

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

New PJM Companies	Docket Nos.	ER03-262-009
American Electric Power Service Corp.		ER03-262-010
Commonwealth Edison Company, and		ER03-262-013
Commonwealth Edison Company of Indiana, Inc.		EC98-40-008
Virginia Electric and Power Company		ER98-2770-009
The Dayton Power and Light Company,		ER98-2786-009
and		
PJM Interconnection, LLC		

**COMMENTS OF INTERVENOR STATES  
SUPPORTING THE VIRGINIA STATE CORPORATION COMMISSION'S  
OFFER OF SETTLEMENT**

Pursuant to the Rules of Practice of the Federal Energy Regulatory Commission (Commission or FERC) and the Commission's September 14, 2004, Notice of Filing of Offer of Settlement, the North Carolina Utilities Commission, the Public Staff – North Carolina Utilities Commission, the Attorney General of the State of 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 (collectively, the Supporting Parties), submit these comments supporting the Offer of Settlement filed in this proceeding by the Virginia State Corporation Commission (VSCC), the Commonwealth of Virginia by, through and at the relation of its Governor and its Attorney General, and the Louisiana Public Service Commission on September 9, 2004, pursuant to Rule 602, 18 C.F.R. § 385.602.

## **BACKGROUND**

On December 9, 2002, American Electric Power's (AEP's) affiliated operating company, Appalachian Power Company (APCO), filed an application with the VSCC in Case No. PUE-2000-00550 requesting authorization to transfer functional and operational control of APCO's transmission assets located in the Commonwealth of Virginia to PJM Interconnection, LLC (PJM). On December 19, 2002, a similar application was filed by AEP's affiliated operating company, Kentucky Power Company (KPC), with the Kentucky Public Service Commission (KPSC).

On November 25, 2003, the Commission issued an Order setting for hearing in this proceeding, pursuant to Section 205(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-1(1)(2003), the issue of whether the Commission should exempt AEP from complying with Kentucky and Virginia laws, rules, or regulations that allegedly were preventing AEP from joining PJM.<sup>1</sup> On March 12, 2004, the Presiding Administrative Law Judge (ALJ) issued an Initial Decision in this proceeding preempting certain laws, rules and regulations of Kentucky and Virginia that the ALJ viewed as preventing the transfer of functional and operational control over AEP's transmission assets to PJM.<sup>2</sup> On June 17, 2004, the Commission issued Opinion No. 472 affirming the ALJ's Initial Decision with regard to the laws, rules and regulations of

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<sup>1</sup>*New PJM Companies, et al.*, 105 FERC ¶ 61,251 at 63,327, Heading "E" (November 25 Order).

<sup>2</sup>*New PJM Companies, et al.*, 106 FERC ¶ 63,029 (2004).

Virginia.<sup>3</sup> In a separate order on June 17, 2004, the Commission approved a settlement between AEP, PJM, the Kentucky Office of Attorney General, the Kentucky Industrial Utility Consumers and the KPSC allowing KPC to transfer functional and operational control of its transmission assets to PJM.<sup>4</sup> Several of the Supporting Parties participated in the above described Commission proceedings, timely sought rehearing of the November 25 Order and Opinion No. 472 and sought judicial review of the November 25 Order.<sup>5</sup>

At a public hearing on July 27, 2004, the VSCC received into evidence in Case No. PUE-2000-00550 a Stipulation recommending that the VSCC approve APCO's application, subject to specified terms and conditions (Stipulation). On August 30, 2004, the VSCC issued an Order Granting Approval authorizing APCO to transfer functional and operational control of its transmission assets located in Virginia to PJM, subject to the terms and conditions contained in the

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<sup>3</sup>*New PJM Companies, et al.*, Opinion on Initial Decision and Order on Rehearing, Opinion No. 472, 107 FERC ¶ 61,271 (2004) (Opinion No. 472).

<sup>4</sup>*New PJM Companies*, 107 FERC ¶ 61,272 (2004).

<sup>5</sup>The North Carolina Utilities Commission, the Public Staff – North Carolina Utilities Commission, and the Attorney General of the State of North Carolina (collectively, the North Carolina Agencies) intervened in the Commission's proceedings, participated in the ALJ hearings, requested reconsideration of both the November 25 Order and Opinion No. 472, and filed a Petition for Review of the November 25 Order and the Commission's denial of reconsideration of that Order in the United States Court of Appeals for the District of Columbia Circuit. The Alabama Public Service Commission intervened in the Commission's proceedings. The Washington Utilities and Transportation Commission and the New Mexico Attorney General intervened in the Commission's proceedings and joined with the North Carolina Agencies in their request for rehearing of Opinion No. 472. The Public Utilities Commission of the State of California intervened in the Commission's proceedings and intervened in the appellate proceedings in the D.C. Circuit.

Stipulation, as modified in one respect by that Order with the concurrence of the parties to the Stipulation (VSCC Order Granting Approval).

