

FERC 121 ¶ 61,255
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

East Kentucky Power Cooperative, Inc.	Docket Nos. TX05-1-000
	TX05-1-001
	TX05-1-002
	TX05-1-003
	TX05-1-004
	TX05-1-005
	TX05-1-006
	TX05-1-007
	TX05-1-008
	TX05-1-009

ORDER GRANTING MOTION TO TERMINATE AND DENYING MOTION
TO VACATE

(Issued December 12, 2007)

1. In this order, we grant East Kentucky Power Cooperative, Inc.'s (East Kentucky) motion to terminate the proceedings in this docket on the grounds of mootness, and deny Tennessee Valley Authority's (TVA) motion to vacate orders issued in this proceeding.

Background

2. On October 1, 2004, East Kentucky filed an application pursuant to section 210 of the Federal Power Act¹ seeking an order from the Commission requiring TVA to interconnect with East Kentucky at three locations on TVA's transmission system. In its filing, East Kentucky explained that Warren Rural Electric Cooperative (Warren), a current TVA customer, had entered into a wholesale power contract with East Kentucky, and that it needed these interconnections to TVA's transmission system in order to facilitate the transmission of energy to Warren. TVA opposed East Kentucky's application.

¹ 16 U.S.C. § 824i (2000).

3. The Commission issued a series of orders in this proceeding, including: (1) Proposed Order Directing Interconnection, Establishing Further Procedures and Offering Settlement Judge Procedures;² (2) Order Directing the Filing of an Interconnection Agreement and Revised System Impact Studies;³ (3) Final Order Directing Interconnection and Accepting Interconnection Agreement, As Modified;⁴ (4) Order Denying Rehearing;⁵ and (4) Order on Compliance Filing.⁶ In these orders, the Commission required TVA to interconnect with East Kentucky and to submit an interconnection agreement to govern the operation of the interconnections and the provision of certain coordination services to East Kentucky. In its Compliance Order, the Commission required TVA to submit a revised interconnection agreement with East Kentucky.

4. On August 18, 2006, TVA filed a petition for review of the Final Order and Rehearing Order with the United States Court of Appeals for the District of Columbia Circuit.⁷ On October 27, 2006, the Court granted the Commission's motion to hold the appeal in abeyance, pending final resolution of the issues on compliance.

5. On December 7, 2006, Warren issued a press release stating that its board of directors had decided to withdraw its notice to leave TVA.⁸

The Filings

6. On May 3, 2007, East Kentucky filed a motion to terminate these proceedings as moot. According to East Kentucky, its interconnection application

² See *East Kentucky Power Cooperative, Inc.*, 111 FERC ¶ 61,031 (2005).

³ See *East Kentucky Power Cooperative, Inc.*, 112 FERC ¶ 61,160 (2005).

⁴ See *East Kentucky Power Cooperative, Inc.*, 114 FERC ¶ 61,035 (2006). (Final Order).

⁵ See *East Kentucky Power Cooperative, Inc.*, 115 FERC ¶ 61,347 (2006) (Rehearing Order).

⁶ See *East Kentucky Power Cooperative, Inc.*, 116 FERC ¶ 61,072 (2006), *reh'g pending*. (Compliance Order).

⁷ *Tennessee Valley Authority v. Federal Energy Regulatory Commission*, No. 06-1304 (D.C. Cir. Aug. 18, 2006).

⁸ See TVA Distributor Group Motion, Attachment A.

was rendered moot by Warren's decision to continue to acquire electric service from TVA and to terminate its agreement with East Kentucky. East Kentucky states that: (1) it was not involved in Warren's decision to revert to TVA; (2) it was not a participant in the discussions between Warren and TVA that resulted in Warren's decision to continue receiving electric energy from TVA; and (3) it did not know of these developments until Warren notified East Kentucky that it would terminate its arrangements with East Kentucky. East Kentucky declares that, as a result of Warren's decision to terminate its agreement with East Kentucky, it no longer needs the three interconnections or the interconnection agreement that are subject of the proceedings in this docket. East Kentucky, therefore, requests that the Commission terminate these proceedings.

7. On May 4, 2007, TVA filed a motion with the Commission to vacate the orders issued in this proceeding in light of East Kentucky's motion to terminate. In support, TVA argues that: (1) principles of fairness dictate that the orders be vacated, as TVA did not cause these proceedings to become moot; (2) the rulings reflected in these orders are not necessary to establish Commission policy; (3) the particular terms and conditions that govern an interconnection can be fact specific; (4) neither East Kentucky nor Warren opposes vacatur; and (5) granting vacatur would put TVA in the same position as if East Kentucky had not filed its application.

