

UNITED STATES OF AMERICA 114 FERC ¶63,015
FEDERAL ENERGY REGULATORY COMMISSION

Arkansas Electric Cooperative Corporation

v.

Docket No. EL05-15-001

Entergy Arkansas, Inc.

INITIAL DECISION

(Issued January 26, 2006)

Appearances

Sean T. Beeny, Denise C. Goulet, Phyllis G. Kimmel, and Stephen P. Williams, Sr., for Arkansas Electric Cooperative Corporation

William H. Burchette, John H. Conway, and A. Hewitt Rose for East Texas Electric Cooperative, Inc.

Erin M. Murphy, Floyd L. Norton, IV, and Andrea J. Weinstein for Entergy Arkansas, Inc., and Entergy Services, Inc.

O. H. Storey for Entergy Arkansas, Inc.

Glenn S. Benson and Louis S. Zimmerman for City Water and Light Plant, Jonesboro, Arkansas

H. Mark Hicks and Zachary D. Wilson for Conway Corporation; West Memphis Utilities Commission; and City of Osceola, Arkansas

Jason Reed, Robert Shults, and Steven Shults for Henry H. Thompson, Jr.

Joseph H. Long and Arnold H. Meltz for Trial Staff, Federal Energy Regulatory Commission

NACY, Administrative Law Judge:

Procedural History

1. The proceeding named in the caption, *above*, is the survivor of two that were consolidated and set for hearing and decision together.

2. By a complaint filed September 14, 2004, in Docket No. EL04-134-000, East Texas Electric Cooperative, Inc. (ETEC) alleged that the announcement by Entergy Arkansas, Inc. (EAI or respondent), that it would charge co-owners of the Independence Steam Electric Station (ISES) the Entergy System's (Entergy) incremental cost plus 10 percent for substitute energy violated both the filed rate doctrine and the express terms of the operating agreement in effect between EAI and the co-owners of the ISES. On November 23, 2004, in response to that complaint, the Commission issued its *Order on Complaint Establishing Hearing and Settlement Judge Procedures*, 109 FERC ¶ 61,207 (2004).

3. By the complaint now under consideration, filed October 25, 2004, in Docket No. EL05-15-000, Arkansas Electric Cooperative Corporation (AECC or complainant) alleges that EAI has unilaterally changed the method of classifying and pricing energy (from four co-owned coal-fired units) under the Interchange Agreement in effect between these two parties. AECC further alleges that those actions are anticompetitive and violate both the terms of the agreement and the filed rate doctrine. On December 22, 2004, in response to that complaint, the Commission issued its *Order on Complaint Establishing Hearing and Settlement Judge Procedures and Consolidating Proceedings*, 109 FERC ¶ 61,327 (2004), consolidating Docket Nos. EL04-134-000 and EL05-15-000.

4. A settlement judge was designated. Two sessions of settlement conference were held before him and, by a report issued January 26, 2005, 110 FERC ¶ 63,016 (2005), he advised the Commission and the Chief Judge that the parties had not yet resolved their differences. He recommended (a) that the proceedings be set for hearing; (b) that a presiding judge be designated; and (c) that the existing settlement judge procedures not be terminated, but only deferred subject to later reinstatement.

5. On February 7, 2005, the Chief Judge issued his *Order of Chief Judge Instituting Hearing Procedures, Designating Presiding Administrative Law Judge, Scheduling Prehearing Conference, and Continuing Settlement Judge Procedures*, in which he (a) instituted hearing procedures in Docket Nos. EL04-134-001 and EL05-15-001; (b) designated me presiding judge in those dockets; (c) continued the settlement judge procedures; (d) established the due-date of the initial decision; and (e) scheduled a prehearing conference.

6. The prehearing conference met as scheduled. A satisfactory procedural schedule was drafted by the participants and established by my order issued February 16, 2005.

7. On March 18, 2005, counsel for EAI and the City Water and Light Plant of the City of Jonesboro, Arkansas (CWL), submitted an offer of settlement calculated to dispose of all issues outstanding in the proceedings between them. This offer was certified to the Commission as an uncontested offer of partial settlement on April 26,

2005, and approved by an order issued by the Commission on June 1, 2005. *See* 111 FERC ¶ 61,322 (2005).

8. On April 18, 2005, by formal motion, allegations of serious impropriety were made by complainants, who prayed a hearing *in camera* on those allegations. A partial hearing, limited to those allegations, was held *in camera* on April 27, 2005 (Tr. 14-59). The confidential record of that hearing was certified to the Commission for its consideration on April 29, 2005.

9. On July 7, 2005, in response to a requirement in the offer of settlement described at P 7, *above*, CWL filed a notice of withdrawal of its previously filed pleadings and testimony. There being no timely objection, that withdrawal was confirmed by my order issued July 25, 2005.

