101 FERC ¶ 61, 318

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Pennsylvania-New Jersey-Maryland Interconnection	Docket Nos.OA97-261-003 and ER97-1082-005
Atlantic City Electric Company, Baltimore Gas and Electric Company, Delmarva Power & Light Company, Jersey Central Power & Light Company, and Metropolitan Edison Company	Docket No. ER97-3189-031
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. EC97-38-002
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. ER97-3273-002
Pennsylvania-New Jersey-Maryland Interconnection Restructuring	Docket No. EL97-44-002
PJM Interconnection, L.L.C.	Docket No. OA97-678-002
Atlantic City Electric Company, Baltimore Gas and Electric Company, Delmarva Power & Light Company, Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company,	Docket Nos. ER96-2516-004, EC96-28-004 and EL96-69-004

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

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

PECO Energy Company Docket Nos. ER96-2668-004 and EC96-29-004

ORDER ON REMAND

(Issued December 19, 2002)

1. This case is before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit,[1] concerning certain rulings made by the Commission in its orders conditionally authorizing the establishment of PJM Interconnection, L.L.C. (PJM) as an independent system operator (ISO).[2]

2. In Atlantic City, the court vacated and remanded three aspects of the Commission's revisions to PJM's 1997 proposal to create an ISO. First, the court determined that the Commission's ruling requiring Public Service Electric and Gas Company (PSE&G) to modify the transmission component in its bundled wholesale power sales contract with Old Dominion Electric Cooperative (ODEC), consistent with the start up of the PJM ISO, failed to satisfy the public interest findings required by the Mobile-Sierra doctrine. Second, the court determined that the Commission's decision to prohibit the PJM transmission owners from unilaterally filing for rate design changes, subject only to the ISO's veto, violated the right of the PJM transmission owners to file tariff changes under section 205 of the Federal Power Act (FPA).[3] Third, the court determined that the Commission's decision to prohibit PJM's transmission owners from

---

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

[2]See Pennsylvania-New Jersey-Maryland Interconnection, et al., 81 FERC ¶ 61,257 (1997) (PJM Restructuring Order), order on reh'g, 92 FERC ¶ 61,282 (2000) (PJM Rehearing Order).

[3]16 U.S.C. § 824d (2000).

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

leaving the ISO, without first securing the Commission's authorization under section 203 of the FPA,[4] was inconsistent with the structure and meaning of that statutory provision.

3. On remand, as directed by the court, we revisit and reconsider our underlying findings relating to these three issues. First, we reverse our ruling regarding the bundled PSE&G/ODEC contract, based on our belief that our prior-stated concern over the rates and charges under this contract, while important, does not rise to the higher public interest level necessary to reform that contract. Second, we revisit the respective balance of section 205 rights and responsibilities that the PJM transmission owners and the PJM ISO, as public utilities subject to the Commission's regulation under the FPA, share, and allow PJM's transmission owners, at their election, to explain why their proposed allocation of these rights will not upset the independence of the ISO or result in unduly discriminatory rates and practices. Finally, we continue to conclude, after explaining the nature of the PJM restructuring and the resulting transfer of operating authority over the PJM transmission facilities from the transmission owners to the ISO, that the withdrawal of a transmission owner from the ISO, thus resulting in the transfer of operating control from the ISO back to that transmission owner, is a disposition of facilities necessitating the Commission's prior review under section 203 of the FPA.

Background

4. The orders at issue here date back to the beginning of the Commission's electric open access and ISO regime. PJM was the first entity to restructure itself into an ISO in accordance with the principles for ISO formation identified by the Commission in Order No. 888.[5] The Commission rejected the initial proposal made by PJM's market participants to transform PJM into an ISO.[6] In the PJM Restructuring Order, however, we found, subject to certain modifications, that the restructuring proposal made by the

---

[4]Id. at § 824b.

[5]See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Pubic Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,730-32 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in part and rev'd in part sub nom.Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000) (Transmission Access), aff'd sub nom. New York v. FERC, 122 S. Ct. 1012 (2002).

[6]See Atlantic City Electric Company, et al., 77 FERC ¶ 61,148 (1996).

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

PJM Supporting Companies,[7] on June 2, 1997, to establish an ISO (and the supporting documents accompanying that proposal) generally satisfied the eleven principles enunciated in Order No. 888 pertaining to the establishment of ISOs.[8] Accordingly, we authorized the establishment of the PJM ISO to: (1) operate the transmission facilities under its control; (2) administer the PJM OATT for transmission service over those facilities; (3) operate PJM's spot energy market (referred to as the Power Exchange, or PX); (4) approve a regional transmission expansion plan; and (5) administer certain aspects of the TO Agreement and Reliability Agreement.[9] We also approved the PJM Office of Interconnection (PJM-IO) 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.

5. We also addressed a number of issues related to the start up of the ISO, including the three issues addressed by the court in Atlantic City. First, we determined whether PSE&G's existing bilateral power sales contract with ODEC should be modified as a result of PJM's restructuring. We held that it should be, consistent with the start up of the PJM ISO and the implementation of systemwide, non-pancaked rates.

6. Second, we addressed the issue of whether, as proposed, transmission owners should be permitted to file changes in the PJM OATT's transmission service rate design and non-rate terms and conditions under section 205, in those instances where the

---

[7]The Supporting Companies were comprised of Atlantic City Electric Company, Baltimore Gas and Electric Company, Delmarva Power & Light Company, Pennsylvania Power & Light Company, Potomac Electric Power Company, Public Service Electric and Gas Company, and GPU, Inc.

[8]While the PJM name survived PJM's comprehensive restructuring – from a tight power pool to an ISO – the past and present PJM differ significantly. The ISO, among other things, operates the transmission system and administers the OATT that governs the transmission service provided over these facilities, as an entity independent of the transmission owners and not as merely an agent of the transmission owners, and does so in a way and to a degree that it could not formerly. We explain this difference in greater detail below.

[9]The supporting documents giving rise to the PJM ISO consisted of an Amended and Restated Operating Agreement (Operating Agreement); a Transmission Owners Agreement (TO Agreement); the PJM Open Access Transmission Tariff (PJM OATT); and a Reliability Assurance Agreement Among Load Serving Entities (LSEs) in the PJM Control Area (Reliability Agreement).

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

proposed changes have not been rejected by a majority of the PJM Board. We rejected this proposal, holding that any such change to the PJM OATT, i.e., to the ISO's tariff, should be developed in accordance with the ISO governance process (and thus should be independent of any individual transmission owner).

7. Third, we 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 Operating Agreement, TO Agreement, and Reliability Agreement be modified to require that any notice of termination or withdrawal from these agreements be filed with the Commission and not become effective prior to Commission approval under section 203.

8. The court, in Atlantic City, vacated and remanded the Commission's findings with respect to each of the three issues enumerated above.

