UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

The New PJM Companies:	)	
	)	
American Electric Power Service Corporation, *et al*.,	)	
	)	
Commonwealth Edison Company, *et al*.,	)	
	)	**Docket Nos. ER03-262-000**
The Dayton Power and Light Company,	)	**and ER03-262-001**
	)	
Virginia Electric and Power Company,	)	
	)	
and	)	
	)	
PJM Interconnection, L.L.C.	)	
	)	
	)	
	)	
American Electric Power Company and Central and South West Corporation	)	**Docket Nos. EC98-40-000, EC98-2770-000 and EC98-2786-000**
	)	
	)	
	)	**(Dockets Not Consolidated)**

ANSWER OF VIRGINIA STATE CORPORATION COMMISSION TO THE MOTION FOR RELIEF OF THE MICHIGAN, OHIO AND PENNSYLVANIA COMMISSIONS AND TO THE MOTION OF EXELON CORPORATION AND COMMONWEALTH EDISON COMPANY FOR EXPEDITED DECISION ON PENDING APPLICATIONS TO JOIN PJM

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2002), the Virginia State Corporation Commission ("VSCC"), an intervenor in each of the above-captioned

proceedings, hereby files this Answer to the Motion for Relief of the Michigan Public Service Commission ("MichPSC"), the Public Utilities Commission of Ohio ("PUCO") and the Pennsylvania Public Utility Commission ("PaPUC") ("Tri-State Motion"), filed in Docket No. ER03-262 on March 19, 2003.[1] This Answer also responds to the Motion of Exelon Corporation ("Exelon") and Commonwealth Edison Company ("ComEd") (Exelon and ComEd collectively, "Companies") for Expedited Decision on Pending Applications to Join PJM ("Companies' Motion"), filed solely in Docket No. ER03-262-000 on March 17, 2003 (Tri-State Motion and Companies' Motion collectively, "Motions").

The Companies' Motion requests that the Commission immediately grant the pending applications that the so-called New PJM Companies[2] filed in Docket No. ER03-262 on December 11, 2002 ("Application") to (i) approve the New PJM Companies as Transmission Owners in PJM Interconnection, L.L.C. ("PJM"), and (ii) authorize the New PJM Companies (including AEP and its Virginia-jurisdictional subsidiary, APCO)[3] to transfer functional control of their transmission facilities to PJM, all pursuant to Section 205 of the Federal Power Act

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1 Apparently, the Tri-State Motion was filed in Docket No. EC98-40 on March 14, 2003, but it was not filed in the remaining dockets identified above until March 19, 2003. For the Commission's convenience, the VSCC is filing a consolidated Answer to the Tri-State and Companies' Motions in all the above-captioned dockets in this one pleading today.

2 The "New PJM Companies" consist of American Electric Service Corporation, on behalf of its operating companies Appalachian Power Company ("APCO"), Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company (collectively, "AEP"); ComEd and Commonwealth Edison Company of Indiana, Inc.; The Dayton Power and Light Company; and Virginia Electric and Power Company ("VEPCO").

3 It should be noted that while VEPCO is included as one of the New PJM Companies in the Application, footnote 3 in the Application indicates that VECPO did not participate in the Application for purposes of proposed revisions to the PJM West TOA or the PJM Operating Agreement.

("FPA"), 16 U.S.C. § 824d. Companies' Motion at 3. The pending Application also requested that the Commission approve such PJM membership and transfer of functional control to PJM by not later than February 15, 2003.[4]

In contrast, the Tri-State Motion seeks the Commission's issuance of an order requiring AEP and its operating subsidiaries (but not the remaining New PJM Companies) to join an established Regional Transmission Organization ("RTO").[5] Tri-State Motion at 4. The Tri-State Motion also requests, in the alternative, that the Commission order AEP to contract with a third party to operate AEP's transmission system in a manner not requiring the transfer of functional control over that system. Tri-State Motion at 4-5. However, both Motions assert that the Commission may, and in fact should, grant the requested relief in a manner that entirely preempts the ability of the VSCC to carry out the responsibilities imposed by Virginia law (pursuant to Sections 56-577 and 56-579 of the Code of Virginia) to (i) review APCO's state-jurisdictional application to transfer functional control of its transmission system to PJM, and (ii) approve or disapprove such transfer of functional control.[6]

As discussed below, neither the Tri-State Motion nor the Companies' Motion provides a legitimate basis for the Commission to preempt the VSCC's lawful authority to consider and

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4 Application at 1, 2.

5 For purpose of the Tri-State Motion, "join" includes the transfer of functional control. While the Tri-State Motion may seek to require AEP and its operating subsidiaries to join and transfer to "an established RTO," that Motion -- given the status of AEP and PJM -- in essence, seeks an order requiring AEP and its subsidiaries to join and transfer functional control of their transmission facilities to PJM.

6 Section 56-579 of the Code of Virginia sets forth standards established by Virginia's General Assembly pursuant to which the VSCC determines whether any such proposed transfer of functional control is in the public interest and will meet the transmission needs of electric generation suppliers both within and without the Commonwealth of Virginia.

approve or disapprove requests by utilities operating within Virginia to transfer functional control of their transmission facilities to PJM or any other RTO. Assertions in the Tri-State Motion and the Companies' Motion that the Commonwealth of Virginia's invocation of authority to review APCO's proposal to transfer control over its transmission facilities to PJM is somehow contrary to and preempted by federal law are quite clearly erroneous. Contrary to the Motions, neither the Commission's conditions in the AEP-Central and South West Corporation ("CSW") merger nor Order No. 2000[7] provides any basis for preemption.

Moreover, neither the Tri-State Motion nor the Companies' Motion disputes the VSCC's showing (in its Notice of Intervention, Motion to Dismiss, Or In The Alternative, Protest, Motion for Maximum Suspension, Refund Conditions, Consolidation and Hearing filed in Docket No. ER03-262-000 on January 16, 2003 ("VSCC Protest")) regarding the fundamental flaws in the Application, including that neither AEP nor the other New PJM Companies have as yet made a filing under Section 203 of the FPA, which the Commission requires for such a transfer of ownership or control of transmission facilities. In fact, both Motions are utterly silent with respect to the merits of the VSCC's showing. Further, the claimed need in the Tri-State Motion and the Companies' Motion for urgent and expedited Commission action on the Application rests on nothing more than hyperbole and speculation and is thus entitled to no weight. Both Motions must be denied.[8]

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[7] Order No. 2000, *Regional Transmission Organizations*, FERC Stats. & Regs. ¶ 31,089 (1999), 65 Fed. Reg. 810, *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) ("*Snohomish County*").

[8] The VSCC notes that the Arkansas, Kentucky and Louisiana Commissions and others have now (con't)

I. SUMMARY

The AEP States and the Commission Share Concurrent Jurisdiction Over a Utility's Proposal to Transfer Functional Control Of Its Transmission Assets to PJM

Both the Tri-State Motion and the Companies' Motion are clearly wrong to assert that the Commission possesses exclusive jurisdiction over transmission facilities that preempts the authority of Virginia, or any other state, for that matter, to review and approve (or disapprove) requests by electric utilities operating within that state's jurisdiction to transfer functional control of their transmission facilities to an RTO. In this regard, the Commission's authority over electric transmission facilities is in stark contrast to its much broader authority over pipelines under the Natural Gas Act.

Under the law, the states and the Commission share concurrent jurisdiction over the transfer of management and control of state-jurisdictional utilities' transmission assets to regional transmission entities. The Commission's authority under the FPA over the transmission and sale of electric energy at wholesale in interstate commerce cannot be leveraged into comprehensive or exclusive jurisdiction over the facilities used to perform those functions. Thus, the Commission cannot unilaterally order the transfer of functional control over transmission facilities belonging to AEP's operating companies (including APCO, a Virginia-jurisdictional utility), without such companies also obtaining the prior approval of those states whose laws authorize or obligate them to provide such prior approval.

(…continued)

filed responses in opposition to the Tri-State and Companies' Motions, raising many of the same arguments as those advanced by the VSCC herein.

States have authority over transmission facilities constructed within their borders. It is the states that authorize the construction of these transmission facilities and issue certificates to specific utilities to operate them. That long-standing state authority is specifically preserved by the FPA and cannot be preempted by the Commission's actions thereunder.

It is well settled—as recently reiterated by the U.S. Supreme Court in *New York v. FERC*, 535 U.S. 1, 152 L.Ed.2d 47 (2002) ("*New York v. FERC*")—that no federal agency has the power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers such power upon it manifesting clear Congressional intent to so preempt. 152 L.Ed.2d at 62-63 (citation omitted). In this case, the Companies and the Tri-States are asking this Commission to preempt specific legislation of the Commonwealth of Virginia governing the transfer of control of transmission facilities physically situated within the Commonwealth's borders and owned and operated by a Virginia-jurisdictional electric utility. That the Commission may not do since Congress has not given it that exclusive authority, nor manifested any intent to give the Commission preemptive authority in this instance.

