110 FERC ¶ 61,117
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PPL University Park, LLC Docket No. EL04-122-001

v.

Commonwealth Edison Company

ORDER DENYING REHEARING

(Issued February 11, 2005)

1. PPL University Park, LLC (PPL) filed a request for rehearing of the Commission's order in this proceeding issued on November 22, 2004.[1] As discussed below, we will deny rehearing and find that the public interest standard must apply to any modification to the interconnection agreement at issue. This order benefits customers because it ensures that the terms, conditions, and rates for the interconnection service filed with and accepted by the Commission are enforced as written.

Background

2. On August 13, 2004, PPL filed a complaint against Commonwealth Edison Company (ComEd) requesting that the Commission find certain terms and conditions of the interconnection agreement between ComEd and PPL (Interconnection Agreement) to be inconsistent with Commission policy and thus unjust, unreasonable, and unduly discriminatory in failing to reimburse PPL for providing upgrades to the ComEd system.

[1] *PPL University Park, LLC v. Commonwealth Edison Company*, 109 FERC ¶ 61,190 (2004) (November 22 Order).

3. In the November 22 Order, the Commission dismissed PPL's complaint, finding that PPL had failed to meet the *Mobile-Sierra*[2] public interest standard required to modify the interconnection agreement. The Commission explained that contracts that require joint filings in order to implement modifications are subject to the public interest standard of review[3] and that because section 14.2 of the Interconnection Agreement explicitly provides that no amendment or modification may be made absent written agreement by the other party, the public interest standard must apply.

4. In addition, the November 22 Order found that, although section 12.4 of the Interconnection Agreement allows either party to unilaterally file complaints with the Commission over an arbitrable claim, such language did not invoke the just and reasonable standard of review. The Commission noted that section 12.2(d) states that arbitrators "shall have the right only to interpret and apply the terms and conditions of this Agreement . . . but may not change any term or condition of this Agreement." Therefore, it found that an "arbitrable claim" may not involve a modification to the Interconnection Agreement, but an interpretation or application of the contract. The Commission found that PPL was requesting a modification of the Interconnection Agreement that should be reviewed in light of section 14.2, and thus the public interest standard.

5. Also, the Commission found that, language in the Interconnection Agreement that made it subject to "all applicable federal . . . laws" (section 4.6) was irrelevant as to whether the parties were permitted to seek unilateral modification of the Interconnection Agreement.

6. Further, the Commission found that although ComEd may reimburse other generators for the network upgrades they provide and not PPL under the Interconnection Agreement, the disparity is the result of private contract and section 14.2 of the Interconnection Agreement requiring both parties to agree to a modification.

Discussion

7. PPL requests that the Commission grant its complaint and direct ComEd to revise the Interconnection Agreement to provide reimbursement to PPL for network upgrades it

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[2] *United Gas Pipe Line Co. v. Mobile Gas Corp*., 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

[3] *Citing, e.g., PacifiCorp v. Reliant Energy Services, Inc.,* 103 FERC ¶ 61,355 at P 29 (2003).

funded, plus interest. In the alternative, PPL requests that the Commission set the matter for resolution through hearing and settlement procedures. We will deny PPL's request for rehearing.

A. Standard for Modification

1. PPL's Arguments

8. PPL argues that the Commission focused on only section 14.2 of the Interconnection Agreement in reaching its conclusion that the public interest standard applied to complaints brought pursuant to the Interconnection Agreement and failed to review the Interconnection Agreement as a whole. Specifically, PPL argues that section 14.2 simply requires modifications to the Interconnection Agreement to be reduced to writing and executed and that section 12.4(a) is in fact a superior contractual clause that provides either party unilateral complaint rights to seek resolution by the Commission or an arbitrator of any unresolved dispute. PPL cites to several cases, *Commonwealth Edison Co.*,[4] *Duke Energy Hinds, LLC v. Entergy Services, Inc. (Duke Hinds II)*,[5] *and Pacific Gas & Electric Co.*,[6] to support the argument that contracts that require modifications to be in writing and executed by both parties that also provide unilateral complaint rights have been judged under the just and reasonable standard.

