

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

The City of Glendale, California

Docket No. EL06-5-001

v.

Portland General Electric Company

ORDER DENYING REHEARING

(Issued May 23, 2006)

1. On January 18, 2006, the Water and Power Department of the City of Glendale, California (Glendale) filed a request for rehearing of the Commission's order issued on December 19, 2005,¹ which addressed a complaint filed by Glendale against Portland General Electric Company (Portland General).² In the December 19 Order, we dismissed the complaint filed by Glendale, finding that the Commission did not have exclusive jurisdiction over the complaint and deciding not to exercise primary jurisdiction. Here, we determine that the Commission did not erroneously dismiss the complaint and, accordingly, deny rehearing.

Background

2. On October 18, 2005, Glendale filed a complaint pursuant to section 206 of the Federal Power Act (FPA) against Portland General that disputes Portland General's method of computing price calculations for energy and firm system capacity related to services provided to Glendale under their Long-Term Power Sale and Exchange Agreement (Agreement).³ Glendale requested that the Commission direct Portland

¹ *Water and Power Department of the City of Glendale, California v. Portland General Electric Co.*, 113 FERC ¶ 61,285 (2005) (December 19 Order).

² On February 17, 2006, the Commission granted rehearing for further consideration of the Commission's December 19 Order.

³ The Commission accepted the Agreement in *Portland General Exchange Inc.*, 51 FERC ¶ 61,108 (1990) (April 30 Order), *clarification granted*, 51 FERC ¶ 61,379 (1990) (observing that the rates under the Agreement represent market-based rates as negotiated by the parties).

General to refund any and all amounts in excess of properly calculated formulary rates set forth in the Agreement, plus interest. In its complaint, Glendale also requested Commission action because on August 2, 2005, Portland General had filed a complaint in the United States District Court for the District of Oregon (District Court) arguing this same dispute.

3. Portland General filed an answer to Glendale's complaint, and Glendale filed an answer to Portland General's answer. The Commission decided not to accept Glendale's answer stating that the Commission was "not persuaded to accept Glendale's answer, and will, therefore, reject it," pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.213(a)(2) (2005).

4. In the December 19 Order, the Commission found that the case did not fall within the Commission's exclusive jurisdiction because the dispute concerned the interpretation of certain contract provisions and their application, namely that the requirements for the pricing, fees, and charges for energy and firm capacity set forth in the Agreement had not been applied properly, resulting in the miscalculation of rates and pricing.⁴ More specifically, Glendale complained 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. The Commission found that the dispute was not about what the proper rate was, which was the formula itself, but how the rate should be calculated under the formula.⁵

5. Having established that the Commission and the District Court shared concurrent jurisdiction, the Commission decided not to assert primary jurisdiction in this proceeding, after examining the factors set forth in *Arkansas Louisiana Gas Company v. Hall*.⁶ The Commission found that Glendale's complaint did not implicate any of the relevant factors because: (1) the case did 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 related to the interplay of certain sections of the Agreement; (2) the case did not involve a generic, industry-wide contract, so that the interpretation of the Agreement would affect other contracts or other market participants; instead, concluding

⁴ December 19 Order at P 15.

⁵ *Id.* at P 16.

⁶ 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*). The *Arkla* factors are as follows: (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.

that the Agreement was very specific to its particular parties and the services to be provided; and, (3) the interpretation of the appropriate provisions of the Agreement was inextricably tied to the facts at the time of its execution and the understanding of the parties at that time.⁷ Accordingly, the Commission dismissed the complaint, without reaching the merits of the claim.