10. The original procedural schedule was revised by an order issued by the Chief Judge on July 8, 2005.

11. On August 24, 2005, EAI and ETEC filed an offer of settlement calculated to dispose of the complaint in Docket No. EL04-134-000. That offer was certified to the Commission as an uncontested offer of partial settlement on September 27, 2005. *See* 112 FERC ¶ 63,031 (2005). It was approved November 7, 2005, at 113 FERC ¶ 61,137 (2005).

12. As a result of the offer of settlement described in P11, *above*, Docket No. EL04-134-003 was terminated, leaving the subject complaint surviving.

13. On August 25, 2005, EAI and Arkansas Cities¹ filed an offer of settlement calculated to dispose of the issues outstanding between them in Docket No. EL05-15-000 and in Docket No. EL04-134-000. In my absence, the Chief Judge certified that offer to the Commission as an uncontested offer of partial settlement on October 12, 2005. *See* 113 FERC ¶ 63,004 (2005).

14. Also on August 25, 2005, by separate notices:

a. Arkansas Cities withdrew their intervention filed September 30, 2004, in Docket No. EL04-134-000, and their intervention filed November 17, 2004, in Docket No. EL05-15-000; and

b. ETEC withdrew its intervention filed October 29, 2004, in Docket No. EL05-15-000.

¹ Conway Corporation, West Memphis Utilities Commission, and the City of Osceola, Arkansas.

15. No motion opposing either of these withdrawals having been filed, they were confirmed by a single order issued September 13, 2005.

16. A public hearing in Docket No. EL05-15-001, the only proceeding left active by the settlements and withdrawals just described, was held August 30, September 7, September 8, and September 12, 2005, in Washington, D.C.² Testimony and exhibits were submitted by complainant and respondent.

17. Timely initial and reply briefs have been filed and duly considered. Any finding or conclusion urged therein, but not made or drawn herein, has been considered and evaluated and found either to lack merit or significance or to tend only to lengthen this decision without altering its substance or effect.

Discussion

18. At the outset, it must be observed that AECC, as complainant and moving party, has the burden of proof. It follows that AECC must sustain its allegations "in accordance with the reliable, probative, and substantial evidence." *See* Section 556(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (2000).

19. It must also be observed that, stripped of irrelevancies, this surviving proceeding really involves only a single general issue: Has respondent violated a provision of a contract outstanding between it and complainant?

20. Five relevant contracts govern the relationship between complainant and respondent: a) the ISES (Independence Steam Electric Station) Ownership Agreement; b) the White Bluff (White Bluff Steam electric Station) Ownership Agreement; c) the ISES Operating Agreement (ISES OA); d) the White Bluff Operating Agreement (White Bluff OA); and e) the Power Coordination, Interchange and Transmission Agreement (PCITSA) (collectively Co-Owner Agreements).

21. In its Initial Brief, AECC makes numerous claims about the operation of the Co-Owner Agreements, but only selectively cites to certain provisions of the PCITSA for support of its claims. AECC Initial Brief at 25 (AECC I.B). When the terms of the contract are reviewed objectively, however, it is clear that the plain terms of the Co-Owner Agreements – all five agreements governing the relationship between EAI and AECC – call for EAI to include system operating constraints in determining the hour-to-hour availability of the Co-Owned Units.

² The hearing sessions were interrupted by the pressing need for scheduled witnesses to participate in efforts to restore power to areas ravaged by Hurricane Katrina.

22. EAI and AECC agree that the PCITSA (Exh. AECC-3) is the agreement that addresses, among other things, the manner in which AECC Resources are treated by EAI in the after-the-fact redispatch billing and the manner in which EAI charges AECC for energy from AECC's ownership shares of the ISES and White Bluff units. AECC I.B. at 25; EAI Initial Brief at 30 (EAI I.B.). That, however, is where their common ground ends, because AECC construes the actual terms of the PCITSA in ways that frustrate EAI's obligations as dispatcher and its responsibilities for after-the-fact redispatch billing under that agreement. AECC has not rebutted the fact that Article V, Section 5 of the PCITSA provides for the recognition of system operating constraints in the after-the-fact redispatch. AECC acknowledges that Article V, Section 5 of the PCITSA states that "it is the intent of both parties that all resources of both parties will be dispatched by EAI for maximum combined efficiency" (AECC I.B. at 25; Exh. AEC-3 (PCITSA Art. 5, Sec. 5)), but AECC does not make any attempt to explain how that provision is to be implemented by the EAI Dispatcher. AECC continues to espouse the theory that, contrary to the plain wording of this section, it means only that EAI has the freedom to dispatch the resources however it sees fit. Yet, "maximum combined efficiency" of both parties necessarily means that system operating constraints must be considered in the dispatch, while in the after-the-fact redispatch, the units' availability on an hour-to-hour basis must be used "to theoretically dispatch" AECC's load from AECC's Resources. Exh. AEC-3 (PCITSA, Art. 5, Sec. 5; Exhibit E, 3); Exh. EAI-3 at 30. AECC ignores this recognition in the PCITSA that unit availability will vary from hour to hour.

