148 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, John R. Norris,
Tony Clark, and Norman C. Bay.

Twin Valley Hydroelectric Docket No. MD13-1-001

ORDER DENYING REHEARING

(Issued August 15, 2014)

1. On July 22, 2014, the Secretary of the Commission, pursuant to delegated authority,[1] issued a notice rejecting Twin Valley Hydroelectric's (Twin Valley) brief on exceptions to an arbitrator's award in a binding arbitration proceeding.[2] On July 23, 2014, Twin Valley filed a request for rehearing. As discussed below, we deny rehearing.

Background

2. On May 7, 2013, Chief Administrative Law Judge Curtis L. Wagner, Jr. issued an order designating Deputy Chief Administrative Law Judge Bobbie J. McCartney as an arbitrator to preside over binding arbitration jointly requested by Twin Valley Hydroelectric (Twin Valley) and Pacific Gas and Electric Company (PG&E). On April 24, 2014, Judge McCartney, in her capacity as arbitrator, issued an arbitration award. On May 27, 2014, Twin Valley filed a brief on exceptions. On June 3, 2014, PG&E filed a motion to reject Twin Valley's brief, and on June 6, 2014, Twin Valley filed an answer to PG&E's motion.

3. By notice dated July 22, 2014, the Secretary rejected Twin Valley's brief. The notice explained that, pursuant to Rule 605(e) of the Commission's Rules of Practice and Procedure,[3] an award in a binding arbitration proceeding is final 30 days after its service on the parties, and that a final award in a binding arbitration proceeding is binding on the

[1] 18 C.F.R. § 375.302(h) (2014); *see also* 18 C.F.R. § 385.20¶01(b) (2014).

[2] *Twin Valley Hydroelectric*, Docket No. MD13-1-000 (July 22, 2014); *see* Arbitration Award, Docket No. MD13-1-000 (April 24, 2014) (Arbitration Award).

[3] 18 C.F.R. § 385.605(e) (2014).

participants to the arbitration proceeding; Rule 605(e) does not provide for Commission review of the arbitrator's award.[4]

4. The Secretary's notice added that briefs on exceptions are provided for in Rule 711 of the Commission's Rules of Practice and Procedure.[5] But, the notice went on to explain, pursuant to Rule 701 of the Commission's Rules of Practice and Procedure,[6] Rule 711 applies only in proceedings set for hearing under subpart E of the Commission's Rules of Practice and Procedure, i.e., Rules 501 through 510.[7] The notice then stated that, in contrast, binding arbitration proceedings are provided for in subpart F of the Commission's Rules of Practice and Procedure, i.e., Rules 601 through 606.[8] Thus, the Secretary's notice concluded, the Commission's Rules of Practice and Procedure provide only for the filing of briefs on exceptions to initial decisions, but not for the filing of briefs on exceptions to binding arbitration awards.

5. Accordingly, the Secretary's notice found that, pursuant to section 375.302(h) of the Commission's regulations,[9] and to Rule 2001(b) of the Commission's Rules of Practice and Procedure,[10] because the Commission's Rules of Practice and Procedure do not provide for Commission review of binding arbitration awards but instead provide that binding arbitration awards are final and binding on the participants to an arbitration proceeding, and because the Commission's Rules of Practice and Procedure do not

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[4] In support of this conclusion, the Secretary's notice explained that the Commission's regulations previously had provided for Commission review of an arbitrator's award (providing that such awards were final "unless the award is vacated," and establishing procedures for the Commission to review and vacate), but the notice also stated that the provisions providing for Commission review were eliminated in 1999. *Compare* 18 C.F.R. § 385.605(e), (f) (1996) *with* 18 C.F.R. § 385.605(e) (2014); *see Complaint Procedures*, Order No. 602, FERC Stats. & Regs. ¶ 31,071, *order on reh'g*, Order No. 602-A, 88 FERC ¶ 61,114, *order on reh'g*, Order No. 602-B, 88 FERC ¶ 61,294 (1999).

[5] 18 C.F.R. § 385.711 (2014).

[6] 18 C.F.R. § 385.701 (2014).

[7] 18 C.F.R. § 385.501-10 (2014).

[8] 18 C.F.R. § 385.601-06 (2014).

[9] 18 C.F.R. § 375.302(h) (2014).

[10] 18 C.F.R. § 385.2001(b) (2014).

provide for the filing of briefs on exceptions to binding arbitration awards, Twin Valley's brief on exceptions to the binding arbitration award in this proceeding should be rejected.

