

107 FERC ¶ 61,309
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas-New Mexico Power Company

Docket No. EL04-15-001

v.

El Paso Electric Company

ORDER DENYING MOTIONS TO DISMISS AND TO LODGE, DENYING
REQUEST FOR REHEARING AND GRANTING CLARIFICATION

(Issued June 25, 2004)

1. In this order the Commission denies El Paso Electric Company's (El Paso Electric) motion to dismiss Texas-New Mexico Power Company's (TNMP) complaint filed in this proceeding and motion to lodge, and denies El Paso Electric's request for rehearing of the order issued in this proceeding on February 18, 2004, addressing that complaint (February 18 Order).¹ This order does, however, grant TNMP's request for clarification. This order benefits customers by supporting our decision to establish a forum for the parties to resolve their concerns.

I. Background

2. On November 3, 2003, TNMP filed a complaint in this proceeding (November 3 Complaint) against El Paso Electric asking the Commission to: (1) determine that TNMP has a rollover right to continue the network-type transmission service component of a

¹ Texas-New Mexico Power Company v. El Paso Electric Company, 106 FERC ¶ 61,169 (2003).

bundled pre-Order No. 888² Power Sale Agreement between TNMP and El Paso Electric;³ (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 Electric's Open Access Transmission Tariff (OATT); and (3) direct El Paso Electric to allow TNMP to exercise its rollover rights under the Power Sale Agreement by providing TNMP with network transmission service pursuant to El Paso Electric's OATT.

3. El Paso Electric filed an answer to TNMP's complaint. It argued that TNMP's complaint should be denied because its rollover request seeks new service (i.e., network transmission service as opposed to point-to-point service, which El Paso Electric claims TNMP had under the Power Sale Agreement) 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.

4. On February 18, 2004, the Commission issued an order on the complaint. The Commission found that TNMP had raised matters that the Commission could not resolve on the record before it. In particular, the Commission found material issues of fact concerning whether the transmission component of the bundled service provided under the Power Sale Agreement was point-to-point or network in nature and concerning which facilities and what capacity were used to render service to TNMP. Accordingly, the Commission set the complaint for investigation and a trial-type evidentiary hearing under section 206 of the Federal Power Act (FPA).⁴

² 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 Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), Order No. 888-A, FERC Stats. & Regs., 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 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).

³ The Power Sale Agreement is on file with the Commission as El Paso Electric Rate Schedule No. 57. According to the parties to this proceeding, the Power Sale Agreement expired on December 31, 2002.

⁴ 16 U.S.C. § 824e (2000).

5. In an order dated March 16, 2004,⁵ the Presiding Judge to the hearing established in the February 18 Order defined the scope of the evidentiary hearing by stating that “Reading the Commission’s February 18 Order as a whole, I have concluded that the Commission intended to single out a group of factual issues that required development before it issued an Order dealing with the Complaint, as a whole.”⁶

6. On March 16, 2004, as a result of the Presiding Judge’s Scope Order to limit the scope of the evidentiary hearing, El Paso Electric filed a motion to dismiss TNMP’s November 3 Complaint arguing that El Paso Electric did not have a reasonable expectation to continue to provide transmission service to TNMP and that the Power Sale Agreement is a coordination agreement for which Order No. 888 does not allow rollover rights. In addition, El Paso Electric argued that if the Commission were to find that TNMP is entitled to rollover rights, *i.e.*, that El Paso Electric had a reasonable expectation of continuing service with respect to the transmission portion of the Power Sale Agreement, then El Paso Electric must be provided an opportunity to recover its wholesale stranded costs associated with termination of the power sales portion of the Power Sale Agreement because that expectation would have existed equally for wholesale power and transmission under the Power Sale Agreement.

7. TNMP filed an answer to El Paso Electric’s motion to dismiss. TNMP argues that El Paso Electric’s “expectation” arguments must be rejected in light of the express termination provisions of the Power Sale Agreement and El Paso Electric’s own actions in failing to file a notice of cancellation. In addition, TNMP argues that El Paso Electric’s contention that TNMP’s rollover right should be denied because the Power Sale Agreement is a coordination agreement must be rejected. TNMP asserts that El Paso Electric has typically characterized its Power Sale Agreement to TNMP in its annual Form 1 filings with the Commission as an “RQ” or requirements-type sale transaction. Further, TNMP argues that the Commission should reject El Paso Electric’s stranded cost arguments as wholly irrelevant to this proceeding or to El Paso Electric’s motion.

8. El Paso Electric also filed a request for rehearing of the February 18 Order. TNMP filed a motion for clarification and conditional request for rehearing of the February 18 Order and an answer to El Paso Electric’s request for rehearing. We will discuss El Paso Electric’s and TNMP’s filings below.

⁵ Order Defining Scope of Issues for Initial Decision (March 16, 2004) (Scope Order).