Discussion

A. The PSE&G/ODEC Contract

9. The court held that the Commission failed to make the particularized, public interest findings required by the Mobile Sierra doctrine,[10] in finding, in the PJM Restructuring Order, that the transmission component of PSE&G's pre-Order No. 888 wholesale power sales contract with ODEC must be modified, consistent with the start up of the PJM ISO.[11]

10. In Order No. 888, we held that while the Commission possesses the authority to modify contracts on a generic basis, as necessary, to eliminate undue discrimination or preferences, we would not do so in connection with our open access mandate. We noted that, although changes in the industry have been and continue to be dramatic, we would

---

[10]The doctrine derives its name from the companion cases, United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) (Mobile) and FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (Sierra).

[11]While, as explained infra, the PJM Restructuring Order required contract revisions relating to all existing bilateral agreements under which PJM's transmission owners provided service and all existing power sale contracts that included a transmission component, PSE&G alone appealed this ruling. Thus, the court's order addresses our Mobile-Sierra finding only as it relates to the PSE&G/ODEC contract.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

consider revisions to pre-open access contracts that do not contemplate revision during their term only on a case-by-case.[12] We further explained that the burden of proving the need for such a revision would not be easily met: "Whether a utility is seeking a contract amendment to permit stranded cost recovery based on expectations beyond the stated term of the contract, or a customer is seeking to shorten or eliminate the term of an existing contract, we believe that each has a heavy burden in demonstrating that the contract ought to be modified."[13]

11. In the PJM Restructuring Order, we nonetheless ordered the modification of existing bilateral transmission agreements and the unbundling of existing power sales contracts.[14] We did so, at the request of various intervenors, including ODEC, to reflect the nature of the PJM restructuring. We explained that the PJM transmission owners agreed to transfer control of their facilities to the ISO, and that it is the ISO that has assumed responsibility for all transmission services (such as scheduling and planning) within the PJM control area. In doing so, we distinguished the class of contracts at issue from the class of contracts contemplated by Order No. 888. We held:

> The circumstances presented here are inapposite to those addressed in Order Nos. 888 and 888-A. In those orders, the Commission was considering the need to transfer transmission services from individual company bilateral agreements to an individual company tariff. Unlike PJM restructuring, nothing had changed with regard to the identity of the service provider, the nature of transmission service, or the configuration or operation of the transmission system. The very purpose of PJM restructuring, however, is to transfer the obligation to provide open access transmission services from the individual [transmission owners] to the ISO. As such, it is essential to bring all stand alone transmission services under the control and administration of the ISO.[[15]]

---

[12]Order No. 888 at 31,663-64.

[13]Id. at 31,665.

[14]PJM Restructuring Order, 81 FERC at 62,280-82

[15]Id. at 62,281. We similarly explained in the PJM Rehearing Order that it was necessary to modify existing contracts that did not reflect the transmission owners' agreement to hand over control of their transmission facilities to the ISO, in order to "reflect the reality of the new regime." PJM Rehearing Order, 92 FERC at 61,963.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

12. The Commission also explained that modification of bilateral transmission agreements and bundled power sales contracts was necessary to avoid undue discrimination. Specifically, in the PJM Restructuring Order, we found that modification was necessary to avoid the incurrence of multiple transmission service charges within the PJM control area. We found that it was unreasonable for transmission owners to benefit from the elimination of pancaked rates, while at the same time denying to their customers under preexisting contracts precisely the same benefit:

> It is unreasonable for [PJM's transmission owners] to design a comprehensive restructuring that reduces the rate for transactions among themselves alone. Continuation of multiple system rates only for those existing bilateral contracts that involve a non-[PJM transmission owner] is unreasonable.[[16]]

13. For these reasons, we directed the PJM transmission owners to modify existing contracts to the extent necessary to reflect the PJM restructuring and to ensure that a customer was not assessed multiple transmission charges. We did not identify the specific contracts that required modification. Rather, in subsequent orders, we addressed specific contract modifications submitted by the transmission owners in purported compliance with the PJM Restructuring Order.[17]

14. One of the contracts identified in the compliance filings was the PSE&G/ODEC contract. Under that contract, PSE&G agreed to sell, and ODEC agreed to buy, 150 MW of capacity and related transmission and ancillary services for the ten-year period commencing January 1, 1995 and ending December 31, 2004. In the PJM Compliance Orders, we directed PSE&G to recalculate the transmission component of the bundled contract based on cost data that PSE&G filed in 1993 in support of the bundled power sales rate.[18]

---

[16]PJM Restructuring Order, 81 FERC at 62,281. Similarly, in the PJM Rehearing Order, we explained that a customer to a preexisting contract that requires transmission service over multiple transmission systems would be paying an unreasonable rate as compared to a customer that is able to take non-pancaked service under the PJM OATT. PJM Rehearing Order, 92 FERC at 61,963.

[17]See Potomac Electric Power Co., et al., 83 FERC ¶ 61,162 (1998), order on reh'g, 93 FERC ¶ 61,111 (2000) (PJM Compliance Orders).

[18]In making this calculation, we rejected alternative calculations offered on

(continued...)

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

15. On appeal, the court found that the Commission could not rely upon its review of the PSE&G/ODEC contract in the PJM Compliance Orders eliminating the duplicative transmission charge. Rather, the court found that the Commission had to undertake a particularized, case-specific review of that contract before determining that the duplicative charge had to be eliminated.[19] Moreover, on appeal, the court found that the Commission could not rely upon its application of a just and reasonable standard in finding that charges under the bundled PSE&G/ODEC contract, in light of the PJM restructuring, were unreasonable. Rather, the court found that the Commission, consistent with the Mobile-Sierra doctrine, must sustain the heavier burden of demonstrating that such a contract revision is in the public interest.

16. On remand, we face the difficult task of reassessing, five years later, the effect of the PJM restructuring on a single bundled contract for the sale of power within the PJM control area.[20] The PSE&G/ODEC contract, as originally agreed to by the parties, required ODEC to pay transmission charges to two public utilities within the former PJM power pool (PSE&G and Delmarva Power & Light Company) for the delivery of power purchased from PSE&G. While PSE&G and other PJM members not encumbered by such a contract have been allowed (following PJM's restructuring) to pay only a single

---

[18](...continued)
compliance by PSE&G that would have unbundled the transmission component by subtracting the then-effective transmission tariff rate from the bundled wholesale power sales rate. See 83 FERC at 61,687-88; 93 FERC at 61,312-13.

[19]The court also found that the Commission could not rely upon ODEC's filing of a complaint against PSE&G in another proceeding (concerning the pancaked rates it was required to pay under the PSE&G/ODEC contract) as implicating the type of fact-specific inquiry necessary to justify contract reformation, as the Commission never considered the merits of that complaint and instead dismissed it in light of the PJM Restructuring Order. See Atlantic City, 295 F.3d at 14-15, citing Old Dominion Electric Cooperative v. Public Service Electric & Gas Company, 84 FERC ¶ 61,155 (1998).