The FPA also specifically reserves to the states jurisdiction over electric generation facilities. Membership in PJM, however, means nothing less than a utility's substantial relinquishment of its control and coordination of generation as well as transmission. PJM oversees generation pricing, economic dispatch, reliability, reserve setting, and the provision of generation-based ancillary services. Thus, transfer of control of transmission assets located in Virginia to PJM transfers significant control over the operation and reliability of electric generation serving the Commonwealth. The Virginia General Assembly is fully within its

jurisdictional rights to require the VSCC to determine whether transferring the functional control of APCO's transmission system and, to a large extent, its generation facilities to PJM is in the public interest.

The Commission Must Reject the Attempt to Bootstrap AEP's Voluntarily-Adopted Merger Condition to Join an RTO Into a Federal Requirement That Preempts State Review Of AEP's RTO Application

The Commission's merger review authority under Section 203 of the FPA authorizes the Commission to review merger applications and, if the Commission determines that such applications are in the public interest, approve the applications. Nothing in that statute or elsewhere empowers the Commission **to order** public utilities to consummate a merger. Merger applicants come to the Commission under FPA Section 203 in an entirely voluntary mode, and are always free to walk away from a proposed merger. Moreover, this freedom to abandon a merger is maintained before, during and after the Commission's merger application review process.

The RTO condition of the Commission's AEP-CSW merger order was voluntarily offered by the merger applicants themselves as their suggested approach to mitigate the market power concerns raised by intervenors in the merger proceeding. The Tri-State Motion cannot bootstrap the voluntary nature of that condition of the merger order into a requirement that can be relied upon to preempt valid state law to review RTO applications.

If AEP and CSW are unable to fulfill that condition due to their inability to secure the requisite state approvals for transferring functional control of the companies' transmission facilities to an RTO, then the appropriate Commission remedy is to revoke the merger

authorization (since the conditions upon which the Commission relied to satisfy the public interest standard did not come to pass), or possibly grant an extension of time to satisfy the condition. The Commission cannot preempt the states and order the transfer of functional control of AEP's operating companies' transmission facilities to an RTO without required state approvals.

If the Commission Determines That There Is a Potential for Conflict Between Section 56-579 Of the Virginia Act and Federal Law, the Commission Must Hold These Motions in Abeyance Pending the VSCC's Decision

Even if the Commission determines that there could be an actual conflict between Section 56-579 of the Virginia Act and the FPA, the Commission must await final action by the VSCC on APCO's pending state-jurisdictional application before the VSCC prior to engaging the issue of federal preemption. The Commission must wait because there is no facial inconsistency between the Virginia Act and any federal law. Thus, an actual conflict could arise, if at all, only from the VSCC's application of Section 56-579 of the Act.

Further, significant material facts essential to this Commission's determination on the merits of AEP's pending applications before the Commission (including, in particular, the identity of transmission facilities proposed for transfer to the management and control of PJM), are conspicuously absent in AEP's filing. That information is similarly undeveloped in APCO's application pending before the VSCC. In the absence of such material facts, this case is not ripe for a determination on the merits, much less motions akin to motions for summary judgment.

However, at least in Virginia, AEP appears to be seeking to comply with the provisions of Section 56-579 and the VSCC's regulations implementing it. On the other hand, AEP has

not complied with the requirements of this Commission. Specifically, and as the VSCC emphasized in its initial pleading in the New PJM Companies docket, AEP has not made an FPA Section 203 filing or attempted to comply with the Commission's regulations implementing Section 203, which the Commission requires for a request to transfer operational control of facilities to an RTO.

Finally, the Companies and Tri-State's arguments that Virginia's law (and presumably those like it) are barred by the Commerce Clause, and that the Commission must act immediately to preempt Virginia or there will be irreparable harm to the development of an interstate market, are disingenuous, at best. The movants' real gripe is with the obligations that federalism and concurrent jurisdiction impose on those seeking to introduce regulatory sea changes that would transform state and federal interests. Each pending state RTO proceeding identified in AEP's Compliance Report, including those currently underway in Kentucky, Ohio, Indiana, Arkansas, Louisiana, and Virginia, carries with it the prospect that state and federal reviews may not be on the same timetable. That so-called "delay" may be annoying to the movants, but the absence of lockstep synchronicity is not a burden on interstate commerce; rather, it is the price of concurrent jurisdiction that ultimately inures to the public interest.

II. BACKGROUND

A. Procedural History

Virginia's well-established and Commission-recognized right to exercise its concurrent jurisdiction over the transfer of ownership or control of transmission facilities located in the Commonwealth is under attack in several unconsolidated dockets.

On April 30, 1998, AEP and CSW filed a joint application under Section 203 of the FPA, 16 U.S.C. § 824b, seeking authorization to merge. After a hearing and initial decision, the Commission issued an order identifying conditions to which the merging entities must agree to comply before the merger could be found to be consistent with the public interest.[9] One such condition was a mitigation measure voluntarily offered by the merger applicants as a way to address market power concerns expressed by intervenors in the merger proceeding, namely, that AEP would transfer the operation of certain transmission facilities to an approved RTO by December 15, 2001.[10] AEP accepted the conditions to the merger and made a compliance filing on March 31, 2000.

On December 11, 2002, the New PJM Companies and PJM filed their Application with the Commission for approval for the New PJM Companies to join PJM.[11] In the Application, which was filed only pursuant to FPA Section 205, 16 U.S.C. § 824d, the New

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9 *American Electric Power Co. and Central and South West Corp.*, Opinion No. 442, 90 FERC ¶ 61,242 ("Merger Order"), *order on reh'g*, Opinion No. 442-A, 91 FERC ¶ 61,129 (2000), *aff'd sub nom Wabash Valley Power Ass'n., Inc. v. FERC*, 268 F.3d 1105 (D.C. Cir. 2001).

10 Merger Order, 90 FERC at 61,777 and 61,786-88.

11 As noted earlier, while VEPCO is included as one of the New PJM Companies in the Application, footnote 3 in the Application indicates that VECPO did not participate in the Application for purposes of proposed revisions to the PJM West TOA or the PJM Operating Agreement.

PJM Companies seek, *inter alia*, Commission approval to include the New PJM Companies as transmission owners within PJM and to make associated revisions to the PJM Transmission Owners Agreement, the PJM West Transmission Owners Agreement, the PJM Operating Agreement, and the PJM Open Access Transmission Tariff. That proceeding has been designated Docket No. ER03-262. That Application was submitted in conjunction with AEP's rate filing in Docket No. ER03-242 on December 3, 2002, and VEPCO's filing in Docket No. ER03-257 on December 10, 2002, both of which also concern the proposed expansion of PJM. VSCC Protest at 4-5.

On January 16, 2003, the VSCC filed a notice of intervention and motion for dismissal, or in the alternative, protest in Docket No. ER03-262. That filing also sought consolidation of Docket No. ER03-262 with Docket Nos. ER03-257 and ER03-242. The basis for the VSCC's Motion is that the filing in Docket No. ER03-262 is part and parcel of AEP's and VEPCO's effort to join PJM; that AEP has failed to file an application with the Commission pursuant to FPA Section 203 to transfer control of transmission facilities to PJM; and that neither AEP nor VEPCO has complied with applicable state law requiring approval prior to transferring ownership or control of transmission facilities to a third party. VSCC Protest at 6-7.

AEP filed an Answer to the VSCC Protest in Docket No. ER03-262 on February 10, 2003 ("AEP Answer"). In that filing, AEP expresses its hope to avoid jurisdictional disputes and to have the VSCC complete its review of AEP's state application (submitted to the VSCC on December 19, 2002) in time for AEP to join PJM in May 2003. AEP Answer at 5.

Nonetheless, AEP asserts that it would be counterproductive to dismiss or hold this docket in abeyance simply because of the pendency of state proceedings. *Id*. at 6. However, AEP states that it is "sympathetic to the desires of the VSCC and other state commissions to thoroughly examine AEP's proposed transfer of transmission facilities to PJM." *Id*. at 5. In fact, AEP concludes its Answer with its suggestion "that in the interest of maintaining harmony among federal and state regulators and regulated entities, the Commission afford the states reasonable time to complete the required state processes." *Id*. at 6.

In its "Report on Compliance with Transmission-Related Merger Conditions," filed on February 28, 2003 in Docket Nos. EC98-40 *et al*. ("Compliance Report"), AEP discusses the actions it has taken to satisfy the AEP-CSW merger conditions. With regard to RTO membership, AEP recounts that its first efforts were to join the now-defunct Alliance RTO, which was ultimately turned down by the Commission. Compliance Report at 6-7. AEP then describes its current efforts to comply with the RTO membership condition. In particular, AEP explains that it "is willing to move the functions now performed by SPP [Southwest Power Pool, Inc.] and the Independent Market Monitor to PJM; for the SPP utilities in the West, AEP will commit to leave those functions with SPP, or agree to have MISO [Midwest Independent Transmission System Operator, Inc.] assume those functions, subject to necessary state approvals." Compliance Report at 8. The report continues with a summary of the status of state actions to approve AEP's RTO participation in six states (Virginia, Louisiana, Arkansas, Kentucky, Indiana and Ohio) where AEP is seeking approval of its proposal transfer functional control of its operating companies' transmission facilities to RTOs, including PJM. *Id*. at 9-12.

