

110 FERC ¶61,285
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kentucky Utilities Company

Docket No. EL04-117-001

ORDER DENYING REHEARING

(Issued March 15, 2005)

1. In this order, the Commission denies a request by Kentucky Utilities Company (Kentucky) for rehearing of the order issued in this proceeding on October 8, 2004.¹ In that order, the Commission denied Kentucky's petition for a declaratory order regarding the interpretation of a contract. This order benefits customers by having the contract dispute settled in the most appropriate venue.

Background

2. Owensboro Municipal Utilities (Owensboro) filed suit against Kentucky in the Commonwealth of Kentucky's Daviess Circuit Court, requesting that "the Court declare the rights and duties of" Owensboro and "Kentucky under the contract" and that the court order Kentucky to pay damages. Kentucky removed the case to the U.S. District Court for the Western District of Kentucky. Kentucky also filed a petition for declaratory order with the Commission requesting the Commission to assert jurisdiction over the dispute between the parties.

3. Kentucky and Owensboro are parties to a longstanding wholesale electricity contract that includes rates, terms, and conditions of service for certain wholesale sales of electric energy in interstate commerce. In the October Order, the Commission denied Kentucky's petition for declaratory order on the grounds that the dispute involves a matter of contract interpretation that is best left to the district court, relied in part on the

¹ *Kentucky Utilities Co.*, 109 FERC ¶ 61,033 (2004) (October Order).

test established in *Arkansas Louisiana Gas Co. v. Hall*.² The three-part test for deciding whether the Commission will assert primary jurisdiction, as explained in *Arkla*, is:

(1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission.³

4. Based on these factors, the Commission found that the contract dispute between Kentucky and Owensboro did not warrant assertion of the Commission's primary jurisdiction because the Commission does not possess special expertise beyond that of a federal district court in this matter. There was no need for uniform interpretation of the contract language at issue here because this is merely a contract dispute between two parties over the appropriate compensation for backup energy services. Finally, while this is a matter of significance to the parties, the Commission found that it is not important in relation to its regulatory responsibilities.

Request for Rehearing

5. In its request for rehearing of the October Order, Kentucky asserts that the outcome of its dispute with Owensboro turns on whether a wholesale electricity rate charged under a contract on file with the Commission should be changed, and that therefore the matter falls within the Commission's exclusive and/or primary jurisdiction. Kentucky thus requests that the Commission assert jurisdiction and grant the relief Kentucky requests. If the Commission denies rehearing, however, Kentucky requests that the Commission state that if a court agrees with Owensboro's argument, then Kentucky must make a filing with the Commission under section 205 of the Federal Power Act to implement the court's interpretation, and that any such filing would be evaluated under the *Mobile-Sierra* standard of review.

6. The contract at issue in this case specifies the rights and responsibilities of the parties with regard to Owensboro's Elmer Smith Generating Station (ESGS). The contractual obligations, as described by Kentucky, are that (1) Owensboro sells supply from ESGS that is excess to its needs to Kentucky, (2) Kentucky dispatches ESGS, and (3) Kentucky sells "Backup Energy" to Owensboro during periods of forced outages, unit derates, and scheduled maintenance at ESGS when Owensboro cannot supply its

² 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*).

³ *Arkla*, 7 FERC ¶ 61,175 at 61,322.

customers from its own resources. The dispute in this case arises from the third obligation.

7. The contract provides that the rate Kentucky charges Owensboro for Backup Energy will generally reflect the “incremental energy cost” of Kentucky’s system. The term “incremental energy cost” is defined in the contract. Kentucky argues that an interpretation of this term could have the effect of changing the filed rate for wholesale electricity rates charged under the contract, and that such interpretations are at the core of the Commission’s responsibility. Specifically, Kentucky asserts that Owensboro calls for new, extra-contractual calculations to reduce the rate for backup energy. Furthermore, Kentucky characterizes Owensboro’s desire to seek an interpretation of the contract as a reformation of the contract, which, Kentucky argues, also falls within the Commission’s jurisdiction. Kentucky supports its claim by arguing that the Commission has, in other cases, found that its exclusive jurisdiction covers determinations as to the amount of service and compensation due under a contract on file with the Commission, and that a similar situation exists here.

