

111 FERC ¶ 61,075
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Oklahoma Gas and Electric Company and
NRG McClain LLC

Docket Nos. EC03-131-000
EC03-131-002

ORDER DENYING REHEARING

(Issued April 18, 2005)

1. In this order, we address a request for rehearing of the Commission's July 2, 2004 Order approving a contested settlement and authorizing the disposition of jurisdictional facilities under section 203 of the Federal Power Act (FPA).¹ Specifically, in this order, we deny the request for rehearing of the Commission's July 2 Order filed by InterGen Services, Inc. and Redbud Energy, LP (InterGen), as discussed below.

Background

2. On August 26, 2003, Oklahoma Gas and Electric Company (OG&E) and NRG McClain LLC (NRG McClain) (collectively, Applicants) filed a joint application under section 203 of the FPA requesting that the Commission authorize the sale of certain jurisdictional facilities by NRG McClain to OG&E. Applicants agreed that OG&E would acquire NRG McClain's interest in a 520 MW gas-fired combined cycle electric plant in Oklahoma (Facility),² enabling OG&E to satisfy its native load service obligations and to fulfill its commitment under an Oklahoma Corporation Commission (OCC) settlement order (OCC Settlement Order) to acquire electric generating capacity of not less than 400 MWs.

¹ 16 U.S.C. § 824b (2000). See *Oklahoma Gas and Electric Company and NRG McClain LLC*, 108 FERC ¶ 61,004 (2004) (July 2 Order).

² Oklahoma Municipal Power Authority (OMPA), a wholesale customer of OG&E, owns the remaining 23 percent undivided interest.

3. In its December 18, 2003 Order,³ the Commission found the transaction, without appropriate mitigation measures, would harm competition due to increases in OG&E's market power,⁴ and thus was not consistent with the public interest. The Commission further stated that there was insufficient evidence in the record for the Commission to determine the mitigation measures it should impose as conditions if, and when, the Commission decided to approve the transaction. Therefore, the Commission set the application for hearing in order to determine what mitigation measures should be imposed as conditions if the Commission were to approve the transaction and to develop a more complete record on which to make such a determination. In the December 18 Order, the Commission also found that the transaction, if properly conditioned, would not harm wholesale electricity rates and that the transaction would not affect adversely state or federal regulation.⁵

³ *Oklahoma Gas and Electric Company and NRG McClain LLC*, 105 FERC ¶ 61,297 (2003).

⁴ Horizontal market power is exercised when in order to increase profits, a firm drives up prices through its control of a single activity, such as electric generation, and it controls a significant share of the total capacity available in that market. Vertical market power is exercised when a firm involved in two related activities, such as electricity generation and transmission, uses its dominance in one activity to raise prices and increase profits for the overall enterprise.

⁵ OG&E filed a request for expedited reconsideration and/or rehearing and clarification of the December 18 Order in Docket No. EC03-131-001 on January 20, 2004. In the same pleading, OG&E filed an offer of settlement offering additional mitigation in order to allow prompt Commission approval of the transaction (by obviating the need for the Commission to act on the merits of the rehearing requests). In addition, Oklahoma Municipal Power Authority filed a rehearing request, and the Edison Electric Institute and the Alliance of Energy Suppliers filed an untimely motion to intervene and rehearing request. In the July 2 Order, the Commission noted that it had not yet acted on the rehearing requests or OG&E's offer of additional mitigation that was contained in its rehearing request. The Commission determined that those rehearing requests would become moot if OG&E accepts the revisions to its settlement required by the July 2 Order. OG&E, in fact, has accepted those modifications. And the entities filing the requests for rehearing of the December 28 Order did not seek rehearing of the July 2 Order on this issue. These rehearing requests in Docket No. EC03-131-001, therefore, are moot and will be dismissed.

4. Subsequently, on May 10, 2004, the Motions Commissioner referred to the full Commission an OG&E interlocutory appeal in which OG&E asked that its settlement be certified to the full Commission and that the settlement be approved by the Commission. In its settlement, OG&E agreed to undertake the following mitigation measures to support the transaction: (1) construct a 600 MW permanent “bridge” (an upgrade to OG&E’s Draper substation) between InterGen’s Redbud Energy Project and OG&E’s control area; (2) during the “interim period” (before the completion of the 600 MW permanent bridge), redispatch, at no cost to InterGen, of OG&E’s generating units to enable InterGen to sell power, not exceeding 600 MW in the aggregate, to wholesale customers, (3) establish a market monitor that would, among other duties, oversee OG&E’s calculation of Available Transmission Capacity and TTC and OG&E’s communication of such data to the Southwest Power Pool, and (4) complete a network upgrade at the Ft. Smith substation.

5. InterGen and AES Shady Point, LLC (AES) also filed settlements which the Motions Commissioner also referred to the full Commission.

6. In the July 2 Order, the Commission approved OG&E’s settlement and rejected InterGen’s and AES’s settlements. The Commission found that the OG&E settlement, as revised, effectively mitigates OG&E’s increased market power identified in the December 18 Order. The Commission adopted some of InterGen’s suggestions proposed in its settlement; but rejected other suggestions (such as an all-inclusive economic dispatch) to the extent that InterGen’s settlement differed from OG&E’s settlement.