[20]As demonstrated in the PJM Compliance Orders, no other bundled sales contract was identified in the compliance filings that similarly required the removal of a duplicative transmission charge. And as the Commission found in the PJM Rehearing Order, the issue did not extend to the Commission's consideration of ISOs forming in other regions, as the parties to other ISO proceedings either did not raise the issue of contract modification or proposed tariffs that included provisions for voluntary contract modifications. See PJM Rehearing Order, 92 FERC at 61,963 (citing orders).

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

region-wide rate for service anywhere throughout the PJM ISO's control area, a rate differential alone, as the court noted in Atlantic City, "is not, by itself, enough to demonstrate that the public interest demands a modification to or an abrogation of an existing contract."[21]

17. We note, in this regard, that at the time we issued the PJM Restructuring Order, there was no record evidence before us concerning the PSE&G/ODEC contract (and none presented for our review since that time), to demonstrate what, if any, unduly discriminatory effects could or can be attributed to the contract that ODEC freely entered into with PSE&G.[22] Accordingly, while ODEC is free to present such a case for our review under section 206 of the FPA,[23] we will reverse our ruling in the PJM Restructuring Order regarding the PSE&G/ODEC contract in light of the record before us.

B. Section 205 Filing Rights

18. In the PJM Restructuring Order, we approved the restructuring of PJM and the creation of the PJM ISO on the condition that the PJM transmission owners afford the ISO more than simply a veto over filings made by the transmission owners to change the rates, terms and conditions of service.[24] Specifically, we found that the ISO must have the right to participate in the development of such filings. In response to the concern of transmission owners, however, we allowed the transmission owners to make unilateral filings to determine the level of the revenue requirements that they must receive from PJM and that PJM, in turn, will collect from transmission customers.

19. On appeal, the court held that the Commission should not have vested in the PJM ISO the exclusive and independent authority to make section 205 filings concerning facilities owned by PJM's transmission owners. The court reasoned that while the ISO may have certain section 205 rights, there is simply no denying the transmission owners'

---

[21] Atlantic City, 295 F.3d at 15.

[22] ODEC, for example, did not participate as an intervenor in the appellate proceeding, leaving it to the Commission alone to demonstrate (ultimately unsuccessfully) the need to protect the customer to that contract.

[23] 16 U.S.C. § 824e (2000).

[24] See PJM Restructuring Order, 81 FERC at 62,279; PJM Rehearing Order, 92 FERC at 61,961-62.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

section 205 rights. In particular, the court held that it is the transmission owner that has the right to initiate or propose changes to its existing rates, unless it has undertaken by contract not to do so.

20. The court further noted that the Commission's authority under section 206 of the FPA[25] is similarly limited, sanctioning changes in existing utility rates and practices only in those instances where the Commission finds the existing rate or practice to be unjust, unreasonable, or unduly discriminatory or preferential. In addition, the court found that a transmission owner's rights under section 205 cannot be ceded by the Commission to an ISO. The court held that a rule or regulation, in this instance, specifically, the requirement that ISOs be independent of market participants, cannot trump a statutory right. Accordingly, the court vacated and remanded to the Commission this aspect of our underlying orders.

21. On remand, as instructed by the court, we turn to the provisions of the statute that determine the rights and responsibilities of the public utilities the Commission regulates. Before turning to section 205 of the FPA, however, we believe that it is necessary to establish the predicate for our regulation of not simply the transmission owners, but also the ISO.

22. Unfortunately, the Commission's underlying orders did not focus adequately on the specific public utility functions of an ISO under the FPA or the statutory rights and responsibilities that accompany those functions under section 205 of the FPA. Nor did our prior orders adequately explain the task facing the Commission – an obligation which has arisen only in recent years as a result of our efforts to provide for independent operation of transmission facilities in order to assure non-discriminatory transmission service – to balance and apportion statutorily-conferred rights and responsibilities among different public utilities that need to work cooperatively to effectuate non-discriminatory transmission service.

23. To do so, here, we turn first to section 201(e) of the FPA, which defines a "public utility" subject to our regulation under the FPA as "any person who owns or operates" jurisdictional facilities.[26] Undeniably, the PJM transmission owners continue to be "public utilities" even after formation of the PJM ISO. This is so because they continue to own the PJM transmission facilities that are subject to our regulation under the FPA. As public utilities that own transmission facilities used for jurisdictional service, the PJM

---

[25] 16 U.S.C. § 824e (2000).

[26] 16 U.S.C. § 824(e) (2000).

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

transmission owners have the right under section 205 of the FPA, which applies to any "public utility," to make filings with respect to their public utility functions.

24. Just as undeniably, the PJM ISO, as a result of the PJM restructuring and the voluntary action of the PJM transmission owners, is also a public utility. This is so because the ISO, and not the transmission owner, "operates" jurisdictional facilities, as encompassed in the very definition of a public utility in section 201(e) of the FPA; additionally, the ISO, and not the transmission owner, is the transmission service provider. As a public utility that operates jurisdictional transmission facilities and is the transmission service provider, the ISO has the same right under section 205 to make filings with respect to its public utility functions as the transmission owners have the right under section 205 to make filings with respect to their public utility functions. The ISO's rate filings for service to transmission customers pursuant to the ISO's tariff (i.e., the ISO's OATT) include a component reflecting the costs of the owners of the transmission facilities[27] in addition to components reflecting the costs of the ISO in operating the facilities and administering the tariff. Our underlying orders, which did not make these points clearly, might have created some confusion as to the balancing task that confronted the Commission when presented with the bundle of related agreements that collectively comprised PJM's restructuring.[28]

---

[27]The transmission owners' costs, which are charged to the ISO through separate transmission owner agreements on file under section 205, are, in turn, charged to (i.e., flowed through to) customers in the ISO's rate tariff on file under section 205. See Pacific Gas and Electric Company v. FERC, No. 01-1187 (D.C. Cir. Oct. 15, 2002) (PG&E) (discussing the ISO's consideration of the revenue requirements of a municipal transmission owner in setting the ISO's rates for transmission service, and the Commission's review of those revenue requirements and rates).

