission (Virginia Commission), and the Commission stated that if the Virginia Commission did not approve the application in time for AEP to integrate by October 1, 2004, the Commission would nevertheless require the integration of AEP into PJM. The Commission also stated that:

> If the Virginia Commission timely finds that AEP should integrate into PJM on October 1, 2004, there will be no need for the Commission to use its authority under PURPA section 205(a) to permit the integration. Additionally, if the Virginia Commission is able to timely complete its proceedings, and reaches agreement as to reasonable conditions relating to integration that do not prevent or prohibit integration, the Commission is certainly open to considering such provisions.[3]

4. Timely requests for rehearing of Opinion No. 472 were filed by the Virginia Commission and the Commonwealth of Virginia, the Louisiana Public Service Commission (Louisiana Commission), and the North Carolina Utilities Commission.

5. On August 30, 2004, the Virginia Commission approved a settlement filed by AEP's Virginia operating company, PJM, the Virginia Commission staff and other parties that enabled the Virginia Commission to approve the integration of AEP into PJM.[4]

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[1] New PJM Companies, *et al.*, 107 FERC ¶ 61,271 (2004) (Opinion No. 472).

[2] 16 U.S.C. § 824a-1(a) (2000).

[3] Opinion No. 472 at P 74.

[4] Commonwealth of Virginia *ex rel.* State Corporation Commission, Case No. PUE-2000-00550, Order Granting Approval, August 30, 2004.

6. On September 9, 2004, the Virginia and Louisiana Commissions (Settling Parties) filed an Offer of Settlement with the Commission. They propose that, if the Commission approves this Offer of Settlement without modifications or conditions, and the Commission issues an order vacating Opinion No. 472 and dismissing it as moot, each of the Settling Parties will withdraw its request for rehearing of Opinion No. 472, withdraw with prejudice pending petitions for judicial review of Opinion No. 472, and permanently forego efforts to seek judicial review of Opinion No. 472. The Settling Parties argue for acceptance of the Offer of Settlement on the basis that AEP has now integrated into PJM pursuant to state authorization, and that, unless the Commission vacates Opinion No. 472, the Commission will be using its authority under PURPA section 205(a) in "clear contradiction" to Paragraph 74 of Opinion No. 472.[5] The Settling Parties further argued that principles of state-federal comity supported vacatur of Opinion No. 472, in that "[i]f not vacated, Opinion No. 472 would represent an unfortunate precedent that will continue to contribute to federal-state tension and mistrust that will harm ongoing collaborative efforts between this Commission and state utility commissions."[6]

7. The Offer of Settlement was noticed in the Federal Register,[7] with comments due on September 29, 2004, and reply comments due on October 12, 2004. Timely initial comments were filed by the Intervenor States (North Carolina Utilities Commission Public Staff, North Carolina Utilities Commission and the Attorney General of North Carolina (collectively, North Carolina), the Alabama Public Service Commission, the Public Utilities Commission of the State of California, the New Mexico Attorney General, and the Washington Utilities and Transportation Commission (Washington Commission), the Tennessee Regulatory Authority (TRA), Exelon Corporation (Exelon), Cinergy Services, Inc. (Cinergy), Edison Mission Energy, *et al.* (EME), and Commission Trial Staff. The Florida Public Service Commission (Florida Commission) filed a motion for leave to file comments out of time, and late-filed comments. Reply comments were filed by the Settling Parties and the Washington Commission, and North Carolina.

8. In initial comments, the Intervenor States support the Offer of Settlement on the basis that the Commission's goal – integration of AEP into PJM by October 1 – has been met, and thus, Opinion No. 472 no longer serves any purpose. The TRA supports

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[5] Offer of Settlement, Explanatory Statement of Settling Parties in Support of Offer of Settlement, Request for Shortened Comment Period and Expedited Consideration at 10.

[6] *Id.* at 11.

[7] 69 Fed. Reg. 56420 (2004).

vacatur, on the basis that leaving Opinion No. 472 extant will create a negative precedent for any future cases related to the interpretation of section 205(a) of PURPA. The Florida Commission also stresses the benefits of vacatur to continued maintenance of productive state-federal relationships.

9. Exelon states that there is no requirement that the Commission vacate Opinion No. 472 and that strong policy reasons exist to retain Opinion No. 472 because it provides an interpretation of section 205(a) of PURPA; however, Exelon additionally states that, should the Commission wish to vacate Opinion No. 472 for purposes of state-federal comity, Exelon would not object. Cinergy and EME assert that, while vacatur is an equitable remedy generally granted only under extraordinary circumstances, they too would not object if the Commission vacated Opinion No. 472.

10. Commission Trial Staff oppose vacatur of Opinion No. 472, arguing that even though the underlying case has now been rendered moot, the Commission has used mootness as only one of several factors in making its equitable determination as to whether extraordinary circumstances justify vacatur, including whether the Commission has engaged in lengthy hearings covering a broad range of issues, the Commission's Opinion is valuable to the legal community as a whole, extensive Commission deliberations were involved in determining the outcome of the proceeding, and the Commission and the public have a large investment in the outcome of the proceeding.