InterGen’s Rehearing Request

7. In its request, InterGen argues that the Commission lost sight of the fact that OG&E’s acquisition of the Facility would eliminate wholesale purchases in the OG&E service area. According to InterGen, OG&E, by using its control over both wholesale generation and purchases in its control area, forecloses lower-cost competitors from the wholesale market. InterGen points out that, prior to the acquisition, OG&E purchased at least some power from the wholesale market to meet its obligations; after the acquisition, it will not; the Commission failed to consider that OG&E has the incentive and demonstrated ability to substitute its own generation for competitors’ generation, even when its own generation is more expensive, and that the transaction will increase both OG&E’s incentive and ability to exercise vertical market foreclosure. InterGen argues that, absent mitigation, there will be no wholesale purchases, rendering the transmission upgrades relied upon for mitigation in the July 2 Order meaningless.

8. OG&E’s settlement included an offer to redispatch, at no cost to InterGen, of OG&E’s generating units to enable InterGen to sell power to wholesale customers during the estimated 11-month interim period. InterGen challenges the Commission’s

conclusion in the July 2 Order that the alternative economic dispatch proposal in InterGen's proposed settlement could not be implemented in less than 11 months. According to InterGen, this conclusion is unsupported by the record. InterGen points out that it provided extensive testimony regarding the immediate feasibility of its economic dispatch proposal while no evidence was presented to the contrary.

9. Finally, InterGen argues that the market monitor proposal in OG&E's settlement will be inadequate to mitigate OG&E's increased buyer market power resulting from the transaction. InterGen states that the Commission did not even task OG&E's market monitor with the role of preventing OG&E from foreclosing the wholesale market to competing generators, either through OG&E's refusal to purchase lower-cost competing generation or by artificially creating congestion. InterGen argues that both it and AES proposed ways to mitigate OG&E's enhanced vertical power and ability to foreclose wholesale competition attributable to the transaction.

10. InterGen requests the Commission to require OG&E to adopt either InterGen's proposed incorporation of competitive generation into OG&E's internal economic dispatch procedures or AES's alternative process. In addition, InterGen also requests the Commission to clarify that any refusal by OG&E to purchase power on a day ahead or longer basis from competitive suppliers that is offered at a lower price than the cost to OG&E of running its own generation (or pursuing other higher cost purchases) will constitute anticompetitive behavior.

Discussion

11. InterGen argues that the July 2 Order errs in concluding that OG&E's vertical market power can be mitigated by transmission upgrades and the use of a market monitor. It states that some form of economic dispatch requirement is required to mitigate OG&E's increased ability to use its role as the dominant buyer in the market to foreclose competition.

12. Traditionally, the concern with buyer market power, also known as monopsony power, is that a dominant buyer can purchase a good for less than the price that would prevail in a competitive market. Additionally, a firm that has some degree of both buyer market power and seller market power could withhold purchasing from competitors, thus driving those competitors out of business, and in turn, ultimately increase its seller market power. Such predatory behavior would harm competition by eliminating competitors and increasing market concentration. However, by raising the issue of buyer market power in the context of the remedy for OG&E's acquisition-related increase in vertical market power, InterGen misses the fundamental issue in this case. OG&E may indeed have buyer market power in the relevant geographic market, but the NRG McClain acquisition does not affect that fact. Our review is focused on the *change* in

competition resulting from the acquisition. NRG McClain was not a wholesale buyer, it was a wholesale seller. Had OG&E acquired another large wholesale buyer in the OG&E control area, it would have increased whatever buyer market power it already possessed. In which case, an examination of the effect on wholesale competition of increased buyer market power would have been appropriate.⁶ The concern here, however, is not that the acquisition at issue results in fewer *buyers* in the relevant market, but that it results in fewer *sellers* in the market, and the mitigation is designed to address that latter fact.

13. The issue before us here, in contrast, is whether the transaction increases OG&E's ability and/or incentive to use its control of transmission facilities to harm competition in wholesale electricity markets, and, if so, how to appropriately mitigate any such increase. In the July 2 Order, we listed three possible types of mitigation: (1) generation divestiture; (2) transmission expansion; and (3) an economic dispatch plan.⁷ We approved OG&E's contested settlement offer of transmission expansion because it addressed the identified possible harm to competition by "reducing concentration and increasing the entry of competing suppliers by ensuring better access to customers" in the relevant market.⁸ Therefore, we deny InterGen's request for rehearing on this matter.

14. InterGen states that the Commission erroneously concluded that InterGen's proposed economic dispatch mitigation measure would require more than eleven months to implement, and thus rejected InterGen's settlement based upon a finding that is unsupported by, and inconsistent with, substantial evidence in the record.⁹ InterGen

⁶ "An analysis of monopsony power should be developed if appropriate." *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 at 30,135 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

⁷ July 2 Order at P 36.

⁸ *Id.* at P 37.

