

Chapter II

Federal Energy Regulatory Commission: Jurisdictional Issues

When the TIG participants decided to develop the proposals now set forth in this Report, they restricted themselves to develop proposals that do not expand FERC's jurisdiction over Northwest transmission systems. In particular, TIG participants did not want to create a new entity that would be subject to FERC jurisdiction. Nor did they want to subject utilities that are not currently regulated by FERC to FERC jurisdiction. The reason for this restriction stems from the desire to retain within the region to the extent possible the authority to make decisions on regional transmission policy questions.

The proposals in this agreement are intended to meet the goal of not expanding federal jurisdiction. This Chapter discusses the legal principles that helped shape the relationships those proposals.

I. FERC Jurisdiction - The Meaning of "Control"

Under the Federal Power Act ("FPA"), the Federal Energy Regulatory Commission ("FERC" or "Commission") has exclusive jurisdiction to regulate interstate transmission and wholesale sales of power by public utilities.¹ Generally, public power entities and cooperatives are not public utilities. Section 201(f) of the FPA states:

No provision of this Part shall apply to, or be deemed to include, *the United States, a state or any political subdivision of a state*, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one of the foregoing, or any officer, agent employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.²

Thus, in creating new regional transmission services, the question of FERC jurisdiction turns on whether a new entity has been created and if so whether it is a public utility. A new entity is not created through a contract among existing entities – the contract is just a contract. However, in some cases, the parties to the contract desire a separate entity to administer the

1 16 U.S.C § 824(e)-(f) (2004). The FPA defines a "public utility" as "any person who owns or operates facilities subject to FERC jurisdiction." *Id.* at § 824(e). Thus, investor-owned utilities are considered "public utilities" under the FPA while public power entities, such as municipal power systems, are not.

2 *Id.*, § 824(f) (2004). Cooperatives that are financed by the Rural Utilities Service are also not subject to FERC jurisdiction. See *Dairyland Power Cooperative*, 37 FPC 12 (1967); see also *Salt River Project Agricultural District v. FPC*, 391 F.2d 470 (1967).

contract. Thus, the question becomes whether the new entity that administers the contract is a public utility or a transmission provider.³

In prior cases involving either jurisdictional facilities or jurisdictional services, the Commission has held that the relevant test is one of control.⁴ There is no single definition of “control” for purposes of applying this test; rather, “the standard of ‘effective control’ over jurisdictional transactions is not static and may evolve with the market and the Commission’s regulatory needs.”⁵ Four prominent cases illustrate the nature of this test. In *PSI Energy, Inc.*, the Commission considered whether a public utility had gained “operational control” over the transmission facilities of a third party on a jointly-owned transmission grid.⁶ The Commission held that PSI controlled those facilities because “PSI basically directs and controls the transmission system with only the limitation that it act in accordance with ‘prudent utility practice.’”⁷

The Commission applied the same test in *Puget Sound Power & Light Co.* but found on the facts there that control had *not* been transferred because the parties “specifically limited in the agreement, the operation and management services that Puget may perform without prior direction or approval.”⁸ In contrast, [the parties] could simply have directed that Puget operate and maintain the facilities in accordance with some general standard, such as prudent utility practice.”⁹ The Commission recently applied the same test to jurisdictional services in *El Paso Elec. Co.*¹⁰ There, the Commission held that Enron Power Marketing, Inc. had assumed “control” over certain jurisdictional power sales made by El Paso Electric Company because “El Paso Electric admitted that it gave Enron discretion on how, when, and to whom it could sell power on El Paso Electric’s behalf while Enron ran the El Paso Electric trading desk.”¹¹

A similar result was reached in *R.W. Beck Plant Management, Ltd.*¹² In that case, the Commission held that the manager of a power plant (and appurtenant jurisdictional facilities)

3 FERC’s *pro forma* tariff defines “transmission provider” as the “public utility (or its designated agent) that *owns, controls, or operates* facilities used for the transmission of electric energy in interstate commerce and provides transmission service under the tariff. *See pro forma* tariff, § 1.46 (emphasis added). This definition mirrors the definition of public utility under the FPA.