9. In addition, PPL argues that the Commission misunderstood the meaning of "arbitrable claim," which is not defined in the Interconnection Agreement. It argues that an arbitrable claim involves any unresolved dispute, and it may be brought either to the Commission or to an arbitrator for consideration.[7] PPL argues that the Commission erroneously concluded that, because PPL requested a modification to the Interconnection Agreement, and because the Interconnection Agreement prohibits arbitrators from changing the terms of the agreement, PPL's claim could not be arbitrated. PPL argues that whether a claim is arbitrable has nothing to do with whether an arbitrator is

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[4] 107 FERC ¶ 61,084 (2004).

[5] 102 FERC ¶ 61,068 at P 18-21 (2003), *reh'g pending*.

[6] 102 FERC ¶ 61,070 (2003); 102 FERC ¶ 61,232 (2003).

[7] *Citing* Interconnection Agreement, section 12.1: "[t]he Parties shall attempt in good faith to resolve all disputes promptly by negotiation . . . ." and section 12.2(a): "If the negotiation process provided for in Section 12.1 has not resolved the dispute within the time periods set forth therein . . . the dispute shall be decided by arbitration . . . ."

authorized to grant the relief requested. It states that a claim can be brought to arbitrators for consideration, even if the remedy must be imposed in another forum.

2. Commission Determination

10. In the November 22 Order, the Commission was presented with the issue of whether to review PPL's request to modify the Interconnection Agreement, so that it could receive transmission service credits for what PPL characterized as network upgrades to the ComEd transmission system, under the just and reasonable standard or the *Mobile-Sierra* public interest standard. Contrary to PPL's assertion, the Commission interpreted the contract by reading it as a whole with meaning given to every provision.[8]

11. Because PPL was seeking a modification to the Interconnection Agreement, the Commission began its reading of the Interconnection Agreement from an obvious starting point, section 14.2 titled "Modifications":

> 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.

12. Then, the Commission noted section 12.4 of the Interconnection Agreement titled "FERC Jurisdiction Over *Certain* Disputes" (emphasis added). Section 12.4 states in part that:

> (a) Nothing in this Agreement shall preclude or be construed to preclude, either Party from filing a petition or complaint with FERC with respect to any *arbitrable claim* over which FERC has jurisdiction. In such case, the other Party may request that FERC reject or waive jurisdiction. If FERC rejects or waives jurisdiction, with respect to all or a portion of the claim, the portion of the claim not so accepted by FERC shall be resolved through arbitration, as provided in this Agreement.
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> (b) The arbitration panels shall have no authority to modify, and shall be conclusively bound by, any decision, finding of fact, or order of FERC. [Emphasis added.]

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[8] *See Southern Co. Services v. FERC*, 353 F.3d 29 (D.C. Cir. 2003) (citing *KiSKA Construction Corp. v. Washington Metro. Area Transit Auth.*, 321 F.3d 1151, 1163 (D.C. Cir. 2003) *cert. denied*, 540 U.S. 939 (2003).

> In addition, the Commission noted section 12.2(d), which states:
> The arbitrators shall have the right only to interpret and apply the terms and conditions of this Agreement and to order any remedy allowed by this Agreement, but *may not change any term or condition* of this Agreement, deprive either Party of any right or remedy expressly provided hereunder, or provide any right or remedy that has been *excluded hereunder*. [Emphasis added].

13. Based on our reading of these provisions, we found that section 14.2 was controlling and that, because it explicitly provides that no amendment or modification may be made absent written agreement by the other party, the public interest standard must apply.[9] We explained that, although section 12.4 allows either party to unilaterally file a complaint with the Commission, usually invoking the just and reasonable standard of review, the complaint is limited to an "arbitrable claim" and does not apply to all disputes. Pointing to section 12.2(d), the Commission found that because the Interconnection Agreement prohibits arbitrators from changing the terms of the agreement, an "arbitrable claim" may not involve a modification to the Interconnection Agreement.