⁶ *Id.* at P 6 (emphasis in original).

II. Discussion

A. Procedural Matters

9. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (d) (2003), provides that the Commission will not permit an answer to requests for rehearing. We will accordingly reject TNMP's answer to El Paso Electric's request for rehearing.

B. Motion to Dismiss Complaint

10. El Paso Electric raises the following arguments in its motion to dismiss: it did not have a reasonable expectation to provide TNMP with service, the Power Sale Agreement was a coordination agreement, and it should be entitled to stranded cost recovery. To the extent that these issues, none of which were raised before,⁷ are properly addressed in this proceeding at all, they are more appropriately addressed in the hearing we previously established. They do not provide a basis to dismiss.

11. In this regard, we find that in the Scope Order, where the Presiding Judge ruled that the February 18 Order “intended to single out a group of factual issues that required development before it issued an Order dealing with the Complaint, as a whole,”⁸ the Presiding Judge gave our February 18 Order too narrow a reading. As we stated in Cincinnati Gas & Electric Co., 59 FERC ¶ 61,072 at 61,291 (1992):

We clarify . . . that the scope of a Commission-ordered evidentiary hearing is not necessarily confined to those issues discussed in detail and “explicitly” set for hearing. When the Commission sets for hearing the justness and reasonableness of a matter [here, the rollover rights of TNMP], it necessarily sets for hearing all issues that are relevant to an assessment of justness and reasonableness. Unless there are special circumstances warranting a narrowing of the litigation focus (such as the grant of summary disposition), issues relating to justness and reasonableness typically are a matter, in the first instance, for identification by the

⁷ E.g., Constellation Power Source, Inc., 100 FERC ¶ 61,380 at P 18 (2002); Nevada Power Co., 100 FERC ¶ 61,273 at P 25 (2002); Southwestern Electric Cooperative, Inc., Opinion No. 450-A, 97 FERC ¶ 61,001 at 61,028 & n. 45 (2001), order on reh'g, Opinion No. 450-B, 99 FERC ¶ 61,008 (2002), aff'd, 347 F.3d 975 (D.C. Cir. 2003); Niagara Mohawk Power Corp., 96 FERC ¶ 61,011 at 61,044 (2001); accord Baltimore Gas and Electric Company, et al., 91 FERC ¶ 61,270 at 61,921-22 (2000) and Baltimore Gas and Electric Company, et al., 92 FERC ¶ 61,043 at 61,114 (2000).

⁸ Scope Order at P 6 (emphasis in original).

administrative law judge designated to preside over the hearing.

12. Although we emphasized in the February 18 Order that the evidentiary hearing should focus “in particular” on whether the transmission component of the bundled service provided under the Power Sale Agreement is point-to-point or network in nature and which facilities and what capacity were used to render service to TNMP, this was intended only to be illustrative and was not intended to confine the hearing to those issues only. Indeed, the concluding sentence of the relevant paragraph of the February 18 Order (P 18), as well as Ordering Paragraph A, set the entire complaint for hearing. Therefore, the issues raised by El Paso Electric are subsumed within the broader issue raised by TNMP’s complaint of whether TNMP is entitled to rollover rights under the Power Sale Agreement and are properly addressed in the evidentiary hearing established in the February 18 Order.

13. However, with regard to El Paso Electric’s stranded cost recovery arguments, we agree with TNMP that they are irrelevant to this proceeding. This proceeding involves TNMP’s complaint concerning rollover of its transmission service under the Power Sale Agreement.⁹ Thus, we will reject El Paso Electric’s stranded cost arguments as beyond the scope of this proceeding.

C. El Paso Electric’s Request for Rehearing

14. El Paso Electric argues that if the Commission does not grant the motion to dismiss, it should grant rehearing, terminate the hearing procedures, and reject TNMP’s complaint. As discussed below, we will deny El Paso Electric’s request for rehearing.

1. El Paso Electric’s Arguments

15. El Paso Electric argues that the Commission erred in setting for hearing: (1) TNMP’s complaint in circumstances where it is undisputed that El Paso Electric used the transmission capacity at issue to serve its native load while the Power Sale Agreement was in effect and has properly designated the network resources on its system to reserve this capacity for native load; (2) the question of whether the transmission service that TNMP seeks as a rollover right uses the same facilities and capacity as the previous, contractually provided service because the undisputed facts demonstrate that they do not use the same facilities and capacity; and (3) the question of whether the service TNMP seeks is network transmission service in light of undisputed facts demonstrating that the service does not satisfy the tariff definition of network service.

⁹ The procedures for recovering stranded costs, which El Paso Electric has not followed, are set forth in Order Nos. 888 and 888-A.

2. Commission Determination

16. We will deny El Paso Electric's request for rehearing. Each of El Paso Electric's arguments was considered in the February 18 Order, which set the complaint for hearing.

