110 FERC ¶ 61,118
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kiowa Power Partners, LLC v. Public Service Company of Oklahoma and American Electric Power Service Corp.	Docket No. EL05-42-000
Tenaska Gateway Partners, Ltd. v. Southwestern Electric Power Co. and American Electric Power Service Corp.	Docket No. EL05-43-000
	(not consolidated)

ORDER DENYING COMPLAINTS

(Issued February 11, 2005)

1. In this order, the Commission addresses complaints filed by Kiowa Power Partners, LLC (Kiowa) and Tenaska Gateway Partners, Ltd. (Tenaska), against operating affiliates of the American Electric Power Service Corporation (AEP). Kiowa and Tenaska, both generating companies, unilaterally request the Commission to modify their respective interconnection agreements (IAs) with the AEP affiliates by reclassifying certain facilities as network upgrades, and to consider these requests under the just and reasonable standard of the Federal Power Act (FPA).[1] For the reasons described below, the Commission will deny the requested contract modifications as ineligible for consideration under the FPA's just and reasonable standard and for failure to meet the public interest standard. This order benefits customers by ensuring enforcement of the lawful terms and conditions of existing IAs.

Background

2. On August 16, 2001, supplemented on December 14, 2001, Public Service Company of Oklahoma (Public Service) submitted for filing, as a service agreement under the AEP open access transmission tariff (OATT), an IA between it and Kiowa to provide for connection of Kiowa's new generating facility to the AEP transmission

[1] 16 U.S.C. §§ 791a-825r (2000).

system (Kiowa IA). Commission staff accepted the Kiowa IA on February 7, 2002 (Docket Nos. ER01-2857-000 and ER01-2857-001).

3. Similarly, on July 23, 1999, Southwestern Electric Power Company (SWEPCO) submitted for filing, as a service agreement under the SWEPCO OATT,[2] an IA between it and Tenaska to permit connection of Tenaska's new generating facility to the SWEPCO transmission system (Tenaska IA). Commission staff accepted the Tenaska IA on August 11, 1999 (Docket No. ER99-3712-000).

Complaints

4. Kiowa's complaint (Docket No. EL05-42-000) asks the Commission to implement its generator interconnection policy, primarily as stated in Order No. 2003,[3] by changing the Kiowa IA's classification of certain interconnection facilities, located beyond the point of interconnection with Public Service's transmission system, from directly assignable facilities to network upgrades. Kiowa asks for reimbursement, by transmission credits, of its actual costs for the facilities ($1,937,139), with interest. It asks for further modification of the IA to end Public Service's collection of monthly operation and maintenance (O&M) charges for these facilities. Kiowa says that both the Kiowa IA and Public Service's OATT give Kiowa the right to have this complaint considered under the FPA's just and reasonable standard, per the Commission's holding in *Duke Energy Hinds, LLC v. Entergy Services, Inc.* (2003).[4]

5. Citing Order No. 2003, Kiowa first summarizes the Commission's general policy on network upgrades associated with interconnections. A transmission provider may require an interconnection customer to pay upfront costs of network upgrades, Kiowa explains, but it must then provide the interconnection customer with transmission credits equal to the upfront amounts paid for the network upgrades, plus interest. A network upgrade is any facility located at or beyond the point of interconnection. Kiowa then

[2] After SWEPCO became a wholly-owned electric utility subsidiary of AEP, on June 15, 2000, regulation of services under the SWEPCO OATT came under the AEP OATT.

[3] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 at P 675-695 (2003), *on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 24, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *reh'g pending*.

[4] *Duke Energy Hinds, LLC v. Entergy Services, Inc.*, 102 FERC ¶ 61,068 (2003), *reh'g pending* (*Duke Hinds II*).

addresses the Commission's policy on unilaterally-requested modification of existing IAs. The Commission held originally that it could not modify these contracts unless it was in the public interest[5] to do so.[6] Subsequently, in *Duke Hinds II*, the Commission refined this policy to hold that where IAs provide for either party to unilaterally request changes to the IA under FPA sections 205 or 206, the appropriate standard of review for modifying the contract is the just and reasonable standard.[7] Lastly, Kiowa cites Commission policy that prohibits a transmission provider from assessing operating and maintenance (O&M) costs on network upgrades.[8]

6. Kiowa states that, per Appendix A of the Kiowa IA, certain interconnection facilities, which are currently classified as directly assignable, are located beyond the point of interconnection with Public Service's transmission system. Therefore, it argues, these facilities are properly network upgrades and should be re-classified.

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[5] The Commission described how the *Mobile-Sierra* public interest standard constrains its authority to review and order modification to contracts depending upon the circumstances of the particular contract in *Northeast Utilities Service Co.*, 66 FERC ¶ 61,332 (1994), *aff'd sub nom. Northeast Utilities Service Co. v. FERC*, 55 F.3d 686 (1st Cir. 1995) (*Northeast Utilities*):

> [u]nder the *Mobile-Sierra* doctrine, rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid. Parties to a contract . . . cannot waive the indefeasible right of the Commission under section 206 to replace rates that are contrary to the public interest, "as where [the existing rate structure] might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." . . . This standard is in contrast to the normal section 206 standard which allows the Commission to replace rates found to be unjust, unreasonable, unduly discriminatory or preferential.

