

138 FERC ¶ 61,040  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Public Service Commission of South Carolina and the South Carolina Office of Regulatory Staff      Docket No. EL11-62-000

ORDER ON PETITION

(Issued January 19, 2012)

1. On September 2, 2011, the Public Service Commission of South Carolina and South Carolina Office of Regulatory Staff (collectively, “South Carolina PSC”) filed a petition requesting the creation of a “joint board” between the South Carolina PSC and this Commission “to study the impact of regulations of the Environmental Protection Agency (EPA) on the reliability and affordability of electric power in the State of South Carolina.”<sup>1</sup> In addition, the petition requests that the Commission make available to the South Carolina PSC and the joint board information relating to the Commission’s informal analysis of the reliability impact of the EPA rules and discussions with the EPA.

2. As discussed in this order, we deny the request for creation of a joint board. We also deny as moot the request for information because this information is already publicly available.

**I. Background**

3. In 2011, the EPA promulgated or proposed several rules affecting the power generation sector. On July 6, 2011, the EPA finalized the Cross State Air Pollution Rule,<sup>2</sup> which requires 27 states to reduce power plant emissions that contribute to ozone and/or fine particle pollution in other states. On December 21, 2011, the EPA issued a

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<sup>1</sup> Petition at 1.

<sup>2</sup> Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Envtl. Prot. Agency Aug. 8, 2011).

Final Rule on the Mercury and Air Toxics Standards (MATS).<sup>3</sup> The MATS Final Rule limits mercury, acid gases and other toxic emissions from power plants. On April 20, 2011, the EPA proposed a rule under section 316(b) of the Clean Water Act establishing requirements for water intake structures existing at power plants and factories.<sup>4</sup>

4. On November 30, 2011, the Commission held a technical conference to consider the possible effects on Bulk-Power System reliability from these and other proposed EPA rules. Representatives from the EPA, Department of Energy, North American Electric Reliability Corporation, South Carolina Public Service Commission, Colorado Public Utilities Commission, Public Utilities Commission of Ohio, District of Columbia Public Service Commission, PJM Interconnection, L.L.C., Southwest Power Pool, Midwest Independent Transmission System Operator, Inc. and others participated in the technical conference and submitted written comments.<sup>5</sup>

## II. Filing

5. The South Carolina PSC states that the EPA has promulgated, proposed, or will propose a significant number of regulations affecting the electric power sector, which it asserts could result in numerous retirements of electric generating units.<sup>6</sup> The South Carolina PSC believes that the EPA has not assessed the cumulative effect of these regulations on the reliability and affordability of electric power. Further, the South Carolina PSC maintains that the impact of the new EPA rules on electric reliability and affordability has not been comprehensively studied by the Commission and that the South

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<sup>3</sup> National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, <http://www.epa.gov/mats/pdfs/20111216MATSfinal.pdf>.

<sup>4</sup> National Pollutant Discharge Elimination System—Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, 76 Fed. Reg. 22,174 (Env'tl. Prot. Agency Apr. 20, 2011).

<sup>5</sup> The technical conference written comments are available on the Commission's eLibrary document retrieval system in Docket No. AD12-01-000.

<sup>6</sup> In addition to the Cross State Air Pollution Rule, MATS Rule, and proposed Cooling Water Intake Structures Rule, the South Carolina PSC states that existing, proposed, or to be proposed EPA rules concerning greenhouse gases, coal ash, and National Ambient Air Quality Standards for sulfur dioxide, nitrogen dioxide, ozone, and fine particulate matter will also affect the power sector. Petition at 2.

Carolina PSC has not been consulted by the EPA regarding the impacts of its regulations on electric reliability in South Carolina.

6. The South Carolina PSC requests the creation of a “joint board” comprised of nominees from interested states and the Commission to assess the reliability impacts of the EPA rules. Further, South Carolina PSC asks that the Commission request that the EPA coordinate the promulgation of its regulations affecting the power sector with the joint board’s work.