⁹ InterGen Rehearing Request at 14-15.

argues that, by rejecting its proposed economic dispatch mitigation measure, “the Commission adopted no remedy at all for *buyer market power*.”¹⁰ Again, as discussed above, InterGen misses the fundamental issue; buyer market power is only relevant in this case to the extent any acquisition-related increase in buyer market power could harm wholesale competition and there is no acquisition-related increase in buyer market power here.

15. As stated above, OG&E’s contested settlement offer of the 600 MW Bridge addressed the identified possible harm to competition by increasing the amount of competing supply in the relevant market. We considered the economic dispatch plan as interim mitigation for the acquisition-related increase in vertical market power until the completion of the 600 MW bridge. If it were adopted as the interim mitigation, it would have had to have been ready for implementation by the acquisition’s closing date, and would only have been in place for approximately eleven months (the estimated time to complete the 600 MW bridge).¹¹ We agree with OG&E’s argument that the time required to establish an economic dispatch plan made it an impractical form of interim mitigation. We are not convinced by InterGen’s claim that the economic dispatch plan could have been implemented in less than 11 months. As argued by OG&E, there are numerous commercial and reliability issues that would have to be addressed before an economic dispatch plan could be implemented.¹²

16. We also considered the economic dispatch plan as permanent mitigation, but, while we stated in the July 2 Order that economic dispatch would have been a possible solution to the identified vertical market power problem, it was just one of three options. OG&E’s proposed transmission expansion was no less a viable option that addressed the problem; we approved their proposal and will not grant rehearing on this issue.

17. InterGen states that the Commission should (1) expand the role of the market monitor to require the market monitor to monitor OG&E’s generation dispatch and procurement practices to ensure that such practices do not contribute to transmission congestion that precludes Redbud from obtaining firm transmission to reach markets, and (2) require the market monitor to remain in place until Southwest Power Pool’s market monitor and markets are fully functioning.

¹⁰ *Id.* at 16 (emphasis added).

¹¹ July 2 Order at note 6.

¹² OG&E’s Answer at 11-13.

18. We deny InterGen's first request because it goes beyond what is necessary to properly mitigate the identified acquisition-related potential harm to competition. Clearly, OG&E's procurement and dispatch practices will affect transmission congestion and potentially the availability of firm transmission rights. The issue here is whether the acquisition will harm competition by increasing the ability or incentive for OG&E to limit firm transmission availability. The mitigation plan, as approved by this Commission, addresses that concern. The July 2 Order specifically requires the market monitor to "directly notify this Commission of any structural or operational problems that could prevent OG&E's horizontal and vertical market power from being properly mitigated."¹³ In addition, the July 2 Order instructs the market monitor to "monitor whether InterGen's access to any wholesale customer in the OG&E control area is being limited by OG&E."¹⁴ OG&E's market monitoring plan reflects these instructions, among others, and specifically addresses anticompetitive generation operation as a form of anticompetitive conduct:

Generation operation - operating generation facilities under OG&E's control in a manner that departs substantially from economic dispatch or is inconsistent with good utility practice and knowingly shifts flows on the network in order to create a binding transmission constraint.¹⁵

We conclude that the July 2 Order addresses any strategic dispatch by OG&E intended to limit InterGen's access to wholesale customers.

19. We also deny InterGen's request for rehearing on the length of time that the market monitor shall be in place. InterGen requests that the Commission require the market monitor to remain in place until Southwest Power Pool's market monitor and markets are fully functioning. The July 2 Order requires the market monitor to be in place until the Southwest Power Pool has a market monitor in place. At that time, the Southwest Power Pool market monitor will be monitoring the OG&E market for anticompetitive behavior and reporting to the Commission. Whether or not the future Southwest Power Pool RTO markets are fully functioning is not relevant to the mitigation in this case. The relevant issue is whether the identified harm to competition is fully mitigated, which it would be in the presence of a Commission-approved RTO market monitor as a supplement to the 600 MW bridge.

¹³ July 2 Order at P 34.

¹⁴ *Id.* at P 39.

¹⁵ July 9, 2004 Conformed Market Monitor Plan, section 1.2.

20. Finally, we deny InterGen's request to clarify that any refusal by OG&E to purchase power on a day ahead or longer basis from competitive suppliers that is offered at a lower price than the cost to OG&E of running its own generation (or pursuing other higher cost purchases) will constitute anticompetitive behavior, and that the Commission should charge the market monitor with notifying the Commission of any such actions. The market monitor has been charged with monitoring for anticompetitive behavior, including any attempt by OG&E to restrict access to wholesale customers (including OG&E itself). Again, InterGen is requesting that the Commission impose additional mitigation to address OG&E's alleged buyer market power, in this case by monitoring and assessing the validity of OG&E's power purchase decisions. As stated above, we find that the acquisition does not create or enhance buyer market power for OG&E, and, therefore, we do not need to impose mitigation for buyer market power. We are concerned with the effect the acquisition will have on wholesale sellers' access to wholesale buyers, and we have imposed appropriate mitigation to address that effect.

The Commission orders:

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

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.