[28]Nevertheless, the Commission was clear that in approving the PJM restructuring, it was approving the transfer of operation over the transmission facilities from the PJM transmission owners to the PJM ISO. For example, the Commission explained in the PJM Restructuring Order that the ISO "will have sole and exclusive responsibility over administration of the PJM Transmission Tariff." PJM Rehearing Order, 81 FERC at 62,243. The Commission further explained that "[t]he ISO is responsible for directing the operation of the transmission facilities provided by parties to the Owners Agreement." Id. at 62,268. In later portions of this order, we discuss specific provisions of the PJM restructuring agreements that explicitly transferred operational authority over the PJM transmission facilities from the PJM transmission owners to the PJM ISO.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

25. Thus, the PJM ISO, as the operator of the transmission facilities that make up the PJM grid and the provider of transmission services within the PJM control area, is just as much a public utility as the owners of those facilities. The ISO has the same right under section 205 of the FPA to make filings to change the rates, terms and conditions of service, as well as the same obligation to ensure that those rates, terms and conditions are not unduly discriminatory or preferential. In reaching this conclusion, the Commission is relying upon the status of the ISO as a public utility within the meaning of section 201(e) of the FPA,[29] and is not, as the court expressed concern, "rely[ing] on one of its own regulations to trump the plain meaning of a statute."[30]

26. On review of the PJM restructuring orders, the court noted that the Commission "believes an ISO to be a public utility within the scope of the Federal Power Act," and also noted that "an ISO may have certain section 205 rights."[31] Because the Commission, in the underlying orders, never explicitly explained that the PJM ISO is a public utility and never clearly explained that it was confronted with the task of balancing the rights and responsibilities of two different classes of public utilities (individual transmission owners versus the regional ISO), the court had no need to go further. We note that in other cases, however, in which the jurisdictional status of newly-created market institutions was directly at issue, the courts have agreed with the Commission that such

---

[29]See Bechtel Power Corporation, 60 FERC ¶ 61,156 at 61,571-72 (1992) (Bechtel).

[30]Atlantic City, 295 F.3d at 11. Our conclusion is consistent with the determination previously made by the Commission in the section of Order No. 888 that identified and explained the eleven ISO principles that governed the Commission's review of the PJM restructuring agreements. Specifically, the Commission stated that "an ISO will be a public utility subject to our jurisdiction" because it "will operate facilities used for the transmission of electric energy in interstate commerce." For this reason, "the ISO's operating standards and procedures must be approved by the Commission." Order No. 888 at 31,730. See also Regional Transmission Organizations, Order No. 2000, 65 Fed. Red. 809 (2000), FERC Stats. & Regs. ¶ 31,089 at 31,075 n.332 (1999), order on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (2000), FERC Stats. & Regs. ¶ 31,092 (2000), appeal dismissed, Public Utility District No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

[31]Atlantic City, 295 F.3d at 11.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

institutions are FPA-jurisdictional public utilities to the extent they own or operate jurisdictional facilities.[32]

27. Once the public utility status of the PJM ISO is established, the question then becomes how to respect and balance its public utility rights and responsibilities with those belonging to the PJM transmission owners. The court directed the Commission to refrain from forcing the PJM transmission owners, which are FPA public utilities, to cede their filing rights under FPA section 205. However, the basis for this direction applies equally to the PJM ISO, a FPA public utility that also has filing rights that the Commission, under the court's ruling, cannot force the ISO to give up.[33]

28. As an initial matter, the Commission clearly recognized, in the underlying orders, that the transmission owners had an absolute right to make section 205 filings to recover their revenue requirements from the ISO. However, with respect to the transmission services provided by the ISO to customers under the tariff administered by the ISO, the Commission found that if the PJM transmission owners have the unilateral right to make filings under section 205, subject only to the ISO's ability to veto those filings and present its own proposals under section 206, the ISO effectively would be ceding its own ability to participate in the development of rate design filings.[34] The Commission continues to believe that the ISO, as the transmission service provider, must have the right to file tariffs (and changes to the tariffs) to serve its customers, including rate level and rate design for rates charged under those tariffs. It is the PJM ISO, not the transmission owners, that under the PJM OATT contracts with and has the obligation to provide transmission service to prospective customers. Specifically, as a result of the PJM restructuring, it is the ISO, not the transmission owners, that is now obligated to

---

[32]See PG&E, No. 01-1187, slip op. at 3 (explaining that the California ISO, which "operate[s] transmission facilities within California, . . . is subject to FERC's regulatory authority, including the statutory requirement under §§ 205 and 206 of the FPA that a utility's rates must be 'just and reasonable'") (internal citation omitted); Automated Power Exchange, Inc. v. FERC, 204 F.3d 1147, 1151-54 (D.C. Cir. 2000) (affirming the Commission's assertion of jurisdiction over a power exchange that played a central role in setting the market price for power it did not own).

[33]As the Supreme Court has explained, the Commission "must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." Permian Basin Rate Area Rate Cases, 390 U.S. 747, 767 (1969).

[34]PJM Restructuring Order, 81 FERC at 62,279.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

administer the PJM OATT and to provide the services enumerated under that tariff. Under the court's directive, it follows that the ISO, a public utility, should have the ability to set the rates it will charge prospective customers for such services, subject to the Commission's review of those rates under sections 205 and 206.

29. As noted previously, the rates charged to transmission customers under the ISO tariff include the costs incurred by the ISO in operating facilities and administering the tariff, as well as a component to reflect the flow through of the transmission owners' revenue requirements which are charged to the ISO and established in separate section 205 proceedings. If the individual transmission owners were in charge of filing rates for the regional transmission services the ISO provides, as they proposed, the Commission could not be assured that those rates would be reasonable and not unduly discriminatory. That is, individual transmission owners lack the regional perspective, and the obligation to plan for regional reliability (and, as necessary, expansion) of the ISO. A patchwork of duplicative filings and different rate designs, perhaps working at cross purposes, could lead to precisely the type of unduly discriminatory or preferential practices that the ISO (or, later, RTO) is intended to eliminate.[35] Moreover, the ISO's independence as the administrator of the PJM Transmission Tariff would be severely compromised, if not wholly defeated, if individual transmission owners could make separate rate design and related tariff filings.

30. For these reasons, the Commission sought to adopt a balance that matches filing rights with each entity's functions as a public utility and each entity's interests (or incentives) in ensuring non-discriminatory transmission services. In the underlying orders, the Commission gave the ISO exclusive rights to file rate design and related tariff provisions because it is the ISO that actually provides transmission services and charges for those services. The Commission gave the transmission owners exclusive rights to file for recovery of their revenue requirements, i.e., their costs plus a return on their investment in facilities devoted to transmission service.