AEP concludes that it "cannot be expected, in defiance of state laws and concerns, unilaterally to take actions that states have prohibited or for which states have declined to provide requisite approvals." *Id*. at 16.

On March 10, 2003, VEPCO filed a request for leave to respond, a response and a request to waive the sixty-day period for acceptance of rates (the filing was made in both Docket Nos. ER03-257 and ER03-262). In that filing, VEPCO stated its intention to comply with applicable Virginia statutory requirements.

In response to the Compliance Report, the PaPUC, the MichPSC and the PUCO filed the Tri-State Motion on March 14, 2003,[12] seeking an order from the Commission to require AEP to fulfill its merger conditions immediately and resolve perceived state/federal jurisdictional conflicts which allegedly are blocking the progress of RTO expansion in the Northeastern United States. Tri-State Motion at 3. The Tri-State Motion was filed in the AEP merger proceedings (Docket Nos. EC98-40 *et al*.) as well as in Docket No. ER03-262 (discussed below). The primary request in the Tri-State Motion is for the Commission to issue an order directing AEP immediately to join an established RTO, without regard to whether AEP's operating companies, including APCO, have complied with state statutory prerequisites to obtain prior approval to transfer functional control of the facilities in question. The Tri-State Motion (at 4) presents an alternative proposal (which the Tri-State Motion claims will "forestall a jurisdictional conflict") under which the Commission would order AEP to contract with a third

[12] As noted above, the Tri-State Motion was not filed in most of the above-captioned proceedings until March 19, 2003.

party to operate AEP's transmission system in a manner not requiring the transfer of functional control over that system.[13] Tri-State Motion at 4-5.

The Companies' Motion, filed on March 17, 2003 in Docket No. ER03-262, seeks an expedited Commission decision approving the pending applications of the New PJM Companies to join PJM. Adopting a strident tone, Exelon and ComEd claim that Virginia is "overstepping the bounds of its jurisdiction," and that the VSCC "blatantly is attempting to hold PJM expansion hostage to a final rule in the SMD [Standard Market Design] proceeding[14] that would be acceptable to Virginia." Companies' Motion at 9. The Companies further accuse Virginia of "an unlawful attempt to side-step the single lawful means for challenging" the Commission's eventual SMD final rule. *Id.* at 10. According to the Companies, "[t]hat the Virginia legislation has caused AEP to seek to delay joining PJM, demonstrates the unconstitutional interference with interstate commerce perpetrated by the Virginia Legislature." *Id*. The Companies express their support for the first option set forth in the Tri-State Motion (the Commission's issuance of an order requiring AEP to join an RTO), but contend that the Tri-State's second option (requiring AEP to contract with a third party to operate AEP's transmission system), would be equally in conflict with Virginia's Restructuring Act. Companies' Motion at 3-4. The Companies thus move that the Commission "immediately grant the pending applications of the New PJM Companies to join PJM." Companies' Motion at 3

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[13] The VSCC notes, however, that the Tri-States' alternative is no less in conflict with Virginia law than the primary proposal to preempt. Subsection A 1 of Virginia Code § 56-579 broadly proscribes the transfer of "[a]ny ownership or control of, or any responsibility to operate, any portion of any transmission system located in the Commonwealth" without the prior approval of the VSCC.

[14] *Remedying Undue Discrimination Through Open Access Transmission Service and Standard* (con't)

(footnote omitted).

B. The Virginia Restructuring Act

This dispute concerns Sections 56-577 and 56-579 of the Virginia Electric Utility Restructuring Act of 1999 (the "Act" or "Restructuring Act").[15] The Act opens Virginia to retail competition in the sale of electric generation. Specifically, Section 56-577 of the Act provides that by January 1, 2004, all retail customers in Virginia will be able to purchase electric energy from a supplier of their choice.

Virginia's 1999 restructuring legislation, which preceded Order No. 2000, contemplated participation by Virginia's incumbent utilities in regional transmission entities, subject to the oversight of the VSCC. Specifically, Section 56-577 A 1 of the Act requires that Virginia electric utilities join regional transmission entities.[16] The Act states that, subject to the VSCC's approval of utilities' proposed transfers of functional control, each

> incumbent electric utility owning, operating, controlling or having an entitlement to transmission capacity shall join or establish a regional transmission entity, which entity may be an independent system operator, to which such utility shall transfer the management and control of its transmission system . . . .

(…continued)

Electricity Market Design, FERC Stats. & Regs. ¶ 32,563 (2002).

15 The Virginia Electric Utility Restructuring Act, Chapter 23 (§§ 56-576 through 56-595*)* of Title 56 of the Code of Virginia. The Act is attached as Appendix A.

16 For convenience, and for the purposes of only this filing, a regional transmission entity under Virginia law is equated with an RTO under the FPA.

Act, § 56-577 A 1. Section 56-579 states that prior to transferring ownership, control, or responsibility to operate a transmission system to an RTO, Virginia utilities must obtain the prior approval of the VSCC. Section 56-579 A 1 of the Act states:

> No such incumbent electric utility shall transfer to any person any ownership or control of, or any responsibility to operate, any portion of any transmission system located in the Commonwealth without obtaining the prior approval of the Commission . . .

Section 56-579 identifies the factors the VSCC must address in reviewing such an application. The VSCC may impose on such a transfer conditions that promote reliable "planning, operating, maintaining, and upgrading of the transmission systems and any necessary additions thereto." Act, § 56-579 A 2 a 1. The VSCC may also condition the transfer on "terms that fairly compensate the transferor," § 56-579 A 2 c, and that meet "the transmission needs of electric generation suppliers both within and without this Commonwealth." § 56-579 A 2 d.[17] Critically, the Virginia General Assembly directed the VSCC in its implementation of this important task to ensure that any such transfers of management and control of Virginia-jurisdictional transmission assets generally promote the public interest. *Id*.

Section 56-579 B requires the VSCC to establish rules and regulations implementing the VSCC's review and approval (or disapproval) obligations established by the Virginia General Assembly. These rules, in combination with the statutory framework set forth in

[17] The Act states that any transfer must be consistent with the requirements of this Commission. Act, § 56-579 A 2 b. The Act states that it does not abrogate or modify the VSCC's existing authority over "transmission line . . . construction, enlargement or acquisition," "the right of eminent domain" or the VSCC's "authority over retail electric energy sold to retail customers within the Commonwealth, . . . including necessary reserve requirements." Act, § 56-579 D.

Section 56-579, provide the basis for utilities' applications to transfer functional control of their transmission assets and for the VSCC's determination as to whether to approve any such applications.

The Act, originally passed in 1999, has been amended several times, most recently by the 2003 Session of the Virginia General Assembly when it passed House Bill 2453 ("Pending Amendments").[18] A copy of the Pending Amendments is attached as Appendix B.

Under the Pending Amendments, the core requirement that all Virginia utilities seeking to transfer functional control of their facilities to an RTO first obtain the prior review and approval of the VSCC remains the same.[19] The Pending Amendments do not change the Act's **current** requirements that Virginia's incumbent utilities join RTOs and these utilities obtain VSCC approval as a prerequisite to transferring management and control of their transmission assets to RTOs. The Pending Amendments instead modify only the mechanics of such proposed functional control transfers to RTOs, including timelines. They provide, in pertinent part, that utilities must submit applications to the VSCC to transfer functional control of their transmission assets to RTOs by July 1, 2003. However, utilities may not transfer their transmission assets to an RTO prior to July 1, 2004, but they are directed to accomplish such

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[18] HB-2453 is currently awaiting action by the General Assembly on an amendment requested by the Governor adding an Emergency Clause to the legislation. The Pending Amendments will become effective July 1, 2003 unless (i) the Emergency Clause proposed by the Governor is adopted (in which case they would become effective immediately upon the Governor's signature), or (ii) the General Assembly declines to adopt the proposed Emergency Clause, and the Governor, thereafter, declines to sign the legislation.

[19] Thus, contrary to the Companies' statement that "a very dramatic and adverse change in circumstances," occurred with the passage of the 2003 Amendments (Companies' Motion at 4-5), the core requirements of the Act, including provisions stipulating that transfer of functional control (con't)

transfers by January 1, 2005 -- subject to the VSCC's review and approval.

The Pending Amendments further require the VSCC to address consumers' needs for economic and reliable transmission in conjunction with its review of utilities' functional control transfer applications. Additionally, they require that utilities requesting VSCC authorization to transfer functional control of their transmission assets to an RTO provide to the VSCC a study of the comparative costs and benefits of such a transfer, including a description of the economic effects on consumers and the effects of any such transfers on transmission congestion costs. Finally, the Pending Amendments state that the VSCC may approve such proposed transfers if it determines that the conditions in the Act are satisfied.

C. APCO's Application Before the VSCC

Pursuant to the current provisions of the Act, on December 19, 2002, APCO filed with the VSSC an application requesting approval to transfer functional and operational control of its transmission facilities to PJM. On March 7, 2003, the VSCC issued an Order for Notice in Case No. PUE-2000-00550 (March 7, 2003) ("VSCC Scheduling Order"). In that order, the VSCC stated its desire "to move forward as promptly as possible" in the case. VSCC Scheduling Order at 7. In order to do so, the VSCC specifically identified additional information for APCO to submit in support of its Application and provided for expedited discovery. *Id*. at 16, 20.

