

123 FERC ¶ 61,191
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Union Power Partners, L.P.

Docket No. ER05-977-005

ORDER DENYING REHEARING

(Issued May 20, 2008)

1. On October 29, 2007, Union Power Partners, L.P. (Union Power) requested rehearing of the Commission's order¹ affirming the Partial Initial Decision in this proceeding.² In that order, the Commission affirmed the Presiding Judge's conclusion that Union Power does not have an independent contractual right under its interconnection agreement with Entergy Services, Inc. (Entergy) to compensation for Reactive Supply and Voltage Control from Generation Sources Service (reactive power) inside the established power factor range (deadband). For the reasons discussed below, we deny rehearing.

I. Background

2. The Partial Initial Decision contains a detailed account of the background and history of this proceeding.³ Briefly, Union Power was one of five Independent Power Producers (IPPs) (collectively, Independent Generators)⁴ that separately filed a cost-based revenue requirement seeking reactive power compensation from Entergy. Like the

¹ *KGen Hinds, LLC*, 120 FERC ¶ 61,284 (2007) (*KGen*).

² *Entergy Services, Inc.*, 117 FERC ¶ 63,004 (2006) (Partial Initial Decision).

³ *Id.* P 2-7; 33-39.

⁴ The four other Independent Generators are: KGen Hinds, LLC (Hinds), KGen Hot Spring LLC (Hot Spring), Hot Spring Power Company, LP (Hot Spring Power), and Cottonwood Energy Company LP (Cottonwood).

other Independent Generators, Union Power claimed that it had a right to such compensation under the principle of comparability set forth in Order No. 2003-A.⁵

3. The Commission accepted rate schedules filed by two of the Independent Generators, Union Power and Cottonwood, suspended them for a nominal period, made them effective subject to refund, and ordered hearing and settlement judge procedures.⁶ Before the Commission acted on the rate schedules filed by the other Independent Generators, Entergy filed a petition for declaratory order confirming that, if Entergy did not compensate its own or affiliated generators for reactive power inside the deadband, then it need not on a prospective basis compensate non-affiliated generators for reactive power inside the deadband. In a concurrent filing, Entergy proposed to modify Schedule 2 of its Open Access Transmission Tariff (OATT) to set to zero the charge levied by Entergy for reactive power inside the deadband from its own generators.

4. The Commission granted Entergy's petition for declaratory order and accepted the proposed revisions to Entergy's Schedule 2, effective November 1, 2005.⁷ Consequently, Entergy filed separate complaints under section 206 of the Federal Power Act (FPA)⁸ alleging that Union Power's and Cottonwood's rate schedules were unjust and unreasonable as of November 1, 2005. The Commission found that these complaints were premature because Union Power and Cottonwood had asserted independent contractual rights to reactive power compensation, and the Commission had not yet adjudicated their claims. Consequently, the Commission directed that these claims be

⁵ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs., ¶ 31,146, at P 21 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs., ¶ 31,160, at P 416 (2004) (Order No. 2003-A), *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004) (Order No. 2003-B), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005) (Order No. 2003-C), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

⁶ *See Union Power Partners, L.P.*, 112 FERC ¶ 61,065 (2005), *order on reh'g*, 113 FERC ¶ 61,272 (2005); *Cottonwood Energy Co. LP*, 110 FERC ¶ 61,303 (2005), *clarified*, 112 FERC ¶ 61,317 (2005).

⁷ *Entergy Services, Inc.*, 113 FERC ¶ 61,040 (2005), *order on reh'g*, 114 FERC ¶ 61,303, *order on reh'g*, 115 FERC ¶ 61,378 (2006) (Declaratory Order).

⁸ 16 U.S.C. § 824e (2000).

considered in the hearings established in Union Power's and Cottonwood's respective proceedings.⁹

5. The Commission accepted the rate schedules filed by the other Independent Generators, suspended them for a nominal period, made them effective subject to refund, ordered hearing and settlement judge procedures, and specified that, in light of the Declaratory Order and the Commission's acceptance of the related revision to Entergy's Schedule 2, the rate schedules would be unjust and unreasonable as of November 1, 2005. Each Independent Generator sought rehearing of the Commission's summary finding that their rate schedules would be unjust and unreasonable effective November 1, 2005, asserting an independent contractual right to reactive power compensation under section 4.7.1 of its respective interconnection agreement.¹⁰ The Commission granted rehearing, permitting the arguments to be pursued in the hearings established in the Independent Generator's respective proceedings, and permitting the Chief Administrative

⁹ *Entergy Services Inc. v. Union Power Partners, L.P.*, 115 FERC ¶ 61,030, at P 20-21 (2006) (*Union Power*); *Entergy Services Inc. v. Cottonwood Energy Company, L.P.*, 115 FERC ¶ 61,031, at P 20-21 (2006) (*Cottonwood*).