31. Although, as discussed infra, we have subsequent to the underlying PJM restructuring orders allowed greater section 205 filing rights for transmission owners, we continue to believe that the balance struck in those orders reasonably respects and enforces the statutory filing rights of all public utilities based on the public utility functions they serve (and the interests they have) – the transmission owners that own and maintain the PJM facilities (and therefore are most interested in filings covering recovery of their costs plus a return – which the Commission allowed them to be responsible for),

---

[35] See Order No. 888 at 31,731.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

and the ISO that operates those facilities and is the service provider (and therefore one most interested in filings addressing rate design and ultimate rates charged to customers – which the Commission allowed it to be responsible for). The Commission thus was not convinced that the PJM restructuring agreements as proposed by the transmission owners were just and reasonable unless revised to reflect a greater role for the ISO in the development of rate filings for rates to serve the ISO's customers.[36]

32. Subsequent to our 1997 judgment, in Order No. 2000, we reaffirmed our determination that independent regional entities (whether ISOs or RTOs) must have the independent and exclusive right to make section 205 filings that apply to the rates, terms and conditions of all transmission services pursuant to the tariffs they administer and over the facilities they operate.[37] Nevertheless, to avoid unnecessary disputes, we required the regional entity and the transmission owners that comprise it to give prior notice to each other of any planned section 205 filings. We also strongly encouraged the parties to resolve rate issues prior to filing proposed rate changes. Finally, we stated that we would consider alternative proposals for meeting the Commission's independence requirement.[38]

33. In several orders involving implementation of Order No. 2000, we provided further flexibility with regard to section 205 filing rights of transmission owners that are

---

[36]The PJM transmission owners, which had abandoned earlier restructuring proposals after Commission review, accepted this condition on the Commission's approval of their 1997 restructuring filings. As the court explained in Public Utility District No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607, 613 (D.C. Cir. 2001), on review of Order No. 2000 and its balancing of filing rights and responsibilities, public utilities "will not be involuntarily ceding any claimed statutory rights, but rather voluntarily waiving them," if they voluntarily choose to participate in a RTO and accept the terms and conditions of the Commission's approval of a RTO proposal. The formation of an ISO by the PJM transmission owners was similarly voluntary.

[37]See Order No. 2000 at 31,061. In making this determination, we explicitly recognized that an RTO, like an ISO, is a "public utility" within the meaning of section 201 of the FPA, and that the statute is silent on the issue of apportioning rights and obligations (including filing rights) among public utilities whose interests may be overlapping.

[38]Id. at 31,075-76.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

members of an RTO. First, in Commonwealth Edison Company, et al,[39] issued shortly after Order No. 2000, we granted, in part, a petition for a declaratory order seeking guidance on a proposed structure for an RTO involving the operation of one or more independent transmission companies (ITCs) within the control area operated by the Midwest Independent System Operator, Inc. (Midwest ISO). Under the proposal at issue in Commonwealth Edison, certain RTO functions could be performed primarily by the ITC rather than the RTO, albeit under the supervision of or in coordination with the RTO, while other RTO functions would be performed exclusively by the RTO.[40] In relevant respect, we permitted the ITC to file, without Midwest ISO approval, under section 205 for design or rate changes for service solely with the ITC, including incentive rates, based upon our belief that the independence of the ITC would ensure that any proposal would not unduly discriminate among particular market participants.

34. Similarly, in RTO West,[41] we permitted the ITC, Transconnect, to file unilaterally under section 205 incentive rates so long as Transconnect consulted with RTO West prior to filing. In the event of a dispute, the RTO West position would govern. As in Commonwealth Edison, we were motivated by our belief that the parties' proposal would not undermine the independence of the RTO or result in unduly discriminatory practices.

35. More recently, in TRANSLink Transmission Company, we clarified our guidelines relating to such hybrid RTO structures and specifically addressed broader

---

[39]90 FERC ¶ 61,192 (2000) (Commonwealth Edison), reh'g denied, 91 FERC ¶ 61,178 (2000).

[40]In our order, we held that because certain aspects of the proposal were incomplete or required further development, we could not evaluate whether the proposal met our independence requirement. We nonetheless stated that Order No. 2000 contemplated alternative structures of this kind and commended the parties for their innovative approach to satisfying the Commission's RTO objectives. Id. at 61,617; See also International Transmission Company, 97 FERC ¶ 61,228 (2001) (approving operation of an ITC within Midwest ISO subject to Midwest ISO oversight); Bangor-Hydro Electric Company, et al., 96 FERC ¶ 61,063 at 61,255 (2001), reh'g pending (rejecting a proposed ITC for the New England region where market participants would continue to exercise control over ISO New England, Inc.).

[41]Avista Corp., et al., 95 FERC ¶ 61,114 at 61,338-39 (2001), reh'g denied, 96 FERC ¶ 61,058 at 61,177 (2001).

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

section 205 filing rights.[42] In TRANSLink, we specifically approved a provision allowing the ITC, TRANSLink, to maintain a separate schedule within the Midwest ISO tariff to facilitate a different rate design and different rates, as long as TRANSLink could justify differences and explain how regional uniformity is not harmed. We explained that "we are trying to provide to the transmission customer maximum ease of use of the regional transmission network and a pricing structure that makes sense and can be reconciled with transmission rates and rate design for the region as a whole." Specifically with respect to section 205 filing rights, we explained that, consistent with Order Nos. 2000 and 2000-A and later orders, we are willing to look at all proposals "so long as they continue[] to ensure independence and protect[] the level of revenue needed to be collected from the facilities." [43]

36. These recent rulings on the topic of balancing section 205 filing rights among public utilities convince us that the PJM transmission owners should be given an opportunity to, again, explain the reasonableness of their originally proposed allocation of filing responsibilities.[44] In this regard, we note that their initial proposal is now over five years old and that our previous review of that proposal did not reflect the type of flexibility we are now willing to afford to ISO and RTO filings.

---

[42]99 FERC ¶ 61,106 (2002) (TRANSLink).

[43]Id. at 61,464-65. See also Alliance Companies, 99 FERC ¶ 61,105 at 61,434-35 (2002) (reaching same conclusion). We also held in TRANSLink that for effective RTO operations, regional trading, and one-stop shopping, a single transmission provider must retain overall authority and ultimate responsibility for transmission service in the region. Accordingly, we held that we would consider delegations of RTO functions to an ITC (including a delegation of section 205 filing rights) only in those cases where the delegations concerned predominantly local characteristics and where the RTO retains oversight authority in the event that local actions have a regional impact. These requirements were also articulated by the Commission in our notice of proposed rulemaking on standard market design and, like our related requirements set forth in Order No. 888 and Order No. 2000, are based on our statutory obligation under the FPA to remedy undue discrimination in the wholesale electric industry. See Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, 67 Fed. Reg. 55,452 at 55,471 (2002), FERC Stats. & Regs. ¶ 32,563 at 34,307-09 (2002).

