

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
101 FERC ¶ 61,052

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

City of College Station, Texas

Docket Nos. TX96-2-000,
TX96-2-001,
TX96-2-002, and
TX96-2-006

ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued October 11, 2002)

Summary

1. This order sets certain claims for regulatory expenses for hearing, and rejects others. This order benefits customers by allowing utilities to recover just and reasonable expenses associated with their participation in proceedings before this Commission, provided that they properly support the requested recovery and amortize the expenses over an appropriate period.

Background

2. In College Station I, the Commission established the rates, terms and conditions for transmission services that the City of Bryan, Texas (Bryan) and the Texas Municipal Power Agency (TMPA) supply to the City of College Station, Texas (College Station).¹ The Commission also allowed Bryan and TMPA to seek recovery from College Station of regulatory expenses pertaining to that proceeding, through a rate filing under the

¹City of College Station, Texas, 86 FERC ¶ 61,165 (1999) (College Station I or Final Order), order on reh'g, 97 FERC ¶ 61,152 (2001) (College Station II), order on reh'g, 98 FERC ¶ 61,222 (2002) (College Station III).

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Federal Power Act (FPA) that properly supports the requested expenses, including amortization over an appropriate period.²

3. On June 20, 2002, Bryan and TMPA made a filing (Joint Application), with attached tariff sheets, to recover regulatory expenses. Bryan and TMPA seek to recover regulatory expenses not only incurred for the proceeding before this Commission (Docket No. TX96-2-000, et seq.) but also incurred for a proceeding before the Texas Public Utilities Commission (Texas Commission) (Texas Commission Docket No. 15296). Bryan and TMPA state that they participated in both proceedings as a direct result of College Station's requesting that the Commission order transmission service.³

4. TMPA claims that its regulatory expenses are: \$1,651,758, including interest for FERC Docket No. TX96-2-000, et seq. and \$686,712, including interest, for Texas Commission Docket No. 15296. Bryan claims that its regulatory expenses are: \$589,426, plus interest, for FERC Docket No. TX96-2-000, et seq., and \$299,061 plus interest, for Texas Commission Docket No. 15296.⁴

5. Bryan and TMPA state that these amounts reflect actual expenses that they incurred through March 31, 2002, and that they will make a later filing for regulatory expenses that they incur after that date.⁵ Bryan and TMPA propose to recover these expenses either through lump sum payments or through equal monthly installments, including interest, based on a three year amortization schedule.⁶

²College Station I, 86 FERC at 61,582; College Station II, 97 FERC at 61,668.

³Bryan and TMPA state that "College Station initiated these proceedings when it filed its Section 211 petition in December 1995 . . . As a direct result of College Station's filing [with this Commission] TMPA and Bryan are required to participate in . . . proceedings before two regulatory agencies, the FERC . . . and the [Texas Commission]." Joint Application at 3.

⁴Joint Application at 5-7.

⁵Id.

⁶Id. at 10.

Notice and Protest

6. The Commission published notice of Bryan's and TMPA's filing in the Federal Register, 67 Fed. Reg. 44,189 (2002), with interventions and protests due on or before July 11, 2002. On July 11, 2002, as amended on July 12, 2002 and August 19, 2002, College Station filed a motion to intervene and a protest.⁷ On July 26, 2002, as amended on September 3, 2002, Bryan and TMPA filed an answer to College Station's protest.

7. College Station asks the Commission to reject the Joint Application or to hold it in abeyance pending completion of the Commission's proceedings in Docket No. TX96-2-000, et seq.⁸ College Station notes that the Joint Application covers only part of Bryan's and TMPA's regulatory expenses and that Bryan and TMPA intend to file later to recover further regulatory expenses. College Station argues that the Commission never indicated that Bryan and TMPA could make multiple claims for regulatory expenses or that Bryan and TMPA were free to file an interim claim for partial expenses. According to College Station, the Commission intended that Bryan and TMPA would make one rate filing for recovery of regulatory expenses, rather than recover those expenses through multiple filings.⁹ College Station also maintains that it would be unfair to allow Bryan and TMPA to adjudicate incomplete or partial claims for regulatory expenses and force College Station to litigate the issue several times.¹⁰ College Station therefore asks the Commission to reject the Joint Application without prejudice to Bryan's and TMPA's right to file a full and final claim for regulatory expenses at the completion of the proceeding.¹¹ As an alternative, College Station asks the Commission to require TMPA