Northeast Utilities, 66 FERC at 62,076, 62,077 n.12, citation omitted.

[6] *See Entergy Services, Inc.*, 98 FERC ¶ 61,290 at 62,261-262 (2002), *reh'g dismissed, Duke Hinds II.*

[7] *Duke Hinds II*, 102 FERC ¶ 61,068 at P 21 (2003).

[8] *See* Order No. 2003-A at P 424.

7. To support Commission consideration of the reclassification request under the just and reasonable standard, per *Duke Hinds II*, and not under the public interest standard, Kiowa argues first that, because it is a service agreement, the Kiowa IA is subject to the AEP OATT, which provides:

> Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the ability of any Party receiving service under the Tariff to exercise its rights under the Federal Power Act and pursuant to the Commission's rules and regulations promulgated thereunder.[9] [hereinafter, OATT Provision]

Second, Kiowa cites section 10.1 of the Kiowa IA (Applicable Laws and Regulations), which provides:

> This Agreement and all rights, obligations, and performances of the Parties hereunder, are subject to Applicable Laws and Regulations. Notwithstanding the foregoing, each Party shall have the right at its sole expense to contest the application of any Applicable Laws and Regulations to such Party before the appropriate authorities. [hereinafter, IA section 10.1]

Kiowa argues that both textual provisions give Kiowa the right to bring its complaint under FPA section 206 and, under application of the just and reasonable standard of that statutory section, to receive the requested relief.

8. Tenaska's complaint, in Docket No. EL05-43-000, is nearly identical. Tenaska states that Appendix A of the Tenaska IA demonstrates that the facilities in question are located beyond the point of interconnection with SWEPCO's transmission system. It references the same OATT Provision and section 10.1 of its IA, which is identical to section 10.1 of the Kiowa IA. Like Kiowa, Tenaska argues that these textual provisions support its rights to have its complaint for interconnection facilities reclassification considered under FPA section 206's just and reasonable standard. Like Kiowa, it asks the Commission to grant relief in the form of transmission credits for the facilities' actual costs ($3.28 million) plus interest. Tenaska does not request modification of the Tenaska IA to terminate O&M charges.

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[9] Operating Companies of American Electric Power System, FERC Electric Tariff, Third Revised Volume No. 6, section 9 (Regulatory Filings) at Original Sheet 39.

Notice of Filings and Answers

9. Notices of Kiowa's and Tenaska's complaints were published in the *Federal Register*, 69 Fed. Reg. 76,935 (2004), with the answers to the complaints and comments, interventions or protests due on or before January 4, 2005. AEP filed answers to both complaints. The Arkansas Public Service Commission filed a notice of intervention in Docket No. EL05-43-000.

Answers

10. AEP answers Kiowa's and Tenaska's complaints in nearly identical language. It disputes the applicability of FPA section 206's just and reasonable standard to these unilaterally requested IA re-openings, and says that, necessarily, the public interest standard of *Mobile-Sierra* must apply. AEP relies upon, as controlling, each IA's inclusion of an identical *Mobile-Sierra* provision, at section 13.2 (Modifications), that prevents IA modification without both parties' consent:

> No amendment or modification to this Agreement or waiver of a Party's rights hereunder shall be binding unless it shall be in writing and signed by the Party against which enforcement is sought. This Interconnection Agreement may be amended by and only by a written instrument duly executed by each of the Parties hereto. [hereinafter, IA section 13.2]

AEP argues that because IA section 13.2 clearly limits the parties' rights to seek unilateral modification of the IAs, the Commission must apply the public interest standard to Kiowa's and Tenaska's unilateral requests for IA modification.

11. AEP characterizes the generators' reliance on IA section 10.1 as misplaced. This section is only a standard provision that acknowledges each party's obligation to meet any applicable laws or regulations to which it may be subject, and preserves each party's right to contest the applicability of any such laws or regulations to which it might otherwise be subject. The rights reserved apply only to laws and regulations that the party *contests*, and Kiowa and Tenaska are not contesting laws or regulations. The section is silent about unilateral contract modification, which the IAs describe in IA section 13.2 only. AEP cites court rulings that such "applicable laws" provisions are generic contract clauses that do not bear on the parties' *Mobile-Sierra* rights.[10]

[10] AEP cites *Boston Edison Co. v. FERC*, 233 F.3d 60, 66 (1st Cir. 2000) (specification of a rate or formula implicates Mobile-Sierra, which boilerplate like a standard laws and regulations clause does not negate) and *Texaco Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. 1998) (generic contract clause is irrelevant to rate setting).