[44]Should they instead desire to make a new proposal, as we explain below, they should do so in a new section 205 filing rather than in this proceeding.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

37. Accordingly, if the PJM transmission owners are still committed to their 1997 allocation of filing responsibilities, they should file with us, within 45 days, an explanation as to how and why their originally proposed allocation ensures the independence of the regional entity and does not result in unduly discriminatory rates and practices.[45] Alternatively, based on their further consideration of the matters at issue and after taking into account subsequent orders on section 205 filing rights (as described above), the PJM transmission owners may seek to commit to another model; if so, they must file with us in a new section 205 filing their alternative model and an explanation as to why that allocation of filing responsibilities ensures independence and avoids undue discrimination or preference.[46]

C. ISO Withdrawal Rights Under Section 203

38. In the PJM Restructuring Order, we approved the restructuring of PJM and the creation of the PJM ISO on the condition that the PJM transmission owners apply for and receive the authorization of the Commission, under section 203 of FPA, prior to withdrawing from the ISO. Specifically, we rejected the proposal of the transmission owners to withdraw from the ISO upon 90-days' advance notice, subject only to their demonstration of compliance with applicable reliability requirements and satisfaction of applicable open access transmission requirements.[47] We agreed with the objections of intervenors, including the PJM Board and Supporting Companies, that the proposed withdrawal provision of the PJM restructuring agreements, if not modified to require Commission approval, could act to undermine the viability and independence of the ISO.[48]

---

[45]PJM's views and comments on any such filings, should they be made, would be both welcomed and encouraged.

[46]In an order issued today, we also address the establishment of PJM as an RTO. See PJM Interconnection, L.L.C., 101 FERC ¶ 61,___ (2002). Thus, any filing made in response to the description of section 205 filing rights and options outlined here should conform to (or otherwise address) the operating agreements and other provisions giving rise to the PJM RTO.

[47]See Section 3.2, TO Agreement ("Withdrawal"); Section 18.18.2, Operating Agreement ("Withdrawal").

[48]See PJM Restructuring Order, 81 FERC at 62,264-65, 62,279; PJM Rehearing Order, 92 FERC at 61,958-59. In an earlier order, we similarly found, after reviewing

(continued...)

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

39. On appeal, the court held that a public utility does not engage in the acts required to trigger the Commission's section 203 jurisdiction, i.e., it does not "sell, lease, or otherwise dispose" of its facilities, when it withdraws from an ISO. Specifically, the court held that the word "dispose," in this context, cannot be construed to include the transfer of supervisory operational responsibility over transmission facilities that occurs when a transmission owner leaves (or joins) the ISO.

40. In support of its ruling, the court noted that the terms "sell" and "lease," in section 203, contemplate a transfer of ownership or proprietary interests, and that the term "otherwise dispose" must be given a similar interpretation under the principle noscitur a sociis.[49] In addition, the court held that the Commission's interpretation of its section 203 authority cannot be reconciled with its prior precedent,[50] or with section 202(a) of the FPA.[51] Finally, the court noted that prior to the instant case, the Commission at no time attempted to assert section 203 jurisdiction over the ISO's predecessor, the member-controlled tight power pool, and could not have done so. Then (as now) the court reasoned, the relevant agreements permitted the transmission owners to retain physical control and ownership of their facilities. Based on these findings, the court concluded

---

[48](...continued)
Commission cases on the subject, that FPA section 203 requires Commission approval prior to the formation of the PJM ISO and the transfer of control over transmission facilities from the transmission owners to the ISO. See Atlantic City Electric Co., et al., 76 FERC ¶ 61,306 at 62,513 (1996) (PJM Jurisdictional Order).

[49]Id. at 12. Noscitur a sociis ("it is known from its associates") is a canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it. See Black's Law Dictionary 1084 (7th ed. 1999).

[50]Id., citing Duke Power Co., 36 F.P.C. 399, 402 (1966) (Duke Power), rev'd on other grounds, Duke Power Co. v. FPC, 401 F.2d 930 (D.C. Cir. 1968).

[51]16 U.S.C. § 824a(a) (2000). Section 202(a) authorizes the Commission to "divide the country into regional districts for the voluntary interconnection and coordination of facilities." (emphasis added). The court held that "it would be anomalous for FERC to have jurisdiction under section 203 to prohibit the utility petitioners from ending their voluntary coordination and interconnection through the PJM ISO." Atlantic City, 295 F.3d at 12.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

that the Commission lacks authority under section 203 to condition a PJM transmission owner's withdrawal from the ISO on prior Commission approval.

41. On remand, our task is to apply the directives of the court to the circumstances presented by the restructuring of PJM. In doing so, we believe that it is imperative to better explain the nature of that restructuring, the transfer of operating control that occurred, and the functions of the ISO that emerged. In reviewing the underlying PJM restructuring orders, the court, unfortunately, had little Commission explanation to guide its review of the Commission's understanding of the events triggering its section 203 review of both entry of a transmission owner into, and exit by a transmission owner out of, the PJM ISO.

42. We start, as we do supra, with respect to our analysis of section 205 filing rights and responsibilities of the transmission owners and the ISO, with section 201 of the FPA and its definition of "public utilities" subject to our regulation. As we have discussed, upon the transmission owners' transfer of jurisdictional facilities to an independent ISO, that ISO becomes a "public utility" because it "operates" jurisdictional facilities and because public utilities are specifically defined in FPA section 201(e) as persons which own or operate jurisdictional facilities. The court had no reason to analyze the Commission's jurisdictional assessment of the ISO because the Commission never explicitly explained in the underlying orders that the ISO, in fact, is a "public utility" because of its operation of the jurisdictional transmission facilities that form the PJM grid or its role as a provider of jurisdictional transmission services under the PJM OATT.

43. Moreover, while we explained in the PJM Jurisdictional Order that a transmission owner's entry into the PJM ISO, and thus by implication its withdrawal from the ISO, would result in "the transfer of control of the operation of the PJM transmission facilities," [52] we failed to explain why. Similarly, while we explained in the PJM Restructuring Order that a transmission owner's unilateral withdrawal from the ISO "could effectively terminate the ISO,"[53] we similarly failed to explain why. We do so now.

44. In the underlying restructuring orders, we addressed a proposal to establish a PJM ISO that would operate in a manner materially different from its PJM predecessors.

---

[52] 76 FERC at 62,513.

[53] 81 FERC at 62,264 n.147.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

Contrary to the belief of the Atlantic City court,[54] the PJM ISO (and successor PJM RTO) exercises operational control over the PJM transmission facilities that is considerably different from that of its predecessor power pool. As the ISO, PJM directs the operation of the transmission facilities and the transmission owners have agreed to respond to that direction. The PJM Operating Agreement specifically provides that PJM will direct the operation and coordinate the maintenance of these facilities.[55] The TO Agreement similarly establishes the transfer of control from the transmission owners in several material respects: section 2.3.4 ("transfer" of "responsibility to direct the operation" of transmission facilities); section 2.3.6 (obligation of transmission owners to coordinate maintenance of the transmission facilities they own with other transmission owners and generation owners "subject to the direction of" PJM); and section 2.3.7 (transfer to PJM of responsibility for regional long-term planning).

