MEMORANDUM

TO: Ben Bright
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FROM: John Conway
       Fred Ritts

DATE: June 28, 2010

RE: Whether FERC Jurisdiction Over the E-RSC Can Be Created Under the Section 205 Filing Provisions of the Draft Memorandum of Understanding

During the June 15-16, 2010 meeting of the E-RSC, and in comments made to the E-RSC Working Group’s Draft Memorandum of Understanding,¹ the question arose as to whether the MOU, in providing the E-RSC the authority to require Entergy to make filings at FERC under Section 205 of the Federal Power Act, would make the E-RSC FERC jurisdictional. The answer to that question, whether presented to FERC as a request for a Declaratory Order or in response to actions taken by FERC in response to a filing, should be NO. The reasons supporting that answer follow.²

¹ Comments from Entergy Services, Inc. submitted June 10, 2010 to the E-RSC Working Group, at p. 4, n. 3 (the “Entergy June 10 Comments”).

² Although FERC has taken the position, affirmed on judicial review, that the state has no such authority when the jurisdictional utility objects to making the filing, Western Massachusetts Electric Co., 23 FERC ¶ 61,025 (1983), aff’d sub nom. Commonwealth of Massachusetts v. FERC, 729 F.2d 886 (1st Cir. 1984); and FERC cannot itself require the filing, Atlantic City Electric Company v. FERC, 295 F.3d 1 at 10 (D.C. Cir. 2002), a consensual agreement under which the jurisdictional entity agrees to file under Section 205 as requested by its state commissions will be approved by FERC as lawful. See Southwest Power Pool, 109 FERC ¶ 61,010 at PP 92-93 (2004); cf Midwest Independent Transmission System Operator, Inc. 122 FERC ¶ 61,283 at PP 66-67 (2008).
It is black-letter law that FERC is a “creature of statute” having “only those authorities conferred upon it by Congress”; and “FERC exceeds its jurisdiction under the APA if it regulates an entity that Congress has explicitly exempted from the statute.” *Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007)(internal quotation marks and citations omitted). Section 201(f) of the Federal Power Act, 16 U.S.C. § 824(f), makes plain that, absent a specific statutory provision, state agencies are “explicitly exempted” from FERC jurisdiction. Section 201(f) states, in relevant part, that

No provision in this subchapter shall apply to, or be deemed to include, . . . 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 or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

There can be no argument that the members of the E-RSC fall under the purview of Section 201(f). Acting in their respective individual capacities, they cannot be swept into FERC’s jurisdictional orbit “unless such provision [of the Federal Power Act] makes specific reference thereto.” Acting as a single entity in concert under the MOU does not change that non-jurisdictional status. Section 201(f) explicitly exempts an “instrumentality of any one or more of the foregoing.” Properly viewed, the E-RSC is an exempt “instrumentality,” as are its members.

It is also well-established that, under the statutory scheme, otherwise non-jurisdictional entities cannot volunteer to make themselves jurisdictional.

[J]urisdiction cannot arise from the absence of objection, or even from affirmative agreement. To the contrary, “as a statutory entity, the Commission cannot acquire jurisdiction merely by agreement of the parties before it.” As the Supreme Court has explained, “parties . . . cannot confer jurisdiction; only Congress can.”

*Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 463 (D.C. Cir. 2005) (internal citations omitted); *see generally Bonneville Power Administration v. FERC*, 422 F.3d 908, 924-925 (9th Cir. 2005).

With this background, we move to the specific question of whether the E-RSC, in being empowered under the MOU to require Entergy to make Section 205 filings, will thereby become FERC jurisdictional either on the basis of having that authority or by exercising that authority.
Section 205 provides no basis for FERC to exert jurisdiction over the E-RSC under *any* circumstances. First, there would be no jurisdiction created if the E-RSC were to make the filing itself. As FERC has recognized in rejecting the attempt of the South Carolina Public Service Authority to make a voluntary Section 205 filing, Section 205 of the Federal Power Act provides no specific reference to imposing FERC jurisdiction over state instrumentalities and no such Section 205 jurisdiction can be created.

Because the Commission is prohibited by statute from regulating directly the activities of non-public utilities under Sections 205 and 206, the Authority cannot simply waive this restriction and volunteer to become subject to this Commission’s jurisdiction under Sections 205 and 206.

South Carolina Public Service Authority, 75 FERC ¶ 61,209 at p. 61,696 (1996)(emphasis in original); see also New West Energy Corp., 83 FERC ¶ 61,004 at p. 61,015 (1998)(rejecting Section 205 filing made by an instrumentality of a state agency on the basis of section 201(f)). Stated simply, if the E-RSC cannot voluntarily create FERC jurisdiction, it cannot do so accidently, either.

