

112 FERC ¶ 61,279
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

The United Illuminating Company
v.
Dominion Energy Marketing, Inc.

Docket No. EL05-76-001

ORDER GRANTING REHEARING AND
INSTITUTING HEARING PROCEDURES

(Issued September 15, 2005)

1. Dominion Energy Marketing, Inc. (Dominion) requests rehearing of the Commission's May 13, 2005 Order¹ granting a complaint filed by the United Illuminating Company (UI) and finding that Dominion is responsible for the costs of "Reliability Cost Tracker" charges² pursuant to the terms of a Wholesale Power Supply Agreement (PSA) between UI and Dominion. This order grants the request for rehearing and sets for evidentiary hearing whether Dominion is responsible for Reliability Cost Tracker charges pursuant to the PSA.

¹ *The United Illuminating Company v. Dominion Energy Marketing, Inc.*, 111 FERC ¶ 61,224 (2005) (May 13 Order).

² In *Devon Power LLC*, 103 FERC ¶ 61,082 (*Devon*), order on reh'g, 104 FERC ¶ 61,123 (2003), the Commission accepted, in part, four reliability must-run (RMR) contracts for generation units located in Southwest Connecticut. In particular, the Commission accepted the reliability "cost-of-service tracker" of the RMR agreements, which "provides a cost tracking provision to compensate the [owners of the generation units filing the four RMR contracts] for the costs of specifically identified Reliability Projects to ensure that [these generation owners] complete this needed maintenance in order to keep the facilities in operation so they are available when called upon by the ISO." *Id.*, 103 FERC ¶ 61,082 at P 46.

Background

2. On March 14, 2005, UI filed a complaint alleging that Dominion refused to abide by the terms of a PSA between UI and Dominion by requiring UI to bear the costs of Reliability Cost Tracker charges. UI claimed that the PSA made Dominion responsible for these Reliability Cost Tracker charges and requested that the Commission direct Dominion to bear the cost responsibility for such charges. UI argued that the charges at issue were “associated with the delivery of energy” for which Dominion was responsible under section 2.1(c) of the PSA. Further, UI argued that the Reliability Cost Tracker charges were transmission congestion costs for which Dominion is responsible under the PSA.³

3. Dominion responded that it had previously filed a breach of contract suit in federal district court to resolve the same issue and asked that the Commission decline to exercise jurisdiction over the matter and dismiss the complaint. Further, Dominion argued that the PSA did not specifically state that it was responsible for the Reliability Cost Tracker charges and the PSA provisions relied upon by UI were not controlling because the charges at issue were fixed cost charges, and not associated with the delivery of energy.

4. In the May 13 Order, the Commission decided to exercise primary jurisdiction over the complaint.⁴ The Commission then granted UI’s complaint. The May 13 Order recognized that the PSA, which was originally executed in 2001, is “understandably silent” with regard to which party must pay for Reliability Cost Tracker charges, which were accepted by the Commission in 2003.⁵ The Commission then found that the broad language of section 2.1(c) of the PSA, which provides that Dominion is responsible for “all costs or charges . . . imposed on or associated with the delivery of Energy . . .

³ Section 1.90 of the PSA defines Transmission Congestion Costs as follows:

[a]ll costs resulting from insufficient transmission capacity, without regard to the cause of such congestion or how such costs are allocated or assessed, including the difference in the clearing price for Energy between the point of injection and point of receipt of Energy, and redispatch costs resulting from Reliability Must Run . . . requirements or other out of merit order generation dispatch directed by ISO-NE pursuant to the NEPOOL Rules, the interconnection of a generation or the maintenance or upgrade of the [Pooled Transmission Facilities].

⁴ May 13 Order, 111 FERC ¶ 61,224 at P 23-26.

⁵ *Id.* at P 27.

including Transmission Congestion Costs,” made Dominion responsible for the Reliability Cost Tracker charges at issue.

5. The May 13 Order rejected Dominion’s argument that the Reliability Cost Tracker charge, as a fixed cost charge, is not related to the delivery of energy and is not a transmission cost charge for which Dominion is responsible.⁶ The Commission found that “the language of the PSA, on its face, indicates that Dominion is responsible for Transmission Congestion Costs, which includes the Reliability Cost Tracker charges at issue” and that “Dominion has not shown that the parties intended at the time of contracting to except such fixed cost charges from the PSA’s broad definition of Transmission Congestion Costs.”⁷ The Commission declined to consider material extrinsic to the contract since the intent of the PSA could be gleaned from the contract itself.