45. Moreover, as an ISO, PJM is independently governed, and is prohibited from taking direction from any transmission owner(s) or any other market sector. It is no mere contractual agency arrangement; rather, as explained supra, it is a separate entity that independently administers the PJM OATT and independently contracts with transmission customers for the transmission service it provides.

46. Thus, prior to the transfer, the transmission owners had complete control over the operation of the facilities they both owned and operated. The PJM power pool had no control over facilities it neither owned nor operated. Rather, it performed central dispatch at the direction and control of the transmission owners. Thus, while the court in Atlantic City was correct that the Commission never previously asserted jurisdiction over PJM as a public utility during PJM's earlier incarnation as a power pool, and did not insist upon section 203 review at any time during PJM's earlier history,[56] the fact is that the functions performed by the PJM power pool differed significantly from the functions of the PJM ISO. In short, when the PJM power pool (and later, in 1993, the PJM

---

[54]See Atlantic City, 295 F.3d at 13.

[55]See Section 10.4(vi), Operating Agreement (PJM would "[d]irect the operation and coordinate the maintenance of the facilities of the Interconnection . . . so as to maintain reliability of service and obtain the benefits of pooling and interchange"); Section 10.4 (xviii), Operating Agreement (PJM would "[p]erform those functions and undertake those responsibilities transferred to it under the [TO] Agreement, including (A) direct the operation of the transmission facilities of the parties to the [TO] Agreement").

[56]See Atlantic City, 295 F.3d at 5, 13.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

Interconnection Association) was formed, there was not a transfer of operational control of jurisdictional facilities, and PJM did not become a public utility as defined in FPA section 201(e).[57] This is in stark contrast to the situation before us now. Further, our interpretation of FPA section 203 is a logical outgrowth of Commission precedent under that section and gives meaning to the statutory structure of the FPA, in particular the relationship between sections 201(e) and 203(a) and 203(b). We discuss the statute and our precedent below.

47. Turning to section 203 of the FPA, the transfer of operation of jurisdictional facilities recognized in the PJM restructuring agreements is not explicitly contemplated in its precise language. The court found, based on the Commission's limited explanation of its reasoning in its earlier orders, that the phrase "sell, lease, or otherwise dispose" connotes the transfer of ownership or proprietary interests. However, the court was not presented with the opportunity to reconcile the language of section 203 with the language of section 201, discussed above. Our effort to reconcile those provisions leads us to continue to believe that where, as here, the Commission is approving the creation of a brand new public utility, and the transfer of operating authority over jurisdictional transmission facilities to that public utility, the Commission has the authority to approve that transfer under section 203. For the same reason, the Commission has the authority to approve under section 203 any subsequent transfer of ISO control of jurisdictional transmission facilities back to a transmission owner leaving the ISO.

48. The Commission's analytical task continues to focus on whether the transfer of operational control is captured by the words "otherwise dispose" in section 203.[58] We

---

[57]In an analogous context, the court in Automated Power Exchange explained that "deference to FERC's expertise is due where it concludes that APX's de facto third-party role is substantively different from that of a traditional power broker over which FERC has previously disclaimed jurisdiction." 204 F.3d at 1154.

[58]Section 203(a) provides in relevant part as follows:

> No public utility shall sell, lease, or otherwise dispose of . . . its facilities subject to the jurisdiction of the Commission . . . without first having secured an order of the Commission authorizing it to do so.

16 U.S.C. § 824b(a) (2000). Section 203(b) further provides as follows:

> The Commission may grant any application for an order under this section

(continued...)

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

believe that it is,[59] or otherwise those words would add nothing to the statute.[60] Moreover, the legislative history of section 203 – which was not addressed by the court – indicates that Congress intended to authorize the Commission to review more than just sales or leases. Specifically, the Senate eliminated from the bill that ultimately resulted in the FPA the words "assign, mortgage, and encumber from the actions made subject to approval, as the elimination of these words removes any unnecessary duplication."[61] Likewise, the House Report noted that "Commission approval of an acquisition, consolidation, or control would remove such transaction from the prohibitory provisions of any other law."[62] The legislative history also shows Congress intended for the Commission to "prevent transfers or consolidation of property which would impair the

---

[58](...continued)

> in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

Id. at § 824b(b).

[59]In this regard, we note that section 203(a) goes on to say:

> After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

Id. at § 824b(a) (emphasis added).

[60]It is a basic principle of statutory construction that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant." Sutherland Statutory Construction § 46.06, p. 119 (5th ed. 1992) (emphasis added).

[61]S. Rep. No. 621, 74th Cong., 1st Sess. 20 (1935) (internal citations omitted).

[62]H. Rep. No. 1318, 74th Cong., 1st Sess. 28 (1935) (emphasis added).

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

ability of public utilities to render adequate service. . . ."[63] Therefore, the Commission's assertion of jurisdiction over operational transfer and withdrawal is entirely consistent with Congressional intent.

49. In addition, the exercise of section 203 authority over the transfer of operational control to or from the ISO is entirely consistent with Commission cases on the scope of section 203. The Commission cases cited in the PJM Jurisdictional Order, and reviewed by the court, are all pre-ISO cases.[64] Thus, while it is true, as the court stated, that prior to the PJM restructuring orders – the first to authorize an ISO as consistent with the principles enumerated in Order No. 888 – the Commission "had never applied section

---

[63]S. Rep. No. 621, 74th Cong., 1st Sess. 18 (1935). See also id. at 50 (the purpose of section 203 is to "furnish[ ] an essential check upon the development of the industry along uneconomic lines." Section 203(b) expressly embodies this broadly-stated intent by granting to the Commission the power to condition, as may be necessary or appropriate, its grant of any application filed under section 203 "to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission." See also Duke Power, 36 FPC at 401 ("Essentially, section 203 is designed to ensure that growth of the operating utilities be economic and render adequate service to the public."). The Commission has applied this statutory mandate broadly, as section 203(b) envisions. See, e.g., El Paso Electric Company and Southwest Services, 68 FERC ¶ 61,181 at 61,914-15 (1994) (conditioning approval of merger on offer of comparable open access transmission), order dismissing proceedings, 72 FERC ¶ 61,292 (1995).

[64]See, e.g., Central Vermont Public Service Corporation, 39 FERC ¶ 61,295 (1987) (Central Vermont) (order denying disclaimer of section 203 jurisdiction over a proposed reorganization involving the transfer of a public utility's common stock to a parent holding company); Savannah Electric & Power Co., 42 FERC ¶ 61,240 (1988) (order denying disclaimer of section 203 jurisdiction over acquisition by one public utility of all of the outstanding common stock of another public utility); Baltimore Refuse Energy Systems Co., 40 FERC ¶ 61,366 (1987) (order denying disclaimer of section 203 jurisdiction over the financing arrangements of a proposed sale and leaseback transaction of electric generation facilities). However, to the extent the later case, in particular, has relevance, we note that it involved a sale/leaseback transaction. Because section 203(a), as quoted above, expressly encompasses leases, the transfer of operational control of transmission facilities, in this circumstance, can be viewed, essentially, as a lease of those facilities.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

203 where only operational control was transferred,"[65] it is equally true that the Commission had never been presented with the opportunity to apply section 203 where, as here, only operational control (as opposed to ownership control) was transferred.