Commission Discussion

A. Exclusive Jurisdiction

i. Glendale's Request for Rehearing

6. Glendale requests rehearing of the determination that the Commission did not have exclusive jurisdiction over Glendale's complaint. Glendale argues that its complaint repeatedly sought a determination of what the past just and reasonable charges should have been and sought refunds of any over-collections. Glendale claims these are matters exclusively within the Commission's jurisdiction, regardless of whether a formula rate would need to be changed. Glendale also claims that the Commission's exclusive rate jurisdiction extends to cases addressing the validity of charges actually collected under approved tariffs. In support for this assertion, Glendale cites to *California v. Dynege, Inc.*, stating that "remedies for breach and non-performance of FERC-approved operating agreements in the interstate wholesale electricity market fall within the exclusive domain of FERC."⁸ Next, Glendale argues that Commission precedent supports the Commission's authority to order refunds to correct miscalculations involving an approved formula rate.

7. Glendale also asserts that nothing in the language of FPA section 206 suggests that, in situations involving a formula rate, a determination of the reasonableness of charges collected under the formula falls outside the Commission's exclusive jurisdiction. Finally, Glendale argues that the cases the Commission relied on to support its determination in the December 19 Order are inapposite because, unlike the situation here, the justness and reasonableness of rates does not come into play.

ii. Commission Response

8. The issues presented in Glendale's complaint do not require a finding that any provisions of the Agreement are unreasonable or unenforceable. Instead, Glendale is seeking enforcement of the Agreement's existing provisions, as well as refunds for past alleged miscalculations of the formula rate. These issues will not require the

⁷ December 19 Order at P 18.

⁸ 375 F.3d 831, 852 (9th Cir. 2004).

Commission to determine and approve what the proper rate is under the Agreement. As we stated in the December 19 Order, the Commission has already determined the proper rate when it examined the market-based rates formula and accepted the Agreement for filing.⁹

9. Glendale's complaint presents only a matter of contract interpretation, which will not require a court to reform or change the rate,¹⁰ nor to determine what the proper rate is. Glendale itself has stated that it is not seeking to have the Agreement or rate changed but instead to have it "*enforced as written and intended by the parties*" (emphasis in original), alleging that Portland General erroneously applied the rate-determinative formulas under the Agreement.¹¹ Glendale further states that it is not seeking to reform or modify the existing terms of the Agreement but simply seeks that Portland General fully comply with the Agreement.¹²

10. Glendale's reliance on *California v. Dynegy* is inapposite. In that case, the People of the State of California and the California Attorney General (together, California) brought suit against power companies in federal district court, alleging violations of state unfair competition law with respect to the ancillary services market, seeking injunctions, restitution, disgorgement, and civil penalties against defendants for double-selling reserve generation capacity. On appeal, the U.S. Court of Appeals for the Ninth Circuit found that the Commission had exclusive jurisdiction over California's lawsuit. The court held that California's claim was an attempt to exert authority over the substantive provisions of a federal tariff because it was proposing judicial remedies in addition to those that the

⁹ *Doswell Limited Partnership*, 61 FERC ¶ 61,196 (1992), *reh'g denied*, 62 FERC ¶ 61,149 at 62,069 (1993) (finding that "the formula itself is the rate, not the components of that formula. The fact that Doswell and Virginia Power dispute how to compute a single component of the rate does not affect in any way the formula rate which the Commission accepted as just and reasonable").

¹⁰ *Portland General Elec. Co.*, 72 FERC ¶ 61,009 at 61,021 (1995) (finding that since the complaint did not seek to modify the agreement but only to interpret it, it does not challenge the reasonableness of any rate on file with the Commission); *Kentucky Utilities Co.*, 110 FERC ¶ 61,285, *reh'g denied*, 110 FERC ¶ 61,285 at P 10-11 (2005) (holding that an interpretation and enforcement of a jurisdictional contract's existing provisions does not trigger the Commission's exclusive jurisdiction, while a change in the contract presumably would, and that clarification on how to apply the existing terms of a contract is not the same as changing the contract).

¹¹ Glendale Complaint at 18.

¹² Glendale Complaint at 19.

Commission may impose.¹³ Here, in contrast, there is no attempt to exert authority over the substantive provisions of the tariff, nor is there a proposal for a judicial remedy in addition to that which only the Commission may impose.

