

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Virginia Electric Cooperative, Inc.

v.

Docket No. EL06-43-000

Old Dominion Electric Cooperative

ORDER DENYING COMPLAINT

(Issued March 2, 2006)

1. On January 5, 2006, Northern Virginia Electric Cooperative, Inc. (NOVEC) filed a complaint against Old Dominion Electric Cooperative (Old Dominion) pursuant to section 206 of the Federal Power Act (FPA).¹ NOVEC states that it seeks: a determination that certain of the terms of the 1992 Amended and Restated Wholesale Power Agreement between NOVEC and Old Dominion are no longer just and reasonable and should be modified for the remaining term of the agreement; a determination that NOVEC's share of Old Dominion's "existing resources" be calculated, effective as of a date no later than the date of the complaint, based on the ratio of NOVEC's load to Old Dominion's load; and reformation of the parties' agreement to permit NOVEC to obtain power supply for amounts in excess of NOVEC's share of Old Dominion's "existing resources" from suppliers and/or resources other than Old Dominion. For the reasons set out below, we deny the complaint.

Background

2. Old Dominion is a public utility that operates as a not-for-profit electric generation and transmission cooperative, providing generation, transmission, ancillary and other related services to twelve member electric distribution cooperatives serving retail

¹ 16 U.S.C. § 824e (2000).

customers in Virginia, Delaware, Maryland and parts of West Virginia.² The twelve member cooperatives are customer-owned electric distribution cooperatives providing electric service at retail to residential, commercial and industrial consumers in established service territories. The member cooperatives own Old Dominion and are also its customers, purchasing substantially all of their power requirements from Old Dominion under full requirements wholesale power contracts.

NOVEC Complaint

3. NOVEC asserts that certain terms of its contract with Old Dominion are no longer just and reasonable because the contract predates the modern era of open transmission access and competitive bulk power markets. NOVEC cites the Commission's Order No. 888,³ which NOVEC states restructured the electric industry by unbundling electric generation and transmission services and mandating open access transmission to create competitive wholesale power markets, and determined that the continued justness and reasonableness of existing contracts should be considered on a case-by-case basis with contract reformation constituting the appropriate remedy where the contract is found to be unjust and unreasonable.

4. NOVEC argues that the decision to reform a contract should be made by balancing the Commission's desire to honor existing contractual arrangements with the need to provide some means to accelerate the opportunity of parties to participate in competitive

² The member cooperatives of Old Dominion are: A&N Electric Cooperative; BARC Electric Cooperative; Community Electric Cooperative; Choptank Electric Cooperative; Delaware Electric Cooperative; Mecklenburg Electric Cooperative; Northern Neck Electric Cooperative; NOVEC; Prince George Electric Cooperative; Rappahannock Electric Cooperative; Shenandoah Valley Electric Cooperative; and Southside Electric Cooperative.

³ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

wholesale power markets. NOVEC argues its contract, executed prior to July 11, 1994, is a bundled requirements contract which prevents it from accessing competitive markets until 2028, and is the type of contract the Commission referenced in Order No. 888. NOVEC argues that its proposal will not harm Old Dominion or its members as NOVEC will remain financially responsible for its share of existing electric power supplies⁴ presently committed to Old Dominion.

5. NOVEC states that Old Dominion takes the position that the contract is an all requirements contract and requires NOVEC to take all of its requirements through 2028 from Old Dominion, a position with which NOVEC disagrees. NOVEC states it has attempted to negotiate with Old Dominion for a change in the contract allowing it to purchase incremental bulk power from other sources, but these attempts have been futile.

Notice and Pleadings

6. Notice of the complaint was published in the *Federal Register*, 71 Fed. Reg. 2211 (2006), with protests and interventions due on or before February 6, 2006.

7. Motions to intervene were filed by A&N Electric Cooperative; BARC Electric Cooperative; Community Electric Cooperative; Choptank Electric Cooperative; Delaware Electric Cooperative; Mecklenburg Electric Cooperative; Northern Neck Electric Cooperative; NOVEC; Prince George Electric Cooperative; Rappahannock Electric Cooperative; Shenandoah Valley Electric Cooperative; and Southside Electric Cooperative. Each intervenor states that it is a member cooperative of Old Dominion and has a contract with Old Dominion substantially similar to NOVEC's contract; changes in the NOVEC contract would directly affect this interest as a signatory party to a similar wholesale power contract and as a member cooperative in Old Dominion.

8. Old Dominion filed an answer to the complaint, which asks that the complaint be denied. Old Dominion claims the contract is subject to the *Mobile-Sierra*⁵ doctrine, and

⁴ Old Dominion's existing power supplies are ownership interests in the Clover coal-fired plant, the North Anna nuclear power station, the Marsh Run and Louisa combustion turbine units in Virginia, and the Rock Springs combustion turbine facility in Maryland.

⁵ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

the complaint cannot be sustained on NOVEC's asserted change in circumstances or asserted need for the reformation. Old Dominion argues that NOVEC has not met the public interest standard of review for contract modification or established a basis for reformation under the terms of Order No. 888. Old Dominion also claims the complaint fails to address the harm to other member cooperatives if NOVEC is allowed the reformation of the contract it proposes

9. Old Dominion claims its contract with NOVEC is an all requirements contract, like all of its contracts with its member cooperatives, because Old Dominion was granted the exclusive right to furnish power to all member cooperatives and the members were required to purchase all power supplied to them, and it has operated its business in that manner. Operation of the rate formula produces a postage stamp rate which represents the system average cost of all generation resources necessary to supply power to all members with no assets allocated to any particular load or member. In reliance on these contracts, Old Dominion obtains financing, invests in facilities and makes commitments to long-term power supplies.