¹⁰ Section 4.7.1 is the same in all of the interconnection agreements, except for Union Power's. During the proceeding before the Presiding Judge, all of the parties agreed that the differences in Union Power's section 4.7.1 are not material to whether they have an independent contractual right to compensation. See Partial Initial Decision, 117 FERC ¶ 63,004 at P 47. Thus, in *KGen*, the Commission reproduced the version of section 4.7.1 that is common to the four interconnection agreements. The version of section 4.7.1 in Union Power's interconnection agreement provides, in relevant part:

At such time as FERC . . . accepts a tariff, rate schedule, or market mechanism for reactive power services or otherwise permits [Union Power] to charge [Entergy] . . . for reactive power . . . or in the event of any other change in law or regulation that permits [Union Power] to assess market-based charges or otherwise seek reimbursement for its provision of reactive power services, [Union Power] shall be entitled to compensation for reactive power services at such market-based or tariff rates . . . only in accordance with the terms and conditions of such tariff, rate schedule, market mechanism, or other legal or regulatory scheme.

Law Judge to consolidate the hearings on this issue with the similar hearings in Union Power's and Cottonwood's proceedings.¹¹

6. Pursuant to the Chief Administrative Law Judge's order, the Independent Generators and Entergy held a telephone conference on the issue of consolidation. The parties agreed to consolidate the proceedings, and to proceed with motions for summary disposition on the issue in lieu of a hearing.¹²

7. In the Partial Initial Decision, the Presiding Judge held that section 4.7.1 does not create an independent contractual right to compensation. The Presiding Judge held that section 4.7.1 grants the Independent Generators the right to *seek* compensation for reactive power inside the deadband,¹³ that it makes payment of compensation ultimately contingent on Commission approval, therefore making such approval a contractual, as well as statutory, prerequisite,¹⁴ and that it does not prohibit Entergy from objecting to compensation as inconsistent with Commission policy.¹⁵ In *KGen*, the Commission examined section 4.7.1 and affirmed the Partial Initial Decision. The Commission agreed with the Presiding Judge's interpretation of section 4.7.1, and held that "[i]n view of [its] contractual structure, the Presiding Judge reasonably concluded that the parties intended to distinguish between a straightforward right to *file* a rate schedule . . . and a contractual right to receive compensation."¹⁶

¹¹ *KGen Hinds LLC*, 113 FERC ¶ 61,041, at P 14 (2005), *order on reh'g*, 115 FERC ¶ 61,028, at P 8-9 (2006); *KGen Hot Spring LLC*, 113 FERC ¶ 61,071, at P 14 (2005), *order on reh'g*, 115 FERC ¶ 61,029, at P 8-9 (2006); *Hot Spring Power Co., LP*, 113 FERC ¶ 61,088, at P 14 (2005), *order on reh'g*, 115 FERC ¶ 61,027, at P 8-9 (2006); *Union Power*, 115 FERC ¶ 61,030 at P 22; *Cottonwood*, 115 FERC ¶ 61,031 at P 22.

¹² Partial Initial Decision, 117 FERC ¶ 63,004 at P 41.

¹³ *Id.* P 49-51, 53, 59.

¹⁴ *Id.* P 51-52.

¹⁵ *Id.* P 53, 59.

¹⁶ *KGen*, 120 FERC ¶ 61,284 at P 22 (emphasis original).

8. The Commission also noted that it had encountered a provision similar to section 4.7.1 in *Bluegrass*,¹⁷ where it held that Bluegrass Generation Company, L.L.C., (Bluegrass) had a right to seek reactive power compensation, but not a right to compensation itself.¹⁸ The Commission observed that section 4.7.1, like the provision in *Bluegrass*, “neither establishes a specific level of contractual compensation for reactive power within the [deadband], nor goes beyond merely providing that the Independent Generators will receive such compensation if the Commission approves a tariff or rate schedule allowing it.”¹⁹

