

111 FERC ¶ 61,224
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

The United Illuminating Company

Docket No. EL05-76-000

v.

Dominion Energy Marketing, Inc.

ORDER ON COMPLAINT

(Issued May 13, 2005)

1. On March 14, 2005, the United Illuminating Company (UI) filed a complaint alleging that Dominion Energy Marketing, Inc. (Dominion) is refusing to abide by the terms of a Wholesale Power Supply Agreement (PSA) between UI and Dominion by requiring UI to bear the costs of “Reliability Cost Tracker” charges associated with Reliability Must-Run (RMR) agreements with ISO New England, Inc. (ISO-NE). UI claims that the PSA makes Dominion responsible for the Reliability Cost Tracker charges and requests that the Commission direct Dominion to bear the cost responsibility for such charges. As discussed below, the Commission grants UI’s complaint and finds that Dominion is responsible for the Reliability Cost Tracker charges pursuant to the PSA.
2. This order benefits customers because it clarifies the costs for which UI and Dominion are responsible pursuant to the PSA.

Background

A. The PSA

3. The PSA, executed on December 28, 2001, and as amended and restated on January 28, 2002, requires Virginia Electric and Power Company (VEPCO) to provide power supply to UI for UI to serve its “Standard Offer Service” customers, *i.e.*, UI’s retail customers in its service territory that do not choose an alternate electric supplier. Dominion, a VEPCO affiliate, subsequently assumed the PSA. The PSA, as amended and restated, was accepted by the Commission,¹ and service under the agreement began

¹ March 8, 2002, Virginia Electric and Power Co., Delegated Letter Order, Docket No. ER02-932-000.

on January 1, 2002. Dominion's obligation to provide power for UI's Standard Offer Service customer load expired on December 31, 2003. Under the PSA, Dominion must also supply power to UI's Special Contract Customer load through the terms of those contracts, the last of which expires in December 2008.²

B. The Reliability Cost Tracker

4. In the context of a new Standard Market Design (SMD) in ISO-NE, the Commission authorized ISO-NE to classify as RMR units generation units within chronically constrained areas (referred to as Designated Congestion Areas or DCAs) that must run at certain times to alleviate transmission congestion.³

5. In an April 25, 2003 Order, the Commission accepted, in part, four RMR contracts for generation units located in Southwest Connecticut, an area that has been chronically constrained and, thus, identified as a DCA by ISO-NE.⁴ In particular, the Commission accepted the reliability "cost-of-service tracker" of the RMR agreements, which "provides a cost tracking provision to compensate the [owners of the generation units filing the four RMR contracts] for the costs of specifically identified Reliability Projects to ensure that [these generation owners] complete this needed maintenance in order to keep the facilities in operation so they are available when called upon by the ISO."⁵ The Commission explained that these units, needed for reliability, must undergo maintenance in order to operate. The cost tracking provision was needed for the four RMR contracts because, otherwise, the generation owners may not be in a financial position to fund maintenance in advance of revenue.⁶

C. UI/Dominion Billing Dispute

6. ISO-NE first billed UI for the Reliability Cost Tracker (identified as "CT Reliability COS" charges on the ISO-NE invoice) in April 2003 for February 2003 charges. In turn, UI deducted the amount of the charge on the billing statement from Dominion. This practice continued each month until December 2004, when Dominion

² See Complaint at p. 5, n.12.

³ See *New England Power Pool*, 100 FERC ¶ 61,287 (2002), *order on reh'g*, 101 FERC ¶ 61,344 (2002), *order on reh'g*, 103 FERC ¶ 61,304 (2003), *order on reh'g*, 105 FERC ¶ 61,211 (2003).

⁴ *Devon Power LLC*, 103 FERC ¶ 61,082 (*Devon*), *order on reh'g*, 104 FERC ¶ 61,123 (2003).

⁵ *Id.*, 103 FERC ¶ 61,082 at P 46.

⁶ *Id.*, 103 FERC ¶ 61,082 at P 47.

advised UI that UI had improperly deducted CT Reliability COS charges from payments due to Dominion under the PSA. Dominion requested that UI refund approximately \$8.9 million in improper deductions and related interest.

7. UI and Dominion were unable to resolve their dispute and, on February 11, 2005, Dominion filed a breach of contract suit in the United States District Court for the District of Connecticut.⁷ Dominion alleged that UI, by deducting CT Reliability COS charges from payments to Dominion, had breached its obligation to pay for all energy and market products provided by Dominion under the PSA. Dominion asked for relief and an award of the payments withheld by UI, plus interest.

