

123 FERC ¶ 61,147
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.

LG&E Energy Marketing, Inc.

Docket No. ER08-678-000

ORDER ON JURISDICTION

(Issued May 13, 2008)

1. On March 14, 2008, LG&E Energy Marketing, Inc. (LG&E Marketing) submitted for filing pursuant to section 205 of the Federal Power Act (FPA)¹ a Generation Dispatch Support Services Agreement (Support Services Agreement), requesting that the Commission determine that acceptance of the Support Services Agreement is not necessary because the services provided under the Support Services Agreement are not jurisdictional; or in the alternative, that the Commission accept the Support Services Agreement for filing.

2. In this order we find that the Support Services Agreement is not jurisdictional under normal circumstances under section 205 of the FPA and did not have to be filed with us. The Support Services Agreement does not normally involve services that affect or relate to charges, classifications or services over which the Commission has jurisdiction.

Background

3. In the mid-1990s, Big Rivers Electric Corporation (Big Rivers), a rural electric cooperative that is not a public utility as defined in section 201(e) of the FPA,² was operating under Chapter 11 of the Bankruptcy Code.³ During that time, four indirect, wholly-owned subsidiaries of LG&E Energy Corp., Western Kentucky Energy Corp.

¹ 16 U.S.C § 824d (2000)

² 16 U.S.C. § 824f (2000 & Supp. V 2005).

³ 11 U.S.C. § 1101 *et seq.* (1988).

(WKEC),⁴ WKE Station Two Inc. (WKE Station), Western Kentucky Leasing Corp. (WKLC), and LG&E Marketing (collectively, Original Applicants) entered into an agreement (Reorganization Plan) with Big Rivers. Among other things, the Reorganization Plan provided for the disaggregation of Big Rivers' generating facilities⁵ from its transmission and power supply business and for the leasing and/or assigning of Big Rivers' generation interests to the Original Applicants.

4. The Original Applicants asked the Commission to disclaim jurisdiction under section 203 of the FPA⁶ regarding: (1) the merger of WKLC and WKEC;⁷ (2) operation of Big Rivers' Facilities pursuant to the Western Kentucky Lease;⁸ and (3) the assignment of certain contractual rights and obligations from Big Rivers to WKE Station,

⁴ WKEC is a jurisdictional public utility with market-based rate authority. *See WKE Station Two Inc. and Western Kentucky Energy Corp.*, 82 FERC ¶ 61,178 (1998).

⁵ Big Rivers' facilities consisted of four generating plants owned and operated by Big Rivers (Big Rivers' Facilities) and a generating plant operated by Big Rivers under contract (Station Two Facility) that is owned by the City of Henderson, Kentucky.

⁶ Big Rivers' facilities consisted of four generating plants owned and operated by Big Rivers (Big Rivers' Facilities) and a generating plant operated by Big Rivers under contract (Station Two Facility) that is owned by the City of Henderson, Kentucky.

⁷ The merger of WKLC and WKEC was proposed to occur immediately prior to the commencement of the Western Kentucky Lease. Prior to the merger, Original Applicants stated that WKLC's activities relate solely to non-jurisdictional facilities and services and that it would not own or operate any type of transmission facilities or services.

⁸ The Western Kentucky Lease involved only generating facilities and generation-related assets and all other physical assets owned by Big Rivers and used in connection with the ownership or operation of those generation facilities. The Original Applicants stated that all transmission facilities, transmission-related equipment, contracts for the sale of power, and/or Big Rivers' books and records would not be transferred to WKEC.

pursuant to the Station Two Agreement.⁹ Among other things, Western Kentucky and WKE Station would obtain title to electric energy and capacity produced by Big Rivers' Facilities. They also requested that the Commission accept for filing the rates, terms and conditions for LG&E Marketing's sale of generation-based ancillary services at cost-based rates.

5. In *Western Kentucky Energy Corporation*,¹⁰ the Commission disclaimed jurisdiction under section 203 of the FPA, as requested, and accepted for filing LG&E Marketing's proposed cost-based rates for generation-based ancillary services that Big Rivers had been providing to itself and others.

Proposed Support Services Agreement

6. LG&E Marketing requests that the Commission disclaim jurisdiction or, in the alternative, accept for filing the Support Services Agreement between it and Big Rivers.¹¹ LG&E Marketing states that after the Operating Documents terminate, it will perform services under the Support Services Agreement pursuant to Big Rivers' direction and control. Under the Support Services Agreement, LG&E Marketing will: (1) monitor load signals provided by Big Rivers for each load and any off-system purchase and/or

⁹ Under the Station Two Agreement, WKE Station would operate and maintain the Station Two Facility and certain joint use facilities of Big Rivers and the City of Henderson located at the Reid Facility. WKE Station would also provide operation and maintenance (O&M) services to the Reid Facility and the Common Facilities owned by Big Rivers, as a subcontractor to WKEC. In addition to these services, WKEC would be responsible for preserving and maintaining books, records, and other accounts for procuring and maintaining insurance, and for administering fuel contracts, but Big Rivers would continue to exercise a right of control, review, and approval with respect to these functions. Big Rivers' existing obligations with respect to the transmission facilities at the Station Two Facility were expressly excluded from WKE Station's functions as an assignee.

¹⁰ 83 FERC ¶ 61,336 (1998) (*Western Kentucky*).