23. AECC has stated that Article V, Section 5 of the PCITSA and Exhibit E (Redispatching Principles) "are designed to assure a realistic scenario for using AECC Resources in the after-the-fact redispatch, and to assure that the AECC Resources are used in a manner that is consistent with the conditions of their real-time availability to the EAI dispatcher." Exh. EAI-32 at 41. To ensure such a realistic scenario for after-the-fact redispatch based on the real-time availability, the EAI Dispatcher must recognize system operating constraints in the hour-to-hour availability of the Co-Owned Units. To not include system operating constraints in the after-the-fact redispatch would be inconsistent with the "conditions of their real-time availability," which according to AECC is what Article V, Section 5 and Exhibit E are designed to implement. Clearly, system operating constraints must be included in the hour-to-hour determination of unit availability. AECC's argument that system operating constraints are limited to "unit constraints" is unsupported.

24. Article V, Section 5 of the PCITSA obligates EAI to redispatch AECC's Resources in accordance with "Redispatching Principles" outlined in Exhibit E to the PCITSA. Exh. AEC-3 (PCITSA Art. 5, Sec. 5; Exhibit E). That exhibit contains a set of nine principles that EAI must follow when implementing the after-the-fact redispatch procedures. Exh. EAI-3 at 68:9-13. Exhibit E specifically calls for appropriate consideration to be given to system operating constraints:

For redispatch purposes appropriate consideration will be given to other operating constraints which limit the availability of the plant to the EAI dispatcher.

Exh. AEC-3 (PCITSA, Exhibit E, (3)). This provision means that AECC is not to be given credit for phantom energy that is not produced, and could not have been produced even in theory, when ISES and White Bluff have to be operated at a less than optimum level due to other operating constraints such as the operating constraints on the Entergy System. Exh. EAI-3 at 67.

25. AECC argues, however, that the language contained in Redispatching Principle No. 3 does not include all operating constraints. AECC I.B. at 30. AECC maintains that the "PCITSA is with EAI, and not Entergy Corporation or any of its subsidiaries, other than EAI." *Id.* Implicit in this argument is a recognition by AECC that system operating constraints on the EAI system are properly included in the after-the-fact redispatch billing. Yet AECC's own witnesses have acknowledged that it is EAI's responsibility to schedule and dispatch AECC Resources as part of the overall Entergy System to serve the combined loads of both EAI and AECC. EAI I.B. at 11; Exh. EAI-28. As stated above, Redispatching Principle No. 3 states that "appropriate consideration will be given to other operating constraints which limit the availability of the plant." The ISES and White Bluff plants are part of the integrated Entergy system; thus, the ISES and White Bluff plants by this express language of the PCITSA are to be limited by "other operating constraints" that exist on the Entergy system. As EAI described in its Initial Brief, documents provided from the files of AECC's principal negotiator of the PCITSA, which went unchallenged by AECC at hearing and on brief, demonstrate that the parties understood at the time of negotiation that AECC's Resources would be integrated with EAI's and that scheduling would be "done by AP&L to meet the combined load requirements of the Middle South System and AECC." Exh. EAI-28 (Data Response EAI-AECC 1-7). Moreover, AECC's own witness Fish has asserted that an "AP&L grid" does not exist, only an Entergy grid. Exh. EAI-24 at 8. Additionally, the Entergy System Agreement is referenced and acknowledged by the PCITSA. Exh. AECC-3 at 80 (Exh. H). Therefore, any claims by AECC that the ISES and White Bluff plants cannot be affected by system operating constraints are contradicted by uncontroverted evidence. EAI's witness Hurstell testified that system operating constraints affect all system generation, in addition to the Co-Owned Units. Exh. EAI-3 at 52. What AECC really wants is for EAI to shoulder all of the effects of system operating constraints and insulate AECC from all such effects. This is not what the Co-Owner Agreements require.

26. AECC has claimed that Redispatching Principle No. 3 is somehow limited by the language contained in other Redispatching Principles. AECC I.B. at 30. As is plain from its argument, AECC would like certain interpretations to be read into Redispatching Principle No. 3 that are not there. AECC claims that reading the Redispatching Principles "as a whole" reveals that "other" constraints are really "unit constraints"

despite the fact that the words *unit constraints* appear nowhere in Redispatching Principle No. 3. AECC cites to Redispatching Principle Nos. 1, 2, and 9 as support for the claim that the word *unit* should be read into Redispatching Principle No. 3. AECC does a fine job of pointing out that the word *unit* exists in each of those principles, and EAI agrees that it is there, but AECC fails to demonstrate why the word *unit* should be read into Redispatching Principle No. 3. If the drafters intended the word *unit* to be included in Redispatching Principle No. 3, they would have expressly included it, as they did in Redispatching Principle Nos. 1, 2, and 9. They did not. It should not be read into the agreement now. The more reasonable interpretation is that Redispatching Principle Nos. 1, 2, and 9 address unit issues, while Redispatching Principle No. 3 deals with "other operating constraints," specifically those that are not unit-specific.

