

123 FERC ¶ 61,027  
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.

Luzenac America, Inc.

Docket No. EL06-8-001

ORDER ON REHEARING

(Issued April 11, 2008)

1. Luzenac America, Inc. (Luzenac) seeks rehearing of a Commission order issued in this proceeding on October 24, 2007 (*October 24 Order*).<sup>1</sup> For the reasons discussed below, we deny rehearing.

**I. Background**

2. In the *October 24 Order*, the Commission addressed Luzenac's request that the Commission assert its jurisdiction over a claim for a termination payment sought by Enron Power Marketing, Inc. (Enron) in a bankruptcy complaint proceeding.<sup>2</sup> Luzenac requested that the Commission: (i) assert its jurisdiction under section 1290 of the Energy Policy Act of 2005 (EPAc 2005),<sup>3</sup> or alternatively under the Federal Power Act (FPA),<sup>4</sup> and (ii) deny Enron's bankruptcy claim on the merits.

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<sup>1</sup> *Luzenac America, Inc.*, 121 FERC ¶ 61,084 (2007).

<sup>2</sup> See Enron Power Marketing Inc.'s Complaint for Declaratory Relief Pursuant to the Bankruptcy Code and Rules and for Damages, *Enron Power Marketing, Inc. v. Luzenac America, Inc.*, Case No. 01-16034 (AJG) (Bankr. S.D.N.Y. filed Feb. 10, 2003) (*Luzenac Adversary Proceeding*).

<sup>3</sup> Pub. L. No. 109-58, 119 Stat. 594, 983-984 (2005).

<sup>4</sup> 16 U.S.C. § 824 (2000).

3. Enron's claim is based on the terms of a power sales agreement entered into by the parties on August 31, 2000 (Agreement), pursuant to which Enron was obligated to sell five megawatts of "West Firm Energy" to Luzenac, per hour, for a term of ten years utilizing the transmission facilities of the Montana Power Company (the predecessor in interest to NorthWestern Energy).<sup>5</sup> Luzenac, in its petition, stated that it required this supply of energy for its talc processing facilities in Sappington and Three Forks, Montana. Luzenac also stated that it terminated the Agreement, on January 9, 2002, following the public disclosure of Enron's financial fraud, its manipulative business practices in the western energy markets (including Montana), and its subsequent filing seeking bankruptcy protection. Luzenac asserted that these occurrences constituted a default by Enron under the Agreement, relieving Luzenac of its contractual obligations.

4. Enron, in response, asserted that under sections 5.2 and 5.3 of the Agreement, it was entitled to receive from Luzenac a termination payment, regardless of whether Enron was the defaulting party or the non-defaulting party.<sup>6</sup> Pursuant to these asserted rights, Enron initiated the *Luzenac Adversary Proceeding*, on February 12, 2003, seeking from Luzenac a termination payment of approximately \$6.8 million.

5. While this matter remained pending in Enron's bankruptcy proceeding, in New York, Congress adopted EAct 2005. In section 1290 of EAct 2005, the Commission was given exclusive jurisdiction under the FPA to hear, under certain specified

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<sup>5</sup> The Agreement was modeled on a standard form purchase and sale agreement published by the Edison Electric Institute (EEI).

<sup>6</sup> Section 5.2 of the Agreement provides that in the "Event of Default," the Non-Defaulting Party shall have the right to designate an Early Termination Date "to accelerate all amounts owing between the Parties and to liquidate and terminate all, but not less than all, Transactions (each referred to as a 'Terminated Transaction') between the Parties." Section 5.2 further provides that the Non-Defaulting Party shall calculate a "Settlement Amount" for each such Terminated Transaction. The Settlement Amount, a defined term under the Agreement, means, "with respect to a Transaction and the Non-Defaulting Party, the Losses or Gains, and Costs, expressed in U.S. Dollars, which such party incurs as a result of the liquidation of a Terminated Transaction pursuant to section 5.2." Section 5.3 requires that the Settlement Amounts be netted out to a single liquidated amount, payable by one Party to the other in the form a Termination Payment.

circumstances, contract termination payment claims.<sup>7</sup> As noted above, Luzenac, in its petition in this proceeding, asserted that Enron's bankruptcy claim against Luzenac could and should be addressed by the Commission pursuant to either EPAct 2005, section 1290, or alternatively under the FPA.

