

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Xcel Energy Services Inc.

Docket Nos. ER06-207-001
ER06-208-000
ER06-209-001
ER06-210-001

ORDER DENYING REHEARING

(Issued March 21, 2006)

1. On January 23, 2006, Xcel Energy Services Inc. (XES) requested rehearing of the December 23, 2005 Letter Order (Letter Order),¹ in which the Acting Director of the Division of Tariffs and Market Development – West, Office of Markets, Tariffs and Rates, pursuant to delegated authority, accepted for filing amended and restated generation interconnection agreements, but denied requests for waiver of the 60-day prior notice requirement. In this order we affirm the decision to deny waiver and we deny XES's request for rehearing.

Background

2. On November 14, 2005, XES, on behalf of Public Service Company of Colorado (PSCo), filed amended and restated agreements for interconnection service between PSCo and Fountain Valley Power, LLC (Service Agreement No. 107-PSCo), PSCo and Black Hills Colorado, LLC (Service Agreement No. 163-PSCo and Service Agreement No. 164-PSCo), and PSCo and BIV Generation Company LLC (Service Agreement No. 53-PSCo).² XES requested waiver of the Commission's 60-day prior notice

¹ *Xcel Energy Services Inc.*, Docket No. ER06-207-000, *et al.* (Dec. 23, 2005) (unpublished letter order).

² Fountain Valley Power, LLC, Black Hills Colorado, LLC, and BIV Generation Company LLC are referred to jointly as the Customers.

requirement to allow the agreements to become effective roughly four to almost five years earlier, as follows: May 23, 2001 for Service Agreement No. 107-PSCo, January 26, 2001 for Service Agreement Nos. 163-PSCo and 164-PSCo, and October 26, 2001 for Service Agreement No. 153-PSCo.

3. XES acknowledges filing the agreements out of time, but explains that this was done to accommodate settlement discussions on a separate agreement with a separate customer, Plains End LLC (Plains End), the outcome of which had an effect on the agreements in question. Specifically, Plains End had protested the rates and certain associated terms and conditions of its interconnection agreement, which resulted in the Commission setting the matter for hearing and settlement judge procedures.³ During settlement negotiations, XES had informed the Customers, who were similarly situated to Plains End, that their rates, terms and conditions would be revised in a manner consistent with any settlement. As a result, XES chose not to file the signed agreements, anticipating changes once XES settled with Plains End. However, as XES acknowledges, settlement negotiations took “an unusually long time” and were not resolved until May 27, 2004.⁴ XES then approached the Customers to revise the agreements, which were finally submitted to the Commission on November 14, 2005 with the request to waive the Commission’s 60-day prior notice requirement.

Letter Order

4. The Letter Order denied the request for waiver by XES and accepted the interconnection service agreements for filing to be effective January 13, 2006.⁵ Relying on longstanding precedent, the Letter Order determined that XES’s filing of the interconnection service agreements had not been made within 30 days after service commenced and was, therefore, not within the criteria for waiver of the Commission’s 60-day prior notice requirement.⁶ The Letter Order also noted, however, that no refunds

³ See *Xcel Energy Services Inc.*, 100 FERC ¶ 61,267 (2002).

⁴ Request for Rehearing at 3; *Xcel Energy Services Inc.*, 107 FERC ¶ 61,198 (2004).

⁵ See *supra* note 1.

⁶ See *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081 (1993) (*Prior Notice*); *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, *reh’g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*).

would be due because XES had indicated that PSCo had not yet charged the Customers under these agreements.

Request for Rehearing

5. On January 23, 2006, XES filed a request for rehearing. XES contends that the Letter Order improperly denied waiver of the 60-day prior notice requirement, and that the Commission should reconsider the decision and grant waiver based on the factual circumstances of these filings.

6. XES first contends that extraordinary circumstances justifying waiver exist because the agreements were contingent on the outcome of Docket No. ER01-2905 (which did not settle until 2004) and were not finalized until the time of their filing in late 2005.⁷ XES points to *Mirant Americas Energy Marketing* as support for its argument that the Commission should grant the requested waiver because “section 205 nowhere prohibits the Commission’s granting waiver to allow an effective date that pre-dates the filing date.”⁸

7. XES also contends that good cause to grant waiver exists because the rates have never been charged under these agreements, and so there is no harm in allowing a retroactive effective date.⁹ XES further argues that good cause for waiver exists because all parties have agreed on the earlier effective dates.¹⁰

Discussion

8. XES’s arguments in its request for rehearing are not persuasive and we will deny rehearing. The Commission’s decisions in *Prior Notice* and *Central Hudson* identify the standards for waiver of the 60-day prior notice requirement, none of which applies in the present case. The service agreements at issue here were not filed within 30 days of commencement of service and thus do not qualify for waiver under the circumstances

⁷ Request for Rehearing at 5 & nn. 15-16.

⁸ *Mirant Americas Energy Marketing, LP*, 112 FERC ¶ 61,056 at P 17 (2005) (*Mirant*). We agree that we can grant waiver to allow an effective date that pre-dates the filing date. What is at issue here, however, is not whether we have the ability to do so, but whether we should do so.

⁹ Request for Rehearing at 5.

