

102 FERC ¶ 61,014
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator, Inc.

Docket No. EL02-111-000

ORDER GRANTING INTERLOCUTORY APPEAL

(Issued January 6, 2003)

1. On December 18, 2002, the Detroit Edison Company, International Transmission Co., Indiana Municipal Power Agency, Wisconsin Public Power, Inc. and Southeast Michigan Systems (collectively, Transmission Revenue Requirement Group or TRRG) filed with the Chairman, as the Motions Commissioner, an interlocutory appeal. The interlocutory appeal pertains to the December 16, 2002 order by the presiding administrative law judge striking Transmission Revenue Requirement Group's rebuttal testimony and accompanying exhibits.¹ On December 20, 2002, the Chairman, as Motions Commissioner, referred the matter to the Commission.

2. In this order, the Commission grants TRRG's request for interlocutory appeal. This order benefits customers because it assures the development of a complete evidentiary record from which the presiding administrative law judge and the Commission can reach decisions.

Background

A. July 31 Order Establishing Hearing

3. On July 31, 2002, the Commission conditionally accepted the Alliance Companies' proposals to join either the Midwest Independent Transmission System

¹See Motion of GridAmerica Companies and the New PJM Companies to Strike Rebuttal Testimony Submitted on Behalf of the Detroit Edison Company, International Transmission Company, Indiana Municipal Power Agency, Wisconsin Public Power, Inc., Southeast Michigan Systems, and Consumer Energy Company and Request for Expedited Consideration.

Operator, Inc. (Midwest ISO) or PJM Interconnection, L.L.C. (PJM). In the July 31 Order, among other things,² the Commission instituted, under section 206 of the Federal Power Act (FPA),³ an investigation of inter-RTO rates⁴ under the Midwest ISO and PJM Tariffs, and the protocols regarding the distribution of revenues associated with through and out service in the PJM, PJM West, and Midwest ISO Transmission Owners Agreements. The Commission explained that inter-RTO rate pancaking is one of the primary obstacles to RTO formation and that resolving inter-RTO rates is fundamental to the creation of a single, common market. While instituting a section 206 proceeding, the Commission nevertheless encouraged Midwest ISO and PJM to develop a solution to eliminate rate pancaking between the organizations on their own. Stakeholders did not

²In the July 31 Order, the Commission conditionally accepted the Alliance Companies' compliance filings indicating which regional transmission organization (RTO) they chose to join (PJM or Midwest ISO), subject to satisfactory compliance with certain conditions. July 31 Order, 100 FERC ¶ 61,137 at P 39-57. These conditions are summarized as follows: (1) that a single market across the two RTOs must be implemented by October 1, 2004; (2) that National Grid USA (National Grid) participates in both Midwest ISO as GridAmerica LLC (GridAmerica) and in PJM, and performs the same functions, consistent with the allocation of functions to independent transmission companies (ITCs) provided in the April 25 Order and the Translink Order, in both RTOs for Day One operations; (3) that there be pro forma agreements under the respective tariffs of Midwest ISO and PJM that provide for participation of ITCs consistent with the delegation of functions provided for in the April 25 Order and the TRANSLink Order; (4) that the agreement to form an ITC between National Grid, AEP, ComEd, DP&L and PJM must be filed within 30 days of the date of the July 31 Order; (5) that NERC must approve the Reliability Plans pursuant to which PJM and Midwest ISO will coordinate their operations under the new configuration; (6) that a solution addressing the "through and out" rates between Midwest ISO and PJM must be developed; (7) that the Alliance Companies seeking to join PJM, along with PJM and Midwest ISO, provide a solution which will effectively hold utilities in Wisconsin and Michigan harmless from any loop flows or congestion that results from the proposed configuration; (8) that PJM and Midwest ISO must each file a statement agreeing to the conditions within 15 days of the July 31 Order, an implementation plan for achieving a common market by October 1, 2004, within 45 days, and frequent progress reports thereafter; and (9) Commission Staff participation in the process. *Id.*

³16 U.S.C. § 824e (2000).

⁴Alliance Companies, *et al.*, 100 FERC ¶ 61,137 (2002) (July 31 Order).

reach agreement on a proposed solution by the July 31 Order's September 16, 2002 deadline.