4 *Bechtel Power Corp.*, 60 FERC ¶ 61,156 at 61,572 (1992) (an entity “operates” a jurisdictional facility if it has “control and decisionmaking authority concerning the operation of the [f]acility.”).

5 *Pacer Power, LLC*, 104 FERC ¶ 61,131, P 31 (2003).

6 63 FERC ¶ 61,107 (1993).

7 *Id.* at 61,753.

8 64 FERC ¶ 61,335 (1993).

9 *Id.* at 63,428.

10 108 FERC ¶ 61,071 (2004).

11 *Id.* P 14.

12 109 FERC ¶ 61,315 (2004).

was a public utility because “except for certain powers reserved to the [owner], Beck has complete authority to manage, control and make all decisions affecting the business and affairs of [the plant]” and, furthermore, the owner had “no employees and no company personnel responsible for the management of the [plant].”¹³ Thus, FERC previously has found that an entity will not be deemed a public utility if it is *implementing* or *administering* Commission-approved rates, terms and conditions of service, as opposed to *creating* its own criteria for providing jurisdictional service.

13 *Id.* PP 3, 12.

II. Power Pools and Their Contractors

A. The Mid-Continent Area Power Pool

The Commission has previously found that a contractor to a power pool is not a public utility for jurisdictional purposes. In reviewing the structure and functions of the Mid-Continent Area Power Pool (“MAPP”), the Commission stated that the contractor was not a public utility. MAPP provides certain transmission services over its members’ facilities under a transmission tariff (referred to as “Schedule F”) on file with the Commission. While MAPPCOR (the contractor) administers the tariff and is the entity with whom transmission customers enter into service agreements, it does not own or control jurisdictional facilities and is not a transmission provider under the tariff. MAPPCOR is simply the agent of the individual jurisdictional transmission providers and operates under their control.

As contractor for MAPP, MAPPCOR administers Schedule F by performing the following functions: (i) calculating ATC from data provided by members that apply under that tariff (*see* MAPP Schedule F, Att. C), (ii) operating the OASIS (Schedule F, § 15.2), (iii) receiving and evaluating transmission requests (Schedule F, § 17.1), (iv) granting or denying service (Schedule F, § 17.5), and (v) entering into service agreements with customers (Schedule F, § 13.4). These functions, however, did not make MAPPCOR the Transmission Provider. Rather, the “Transmission Provider” under Schedule F was defined as “[t]he [MAPP] Member (or its Designated Agent) that owns, controls, or operates a portion of the Transmission System. [MAPPCOR] shall not be considered to be a Transmission Provider.” *Id.* § 1.45.

Consistent with the tariff, the Commission found in a case involving refunds ordered under Schedule F that MAPPCOR was not a public utility and not the Transmission Provider under the MAPP tariff.¹⁴ The Commission explained that, “[w]hile [MAPP] administers [Schedule F], and is the entity with whom pool transmission customers enter into transmission service agreements, it does not own or control jurisdictional facilities and, pursuant to Section 1.45 of Schedule F of the tariff, it is not a ‘transmission provider’ under the tariff.”¹⁵ The Commission also found that MAPP does not “provide transmission services[] or determine prices at which transmission is sold” and that “[u]nder the terms of the MAPP members’ contractual arrangements, the individual MAPP members (and not MAPP) offer and provide jurisdictional transmission service.”¹⁶

With regard to FERC jurisdiction over otherwise non-jurisdictional entities due to their involvement in joint activities with jurisdictional entities, the MAPP orders also are an example of FERC noting its lack of jurisdiction over non-jurisdictional entities. In that case, FERC noted that it had no jurisdiction over Nebraska Public Power District (“NPPD”) – a non-jurisdictional member – and that jurisdictional members were not responsible for refunds attributable to NPPD under a joint tariff on file with FERC. The Commission stated:

14 *Mid-Continent Area Power Pool*, 91 FERC ¶ 61,353, *order on reh'g*, 92 FERC ¶ 61,229 (2000).

15 91 FERC ¶ 61,353 at 62,182 n.5 (2000).

16 92 FERC ¶ 61,229 at 61,755 (2000).