Request for Rehearing

6. On July 23, 2014, Twin Valley filed a request for rehearing. Twin Valley argues that the arbitration proceeding and the resulting arbitration award should not be binding because Judge McCartney in her capacity as arbitrator unilaterally and thus improperly limited the scope of the arbitration proceeding, which, in turn, should allow the filing of the brief on exceptions. Twin Valley goes on to complain that the Secretary's notice fails to cite any reasoning, regulations or precedent that would allow Judge McCartney to unilaterally limit the scope of the arbitration without the consent of the participants.

7. Twin Valley highlights that the request for binding arbitration identified the issues to be arbitrated as the "reasonableness of the final actual cost [for 'Interconnection Facilities and Distribution Upgrades under Twin Valley's Small Generator Interconnection Agreement, FERC Service Schedule No. 83'[11]] including the need for certain Distribution Upgrades," and, as particularly relevant here, "other economic damages based on other related issues stemming from 2008 until the present."[12] Twin Valley states that Judge McCartney in her capacity as arbitrator changed the scope of the arbitration proceeding to "Twin Valley's cost responsibility and the reasonableness of the final costs, for Interconnection Facilities and Distribution Upgrades and the economic damages related to alleged lost profits from January 26, 2012 to March 26, 2012."[13] Twin Valley argues that this characterization of the issues violates Rule 604(d)(5) of the Commission's Rules of Practice and Procedure, which provides that "[a]ny request to modify a previously-approved ADR proposal must follow the same procedure used for the initial proposal."[14] Twin Valley states that it would not have

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[11] Proposal of Twin Valley Hydroelectric and Pacific Gas and Electric Company for Binding Arbitration, Docket No. MD13-1-000, at 1 (filed April 17, 2013) (Joint Proposal for Arbitration). The parties' interconnection agreement was signed by Twin Valley on September 20, 2011, and by PG&E on November 7, 2011. *Id*. at Attachment F.

[12] Request for Rehearing at 2 (quoting Joint Proposal for Arbitration at 1).

[13] *Id*. at 2 (quoting Arbitration Award at P 67). This, in turn, draws upon Judge McCartney's ruling, in her capacity as arbitrator, in an October 29, 2013 order. *See* Order Denying Motion for Escrow and Granting in Part and Denying in Part Motion for Clarification, Docket No. MD13-1-000, at PP 22-23 (Oct. 29, 2013) (Clarification Order).

[14] 18 C.F.R. § 385.604(d)(5) (2014).

stipulated to binding arbitration had it known the scope of the arbitration would exclude "other economic damages based on other related issues stemming from 2008 until the present." And Twin Valley suggests that, given that Judge McCartney in her capacity as arbitrator changed the scope of the arbitration, the arbitration should not be binding and that Twin Valley should have a right to file a brief on exceptions.

Discussion

8. We find that the Secretary's notice appropriately rejected Twin Valley's brief on exceptions, and we deny rehearing.

9. The parties to this proceeding, Twin Valley and PG&E, jointly sought in their July 17, 2013 submission, and expressly consented to, binding arbitration under Rule 605 of the Commission's Rules of Practice and Procedure, and jointly sought the services of a Commission Administrative Law Judge as an arbitrator.[15] In response, by order dated May 7, 2013, Chief Administrative Law Judge Curtis L. Wagner, Jr. approved the proposal for use of binding arbitration and designated Deputy Chief Administrative Law Judge Bobbie J. McCartney as the arbitrator to preside over that binding arbitration.[16]

10. The Commission's Rules of Practice and Procedure, as the Secretary's notice correctly explained, do not provide for Commission review of an arbitrator's award in a binding arbitration proceeding such as this one.[17] Rather, the Commission's Rules of Practice and Procedure provide that the arbitrator's award in a binding arbitration proceeding is final 30 days after service on all parties, and final arbitration awards are binding on all participants to the binding arbitration proceeding. Indeed, as the Secretary's notice correctly points out, at one time the Commission's Rules of Practice and Procedure did provide for such review, but they were changed in 1999 to eliminate Commission review.[18] In this regard, the Commission's Rules of Practice and Procedure

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[15] Joint Proposal for Arbitration at 1-2; *see* 18 C.F.R. § 385.604 (2014).

[16] Order of Chief Judge Approving Proposal for Binding Arbitration, Designating Arbitrator, and Approving Request for Out of Town Proceeding, Docket No. MD13-1-000 (May 7, 2013).