UI Complaint

8. UI contends that the Commission has exclusive jurisdiction over the issues in dispute because the PSA is a market-based rate schedule accepted by, and on file with, the Commission pursuant to section 205 of the Federal Power Act (FPA).⁸ Alternatively, UI argues that the facts of this case satisfy the three-part test that the Commission established for determining whether to exercise primary jurisdiction.⁹ UI claims that: (1) the Commission has special expertise because the Commission has been immersed in numerous proceedings involving ISO-NE's SMD and transmission congestion management in the region; (2) there is a need for a uniform regulatory policy regarding the treatment of Reliability Cost Tracker charges; and (3) the issue is central to the Commission's regulatory responsibilities, noting that the Commission has consistently exercised its jurisdiction to address RMR cost issues in ISO-NE.¹⁰

9. With regard to the substance of its complaint, UI contends that Dominion is responsible for the Reliability Cost Tracker charges under the PSA. Section 2.1(c) of the PSA makes Dominion, as the seller, responsible for:

all costs or charges (excluding any Stranded Costs) imposed on or associated with the delivery of Energy and, as may be necessary, Market Products, delivered, or caused to be delivered, by Seller to UI to the Delivery Point(s), including Transmission Congestion

⁷ Exhibit No. 2 of UI's Complaint is Dominion's federal court complaint.

⁸ 16 U.S.C. § 824d (2000).

⁹ See *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175 at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*).

¹⁰ Citing *State of Connecticut v. NRG Power Marketing, Inc.*, 103 FERC ¶ 61,344 at 46 (*NRG*), *reh'g denied*, 104 FERC ¶ 61,211 (2003).

Costs, settlement uplift charges, control area services, inadvertent energy flows, losses, and loss charges, each relating to the transmission of Energy, if any, to the Delivery Point(s)

10. According to UI, the broad language making the seller responsible for “all costs or charges . . . imposed on or associated with the delivery of Energy . . .” makes Dominion responsible for Reliability Cost Tracker charges, which the Commission determined are necessary costs imposed by ISO-NE on the delivery of energy. Further, UI argues that Dominion’s responsibility for the charges at issue is confirmed by the more specific language of section 2.1(c) that the seller is responsible for “Transmission Congestion Costs,” which the PSA defines as:

[a]ll costs resulting from insufficient transmission capacity, without regard to the cause of such congestion or how such costs are allocated or assessed, including the difference in the clearing price for Energy between the point of injection and point of receipt of Energy, and redispatch costs resulting from Reliability Must Run (as such term is defined in the Restated NEPOOL Agreement) requirements or other out of merit order generation dispatch directed by ISO-NE pursuant to the NEPOOL Rules, the interconnection of a generation or the maintenance or upgrade of the [Pooled Transmission Facilities].¹¹

11. UI contends that the Reliability Cost Tracker charges are unquestionably costs associated with the delivery of energy “resulting from insufficient transmission capacity,” pursuant to the definition above. UI states that both the *pro forma* cost-of-service agreement accepted by the Commission as part of the ISO-NE SMD, as well as the four RMR contracts at issue in *Devon*, provide that “[ISO-NE] has concluded that the Resource will be needed for reliability purposes during the Term to relieve transmission congestion and expects [that] the Resource will be required to run out-of-economic merit during transmission constraints.”¹² UI claims that Commission precedent also recognizes that the Reliability Cost Tracker charges are costs resulting from insufficient transmission capacity.¹³

¹¹ PSA, section 1.90.

¹² *Quoting* Market Rule 1, Appendix A, Exhibit 4 at Recital ¶ D (Form of Cost of Service Agreement).

¹³ *Citing, e.g., New England Power Pool*, 100 FERC ¶ 61,287 at P 61; *ISO New England, Inc.*, 105 FERC ¶ 61,263 at P 1, 11 (2003).

12. UI further argues that, while the PSA identifies specific costs for which UI is responsible, the charges at issue here do not fall into any of those categories. Specifically, UI is responsible for: (1) stranded costs; (2) Regional Network Service charges; (3) Local Network Service charges; (4) Service under UI's retail tariff; and (5) costs associated with delivery of energy and market products at or from UI's delivery points. UI notes that Dominion has argued that the Reliability Cost Tracker charges are charges associated with Regional Network Service for which UI is responsible. UI counters that, under the PSA, it is responsible specifically for the costs and charges of Regional Network Service, but not charges "associated" with that service. In contrast, Dominion is responsible for all costs "associated with the delivery of energy."

