

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Virginia Electric Cooperative, Inc.

v.

Docket No. EL06-43-001

Old Dominion Electric Cooperative

ORDER DENYING REHEARING

(Issued August 24, 2006)

1. On April 3, 2006, Northern Virginia Electric Cooperative, Inc. (NOVEC) filed a request for rehearing of an order issued on March 2, 2006, denying its complaint seeking a modification of its wholesale power agreement with Old Dominion Electric Cooperative (Old Dominion).¹ For the reasons set out below, we deny the request for rehearing.

Background

2. NOVEC's complaint against Old Dominion, filed pursuant to section 206 of the Federal Power Act (FPA),² sought 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,

¹ *Northern Virginia Electric Cooperative, Inc. v. Old Dominion Electric Cooperative*, 114 FERC ¶ 61,240 (2006) (March 2 Order).

² 16 U.S.C. § 824e (2000).

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.

3. NOVEC argued that the complaint should be granted because certain terms of the contract with Old Dominion were no longer just and reasonable as the contract predated open access transmission and competitive bulk power markets. NOVEC cited in support of its complaint the Commission's Order No. 888³ 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.

4. In the March 2 Order, the Commission examined the provisions of the contract between NOVEC and Old Dominion and found 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 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 power suppliers other than Old Dominion without Old Dominion's approval during its 45-year term, and can be amended only with Old Dominion's written consent. 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.⁴

5. Moreover, the Commission found that the complaint failed to demonstrate that the contract in question had, for example, caused financial distress sufficient to threaten NOVEC's ability to continue service, that the contract casts an excessive burden on

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) (*TAPS*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁴ March 2 Order, 114 FERC ¶ 61,240 at P 17-18.

NOVEC's customers, or that the contract is unduly discriminatory. In these circumstances, the Commission could not find that the contract should be reformed to permit NOVEC to obtain the relief it sought in its complaint.⁵

6. Finally, the Commission noted it had expressly declined to modify all pre-Order No. 888 contracts. In Order No. 888, the Commission had explained, "we do not believe it is appropriate to order generic abrogation of existing requirements and transmission contracts."⁶

NOVEC Request for Rehearing

7. NOVEC requests that the Commission grant rehearing, vacate its March 2 Order and set NOVEC's complaint for a trial-type evidentiary hearing. NOVEC argues: (1) the Commission erred by applying the public interest standard of review to the issues in this proceeding, contrary to Order No. 888, and in not addressing the assertions that the contract with Old Dominion should be reformed under the just and reasonable standard; (2) the Commission violated NOVEC's due process rights by improperly denying it a hearing on its complaint and by granting summary disposition where there were material issues of fact to be decided; (3) the Commission erred by not considering NOVEC's answer to Old Dominion's motion to dismiss; and (4) the Commission erred in not giving consideration to NOVEC's February 15 and 21 pleadings

Discussion

8. Reviewing the language of the contract between NOVEC and Old Dominion, the Commission in the March 2 Order concluded that without Old Dominion's consent NOVEC could not acquire power from other suppliers. NOVEC has not persuaded us that we erred in the March 2 Order in our reading of the parties' contract; indeed, NOVEC largely does not argue that the parties' contract could reasonably be read differently. Rather, NOVEC largely argues that we nevertheless should modify the parties' contract to allow NOVEC to now shop for power. As explained below, we are not persuaded that we should do so. Accordingly, we will deny rehearing.

9. First, NOVEC asserts that the Commission erred by applying the public interest standard of review to the issues in this proceeding, contrary to Order No. 888, and in not

⁵ *Id.* at P 18; *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*).