8. Kentucky also encourages the Commission to assert jurisdiction by pointing out that both it and Owensboro agree that the issue falls within the Commission’s primary jurisdiction. Kentucky argues that the dispute satisfies the Commission’s three-part *Arkla* test for whether primary jurisdiction should be exercised. Specifically, Kentucky asserts that the Commission possesses the requisite special expertise, that there is a need for uniformity because the contract is subject to the *Mobile-Sierra* “public interest” standard, and that the Commission has a regulatory responsibility to prevent “end runs” around the *Mobile-Sierra* doctrine by bringing jurisdictional disputes to state or federal courts.⁴

Procedural Matters

9. Owensboro filed an answer in response to Kentucky’s request for rehearing. Rule 713(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2004), prohibits an answer to a request for rehearing. Accordingly, Owensboro’s answer is rejected.

⁴ Kentucky also argues that if the Commission does not exercise jurisdiction, then the Commission runs the risk of eroding the protections afforded to contracts by the *Mobile-Sierra* doctrine. Kentucky’s theory is that other parties with *Mobile-Sierra* contracts would frame their rate disputes as questions of contract interpretation.

Discussion

10. Kentucky asserts that the interpretation of the contract that Owensboro seeks in its lawsuit could change wholesale electricity rates charged under the contract, and that reviewing such rates is at the core of the Commission's responsibility under the Federal Power Act. The Commission disagrees. Owensboro's complaint filed in the Commonwealth of Kentucky's Daviess Circuit Court asks the court to "declare the rights and duties of" the parties "under the Contract" and award damages to the extent that Kentucky has failed to comply with the contract. Owensboro requests, *inter alia*, that the court determine how to apply the definition of "incremental energy cost". Owensboro argues in its complaint that its contract with Kentucky requires Kentucky to exclude from such incremental energy cost any demand charge, whether separately stated or not. Owensboro does not ask the court to find any provisions of the contract unreasonable or unenforceable. In short, Owensboro seeks an interpretation and enforcement of the contract's existing provisions, not a change in the contract.

11. Resolving an ambiguity about how to apply the existing terms of a contract is not the same as changing the contract, and in this case does not warrant the Commission's assertion of jurisdiction because the three-part test introduced in *Arkla* is not satisfied, as described in the October Order. Because Owensboro's complaint only seeks enforcement of an existing contract, and not the setting of a new just and reasonable rate, its lawsuit does not fall within the Commission's exclusive jurisdiction.

12. Pursuant to the three-part test introduced in *Arkla*, the Commission may decline to assert jurisdiction and allow the matter to be decided by a court of competent jurisdiction. The Commission is satisfied that analysis of each *Arkla* factor leads to the conclusion that the dispute over the contract does not require assertion of the Commission's primary jurisdiction. The Commission has no special expertise beyond that of a federal district court in this matter.⁵ The dispute between the parties does not raise any policy issues of industry-wide significance, but only involves interpretation of particular contractual language these two parties negotiated among themselves. Thus, there is no need for uniformity of interpretation. Nor is the case important in relation to the regulatory responsibilities of the Commission.

13. In its request for rehearing, Kentucky also raises the *Mobile-Sierra* doctrine and claims that the sanctity of contracts could be endangered if the Commission disclaims jurisdiction here. The Commission disagrees with this assertion because, as stated above,

⁵ See *Arkla*, 7 FERC ¶ 61,175 at 61,322 (finding that the Commission is no more expert than a court in deciding non-technical contract questions).

Docket No. EL04-117-001

5

the dispute is limited to determining the correct meaning of the existing contract, rather than changing the contract. Kentucky will not be required to make a section 205 filing following the court's contract interpretation because the court's decision cannot be a reformation of the contract.⁶ Therefore, the *Mobile-Sierra* question is irrelevant.

The Commission orders:

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

(B) Owensboro's answer is hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

⁶ According to the Supreme Court, "when Congress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce.'" *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 580 (1981) (*quoting Missouri Pacific R. Co. v. Stroud*, 267 U.S. 404, 408 (1925)).