The VSCC's Scheduling Order denied APCO's request for expedited consideration,

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(…continued)

of transmission facilities to an RTO are subject to the prior approval of the VSCC, have not changed since 1999.

however, stating that it could not reach a final decision on whether to authorize APCO to transfer functional control of its transmission assets to PJM until it has reviewed the full public interest implications of this Commission's SMD rulemaking. *Id.* at 8.

III. THE STATES AND THE COMMISSION SHARE CONCURRENT JURISDICTION OVER A UTILITY'S PROPOSAL TO TRANSFER MANAGEMENT AND CONTROL OF ITS TRANSMISSION ASSETS TO AN RTO

The Tri-State Motion argues that the Commission should direct AEP to join an established RTO in order to fulfill the conditions it agreed to as part of its merger with CSW, and, in issuing such order, the Commission should direct AEP to take such action without regard for the requirements of Virginia law that AEP's operating subsidiary, APCO, first obtain the VSCC's approval to transfer control of its transmission facilities to any RTO. Tri-State Motion at 4, 22. Exelon and ComEd go even further, arguing that the Commission should expedite granting the pending applications by the New PJM Companies to join PJM to protect the Commission's exclusive jurisdiction over interstate transmission services and rates. The Companies even assert that "by approving the pending filing to expand PJM, the Commission would not tread on areas of legitimate state interest." Companies' Motion at 9. Without citation or any other support, the Companies allege that the "Supreme Court has made clear that there is no room for the states to act with respect to these matters." *Id.*

Both the Tri-State Motion and the Companies' Motion are clearly wrong to assert that the Commission's jurisdiction over transmission preempts Virginia's statutory requirements pertaining to mandatory VSCC review and approval of requests by electric utilities operating

within Virginia to transfer functional control of such facilities to an RTO. Both Motions are long on breathless rhetoric, but short on legal analysis. As demonstrated herein, the VSCC's statutory obligation to review APCO's request to transfer functional control of its transmission assets to PJM is well within Virginia's legitimate, long-standing authority. Virginia's authority and the VSCC's obligations thereunder are neither subordinate to nor superseded by AEP's voluntary pledge to comply with certain merger-related conditions or the Commission's RTO policies related to participation in RTOs.

The discussion below demonstrates that under the law the states and the Commission share concurrent jurisdiction over the transfer of management and control of state-jurisdictional utilities' transmission assets to regional transmission entities. Thus, the Commission cannot unilaterally order the functional control of state-jurisdictional utilities' assets transferred to PJM or any other RTO without also obtaining the approval of those states whose laws obligate such utilities to obtain such prior state approval. This is a matter of long-standing federal statutory and decisional law as well as Commission precedent. Indeed, Order No. 2000 itself, heavily relied upon by the movants, expressly recognizes and respects the states' concurrent jurisdiction over the transfer of ownership or control of transmission facilities. Also, numerous Commission decisions acknowledge the states' concurrent jurisdiction over transmission facilities. Accordingly, the arguments that Virginia's law, or similar state RTO review requirements imposed in other AEP states (including Indiana, Kentucky, Arkansas, Louisiana, and even Ohio), are preempted by federal law are entirely misplaced and erroneous.

A. The Commission's Authority Over Transmission Facilities Is Not Exclusive; the Commission and the States Have Concurrent Jurisdiction

In This Area

The text of the FPA gives the Commission jurisdiction over the "transmission of electric energy in interstate commerce and . . . the sale of such energy at wholesale in interstate commerce." 16 U.S.C. § 824(b). The Supreme Court recently explained that this statutory text "unambiguously authorizes FERC to assert jurisdiction over two separate **activities** – transmitting and selling." *New York v. FERC*, 152 L.Ed.2d at 63 (emphasis supplied). However, as discussed in greater detail below, the Commission's authority over transmission **activities** in no way gives it comprehensive or exclusive authority over the **facilities** used to perform that activity.

The Commission has recognized that its "authority is limited to review of the rates, terms and conditions of jurisdictional agreements to ensure that they are just and reasonable and not unduly discriminatory or preferential." *PSI Energy, Inc. and Consumers Power Company*, 55 FERC ¶ 61,254 at 61,811 (1991). While the Commission has exclusive jurisdiction over the rates, terms and conditions of transmission service in interstate commerce, as well as over wholesale sales of power, states continue to have broad authority over electric utilities operating within their borders and the facilities constructed within them. That long-standing state authority is specifically preserved by the FPA and cannot be preempted by the Commission.

1. The Commission Does Not Have Exclusive Authority Over All Aspects of Transmission

Any claim that the Commission's authority over transmission is exclusive or occupies the field is easily refuted by a comparison of the Commission's lack of authority under the FPA to

issue certificates for the construction, operation or abandonment of electric transmission lines, with the explicit legislative grant of such authority with regard to the construction, operation and abandonment of natural gas transmission lines in Section 7 of the Natural Gas Act ("NGA"), 16 U.S.C. § 717f. In sharp contrast to the authority granted to the Commission over natural gas transmission line facilities, Congress has granted the Commission no authority to issue any type of a certificate or other authorization to construct, operate or abandon an electric transmission line, whether operated to serve wholesale or retail customers.[20]

Rather, it is the states that regulate these aspects of the transmission of electricity. For example, public utilities need a certificate of convenience and necessity from the Commonwealth of Virginia in order to construct, acquire or operate transmission facilities within the Commonwealth of Virginia. Code of Virginia § 56-265.2 A. Also, the right of eminent domain to construct utility property in Virginia is a right granted by the Commonwealth, not by the Commission. Code of Virginia § 56-49.

As the Supreme Court recently explained, a federal agency "'literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.'" *New York v. FERC*, 152 L.Ed.2d at 63 (*quoting Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). There is nothing in the FPA that even suggests that the Commission has the authority, in derogation of a state law, to

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[20] *See, e.g*., *Trunkline Gas Co*., 90 FERC ¶ 61,017 at 61,048 (2000) ("The Commission has jurisdiction over the certification of natural gas pipeline facilities, but not electric facilities"); *PSI Energy, Inc. and Consumers Power Company*, 55 FERC at 61,811 ("potential siting, health, safety, environmental or archeological problems are beyond the Commission's authority to consider under sections 205 and 206 of the Federal Power Act (FPA). The Commission does not have siting or certification authority with respect to transmission lines under Part II of the Federal Power Act").

direct a utility to transfer transmission assets, or the control of those assets, to any other entity, including an RTO. Further, no Commission or judicial precedent supports the proposition that the Commission has that exclusive authority.

2. The Presumption Against Preemption

As discussed above, the Commission has no authority except that granted it by Congress, and there exists no legislative basis for the Tri-States' and Companies' assertion that the Commission has exclusive jurisdiction over the transfer of functional control of transmission assets owned by state-jurisdictional utilities. However, even if such a legislative basis arguably existed, a presumption against preemption of state law by federal law would come into play in this instance because of the scope and operation of the Virginia statutory scheme at issue here.

The Supreme Court stated in *New York v. FERC* that this presumption is triggered when at issue is whether "a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority." 152 L.Ed.2d at 62 (citations omitted). In such a situation, the Court starts with the assumption (or the presumption) that the historical police powers of the States are not to be superseded "unless that was the clear and manifest purpose of Congress." *Id.* (citations omitted).

In the matter before the Commission, specific Virginia law (Sections 56-577 and 56-579 of the Code of Virginia) requires Virginia-jurisdictional utilities to obtain VSCC approval as a prerequisite to transferring functional control of their transmission assets to RTOs. Consequently, the movants must overcome the presumption against preemption of this Virginia statute by offering evidence of the clear and manifest purpose of Congress to supersede this

statute, and the federal law so doing. Neither the Tri-States nor the Companies have done so. Put simply, the presence of Virginia's explicit state statutory scheme raises the bar for the movants and their claims of preemption. They have not cleared it.

3. The Commission Has Repeatedly and Explicitly Recognized Concurrent State and Federal Jurisdiction With Regard to RTO Applications

The VSCC is puzzled by the Companies' contention that "the foundation of the Commission's assertion of authority in this case is Order No. 2000, governing development of RTOs." Companies' Motion at 16 (*citing* Order No. 2000 at 31,108, 31,126 and 31,174). According to the Companies, the Virginia law in question "directly contravenes this Commission's policy directive in Order No. 2000 and attempts to usurp the Commission's exclusive authority over interstate transmission." Companies' Motion at 16-17. The Companies' position reflects a serious misunderstanding of relevant federal law.

To the extent the Companies contend that Order No. 2000 contains a federal requirement mandating participation in an RTO, such contention is most assuredly wrong. The Commission did not mandate RTO formation because the Commission could not require any utility to transfer the functional control of its transmission assets to an RTO. Rather, the Commission emphasized that Order No. 2000 "does not mandate RTO formation." Order No. 2000 at 31,026. The voluntary nature of Order No. 2000 was not only clearly recognized by the Court of Appeals on review of Order No. 2000,[21] but that court explicitly relied on the

[21] "Order No. 2000, by its own terms, does not mandate RTO participation. *See* 18 C.F.R. §§ 35.34(c), (g). . . . The preambles confirm that Order 2000 neither was intended to mandate nor does mandate RTO participation." *Snohomish County*, 272 F.3d at 614.

voluntary nature of Order No. 2000 to find that petitioners challenging that Order set forth no injury in fact and thus were not aggrieved as required under Section 313(b) of the FPA. Thus, based on its conclusion that Order No. 2000 does not mandate RTO participation, the court found it lacked jurisdiction to address challenges thereto. *Snohomish County*, 272 F.3d at 617.