11. Since Glendale's complaint "only sought enforcement of an existing contract and not the setting of a new just and reasonable rate,"¹⁴ the Commission does not have exclusive jurisdiction, and we dismiss the request for rehearing accordingly.

B. Primary Jurisdiction

i. Glendale's Request for Rehearing

12. Glendale requests rehearing of the Commission's decision not to assert primary jurisdiction over its complaint, in light of the *Arkla* factors. Glendale argues that this decision failed to consider a key question in its complaint, namely whether the energy price under the Agreement that was capped, was intertwined with the Commission's earlier finding that Portland General Exchange (PGX) lacked market power in the relevant market, so that it could make sales under the Agreement at market-based rates.¹⁵

13. Glendale states that in the April 30 Order, when the Commission was considering whether Portland General had market power in the generation market, the Commission limited the relevant generation market to contracts involving prices based on sales from coal-fired, baseload units. In other words, when considering whether there were alternative suppliers to Portland General, Glendale states the Commission limited its consideration to offers "for long-term capacity with the ability to take energy at a high load factor where energy would be priced no higher than the cost of coal-fired, baseload units." Glendale says that the Commission then determined that PGX would be constrained from exercising market power because six alternate suppliers existed that "could offer energy prices reflecting the costs of fossil, baseload units." Glendale argues that the fact that the relevant generation market was limited to offers with prices based on coal-fired, baseload units should have been considered in concurrence with the *Arkla* factors, in deciding whether the Commission should exercise primary jurisdiction in the instant case.

14. Glendale implicates the third *Arkla* factor that reviews whether the case is important in relation to the regulatory responsibilities of the Commission because it is concerned whether Portland General's actual charges to Glendale are constrained consistent with the constraints on which the Commission based its approval of market-

¹³ *California v. Dynege*, 375 F.3d at 851-52.

¹⁴ *Kentucky Utilities Co.*, 110 FERC ¶ 61,285 at P 11.

¹⁵ See April 30 Order, 51 FERC at ¶ 61,248-51.

based pricing for the Agreement. Glendale argues that the presence of such a price constraint remains important to the Commission's continued supervision of pricing under the Agreement today.

15. Glendale further argues that the first *Arkla* factor (whether the Commission possesses special expertise on the matter) also suggests that the Commission should exercise primary jurisdiction. Glendale claims that the Commission used its expertise in determining the types of purchases the purchasers under the Agreement (including Glendale) could make, what power was being replaced, and viable transmission/exchange options. Glendale asserts that these factors remain important throughout the life of the Agreement and should be considered by the Commission as part of its monitoring of market-based pricing.

16. Finally, Glendale argues that the second *Arkla* factor (whether there is a need for uniformity of interpretation of the type of question raised by the dispute) also indicates that the Commission should have exercised its primary jurisdiction here. Glendale contends that the need for uniformity may be considered in terms of the Commission assuring that the basis for approving market-based pricing of a contract remains in effect throughout the life of the contract. Glendale argues that its complaint alleges that Portland General ignored a rate cap that was related to the price of coal-fired, baseload units,¹⁶ calling into question the continued validity of the constraint in the April 30 Order.

ii. Commission Response

17. "Issues of interpretation of a contract on file with the Commission are within the Commission's concurrent jurisdiction with the courts, and whether the Commission decides to exercise its primary jurisdiction over the case is a matter *within the Commission's discretion*" (emphasis added).¹⁷ We find that Glendale has not raised any argument on rehearing that convinces us that our original decision not to exercise primary jurisdiction was erroneous. In particular, we are not persuaded by Glendale's argument that continued supervision of Portland General's market-based rate authority for the Agreement necessitates the Commission to exercise primary jurisdiction in this case.

¹⁶ Glendale states that there is a rate cap in the Agreement that does not differ significantly from the constraint imposed by the Commission in the April 30 Order because it limited the price to Glendale to a cost less than the weighted average variable operating costs of Portland General's existing combustion turbines. Glendale states that these combustion turbines were the next highest-priced energy above coal-fired units in the bid stack, thus the agreed-upon price cap was close to the costs of fossil, baseload units. Glendale Request for Rehearing at 10.