## II. October 24 Order

6. In the *October 24, Order*, the Commission dismissed Luzenac's petition, finding that the Commission lacks jurisdiction over the Agreement. First, the Commission found that the Agreement is a retail contract. Specifically, the Commission found that Luzenac

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<sup>7</sup> Section 1290 provides:

- (a) Application – This section applies to any contract entered into in the Western Interconnection prior to June 20, 2001, with a seller of wholesale electricity that the Commission has –
  - (1) found to have manipulated the electricity market resulting in unjust and unreasonable rates; and
  - (2) revoked the seller's authority to sell any electricity at market-based rates.
- (b) Relief – Notwithstanding section 222 of the Federal Power Act (as added by section 1262 [sic]), any provision of title 11, United States Code, or any other provision of law, in the case of a contract described in subsection (a), the Commission shall have exclusive jurisdiction under the Federal Power Act (16 U.S.C. § 791a, *et seq.*) to determine whether a requirement to make termination payments for power not delivered by the seller, or any successor in interest of the seller, is not permitted under a rate schedule (or contract under such a schedule) or is otherwise unlawful on the grounds that the contract is unjust and unreasonable or contrary to the public interest.
- (c) Applicability – This section applies to any proceeding pending on the date of enactment of this section involving a seller described in subsection (a) in which there is not a final, nonappealable order by the Commission or any other jurisdiction determining the respective rights of the seller.

was an end-user with respect to all supplies delivered by Enron under the Agreement.<sup>8</sup> The Commission next found that regardless of the outcome of a pending appeal in the *Luzenac Adversary Proceeding*, regarding the Constitutionality of section 1290, Luzenac's petition must be dismissed because neither section 1290 (even assuming it is Constitutional), nor section 201 of the FPA<sup>9</sup> gives the Commission jurisdiction over a retail contract.<sup>10</sup>

### **III. Luzenac's Request for Rehearing**

7. Luzenac asserts on rehearing that the Commission erred, in the *October 24 Order*, by not considering certain facts relevant to the issue of whether the Agreement was a wholesale contract. First, Luzenac argues that the Agreement was executed by an Enron affiliate responsible for executing wholesale contracts, not by the Enron affiliate (Enron Energy Services) responsible for the negotiation of retail contracts. Luzenac also argues that the contract was expressly developed by EEI for the wholesale power markets and was entered into pursuant Enron's "FERC Tarrif [filed in] Docket Number ER94-24-027" (a tariff that Luzenac argues does not authorize Enron to make retail sales of electricity). In addition, Luzenac argues that the Agreement was listed by Enron in its FERC Electronic Quarterly Report for the third quarter of 2000 (and related submissions)

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<sup>8</sup> *October 24 Order*, 121 FERC ¶ 61,084 at P 31.

<sup>9</sup> 16 U.S.C. § 824(b)(1) (2000). Section 201(b)(1) grants the Commission jurisdiction over "the transmission of electric energy in interstate commerce and [ ] the sale of electric energy at wholesale in interstate commerce...."

<sup>10</sup> The interlocutory appeal cited by the Commission in the *October 24 Order* was subsequently dismissed, on February 13, 2008, pursuant to a settlement reached by Enron and the Public Utility District No. 1 of Snohomish County, Washington. Luzenac also agreed that as to it the appeal should be dismissed, provided, among other things, that such dismissal is without prejudice to its rights to raise any and all issues on appeal from a final order in the *Luzenac Adversarial Proceeding* or any other litigation. See *Stipulation Dismissing Consolidated Appeals, Pub. Util Dist. No. 1 of Snohomish Co., et al. v. Enron Power Marketing, Inc. (In re Enron Corp.)*, Case Nos. 07-1158, et al. (2d Cir. Feb. 13, 2008).

and contains terms that typically apply to jurisdictional sales of wholesale power or transmission in interstate commerce (e.g., transmission and scheduling services).

8. Luzenac also argues that if Enron misrepresented that the Agreement was entered into pursuant to authority granted in Enron's tariff and then fraudulently created the appearance that the Agreement was being regulated by the Commission, the Commission can and should step in to prevent Enron from benefiting unjustly from that Agreement.