B. Presiding Judge's Procedural Rulings

4. On October 8, 2002, the presiding judge convened a pre-hearing conference, and established a schedule for discovery, submission of testimony and hearing. Initial testimony was filed on November 14, 2002 and Rebuttal Testimony was filed on December 10, 2002. The hearing began on December 16, 2002 and concluded on December 20, 2002. Initial briefs are due on January 17, 2003 and reply briefs are due on January 29, 2003. The presiding judge's initial decision is expected by February 28, 2003.

5. During oral argument on December 16, 2002, the presiding judge granted GridAmerica Companies⁵ and the New PJM Companies⁶ motion to strike certain rebuttal testimony and exhibits from the hearing record.⁷ The stricken testimony reflected cost-of-service analysis purportedly demonstrating that transmission owners seeking recovery of lost-revenues are currently over-recovering their transmission cost of service. The presiding judge found that this testimony was relevant to the issues set for hearing but reasoned that the rebuttal testimony "was in the nature of direct testimony."⁸ TRRG immediately requested permission under 18 C.F.R. § 385.715 to seek interlocutory appeal, which the presiding judge orally denied. In addition, the presiding judge denied Classic PJM Companies⁹ and New PJM Companies' motion to strike direct testimony

⁵Ameren Services Corp.; FirstEnergy Corp., on behalf of its subsidiary American Transmission Systems, Inc.; and NIPSCO.

⁶American Electric Power Service Corp. (on behalf of Appalachian Power Co., Columbus Southern Power Co., Indiana Michigan Power Co., and Wheeling Power Co.); Commonwealth Edison Co. and Commonwealth Edison Co. of Indiana; Dayton Power & Light Co.; and Virginia Electric and Power Co.

⁷December 16, 2002 Hearing Transcript at 138 and Motion of the GridAmerica Companies and the New PJM Companies to strike rebuttal testimony submitted on behalf of the Detroit Edison Co., et al.

⁸Tr. at 138-39.

⁹West Penn Power Co., Monongahela Power Co., Potomac Edison Co., (all d/b/a as Allegheny Power); Baltimore Gas and Electric Co.; PECO Energy Co.; PEPCo

(continued...)

submitted on behalf of Consumers Energy Company as irrelevant to the issues set for hearing in this proceeding.¹⁰

C. TRRG's Interlocutory Appeal

6. On December 18, 2002, TRRG filed with the Chairman, as Motions Commissioner, an interlocutory appeal of the presiding judge's December 16, 2002 ruling. In its motion to permit interlocutory appeal, TRRG requests that the Commission reverse the presiding administrative law judge's ruling granting the motion to strike the above-referenced rebuttal testimony and to reinstate the testimony and accompanying exhibits by no later than December 20, 2002. Alternatively, if the Commission rules on TRRG's motion after close of trial, TRRG requests that the Commission order the presiding judge to: (1) accept submission of the evidence in question into the record; (2) re-open the record in order to permit cross-examination; and (3) extend accordingly the time period for the presiding judge to issue his initial decision.

7. TRRG argues that the rebuttal testimony was proper rebuttal testimony and highly relevant to the proceeding because it: (1) directly responded to inter-RTO lost revenue proposals presented in initial testimony;¹¹ (2) presented a recommended methodology to examine whether lost revenue claims need to be permitted here; and (3) provided relevant empirical evidence regarding several specific parties in this case.¹² TRRG also

⁹(...continued)

Holdings, Inc.; and its affiliates Potomac Electric Power Co.; Atlantic City Electric Co.; and Delmarva Power & Light Co.; PPL Electric Utilities Corp.; Public Service Electric and Gas Co.; and UGI Utilities, Inc.

¹⁰Id. at 142. Moved to strike portions of direct testimony of Steven L. Gaarde, Witness for Consumers Energy Co., submitted on November 14, 2002 in this proceeding. See Motion of the Classic PJM Cos. and New PJM Cos. to Strike at 1.

¹¹TRRG states that its rebuttal testimony specifically rebutted direct testimony that transmission owners are entitled to specific claimed amounts of lost revenues, without a corresponding examination of costs. TRRG Motion at 6. See Direct Testimonies of Witness Trabandt on behalf of the GridAmerica Cos., Exh. No. (GA-1) at 3; and Witness Alan C. Heintz on behalf of the Midwest ISO Transmission Owners, Exh. No. Midwest ISO TOs-1 at 10-11.