9. Finally, the Commission rejected the Independent Generators’ claim that the Presiding Judge’s interpretation of section 4.7.1 is meaningless because it adds nothing to the Independent Generators’ rights under section 205 of the FPA.²⁰ The Commission stated that “a contractually protected, unilateral right to file is itself a valuable and important right,” explaining that having such a right protects against “the claim that each time [the Independent Generators] seek new or different compensation they are impermissibly attempting to unilaterally alter their [interconnection agreements].”²¹

II. Rehearing Request

10. On rehearing, Union Power argues that the plain language of section 4.7.1—specifically, the phrase “*shall be entitled* to compensation for reactive power services at such market-based or tariff rates”—creates a clear contractual right to reactive power compensation.²² Union Power characterizes the word “shall” as “mandatory language,” and cites it as evidence that the parties to the interconnection agreement “expressed their

¹⁷ *Bluegrass Generation Co. L.L.C.*, 119 FERC ¶ 61,340, at P 18-19 (2007) (*Bluegrass*). The provision at issue in *Bluegrass* stated:

In the event that FERC, or any other applicable Governmental Authority, issues an order or approves a tariff establishing specific compensation to be paid to [Bluegrass] for reactive power support service, [Louisville Gas and Electric Company] shall pay [Bluegrass] pursuant to such order or tariff.

¹⁸ See *KGen*, 120 FERC ¶ 61,284 at P 24-27.

¹⁹ *Id.* P 27.

²⁰ 16 U.S.C. § 824d (2000).

²¹ *KGen*, 120 FERC ¶ 61,284 at P 23.

²² Union Power Request for Rehearing at 15.

clear intent” that Union Power have the contractual right to seek and receive such compensation.²³

11. Union Power claims that the Commission has rendered section 4.7.1 “meaningless” by interpreting it to create only the right to seek reactive power compensation, and not the right to receive such compensation.²⁴ Union Power contends that the Commission’s interpretation “adds nothing to [its] statutory rights” because it already has the right to seek reactive power compensation under section 205 of the FPA, and it has done nothing to voluntarily waive its rights.²⁵ Thus, Union Power asserts that preserving a unilateral right to file “is . . . not a valuable and important right”²⁶ and that the Commission was “plainly incorrect” to find otherwise.²⁷

12. Union Power asserts that the inquiry in this case is whether it has a contractual right to reactive power compensation, not whether it is entitled to compensation under the comparability standard. Union Power contends that interpreting section 4.7.1 to merely protect its section 205 rights “would be to immediately eliminate any consideration of the contractual right in favor of application of the comparability standard.”²⁸ Union Power claims that this approach violates fundamental principles of contract interpretation by rendering section 4.7.1 meaningless.²⁹

13. Union Power argues that because it already has a statutory right to unilaterally file for compensation, the “only remaining interpretation” that gives section 4.7.1 any meaning “is that either Union Power’s and/or [Entergy’s] rights are restricted.”³⁰ Union Power states that such restrictions must be explicit, and that no such restrictions exist with respect to its rights. However, Union Power asserts that Entergy failed to reserve its right to challenge Union Power’s right to compensation.³¹ Union Power claims that

²³ *Id.*

²⁴ *Id.* at 6, 20.

²⁵ *Id.* at 6, 17.

²⁶ *Id.* at 18.

²⁷ *Id.* at 6.

²⁸ *Id.* at 20.

²⁹ *Id.* at 20-21.

³⁰ *Id.* at 21.

³¹ *Id.* at 21-22.

Entergy limited its right to challenging “only the rate itself.”³² Union Power concludes that “[b]ecause [Entergy] did not reserve its ability to challenge Union Power’s right to compensation and [s]ection 4.7.1 otherwise identifies the circumstances under which compensation can be implemented, [s]ection 4.7.1 provides a contractual right . . . that is not subject to, and completely independent of, . . . [the Commission’s] comparability policy.”³³

14. Union Power claims that the Commission relied on the similarities between section 4.7.1 and the interconnection agreement in *Bluegrass* to find that “a contractual basis for . . . compensation is not established if the interconnection agreement does not set forth a *particular level* of compensation for Reactive [Power] Service within the deadband, but instead simply provides [for] Commission issuance of an order or approval of a tariff establishing such compensation.”³⁴ Union Power argues that this alleged distinction between an interconnection agreement with a stated rate and an interconnection agreement recognizing a right to compensation upon filing a rate in the future is unduly discriminatory, and that the only real difference is that the former is possible only if the rate is known at the time the interconnection agreement is being negotiated, while the latter is “the only logical alternative” if the rate has yet to be determined.³⁵

III. Commission Determination

15. We deny rehearing, and affirm our finding that section 4.7.1 does not grant Union Power an independent contractual right to reactive power compensation. Although ambiguous, we remain convinced that when section 4.7.1 is read as a whole, it renders Union Power’s “entitlement” contingent on a Commission order finding that compensation is consistent with Commission policy. Accordingly, we find that Union Power is not entitled to compensation absent such a finding.