¹¹ On March 14, 2008, WKEC, jointly with E.ON U.S. LLC (Applicants), filed an application pursuant to section 203 of the FPA seeking disclaimer of jurisdiction with respect to or, in the alternative, authorization of a disposition of assets by WKEC to Big Rivers (the Transaction). The Transaction is the termination of WKEC's lease, an operating agreement and associated other documents (Operating Documents) so that operational control over Big Rivers' Facilities and ownership of the output of the Facilities (or right to purchase power) will revert to Big Rivers. This filing will be addressed in an order in Docket No. EC08-54-000.

sales commitments implemented by Big Rivers; (2) monitor Big Rivers' balancing authority Area Control Error and regulate Big Rivers' plants to maintain acceptable imbalance error consistent with North American Electric Reliability Corporation (NERC) requirements; (3) assist Big Rivers in regulating its plants so as to economically dispatch those plants' units; (4) assist Big Rivers in allocating spinning and operating reserves among the Big Rivers plants' generation units consistent with the direction of Big Rivers and Southeastern Electric Reliability Council, Inc. and NERC requirements; (5) assist Big Rivers in taking any corrective action during the loss of generation resources from Big Rivers' Facilities consistent with NERC reliability guidelines; (6) assist Big Rivers in implementing generation-based ancillary services from Big Rivers' Facilities in accordance with the direction of Big Rivers; and (7) assist Big Rivers in balancing its inadvertent account.¹² LG&E Marketing states that it will provide these services because it already has in place or has access to the software systems and communication systems necessary to remotely dispatch the generating plants and because Big Rivers will not have these capabilities immediately following the Transaction closing, but must develop them over time.¹³

7. LG&E Marketing emphasizes that Big Rivers will have operational control over the generating plants and that those facilities will be staffed with Big Rivers' personnel. LG&E Marketing also states that all sales decisions and the ultimate decision whether to operate a plant, including the ability to declare a plant to be off-line or out-of-service, will be made by Big Rivers. Only if Big Rivers fails to provide direction with respect to the services described and the failure is likely to result in a system reliability issue, does the Support Services Agreement give LG&E Marketing the limited right to independently dispatch and operate the generating facilities.¹⁴ This limited right terminates when Big Rivers again begins providing LG&E Marketing with the data necessary for LG&E Marketing to perform its functions under Big Rivers' direction.¹⁵

Notice and Pleadings

8. Notice of LG&E Marketing's filing was published in the *Federal Register*, 73 Fed. Reg. 16,000 (2008), with interventions and protests due on or before April 4, 2008. None were filed.

¹² Transmittal Letter at p. 2, citing Support Services Agreement Section 2.1.

¹³ *Id.* at 3.

¹⁴ *Id.* at p. 2, citing Support Services Agreement Section 2.5.

¹⁵ *Id.* at p. 3.

Discussion

9. We find that the Support Services Agreement is not jurisdictional under ordinary circumstances. The issue raised by this filing is whether the Support Services Agreement is required to be filed with the Commission pursuant to section 205 of the FPA. Section 205(c) of the FPA requires public utilities to file “schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations *affecting* such rates and charges, together with all contracts which in any manner *affect or relate* to such rates, charges, classifications, and services.”¹⁶ In *Prior Notice and Filing Requirements Under Part II of the Federal Power Act (Prior Notice)*,¹⁷ the Commission set forth a two-part test for deciding whether an agreement is subject to the Commission’s jurisdiction under section 205 of the FPA. First, is the service at issue tied to wholesale sales or to transmission in interstate commerce or does it in any manner affect or relate to jurisdictional rates or services? Second, does a public utility provide the service? If the answer to both questions is yes, then the agreement is jurisdictional.¹⁸

10. Thus, the relevant question here is whether the Support Services Agreement is a contract that affects or relates to charges or rates over which the Commission has jurisdiction. We find that it is not. LG&E Marketing will perform duties that will help Big Rivers, a non-public utility, to serve its load. Thus, this case is quite different from *Entergy*, where the Commission found that:

[T]he Lease Agreement must be filed under section 205 of the FPA. The O&M services provided by Entergy via the Lease Agreement will affect and relate to jurisdictional transmission services. . . . Under the Lease Agreement, Entergy will operate facilities used to provide transmission services in interstate commerce that are jurisdictional to the Commission under section 205 of the FPA.¹⁹

¹⁶ 16 U.S.C. § 824d(c) (2000) (emphasis added).

¹⁷ *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *order on reh’g and clarification*, 65 FERC ¶ 61,081 (1993). *See also Entergy Mississippi, Inc.*, 117 FERC ¶ 61,200 (2006) (*Entergy*).

¹⁸ *Entergy*, 117 FERC ¶ 61,200 at P 26.

¹⁹ *Id.* P 27.

11. Here in contrast, the service that is affected by the Support Services Agreement is not under the Commission's jurisdiction.

12. The Support Services Agreement provides that under rare circumstances, LG&E Marketing may be required to perform certain functions that may be jurisdictional. However, LG&E Marketing maintains that these rare instances will be short-lived. Because LG&E Marketing will only perform functions under the Agreement that may be jurisdictional in rare circumstances for a limited time, under the "rule of reason," we will not require it to file the Support Services Agreement with us if it temporarily assumes these functions.²⁰

The Commission orders:

LG&E Marketing's request that the Commission disclaim jurisdiction over the Support Services Agreement is hereby granted in part, for the reasons stated herein.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁰ The Commission's policy is to apply the "rule of reason" to determine which jurisdictional agreements must be filed with it. See *Pacific Gas and Electric Company*, 7 FERC ¶ 61,267, at 61,565 (1979) (*Pacific Gas*), *aff'd sub nom. Pacific Gas and Electric Co. v. FERC*, 679 F.2d 262 (D.C. Cir. 1982). See also *Commonwealth Edison Company, order on remand*, 21 FERC ¶ 61,096, at 61,294 (1982) (*Commonwealth Edison*). Such an action by the Commission does not make an agreement non-jurisdictional; it merely means that the Commission has decided that it does not need a public utility to file the agreement. Cf. *Public Service Company of Colorado*, 67 FERC ¶ 61,371 (1994).