The Commission and its Staff have also repeatedly and specifically recognized concurrent jurisdiction with respect to RTOs. For example, in Order 2000, the Commission concluded that it

> continue[s] to believe that states have important roles to play in RTO matters. For example, **most states must approve a utility joining an RTO**, and several states have required their utilities to turn over their transmission facilities to an independent transmission operator.

Order No. 2000 at 31,213 (emphasis supplied).

This basic principle of concurrent jurisdiction was also explicitly recognized by the Commission's Staff in a recent memorandum concerning Indiana's ongoing review of AEP's PJM application in that state: "[I]n some circumstances, the FERC has concurrent jurisdiction with state and/or federal regulatory entities. **Concurrent jurisdiction exists in certain corporate matters such as corporate mergers and dispositions in several areas (including transfers of operational control of transmission facilities to an RTO)**."[22]

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[22] Memorandum to State-Federal Working Group on Midwest/PJM RTO Procedural Options, from Len Tao, FERC Attorney Advisor, concerning "Options to Facilitate Communications Between the FERC and State Commissions With Respect to Midwest/PJM RTO Matters" at 3 (January 23, 2003) (filed in Docket No. RT02-2) (emphasis supplied). A copy of that memorandum is attached as Appendix C.

4. The Supreme Court Has Specifically Recognized Both the Limited Nature of the Commission's Jurisdiction and the Congressional Grant of Concurrent Jurisdiction to the States Under the FPA

Firmly supporting the above-discussed limit to the Commission's jurisdiction under the FPA, the Supreme Court has unequivocally affirmed the Commission's conclusion that "the States retain significant control over local matters even when retail transmissions are unbundled." *New York v. FERC*, 152 L.Ed.2d at 66 (*quoting* Order No. 888 at 31,782, nn. 543 and 544). The Court's pronouncements fatally undermine the movants' arguments concerning Commerce Clause and preemption issues supposedly implicated by Virginia's assertion of review and decision-making authority over APCO's transfer of functional control of transmission facilities to PJM.

In *New York v. FERC*, the Court noted with approval the Commission's finding that, "'[a]mong other things, Congress left to the States authority to regulate generation and transmission siting.'" 152 L.Ed.2d at 66 (*quoting* Order No. 888 at 31,782, n. 543). Similarly, the Court affirmed the Commission's ruling that Order No. 888 "'will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose non-bypassable distribution or retail stranded cost charges.'" 152 L.Ed.2d at 66 (*quoting* Order No. 888 at 31,782, n. 544). The Court further agreed with petitioner State of New York in that case that "the legislative

history [of the FPA] is replete with statements describing Congress' intent to preserve state jurisdiction over local facilities," and that such intent "is incorporated in the second sentence of § 201(b) of the FPA . . . ." 152 L.Ed.2d at 65. Moreover, the Court recognized that "Order No. 888 does not even arguably affect the States' jurisdiction over three . . . subjects: generation facilities, transmissions in intrastate commerce, or transmissions consumed by the transmitter." *Id.* Thus, the Court has properly interpreted the Commission's jurisdiction as extending to the rates, terms and conditions of interstate transmission service, but not preempting any and all state jurisdiction over transmission facilities.

For its part, the Commission explained in Order No. 888 that, "we do not believe the unbundling of retail transactions will radically change fundamental state authorities, including authority to regulate the vast majority of generation asset costs, the siting and maintenance of generation facilities and transmission lines, and decisions regarding retail service territories." Order No. 888 at 31,785. Other examples of the Commission's recognition of state authority to regulate transmission facilities abound. *See, e.g.*, *Policy Statement Regarding Regional Transmission Groups; Policy Statement*, FERC Stats. & Regs. ¶ 30,976 (1993) ("In reference to concerns regarding enlargement of facilities, Congress was clear in its intention to preserve state authorities. RTGs [Regional Transmission Groups] that deal with enlargement of capacity must obtain necessary state approval for the construction of transmission facilities").

5. The Commission Has Long Recognized States' Concurrent Jurisdiction Over Applications Involving the Transfer of Control of Transmission Facilities

The Commission has long recognized that the states have concurrent jurisdiction over

the transfer of control over transmission assets, including the right to review and approve or disapprove such transfer. The Commission's Merger Policy Statement makes clear that any transaction involving the disposition of transmission facilities requires the approval of the Commission and the affected states.[23] The Commission specifically noted that "[w]ith respect to the effect of a merger on state regulatory authority, where a state has authority to act on a merger, as in *PS Colorado* [*Public Serv. Co. of Colorado and Southwestern Pub. Serv. Co*., 75 FERC ¶ 61,325 (1996)], we ordinarily will not set this issue for a trial-type hearing." Merger Policy Statement, ¶ 31,044 at 30,125.

More importantly, the Commission recently reaffirmed that the transfer of control of transmission assets to another entity, **including an RTO**, requires Commission approval under Section 203 of the FPA. *Pennsylvania-New Jersey-Maryland Interconnection*, Order on Remand, 101 FERC ¶ 61,318 at P 47 (2002) ("Order on Remand") ("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"). The Commission's regulations implementing FPA Section 203 expressly apply to "transfers of operational control of transmission facilities to Commission approved Regional Transmission Organizations . . . ." 18 C.F.R. § 33.2(c)(4). Thus, the states have the same lawful authority under FPA Section 203 to review a utility's an application to transfer control of transmission assets to an RTO that the

[23] Order No. 592, *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, FERC Stat. & Regs. ¶ 31,044 at 30,124-25 (1996) ("Merger Policy Statement").

states have to review an application for transfer of transmission assets outside the RTO context.

Not surprisingly, states routinely review Section 203 applications involving the disposition of transmission facilities, as the Commission has noted in numerous merger and other orders. *See, e.g.*, *Energy East Corp. and RGS Energy Group*, 96 FERC ¶ 61,322 at 62,230 (2001) ("the proposed merger will require regulatory approval by the New York Commission"); *Jersey Central Power & Light Co., et al*., 87 FERC ¶ 61,014 at 61,040 (1999) ("The proposed transaction is subject to review by the respective state commissions . . ."); *Sierra Pacific Power Co. and Nevada Power Co*., 87 FERC ¶ 61,077 at 61,332 (1999) ("we do not believe that our action approving the Applicants' proposed merger preempts or interferes with the Nevada Commission's independent merger approval authority")[24]; *Ohio Edison Co., et al*., 80 FERC ¶ 61,039 at 61,099 (1997) ("The merger is subject to review and approval by the state commissions in Ohio and Pennsylvania").

In fact, the Commission acknowledged the states' authority to review the merger of AEP and CSW. "We note that several of the state commissions will either be acting on the merger, or have initiated proceedings to examine the effects of the merger, and each state will

[24] In that case, the Commission declined to hold its merger proceeding in abeyance pending completion of a show cause proceeding before the Nevada Commission concerning whether the merger applicants were in violation of that state's merger order. The Commission determined that it need not grant the state's request, finding that the state would not be prevented from taking whatever actions it believed necessary to protect ratepayers in that state. 87 FERC at 61,332. Here, by contrast, the VSCC has requested that the Commission dismiss the Application because the Application is incomplete as a matter of law, given the absence of the required analysis under FPA Section 203 and Part 33 of the Commission's regulations. In addition, the VSCC's request to dismiss the Application is appropriate to the extent that the New PJM Companies, the Tri-States and/or Exelon/ComEd are arguing that the Commission should approve APCO's joining PJM and transferring functional control of its transmission facilities to PJM in a manner that preempts the VSCC's ability to review and approve or disapprove such transfer. As discussed above, such preemption would clearly violate Virginia's concurrent jurisdiction to take such action.

continue to regulate the retail rates of one or more of the AEP or CSW operating companies. Thus, the state commissions will have the opportunity to impose appropriate conditions in their own proceedings." *American Elec. Power Co. and Central and South West Corp.*, 85 FERC ¶ 61,201 at 61,822 (1998) (citations omitted).

6. Virginia's Long-Standing Regulation Over Transmission Lines and Transfers of Utility Facilities

For over 50 years, certificates of convenience and necessity issued by the VSCC have been required before a utility can construct and operate electrical transmission lines in Virginia. Code of Virginia § 56-265.2. Similarly, since at least 1950, a public utility must obtain a certificate prior to furnishing public utility service, including the transmission of electricity, within the Commonwealth. Code of Virginia § 56-265.3. Virginia's statutory authority over the transfer of utility assets[25] has an even longer history, going back to at least 1940.