13. As additional support for its complaint, UI contends that Dominion has represented to the Commission in earlier proceedings that Dominion is responsible for costs associated with RMR agreements under the PSA. UI also claims that Dominion's failure to challenge the UI billing statements for almost 20 months is evidence that Dominion is responsible for the Reliability Cost Tracker charges.

Notice and Filings

A. Federal Register Notice

14. Notice of UI's complaint was published in the *Federal Register*, 70 *Fed. Reg.* 13,493 (2005), with interventions and protests due on or before April 13, 2005. Dominion filed a timely answer. The Connecticut Department of Public Utility Control filed a notice of intervention and comment, supporting UI's complaint and asking that the Commission hold Dominion to its contractual obligation to cover all of the costs associated with RMR agreements. ISO-NE filed a motion to intervene out-of-time.

15. On April 28, 2005, UI filed an answer to Dominion's answer. On May 11, 2005, Dominion filed a response to UI's answer.

B. Dominion's Answer

16. In its answer, Dominion moves to dismiss the complaint, contending that the Commission should not exercise either exclusive or primary jurisdiction over this breach of contract dispute that is pending in federal district court. It contends that, while the Commission has exclusive jurisdiction to set wholesale rates, the FPA does not provide the Commission with exclusive jurisdiction over the breach of a Commission-approved contract.¹⁴ Dominion explains that, in its breach of contract action in federal district

¹⁴ *Citing Mirant Corp. v. Potomac Electric Power Co.*, 378 F.3d 511, 519 (5th Cir. 2004).

court, it is not seeking to change the rate under the contract but, rather, seeks judicial interpretation as to which party the Reliability Cost Tracker charges are allocated under the PSA.

17. Further, Dominion contends that the Commission should decline to assert its primary jurisdiction based on the application of the three-part *Arkla* test. First, Dominion characterizes the dispute as a simple matter of contract interpretation, which does not require the Commission's special expertise. According to Dominion, the proceeding does not require the determination of broader issues related to RMR charges generally or other issues that may implicate the Commission's expertise. Second, Dominion claims that the dispute does not raise issues that require uniformity of interpretation since the dispute is unique to the PSA, which is not a standard or *pro forma* agreement. Third, Dominion contends that the dispute does not implicate the regulatory responsibilities of the Commission. It states that the Commission has already determined that certain costs can be recovered through RMR contracts if shown to be just and reasonable and the dispute at hand simply involves which party to a bilateral agreement should bear these costs.

18. Dominion argues that, if the Commission chooses to exercise jurisdiction over the dispute, it should find in Dominion's favor because there is no basis in the PSA or under Commission precedent that supports UI's position that Dominion is responsible for Reliability Cost Tracker charges under the PSA. Dominion asserts that it is not responsible for the fixed costs at issue here because the PSA, which predates the four Devon RMR contracts, does not specifically state that Dominion must pay for the Reliability Cost Tracker charges. Dominion asserts that UI's claim that the Reliability Cost Tracker charges are "explicitly" allocated to Dominion is refuted by the text of the PSA and the history of the Commission's proceedings on the RMR issue impacting the New England Market.

19. Further, Dominion argues that the contract language relied on by UI is not controlling because the fixed cost charges at issue are not associated with the "delivery of energy." It claims that the list of specific variable costs associated with the delivery of energy in section 2.1(c) of the PSA indicates an intent to exclude fixed costs. Likewise, Dominion contends that the fixed Reliability Cost Tracker charges cannot be transmission congestion costs, which are variable costs according to industry convention. Dominion claims that the absence of a hedging mechanism for the fixed costs at issue supports its position that the charges at issue are not congestion costs.

20. Dominion asserts that as a matter of policy, load – not generation – should bear the Reliability Cost Tracker charges. According to Dominion, requiring suppliers to bear the fixed costs related to RMR generation would result in economic inefficiencies because (1) the supplier, which is not responsible for load growth, does not cause the costs to be incurred and (2) as a non-transmission owner, Dominion has no direct ability to expand

the existing transmission system to impact existing constraints. Dominion also asserts that a determination that Dominion must pay for these fixed charges would result in a direct wealth transfer from one set of suppliers to another.

Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notice of intervention serves to make the entity that filed it a party to this proceeding. Additionally, given the early stage of the proceeding, the lack of delay or undue prejudice and the party's interest, we find good cause to grant, under Rule 214, ISO-NE's unopposed, untimely motion to intervene in this proceeding.

22. The Commission's rules generally prohibit answers to answers, 18 C.F.R. § 385.214(a)(2) (2004). We are not persuaded to allow UI's answer to Dominion or Dominion's answer to UI; accordingly, we reject them.