⁷College Station's motion to intervene is unnecessary. College Station is already a party to this proceeding by virtue of having filed the application for transmission service from Bryan and TMPA. See 18 C.F.R. § 385.102(c)(1) (2002).

⁸Protest, as amended July 12, 2002, at 9-16.

⁹Id. at 13-14.

¹⁰Id. at 14.

¹¹Id. at 14.

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and Bryan to file an estimate of future regulatory expenses before the Commission accepts their filing and orders further procedures.¹²

8. College Station also challenges as beyond this Commission's jurisdiction an award of regulatory expenses for the Texas Commission proceeding (Docket No. 15296). It argues that an award of regulatory expenses for that proceeding is solely within the jurisdiction of the Texas Commission.¹³

9. College Station further contests "each and every category of regulatory expense claimed by TMPA and Bryan."¹⁴ It argues that Bryan and TMPA have failed to supply the underlying documentary support necessary to allow the Commission to determine: (a) whether Bryan and TMPA have paid the claimed expenses in connection with matters directly related to College Station's request in Docket No. TX96-2-000 for transmission; (b) whether Bryan and TMPA's claims include duplicative, unnecessary or unreasonable expenses; and (c) whether the expenses were reasonable and competitive when Bryan and TMPA incurred them.¹⁵ College Station also contends that the documents and testimony of Bryan's and TMPA's witnesses do not support an award of the regulatory expenses that Bryan and TMPA claim.¹⁶ College Station thus requests a hearing to determine whether the amount of the claimed regulatory expenses is reasonable under the circumstances.¹⁷ It also contests Bryan and TMPA's request for interest on regulatory expenses.¹⁸

Discussion

A. Preliminary Matter

¹²Id. at 15-16.

¹³Id. at 16-21.

¹⁴Id. at 27.

¹⁵Id.

¹⁶Id. at 26-31.

¹⁷Id. at 31-33.

¹⁸Id.

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10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹⁹ prohibits an answer to a protest unless authorized by the decisional authority. As we are not persuaded to allow Bryan and TMPA's answer to College Station's protest, we will reject it.

B. Regulatory Expenses Associated with Texas Commission Docket No. 15296

11. We will reject Bryan's and TMPA's request for regulatory expenses incurred in Texas Commission Docket No. 15296, for the reasons noted below.

12. On March 31, 1997, the Texas Commission rejected Bryan's and TMPA's request for regulatory expenses in Texas Commission Docket No. 15296, finding that Bryan and TMPA failed to meet the burden of proof necessary to support their claims for regulatory expenses incurred in the connection with that Docket.²⁰

13. Bryan and TMPA filed their Final Briefs in FERC Docket No. TX96-2-002 on November 5, 1997, well after the Texas Commission had rejected their requests for regulatory expenses with respect to Texas Commission Docket No. 15296. In their Final Briefs Bryan and TMPA claimed only those regulatory expenses associated with FERC Docket No. TX96-2-000.²¹ They stated that they were not seeking to recover in FERC Docket No. TX96-2-000:

any expenses associated with the . . . proceedings before the [Texas Commission], the State district court actions, or the Federal district court antitrust action brought by College Station.²²

14. On March 14, 2001, we directed the parties to inform the Commission "how, in [each parties'] view, the Texas courts' rulings and the new rules that the Texas Commission [was] establishing for the provision of transmission service within [the Electric Reliability Council of Texas (ERCOT)] affect the requests for rehearing and

¹⁹18 C.F.R. § 285.213(a)(2) (2002).

²⁰Texas Commission Order in Docket No. 15296 at 18.