14. With regard to PPL's argument that Commission precedent supports the notion that contracts that require modifications to be in writing and executed by both parties that also provide unilateral complaint rights have been judged under the just and reasonable standard, we find the cited precedent to be distinguishable. For instance, in *Duke Hinds II* and *PG&E,* there were provisions at issue that were comparable to section 14.2 of the Interconnection Agreement. However, those provisions expressly carve out, from the prohibition on non-mutual written modifications, other conflicting provisions of the agreement.[10]

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[9] November 22 Order at P 16.

[10] The following language was at issue in *Duke Hinds II*:

> 23.4 Amendments
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> This Agreement may be amended by and only by a written instrument duly executed by both of the Parties hereto. *Notwithstanding the foregoing*, nothing contained herein shall be construed as affecting in any way the right of the Company or Customer to unilaterally make application to FERC for a change in rates, terms or conditions of service under Sections 205 and 206 of the Federal Power Act . . . .[Emphasis added.]

(continued)

Section 14.2 of the Interconnection Agreement contains no limitations on its applicability.[11]

15. In *Commonwealth Edison Company*, ComEd filed an unexecuted amendment to an interconnection agreement based on ComEd's membership in PJM Interconnection, LLC. Faced with language identical to section 14.2 of the Interconnection Agreement, the Commission found that such language "generally limits the parties' ability to unilaterally amend the contract based on the just and reasonable standard of section 205.[12] The Commission, however, accepted ComEd's amendment because there was a separate provision in the interconnection agreement which "embodie[d] the parties' agreement that if ComEd joins an ISO certain provisions of the contract would be modified to meet the ISO's requirements."[13] In other words, the interconnection agreement was modified by operation of the contract itself instead of by a party. In this

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The following language was at issue in *PG&E*:

> Section 15.16 – Modification
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> This Agreement may be amended or modified only by a written instrument signed by the authorized representatives of both Parties, *except as may otherwise herein be expressly provided*. [Emphasis added.]
>
> Section 15.23.1 – Rate Changes
>
> Nothing contained herein shall be construed as affecting in any way the right of PG&E to unilaterally make application to the FERC for a change in rates under section 205 of the FPA . . . . Applicant shall have the right to protest and object to such change in rates and otherwise to exercise any and all rights it may have with respect thereto, including its rights under section 206 of the FPA.

[11] *Cf. Redbud Energy LP*, 107 FERC ¶ 61,102 at P 11, *reh'g denied*, 109 FERC ¶ 61,119 (2004) (noting that the exact language in section 14.2 limited the rights to modify an interconnection agreement).

[12] 107 FERC ¶ 61,084 at P 12.

[13] *Id.*

proceeding, there is no provision in the Interconnection Agreement that is triggering a modification, but it is PPL, a party to the Interconnection Agreement, that is requesting it.

16. Also, PPL appears to suggest that if sections 12.4 and 14.2 were read together that the result would be language similar to that found in *Duke Hinds II* and *PG&E*. Essentially, PPL argues that even though section 12.4(a) allows either party to unilaterally file an "arbitrable claim" with the Commission, "arbitrable claim" really means any dispute including a modification to the Interconnection Agreement. We find, however, that such a reading would be contrary to the terms of the Interconnection Agreement. As we stated in the November 22 Order, because section 12.2(d) prohibits an arbitrator from modifying the Interconnection Agreement, an "arbitrable claim" may not involve a modification to the Interconnection Agreement, but only an interpretation or application of the contract.[14] Furthermore, although section 12.1 refers to "all disputes" in requiring negotiation and section 12.2(a) refers to "the dispute" when allowing arbitration if negotiations fail, section 12.4(a) specifically refers to "arbitrable claim." It appears that if the parties wanted to refer to "all disputes" or simply "the dispute" in section 12.4(a), that they would have simply used those terms instead of going out of their way to use "arbitrable claim."[15]

17. We find that when read as a whole, modifications to the Interconnection Agreement are governed by section 14.2, and thus the public interest standard.

B. Applicable Laws & Regulations

18. PPL argues that section 4.6 of the Interconnection Agreement makes the Interconnection Agreement subject to the Commission's interconnection crediting policies and provides rights to each party acting independently or unilaterally to contest the application of any applicable laws and regulations. PPL states that this provision is not "generic," but specifically permits either party to contest the application of law, which would extend to contesting the continuing validity of the Commission's order initially accepting the Interconnection Agreement for filing.