7. Separately, the South Carolina PSC asks that all materials relating to the Commission’s informal analysis of the reliability impact of the EPA rules and to the Commission staff’s discussions with the EPA be made available to it and the joint board. The South Carolina PSC states that this information directly relates to its responsibility to engage in state regulation of public utilities.

### **III. Notices of Intervention and Comments**

8. Notice of intervention was filed by the Mississippi Public Service Commission. Notices of intervention and comments in support of the petition were filed by the Louisiana Public Service Commission, Public Service Commission of West Virginia, North Carolina Utilities Commission, South Dakota Public Utilities Commission, Public Utility Commission of Texas, and the Wyoming Public Service Commission.

### **IV. Discussion**

#### **A. Request for “Joint Board”**

##### **1. Filing**

9. The South Carolina PSC states that a federal-state joint board should be formed pursuant to section 209(a) of the Federal Power Act (FPA) to address the cumulative impact of enacted and pending EPA rules on electric reliability. The South Carolina PSC acknowledges that joint boards are “designed for use in unusual cases, and as a means of relief to the Commission when it might find itself unable to hear and determine cases before it, in the usual course, without undue delay.”<sup>7</sup> However, the South Carolina PSC maintains that the requested study of the EPA rules is a suitable candidate for formalized state-federal coordination given the Commission’s responsibility for Bulk-Power System reliability and the state commissions’ responsibility for resource adequacy and the reasonableness of electric service to ultimate consumers. Moreover, the South Carolina

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<sup>7</sup> 18 C.F.R. § 385.1304 (2011).

PSC states that the Commission “may lack the necessary data to conduct this analysis ‘in the normal course without undue delay.’”<sup>8</sup>

## 2. Commission Determination

10. Section 209(a) provides that the Commission “may refer any matter arising in the administration of [Part II of the FPA] to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter.”<sup>9</sup> Generally, section 209(a) is a procedural option for adjudicating rate cases, mergers or other matters arising under Part II, and the joint board is “vested with the same power and . . . subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings.”<sup>10</sup> In this case, reliance on section 209(a) is misplaced because the statute only provides the Commission with the authority to refer any matter arising in the administration of Part II of the FPA to a joint board. The petition, however, does not identify any matter presently before the Commission that is cognizable under Part II of the FPA that could be referred to a joint board. Moreover, the petition does not seek the institution of a proceeding cognizable under Part II of the FPA. Accordingly, in the absence of any matter arising in the administration of Part II of the FPA that could be referred to a joint board, the Commission denies the request.<sup>11</sup>

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<sup>8</sup> Petition at 5.

<sup>9</sup> 16 U.S.C. § 824(h)(a) (2006).

<sup>10</sup> *Id.*; see, e.g., *Stamford Light, Heat and Power Company*, 1 FPC 673 (1936) (designating the Public Service Commission of Vermont as a board to preside at a hearing concerning an application by Stamford Light, Heat and Power Company and Green Mountain Power Corporation under section 203 of the FPA for approval of merger of the whole of the facilities of the former company).

<sup>11</sup> Notwithstanding that we are not establishing a joint board, there are a number of opportunities for a continuing discussion of these issues. For example, the Commission held a conference on November 30, 2011 to discuss emerging issues, including processes used by planning authorities and other entities to identify reliability concerns that may arise in the course of compliance with EPA regulations, and the tools and processes (including tariffs and market rules) available to address any identified reliability concerns. Further, the Commission and the National Association of Regulatory Utility Commissioners are launching a Forum to explore reliability issues stemming from new and pending environmental rules for the power sector.

11. For the reasons above, we deny the petition's request for a joint board.

**B. Request for Information**

**1. Filing**

12. The South Carolina PSC petition requests "any and all materials relating to the Commission's informal analysis of the reliability impact of the EPA rules and to staff's discussions with EPA . . . [and] should include, but not be limited to, any supporting materials that may have accompanied Chairman Wellinghoff's letter of August 1 to Senator Murkowski that have not yet been publicly released."<sup>12</sup> The South Carolina PSC maintains that the issues raised in the petition directly relate to its responsibility to engage in state regulation of public utilities.