As discussed above, consistent with and ancillary to Virginia's exercise of control over utility asset ownership transfers, Section 56-579 of the Act requires each incumbent electric utility owning or operating transmission capacity in the Commonwealth to obtain the VSCC's approval prior to transferring functional control of its transmission assets to an RTO. It is this requirement – VSCC review and approval of such management and control transfers – that is at the heart of the Tri-State and Companies' Motions before the Commission.

Given the long history of state control over transfers of public utility assets within their

[25] Virginia Code §56-89 ("It shall be unlawful for any public utility, directly or indirectly, to acquire or dispose of any utility assets situated within the Commonwealth or any utility securities of any other company unless such acquisition or disposition shall have been authorized by the Commission").

borders and the Commission's explicit recognition of the necessity of state approvals in conjunction with the formation of RTOs,[26] it is difficult to understand why the Virginia Restructuring Act has been singled out for attack. Moreover, as discussed, *infra*, in subdivision III B of this Answer, similar reviews are ongoing in five other states, including Ohio, one of the three moving parties in the Tri-State Motion.

[26] Order No. 2000 at 31,213.

7. The States' Concurrent Jurisdiction Over the Proposed Transfer of Functional Control of Transmission Facilities to PJM Is Required Given the Direct Impact the Transfer Will Have on Generation

Section 201(b)(1) of the FPA makes it abundantly clear that the states have the right to approve or disapprove any proposed transfers of functional control to PJM. That statutory provision states that:

> The Commission shall have jurisdiction over all facilities for [the transmission of electric energy in interstate commerce] or [the] sale of electric energy [at wholesale in interstate commerce], **but shall not have jurisdiction, except as specifically provided in [Parts II and III], over facilities used for the generation of electric energy** . . . .

Id. (emphasis added). Thus, the FPA specifically reserves to the states jurisdiction over generation facilities.

The Supreme Court's decision in *New York v. FERC* reaffirms such state jurisdiction. In upholding Order No. 888, the Court responded to the State of New York's contention that that Order interfered with state jurisdiction over "local facilities" within the aegis of FPA Section 201(b). The Court, however, stated that Order No. 888 did not "even arguably" affect the states' jurisdiction over such local facilities, including facilities used for the generation of electric energy. 152 L.Ed.2d at 65. Thus, the Court made clear, beyond cavil, that state jurisdiction over generation facilities under FPA Section 201 remains undisturbed by its pronouncements in that case.

Membership in PJM requires participating utilities to surrender substantial control and coordination of their generation as well as transmission. PJM's operations entail the

coordination of both generation and transmission assets. *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,060 at 61,212 (2001). Specifically, PJM oversees generation pricing,[27] economic dispatch, capacity reserve setting, and the provision of generation-based ancillary services. Thus, transfer of control of transmission assets located in Virginia to PJM transfers substantial control over the operation and reliability of electric generation serving the Commonwealth to that RTO.[28]

Consequently, the Virginia General Assembly is fully and firmly within its jurisdictional sphere when it requires the VSCC to determine whether the transfer of functional control over APCO's transmission system, and, to a large extent, its generation facilities, to the operational control of PJM is in the public interest.

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[27] PJM manages generation capacity and energy markets which impact retail rates both directly and indirectly. For example, PJM's system of locational marginal pricing is the basis for spot energy prices and the dispatch of generation throughout the PJM region. PJM also designates and dispatches "must-run" generating units. In performing these functions, PJM alters the dispatch of generating units that may not otherwise be engaged in the sale of electricity at wholesale. Consequently, when state-jurisdictional generation units are brought within PJM's dispatch via the transfer of control of the generation owners' transmission facilities, PJM directly affects the level of energy costs passed on to retail ratepayers. In contrast, generation facilities not currently under PJM control (*e.g.*, all of Virginia's electric generation) are primarily dispatched to serve retail load.

[28] As the AEP transmission facilities that are the subject of dispute in these proceedings have yet to be identified before this Commission or before the VSCC, the possibility exists that any resulting transfer of functional control may include facilities that are arguably involved in local distribution and, as such, are subject to the exclusive jurisdiction of the AEP states, including Virginia. Aside from jurisdictional issues, the lack of facility identification raises the troubling possibility that the costs of AEP transmission facilities might be subject to excessive, simultaneous recovery in both federal and state jurisdictions. This potential for double recovery clearly demonstrates the need for continuing state-federal cooperation rather than the preemption sought in the Tri-States and Companies' Motions. This need for cooperation demonstrates that as an enhancement in the federal regulatory toolbox, the FPA was enacted to complement, rather that supplant, state regulation of electric utilities.

8. Virginia's Legislative Requirement That the VSCC Approve Proposed Transfers of Functional Control Of Transmission Assets to RTOs Is Not In Violation of the Commerce Clause

The Companies' Motion alleges that Virginia's statutory framework for state review of utility applications to transfer functional control of their transmission facilities to an RTO is unconstitutional under the Commerce Clause (U.S. Const. Art. I, § 8, cl. 3), that provision of the federal constitution giving Congress power over interstate commerce.[29] The movants attempt to support their argument through citations to several cases upholding the authority of the Commission to regulate wholesale sales and power transmissions in interstate commerce. Companies' Motion at 13-15.

The Companies' argument is misplaced and divorced from any reasonable reading of the FPA. Indeed, the Companies do not discuss the FPA at all in their diatribe concerning the Commerce Clause.

The movants launch their thesis with a discussion of the well-known "Attleboro Gap" case, citing that 1927 Supreme Court decision for the proposition that states are precluded from regulating in such a way so as to impose a direct and impermissible burden on interstate commerce. Companies' Motion at 13 (*citing Public Util. Comm'n of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927)). The VSCC has no quarrel with that case or the proposition of law for which it is offered. However, there is no regulatory gap in the matter before the Commission, nor is Virginia attempting to regulate wholesale power or

[29] U.S. Const. Art. I, § 8, Clause 3 refers to the power of Congress "[T]o regulate commerce with foreign nations, **and among the several states**, and with the Indian Tribes." (Emphasis supplied).

interstate transmission rates, terms and conditions.

The Companies' Motion also cobbles together an argument to the effect that since transmission performed by an RTO is transmission in interstate commerce, state review and approval of transfer of control of transmission assets would impose a direct burden on interstate commerce and is therefore precluded by the Commerce Clause. Companies' Motion at 17. Hence (by implication), Virginia's statutes violate the Commerce Clause.

Analysis of the Commerce Clause must begin with the FPA where the Congress set forth how electricity commerce would be regulated among the several states. Congress created a domain for the Commission and its predecessor (the Federal Power Commission) bounded by the language of FPA Section 201 which establishes the Commission's authority over the wholesale sale and transmission of electricity in interstate commerce. However, nowhere does the FPA give this Commission exclusive authority over the **facilities** used to accomplish such sales and transmission. If such exclusivity had been intended (as the movants contend) Congress surely would have done so in the same manner that it gave this Commission exclusive authority over transmission facilities used to transport natural gas in interstate commerce **by stating so explicitly in federal legislation**. *See, e.g.*, 16 U.S.C. § 717f.

Congress also created a domain for the states within the FPA when it stated in Section 201(a) thereof that this Commission's jurisdiction under the FPA extends "[o]nly to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). With respect to generation, the FPA is more specific; with certain exceptions not relevant here, Section

201(b) of the FPA states that the Commission shall not have jurisdiction over facilities used for the generation of electricity. 16 U.S.C. § 824(b).

What is at issue here is the FPA. It is the FPA that makes clear that the states have jurisdiction over generation and distribution. It is the FPA that makes clear that, with respect to transfers of control such as at issue here, the states have concurrent jurisdiction with this Commission. The VSCC is aware of no judicial opinion holding that the division of responsibility between the federal government and the states, including concurrent jurisdiction, violates the Commerce Clause. Breathless rhetoric and broad generalities do not change the law.

B. Ohio's Assertion of Jurisdiction and Regulatory Authority to Review AEP's Application to Join PJM Contradicts the Central Claim in the Tri-State Motion that Virginia Is Precluded From Taking Similar Action

It is the height of irony that the Michigan, Ohio and Pennsylvania Commissions attack the Virginia statutory requirement that VSCC review and approval are necessary before a Virginia utility may turn functional control of its transmission facilities over to an RTO. The three state commissions contend that, "as a result of the acts and assertions of jurisdiction by Virginia and the VaSCC, the entire PJM market expansion has come to a standstill." Tri-State Motion at 12. What is simply astounding is the absence of any discussion or acknowledgment in the Tri-State Motion that a review of AEP's proposal to transfer its transmission assets to PJM is being conducted not just in Virginia, but in Ohio too.[30]

[30] Also astounding is the attempt to lay all blame for any delay in further PJM expansion at the feet of the VSCC when, as discussed elsewhere, the so-called Application of the New PJM Companies does not contain the requisite Section 203 filing and does not even attempt to meet the

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The Tri-State Motion points to Virginia's RTO review process as indicative of Virginia's "economic protectionism," and takes Virginia to task for "interfer[ing] with the national goals of creating a strong and fair wholesale energy market . . . ." Tri-State Motion at 13. In making these charges, however, Ohio conveniently neglects to mention Section 4928.12 of Title 49 of the Ohio Code, which applies to the "transfer of control of transmission facilities to qualifying transmission entity; regional oversight body or mechanism." (A copy of Ohio Code § 4928.12 is attached as Appendix D.) This provision of the Ohio Code specifically provides that concerning such transfers of control, the PUCO "shall make joint investigations, hold joint hearings . . . and issue joint or concurrent orders in conjunction with any official or agency of any state or of the United States . . . ." Ohio Code § 4982.12(D)(1).