27. On the issue of interpreting the plain language of the Redispatching Principles, AECC is not convincing. In addition to its weak inferences of "unit" limitations under Redispatching Principle No. 3, it repeatedly fails to acknowledge the plain language of the PCITSA. For instance, in a separate, but related proceeding, AECC has failed to recognize the plain meaning of the Redispatching Principles in a different context. In AECC's Answer to EAI's Petition for Declaratory Order filed in Docket No. EL05-135, both of AECC's witnesses fail to acknowledge the plain meaning of Redispatching Principle No. 8. That Principle requires that "[f]or the purposes of dispatching for billing purposes, AECC will keep EAI currently informed of fuel available and cost thereof for each unit and the cost of purchased energy." Exh. AEC-3 at 75 (PCITSA, Exhibit E, 8). Yet, in the Answer filed by AECC and the supporting affidavits filed by Mr. Bittle and Mr. Fish (AECC's witnesses in the instant proceeding), AECC again fails to acknowledge the plain language of the Redispatching Principle. In his affidavit included with AECC's Answer in Docket No. EL05-135, Mr. Bittle states "I am particularly alarmed by EAI's announcement to . . . begin requiring AECC to disclose the price and terms of offers to sell energy to AECC." Exh. EAI-32, Affidavit of Ricky Bittle at P 10. Mr. Bittle makes this statement apparently oblivious of the requirements of the Redispatching Principles. He goes on to state that "[t]here is no billing needed between AECC and Entergy for AECC's purchase of excess energy." *Id.* at P 43. Either Mr. Bittle is uninformed about the PCITSA and the other Co-Owner Agreements, or he is employing a selective reading of the PCITSA whenever it benefits AECC. Either way, such interpretations are inconsistent with the express terms of the PCITSA and are not persuasive.

28. In this proceeding, AECC's witness Fish made a number of statements about the PCITSA that are in direct conflict with the plain language of that agreement. For instance, in Exh. AEC-18 at 9:10-15, he made the following statement:

Mr. Hurstell states that the question in this case is: "[s]hould System operating constraints over which EAI has no control be a factor when determining the hour to hour capability of a Co-Owned Unit available to the Co-Owners?" Exhibit EAI-3, p. 7, ll. 15- 17. If that is the question, the

answer is no. The only constraints recognized by the PCITSA—or the operating agreements, for that matter—are plant operating constraints: those at the plant or near the plant.

To refute this assertion, it is enough to point out that the PCITSA contains a direct reference to non-plant-specific constraints that may limit the availability of a Co-Owned resource. In Article II Section 18 of the PCITSA, "transmission system operations" is listed as one of the reasons why either party may desire to purchase Replacement Energy from the other. Exh. AEC-3 at 14 (PCITSA, Art. II, Sec. 18). Mr. Fish failed to address that section in any of his filed testimony. He addressed it on cross-examination by simply stating that "transmission system operations" did not apply to AECC, only to EAI. Tr. at 233:25-234:2.

29. AECC witness Fish claims that that the system operating constraints at the heart of this dispute are all the result of decisions made by Entergy including Entergy's generation and power purchases decisions. Exh. AEC-18 at 24:13-17. But he failed to point out that AECC makes similar choices with respect to its generation and power purchase resources. Tr. at 268:7-10; Exh. EAI-32. He also claimed that decisions made by AECC actually constitute elections by EAI. Tr. at 217:16-22 ("Q: What if AECC makes a planning decision that affects EAI's dispatch . . . [w]ould that be an election by EAI? A: In the entire meaning of the agreement, yes, I believe it would."). In the same vein, Mr. Bittle testified that AECC is not responsible for real-time dispatching of its resources (Exh. AEC-1 at 7:6-7), and then in the same paragraph testifies that AECC decides which purchases should be made. Exh. AEC-1 at 7:11-12. Mr. Bittle expressly stated that:

AECC does not operate a control area and as such is not responsible for real-time dispatching of its resources. EAI is the load control area operator and all of AECC's owned resources are under EAI's control. AECC performs more of a cost management role. AECC determines the best use of the energy that will be available on redispatch from its generation assets in the EAI, AEP and SPA control areas and energy available from the wholesale market to meet its load in all three control areas. AECC also decides which purchases and sales to make.