9. Luzenac also renews its argument, asserted previously, that the Agreement is subject to the Commission's jurisdiction under section 1290 of EPCAct 2005. First, Luzenac argues that the plain language of section 1290 of EPCAct 2005, at subsection (b), provides that the Commission shall have exclusive jurisdiction "notwithstanding ... any other provision of law," including FPA section 201. Luzenac also argues that section 1290, at subsection (a), encompasses retail contracts because this provision, on its face, applies to "any contract" entered into with certain sellers prior to June 20, 2001 in the Western Interconnection. Luzenac also asserts that the Commission's finding that section 1290 was not intended to change the existing federal-state balance established by Congress under the FPA overlooks the fact that the Commission's jurisdiction under the FPA already extends to contracts over which it may have concurrent jurisdiction with a state.

10. Finally, Luzenac renews its argument, also asserted previously, that the Commission has jurisdiction over Enron and the Agreement under the FPA. Luzenac notes, in this regard, that the Agreement contains exchange features, obligates Enron to obtain transmission service from interstate transmission facilities to deliver power to Luzenac, and requires Enron to provide Luzenac with scheduling coordinator services. Luzenac concludes that when these wholesales services are bundled with a retail sales service, the Commission is authorized to assert its jurisdiction over the entirety of the contract.<sup>11</sup> In the alternative, Luzenac argues that this jurisdiction may also attach where, as here, the transactions or rates affect matters that are within the scope of the Commission's jurisdiction.<sup>12</sup>

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<sup>11</sup> Luzenac rehearing request at 13-14, *citing New York v. FERC*, 535 U.S. 1, 25 (2002).

<sup>12</sup> *Id.* at 14, *citing Conway Corp. v. FPC*, 510 F.2d 1264 at 1272 (D.C. Cir. 1975) (*Conway Corp.*).

#### IV. Discussion

11. We deny rehearing of the *October 24 Order*. In the proceedings, below, Luzenac, Enron, and other interested parties submitted numerous exhibits, bankruptcy court documents, detailed arguments, and answers (three of which were filed by Luzenac alone) addressing each of the arguments raised by Luzenac on rehearing. The *October 24 Order* rejected each of these arguments. On rehearing, we reaffirm these findings.

12. First, we reject Luzenac's argument that the Agreement is a wholesale contract, not a retail contract. As the Commission found in the *October 24 Order*, Luzenac was an end-user with respect to *all* supplies delivered by Enron under the Agreement, i.e., Enron's performance under the Agreement was limited to the provision of a retail service. Luzenac did not dispute this finding, either below or on rehearing.

13. A retail transaction, moreover, cannot be converted, or expanded, into a wholesale transaction simply because the Agreement, as Luzenac claims, may include certain terms, indicia, or underlying circumstances typically associated with a wholesale contract. As the Commission pointed out in the *October 24 Order*, in determining whether a contract contemplates a wholesale transaction subject to our jurisdiction, the Commission is required to focus on the substance of the transaction, not simply the parties' contractual recitations.<sup>13</sup> On rehearing, Luzenac fails to address this fundamental principal, the statutory limitations and precedents on which it is based, or its implications as it relates to the Agreement.

14. Moreover, even assuming that the terms, indicia, or underlying circumstances relied upon by Luzenac *could* convert the Agreement into a wholesale contract, we disagree that any of these considerations are of any relevance here. First, Luzenac's argument that it was Enron's affiliate, Enron Energy Services, that was responsible for engaging in retail transactions, does not disprove the uncontestable fact, here, that it was Enron that contracted with Luzenac, regardless of whether it was, or was not, consistent with company policy to do so. Similarly, the EEI form contract utilized by the parties

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<sup>13</sup> *October 24 Order*, 121 FERC ¶ 61,084 at P 32, citing *New York State Electric & Gas Corp.*, 83 FERC ¶ 61,203, at 61,904 (1998); *Potomac Edison Co.*, 79 FERC ¶ 61,185, at 61,877 (1997); *Central Vermont Pub. Serv. Corp.*, 39 FERC ¶ 61,295, at 61,960 (1987); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 401 (1965).

(and its intended use by EEI) does not address its actual use by the parties, or the nature of the transactions authorized under the Agreement. The Commission, in the *October 24 Order*, also discounted the relevance of the single reference made in the Agreement to the applicability of a Commission-approved tariff. As the Commission found in the *October 24 Order*, while the Agreement may have contemplated the possibility that Luzenac might obtain authorization to re-sell supplies acquired under the Agreement or to participate in exchanges with Enron (thus converting Enron's sales into wholesale transactions that *may* have become jurisdictional and thus subject to Enron's market-based rates tariff), there was no evidence that any such sales occurred.<sup>14</sup> In addition, the asserted representations made by Enron in its FERC Electronic Quarterly Reports did not affect the underlying transactions under the Agreement. For all these reasons, we reject Luzenac's renewed argument, on rehearing, that the Agreement is a wholesale contract.