Moreover, the Ohio statute provides that, after the start date of competitive retail electric service in Ohio, no entity shall own or control transmission facilities within Ohio unless that entity is a member of, and transfers control of those facilities to, a qualifying transmission entity ("QTE"). Ohio Code § 4982.12(A). The statute further provides that an entity can become a QTE if the entity meets nine enumerated "specifications" pertaining to a wide range of factors, including minimization of transmission rate pancaking in Ohio, improvement of service reliability in Ohio, and approval by the Commission of the entity. Ohio Code § 4982.12(B)(1)-(9). The PUCO has promulgated detailed regulations implementing Section 4982.12 of the Ohio Code. *See* OAC Ann. 4901:11-20-17, attached as Appendix E.

(…continued)

requirements of the Commission's regulations for a transfer of control of transmission facilities. 18 C.F.R. Part 33.

Apparently Ohio believes it reasonable and appropriate for it to require Ohio-jurisdictional utilities to make a case for transfers of functional control under Ohio law. However, for some reason, Ohio also appears to believe that Virginia (and, presumably, Arkansas, Indiana, Kentucky and Louisiana – all states with pending RTO proceedings involving AEP operating companies) violates federal law when it takes similar measures. Even more outrageous, particularly in light of Ohio's allegation that Virginia's review of the propriety of APCO's transfer of their transmission facilities to PJM have caused the expansion of PJM to "come to a standstill" (Tri-State Motion at 12), is the fact that the PUCO, on February 20, 2003, barely three weeks prior to its filing of the Tri-State Motion, issued an order **indefinitely staying the proceeding** in which PUCO is reviewing the application of AEP's Ohio operating companies to join PJM. The PUCO order states that the case is stayed in light of the "many unresolved issues regarding the formation, approval and operation of PJM and other transmission organizations at state and federal levels . . . . [T]here are too many unresolved issues beyond the Commission's jurisdiction for the Commission to have a meaningful review of the [Ohio] Utilities ITP [independent transmission plans] at this time." *In the Matter of the Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission Plan*, PUCO Case No. 02-3310-EL-ETP, Entry at 4-5 (February 20, 2003) (A copy of PUCO's order is attached as Appendix F).

Therefore, and as pointed out above, the participation of AEP's state-jurisdictional operating companies in RTOs is not only subject to Virginia's and Ohio's jurisdiction and review, but also to the mandatory review under state law by Arkansas, Indiana, Kentucky and

Louisiana. AEP Compliance Report at 9-12. Put simply, numerous states where AEP has transmission facilities require state approval similar to that required in Virginia. *See, e.g.*, Louisiana Public Service Commission Order No. 25965-A ("no Louisiana utility will be allowed to join an RTO until the implications of the RTO on . . . public interest factors are analyzed and presented to [the Louisiana Commission] for review").

C. Movants' Reliance Upon Section 205 of PURPA Is Unavailing

The Tri-State Motion also implies that Section 205 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-1, adds to the Commission's ability to provide the relief requested by the Tri-State Motion.[31] Tri-State Motion at 20. Once again, the Tri-State Motion is in error. By its own terms, PURPA Section 205 provides no basis to grant the relief requested by the Motion.

As noted by the Tri-State Motion, any action under PURPA Section 205 can come only "after notice and hearing." *Id.* As such, invocation of PURPA Section 205 adds nothing to the Motion. Moreover, the Commission in Order No. 2000 explained that it "has previously interpreted Section 205 of PURPA as essentially complementing the functions under Section 202(a) [of the FPA]." Order No. 2000 at 31,045. In that same section in Order No. 2000, the Commission also explained that its authority under Section 202(a) concerning interconnection and coordination "is limited by the 'voluntary' nature of the provision," and the Commission further explained that it implements the provision "after consultation with state

[31] Interestingly, the Companies' Motion disagrees with the Tri-State Motion, finding that invocation of PURPA Section 205 is premature and is not based on PURPA Section 205. Companies' Motion at 19-20.

commissions." *Id.* at 31,044. In short, both the language of PURPA Section 205 and the Commission's interpretation of it provide no support for an immediate order that would preempt the states from reviewing the transfer of functional control of transmission facilities to PJM.

IV. THE COMMISSION SHOULD REJECT THE ATTEMPT TO BOOTSTRAP AEP'S VOLUNTARILY-ADOPTED MERGER CONDITION TO JOIN AN RTO INTO A FEDERAL REQUIREMENT THAT PREEMPTS STATE REVIEW OF AEP'S RTO APPLICATION

A central justification that the three state commissions offer in support of their Motion is that the Commission, in approving the merger of AEP and CSW, conditioned that approval on, *inter alia*, the merged company's joining an RTO by December 15, 2001.[32] Accordingly, movants argue that because AEP has not yet met that condition, the Commission can and should enforce its merger order by requiring AEP to join PJM immediately. *See generally* Tri-State Motion. This argument is also specious.

The movants misunderstand the Commission's authority with respect to mergers under FPA Section 203. The Commission's power to condition mergers is not the power to order the implementation of such conditions, but to deny the ability to merge if such conditions are not met. Where a utility fails to meet one or more of the Commission-imposed conditions of the merger approval, the Commission's "remedy" is not to force compliance with such conditions, but to withdraw or revoke the merger approval. Where the cause of the merged company's inability or failure to meet such a merger condition is the action (or inaction) of a state agency, the Commission clearly lacks authority to preempt whatever state law (or its enforcement) is

[32] Merger Order, 90 FERC at 61,799-800 (Ordering Paragraph (B).

causing a company's inability to satisfy that condition at all, or on some "preferred" timetable. As shown below, the movants' argument thus suffers from at least three fatal deficiencies.

First, the Tri-State Motion does not, and cannot, point to anything in the Commission's AEP-CSW Merger Order that even remotely suggests preemption of state review of the costs and benefits of AEP's joining PJM. It is one thing to assert that the Commission required AEP and CSW to join an RTO to obtain approval of its merger, it is quite another (and incorrect) thing to imply that the Commission, in issuing the Merger Order, authorized AEP and CSW to bypass or disregard applicable state laws requiring state regulatory agency approval to join an RTO.

Second, the Tri-State Motion fails to grasp a critical fact regarding the Commission's merger review authority under Section 203 of the FPA. Specifically, the statute authorizes the Commission to review merger applications and, if the Commission determines that such applications are in the public interest, approve the applications. 16 U.S.C. § 824b. Nothing in the statute or elsewhere empowers the Commission **to order** public utilities to consummate a merger. The Commission may reject, conditionally approve, or unconditionally approve a particular merger application, but it is without authority, following its conditional approval of that application, to force the merger applicants to follow through with the merger to which conditions have been attached that the applicants cannot or are unwilling to meet. *See, e.g., Utah Power & Light Co., PacifiCorp and PC/UP&L Merging Corp.*, 45 FERC ¶ 61,095 at 61,280 (1988) ("the Applicants can pursue the merger consistent with the terms specified by the Commission or, if they choose, forgo the merger"). Merger applicants come to the Commission

under FPA Section 203 in an entirely voluntary mode, and are always free to walk away from a proposed merger. *Id.* Moreover, this freedom to abandon a merger is maintained before, during and after the Commission's merger application review process.

Consistent with the above precedent, the Commission, in the Merger Order itself, explained that, should AEP and CSW not join an RTO in accordance with one of the conditions of such Order, the consequence would be revocation of the Commission's approval of the merger (and not that the Commission would compel the two companies to merge):

> Applicants should notify the Commission within 15 days of the date of this Opinion **whether they agree to the condition** that they transfer operational control of their transmission facilities to a fully-functioning, Commission-approved RTO by December 15, 2001 and to the condition requiring the interim mitigation measures described above. In the event that Applicants accept these conditions but subsequently do not comply with them, we will use our authority under Section 203(b) of the FPA to address any concerns, and order further procedures as appropriate.[33]
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> * * *
>
> **Should Applicants decline to accept these conditions, we will approve the merger only on the condition that** they transfer operational control of their transmission facilities to a fully-functioning, Commission-approved RTO prior to consummation of the merger.

Merger Order, 90 FERC at 61,789-90 (emphasis supplied).

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[33] Section 203(b) of the FPA merely provides the Commission with the authority to impose terms and conditions on orders issued under that provision and to issue supplemental orders. Section 203(b) does not expand the Commission's authority under Section 203 to take any action other than approving, conditionally approving or disapproving applications filed thereunder.