On September 9, 2004, the VSCC filed in this docket an Offer of Settlement. The VSCC was joined in the Offer of Settlement by the Commonwealth of Virginia, the Attorney General of Virginia and the Louisiana Public Service Commission, all of whom are collectively referred to as the “Settling Parties.” According to the Offer of Settlement, the Settling Parties agree to resolve this proceeding in full, based upon the terms and conditions set forth in the Stipulation, as modified by the VSCC Order Granting Approval, if the Commission will:

- (a) approve the Offer of Settlement without additions, modifications or conditions; and

- (b) issue an order vacating and dismissing as moot Opinion No. 472.<sup>6</sup>

Further, the Settling Parties agree that, upon the Commission’s approval of the Offer of Settlement, and *vacatur* and dismissal of Opinion No. 472 as moot, each of the Settling Parties will:

- (a) withdraw, with prejudice, its pending request for rehearing as to Opinion No. 472;

- (b) terminate, with prejudice, all efforts to obtain a judicial stay of Opinion No. 472;

- (c) withdraw, with prejudice, all pending petitions for review, as well as any interventions in any proceedings concerning such petitions, as to the

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<sup>6</sup>Offer of Settlement, ¶ 2.2.

Commission's November 25 Order, which petitions and interventions are pending in the United States Court of Appeals for the District of Columbia Circuit, Case Nos. 04-1203, 04-1270 and 04-1271; and (d) permanently forego efforts to seek judicial review of any aspect of Opinion No. 472.<sup>7</sup>

### **REASONS THE COMMISSION SHOULD ACCEPT THE OFFER OF SETTLEMENT**

The Supporting Parties intervened in these Commission proceedings for the purpose of attempting to preserve the right of state commissions to regulate their jurisdictional public utilities in accordance with state law. Consequently, the Supporting Parties urged FERC to allow the KPSC and VSCC to review and rule upon AEP's applications to join PJM in accordance with their customary regulatory procedures. By comparison, the Commission's primary goal appears to have been ensuring that AEP became integrated into PJM by October 1, 2004.<sup>8</sup> At this point, both the Supporting Parties and the Commission have achieved their goals. The KPSC's and VSCC's review procedures have been completed, and both state commissions have approved AEP's integration into PJM. Therefore, the Commission's preemption of Kentucky's and Virginia's laws, rules and regulations serves no useful purpose.<sup>9</sup>

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<sup>7</sup>Offer of Settlement, ¶ 2.3.

<sup>8</sup>See, e.g., November 25 Order at ¶¶ 1(A). 55, 77, 78, 87, 91, 97 and 107; Opinion No. 472 at ¶¶ 4, 56, 73, 93 and 128.

<sup>9</sup>These comments in support of the Offer of Settlement are submitted with the understanding that they are part of an attempted negotiated settlement of

Further, as stated by the Settling Parties in their Explanation Statement, principles of comity strongly favor the Settling Parties' request for *vacatur* of Opinion No. 472. This proceeding has created much state-federal jurisdictional tension with respect to the formation of regional transmission organizations (RTOs). In Order No. 2000, the Commission acknowledged that state commissions and FERC exercise joint jurisdiction over RTO formation.<sup>10</sup> By vacating Opinion No. 472, FERC can decisively demonstrate in a concrete manner that it respects state jurisdiction and desires to improve federal-state relations.

Finally, as noted in the Settling Parties' Explanation Statement, vacating Opinion No. 472 will benefit all parties by eliminating the need to expend additional significant time and resources in an appeal of this matter. In addition, Opinion No. 472 is so fact-specific that it does not create any useful precedent for the interpretation of PURPA Section 205. As a result, the Commission should honor the Settling Parties' request for *vacatur* of Opinion No. 472 for purely practical reasons as well.

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these proceedings. As such, if the Offer of Settlement is not accepted, these comments should not constitute any part of the record in this proceeding, or be used for any other purpose.

<sup>10</sup>Order No. 2000, *Regional Transmission Organizations*, FERC Stats. & Regs. ¶ 31,089 at 31,213 (1999), 65 Fed. Reg. 809, *on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092, 65 Fed. Reg. 12,088 (2000), *petitions for review dismissed, Public Utility District No. 1 of Snohomish County v. FERC*, 272 F.3d 607 (D.C. Cir. 2001). See also Order No. 2000 at 31,221 ("commitment to the use of the collaborative process ..."); *id.* at 31,213 ("Regional interests forming an RTO should consult with the states about what state roles best fit the agencies' authorities and preferences and the organizational form of the RTO").

## **CONCLUSION**

For the foregoing reasons, the Supporting Parties request that the Commission accept the Offer of Settlement without additions, modifications or conditions and issue an order vacating and dismissing as moot Opinion No. 472. In return, the Supporting Parties stipulate that they will, as applicable to each of them: (a) withdraw, with prejudice, any pending requests for rehearing as to Opinion No. 472; (b) withdraw, with prejudice, any pending petitions for review, as well as any interventions in any proceedings concerning such petitions, as to the Commission's November 25 Order, which petitions and interventions are pending in the United States Court of Appeals for the District of Columbia Circuit, Case Nos. 04-1203, 04-1270 and 04-1271; and (c) not seek judicial review of Opinion No. 472.

Respectfully submitted this 24th day of September, 2004.

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#### CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

This the 24th day of September, 2004.

/s/ Louis S. Watson, Jr.

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