B. Commission Jurisdiction

23. The PSA at issue here is clearly a Commission-jurisdictional contract, which was previously filed with and approved by the Commission.¹⁵ The question remains whether the Commission should nevertheless decline to assert jurisdiction in deference to the federal district court. As noted above, in determining whether to exercise its primary jurisdiction over contractual disputes, the Commission applies a three part test:

(1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.¹⁶

24. Applying this test to the current proceeding, we find that it is appropriate for the Commission to exercise its primary jurisdiction over the dispute. First, the Commission has special expertise regarding the responsibility for congestion costs and losses under SOS agreements, such as the PSA at issue in this proceeding. Concepts such as "transmission congestion costs" and "reliability must-run," which may be unfamiliar to a

¹⁵ See footnote 1, *supra*.

¹⁶ *Arkla*, 7 FERC at 61,322.

court, are subjects frequently addressed by the Commission. Moreover, the Commission previously determined the need for, and accepted as just and reasonable, the Reliability Cost Tracker charges over which the parties now dispute.

25. Second, while the contract at issue may be unique, there is nonetheless a need for a consistent application and understanding of terminology used in the market design approved by the Commission. Third, the matters raised in the complaint are important in relation to the regulatory responsibilities of the Commission. The Commission has jurisdiction under the FPA to interpret and enforce wholesale power contracts in interstate commerce, such as the SOS agreement at issue in this proceeding. Moreover, the Commission, having determined that it is necessary for certain generation units in Connecticut to remain in service because of system reliability concerns and that generation owners may recover the maintenance costs to keep such units in service, has an interest in the dispute between UI and Dominion regarding who bears the responsibility for payment of these Commission-approved costs.

26. Accordingly, we will exercise our primary jurisdiction over the dispute, and deny Dominion's motion to dismiss.

C. Reliability Cost Tracker Charges

27. The PSA, which was originally executed in 2001, is understandably silent with regard to which party must pay for Reliability Cost Tracker charges, which were accepted by the Commission in 2003. The language of section 2.1(c) of the PSA provides that Dominion is responsible for "all costs or charges . . . imposed on or associated with the delivery of Energy . . . including Transmission Congestion Costs," which the contract defines to include "all costs resulting from insufficient transmission capacity, without regard to the cause of such congestion or how such costs are allocated or assessed." The broad nature of this language indicates an intent to encompass costs beyond the specific examples stated immediately afterward in section 2.1(c) of the PSA. Moreover, the contract language is broad enough, on its face, so as to include the Reliability Cost Tracker charges at issue. These charges are necessary for the ongoing operation of the Devon RMR units to relieve transmission congestion in an area identified by ISO-NE as a Designated Congestion Zone.¹⁷

28. Dominion argues that the Reliability Cost Tracker charge, as a fixed cost charge, is not related to the delivery of energy and is not a transmission cost charge for which Dominion is responsible. However, the PSA does not explicitly state that the seller's responsibility is limited to variable cost charges. Other than pointing to variable cost charges specifically identified in section 2.1(c) of the PSA, Dominion does not provide

¹⁷ *Devon*, 103 FERC ¶ 61,082 at P 3, *New England Power Pool*, 100 FERC ¶ 61,287 at P 61 (RMR fixed costs represent the costs of relieving congestion in specific regions and should be reflected in the cost of energy in those regions).

any evidence that the parties intended to differentiate between fixed and variable charges at the time of negotiating the PSA. To the contrary, the PSA's definition of Transmission Congestion Costs, which includes "*all costs resulting from insufficient transmission capacity, without regard to the cause of such congestion or how such costs are allocated or assessed,*"¹⁸ is broad enough to encompass fixed cost charges, and indicates that the parties intended the seller to bear such costs without the distinction between fixed and variable costs that Dominion claims.

29. We find that the language of the PSA, on its face, indicates that Dominion is responsible for Transmission Congestion Costs, which includes the Reliability Cost Tracker charges at issue. Dominion has not shown that the parties intended at the time of contracting to except such fixed cost charges from the PSA's broad definition of Transmission Congestion Costs. Because the intent of the PSA can be gleaned from the contract itself, it is unnecessary to consider material extrinsic to the contract raised by the parties. Moreover, because the parties decided the cost responsibility in the PSA, we decline to entertain the policy arguments raised by Dominion.

30. Accordingly, we grant UI's complaint and conclude that Dominion must bear the responsibility for the Reliability Cost Tracker charges at issue.

The Commission orders:

(A) UI's complaint is hereby granted, as discussed in the body of this order.

(B) Dominion's motion to dismiss is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁸ See PSA section 1.90 (emphasis added).