We note that [NPPD], as a utility owned and operated by the State of Nebraska, is not a public utility under the FPA. Therefore we cannot assert jurisdiction over [NPPD], and the requirements in our [previous] orders apply only to the public utility members of MAPP (since they are within our jurisdiction).¹⁷

In a later order affirming that finding, the Commission stated that, “[b]ecause [NPPD], although a member of the pool and a party to the Restated Agreement, refused to pay refunds and is not subject to our jurisdiction as a public utility under Sections 205 and 206 of the FPA, we [] cannot enforce the refund requirement against [NPPD].” The Commission went on to find that it could “only enforce the refund requirement against the public utility members of the pool” and that the “wholesale refund requirement imposed on the public utility pool members [did] not include [NPPD’s] share of any refunds.”¹⁸

Thus, the MAPP orders stand for the proposition that a contractor, implementing FERC-jurisdictional activities on behalf of its power pool members, may not become a jurisdictional public utility unless it has actual control over the facilities. The orders also find that a non-jurisdictional entity does not become jurisdictional just because it is a party to a FERC-jurisdictional agreement.¹⁹ Furthermore, jurisdictional entities were not responsible for the refund liability associated with the non-jurisdictionals.

B. The Southwest Power Pool

The holding in the MAPP orders is consistent with the treatment accorded to SPP in performing similar functions for American Electric Power-East and SPP members prior to becoming an RTO. The first arrangement, involving AEP-East, arose in response to conditions established in the Commission's order approving the merger between AEP and Central and South West Corporation.²⁰ To satisfy those conditions, AEP entered into an agreement with SPP under which SPP would calculate ATCs for the AEP East zone, post the applicable ATC values on AEP's OASIS, and process (*i.e.*, accept or deny) transmission service requests under the AEP transmission tariff for service in the AEP East zone.²¹ The AEP transmission tariff, however,

17 *Mid-Continent Area Power Pool*, 89 FERC ¶ 61,135 at 61,387 (1999), *order on reh’g*, 91 FERC ¶ 61,353 (2000).

18 91 FERC ¶ 61,353 at 62,182 (2000).

19 Conversely, FERC has claimed authority to order non-jurisdictionals to make refunds when participating in California energy markets under the California ISO tariff. The California ISO is a public utility, and the voluntary sales by non-jurisdictionals in a market where price is determined by the jurisdictional tariff resulted in FERC jurisdiction over recalculation of price and refunds of overcharges for flawed prices. *See San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 61,120 (2001).

20 *See American Elec. Power Co.*, 90 FERC ¶ 61,242 (2001).

21 *See AEP/SPP Agreement* § 1.1 (as filed in Docket Nos. EC98-40-003, *et al.*); *see also American Elec. Power Co.*, 91 FERC ¶ 61,208 at 61,747 (2000).

continued to define the AEP operating companies as the Transmission Provider for the AEP East zone, not SPP. *See* AEP Transmission Tariff § 1.68. In addition, AEP continued to make all service agreement filings under its tariff.²²

The second example involved SPP acting as tariff administrator for its members prior to its certification as an RTO. SPP's responsibilities at that time included calculating TTC and ATC, posting TTC and ATC values on the SPP OASIS, and processing transmission service requests under certain SPP tariff schedules.²³ Despite assuming these functions, the SPP transmission tariff provided that the SPP members remained the Transmission Providers under that tariff, and that "SPP is not a Transmission Provider but is authorized by the Transmission Providers to carry out its functions under this Tariff by the Agency Agreement, including the execution of service agreement[s]."²⁴ In *Southwest Power Pool*, the Commission noted the contrast between the functions performed by an RTO and the more limited pre-RTO functions of SPP, acting as tariff administrator.²⁵

III. FERC Jurisdiction – Recent Order on Entergy’s ICT

Recent orders demonstrate that the Commission is somewhat reluctant to expressly disclaim jurisdiction over new transmission entities, even though the new entities control over FERC-jurisdictional services is limited. In its request to form an Independent Coordinator of Transmission (“ICT”), Entergy requested the Commission provide guidance on whether the functions to be performed by the ICT would cause it to become a public utility under the FPA or a Transmission Provider under Entergy’s OATT. Under Entergy’s proposal, the ICT would have authority to grant or deny requests for transmission service, calculate available flowgate capability (AFC), administer Entergy's Open-Access Same Time Information Systems (OASIS), and perform an enhanced planning function (integrating the plans of Entergy and other potential transmission owners to identify regional synergies).