Request for Rehearing

6. On June 13, 2005, Dominion filed a request for rehearing of the May 13 Order. Dominion argues that the Commission, having found that the PSA was “understandably silent” with regard to which party must pay for Reliability Cost Tracker charges, erred by summarily finding that Reliability Cost Tracker charges are “Transmission Congestion Costs” allocable to Dominion under the PSA. Dominion contends that the Commission must analyze the PSA under New York law as set forth in the contract and that applicable New York law requires the interpretation of a contract in accordance with the expectation of the parties in light of the circumstances existing at the time of contract formation.⁸ According to Dominion, the parties could not have anticipated the allocation of responsibility for Reliability Cost Tracker charges when negotiating the PSA, which was originally executed in 2001, because the Commission did not consider or accept such charges until 2003. Further, Dominion contends that the Commission erred by failing to consider extrinsic evidence to determine whether the parties intended to include the Reliability Cost Tracker charges within the meaning of Transmission Congestion Costs as defined in the PSA.

7. Dominion claims that, assuming *arguendo* that the intent of the parties can be gleaned solely from the language of the PSA, the Commission failed to examine the PSA

⁶ *Id.* at P 28.

⁷ *Id.* at P 29.

⁸ *Citing VTech Holdings, Ltd. V. Lucent Techs. Inc.*, 172 F. Supp. 2d 435, 441 (S.D.N.Y. 2001).

in its entirety as required under New York law.⁹ Dominion points to the following PSA provisions that the Commission should have considered in its analysis: (1) section 2.1 (c), which allocates responsibility for Transmission Congestion Costs to both UI and Dominion; and (2) section 17.2(b), which provides that the parties agree to negotiate in good faith to amend the PSA if a future regulatory action would likely have a materially adverse effect on the rights or responsibilities of either party to the PSA.

8. Dominion argues that the May 13 Order, having found the PSA silent with regard to the parties' agreement as to the responsibility for Reliability Cost Tracker charges, erred by allocating the charges to Dominion without considering the ISO New England, Inc. (ISO-NE) tariff. According to Dominion, the ISO-NE tariff allocates responsibility for the Reliability Cost Tracker charges to UI. Specifically, section III.6.4.4(c) of the ISO-NE tariff provides that the costs associated with the Tracker Charges "shall be allocated and charged *pro rata* to Market Participants and Non-Market Participants with Network Load in proportion to the sum of their Network Load during that month within the affected Reliability Region."¹⁰ Dominion states that UI is the Market Participant with Network Load. Thus, Dominion asserts that, under the ISO-NE tariff, UI is responsible for the Tracker Charges, as reflected by the fact that the ISO-NE began billing UI for such charges in April 2003.

9. Dominion argues in the alternative that, if the Commission does not reverse the May 13 Order and find for Dominion, the Commission should hold an evidentiary hearing to determine whether the Reliability Cost Tracker charges are properly characterized as Transmission Congestion Costs under the PSA. Dominion asserts that at the very least, the Commission must find that the "silent" PSA is ambiguous as to cost responsibility for Reliability Cost Tracker charges. It contends that, while the charges at issue are arguably the indirect result of insufficient transmission capacity, the PSA's definition of Transmission Congestion Costs "may easily be construed to mean that the parties only intended that true congestion costs fall within this definition."¹¹ According to Dominion, congestion costs typically refer to the difference in the marginal costs of generation at different locations on the grid. In contrast, Reliability Cost Tracker charges represent payments to a generator to ensure that it keeps its facilities operating. Further, Dominion claims that NEPOOL has stated the Reliability Cost Tracker charges are not congestion costs. It also notes that, unlike other congestion costs, there is no hedging mechanism for Reliability Cost Tracker charges. Thus, Dominion asserts that the

⁹ *Citing Net2Globe Int'l, Inc. v. Time Warner Telecom of New York*, 273 F. Supp 2d 436, 445 (S.D.N.Y. 2003).

¹⁰ ISO-NE Tariff No. 3, section III.6.4.4(c) (effective February 1, 2005).

¹¹ Dominion request for rehearing at 19-20.

contract is ambiguous as to the PSA's definition of Transmission Congestion Costs and a hearing is necessary to discern the parties' intent as to the scope of this term.

10. Further, Dominion contends that, even if the Commission finds that Reliability Cost Tracker charges are "Transmission Congestion Costs," a hearing is necessary to determine the appropriate allocation of such costs. Dominion states that the PSA provides that both Dominion and UI are responsible for the costs of Transmission Congestion Costs.