²¹Bryan Final Brief at 26; TMPA Final Brief at 22.

²²Bryan Final Brief at 26, n.35; TMPA Final Brief at 22, n.87.

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motions to vacate in this proceeding.”²³ In their responses to this request for information, neither Bryan nor TMPA indicated that they sought any regulatory expenses other than those associated with FERC Docket No. TX96-2-000.

15. Bryan and TMPA knew when they filed their Final Briefs that the Texas Commission would not allow them to recover regulatory expenses with respect to Texas Commission Docket No. 15296. Yet, in their Final Briefs, they explicitly disavowed any claim for recovery of regulatory expenses associated with Texas Commission Docket No. 15296. They did not raise the issue before the Commission issued its Final Order in this proceeding,²⁴ nor did they raise this issue in their requests for rehearing of the Commission’s Final Order or in response to the Commission’s request for further information.

16. Moreover, the Commission’s Final Order in this proceeding limited Bryan’s and TMPA’s recovery of regulatory expenses to those regulatory expenses that Bryan and TMPA incurred in litigating Docket No. TX96-2-000.²⁵ The claim in Bryan and TMPA’s compliance filing for regulatory expenses related to Texas Commission Docket No. 15296 is really a collateral attack on the Commission’s Final Order in Docket No. TX96-2-000. As Bryan and TMPA did not raise this issue in their request for rehearing of the Commission’s Final Order in this proceeding, or demonstrate reasonable grounds for their failure to do so, they may not raise it now.²⁶

²³City of College Station, Texas, 94 FERC ¶ 61,250 at 61,881 (2001).

²⁴I.e., College Station I.

²⁵See College Station I, 86 FERC at 61,582 (“Bryan and TMPA seek to recover from College Station their regulatory expenses in connection with this proceeding.” emphasis supplied, citing Bryan Final Brief at 25-29; TMPA Final Brief at 22-25); College Station II, 97 FERC at 61,667-68 (“In College Station I we allowed Bryan and TMPA to seek recovery of their regulatory expenses in this proceeding. . . . Bryan and TMPA could not foresee how we would rule in this case. . . . [Bryan and TMPA’s regulatory costs] pertain solely to College Station’s filing. . . . Bryan and TMPA are entitled to recover regulatory expenses from the customer whose services and rates are at issue before us.” emphasis supplied).

²⁶Platte River Whooping Crane Habitat Maintenance Trust, 962 F.2d 27, 34-35, reh’g en banc denied, 972 F.2d 1362 (D.C. Cir. 1992); accord Town of Norwood v.

(continued...)

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17. In any event, this Commission has no jurisdiction to award regulatory expenses associated with Texas Commission Docket No. 15296. That is a matter exclusively within the province of the Texas Commission. In our Final Order we held that:

[W]e do not have jurisdiction to establish rates for the requested transmission service in ERCOT prior to the effective date of a final order from this Commission requiring transmission services under Sections 211 and 212.²⁷

We have steadfastly maintained this position.²⁸ In College Station III we pointed out that:

[A]s provided in Section 212, . . . the Commission had to allow the parties adequate time to agree to the terms and conditions under which the transmission would occur, including the proper apportionment of costs between them and the appropriate level of compensation. Only at the end of the negotiating period could the Commission issue a Final Order prospectively directing transmission and fixing the compensation for the service. Were the Commission to prescribe rates for the pre-Final Order period of transmission, it would be prescribing rates for transmission that occurred before the Commission had statutory authority to order the service. The Commission has no statutory authority to do this.²⁹

As the Commission had no authority to prescribe rates for the pre-Final Order period, it a fortiori has no authority to award regulatory costs for the proceeding that established them.

²⁶(...continued)
FERC, 777 F.2d 764, 774 (D.C. Cir. 1985).

²⁷College Station I, 86 FERC at 61,583, quoting City of College Station, Texas, 76 FERC ¶ 61,138 at 61,741 (1996).

²⁸See College Station II, 97 FERC at 61,666-67; College Station III, 98 FERC at 61,876-77.