The Commission found that it need not rule on whether the functions of the ICT, alone, would serve to make the ICT a public utility under the FPA since SPP, Entergy’s proposed candidate for the ICT, is already a public utility. The Commission also added that regardless of whether or not the ICT would be a public utility under the FPA, the Commission would have jurisdiction over the agreement between Entergy and the ICT.²⁶

22 *American Elec. Power Serv. Corp.*, 101 FERC ¶ 61,384 (2002). AEP continues to make all filings to amend its tariff, *see, e.g., American Elec. Power Serv. Corp.*, 96 FERC ¶ 61,277 (2001); *American Elec. Power Serv. Corp.*, 94 FERC ¶ 61,166, *reh'g denied*, 95 FERC ¶ 61,130 (2001).

23 *See, e.g.,* SPP Transmission Tariff, Att. C (as filed on December 1, 1998 in Docket No. ER99-783-000).

24 *See id.* § 1.46.

25 *Southwest Power Pool, Inc.*, 98 FERC ¶ 61,038 at 61,110 (2002) (“What distinguishes MISO's situation from SPP's is that MISO would have operational control of its members' facilities, and thus would function as something more than a tariff administrator, loose power pool, or security coordinator, which are SPP's current functions.”).

26 *Entergy Servs. Inc.*, 110 FERC ¶ 61,295 (2005).

IV. FERC Jurisdiction – Power Exchanges

Another area in which the Commission has discussed the FERC-jurisdictional line involves the establishment of power exchanges. The most notable of these decisions involved the establishment of the Automated Power Exchange (“APX”). In that case, APX filed an application requesting that FERC disclaim jurisdiction over its operation as a power exchange. In its application, APX asserted that it would not be a public utility under the FPA because it would not make sales for resale of electric power in interstate commerce or transmit electric energy in interstate commerce, and would not own or operate any facilities subject to FERC’s jurisdiction.

FERC concluded that APX exercised "effective control" over sales in its market and was an integral part of the transactional chain because APX “determines the market price at which energy will be sold, and [] it will take the combined actions of the seller and buyer participants as well as APX to effectuate wholesale sales.”²⁷ FERC rejected the argument that APX was more like the computerized bulletin board system over which FERC had disclaimed jurisdiction in *Continental Power Exchange*, 68 F.E.R.C. ¶ 61,235 (1994), noting that unlike APX’s market, participants in Continental’s system determined price through direct negotiation. Thus, in determining whether a power exchange is a public utility under the FPA, the Commission will review the exchange’s participation in the transaction. If the exchange is a passive bulletin board that simply provides a forum for buyers and sellers of power to match offers and bids, the Commission will most likely find that the exchange is not a public utility. However, if the exchange takes an active role in setting the market price, the Commission may find that the exchange is a public utility and assert jurisdiction over it.

V. Conclusion

When creating new regional transmission services, the question of FERC jurisdiction involves whether a new entity has been created and if so whether it is a public utility. When a new entity is formed, the Commission has held that the relevant test is one of control when determining whether the entity is FERC-jurisdictional. FERC previously has found that an entity will not be deemed a public utility if it is implementing or administering Commission-approved rates, terms and conditions of service, as opposed to creating its own criteria for providing jurisdictional service. In the power pool context, the Commission has previously found that a contractor to a power pool is not a public utility for jurisdictional purposes. A contractor, implementing FERC-jurisdictional activities on behalf of its power pool members, does not become a jurisdictional public utility unless it has actual control over the facilities. In addition, a non-jurisdictional entity does not become jurisdictional just because it is a party to a FERC-jurisdictional agreement, and jurisdictional entities are not responsible for the refund liability associated with the non-jurisdictionals. Recent orders, however, demonstrate that the Commission is somewhat reluctant to expressly disclaim jurisdiction over new transmission entities, even if the new entity’s control over FERC-jurisdictional services is limited.

27 *Automated Power Exchange, Inc.*, 82 F.E.R.C. ¶ 61,287, *order on reh’g*, 84 F.E.R.C. ¶ 61,020, *aff’d*, *Automated Power Exchange v. FERC*, 204 F.3d 1144 (D.C. Cir. 2000).