**2. Commission Determination**

13. As noted in the petition, the Commission produced information responsive to the South Carolina PSC request on August 1, 2011, in answer to a letter from U.S. Senator Lisa A. Murkowski requesting the staff informal assessment and "all supporting materials including research." That information is publicly available on the website of the United States Senate Committee on Energy and Natural Resources.<sup>13</sup> Accordingly, the request for information is denied as moot.<sup>14</sup>

The Commission orders:

(A) The South Carolina PSC request for creation of a "joint board" is hereby denied, as discussed in the body of this order.

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<sup>12</sup> Petition at 6.

<sup>13</sup> United States Senate Committee on Energy and Natural Resources, [http://energy.senate.gov/public/FERC EPA Responses/FERC EPA Responses.zip](http://energy.senate.gov/public/FERC_EPA_Responses/FERC_EPA_Responses.zip).

<sup>14</sup> Section 209(c) of the FPA provides that the Commission "shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities." We make no determination whether section 209(c) requires the production of the information at issue here or if it will be of assistance in the South Carolina PSC's regulation of its public utilities.

(B) The South Carolina PSC request for information is denied as moot, as discussed in the body of this order.

By the Commission. Commissioner Moeller is concurring with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

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MOELLER, Commissioner, *concurring*:

While I concur that this Commission is not legally obligated to form a “joint board” with the State of South Carolina, the Commission can still respond to South Carolina’s request in a manner that is productive. That is, instead of a joint board, the expert staff in this agency should be given the opportunity to work with South Carolina (and any other state that requests such assistance) in an open and transparent manner to address the issue of reliability.

Any joint effort between the states and the federal government requires the enthusiastic support of the participants. Despite the evidence that was submitted as part of our recent conference on reliability issues,<sup>1</sup> and despite the urgent need of this nation to maintain a reliable electric grid that is the envy of the world, this Commission has not

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<sup>1</sup> Included among the unchallenged evidence of widespread reliability issues, see the response of the Southwest Power Pool (SPP) to Commissioner Moeller’s request for evidence:

contingency scenarios did not solve, which is indicative of extreme system constraints, including the potential of cascading blackouts similar to what occurred in 2003 or which could require the shedding of firm load (that is, localized rolling black-outs initiated by utilities within the SPP region) to avoid more widespread and uncontrolled blackouts and to remain in compliance with reliability standards.

Page 3 of SPP’s comments in Docket AD12-1, submitted to FERC by SPP on December 20, 2011, quoting a letter that SPP sent to EPA Administrator Lisa P. Jackson on September 20, 2011. And as stated further by SPP at page 4:

based upon overwhelming evidence and testimony before the Commission ... compliance with EPA Rules and Regulations while maintaining the reliability of our nation’s electric grid will require a strong coordination between electric generators, RTOs, non-RTO regions, EPA, NERC and FERC.

yet demonstrated a commitment to overcoming the obstacles that have now been imposed on the reliable operation of the power grid. Perhaps the upcoming FERC and NARUC Forum<sup>2</sup> will be the start of a meaningful collaboration and open exchange of data, and not just another opportunity to hear talking points of the federal government.

Ultimately, reliability is the result of the difficult and day-to-day work of the thousands of individuals who work in control rooms and on the physical assets that are owned by cooperatives, municipal power agencies, state agencies, investor-owned utilities, and federal power agencies. It is not the regulator, but the men and women working on the power grid who fully understand how to maintain reliability --- and these individuals cannot be excluded from the discussion. If they are excluded, uninformed or bad policy decisions by regulators could result in the failure of reliability.

For these reasons, an open and transparent process will be critical to ensuring that the public has an opportunity to inform the federal government about the work that will be required to ensure reliable electricity.

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Philip D. Moeller  
Commissioner

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<sup>2</sup> Press release issued by FERC on January 4, 2012, available at: <http://www.ferc.gov/media/news-releases/2012/2012-1/01-04-12.asp>