²⁹College Station III, 98 FERC at 61,876; accord id. at 61,877.

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18. Bryan and TMPA nevertheless argue that we should award them regulatory expenses for their participation in the Texas Commission Docket No. 15296 proceeding because we effectively required them to seek a ruling from the Texas Commission on the appropriate rates for pre-Final Order transmission to College Station.³⁰ We disagree with their reading of our earlier orders, and their claim that they are entitled to relief because of what we said in those orders. We conditioned our public interest finding (that underlay our ordering transmission) upon Bryan and TMPA being fully compensated for the transmission service that they provided to College Station before the date of our Final Order, and we stated that so long as the Texas Commission prescribes such rates our public interest finding is satisfied;³¹ the statutory scheme precludes our fixing rates for pre-Final Order transmission service to College Station and our awarding regulatory costs for Bryan and TMPA's participation in the Texas Commission proceeding that established those rates.³²

C. Regulatory Expenses Associated with FERC Docket No. TX96-2-000, et seq.

19. As noted above, we will deny Bryant's and TMPA's claims for regulatory expenses associated with their participation in the Texas Commission Docket No. 15296 proceeding. Bryan's and TMPA's claims for regulatory expenses associated with FERC Docket No. TX96-2-000, et seq., however, raise factual questions that we cannot summarily decide based on the record before us. We can best address these matters in the hearing that we order below.

20. Our preliminary analysis indicates that the proposed rates for regulatory expenses associated with FERC Docket No. TX96-2-000, et seq. have not been shown to be consistent with the requirements of sections 211 and 212 of the FPA and may be inconsistent with those requirements. Therefore, we will set the Joint Application and the accompanying tariff sheets (as modified to exclude claims for regulatory expenses related to Texas Commission Docket No. 15296) for hearing. We will also consolidate Docket No. TX96-2-006 with Docket No. TX96-2-000, et seq. for purposes of hearing and decision (as well as for purposes of settlement), as provided below.

³⁰Joint Application at 7.

³¹College Station III, 98 FERC at 61,877.

³²Id.

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21. To assist the parties in resolving this matter amicably, however, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³³ As Docket No. TX96-2-000, et seq. is already the subject of settlement judge procedures, we will leave it to the discretion of the presiding judge in that proceeding to determine the procedures best suited for incorporating the settlement discussions in this matter with the settlement discussions that the parties are already having.

22. Finally, we encourage the parties to resolve this matter completely – i.e., for the prior period and prospectively – either through settlement discussions or through hearing procedures.³⁴

The Commission orders:

(A) Docket No. TX96-2-006 is hereby consolidated with Docket No. TX96-2-000, et seq.

(B) Bryan and TMPA's claims for regulatory expenses associated with Texas Commission Docket No. 15296 are hereby denied.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the FPA, particularly Sections 211 and 212 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter 1), a public hearing shall be held in Docket No. TX96-2-006 into the reasonableness of the regulatory expenses associated with FERC Docket No. TX96-2-000, et seq., as discussed in the body of this order. However, hearing procedures shall be held in abeyance pending the settlement judge procedures ordered below.

(D) The settlement judge designated to oversee the settlement discussions in Docket No. TX96-2-000, et seq. shall determine the procedures best suited to accommodate consolidation of Docket No. TX96-2-006 with the pending proceeding.

³³18 C.F.R. § 385.603 (2002).

³⁴See, e.g., Boston Edison Company, 57 FERC ¶ 61,302 at 61,986 (1991), order on reh'g, 60 FERC ¶ 61,278 (1992) (estimated regulatory expenses associated with litigating transmission service agreement).

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(E) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and with the Commission on the status of the settlement discussions in this docket. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(F) If settlement discussions fail, a presiding administrative law judge, to be designated by the Chief Judge, shall convene a prehearing conference in this proceeding, to be held within approximately fifteen days of the settlement judge's report to the Chief Judge and the Commission, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E. Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding administrative law judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.