

106 FERC ¶ 61, 169
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Texas-New Mexico Power Company

Docket No. EL04-15-000

v.

El Paso Electric Company

ORDER SETTING COMPLAINT FOR HEARING, AND ESTABLISHING HEARING
PROCEDURES AND REFUND EFFECTIVE DATE

(Issued February 18, 2004)

1. On November 3, 2003, Texas-New Mexico Power Company (TNMP) filed a complaint in this proceeding against El Paso Electric Company (El Paso) asking the Commission to: (1) determine that TNMP has a rollover right to continue the network-type transmission service component of a bundled pre-Order No. 888¹ Power Sale Agreement between TNMP and El Paso;² (2) determine that TNMP properly exercised its rollover rights under the Power Sale Agreement by providing timely notice and a request for network service under El Paso's Open Access Transmission Tariff (OATT); and (3) direct El Paso to allow TNMP to exercise its rollover rights under the Power Sale Agreement by providing TNMP with network transmission service pursuant to El Paso's OATT. For the reasons set forth below, the Commission will set the complaint for hearing. This order benefits customers because it establishes a forum for the parties to resolve their concerns.

¹ Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Statutes & Regulations. Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), Order No. 888-A, FERC Statutes. & Regulations., Regulations Preambles July 1996-December 2000 ¶ 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 relevant 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, 535 U.S. 1 (2002).

² The Power Sale Agreement is on file with the Commission as El Paso Rate Schedule No. 57.

Complaint

2. TNMP states that El Paso has rejected multiple requests by TNMP to exercise its rollover right to continue the network-type transmission service component under the Power Sale Agreement because El Paso contends that TNMP is entitled only to firm point-to-point transmission service. Following these rejections, TNMP states that it pursued informal dispute resolution with the Commission's Dispute Resolution Service but that a conclusion could not be reached regarding the nature of the transmission service provided under the Power Sale Agreement.

3. TNMP argues that it has the right to roll over network transmission service under the Power Sale Agreement. It asserts that it meets the requirements provided in Order No. 888 and as incorporated into section 2.2 of the pro forma tariff and El Paso's OATT for rollover transmission service because the Power Sale Agreement is a bundled, requirements contract with a term of sixteen years. TNMP states that in Order No. 888 the Commission directed that all firm transmission customers have a rollover right and a right of first refusal in order to continue transmission service at the time their existing agreements expire, provided they are willing to match the rate and term of any competing offer at the time the customer seeks to exercise its rollover rights or right of first refusal.³ TNMP also states that the Commission has clarified, with respect to TNMP's request to exercise its rollover rights under a different agreement, that firm transmission customers include customers taking bundled firm service.⁴

4. TNMP argues that the transmission service provided under the Power Sale Agreement is network in nature. TNMP states that in response to TNMP's initial notice of exercise of its rollover rights under the Power Sale Agreement, El Paso attempted to limit TNMP's request to points of receipt at only local El Paso generation, thus limiting TNMP's rollover rights to only such specific point-to-point resources, as opposed to the system resources attendant with network transmission service.

5. TNMP believes that El Paso did not limit energy and transmission provided under the Power Sale Agreement to only local El Paso generation resources. TNMP states that given that generation external to El Paso's local generation was typically less expensive than El Paso's local generation, El Paso would have no reason to limit the energy provided under the bundled fixed-rate Power Sale Agreement to only El Paso local generation. Further, TNMP states that there were certainly periods over the sixteen-year duration of the Power Sale Agreement where one of El Paso's transmission segments for local generation were out of service. TNMP states that in such instances, El Paso would have used external generation to serve TNMP.

³ Citing Order No. 888 at 31,694.

⁴ Citing Southwest Power Pool, Inc., 99 FERC ¶ 61,379 at P 10, reh'g denied, 101 FERC ¶ 61,223 (2002).

6. TNMP requests that the Commission direct El Paso to provide network transmission service to TNMP for the twelve-month period commencing following the Commission's order on its complaint.

Notice of Filing and Answer

7. Notice of TNMP's complaint was published in the Federal Register, 68 Fed. Reg. 64,330 (2003), with the answer to the complaint and all comments, interventions or protests due on or before November 20, 2003.

8. El Paso filed an answer to TNMP's complaint. El Paso argues that TNMP's complaint should be denied because its rollover request seeks new service (*i.e.*, network transmission service) from different points of receipt and delivery that it did not receive under the Power Sale Agreement and that the capacity for new service is not available.

9. El Paso argues that TNMP cannot use rollover rights to convert its existing point-to-point service into network service. El Paso states that the dispositive issue in this case is that El Paso does not have the capacity to provide the new network service that TNMP seeks. El Paso asserts that the service that TNMP was receiving under the Power Sale Agreement was fundamentally different from the network service it now seeks.

