

101 FERC ¶ 61,370
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PPL Electric Utilities Corporation

Docket No. EL03-16-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued December 26, 2002)

1. On October 18, 2002, PPL Electric Utilities Corporation (PPL) filed a petition for a declaratory order pursuant to section 206 of the Federal Power Act (FPA),¹ concerning the scope of a Settlement Agreement entered into between PPL and the Borough of Olyphant, Pennsylvania (Olyphant), among others.² PPL requests an order from the Commission stating that if Olyphant, a municipal utility and a wholesale customer of PPL, secures the right to provide electric service to certain of PPL's existing retail customers, the Settlement Agreement would not address (and would not otherwise govern) the obligation of those retail customers to pay retail stranded costs to PPL. For the reasons discussed below, we will grant PPL's petition. The Settlement Agreement, while addressing PPL's rights to recover wholesale stranded costs from the parties to that proceeding, including Olyphant, does not address PPL's rights to recover retail stranded costs from its existing retail customers, who were not parties to the Settlement Agreement.

Background

2. PPL states that in May, 1996, Olyphant filed a petition with the Commission, pursuant to section 211 of the FPA, seeking to require PPL to provide an unbundled transmission service to Olyphant following the termination of the parties' then-existing wholesale requirements service agreement. PPL states that an order addressing

¹16 U.S.C. § 824e (2000).

²See Letter Order, Borough of Lansdale, et al., Docket No. SC97-1-001 (May 29, 1998).

Olyphant's petition was issued by the Commission in Borough of Lansdale, et al.,³ in which we dismissed Olyphant's section 211 request for transmission service as moot, given: (1) the issuance of Order No. 888;⁴ (2) PPL's subsequent filing of an open access transmission tariff; and thus (3) the entitlement of Olyphant to obtain the requested service without recourse to the procedures specified under section 211. In addition, PPL states that the Commission, in its order, set for hearing PPL's entitlement to recover wholesale stranded costs from Olyphant in the event that PPL's wholesale bundled service to Olyphant was terminated.

3. PPL states that the Settlement Agreement addressed all issues set for hearing in the Stranded Cost Order by requiring Olyphant, upon termination of its then-current service agreement, to enter into a new five-year power supply agreement with PPL. In return, PPL states that it agreed to waive its "right to seek[] any stranded cost recovery or exit fee against any of the parties to th[e] Settlement Agreement."

4. PPL states that while the Settlement Agreement resolved all issues relating to its wholesale stranded cost claims, the stranded cost obligations of PPL's retail customers were separately addressed by the Pennsylvania Public Utility Commission (Pennsylvania Commission). PPL states that in April, 1997, it applied to the Pennsylvania Commission for approval of a restructuring plan that included a request for the recovery of certain costs that it claimed had become stranded due to the enactment of Pennsylvania's retail unbundling statute.⁵ PPL states that on August 27, 1998, the Pennsylvania Commission issued an order authorizing PPL to collect up to \$2.97 billion in stranded costs from all retail customers located in its certificated service territory, as of the effective date of Pennsylvania's retail unbundling.

³77 FERC ¶ 61,045 (1996) (Stranded Cost Order).

⁴See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Cost by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,730-32 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in part and rev'd in part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom., New York v. FERC, 122 S. Ct. 1012 (2002).

⁵See PPL Petition at 8, citing Electricity Generation and Customer Choice Act, 66 Pa. Cons. Stat. Ann. §§ 2801, et seq. (West. Supp. 2001).

5. PPL states that among the retail customers from whom it is entitled to collect retail stranded costs are approximately 75 customers located in an Industrial Park within PPL's existing service territory. PPL states, that since 1997, however, Olyphant has been taking steps to acquire these customers and has filed a lawsuit relating to these matters in the United States District Court for the Middle District of Pennsylvania. PPL states that in its lawsuit, Olyphant has alleged, among other things, that the Settlement Agreement frees PPL's retail customers from their obligations to pay retail stranded costs if these retail customers terminate their service from PPL and become, instead, customers of Olyphant.

6. To clarify the intended reach of the Settlement Agreement, under these circumstances, PPL seeks confirmation that the Settlement Agreement addresses only the wholesale stranded cost obligations of the parties to that agreement, including Olyphant, and do not affect the retail stranded cost obligations of PPL's retail customers (who were not parties to the Settlement Agreement). PPL asserts that a contrary ruling, as advocated by Olyphant, would have the unbargained for (and wholly illogical) consequence of shifting costs now paid by PPL's retail customers in the Industrial Park to other retail customers in PPL's service territory. PPL further argues that such an interpretation of the Settlement Agreement would undermine the retail stranded cost compensation plan approved by the Pennsylvania Commission on which the Pennsylvania Commission, PPL, and PPL's retail customers throughout its service territory have justifiably relied.