[17] 18 C.F.R. § 385.605(e) (2014).

[18] *Compare* 18 C.F.R. § 385.605(e), (f) (1996) and *Duquesne Light Co*., 86 FERC ¶ 61,112, at 61,399 (1999) *with* 18 C.F.R. § 385.605(e) (2014); *see Complaint Procedures*, Order No. 602, FERC Stats. & Regs. ¶ 31,071 at 30,756, 30,768 (eliminating the provisions in the Commission's Rules of Practice and Procedure that provided for Commission review of arbitrators' awards), *order on reh'g*, Order No. 602-A, 88 FERC ¶ 61,114, *order on reh'g*, Order No. 602-B, 88 FERC ¶ 61,294 (1999).

track the Administrative Dispute Resolution Act, as amended, which similarly provides that arbitrators' awards become final 30 days after service on all parties, which similarly makes such awards binding on the parties to the arbitration, and which similarly makes no provision for agency review of such awards.[19] In sum, there is no right to Commission review of an arbitrator's award under the Commission's Rules of Practice and Procedure (or the Administrative Dispute Resolution Act), and thus the Secretary's notice could properly reject the brief on exceptions as an impermissible filing.

11. The Secretary's notice also concluded, and correctly so, that the Commission's Rules of Practice and Procedure do not provide for the filing of a brief on exceptions to an arbitrator's award. Rule 711 provides for briefs on exceptions, but it provides for briefs on exceptions to initial decisions and not to arbitrator's awards.[20] Rule 701 provides that Rule 711 applies only in proceedings set for hearing under subpart E of the Commission's Rules of Practice and Procedure, i.e., under Rules 501-510.[21] This proceeding was not set for hearing under Rules 501-510, but was instead conducted pursuant to subpart F of the Commission's Rules of Practice and Procedure, i.e., Rules 601-606.[22] Thus, the Secretary's notice properly rejected the brief on exceptions as an impermissible filing.

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[19] 5 U.S.C. § 580(b), (c) (2012). This statutory language reflects amendments adopted in 1996, which struck language that previously had allowed agency heads to vacate arbitration awards in certain circumstances. *Compare* 5 U.S.C. § 590(c) (1994) *with* 5 U.S.C. § 580(c) (2012). Indeed, the Commission's adoption of its current rules on arbitration was expressly in response to these amendments. *See Complaint Procedures*, Order No. 602, FERC Stats. & Regs. ¶ 31,071 at 30,756, 30,768, *order on reh'g*, Order No. 602-A, 88 FERC ¶ 61,114, *order on reh'g*, Order No. 602-B, 88 FERC ¶ 61,294 (1999).

[20] 18 C.F.R. § 385.711 (2014). In this regard, Rule 711 tracks the Administrative Procedure Act, which similarly provides for the filing of exceptions to initial decisions, and for Commission review of initial decisions, but does not provide for the filing of exceptions to arbitrator's awards or for Commission review of arbitrator's awards. *See* 5 U.S.C. § 557(b) (2012).

[21] *Compare* 18 C.F.R. § 385.701 (2014) *with* 18 C.F.R. § 385.711 (2014); *see* 18 C.F.R. §§ 385.501-10 (2014).

[22] 18 C.F.R. §§ 385.601-06 (2014).

12. Moreover, this proceeding is not a proceeding under the Federal Power Act (FPA),[23] but rather a voluntarily agreed-to binding arbitration proceeding under those provisions of the Commission's Rules of Practice and Procedure which were adopted in response to the Administrative Dispute Resolution Act. While the FPA does provide for Commission action in proceedings under the FPA, the Commission's Rules of Practice and Procedure adopted in response to the Administrative Dispute Resolution Act (and the Administrative Dispute Resolution Act itself) do not similarly provide for Commission action in binding arbitration proceedings.[24] Indeed, this proceeding was not initiated or otherwise ordered by the Commission, but rather was pursuant to a voluntary submission of the parties to the Chief Administrative Law Judge seeking the appointment of an Administrative Law Judge as an arbitrator.[25] And, while the parties sought the services of an Administrative Law Judge as an arbitrator, they were not required to do so and instead could equally have selected some other person – including some other person who was not a Commission employee – as the arbitrator.[26] These circumstances further support our affirming the Secretary's notice dismissing Twin Valley's brief on exceptions.