¹⁷ *Doswell Limited Partnership*, 61 FERC at 61,731.

18. First, we disagree that this case is important in relation to the regulatory responsibilities of the Commission. The facts in this dispute are unique to the parties, the terms of the Agreement, and these parties' conduct. We agree that the Commission must continue to review the conditions under which market-based rate authority is granted to Portland General under the Agreement.¹⁸ However, we are not convinced that not asserting primary jurisdiction in the instant dispute would affect the Commission's ability to do so.

19. Second, the matters that must be resolved in the dispute do not require special expertise or knowledge peculiar to the Commission. The factors suggested by Glendale may be important in the Commission's monitoring of market-based pricing, but they are not relevant to the dispute here. Since Glendale's complaint involves matters related to contract interpretation and intent, the Commission is not in a better position than a court to resolve it.

20. Finally, we find there is no need for uniformity of interpretation since the dispute does not raise any policy issues of industry-wide significance. Even if the dispute may be related to the grant of market-based rate authority for the Agreement between these parties, that does not change the fact that interpretation of the Agreement will not affect other public utilities because the dispute is unique to these parties and to this Agreement.

C. Glendale's Answer

i. Glendale's Request for Rehearing

21. Finally, Glendale requests rehearing of the Commission's decision not to accept Glendale's answer to Portland General's answer in reaching its holdings in the December 19 Order. Glendale argues that Portland General's answer was actually a motion to dismiss, although not titled as such, because it urged the Commission to dismiss Glendale's complaint. Glendale asserts that answers to motions to dismiss are permitted by the Commission regulations and precedent, to the extent they respond to the motion to dismiss. Glendale argues that its answer directly responded to Portland General's jurisdictional arguments for dismissing Glendale's complaint.

22. Glendale further argues that even if it was within the Commission's discretion to reject its answer, its terse rationale was an abuse of discretion. Glendale states that its rejected answer contained substantially all of its argument relating to the jurisdictional grounds, upon which the Commission based its dismissal, while its complaint focused on

¹⁸ Most recently, the Commission accepted an updated market power analysis filed by Portland General on May 5, 2005 in *Portland General Elec. Co.*, 111 FERC ¶ 61,151 (2005).

the factual basis of its dispute with Portland General. Glendale argues that the jurisdictional argument was not in dispute until Portland General raised it in its answer and that the Commission only considered one side of the jurisdictional argument.

ii. **Commission Response**

23. When the Commission issued the December 19 Order, we had sufficient information on the record before us to reach our determination that we did not have exclusive jurisdiction over Glendale's complaint and to guide our decision not to assert primary jurisdiction in this matter. In particular, the facts of this case were similar to past cases involving jurisdictional contract disputes, which we determined were appropriately in front of courts.¹⁹ The Commission's rules generally do not permit an answer to an answer except when the decisional authority decides otherwise. Here, in considering whether to accept Glendale's answer, we determined that Glendale's answer did not provide us with information that would be helpful in our decision-making process.

24. However, given Glendale's assertion that its answer contained arguments that should have been considered, we have reviewed the arguments on rehearing and find that they would not have and do not alter our findings, as Glendale's answer does not provide a compelling reason or legal justification to do so. Further, we are not convinced by Glendale's argument that it was actually responding to Portland General's motion to dismiss. If that were the case, any protest submitted by a party could potentially be considered a motion to dismiss, thereby permitting a subsequent answer. Accordingly, we deny rehearing.

The Commission orders:

Glendale's request for rehearing is hereby denied for the reasons discussed above.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁹ See, e.g., *Doswell Limited Partnership*, 62 FERC at 62,069 ("we are leaving the task of determining the parties' intent under the Agreements to a forum with expertise dealing with the issues at bar"); *Kentucky Utilities Co.*, 110 FERC at P 15 ("[c]onstruing the contract's provisions and inquiring into the parties' intent is a straightforward matter of contract interpretation that is better left to the district court").