¹²For example, TRRG argues that rebuttal testimony contained empirical analysis
(continued...)

argues that striking its rebuttal testimony would prevent it from responding to specific criticisms that its approach was unsupported by credible empirical evidence.

8. TRRG further argues that reversing the presiding judge will prevent a detriment to the public interest because highly relevant testimony and empirical analysis must be considered regarding the impact of inter-RTO lost pancaking charges on Michigan and Wisconsin. TRRG also states that the Commission's expedited procedural schedule for this proceeding should not prevent the development of a complete evidentiary record.

C. Answer of Grid America Cos., New PJM Cos., and Illinois Power Co. to Interlocutory Appeal

9. On December 20, 2002, Grid America Cos., New PJM Cos., and Illinois Power Co. ("Respondents") collectively filed an opposition to TRRG's interlocutory appeal. Respondents argue that TRRG's concerns regarding the impact of excluding TRRG's evidence do not meet the Commission's "extraordinary circumstances" standard for granting interlocutory appeals, and thus the motion for interlocutory appeal should be denied.¹³ They argue that TRRG's presentation of new, unrelated data on rebuttal is not directed at countering initial testimony,¹⁴ and denies opposing parties the opportunity to contest the conclusions of TRRG's witnesses and TRRG's calculations.¹⁵ Respondents also state that the stricken testimony is beyond the scope of the proceeding as it would introduce the review of each transmission owner's existing rates, and would require

¹²(...continued)

that directly responded to Witness Heintz's initial testimony which was supported by empirical analysis. See TRRG motion at 9.

¹³Respondents refer to TRRG's concerns that excluding the proffered evidence will substantially prejudice the sponsoring parties' case, and will lead to uncertainty regarding whether the cost-of-service issues will be considered. Respondents also refer to TRRG's request that the Commission examine the relationship between a transmission owner's revenues and costs. Answer at 4.

¹⁴Respondents state that the stricken testimony elaborates on TRRG's theory of its initial direct testimony and attempts to quantify the alleged over-collection on rebuttal. Answer at 5.

¹⁵Respondents challenge TRRG's calculations submitted in the stricken testimony as inconclusive and strongly question the validity of TRRG's calculation method. Answer at 8.

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subsequent challenges to the TRRG witnesses' calculations. Respondents further comment that if the stricken testimony were relevant, it should have been introduced as part of TRRG's direct case.

Notice of Determination

10. On December 20, 2002, the Chairman, as Motions Commissioner, referred the matter to the Commission. The Notice of Determination stated that TRRG has demonstrated extraordinary circumstances in accordance with Section 385.715(c)(5) of the Commission's Regulations that would make prompt Commission review of the contested rulings necessary to prevent detriment to the public interest or irreparable harm to any person.

Discussion

11. The Commission finds that the stricken rebuttal testimony and exhibits should be admitted to this proceeding because as the Presiding Judge found, the testimony is relevant. The Commission takes no position on the merits of TRRG's proposal, but merely seeks to obtain a full record on which to evaluate the competing positions. To assure a complete airing of the issues, we direct the presiding administrative law judge to allow cross examination on TRRG's rebuttal testimony. Accordingly, the Commission will grant TRRG's motion for interlocutory appeal. We strongly urge the parties to reach a multilateral settlement of the complex issues set for hearing in this proceeding.

The Commission orders:

(A) TRRG's interlocutory appeal is hereby granted, as discussed in the body of this order.

(B) The presiding administrative law judge is hereby directed to allow cross examination on TRRG's rebuttal testimony.

By the Commission. Chairman Wood concurred with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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Wood, Chairman, concurring:

I write separately to offer some thoughts on the issues raised in this procedural motion. The perceived need for cost-of-service analysis such as that proffered by TRRG would be greatly obviated if the rates of each RTO participant were established through a cost-of-service formula such as that contained in Attachment O of the Midwest ISO tariff. While the elimination of rate pancaking should not result in inappropriate cost shifts between customers in different regions, any mechanisms adopted to prevent such cost-shifting must result in just and reasonable rates in accordance with the FPA. However, a mechanism that is established through an appropriate cost-of-service formula could meet this standard. Such a mechanism would have to reflect a reasonable allocation of the formula cost-of-service revenue requirement to loads outside the transmission owner's footprint who benefit from wheeling over the transmission owner's system. I join my colleagues in strongly urging the parties to reach a settlement of the issues in this proceeding.

Pat Wood, III
Chairman