13. Notwithstanding that its brief on exceptions was an impermissible filing, Twin Valley claims that the scope of the arbitration proceeding was inappropriately narrowed and thus Twin Valley should not be bound by the arbitrator's award. At the outset, we note that the parties' joint proposal was for *binding* arbitration,[27] and the Chief Administrative Law Judge's order approving the proposal for arbitration and designating Judge McCartney as the arbitrator expressly stated that she was to issue "a *binding* award."[28] Rule 605(e)(3) of the Commission's Rules of Practice and Procedure

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[23] 16 U.S.C. §§ 791 *et seq.* (2012).

[24] *See supra* notes 17-19 and accompanying text.

[25] There was no order issued by the Commission providing for this proceeding to go forward. Rather, there was instead a joint request by the parties asking for the services of an Administrative Law Judge to serve as an arbitrator, and a designation by the Chief Administrative Law Judge of Judge McCartney as the arbitrator.

[26] *See* 18 C.F.R. § 385.604(c)(1) (2014) (providing that the "neutral" who presides over an alternative dispute resolution proceeding may be an administrative law judge, but may also be "any other individual who is acceptable to the participants to a dispute resolution proceeding").

[27] Joint Proposal for Arbitration at 1-2.

[28] Order of Chief Judge Approving Proposal for Binding Arbitrations, Designating Arbitrator, and Approving Request for Out of Town Proceeding, Docket No. MD13-1-000 (May 7, 2013) (emphasis added).

similarly provides that a final award "is *binding* on the participants to the arbitration proceeding."[29] There is no provision in the Commission's Rules of Practice and Procedure that provides for relief from the binding nature of the arbitrator's award based on how the arbitrator handles the proceeding or on how the arbitrator rules.[30] Rather, as noted above, following service of the arbitrator's award on the parties, the arbitrator's award is final and binding on the participants.

14. While Twin Valley argues that the arbitrator had no right to limit the scope of the proceeding, in support Twin Valley refers to Rule 604(d)(5) which states that "[a]ny request to modify a previously-approved ADR proposal must follow the same procedure used for the initial proposal," and that procedure, pursuant to Rule 604(e)(3), requires the consent of all participants.[31] But Rule 604(d) is entitled "Submission of proposal to use alternative means of dispute resolution," and Rule 604(e) is entitled "Contents of proposal."[32] As those titles suggest, the referenced provisions upon which Twin Valley relies go to proposals *by the participants* to an arbitration proceeding to change the scope of the arbitration proceeding.[33] Indeed the particular language that Twin Valley cites refers to "[a]ny *request* to modify a previously-approved ADR proposal,"[34] and is thus addressed to parties to arbitration proceedings requesting changes to the matters at issue.

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[29] 18 C.F.R. § 385.605(e)(3) (2014) (emphasis added). The Commission's Rules of Practice and Procedure, in this regard, track the Administrative Dispute Resolution Act, which similarly provides that awards in binding arbitration proceedings are binding on the parties to such arbitration proceedings. 5 U.S.C. § 580(c) (2012).

[30] Rules 605(c)(1) and (4) authorize the arbitrator to regulate the course of the arbitration proceeding and to make awards, *see* 18 C.F.R. § 385.605(c)(1), (4) (2014); *accord* 5 U.S.C. § 578(1), (4) (2012), and, pursuant to Rule 605(d)(3)(v), the arbitrator is authorized to interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives. *See* 18 C.F.R. § 385.605(d)(3)(v) (2014); *accord* 5 U.S.C. § 579(c)(5) (2012).

[31] 18 C.F.R. § 385.604(d)(5), (e)(3) (2014).

[32] 18 C.F.R. § 385.604(d), (e) (2014).

[33] *See California Independent Operator Corp. v. FERC*, 372 F.3d 395, 399 (D.C. Cir. 2004) ("We recognize that the section title of a statute is not dispositive of its meaning, but it is not too much to expect that it has something to do with the subject matter of the statute.").

[34] 18 C.F.R. § 385.604(d)(5) (2014).