⁶ March 2 Order, 114 FERC ¶ 61,240 at P 19; *see* Order No. 888 at 31,663.

addressing assertions that its contract with Old Dominion should be reformed under the just and reasonable standard of review. NOVEC argues that the public interest standard of review does not control because, in Order No. 888, the Commission stated:

We conclude further that, even if customers under such contracts are bound by so-called *Mobile-Sierra* clauses, they nonetheless ought to have the opportunity to demonstrate that their contracts no longer are just and reasonable. The Commission finds that it would be against the public interest to permit a *Mobile-Sierra* clause in an existing wholesale requirements contract to preclude the parties to such a contract from the opportunity to realize the benefits of the competitive wholesale power markets.⁷

10. We find that the Commission's above-quoted conclusion on what standard applies is inapposite on the facts here. NOVEC's argument fails to recognize that the Commission's above-quoted conclusion rested on a finding that utilities, prior to Order No. 888, were in a position to impose such contracts on their customers because of their monopoly control of transmission facilities.⁸ Here, Old Dominion effectively has no transmission facilities⁹ and transmission service for NOVEC, in fact, is provided over Virginia Electric Power Company transmission facilities. Old Dominion was never in a position to dictate to its member cooperatives (including NOVEC) the conditions under which it would supply electricity; Old Dominion and its member cooperatives have been fully dependent on others for transmission service.

⁷ Order No. 888 at 31,664.

⁸ Order No. 888 at 31,664; *TAPS*, 225 F. 3d at 709, 712; *accord* Order No. 888-A at 30,192, 30,193. We also note that in Order No. 888 the Commission found that there had been no market failure in the electric industry that would justify generic abrogation of all pre-Order No. 888 contracts. Order No. 888 at 31,663-64; *cf.* Order No. 888 at 31,664 n.173 (noting that many commenters sought to retain their existing requirements contracts).

⁹ *See Northern States Power Co. (Minnesota)*, 76 FERC ¶ 61,250 at 62,295-96, *order on reh'g*, 77 FERC ¶ 61,232 (1996); *Old Dominion Electric Cooperative, Inc.*, 81 FERC ¶ 61,044 at 61,236 & n.6 (1997). Old Dominion in 2004 acquired a 900 foot long transmission line in Maryland which connects the Rock Springs generation plant to the PJM system. We do not view that line as changing Old Dominion's fundamental lack of transmission facilities, and particularly its lack of transmission facilities to serve NOVEC.

11. Thus, as between Old Dominion and NOVEC, the March 2 Order properly reviewed the parties' contract and what it provided for, and the complaint, and concluded that applying a public interest standard of review NOVEC had failed to demonstrate that the contract had, for example, caused financial distress sufficient to threaten NOVEC's ability to continue service, that the contract cast an excessive burden on customers, or that the contract was unduly discriminatory. Moreover, in its request for rehearing, NOVEC does not assert that current circumstances would meet any of these tests.

12. Second, NOVEC argues on rehearing that the Commission violated NOVEC's due process rights by improperly denying it even a trial-type evidentiary hearing on its complaint. In this regard, NOVEC makes allegations relating to the cost of natural gas fired-electric generation acquired by Old Dominion for its member cooperatives; the cost of electricity more generally; and that NOVEC earns no return on its equity in Old Dominion. The fact that NOVEC, by contract, must now pay Old Dominion more than it would like to pay does not by itself entitle NOVEC to be relieved from its contract,¹⁰ or even to a trial-type evidentiary hearing. The critical question is whether NOVEC has made a sufficient showing that it is entitled to be relieved from its contract. NOVEC has not; NOVEC has not shown that the rates it is charged rise to a level that, even under a just and reasonable standard of review, entitles it to relief from what it now views as an unfavorable bargain. In this regard, we note that in reviewing challenges to the justness and reasonableness of contracts and contractually agreed-to rates, we view the dispute from a "life-of-the-contract" perspective. That is, even if we were to apply a just and reasonable standard of review, we view the justness and reasonableness of long-term contracts and their rates over the "life-of-the contract" rather than on a "snapshot-in-time" basis, looking at the benefits and burdens over the full-term of the contract.¹¹ And so, even if we were to apply a just and reasonable standard of review, NOVEC has not shown that NOVEC should be excused from the contract and the contractually-agreed-to