50. It is not surprising that we confront this issue here, for the first time, given the recent, still-unfolding evolution of the industry occasioned by Order No. 888 and more recently by Order No. 2000; traditionally, ownership and operational control tended to be vested in the same entity and only comparatively recently have the two been separated.[66] In this regard, we have held that for section 203 purposes, we will interpret the scope of our jurisdictional responsibilities in light of the changing circumstances in the electric power industry.[67] We have also held that in interpreting the reach of section 203, we will focus on the substance, not the form, of corporate transactions and relationships.[68]

51. Here, in the case of a transfer of the operational control of jurisdictional transmission facilities to a newly formed regional public utility, i.e., the PJM ISO, substance dictates that we apply the full measure of our section 203 authority. To do otherwise would create a gap in our regulatory authority not contemplated by the FPA. Indeed, a contrary interpretation would have the effect of excluding from the Commission's section 203 authority an entire class of public utilities, and public utility transfers, based on a distinction between ownership and operation that is expressly rejected in section 201(e). Operating control over the PJM transmission facilities, transferred from one class of public utilities (the transmission owners) to another public utility (the ISO) upon the creation of the ISO, and then transferred back upon withdrawal from the ISO, is neither qualified nor so limited that our regulatory oversight is unnecessary. Accordingly, we cannot disclaim FPA jurisdiction as we have in other

---

[65]295 F.3d at 12 (emphasis original).

[66]The court noted that the Commission once indicated that section 203 was directed to "transfers of utility property." Id. at 12, citing Duke Power, 36 FPC at 402. However, the Commission did not rule in that case, nor have we ruled in any other case, that the Commission does not also have section 203 jurisdiction over transfers involving operational control alone.

[67]See Central Illinois Public Service Company, 42 FERC ¶ 61,073 at 61,328 (1988).

[68]See Central Vermont, 39 FERC at 61,960.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

cases, where (unlike here) a public utility's role was passive, and lacking control and decisionmaking authority over the facilities in question.[69]

52. Moreover, while the Atlnatic City court focused on the Commission's pre-ISO cases to come to the conclusion that the Commission itself believes that its "jurisdiction under section 203 turns on changes in ownership,"[70] the Commission's ISO cases, issued after the PJM Jurisdictional and Restructuring Orders, confirm that section 203 jurisdiction never has been confined merely to transfers of ownership or proprietary control. Indeed, in the PJM Rehearing Order, we explained that we similarly have required section 203 authorization prior to a transmission owner's withdrawal from other ISOs.[71]

53. Finally, our insistence on a transmission owner's receiving the Commission's authorization under section 203 before withdrawing from an ISO (or RTO), and thus re-transferring operating control over transmission facilities, does not clash with the court's insistence on the Commission respecting the "voluntary" nature of utility action under section 203 (and companion section 202) of the FPA.[72] Indeed, a public utility's filings under section 205 are similarly voluntary, but nonetheless require Commission review to ensure compliance with the statutory standard.[73]

---

[69]See Bechtel, 60 FERC at 61,572-73 (holding that Bechtel does not "operate" facilities subject to FPA jurisdiction where its authority is limited to the performance of specific services that are ordered by and directed by another party, and where it has no control and decisionmaking authority). See also TIFD VIII-H, Inc., 69 FERC ¶ 61,042 at 61,174 (1994) (disclaiming jurisdiction over passive investors in a jurisdictional facility where investors would have no control over the management or operation of the facility); Snake River Power Association, Inc., 50 FERC ¶ 61,088, at 61,250 (1990) (disclaiming jurisdiction over a passive owner of a jurisdictional facility because it provided only the financing mechanism; it had no control over the use, operation or maintenance of the facility).

[70]Atlantic City, 295 F.3d at 13.

[71]92 FERC at 61,959 & n.64 (citing cases); Order No. 2000 at 31,045.

[72]Atlantic City, 295 F.3d at 12 (citing cases construing the scope of section 202).

[73]As the Supreme Court explained in Gulf States Utilities Co. v. FPC, 411 U.S. 747, 758-59 (1973), while a public utility may undertake a voluntary initiative, the

(continued...)

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

54. A transmission owner's exit from an ISO (or RTO) is just as voluntary as its entrance. In 1997, the PJM transmission owners filed their restructuring agreements for the Commission's section 203 approval, knowing that one year earlier, in its PJM Jurisdictional Order, the Commission had insisted upon section 203 approval because it had found that "the transfer of control of the operation of the PJM transmission facilities from the transmission owners, i.e., the public utilities that together comprise PJM, to the ISO . . . is a disposition of jurisdictional facilities requiring prior Commission authorization under section 203 of the FPA."[74] Thus, it could hardly be surprising that the Commission, which insisted upon section 203 approval of the transmission owners' voluntary entry into the PJM ISO, similarly would insist upon section 203 approval of their voluntary exit from the ISO.

55. Moreover, as we similarly explain supra with respect to the balancing of section 205 filing rights and responsibilities, the Commission's approval of the PJM restructuring agreements was subject to the condition that any transmission owner's withdrawal from the ISO be subject to the Commission's section 203 approval. The PJM transmission owners, which had abandoned earlier restructuring efforts, accepted this pre-approval condition. Accordingly, they cannot complain that the Commission is just as insistent on securing approval of the voluntary withdrawal from the ISO as it was on securing approval of the voluntary formation of the ISO. In either event, the Commission is reviewing a voluntary transfer of operating authority between public utilities.

The Commission finds and orders:

(A) The Commission's finding requiring the revision of the PSE&G/ODEC contract is hereby reversed, as discussed in the body of this order.

(B) The Commission hereby allows the PJM transmission owners, within 45 days of the date of this order, to explain how and why their originally proposed allocation of section 205 filing rates, among the public utility transmission owners and the public

---

[73](...continued)
Commission's regulatory authority under the FPA also "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to [FPA] sections 202 and 203, and under like directives contained in sections 205, 206, and 207."

[74]76 FERC at 62,513.

20021219-3084 Issued by FERC OSEC 12/19/2002 in Docket#: OA97-261-003

utility ISO, ensures the independence of the ISO and does not result in unduly discriminatory rates and practices, as discussed in the body of this order.

(C) The Commission hereby continues to find that the withdrawal of a transmission owner from the ISO, thus resulting in the transfer of operating control from the ISO back to that transmission owner, is a disposition of facilities necessitating modification of the PJM restructuring agreements and the Commission's prior review under section 203 of the FPA.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.