In contrast, the arbitrator is not a party to the arbitration proceeding, but rather the "neutral" who oversees the proceeding and makes the award.[35]

15. In any event, Judge McCartney in her capacity as arbitrator, in fact, did not improperly narrow the scope of the proceeding. On September 25, 2013, Twin Valley submitted a motion for clarification, stating that it seeks "other economic damages based on other related issues stemming from 2008 until the present."[36] In response, Judge McCartney in her capacity as arbitrator ruled, as relevant here, that Twin Valley, in its filings to date had only alleged claims concerning just three issues:

> (1) Twin Valley's cost responsibility, and the reasonableness of the final costs, for interconnection facilities and distribution upgrades as reflected in the dispute regarding the May 22, 2012 and July 12, 2012 billing invoices; (2) economic damages related to the lost profits from January 26, 2012 to March 26, 2012; and (3) the lost profits due to denial of Twin Valley's 'Fast Track' application.[37]

Judge McCartney in her capacity as arbitrator stated that these three issues were indeed within the scope of the arbitration proceeding. These three issues, she found, "clearly fall within the scope of the issues identified by the parties in their April 17, 2013 proposal for binding arbitration and have been addressed by the parties as issues in controversy in all of their subsequent filings," and that "these three issues define the scope of these proceedings."[38] As the parties in their filings in the proceeding had alleged and defended against these three issues, it was not inappropriate for Judge McCartney in her capacity as arbitrator to conclude that in defining the scope of the then-upcoming arbitration hearing and briefing these three issues were, in fact, the issues actually in dispute and thus the issues that needed to be addressed in the then-upcoming arbitration hearing and briefing.

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[35] 18 C.F.R. § 385.604(b)(7) (2014). An arbitrator is expressly charged under the Commission's Rules of Practice and Procedure both with regulating the course of an arbitration proceeding and with making awards, and an arbitrator is similarly expressly authorized under the Commission's Rules of Practice and Procedure to interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives. *See supra* note 30.

[36] Twin Valley Hydroelectric Request for Clarification Order and Proposed Order Thereon, Docket No. MD13-1-000 (Sept. 25, 2013).

[37] Clarification Order at P 23 (footnote omitted).

[38] *Id.*; *accord* Arbitration Award at PP 67-68.

16. Subsequently, in the arbitration award itself, issued after the arbitration hearing and briefing, Judge McCartney in her capacity as arbitrator specifically addressed Twin Valley's claim that, in defining the matters at issue, she had not expressly included "other economic damages based on other related issues stemming from 2008 until the present."[39] She stated:

> With respect to Twin Valley's claims stemming from actions that occurred prior to signing the Interconnection Agreement, the undersigned found that Twin Valley had the opportunity to raise those issues at the time, but chose to pursue its project under a new Small Generator Interconnection Agreement (2011 SGIA). Thus the scope of the arbitration is limited to those issues that are still pending under the current 2011 SGIA.[40]

In short, Judge McCartney in her capacity as arbitrator did not ignore Twin Valley's claims for relief for earlier periods, but expressly confronted the matter and found such claims to be, essentially, time-barred. We see nothing inappropriate with her having done so; as noted above, an arbitrator is entitled under the Commission's Rules of Practice and Procedure to regulate the course of an arbitration proceeding and to make awards,[41] and, in doing so, to interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.[42] But, even if we were somehow troubled by her conclusion here, as explained above, under the Commission's Rules of Practice and Procedure (and also under the Administrative Dispute Resolution Act) the Commission has no appellate-like role in binding arbitration proceedings and does not review arbitrators' awards in such proceedings.

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[39] Twin Valley Hydroelectric Request for Clarification Order and Proposed Order Thereon, Docket No. MD13-1-000 (Sept. 25, 2013).

In the arbitration award, Judge McCartney in her capacity as arbitrator noted that, while Twin Valley had asserted claims for lost profits "during earlier stages of this arbitration," Twin Valley's post-hearing briefs "d[id] not specifically allege that [Twin Valley] is entitled to lost profits for the period of January 26, 2012 through March 26, 2012." Arbitration Award at P 87. She added, among other things, that the parties' interconnection agreement at issue expressly bars claims for lost profits. *Id*. P 91.

[40] *Id*. P 7 (footnotes omitted). Judge McCartney noted that the 2011 SGIA had been executed by Twin Valley in September 2011 and by PG&E in November 2011, and that service had been provided since January 2012. *Id*. P 7 n.6.

[41] 18 C.F.R. § 385.605(c)(1), (4) (2014); *accord* 5 U.S.C. § 578(1), (4) (2012).

[42] 18 C.F.R. § 385.605(d)(e)(v) (2014); *accord* 5 U.S.C. § 579(c)(5) (2012).

17. Accordingly, we deny Twin Valley's request for rehearing, and affirm the Secretary's notice rejecting Twin Valley's brief on exceptions as an impermissible filing.

The Commission orders:

Twin Valley's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.