10. El Paso argues that the Commission has ruled that an existing customer that changes its points of receipt or delivery is, in actuality, submitting a new request for transmission service on a capacity-available basis.⁵ El Paso takes issue with TNMP's position that its rollover request is not different from the service it received under the Power Sale Agreement because TNMP believes that El Paso used all of its resources, including its external resources, to serve TNMP. El Paso states that the designation of different delivery points and points of receipt show that TNMP has submitted a new and distinct transmission request—a request that is different from the service it received under the Power Sale Agreement.

11. In any event, El Paso argues that under the Power Sale Agreement, El Paso served TNMP with local generation from the El Paso, Texas area. El Paso states that all of its import capability is used to import El Paso's off-system resources (from Network Resources at the Palo Verde Nuclear Generating Station (Palo Verde) and the Four Corners Coal Power Plant (Four Corners), and under firm contracts with Southwestern Public Service Commission) to serve El Paso's native load.

12. El Paso argues that even if it would have had sufficient capacity from Palo Verde's nuclear generation and Four Corners' coal generation, the way that El Paso

⁵ Citing, *e.g.*, Commonwealth Edison Co., 95 FERC ¶ 61,027 at 61,083 (2001); Constellation Power Source, Inc. v. American Electric Power Service Corp., 102 FERC ¶ 61,142 at 61,392 (2003).

actually fulfilled its Power Sale Agreement obligations to TNMP was by transmitting power from its local generation. El Paso states that having dedicated its most efficient resources to native load, El Paso then uses surplus amounts of its less efficient gas generation in its local service area to fulfill wholesale sales to other utilities. El Paso further states that this has been El Paso's practice here, because this practice comports with prudent utility practice, and because El Paso's retail ratepayers have borne the burden of paying for El Paso's nuclear and coal generation and thus should reap the economic rewards of that lower cost power.

13. In addition, El Paso argues that the transmission path El Paso used to satisfy TNMP's bundled purchase during 2002—the year from which TNMP is seeking to rollover—does not include capacity from any of the paths TNMP now wants to use.

14. Also, El Paso argues that granting TNMP's complaint will conflict with Commission policy and jeopardize El Paso's longstanding plans to serve its native load. Specifically, El Paso states that: (1) the Commission never contemplated that Order No. 888 would give a customer the right to take away from an existing customer capacity that the existing customer was using; and (2) adopting the relief TNMP requests would (a) create reliability problems by oversubscribing transmission facilities if transmission customers in bundled power sales agreements could, upon expiration of those agreements, pick what path they desired to use on the transmission provider's system regardless of whether the transmission capacity existed, (b) undermine the Commission's efforts to encourage transmission providers to add new transmission capacity to their systems by allowing customers to seize any increased capacity, with as little as 60-days notice, and (c) upset the system planning stability that OATT section 2.2 seeks to foster.

15. Finally, El Paso argues that the Commission should reject TNMP's Complaint because its allegations of injury are unsupported and vague.

16. On December 8, 2003, TNMP filed a response to El Paso's answer. On December 17, 2003, El Paso filed an answer to TNMP's answer.

Discussion

A. Procedural Matters

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept TNMP's and El Paso's answers and will, therefore, reject them.

B. Analysis

18. We find that TNMP raises matters that we cannot resolve on the record before us. In particular, there are material issues of fact concerning whether the transmission component of the bundled service provided under the Power Sale Agreement is point-to-point or network in nature and concerning which facilities and what capacity were used to render service to TNMP. Accordingly, we will set the complaint for investigation and a trial-type evidentiary hearing under Section 206 of the Federal Power Act (FPA).⁶

19. In cases where, as here, the Commission institutes an investigation on complaint under Section 206 of the FPA, Section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy,⁷ we will set the refund effective date 60 days after the date of the filing of this complaint, *i.e.*, January 2, 2004.

20. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to Section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective date is January 2, 2004, the Commission cannot follow its normal procedure.

21. Although we do not have the benefit of the presiding judge's report, based on our review of the record, we expect that the presiding judge would be able to issue an initial decision within approximately six months of the commencement of hearing procedures. If the presiding judge is able to render a decision within that time, and assuming the case does not settle, we estimate that we will be able to issue our decision within approximately three months of the filing of briefs on and opposing exceptions.

⁶ 16 U.S.C. § 824e (2000).

⁷ See, *e.g.*, *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

The Commission orders:

(A) 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 Federal Power Act, particularly Section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning this complaint, as discussed in the body of this order.

(B) The refund effective date established pursuant to Section 206(b) of the Federal Power Act is January 2, 2004.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.