16. The Commission’s reactive power compensation policy is that a transmission owner is not required to compensate an IPP for reactive power inside the deadband unless it so compensates its own or affiliated generators (comparability), or more relevant here, unless the IPP has an independent contractual right to compensation. The “independent contractual right exception” recognizes that when comparability is not a factor, an

³² *Id.* at 22.

³³ *Id.*

³⁴ *Id.* at 23.

³⁵ *Id.*

IPP and a transmission owner are still free to negotiate an agreement that compensates the IPP.

17. When an IPP has an independent contractual right to reactive power compensation, it has a right that is not contingent on a condition precedent, such as a Commission determination that compensation is consistent with Commission policy. Rather, the IPP has a right that originates in the parties' mutual agreement, and exists independently of Commission policy or action. In such a case, the IPP's right to compensation is absolute because it arises with the parties themselves, who have affirmatively settled the question of "whether" the IPP should receive compensation. In contrast, the parties may or may not have resolved the question of "how much" compensation should be paid, because the level of compensation may be stated in the contract or left to be determined at a later date.

18. Union Power claims that section 4.7.1 creates an independent contractual right to reactive power compensation because it uses the phrase "*shall be entitled to compensation.*" We reject this argument. The fact that Union Power has an entitlement under section 4.7.1 does not resolve the question of whether it has an independent contractual right under section 4.7.1 because it is not probative of whether the entitlement is absolute or contingent.³⁶ The relevant question here is whether Union Power's entitlement originates *ab initio* with the interconnection agreement, or whether it comes into existence only if the Commission accepts for filing, as consistent with its policy, a reactive power rate schedule that compensates Union Power for reactive power inside the deadband.

19. Although ambiguous, we conclude that when section 4.7.1 is read in its entirety and in light of the Commission's reactive power compensation policy, it creates a *contingent*, rather than an *independent* "right to compensation." Section 4.7.1 entitles Union Power to compensation, but only "[a]t such time as [the Commission] accepts a tariff, rate schedule, or market mechanism for reactive power services or otherwise permits [Union Power] to charge [Entergy] . . . or in the event of any other change in law or regulation that permits [Union Power] to . . . otherwise seek reimbursement." Contrary to Union Power's claim, section 4.7.1 is constructed so that the "mandatory language" of "shall be entitled to" is directly connected to the list of events following the phrase "at such time as." Unlike an independent contractual right, which is absolute and exists as a function of the parties' agreement, section 4.7.1 is so constructed as to render Union Power's entitlement contingent on the occurrence of one of these events.

³⁶ In fact, the Commission has already held that section 4.7.1 entitles Union Power to compensation pursuant to any tariff or rate schedule accepted by the Commission. *KGen*, 120 FERC ¶ 61,284 at P 27.

20. Moreover, the phrase “at such time as” is ambiguous. It may signify that the events which follow are either mandatory or discretionary. For example, the phrase “[a]t such time as [the Commission] accepts a tariff” may indicate either that the Commission is required to accept a tariff or that the Commission has discretion to accept or reject a tariff. We adopt the second reading and interpret the requirement that the Commission accept a rate schedule before Union Power “shall be entitled to compensation” to mean that Union Power is entitled to compensation only if the Commission finds that compensation is consistent with Commission policy. This is the interpretation most consistent with our reactive power compensation policy, which in the first instance treats the provision of reactive power inside the deadband as an obligation of good utility practice rather than as a compensable service,³⁷ and with the language of section 4.7.1, which renders Union Power’s entitlement to compensation contingent on events that rely on future departures from the Commission’s current policy.

