

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Water and Power Department of the  
City of Glendale, California

Docket No. EL06-5-000

v.

Portland General Electric Company

ORDER DISMISSING COMPLAINT

(Issued December 19, 2005)

1. On October 18, 2005, the Water and Power Department of the City of Glendale, California (Glendale) filed a complaint pursuant to section 206 of the Federal Power Act (FPA)<sup>1</sup> against Portland General Electric Company (Portland General) alleging that Portland General did not properly compute the price calculations for energy and firm system capacity that Portland General provided to Glendale under their Long-Term Power Sale and Exchange Agreement (Agreement). Glendale requests that Portland General be required to refund any and all amounts in excess of properly calculated formulary rates set forth in the Agreement, plus interest.

2. Glendale also requests fast-track treatment of its complaint. Glendale bases its request on the fact that on August 2, 2005, Portland General filed a complaint for declaratory order in the United States District Court for the District of Oregon, regarding this dispute. Glendale maintains that while Portland General presented this dispute to the court as one of contract interpretation, the real issue is the miscalculation by Portland General of rates and pricing of energy and capacity sold to Glendale, which is within the exclusive jurisdiction of the Commission.

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<sup>1</sup> 16 U.S.C. § 824e (2005).

3. Additionally, Glendale requests that the Commission initiate a hearing and investigation, and states that it does not oppose the initiation of settlement judge proceedings, given timing restrictions due to the related action pending in the district court.

4. For reasons discussed below, the Commission dismisses Glendale's complaint and requests for fast-track treatment, hearing, and investigation, on the ground that the dispute is appropriately before the district court.

### **Background**

5. Glendale is a municipal corporation organized under the laws of the State of California that, through its Water and Power Department, annually provides more than 1,200,000 MWh electricity service at retail to 83,000 customers in Glendale. The Water and Power Department owns and operates generation used to partially meet its service requirements; the remainder of Glendale's requirements is met by purchases of power by Glendale in wholesale markets. In 2005, Glendale's 20 MW purchase from Portland General represented approximately six percent of its annual peak load.

6. Portland General is an electric utility engaged in the generation, purchase, transmission, distribution, and sale of electricity at wholesale (and thus, is a jurisdictional entity) and at retail.

7. The Agreement at issue was executed in 1988, and accepted for filing, effective September 16, 1988, by the Commission on April 30, 1990.<sup>2</sup> The Agreement provides that Portland General will sell 20 MW of Firm System Capacity to Glendale, plus associated energy, and provide Glendale both a seasonal and daily energy exchange through September 30, 2012. Sales under the contract are wholesale sales made pursuant to market-based sales authority and pricing, implemented through a negotiated formula.

8. Glendale seeks relief and refunds based upon the rate application, charge calculation, and pricing practices by Portland General under the Agreement. Glendale asserts that in each instance, Portland General failed to follow the requirement of the Agreement for pricing capacity and energy.

9. More specifically, Glendale claims that Portland General has misapplied the formula for determining the energy price to Glendale pursuant to section 3.4.1 of the Agreement,<sup>3</sup> and failed to follow the express requirements of sections 3.4 and 3.5 of the

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<sup>2</sup> *Portland General Exchange, Inc.*, 51 FERC ¶ 61,108 (1990).

<sup>3</sup> Complaint at 21-29.

Agreement in billing Glendale for energy.<sup>4</sup> Glendale further alleges that Portland General has erred in billing the Annual Service Fee<sup>5</sup> and Annual Energy Fee<sup>6</sup> under the Agreement, by not properly mitigating these fees to account for the removal of certain of Portland General's resources, including the shutdown of its Trojan nuclear plant.<sup>7</sup>

10. As a remedy for these alleged contractual violations, Glendale seeks a refund from Portland General of approximately \$23,325,029.