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[14] This is true even if the result of arbitration is a recommendation that the Interconnection Agreement be modified. Any modification is subject to section 14.2.

[15] Similarly, the title of section 12.4, "FERC Jurisdiction Over *Certain* Disputes," suggests that section 12.4 is not concerned with "all disputes" but with disputes with a limited scope.

19. We disagree with PPL's interpretation of its rights under section 4.6. In *Boston Edison Company v. FERC*,[16] the court found that a contractual provision nearly identical to section 4.6 of the Interconnection Agreement is a "generally framed boilerplate clause" that does not "constitute a negation" of the specification of a rate or formula in a contract.[17] Therefore, section 4.6 does not indicate an intention by the parties to the Interconnection Agreement to permit unilateral modifications. Furthermore, PPL's claim that section 4.6 allows PPL to contest the continuing validity of the Commission's order accepting the Interconnection Agreement for filing is at odds with the Federal Power Act (FPA)[18] and *res judicata*.[19]

C. Rights Under ComEd's OATT

20. PPL states that the Interconnection Agreement was executed pursuant to, and was a service agreement under, ComEd's OATT, and that the Interconnection Agreement is subordinate to the OATT on file and may not be inconsistent with it. PPL argues that because section 9 of ComEd's OATT states that "[n]othing in the [OATT] or any Service Agreement shall be construed as affecting in any way the ability of any Party receiving service under the [OATT] to exercise its rights under the Federal Power Act . . . .," PPL's rights would be restricted were it unable to bring a unilateral complaint under section 206.

21. The OATT provision, on which PPL relies, states merely that nothing in the Interconnection Agreement, filed as a service agreement under ComEd's OATT, affects the complainant's exercise of its statutory rights under the FPA, rights that PPL has exercised by bringing its complaint. The OATT provision does not expand this statutory right to include automatic consideration of a complaint 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 there found that the

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[16] 233 F.3d 60 (1st Cir. 2000).

[17] *Id.* at 67; *see also Texaco, Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998) (finding a similar provision "a generic contract clause compelling both parties to adhere to the law").

[18] 16 U.S.C. § 825l(a) (2000).

[19] We note, however, that *res judicata* generally does not bar litigation of the justness and reasonableness of rates based on new facts. *See, e.g., Texas Eastern Transmission Corp.*, 893 F.2d 767, 774 (5th Cir. 1990) (that a rate is reasonable in one proceeding does not foreclose a contrary finding in a subsequent proceeding).

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.[20] We decline to read the OATT provision as creating any additional rights.[21]

D. Overloads

22. PPL argues that the Commission failed to consider PPL's claim that ComEd's refusal to provide PPL with transmission credits for upgrades designed to remedy overload problems directly violated Attachment K of ComEd's OATT,[22] and thus requires redress. PPL requests that the Commission direct ComEd to provide PPL with transmission credits equal to the amount paid by PPL for system upgrades necessary to remove overloads. PPL states that this reimbursement is required regardless of the Commission's action on the applicable standard of review, as no change in the Interconnection Agreement is required to enforce reimbursement.

23. We find that PPL is not entitled to transmission credits for providing system upgrades to remove overloads. Section 14.3 of the Interconnection Agreement states that: "This Agreement constitutes the entire agreement between the Parties relating to the subject matter hereof and its execution supersedes all previous agreements . . . with respect to such subject matter." Therefore, because the Interconnection Agreement requires PPL to pay for *any* necessary interconnection facilities and related network upgrades without exception, this requirement must control over the language in the OATT.

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

[21] We note that ComEd's OATT was cancelled on May 1, 2004.

[22] Section 11 to Attachment K of ComEd's OATT provided that:

Applicant shall be entitled to a credit equal to the amount paid by Applicant for system upgrades necessary to remove overloads . . . . The credit is not available for amounts paid for the minimum facilities needed to establish the direct electrical connection between the generating facility and the network or [to] remedy short-circuit or stability problems resulting from the connection of the generating facility to the network.

The Commission orders:

PPL's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.