10. Old Dominion argues that the public interest standard of review controls changes in its contract with NOVEC; nothing in the contract permits unilateral modification of its terms, and the premise of Order No. 888 is inapplicable to Old Dominion as it is not a transmission-owning utility, but relies on others for transmission service, and hence did not exercise monopoly control of access to power supplies by the members.

11. Old Dominion further argues that the Commission in Order No. 888 refused to generically find that all contracts should be modified, and provided for case-by-case review of each contract to determine if it was unjust and unreasonable. Old Dominion claims NOVEC has not shown that the contract is unjust and unreasonable over the life of the contract.

12. Old Dominion asserts that NOVEC's proposal to continue to be responsible for its share of existing resources while acquiring future resources elsewhere is unworkable, will shift costs to other member cooperatives and will affect Old Dominion's credit rating.

13. Old Dominion asks for dismissal of the complaint on the basis that NOVEC has not made a showing of damages under the contract or a showing that the contract should be reformed. Old Dominion asserts the complaint fails to demonstrate impairment of NOVEC's ability to continue to serve its customers, or that the contract places excessive burdens on consumers, or that the contract is unduly discriminatory, or that the contract is even unjust and unreasonable over the life of the contract. Old Dominion argues summary dismissal is appropriate, as here, where there is no genuine issue of fact material to a decision in the proceeding.

14. On February 15, 2006, NOVEC filed an answer, urging the Commission to find that, at a minimum, the complaint warrants a hearing before considering dismissal. NOVEC argues that its proposal does not involve an attempt to escape existing rates or charges assessed by Old Dominion, but that NOVEC seeks to be free to enter into new projects and commitments through direct access to competitive wholesale power markets, the primary goal of Order No. 888, and thus relieve NOVEC from being bound to new commitments by Old Dominion, not yet in place, over the next 22 years. NOVEC argues that its objective is to provide its retail consumers with reliable electric service at the lowest cost reasonably possible. NOVEC argues that, under the rules governing summary dismissal, the facts asserted by NOVEC would be the only basis on which a motion could be considered and the result thus would be a decision to find for the complainant because Old Dominion has presented no facts that would warrant denial of the complaint.

Discussion

Procedural Issues

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 285.214 (2005), the timely, unopposed interventions serve to make the entities that filed them a party to the proceedings in which they intervened.

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

Commission Ruling

17. The contract between NOVEC and Old Dominion contains the following relevant provisions:

Except as otherwise provided in this Section 1, the Seller [Old Dominion] shall sell and deliver to Member [NOVEC] and the Member shall purchase and receive from the Seller all electric power and energy which the Member shall require for the operation of the Member's system to the extent that the Seller shall have the power, energy and facilities available. [Section 1]

Except contracts with Seller and SEPA [Southeast Power Administration] as provided by this Section 1, the Member will not . . . enter into any new power contract without approval of Seller. [Section 1]

This contract shall become effective only upon approval in writing by the Administrator of the Rural Electrification Administration (the “Administrator”) and shall remain in effect for a term of forty-five (45) years from the effective date of the Original Wholesale Power Contract and thereafter until terminated by either party giving the other not less than three (3) years written notice of its intention to terminate. [Section 10]

This contract may be amended only by a written instrument executed by the Seller and the Member. . . . [Section 14]

18. We conclude from an examination of these contractual provisions that NOVEC is bound by its terms and conditions, and without the consent of Old Dominion may not acquire power from suppliers other than Old Dominion (aside from SEPA, which is not relevant here), during the remaining term of the contract. The contract provides for Old Dominion to provide NOVEC’s full requirements, provides that NOVEC may not contract with other power suppliers other than Old Dominion (and SEPA, which is not relevant here), without Old Dominion’s approval during its 45-year term, and can be amended only with Old Dominion’s written consent. And Old Dominion has provided no such consent. The record indicates that Old Dominion has refused to allow NOVEC to acquire other power supplies or to amend the contract to limit its obligations to Old Dominion to its existing power supplies and the costs related to those existing power supplies. Moreover, the complaint fails to demonstrate that the contract in question has, for example, caused financial distress sufficient to threaten its ability to continue service, that the contract casts an excessive burden on its customers, or that the contract is unduly discriminatory. In these circumstances, we cannot find that the contract should be reformed to permit NOVEC to obtain the relief it seeks in its complaint.⁶

19. NOVEC argues that the complaint nevertheless should be granted because certain terms of the contract with Old Dominion are no longer just and reasonable as the contract predates open transmission access and competitive bulk power markets. NOVEC cites in support the Commission’s Order No. 888 and its mandating open access transmission to create competitive wholesale power markets with contract reformation constituting the appropriate remedy where a pre-Order No. 888 contract is found to be unjust and unreasonable. NOVEC’s logic suggests that its contract should be modified simply because it is a requirements contract executed prior to July 11, 1994, the date identified by the Commission in Order No. 888. However, the Commission expressly declined to

⁶ See *supra* note 5.

do just that in Order No. 888. The Commission explained, “we do not believe it is appropriate to order generic abrogation of existing requirements and transmission contracts.”⁷

The Commission orders:

The complaint filed in Docket No. EL06-43-000 by NOVEC is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁷ See Order No. 888 at 31,663.