Exh. AEC-1 7:6-12. This example is illustrative of AECC's position, *viz.*, to assert that the contracts support its position notwithstanding the (contrary) express terms of those contracts. Yet, one of the aims of a written contract is surely the prevention of just this result. Mr. Bittle claims that the "basic bargain" is that EAI is permitted full operating control of the plants in exchange for holding AECC economically indifferent to how the plants are operated. Exh. AEC-1 at 10:1-3. One might reasonably expect a description of the "basic bargain" of a contract to include some reference to the contract itself. Mr. Bittle, though, failed to provide a contractual reference. Why? Because none exists. Both the ISES and White Bluff Operating Agreements, the agreements that give EAI full

operating control of the Co-Owned units, contain contract terms that are the exact opposite of Mr. Bittle's "basic bargain." Section 3.5 of the ISES Operating Agreement states:

EAI shall have no liability for any loss, damage, or expense suffered by Participants caused by or resulting from Force Majeure or arising out of or resulting from any action taken or failed to be taken by EAI or any agent or employee of EAI pursuant to this Section 3, unless such loss, damage or expense results from the willful misconduct of EAI or the failure of EAI to use its reasonable best efforts to conform to good utility practices in discharging its obligation under this Agreement; and in no event shall EAI be liable for any loss of anticipated profits, increased expense of operation or any other consequential damage or losses of any nature. For purposes of this Section, "consequential damages" shall include, but not be limited to, damage or loss of other property or equipment, loss of profits or revenue, loss of use of power system, cost of capital, cost of purchased or replacement power, or claims of customers for service interruptions.

Exh. AEC-7 at 19 (ISES OA § 3.5). A witness who reads this language (or similar language contained in Section 1.c of the White Bluff OA) and interprets it to mean that EAI is required to hold AECC harmless from the impact of any action taken by EAI fails to persuade. It is clear that AECC has employed a selective reading of the provisions of the PCITSA and the Redispatching Principles. AECC's practice of interpreting the contracts in ways that are completely counter to their express terms cannot be accepted.

30. AECC argues that EAI's construction of the Co-Owner Agreements eliminates substitute energy under the Co-Owner Agreements. *See, e.g.*, AECC I.B. at 34-42. In this regard, AECC claims that its "right" to substitute energy stems from the PCITSA, specifically Redispatching Principle No. 6. AECC I.B. at 35. Further, AECC claims that "[t]he PCITSA on its face mandates EAI to provide substitute energy at the cost of White Bluff and ISES energy if it dispatches those units at less than their capability in hours when AECC's load could absorb the energy they are capable of producing." Apparently, AECC gleans this interpretation exclusively from Redispatching Principle No. 6. However, AECC ignores the fundamental fact that under Article V the redispatch of AECC's resources is "considering their availability on an hour-to-hour basis," not their maximum dependable capability as determined in an annual test. Redispatching Principle No. 6 does not come into play unless EAI elects to turn down the Co-Owned Units for economic reasons. Redispatching Principle No. 6 states: "If the capability of AECC Resources is sufficient to supply AECC requirements and if AECC requirements are greater than the energy supplied from AECC Resources in an hour, AECC will pay to EAI AECC's incremental cost per kWh of the energy deficiency."

I construe this to mean that, when system operating constraints are limiting the Co-Owned Unit, the capability of the AECC Resource in the hour is not sufficient to supply AECC's requirements, as recognized in Redispatching Principle No. 3. In those situations Redispatching Principle No. 6 is not a factor in the redispatch methodology because the prerequisite factual situation is not present: EAI has not made an election. On the other hand, when EAI, for economic reasons, has elected to turn down a Co-Owned Unit, then the capability of the resource in the hour is sufficient to supply AECC's requirements. Only in that situation does Redispatching Principle No. 6 factor into the determination.

31. AECC's claim that EAI's "new interpretation" of the Co-Owner Agreements would "render the after-the-fact redispatch provisions meaningless" (AECC I.B. at 42) cannot be adopted. The after-the-fact redispatch methodology is not rendered meaningless by considering system operating constraints in the redispatch calculations. On a monthly basis, pursuant to the redispatch billing methodology, EAI calculates the billing determinants for entitlement, substitute, and replacement energy for each hour. Exh. EAI-3 at 66:5 – 67:13. AECC's bill is calculated pursuant to this redispatch methodology, whether substitute energy ultimately is a portion of the bill or not. *Id.* AECC's claim that including system operating constraints in the calculation for substitute energy would render provisions of the Co-Owner Agreements meaningless is not convincing.

32. AECC claims that EAI's "new" definition of availability is inconsistent with other provisions of the PCITSA. AECC I.B. at 32-33. AECC's argument, however, relies on its own unsupported interpretations of other provisions that, according to it, "mean 'actual output'". *Id.* at 34. First, AECC claims, based solely on the interpretations of its own witness Bittle, that neither the PCITSA nor the Operating Agreements provide that the availability of the co-owned units for billing purposes is the same as actual output of the units. Although AECC cites to Article V, Section 5 of the PCITSA and even quotes a provision of that section, AECC fails to consider the plain meaning of the terms. Article V, Section 5 provides, in part, that "AECC's Resources will, on a retroactive basis, considering their availability on an hour-to-hour basis, be used to theoretically redispatch AECC's load from AECC's Resources." Without any support for its position, AECC states that "availability on an hour-to-hour basis" does not equate to "actual output." In most situations, however, availability does mean actual output. Exh. EAI-9 at 18:13-19:5. As has been well-established in this case, it is in the best economic interest of all parties for the Co-Owned Units to be operated whenever they are available to the EAI Dispatcher. Exh. EAI-3 at 33:4-17. As a consequence, at whatever level a Co-Owned Unit is operated, it is generally the maximum level available to the EAI Dispatcher. Exh. EAI-9 at 24:17-21 and 41:5-15. In those instances, the "availability on an hour-to-hour basis" does equal "actual output." AECC did not offer evidence suggesting that it is not in EAI's or AECC's best interest to operate the Co-Owned Units at the highest level possible. And where economics would call for the reduction in the output of a Co-

Owned Unit, then the "availability on an hour-to-hour basis" is not equal to "actual output" and EAI would be required to provide substitute energy. That is, substitute energy is a function of EAI's having "elected" to reduce unit output.