21. Our interpretation of the requirement that the Commission accept a tariff or rate schedule before Entergy is obligated to compensate Union Power is further informed by the fact that other predicates to compensation indicate that Union Power has not struck a bargain to receive compensation in the absence of a change in policy. Section 4.7.1 provides that Union Power is entitled to reactive power compensation “[a]t such time as [the Commission] accepts a tariff, rate schedule, or market mechanism for reactive power services or otherwise permits [Union Power] to charge [Entergy] . . . or in the event of any other change in law or regulation that permits [Union Power] to . . . otherwise seek reimbursement.” The principle of *noscitur a sociis* (“it is known from its associates”) is a canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.³⁸ Here the meaning of the condition that the Commission accept a tariff or rate schedule is ambiguous, but the remaining conditions for compensation are if the Commission “otherwise permits [Union Power] to charge [Entergy]” and “any other change in law or regulation.” The provision that compensation is owed if the Commission “otherwise permits,” suggests that section 4.7.1 renders Union Power’s entitlement contingent on Commission permission, which is a function of consistency with Commission policy.³⁹ Similarly, the provision that compensation is owed “in the event of any other change in law or regulation” suggests that Commission acceptance of a tariff or rate schedule is subject to

³⁷ See Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 546 (stating that an interconnecting generator “should *not* be compensated for reactive power when operating its Generating Facility *within* the established power factor range, since it is *only* meeting its obligation” (emphasis added)).

³⁸ See *Old Dominion Electric Coop.*, 119 FERC ¶ 61,253, at n.17 (2007).

³⁹ We also note that the phrase “otherwise permits” is in close proximity to the language referring to the Commission accepting a tariff or rate schedule.

a future policy determination. Thus, reading the condition that the Commission accept a tariff or rate schedule in light of the other predicates to compensation, we conclude that Union Power is entitled to compensation only if the Commission finds that compensation is consistent with Commission policy.

22. Union Power alleges that this is “circular reasoning.” We disagree. There is nothing circular in explaining the difference between an independent contractual right to compensation—which would exist regardless of whether the Commission accepted a rate schedule—and a contingent entitlement to compensation—which arises if the Commission does accept a rate schedule. Our reasoning is straightforward: section 4.7.1 does not create a right to reactive power compensation. Rather, it grants Union Power the right to seek compensation, and entitles Union Power to compensation if the Commission determines that compensation is consistent with its policy. Because Union Power does not have an independent right to compensation, it may only receive compensation if it is entitled to compensation under the Commission’s comparability policy. Since Union Power is not entitled to compensation under the Commission’s comparability policy, and it does not have an independent contractual right to compensation, Union Power will not receive compensation.

23. Union Power argues that this interpretation renders section 4.7.1 meaningless because it already has a statutory right to seek reactive power compensation, and it has not waived that right. We reject this argument. At the outset, we note that we have never found or implied that Union Power lacks a statutory right to seek compensation, or that it waived its statutory rights. What we did say in *KGen*, in response to this same argument, is that having an independent contractual right to unilaterally file a rate schedule protects Union Power from the claim that filing a rate schedule violates its interconnection agreement;⁴⁰ in other words, it immunizes Union Power from the claim that it did waive its statutory rights. Whether or not Union Power regards this as a “valuable and important right,” it remains true that having a contractually protected, unilateral right to file deprives Entergy of a potential argument. Union Power’s argument amounts to little more than an assertion that section 4.7.1 is meaningless unless read to have the meaning it advances. We reject this claim. Any interpretation of section 4.7.1 must be measured against its language and structure, not against Union Power’s subjective understanding of its meaning. In other words, section 4.7.1 is not meaningless simply because it has a meaning that Union Power does not like.

24. Finally, we reject Union Power’s claim that the Commission created or relied on a distinction between an interconnection agreement with a stated rate and an interconnection agreement recognizing a right to compensation upon filing a rate in the future. Union Power has simply misread our decision. We cited *Bluegrass* merely to

⁴⁰ *KGen*, 120 FERC ¶ 61,284 at P 23.

show that the Commission had interpreted language similar to section 4.7.1 to create a right to seek compensation, but not to receive compensation. Similarly, our reference to the fact that neither section 4.7.1 nor the interconnection agreement in *Bluegrass* provides for a particular level of compensation was merely to point out a fact that tends to show, in light of the provision's ambiguity, that the parties in both cases did not create an independent contractual right to compensation, or at the least, raises a question as to the parties' intent. As we have stated above, parties may agree to give an IPP the right to compensation without stating a particular rate, thus leaving it to the Commission to determine a just and reasonable rate in the future, consistent with the parties' agreement. As we have explained, that is not the case here. Thus, we reject Union Power's claim that our decision rests on a distinction between an interconnection agreement with a stated rate and an interconnection agreement recognizing a right to compensation upon filing a rate in the future.

25. Accordingly, we deny rehearing.

The Commission orders:

Union Power's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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