South Carolina PSA should serve as a complete answer to the concerns raised by the June 10 Entergy Comments. Even if the E-RSC in requiring Entergy to make a Section 205 filing could, somehow, be found to be, in the terms of Section 205, acting “in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission,” – the gravamen of the concern raised by the Entergy June 10 Comments – that finding would not render the E-RSC FERC-jurisdictional. “[T]he FPA . . . bases the ‘FERC’s authority . . . on the identities of the [service provider], rather than the nature of the transactions.” Central Iowa Power Cooperative v. Midwest Independent Transmission System Operator, 561 F.3d 904, 918 (8th Cir., 2009)(quoting Transmission Agency of Northern California v. FERC, 495 F.3d at 674). If an otherwise non-jurisdictional entity cannot trigger FERC jurisdiction by performing actions that would require making a Section 205 filing, it is difficult to see how FERC jurisdiction would attach under the MOU when it would be Entergy, the jurisdictional utility, making that filing.3

Even if Section 201(f) did not, by its terms, exempt the E-RSC, the E-RSC would not be taking any action under the MOU that would make it a “public utility” subject to

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3 It should not escape notice that when FERC has squarely confronted a state authority asserting the power to require a public utility to make a Section 205 filing, the question of the state authority thereby becoming FERC-jurisdictional has just not come up. See Midwest Independent Transmission System Operator, Inc. 122 FERC ¶ 61,283 at PP 66-67 (2008); Southwest Power Pool, 109 FERC ¶ 61,010 at PP 92-93 (2004); Western Massachusetts Electric Co., 23 FERC ¶ 61,025 (1983), aff’d sub nom. Commonwealth of Massachusetts v. FERC, 729 F.2d 886 (1st Cir. 1984). Although not dispositive, this silence is telling.
the jurisdiction of the Commission.” At most, there might be an argument that an entity that can require a public utility to file under Section 205 for a rate change that may go into effect – whether permanently or subject to refund – has control over rates and terms and conditions of service. But this appears to fall far short of “ownership” and facility “control” that is the hallmark of finding FERC jurisdiction.

Finally, there is a simple prophylactic available against the (remote) contingency of the E-RSC being found to be FERC-jurisdictional because of its authority to require a Section 205 filing of the scope envisioned under the Draft MOU. A condition can be inserted in the MOU that would automatically terminate that element of the MOU and automatically provide for the withdrawal of the offending filing, if that finding is made.

To summarize: Given the broad sweep of Section 201(f) and judicial and FERC precedent, there is little, if any, chance of the E-RSC or of the individuals serving on the E-RSC being found FERC-jurisdictional under the terms of the Draft MOU’s Section 205 filing provisions. Consequently, the concerns raised by Entergy in its June 10 Comments that the E-RSC’s authority to require changes to significant portions of Entergy’s OATT may trigger FERC jurisdiction should be allayed.

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4 Under Section 201(e) of the Federal Power Act, a “public utility” is defined as “any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter” other than certain facilities otherwise explicitly subject to FERC’s jurisdiction solely by reason of certain provisions, as for example, facilities involved in certain required interconnection proceedings (e.g. 16 U.S.C. §§ 824i, 824j and 824k); or facilities falling under the reliability provisions of 16 U.S.C. § 824o; or facilities under the siting provisions of 16 U.S.C. § 824p. For a complete list of these special provisions, see Section 201(e), 16 U.S.C. § 824(e). For our purposes, it only bears noting that the E-RSC does not own or operate facilities subject to FERC’s jurisdiction.

5 The cases cited in the Entergy June 10 Comments are instructive in this regard. Those cases, Bechtel Power Corp., 60 FERC ¶ 61,156 at 61,572 (1992), El Paso Electric Co., et al. 108 FERC ¶ 61,071 at P. 7 (2004), and PSI Energy Inc., 63 FERC ¶ 61,107 (1993), involve determining whether, on their facts, an entity had sufficient control over jurisdictional operations and facilities to warrant finding them jurisdictional. As to operation, FERC found that “operates” refers “to the person who has control and decisionmaking authority concerning the operation of the [f]acility.” Bechtel at p. 61,572. The E-RSC has no operational control over Entergy facilities under the MOU. Cf El Paso 108 FERC ¶ 61,071 at P. 16 (finding Enron had control over facilities when it had control over the quantity, availability and pricing of wholesale power sales by a competitor”); PSI Energy Inc., 63 FERC ¶ 61,107 (1993) at p. 61,753 (finding utility jurisdictional when utility, under the terms of an O&M agreement, was subject only to a “prudent utility practice” standard and not the oversight of the other co-owners).