33. AECC attempts to rely on Exhibit I of the PCITSA for an explanation of why "availability" cannot mean "actual output." AECC I.B. at 33. AECC argues that because the language in Exhibit I, which was added over ten years after the agreements were originally entered into, does not exactly match that which was included in the original drafting of Article V, Section 5, the plain language of Article V, Section 5 should be given a different interpretation. In fact, each provision is plain on its face, and just because the express terms are not identical, that does not mean that the earlier provision should be rendered meaningless.

34. AECC itself indirectly makes this very point. It cites a string of "other references to terms that mean 'actual output.'" AECC I.B. at 33-34. However, applying AECC's own logic, because the same exact terms are not used in each and every instance cited by AECC (which they are not) those terms cannot not have the same meaning or effect. Such an interpretation just does not persuade.

35. In addition to the PCITSA, the ISES and White Bluff Ownership and Operating Agreements are keys to the relationship between the Co-Owners of the ISES and White Bluff units. Indeed, as described by EAI in its Initial Brief, the White Bluff Ownership Agreement, the White Bluff OA, and the PCITSA were negotiated and entered into at the same time. EAI I.B. at 6-8. Additionally, the ISES Ownership Agreement and ISES OA are modeled after, and are essentially the same as, the White Bluff Ownership Agreement and White Bluff OA. *Id.*; *see also* Tr. at 175:4-8. At the time the ISES OA was entered into, the only change made to the PCITSA was to add ISES as a generating point under that agreement. *Id.* at 175:9-15.

36. AECC's resources are integrated with EAI's resources in the Entergy Control Area and have been ever since the inception of the Co-Owner Agreements. Exh. EAI-9 at 5:20-22. Since the start of the Co-Owner Agreements, EAI has had the responsibility to schedule and dispatch all AECC Resources as part of the Entergy System to serve the combined loads of EAI and AECC, and EAI has carried out that responsibility. Exh. AEC-7 at 34 (ISES OA § 8.2); Exh. AEC-5 at 17 (White Bluff OA § 4(b)); *see also* Exh. EAI-9 at 10:6-16. The specific delegation to EAI of the dispatch obligation and the inclusion of the redispatch mechanism for AECC Resources reflect the fact that at the time the PCITSA was entered into, both EAI and AECC knew that AECC Resources would be part of the Entergy system. Exh. EAI-9 at 21:10-12; Exh. AEC-7 (ISES OA § 11.2); Exh. AEC-5 (White Bluff OA § 10(n)).

37. AECC's witness Fish claims that the operating constraints recognized by the White Bluff and ISES OAs that serve to reduce the capabilities of the unit should not be

reflected in the PCITSA billing arrangements. Exh. AEC-18 at 15:10-14. This position runs directly counter to Section 3.5 of the ISES OA and Section 1(c) of the White Bluff OA. Both of these sections state explicitly that EAI is never liable for any replacement power cost incurred by AECC as a result of EAI's actions. Mr. Fish's position requires that absolutely no consideration be given to these provisions.

38. Witness Fish is forced to take this position because compliance with these sections of the Operating Agreements would eviscerate the argument that AECC must be held indifferent to any limitations of the Co-Owned Units. However, contrary to the assertions made in the AECC brief, Mr. Fish's testimony on cross-examination supports EAI's position that operating constraints remote from the plant are properly included in the billing redispatch. Specifically, he agreed that such constraints limit the dispatcher's ability to access the capability of a plant. Tr. at 190:1-8 ("Q: Leaving aside the redispatch provisions for a moment, would you agree that in the real world other operating constraints, whether at the plant or remote, in fact can limit the availability of a plant to the system dispatcher? A: Well they won't limit the available capability of the plant. They may limit the dispatcher's ability to get to it."). If the capability of a unit is not available to the dispatcher as called for in Redispatching Principle No. 3, it is properly excluded from the after-the-fact billing redispatch. It follows that AECC's claims that the Operating Agreements do not support the recognition of system operating constraints in determining the hour-to-hour availability of the Co-Owned Units fail to persuade.