Notice of Filing and Responsive Pleadings

7. Notice of PPL's petition was published in the Federal Register,⁶ with interventions and protests due on or before November 18, 2002. Motions to intervene and protests were timely filed by Olyphant and the PP&L Industrial Customer Alliance (Industrial Customers).

8. In its protest, Olyphant requests that the Commission not rule on PPL's petition, because PPL should not be permitted to fragment the body of issues now pending in Olyphant's district court action against PPL (in which the meaning of the Settlement Agreement is directly at issue). In the alternative, Olyphant asserts that even if PPL does have standing to seek such a clarification, the Settlement Agreement, on its face, precludes PPL from seeking to recover stranded costs applicable to Olyphant's wholesale purchases (regardless of the loads served by these purchases and their existing status under Pennsylvania law).

⁶67 Fed.Reg. 67,169 (2002).

9. Industrial Customers take no position regarding the meaning of the Settlement Agreement. However, Industrial Customers assert that in interpreting the Settlement Agreement, the Commission should not also interpret PPL's retail stranded cost obligations under Pennsylvania law.

10. On December 3, 2002, PPL filed an answer addressing the protest and comments submitted by Olyphant and Industrial Customers.

Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice of Procedure,⁷ the timely, unopposed motions to intervene filed by Olyphant and Industrial Customers serve to make these entities parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,⁸ prohibits an answer to a protest, unless otherwise permitted by the decisional authority. We are not persuaded to accept PPL's answer and therefore will reject it.

B. Analysis

12. We reject Olyphant's request that the Commission decline to rule on PPL's petition. In disputes involving contract claims over which we have jurisdiction under the FPA, but which are also pending in another forum, the Commission has considered three factors governing its application of its primary jurisdiction:

Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts [or in federal courts as a diversity jurisdiction claim or federal law claim] depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the

⁷18 C.F.R. § 385.214 (2000).

⁸Id. at § 385.213(a)(2).

type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.^{9]}

13. Here, we find that PPL's petition satisfies the first of these three factors. The Settlement Agreement, which PPL asks us to interpret, was approved by the Commission; it was entered into by the parties as a result of the evidentiary hearing procedures established by the Commission in the Stranded Cost Order and was negotiated and agreed to by the parties following the development of an extensive record in that proceeding. The issues addressed in the Settlement Agreement, moreover, are directly related to the stranded cost policies and guidelines set forth by the Commission in Order No. 888, where among other things, we delineated the distinction between wholesale and retail stranded costs.¹⁰ Accordingly, we will exercise our primary jurisdiction, here, and thus clarify the scope of the Settlement Agreement, as requested.

14. The Settlement Agreement states, in relevant part, that PPL "will not seek, and hereby waives the right to seek, any stranded cost recovery or exit fee against any of the parties to this Settlement Agreement."¹¹ In return, the parties agreed to execute new wholesale supply agreements. Because the parties to the Settlement Agreement were PPL's wholesale requirements customers (who initiated the proceeding in which the Settlement Agreement was approved to pursue their rights to wholesale services), we clarify, here, that the Settlement Agreement does not address – and thus would not limit or preclude – PPL's ability to recover retail stranded costs from its existing retail customers.¹²

⁹Arkansas Louisiana Gas Company v. Hall, 7 FERC ¶ 61,175, at 61,322, reh'g denied 8 FERC ¶ 61,031 (1979). Accord Southern California Edison Company, 85 FERC ¶ 61,023, at 61,069 (1998); Portland General Electric Company, 72 FERC ¶ 61,009 at 61,021-22 (1995).

¹⁰Order No. 888 at 31,814.

¹¹See Settlement Agreement at Article 6.2 (emphasis added).

¹²In fact, in the Stranded Cost Order, we set for hearing no issues relating to PPL's recovery of retail stranded costs from its existing retail customers, nor were we asked to otherwise address those issues. See Stranded Cost Order, 77 FERC at 61,157 ("Because the [power supply contracts] at issue in this case . . . [do] not contain an exit fee or other explicit stranded cost provision, [and were executed on or before July 11, 1994, they] fall within the category of wholesale requirements contracts for which a utility may seek

(continued...)

Docket No. EL03-16-000

- 6 -

15. PPL's entitlement to recover retail stranded costs from its existing retail customers was the subject of a separate proceeding before the Pennsylvania Commission, which resulted in a final order dated August 27, 1998. While we are not asked to address (and do not address) PPL's obligations under that state-issued order, we do note that Olyphant's strained interpretation of the Settlement Agreement would effectively nullify that order in a way not contemplated by the Settlement Agreement and not contemplated by our policies regarding the recovery of stranded costs under Order No. 888.

The Commission orders:

PPL's petition for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.

¹²(...continued)

stranded cost recovery [under Order No. 888].") (emphasis added). PPL's retail customers, moreover, were not parties to the proceeding.