17. In its answer to TNMP's complaint, El Paso Electric already argued that: (1) TNMP's rollover complaint must be denied in favor of El Paso Electric's use of the transmission to serve its native load;¹⁰ (2) the transmission service TNMP seeks in exercising its rollover right uses different facilities than those used to serve TNMP under the Power Sale Agreement;¹¹ and (3) neither the underlying transmission service in the Power Sale Agreement nor the rollover service TNMP seeks by its complaint is network service.¹²

18. Moreover, each of the points of Commission error alleged by El Paso Electric is an issue of material fact that bears on the central issue of whether TNMP has a valid rollover right to take transmission service under El Paso Electric's OATT and, if so, the nature of that service (*i.e.*, network or point-to-point). As such, we reject El Paso Electric's arguments and allow the evidentiary hearing to continue as directed in the February 18 Order.

D. TNMP's Request for Clarification

19. TNMP requests that the Commission clarify that: (1) the refund effective date (January 2, 2004) established in the February 18 Order does not preclude TNMP from the relief, sought in its complaint, of transmission service under El Paso Electric's OATT to commence following the issuance of the Commission's order on TNMP's complaint; and (2) should the Commission determine that TNMP is indeed entitled to roll over its transmission service under the Power Sale Agreement into transmission service under El Paso Electric's OATT, such transmission service will commence on a date prospective from the date the Commission issues its order on the complaint.

20. We grant TNMP's request for clarification. We agree with TNMP that the refund effective date established in this proceeding does not preclude TNMP from the relief, sought in its complaint, of transmission service under El Paso Electric's OATT to commence following the issuance of the Commission's order on TNMP's complaint. In addition, we agree with TNMP that should it be determined that TNMP is entitled to roll over its transmission service under the Power Sale Agreement into transmission service

¹⁰ El Paso Electric Answer at 23-24, 27-28.

¹¹ *Id.* at 18-23.

¹² *Id.* at 30-33.

under El Paso Electric's OATT, such transmission service will commence on a date prospective from the date the Commission issues its order on the Presiding Judge's initial decision.

III. Motion to Lodge

21. On April 15, 2004, almost a month after requests for rehearing of the February 18 Order were due, El Paso Electric filed a motion to lodge several documents which, it argues, contradict TNMP's answer to El Paso Electric's motion to dismiss. Subsequently, TNMP filed an answer to the motion to lodge.

22. We will deny El Paso Electric's motion to lodge. As with the motion to dismiss discussed above, the motion to lodge is more appropriately directed to the ongoing hearing. To the extent, however, that El Paso Electric seeks, through its motion to lodge, to overturn the Commission's February 18 Order, we similarly deny it. As the courts have repeatedly recognized, the time period within which a party must challenge a Commission order, *i.e.*, seek rehearing of a Commission order, is statutorily established at 30 days by section 313(a) of the FPA, and the Commission has no discretion to extend that deadline.¹³ Thus, the Commission has long held that it lacks the authority to consider requests for rehearing filed more than 30 days after issuance of a Commission order.¹⁴ Moreover, even if the motion to lodge were considered merely a supplement to El Paso Electric's timely motion to dismiss and request for rehearing, Commission precedent is clear that untimely supplements to timely filed requests for rehearing, *i.e.*, supplements filed after the expiration of the statutory 30-day period, will be rejected.¹⁵

¹³ See City of Campbell v. FERC, 770 F.2d 1180, 1183 (D.C. Cir. 1985) ("The 30-day time requirement of [the FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing."); Boston Gas Co. v. FERC, 575 F.2d 975, 977-78, 979 (1st Cir. 1978) (same; describing identical rehearing provision of Natural Gas Act as "a tightly structured and formal provision. Neither the Commission nor the courts are given any form of jurisdictional discretion."). See also Sierra Association for Environment v. FERC, 791 F.2d 1403, 1406 (9th Cir. 1986).

¹⁴ See, *e.g.*, New England Power Pool, 89 FERC ¶61,022 at 61,076 (2000); Arkansas Power & Light Co., 19 FERC ¶61,115 at 61,217-18 (1982), reh'g denied, 20 FERC ¶61,013 at 61,034 (1982). See also Public Service Company of New Hampshire, 56 FERC ¶61,105 at 61,403 (1991); CMS Midland, Inc., 56 FERC ¶61,177 at 61,623 (1991).

¹⁵ See, *e.g.*, Houlton Water Company, et al., 60 FERC ¶ 61,141 at 61,511 & n.8 (1992); Public Service Company of New Hampshire, et al., 56 FERC ¶ 61,105 at 61,403 & n.16 (1991).

We add, however, that as noted above, to the extent that these new documents are relevant, they may be introduced in the hearing established in this proceeding.

The Commission orders:

(A) El Paso Electric's motions to dismiss and to lodge and request for rehearing are hereby denied, as discussed in the body of this order.

(B) TNMP's request for clarification is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.