39. Section 8.4 of the ISES OA requires initially that EAI must schedule the units by "using best efforts to meet the different requirements of Participants in each Unit for the optimum utilization by each Participant in each Unit of its Ownership Share in such Unit." Exh. AEC-7 at 35 (ISES OA § 8.4). This provision requires, essentially as Article V, Section 5 of the PCITSA requires, that EAI must dispatch the units using its best efforts to meet the various requirements of all Co-Owners, while optimizing the utilization of the respective shares. Exh. EAI-3 at 21:7-9. It is notable, however, that this provision does not include any suggestion that each Co-Owner is guaranteed to receive output equal to that of its full ownership share. *Id.* It is likewise notable that AECC has failed to address this issue in any of its testimony. Section 8.4 continues in relevant part to state:

In certain circumstances where EAI may, for its overall system requirements, elect not to schedule generation from either or both of the Independence Unit No. or Independence Unit No. 2 of Independence SES when either such Unit is capable of generation, EAI shall schedule and make available to the Participants who have Ownership Shares in any Unit not so scheduled an amount of energy from other of its resources in accordance with the requirements of such Participants equal to each Participant's Ownership Share of the net capability of the Unit not so

scheduled at the time of the election of EAI not to schedule generation from such Unit.

Exh. AEC-7 at 35-36 (ISES OA § 8.4). The language in this excerpt, "in certain circumstances where EAI may . . . elect not to schedule," means that there are limitations placed on what decisions by EAI are considered an election not to schedule the ISES and White Bluff units. Exh. EAI-3 at 22:6-11. Such circumstances are presented where EAI has identified an available source of generation or a purchase that can be obtained at a cost lower than the cost of production from one or both of the ISES units. *Id.* at 22:16-18. EAI's construction is supported by the concept of good utility practice; if EAI were not to use the Co-Owned units to the maximum extent possible when they represent the lowest cost sources available to the Entergy system, that would violate good utility practice. *Id.* at 22:18-22.

40. In its brief, AECC concludes that the language of Section 8.4 somehow does not support this construction. AECC I.B. at 37. It claims that EAI's interpretation of Section 8.4 "is so narrow as to foreclose any option but one." *Id.* However, AECC does not provide any explanation as to what other options are required under Section 8.4. Either EAI elects not to run the Co-Owned Units because other, less-expensive resources are available (and EAI provides substitute energy to the Co-Owners), or EAI elects to run the Co-Owned units because they are the most economic resource. Either way, EAI's actions comport with good utility practice and with the plain terms of the Co-Owner Agreements.

41. AECC next claims that EAI has somehow used the concept of "Good Utility Practice" to eliminate EAI's own ability to "elect" pursuant to Section 8.4 of the ISES OA. AECC I.B. at 38. In this, however, AECC fails to acknowledge the terms of the Co-Owner Agreements and the obligations of operating an electric system. As EAI's witness Ralston testified, EAI, along with ESI, strives to meet two major objectives in planning and operating the system: economics and reliability. Exh. EAI-9 at 8:17-18. Reliability is maintained chiefly by balancing generation and load, while recognizing certain security constraints. *Id.* at 9:11-15. As described in EAI's Initial Brief, the Energy Management Organization (EMO) division of Entergy Services, Inc. (ESI) operates the system in accordance with good utility practice: subject to operating constraints, resources are dispatched in an amount sufficient to meet load with the units having the lowest operating costs dispatched first, then progressing through the stack with the most expensive units dispatched last. Exh. EAI-9 at 11.

42. AECC does not dispute that EAI has the responsibility to follow good utility practice (AECC I.B. at 38), but it does go on to assert that operating the system under the standards of good utility practice can somehow be separated from EAI's role under the PCITSA. *Id.* at 39. AECC goes to great lengths to cite the testimony of its witness Bittle, that the words "good utility practice" are not included in the PCITSA and that the obligation of good utility practice is somehow not implicated by that agreement. *Id.* This

distinction is inconsistent with any logical reading of the agreements. It is inconsistent with Mr. Bittle's testimony (Exh. AEC-32 at 58:1 – 59:5). It is inconsistent with AECC's own statements (Exh. EAI-33 at 44 (the Co-Owner agreements were created based on "the informed judgment of people who intended to create a workable relationship consistent with good utility practice")). In its Answer to EAI's Petition for Declaratory Order filed in Docket No. EL05-135-000, AECC maintained that the PCITSA and Exhibit E are "designed to assure a realistic scenario for using AECC Resources in the after-the-fact redispatch, and to assure that the AECC Resources are used in a manner that is consistent with the conditions of their real-time availability to the EAI dispatcher." Exh. EAI-32 at 41. In order to reflect a manner that is consistent with the conditions of "real-time availability," it is impossible to exclude good utility practice considerations from the dispatch and, therefore, the redispatch billing. Moreover, Article VI, Section 3-Reliability and Adequacy of Service and Article VI – Section 8 – Standards for Construction, Maintenance and Operation of Equipment effectively impose a "good utility practice" standard on the parties.