Discussion

A. Procedural Matters

11. On July 12, 2005, UI filed a motion for leave to answer and answer to Dominion's request for rehearing. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2005), prohibits answers to requests for rehearing. Accordingly, we will reject UI's motion for leave to answer.

B. Request for Rehearing

12. In its request for rehearing, Dominion raises credible arguments that the PSA is ambiguous regarding which party should bear the responsibility for the Reliability Cost Tracker charges at issue, which are never explicitly mentioned in the PSA. Dominion raises issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in an evidentiary hearing before an administrative law judge (ALJ), as ordered below.

13. In particular, the hearing should address whether the Reliability Cost Tracker charges are "associated with the delivery of energy" or properly categorized as Transmission Congestion Costs as defined in the PSA. Dominion argues that the common industry usage of the term refers to the marginal cost of generation (supply needed to serve load) at different locations on the grid, and does not apply to fixed costs such as the Tracker charges at issue here. While the Commission agrees with Dominion regarding the general use of the term, we are concerned that the PSA definition of transmission congestion costs is broader than the industry usage of the term. The presiding ALJ should determine whether Dominion is responsible for the Reliability Cost Tracker charges in the context of the PSA in its entirety.

14. The evidentiary hearing should also examine the intent of the parties when executing the contract. Dominion argues that, because the Reliability Cost Tracker charges did not exist at the time the contract was executed, the parties could not have anticipated the charges when negotiating the contract. Dominion claims that section 17.2(b) of the PSA, which sets forth a process for addressing future regulatory actions

that materially affect the rights and responsibilities of the parties to the PSA, demonstrates that the parties made provision for future unanticipated regulatory changes not addressed by the agreement. On the other hand, the general categories of cost responsibility set forth in sections 1.90 and 2.1(c) of the PSA do not appear to be all inclusive, and may have been drafted broadly to anticipate the allocation of new costs. The evidentiary hearing should address these and other issues raised with regard to the intent of the parties when executing the contract.

15. Section 2.1(c) of the PSA provides that Dominion is responsible for all costs or charges associated with the delivery of energy by Dominion to UI “to the Delivery Point(s).” The same provision states that UI is responsible for costs or charges associated with the delivery of energy “from the Delivery Point(s).” Thus, according to Dominion, if Reliability Cost Tracker charges are associated with the delivery of energy pursuant to section 2.1(c) of the PSA, the Commission must hold an evidentiary hearing to allocate responsibility for such costs between UI and Dominion. The pleadings do not indicate whether UI, upon receipt of the energy, utilizes transmission facilities other than its own transmission facilities or delivery system. If necessary, *i.e.*, if the ALJ determines that Reliability Cost Tracker charges are associated with the delivery of energy pursuant to section 2.1(c) of the PSA, the evidentiary hearing should address (1) whether UI, upon receipt of energy from Dominion at the delivery point(s), utilizes transmission facilities that make it responsible for Reliability Cost Tracker charges and, if so, (2) the proper allocation of Reliability Cost Tracker charges between Dominion and UI.

16. Accordingly, the Commission grants rehearing and will set this matter for evidentiary hearing before an ALJ pursuant to section 206 of the Federal Power Act (FPA).¹²

17. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b), as it existed at the time of the filing of the complaint, required 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,¹³ we will set the refund effective date at the earliest date possible, 60 days after the date of the filing of this complaint, *i.e.*, May 13, 2005.

18. Section 206(b) also required 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

¹² 16 U.S.C. § 824e (2000).

¹³ 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).

proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the ALJ to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective for the complaint has already passed, the Commission cannot follow its normal procedure.

19. Although we do not have the benefit of an ALJ's report, based on our review of the record we expect that the ALJ would be able to issue an initial decision within approximately seven months of the commencement of hearing procedures, or, if hearing procedures were to commence immediately, by April 30, 2006. If hearing procedures were to commence immediately, and if the ALJ was able to render a decision within that time, and assuming the case did not settle, we estimate that we would be able to issue our decision within approximately three months of the filing of briefs on and opposing exceptions, or, assuming the case goes to hearing immediately, by September 30, 2006.

The Commission orders:

(A) Dominion's request for rehearing is hereby granted, as discussed in the body of this order.

(B) 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 by 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 the matters specified in the body of this order.

(C) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding, to be held within fifteen (15) days from the date of the presiding judge's designation, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding 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.

Docket No. EL05-76-001

8

(D) The refund effective date established pursuant to section 206(b) of the Federal Power Act is May 13, 2005.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.