8. On May 21, 2007, TVA Distributor Group, an intervenor in this proceeding, filed a motion in opposition to TVA's motion for vacatur. TVA Distributor Group points out that, over the course of this proceeding, the Commission devoted substantial resources to the resolution of the novel issues raised in this proceeding. TVA Distributor Group further argues that the policies and rulings established by the Commission in these orders should be preserved. Further, TVA Distributor Group points to TVA's role in the events that caused this proceeding to become moot, noting that TVA had extended to Warren an invitation to withdraw its notice to leave TVA without paying a reintegration fee, if it did so by January 10, 2007. Lastly, TVA Distributor Group states that it believes its member distributors would be harmed were the Commission to grant TVA's motion for vacatur because such action could preclude its member distributors from seeking alternative energy suppliers. TVA Distributor Group argues that its member distributors would be harmed because their ability to actually "break free" of TVA may well depend on being able to obtain interconnections of the sort that were the subject of this proceeding.⁹

⁹ See TVA Distributor Group Motion at 5.

Commission Determination

9. We will grant East Kentucky's motion to terminate these proceedings. We agree that, in light of Warren's decision to terminate its contract for energy with East Kentucky and to continue to receive energy from TVA, it will no longer need the interconnections or the interconnection agreement that are the subject of these proceedings. Therefore, we will terminate these proceedings.

10. We will deny TVA's motion to vacate the orders in this proceeding. As TVA acknowledges, the Commission normally does not vacate its orders.¹⁰ The Commission vacates its prior orders only in "exceptional circumstances."¹¹ In *Town of Neligh v. Kinder Morgan Interstate Gas Transmission*,¹² the Commission refused to vacate an order, finding that the order had value as a policy statement and noting that the Commission "often expends valuable resources to reach a decision in a proceeding and that it would be disruptive to Commission proceedings to vacate orders simply because the parties have settled." In other recent cases, the Commission has declined to vacate orders that provide useful information to the public.¹³ TVA has not shown that exceptional circumstances are present here.

11. Moreover, as the Supreme Court stated in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, vacatur is an equitable remedy, not an automatic right.¹⁴ The principal consideration for vacatur "is whether the party seeking relief from the judgment below caused the mootness by voluntary action."¹⁵ We find that TVA has, in fact, taken such action to moot these proceedings. We recognize that Warren's press release noted that the "primary factor affecting [its] decision [to remain with TVA] was escalations of projected wholesale power costs. Those increases were primarily driven by regulatory delays in permitting and escalations

¹⁰ See TVA Motion at 6.

¹¹ See *New England Power Co.*, 75 FERC ¶ 61,214 at p. 61,720 (1996); see also *Constellation Power Source, Inc. v. California Power Exchange*, 100 FERC ¶ 61,380, P 20 & n.14 (2002).

¹² 94 FERC ¶ 61,075 at p. 61,348 (2001).

¹³ See *New PJM Companies*, 110 FERC ¶ 61,009 (2005).

¹⁴ *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994).

¹⁵ *Id.* at 25.

in material and construction costs.”¹⁶ However, Warren stated that it decided to return to the standard power contract with TVA following TVA’s November, 2006 invitation to waive the reintegration fee for its member distributors, who had given notice to leave TVA’s system, if they returned by January 10, 2007. We find that TVA, through its waiver of the reintegration fee, took “voluntary action” which caused the mootness, and, therefore, is not entitled to vacatur.

12. Furthermore, the orders issued in this proceeding represent the Commission’s first consideration of its authority to order TVA to provide interconnections to allow its departing distribution customers to access alternative power supplies. The orders establish Commission policy that will apply to interconnection applications that may be made in the future by, or on behalf of, other departing TVA distributors. We find that TVA’s assertions that the motion should be granted because neither East Kentucky nor Warren opposes vacatur and no party will be harmed as a result of vacating the orders is immaterial. In the absence of compelling reasons and exceptional circumstances supporting vacatur, we will deny TVA’s motion to vacate the orders in this proceeding.

The Commission orders:

(A) East Kentucky’s motion to terminate the proceedings in this docket is granted, as discussed in the body of this order.

(B) TVA’s motion to vacate the proceedings in this docket is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁶ See TVA Distributor Group Motion, Attachment A.