11. Glendale asserts that Portland General's suit in district court is an attempt to preempt the Commission's exclusive jurisdiction "over the instant dispute concerning [Portland General]'s pricing and resulting rates to Glendale," under the formula established by the Agreement.<sup>8</sup> According to Glendale:

Although [Portland General] attempts to paint [the] dispute . . . as one of interpretation of *non*-rate related contract terms, it is really over the miscalculation and misapplication by Portland General of rates and pricing of energy and capacity sold to Glendale at wholesale by [Portland General] – which matters reside in the exclusive jurisdiction of the Commission.[<sup>9</sup>]

12. Notice of Glendale's complaint was published in the *Federal Register*, 70 Fed. Reg. 61,803 (2005), with comments, protests or interventions due on or before November 8, 2005. On November 4, 2005, the Commission granted Portland General's motion for an extension of time to file an answer to the complaint to November 15, 2005. Portland General filed its answer on that date. On November 30, 2005, as corrected on December 1, 2005, Glendale filed a motion for leave to file an answer to Portland General's answer.

13. Portland General argues that this is not a matter that falls within the Commission's exclusive jurisdiction, as Glendale is not seeking a modification of the Agreement, but merely the appropriate application of its terms. It further asserts that the formula set forth in the contract is the actual rate approved as just and reasonable by the Commission

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<sup>4</sup> *Id.* at 29-30.

<sup>5</sup> The Annual Service Fee represents a fixed charge amount that Glendale pays to Portland for Firm System Capacity and other rights under the Agreement.

<sup>6</sup> The Annual Energy Fee represents a fixed charge amount that Glendale pays to Portland General for energy made available to Glendale pursuant to the Agreement.

<sup>7</sup> Complaint at 31-39.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* (emphasis in original).

and is not at issue. Rather, Portland General maintains that the issue is the manner in which the parties believe the components of the formula should be calculated. Thus, Portland General concludes, this case falls within the category of contract interpretation disputes in which the Commission and the courts have concurrent jurisdiction but the Commission declines to resolve, under the test set forth in *Arkansas Louisiana Gas Company v. Hall*.<sup>10</sup>

### **Discussion**

14. 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 Glendale's answer and will, therefore, reject it.

15. The preliminary issue, of course, is whether Glendale is correct that this contract dispute falls under the Commission's exclusive jurisdiction. This dispute concerns the interpretation of certain contract provisions and their application. Glendale alleges that the requirements for the pricing, fees, and charges for energy and firm capacity set forth in the Agreement have not been applied properly, resulting in miscalculations of rates and pricing. Specifically, Glendale complains about the misapplication of the contract's pricing formula and the miscalculation and misapplication of the contract's Annual Service Fee and Annual Energy Fee.

16. It is clear, therefore, that the parties' dispute is not about the proper rate – which is the formula itself – but how the rate should be calculated under the terms of the Agreement. Thus, because Glendale's complaint “only seeks enforcement of an existing contract, and not the setting of a new just and reasonable rate,” the case “does not fall within the Commission's exclusive jurisdiction.”<sup>11</sup>

17. Having established that the Commission and the district court have concurrent jurisdiction concerning this dispute, we turn to the factors set forth in *Arkla* to determine whether we should assert primary jurisdiction. These factors are: (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 by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission.

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<sup>10</sup> 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*).

<sup>11</sup> *Kentucky Utilities Co.*, 110 FERC ¶ 61,285 at P 11 (2005); *Portland General Electric Co.*, 72 FERC ¶ 61,009 (1995).

18. In our view, Glendale's complaint does not implicate any of the three relevant factors. First, this case does not appear to be a matter requiring particular knowledge or ability related to utility industry rates or practices, but merely a question of discerning the parties' intent concerning the interplay of certain sections of their Agreement. Second, this case does not involve a generic, industry-wide contract, the interpretation of which would affect other contracts or other market participants. Instead, it is a contract that is very specific to its particular parties and the services to be provided, such as what fees are required in light of the shutdown of the Trojan nuclear plant. Third, the interpretation of the appropriate provisions of the Agreement is inextricably tied to the facts at the time of execution and the understanding of the parties at that time.

19. Based on the above analysis, the Commission will not assert primary jurisdiction over this contract dispute and, accordingly, will dismiss the complaint. Therefore, we do not reach the merits of Glendale's claim.

The Commission orders:

For the reasons stated above, Glendale's complaint and requests for fast-track treatment, hearing, and investigation are hereby dismissed.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.