Third, the Tri-State Motion mischaracterizes the nature of the RTO condition of the Commission's Merger Order. The RTO condition was voluntarily offered by the merger applicants themselves as their suggested approach to mitigate the market power concerns raised by intervenors in the merger proceeding. *American Elec. Power Co. and Central and South West Corp*., 85 FERC at 61,815 ("Applicants commit[ted] to joining an ISO when one that conforms with their ISO principles is formed"). *See also* Merger Order, 90 FERC at 61,788 n. 35 ("We observe that Applicants' commitment requires them to join either a Commission-approved RTO or the Midwest RTO"). In other words, the provision of the AEP merger order providing that the merged company must transfer functional control of its transmission assets to an RTO does not have its basis in the FPA or any specific, independent Commission requirement mandating participation in an RTO. Rather, that provision of the merger order merely reflects the Commission's adoption of the merger applicants' voluntary agreement to meet that condition in order to mitigate market power concerns and, thereby, obtain approval of the merger. No amount of wishful thinking in the Tri-State Motion can bootstrap the voluntary nature of that condition of the merger order into a requirement that can be relied upon to preempt valid state law to review RTO applications.

Take, for example, a merger approval in which the Commission explicitly conditioned upon the merged company building upgraded transmission lines to relieve congestion or reduce market power. Assume the company was unable to obtain a requisite environmental permit for the upgrade construction activities because a federal or state environmental agency steadfastly refused to issue the permit. Surely no one would argue that the Commission in those

circumstances could order the company to move forward with the construction activities without the required state environmental permit.

The same is true with respect to the Commission-imposed condition of the AEP-CSW merger order that the merged company join an approved RTO. If AEP and CSW are unable to fulfill that condition due to their inability to secure the requisite state approvals for transferring functional control of the AEP operating companies' assets to an RTO, then the only remedy for the Commission is to revoke the merger authorization (since the conditions upon which the Commission relied to satisfy the public interest standard did not come to pass), or possibly grant an extension of time to satisfy the condition.

V. IF THE COMMISSION DETERMINES THAT THERE IS A POTENTIAL FOR CONFLICT BETWEEN SECTION 56-579 OF THE VIRGINIA ACT AND FEDERAL LAW, THE COMMISSION MUST, DUE TO LACK OF RIPENESS, HOLD THE TRI-STATES AND COMPANIES' MOTIONS IN ABEYANCE PENDING THE VSCC'S ACTION ON THE APCO APPLICATION BEFORE IT

As discussed above, the Commission has concurrent jurisdiction with states over the transfer of functional control of a public utility's transmission lines.[34] However, even if the Commission determines that there could be an actual conflict between Section 56-579 of the Virginia Act and the FPA and an accompanying possibility of preemption (a supposition that the VSCC does not concede), the Commission must await final action by the VSCC on AEP's pending state-jurisdictional application before the VSCC prior to

[34] "Transfer" in this context means not only the transfer of legal title, but also the transfer of their management and control, per the Commission's Order in *Pennsylvania-New Jersey-Maryland Interconnection*, Order on Remand, 101 FERC at P 48.

engaging the issue of federal preemption. The Commission must wait because, as demonstrated above, there is no facial inconsistency between the Virginia Act and any federal law. Thus, an actual conflict could arise, if at all, only from the VSCC's application of Section 56-579 of the Act.

The Companies and Tri-States' arguments that the Commission must act immediately or there will be irreparable harm to the development of an interstate market are unsupported and disingenuous, at best. The movants cite nothing more substantial than their own impatience. As noted above, such impatience is unjustifiable, given that the PUCO has just recently issued an order indefinitely staying the proceeding in which that state commission is reviewing the application of AEP's Ohio operating companies to join PJM. *See* Appendix F at 4-5. The movants' real gripe is with the obligations that federalism and concurrent jurisdiction impose on those seeking to introduce regulatory sea changes that would transform state and federal interests. Each pending state RTO proceeding identified in AEP's Compliance Report, including those currently underway in Kentucky, Ohio, Indiana, and Virginia, carries with it the prospect that state review and federal review may not be on the same schedule. That so-called "delay" may be annoying to the movants, but the absence of lockstep synchronicity is not a burden on interstate commerce; rather, it is the price of concurrent jurisdiction that ultimately inures to the public interest.

Further, significant material facts essential to this Commission's determination on the merits of AEP's pending applications before the Commission (including, in particular, the identity of transmission facilities proposed for transfer to the management and control of PJM),

are conspicuously absent in AEP's filing. That information is similarly undeveloped in AEP's application pending before the VSCC. In the absence of such material facts, this case is not ripe for a determination on the merits, much less requests akin to motions for summary judgment.

Specifically with respect to the Application's incompleteness, AEP has not made an FPA Section 203 filing or attempted to comply with the Commission's regulations implementing Section 203, which the Commission requires for a request to transfer operational control of facilities to an RTO.[35] Consequently, further delay on the Commission's side of the equation will be the likely by-product of AEP's procedural haste. While AEP relies on *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002), for the proposition that transfer of functional control over electric lines does not require authorization under Section 203, this Commission has reached the **opposite** conclusion. *Pennsylvania-New Jersey-Maryland Interconnection*, Order on Remand, 101 FERC at P 47 ("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"). Not only will AEP's decision to contest this issue significantly slow down this Commission's review of the transfer, but it also denies the parties to these various proceedings the necessary information to assess AEP's participation in PJM in other proceedings.

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[35] Nor is AEP's summary statement in its Transmittal Letter in this docket (at 2-3) an adequate 203 application. AEP provides none of the necessary support for such an application. *See, e.g.*, 18 C.F.R. §§ 33.1 to 33.10.

Furthermore, AEP's current position regarding the applicability of FPA Section 203 here is directly contradicted by its prior proposal to join the Alliance RTO and transfer control of its transmission facilities to that RTO. In particular, in connection with that proposal, AEP (and the other proposed Alliance members) submitted two separate applications to the Commission, one pursuant to Section 203 of the FPA and the other pursuant to Section 205 of the statute. *See* AEP *et al*. Initial Filings in Docket Nos. ER99-3144 (Section 205 application) and EC99-80 (Section 203 application), both of which AEP filed on June 3, 1999. AEP's Section 205 application in Docket No. ER99-3144 made repeated references to the "companion" application under Section 203. Significantly, AEP identified its Section 203 application as being filed pursuant to FPA Section 203 as well as Part 33 of the Commission's regulations (18 C.F.R. Part 33), which implement Section 203 of the statute. Application for Approval of Transaction Under Section 203 of the Federal Power Act, at 1-2, Docket No. EC99-80 (June 3, 1999). AEP described its Section 203 application as "a companion to, **and a necessary part of**, the Section 205 Filing to establish the Alliance RTO." *Id*. at 3 (emphasis supplied). Moreover, the Section 203 application explicitly addresses the substantive standard under that provision of the FPA, namely, whether the transfer of control over transmission facilities from the individual utilities to the Alliance RTO is in the public interest. AEP's Section 203 application also included, *inter alia*, a discussion of the impact of the transaction on competition, rates and regulation. *Id*. at 13-21.

In sharp contrast to that prior AEP filing, AEP's application to this Commission to join PJM was not made pursuant to FPA Section 203, and such application contained no discussion

or analysis whatsoever regarding the impacts of the transaction on competition (including horizontal and vertical competitive impacts), rates and regulation as required by FPA Section 203 and Part 33 of the Commission's regulations. AEP's failure to do so violates the Commission's requirements (Order on Remand, 101 FERC at PP 47-49) and is directly at odds with AEP's approach in its Alliance filing in Docket No. EC99-80.

Delay is also caused by the other state proceedings related to the AEP transfer. AEP has currently pending applications for approval or its participation in PJM before the majority of PJM Expansion states where it has transmission facilities. These proceedings may take as long, or longer, than Virginia's proceeding. As noted earlier, an application of AEP's Ohio operating company to transfer functional control of its transmission facilities to PJM is pending before the PUCO. However, on February 20, 2003, the PUCO indefinitely stayed its review of AEP's application. The PUCO order states that the case is stayed in light of the "many unresolved issues regarding the formation, approval and operation of PJM and other transmission organizations at state and federal levels . . . there are too many unresolved issues beyond the Commission's jurisdiction for the Commission to have a meaningful review of the [Ohio] Utilities ITP [independent transmission plans] at this time." *In the Matter of the Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission Plan,* PUCO Case No. 02-3310-EL-ETP, Entry at 4-5 (February 20, 2003).

Given the patent deficiencies in AEP's application to this Commission, the pendency of numerous state proceedings reviewing various AEP operating companies' applications to

transfer functional control of those companies' transmission facilities to RTOS, including PJM, and the PUCO's recent order indefinitely staying Ohio's further review of AEP's application in that state, singling out Virginia's lawful exercise of concurrent jurisdiction as an unlawful impediment to PJM's expansion is absurd and the Motions should be summarily dismissed.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, the Virginia State Corporation Commission requests that the Commission reject both the Tri-State Motion and the Companies' Motion.

Respectfully submitted,

VIRGINIA STATE CORPORATION COMMISSION

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April 1, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Answer Of Virginia State Corporation Commission To The Motion For Relief Of The Michigan, Ohio And Pennsylvania Commissions And To The Motion Of Exelon Corporation And Commonwealth Edison Company For Expedited Decision On Pending Applications To Join PJM Brief Opposing Exceptions upon each person designated on the official service lists compiled by the Secretary of the Commission in these proceedings by depositing copies thereof in first class mail, postage prepaid.

Dated at Washington, D.C., this 1st day of April, 2003.

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