15. We also reject Luzenac's argument that the Commission should impose an equitable remedy in this case, requiring Enron to relinquish its claim to a termination payment under the Agreement. Luzenac suggests that this equitable relief is warranted because Enron induced Luzenac into the belief that the Agreement was entered into pursuant to authority granted in Enron's tariff and then fraudulently created the appearance that the Agreement was being regulated by the Commission. However, even assuming that such relief is warranted, the Commission may not impose an equitable remedy where, as here, it lacks jurisdiction over the underlying contract. Nor does Luzenac cite a single case suggesting otherwise. Moreover, even assuming that the Commission does have the authority to act, under these circumstances, Luzenac presents no credible evidence that would support its allegation of fraud (e.g., that it was induced to enter into a retail contract, as opposed to a wholesale contract, based on Enron's fraudulent misrepresentations).

16. We also reject Luzenac's restated argument that the Commission possesses jurisdiction over the Agreement under EPCA 2005, section 1290. As the Commission noted in the *October 24 Order*, section 1290(b) grants "exclusive jurisdiction to the Commission *under the Federal Power Act* to determine whether a requirement to make termination payments for power not delivered by the seller, or any successor in interest of the seller, is not permitted under a rate schedule (or contract under such a rate schedule) or is otherwise unlawful on the grounds that the contract is unjust and unreasonable or

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<sup>14</sup> *Id.* P 31.

contrary to the public interest.”<sup>15</sup> The Commission also found that this statutory language cannot be construed as a Congressional directive expanding the scope of the Commission’s exclusive jurisdiction to cover retail transactions.<sup>16</sup> Given this analysis, we reject Luzenac’s argument that the section 1290(a) reference to “any contract” can be read to extend the Commission’s jurisdiction to retail contracts. We also reject, as irrelevant, Luzenac’s reliance on the language, at section 1290(b), providing that the Commission shall exercise its jurisdiction, under section 1290, “notwithstanding ... any other provision of law.” Section 1290(b), while addressing the effects of other laws, does not address the scope of section 1290 itself.

17. We also reject Luzenac’s argument that the existence of the Commission’s concurrent jurisdiction undermines the *October 24 Order*’s finding that section 1290 was intended to maintain the existing Federal-State balance established under the FPA. Luzenac asserts, in effect, that the existence of the Commission’s concurrent jurisdiction (allowing the Commission, in its discretion, to decide state contract claims relating to a jurisdictional wholesale contract or tariff) supports the Commission’s right to assert its authority over a state contract law issue. However, our concurrent jurisdiction is not at issue in this case. The issue, rather, is whether the Agreement arises under section 1290’s grant of exclusive jurisdiction. Regardless, even if concurrent jurisdiction were at issue, we find, and we state above, that there are no jurisdictional aspects related to the Agreement over which we would exercise our concurrent jurisdiction.

18. Finally, we reject Luzenac’s argument that the Commission possesses jurisdiction in this case under the FPA. Luzenac claims that because the Agreement (i) contains exchange options (had Luzenac sought and obtained a power marketing certificate from the Commission); (ii) requires Enron to provide Luzenac with scheduling coordinator services (as required to establish the point at which title transfers); and (iii) obligated Enron to obtain an interstate transmission service (from a third party transmission provider), the Agreement as a whole, including its retail components, are subject to the Commission’s jurisdiction. However, the *October 24 Order* addressed and rejected each of these arguments.<sup>17</sup> Moreover, the authority relied upon by Luzenac, *Conway Corp.*,

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<sup>15</sup> EPAct 2005, section 1290(b) (emphasis added).

<sup>16</sup> *October 24 Order*, 121 FERC ¶ 61,084 at P 37.

<sup>17</sup> *Id.* P 30 and P 34.

stands only for the proposition that the Commission may “consider matters which would be completely non-jurisdictional taken by themselves, but are appropriate for consideration when germane to the meaningful execution of a jurisdictional function.”<sup>18</sup> Here, by contrast, Luzenac can point to no such jurisdictional function.

The Commission orders:

Luzenac’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.

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<sup>18</sup> *Conway Corp.* 510 F.2d at 1272.