11. In reply comments, the Settling Parties and the Washington Commission state that the Commission should not hesitate to vacate Opinion No. 472 because it has not yet been cited in other proceedings or served as legal precedent, and that no party has objected to vacatur other than Commission Trial Staff; they then reiterate that principles of comity would encourage vacatur here. North Carolina states that granting vacatur would do much to ameliorate state-federal tensions around the formation of RTOs.

Discussion

Petitions for Rehearing of Opinion No. 472

12. As a result of the settlement reached by the parties, and approved by the Virginia Commission, the Commonwealth of Virginia has approved the integration of AEP. A decision on the rehearing petitions, therefore, will no longer affect the rights of any of the parties, and the Commission dismisses the rehearing requests as moot.

Offer of Settlement

13. The Commission rejects the Offer of Settlement filed by the Settling Parties, and does not find that vacatur of Opinion No. 472 is appropriate. In *Panhandle Eastern Pipe Line Co. v. FERC*,[8] the U.S. Court of Appeals for the District of Columbia Circuit found that when a case is rendered moot by settlement, prior to the issuance of a Commission order on rehearing petitions, the Commission need not vacate the underlying order. The court found that even though the agency order is not a final order and no longer has a binding effect on the parties, the order can still serve as a useful policy statement setting forth the agency's views: "This advance-notice function of policy statements yields significant informational benefits, because policy statements give the public a chance to contemplate an agency's views before those views are applied to particular factual circumstances."[9] The court further pointed out that "this period of foreshadowing is made even more useful by the fact that, unlike substantive rules, '[a] general statement of policy . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed.'"[10]

14. In *Town of Neligh, NE* v. *Kinder Morgan Interstate Gas Transmission*,[11] the Commission refused to vacate an order, finding that the order had value as a policy statement and noting that the Commission "often expends valuable resources to reach a decision in a proceeding and that it would be disruptive to Commission proceedings to vacate orders simply because the parties have settled." In other recent cases, the Commission has declined to vacate mooted orders if they can provide useful information to the public.[12]

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[8] 198 F.3d 266, 267 (D.C. Cir. 1999).

[9] *Panhandle*, 198 F.3d at 269 (footnotes omitted).

[10] *Id*. (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974)).

[11] 94 FERC ¶ 61,075 at 61,348 (2001) (*Town of Neligh*), *citing Edwards Mfg. Co.*, 84 FERC ¶ 61,228 (1998), *citing U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 512 U.S. 18, 26 (1994).

[12] *See Gregory Swecker v. Midland Power Cooperative*, 108 FERC ¶ 61,268 at P 28 (citations omitted) (2004) ("The determination to vacate an order is an equitable one. . . [and Midland has not] shown exceptional circumstances requiring vacatur of the previous order. Moreover, Commission orders serve to provide significant informational

(continued)

15. This case was the first time in which the Commission has considered whether to invoke PURPA section 205. The parties, as well as the Commission, expended extensive time and resources in litigating all the issues and arguments concerning the application of PURPA section 205, and Opinion No. 472 provides useful information about the Commission's approach to the issues raised here under PURPA section 205. As in any policy statement, the determination in Opinion No. 472 does not establish a binding norm, and in any future proceeding, the Commission will have to support any application of PURPA section 205 based on the specific facts and circumstances of that case.

16. Our decision not to vacate Opinion No. 472 does not reflect a retreat from our commitment to federal-state comity on RTO or other issues.[13] We are committed to working collegially with the states to improve the efficiency of the electric market for the benefit of all, and look forward to a continuing and productive working relationship between state and federal regulators.

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benefits to the public by announcing the Commission's intentions for the future. The opportunity to anticipate the agency's actions facilitates long range planning and promotes uniformity"); *Constellation Power Source, Inc. v. California Power Exchange Corp.*, 100 FERC ¶ 61,380 at P 20 (footnotes omitted) (2002) ("We . . . believe that the July 30 Order will continue to provide guidance to the bankruptcy judge as to the Commission's position on certain issues . . . [and] Commission orders, declaratory orders, opinions, and policy statements serve to provide significant informational benefits to the public by announcing the Commission's intentions for the future; further, this opportunity to anticipate the agency's actions facilitates long range planning within the regulated industry and promotes uniformity"); and *KN Wattenberg*, 94 FERC ¶ 61,173 at 61,603-04 (2001) ("Given that these orders offer a potentially instructive example to persons contemplating the scope of the Commission's jurisdiction, we believe it would constitute an imprudent expenditure of our resources were we to take the extraordinary step of vacating the orders.").

[13] Our invocation of PURPA section 205 in this case was in substantial part an effort to resolve a disagreement among states as well as to move forward expeditiously to provide for an integration that would provide for economic utilization of facilities on a region-wide basis. Opinion No. 472, 107 FERC ¶ 61,271, at P 2.

The Commission orders:

(A) The requests for rehearing of Opinion No. 472 are dismissed.

(B) The Commission rejects the Offer of Settlement.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.