¹⁰ *Id.* at 6.

laid out in *Prior Notice*.¹¹ The agreements also were not pursuant to a previously-accepted settlement, as the parties had not submitted and the Commission had not previously accepted a settlement providing for earlier effective dates, and thus do not qualify for waiver under the circumstances laid out in *Central Hudson*.¹² Rather, XES simply chose to await the outcome of its negotiations with Plains End before filing. In fact, the agreements were filed long after the date that service commenced. While the Commission does allow service agreements under umbrella tariffs to be filed up to 30 days after service commences,¹³ here XES filed many years after service commenced. XES stated in its November 14, 2005 filings that the agreements were all signed in 2001 and the facilities were all energized by April 2002 and achieved commercial status by October 2002, yet the agreements were filed years after the date service commenced.¹⁴

9. In instances where a filing for new service not pursuant to an accepted settlement is made on or after the day service has commenced, *Central Hudson* explains that the Commission will not grant waiver absent extraordinary circumstances.¹⁵ XES is unable to demonstrate the presence of extraordinary circumstances. XES concedes in its request for rehearing that the agreements were executed prior to XES's beginning negotiations with Plains End and yet were not filed until years later.¹⁶ XES has a statutory obligation under sections 205(c) and (d) of the Federal Power Act¹⁷ to provide the Commission and

¹¹ See *Prior Notice*, 64 FERC at 61,983-84.

¹² See *Central Hudson*, 60 FERC at 61,338.

¹³ See *Prior Notice*, 64 FERC at 61,983-84.

¹⁴ The interconnection agreements were signed, facilities were energized, and facilities achieved commercial status as follows: Service Agreement No. 107-PSCo signed on February 13, 2001, energized on May 23, 2001, achieved commercial status on September 1, 2001; Service Agreement No. 164-PSCo signed on January 26, 2001, energized on June 26, 2001, achieved commercial status on July 7, 2001; Service Agreement No. 163-PSCo signed on January 26, 2001, energized on March 31, 2002, achieved commercial status on October 3, 2002; Service Agreement No. 153-PSCo signed on October 26, 2001, energized on April 9, 2002, achieved commercial status on May 1, 2002.

¹⁵ *Central Hudson*, 60 FERC at 61,339.

¹⁶ Request for Rehearing at 2.

¹⁷ 16 U.S.C. §§ 824d(c), (d) (2000).

the public with at least 60 days' prior notice, which in turn provides the Commission and the public "the opportunity to examine proposed rates, terms, and conditions of jurisdictional service before that service commences."¹⁸ An informal, unfiled agreement, not accepted by the Commission, between XES and its Customers to await the outcome of the Plains End settlement negotiations before filing the agreements at issue here does not constitute the "extraordinary circumstances" required to waive the 60-day prior notice requirement.

10. In *Mirant*, in contrast, the Commission explained that extraordinary circumstances were present because the agreements in question were "for critical services"¹⁹ and the independent system operator "was authorized [by Commission-accepted Market Rule 17] to enter into such agreements for purposes of protecting system reliability"²⁰ No similar circumstances exist in the present case.

11. XES next argues that good cause exists to grant waiver; "[b]ecause the rates have never been charged under these agreements, there is no harm in allowing a retroactive effective date."²¹ Again, XES has misstated the rule. Lack of harm to the Customers from XES's non-compliance is not an indicator of "good cause" and does not warrant waiver.²²

12. XES also cites cases that pre-date *Central Hudson*, where the Commission found good cause for waiver "when (1) the parties to the rate have agreed at some point in their negotiations on an effective date and (2) the waiver is in the public interest."²³ This analysis is irrelevant because subsequently *Central Hudson* established the Commission's

¹⁸ *El Paso Electric Co.*, 105 FERC ¶ 61,131 at P 14 (2003).

¹⁹ *Mirant*, 112 FERC ¶ 61,056 at P 14.

²⁰ *Id.* at P 5; *accord id.* at P 2, 14.

²¹ Xcel Energy Services Inc. Jan. 23, 2006 Filing, Docket No. ER06-207-000, *et al.* at 5.

²² *El Paso Electric Co.*, 101 FERC ¶ 61,276 at P 5 (2002), *reh'g denied*, 105 FERC ¶ 61,131 (2003).

²³ *E.g.*, *City of Holyoke Gas & Electric Dep't v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992); *City of Girard v. FERC*, 790 F.2d 919, 925 (D.C. Cir. 1986).

current policy for when waiver will be granted.²⁴ As described above, XES's waiver request fails under this analysis.

13. Finally, the Commission notes that this is not the first time XES has filed belatedly. In March 2005, XES filed and requested waiver of the 60-day prior notice requirement claiming that waiver was warranted because it awaited Commission action on a request for rehearing.²⁵ The Commission denied waiver, finding that XES nevertheless could and should have filed timely.²⁶ Similarly, in the present case, XES does not explain why it could not have filed timely.

The Commission orders:

The denial of waiver is affirmed and the request for rehearing filed in this proceeding by XES is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁴ *Central Hudson*, 60 FERC at 61,339.

²⁵ *Xcel Energy Services Inc.*, 111 FERC ¶ 61,206 at P 8 (2005).

²⁶ *Id.* at P 20.