12. AEP refutes Kiowa's and Tenaska's contentions that the OATT Provision defeats the effect of IA section 13.2 by citing the Commission's recent holding in *PPL University Park, LLC v. Commonwealth Edison Co.*[11] The OATT in that proceeding[12] contains identical language to the OATT Provision of these proceedings. The Commission found that the generator there had not refuted the presumption that contracts that require joint filings in order to implement modifications are subject to the public interest standard of review.[13]

13. AEP argues that Kiowa's and Tenaska's reliance on *Duke Hinds II* is inapposite because of the inclusion in both contracts of IA section 13.2, whose force is not diminished by IA section 10.1 or the OATT Provision. For the Commission to modify the IAs, AEP continues, Kiowa and Tenaska must meet the public interest standard; they must demonstrate that their losses from the IAs are so great that they threaten the generators' ability to continue service, cast an excessive burden on their customers, or are unduly discriminatory to the detriment of other customers. AEP points out that Kiowa and Tenaska have not made these demonstrations. It continues that, as stated in *PPL*, a cost differential that may exist now as a result of a change in Commission policy concerning cost allocations under interconnection agreements is not by itself, enough to demonstrate that the public interest demands modification to or abrogation of an existing contract.[14] Lastly, AEP argues that the Commission has held consistently that once a party signs a *Mobile-Sierra* contract, it cannot escape by later claiming that the rates were not just and reasonable when it signed the contract.[15]

14. On January 19, 2005, Kiowa and Tenaska jointly filed a motion for leave to respond to AEP's answers, and their response. On February 3, 2005, AEP asked the Commission to deny the complainants' January 19, 2005 motion.

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[11] *PPL University Park, LLC v. Commonwealth Edison Co.*, 109 FERC ¶ 61,190 (2004), *reh'g denied*, 110 FERC ¶ 61,117 (2005) (*PPL*).

[12] That proceeding concerned the Commonwealth Edison Company OATT.

[13] *PPL*, 109 FERC ¶ 61,190 at P 16.

[14] *PPL*, 109 FERC ¶ 61,190 at P 20. AEP cites also *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2003); *City of Bethany v. FERC*, 727 F.2d 1131, 1139-41 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 917 (1984).

[15] AEP cites *Nevada Power Co. v. Enron Power Marketing, Inc.*, 105 FERC ¶ 61,185 at P 14 (2003).

Discussion

Procedural Matter

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Kiowa's and Tenaska's January 19, 2005 response and will, therefore, reject it.

Modification of IAs

16. We consider first whether the provisions on which Kiowa and Tenaska rely have indeed preserved the generators' rights to have us consider their unilateral requests for IA modification under the FPA's just and reasonable standard before we consider whether the IAs should be modified under that standard or the *Mobile-Sierra* public interest standard.

17. We find that IA section 10.1, even when amplified by the definition in section 1.3 of each IA of "applicable laws and regulations,"[16] is merely a standard clause that acknowledges the parties' obligations to obey the directives of the governmental entities governing their activities under the IA. We agree with AEP that the IA's protection of the right to contest the application of these laws and regulations refers to how such law or regulation applies to the party contesting the applicability of the law or regulation to itself, not to the other signatory to the IA. We decline to read this standard clause as negating the language in IA section 13.2 that explicitly requires both parties' agreement to modification of the IA and the assent of the party against whom enforcement is sought.

18. The OATT Provision, on which Kiowa and Tenaska rely, states merely that nothing in their IAs, which were filed as service agreements under the AEP OATT, affects the complainants' exercise of their statutory rights under the FPA, rights that Kiowa and Tenaska have exercised by bringing their complaints. The OATT Provision does not expand this statutory right to include automatic consideration of complaints under the FPA's just and reasonable standard instead of the *Mobile-Sierra* public interest standard. *Sierra* itself concerned a complaint brought under FPA section 206. The court

[16] Section 1.3 of each IA defines applicable laws and regulations to mean "all applicable federal, state and local laws, ordinances, rules and regulations, and all duly promulgated orders and other duly authorized actions of any Governmental Authority having jurisdiction over the Parties and/or their respective facilities."

found that the reasonableness of the new, proposed rate did not make unreasonable the contract rate to which the parties had agreed. It required the Commission to apply the public interest to determine whether the contract rate was unlawful.[17] We decline to read the OATT Provision as creating any additional rights.

19. Having determined that Kiowa's and Tenaska's complaints are not reviewable under the just and reasonable standard, we will consider them under the public interest standard. The generators state only that the facilities at issue are located beyond the point of interconnection with the transmission grid and that they seek transmission credits. They make no showing that their IAs cause them financial distress that threatens their ability to continue service, nor that the IAs cast excessive burden on their customers, nor that the IAs are unduly discriminatory to the detriment of other customers that are not parties to this proceeding, nor any other factors on this record to demonstrate that the contract is contrary to the public interest.[18] We conclude, therefore, that Kiowa and Tenaska have failed to meet the public interest standard and we will deny their complaints.

The Commission orders:

The complaints filed by Kiowa and by Tenaska in these proceedings are hereby denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

[17] *Sierra*, 350 U.S. 353-55.

[18] *See supra* note 5.