43. AECC uses its witness Fish's testimony to claim that good utility practice should not be considered in determining the hour-to-hour availability of the Co-Owned units. AECC I.B. at 39-40. Mr. Fish's testimony on this point is unpersuasive because he admitted that a number of system operating constraints that now implicate good utility practice were not faced by the parties during his tenure. Tr. at 234:18-24. On cross-examination, he acknowledged that he could not recall any discussions of moment-to-moment changes in load, independent power producer (IPP) imbalances, third-party deliveries to and from the Entergy Control Area, Qualifying Facility (QF) purchases, or transmission constraints during his tenure at AECC. *See id.* Each of these examples of system operating constraints implicates the exercise of good utility practice. In sum, the clear and unambiguous terms of the Co-Owner Agreements require that system operating constraints be considered in the determination of the hour-to-hour availability of the Co-Owned units. AECC's generalizations about the terms of the contracts do not withstand scrutiny upon examination.

44. AECC attempts to establish what it claims was the "intent of the parties" in forming the Co-Owner Agreements and what constitutes "past practice" under those same agreements. Indeed, while AECC focuses much of its Initial Brief on describing past practice and intent of the parties, it does not focus enough on the actual language of the Co-Owner Agreements. However, as EAI described in its Initial Brief, past practice can be dismissed quickly: There is no consistent past practice. There is no consistent past practice in dealing with system operating constraints because many system operating constraints simply did not exist in the past or their magnitude was significantly smaller than what currently exists on the Entergy system today. Moreover, assertions as to the intent of the parties at the time of entering the contracts is irrelevant because the contract terms are clear and unambiguous.

45. AECC and its witness Fish also try to describe the intent of the parties at the time of negotiating the Co-Owner Agreements, including an attempt to show EAI's intentions at that time. *See, e.g.*, AECC I.B. at 44-48. This line of argument is irrelevant. The contract provisions are clear and unambiguous on their face. At this date it must be axiomatic (hardly requiring citation of authority) that, only when there is ambiguity or lack of clarity in the terms of the contract, will the Commission look to the intent of the parties in drafting the contract. *See Nicole Gas Production Ltd.*, 105 FERC ¶ 61,371 (2003). Furthermore, a contract is not ambiguous merely because there is a dispute about the meaning of its terms. *See Florida Power & Light Co.*, 60 FERC ¶ 61,001, 61,003 (1992).

46. The PCITSA and the other Co-Owner Agreements are not ambiguous. Indeed, AECC has not argued that they are. AECC cannot, therefore, expect the Commission to look to extrinsic evidence to interpret them. The Co-Owner Agreements speak for themselves. Unless AECC claims that the Co-Owner Agreements are ambiguous (which it has not done), AECC cannot argue intent of the parties. AECC glosses over this point, and instead offers an (unsupported) narrative about the intent of AECC and EAI at the time of negotiation. EAI admits that the Co-Owner Agreements are complex documents, and they are, but the provisions, taken together, are clear and unambiguous. In the past, the Commission has addressed the interpretation of inter-related and complex contract provisions. It has found no need to review the Parties' course of performance to interpret a contract when the contract becomes clear by reading two or more complicated provisions together. *See Public Service Co. of New Hampshire v. New Hampshire Electric Cooperative, Inc.*, 86 FERC ¶ 61,174 (1999). AECC would have the Commission believe that the provisions of the PCITSA should be read selectively, rather than collectively. When one reads the obligations of the parties in Article III along with the billing requirements in Article V and Exhibit E together, there is no ambiguity in the PCITSA. Moreover, the provisions of the ISES OA and White Bluff OA are also clear on their face. Again, AECC has not argued otherwise.

47. In *Pennzoil Co. v. FERC*, the court noted that the UCC directs that

[T]he express terms of the agreement and any course of performance, course of dealing, and usage of trade shall be construed whenever reasonable as consistent with each other. If such a construction is unreasonable, express terms control course of performance, and course of performance shall control course of dealing and usage of trade.

645 F.2d 360 at 390 (5th Cir. 1981) (citing UCC §§ 1-205(4) and 2-208(2)). The Commission must construe the contract language and course of performance as being consistent with each other, where reasonable; if they are not consistent, the terms of the contract control. As a consequence, although EAI has not historically implemented certain provisions of the PCITSA, the express language of the contract that requires the

after-the-fact redispatch to consider any system operating constraints that limit the availability of an AECC Resource to the EAI Dispatcher cannot be ignored. Finally, AECC's argument that EAI had some obligation to provide evidence of the intent of the parties (AECC I.B. at 65) is simply wrong. EAI is under no such obligation to provide such evidence because, again, the contracts are clear on their face. The express terms of the agreements control.

Conclusions and Order

48. A consideration of the record has led to the conclusion that complainant AECC has not borne its burden of proof. It has not demonstrated by reliable, probative, and substantial evidence, a) that respondent EAI has violated any provision of any relevant contract outstanding between complainant and respondent; b) that the actions of respondent that are the subject of the complaint being decided were anticompetitive; or c) that such actions violated the filed rate doctrine.

49. It is, therefore, ordered that AECC's complaint, described at P 3, *above*, is denied.

Joseph R. Nancy
Administrative Law Judge