¹⁰ The Commission will not relieve customers from what those customers claim to be unfavorable contractual bargains merely because they turn out to be unfavorable. *See, e.g., PPL University Park, LLC v. Commonwealth Edison Co.*, 109 FERC ¶ 61,190 at P 20 (2004), *reh'g denied*, 110 FERC ¶ 61,117 (2005); *Pontook Operating Limited Partnership v. Public Service Co. of New Hampshire*, 94 FERC ¶ 61,144 at 61,551-52 (2001) (*Pontook*); *Southern Company Services, Inc.*, 43 FERC ¶ 61,003 at 61,014, *reh'g denied*, 43 FERC ¶ 61,394 (1988), *aff'd mem. sub nom. Gulf States Utilities Co. v. FERC*, 886 F.2d 442 (D.C. Cir. 1989); *accord Potomac Electric Power Co. v. FERC*, 210 F.3d 403, 409 (D.C. Cir. 2000).

¹¹ *E.g., French Broad Electric Membership Corp. v. Carolina Power & Light Co.*, 92 FERC ¶ 61,283 at 61,967 (2000); *accord Pontook*, 94 FERC at 61,552.

rates because now, 14 years into the contract, the rates are no longer to NOVEC's liking. Likewise, NOVEC has not made a showing sufficient to warrant a trial-type evidentiary hearing on these matters either.¹² Additionally, and, we note, inconsistently with its complaining about Old Dominion's costs and the level of Old Dominion's rates, NOVEC states it is willing to continue to pay for all existing power supplies in Old Dominion's portfolio (and does not request any determination by us as to the appropriateness of Old Dominion's governance structure or other internal arrangements).

13. NOVEC argues that the Commission, in apparent response to an Old Dominion motion to dismiss, granted summary disposition where there were material issues of fact to be decided. NOVEC misconstrues our order. NOVEC filed a complaint, and we denied that complaint. Our determination to deny the complaint was based on the complaint and the answer, as prescribed by the regulations, which provide that the Commission may decide a complaint on its merits based upon the pleadings.¹³

14. In this regard, NOVEC also argues that the Commission erred by not considering NOVEC's answer to Old Dominion's motion to dismiss. What NOVEC describes as a motion to dismiss, was, in fact, part and parcel of Old Dominion's answer, and was not in its substance a claim for relief separate and apart from its request that NOVEC's complaint be denied. Old Dominion, in short, filed an answer to a complaint (which our regulations expressly allow),¹⁴ and NOVEC in response filed what amounted to an answer to an answer (which our regulations generally prohibit).¹⁵ The Commission thus properly rejected NOVEC's answer to an answer.

15. Finally, NOVEC argues that the Commission erred in not giving consideration to NOVEC's February 15 and 21 pleadings. NOVEC's February 15 pleading is the answer to Old Dominion's answer discussed above. NOVEC's February 21 pleading is a further

¹² Complainants seeking a hearing have the burden to show that a hearing is warranted. *See, e.g., Algoma Group v. Wisconsin Public Service Corp.*, 61 FERC ¶ 61,265 at 61,959 (1992), *order on reh'g*, 62 FERC ¶ 61,040 (1993); *accord Pennsylvania Public Utility Commission v. FERC*, 881 F.2d 1123, 1126 (D.C. Cir. 1989).

¹³ 18 C.F.R. § 385.206(g)(2) (2006).

¹⁴ 18 C.F.R. § 385.213(a)(1) (2006).

¹⁵ 18 C.F.R. § 385.213(a)(2) (2006).

answer¹⁶ to Old Dominion's answer. Answers to answers are generally not permitted.¹⁷ In addition, our complaint rule requires that all supporting affidavits and documents be included with the complaint.¹⁸ No justification was offered by NOVEC for its failure to include the affidavits with its complaint.

16. Accordingly, the request for rehearing will be denied.

The Commission orders:

NOVEC's request for rehearing filed in Docket No. EL06-43-001 is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁶ The answer had attached five affidavits addressing various matters relating to the costs of Old Dominion electricity, the cost of electricity of other cooperatives, the changes in the restructuring of other cooperatives, etc.

¹⁷ 18 C.F.R. § 385.213(a)(2) (2006); *see* March 2 Order, 114 FERC ¶ 61,240 at P 16.

¹⁸ 18 C.F.R. § 385.206(b)(8) (2006).