

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Borough of Zelienople, Pennsylvania

v.

Docket No. EL03-221-000

American Transmission Systems, Inc.

ORDER DENYING COMPLAINT

(Issued April 16, 2004)

1. This order denies a complaint filed by the Borough of Zelienople, Pennsylvania (Zelienople) against American Transmission Systems, Inc. (ATSI),¹ alleging that ATSI has overcharged for interconnecting ATSI's 138 kV transmission line to Zelienople's new 138 kV substation. It benefits customers by ensuring that costs are borne by the beneficiary of the facility.

Background

2. Since the 1920s, Zelienople has owned and operated a municipal electric distribution system and had been connected to the ATSI transmission system through a 4 kV substation owned by Zelienople. On February 19, 2001, Zelienople and ATSI executed a Construction Agreement (Agreement), under which ATSI agreed to construct a new 138 kV circuit including 400 feet of 138 kV line (Facility or delivery point) at Zelienople's expense to connect ATSI's Maple 138 kV substation to a new 138 kV substation that was to be constructed by Zelienople. A facility study on June 19, 2000 (2000 Facility Study) estimated the cost of construction at \$180,000.

¹ ATSI is a wholly-owned subsidiary of FirstEnergy Corp.

3. Section 2.1 of the Agreement governs billing and provides:

Zelienople will reimburse ATSI for the actual costs incurred by ATSI to perform the tasks identified above, and the actual costs incurred by ATSI to design, construct, and install ATSI facilities necessary to provide the delivery point requested by Zelienople. These costs include, but are not limited to, all engineering work necessary to identify the design, construction and operation requirements for the delivery point. The total of these costs is estimated in Exhibit B. Zelienople will also reimburse ATSI for actual tax costs, which, as ATSI would incur such tax costs, are equal to an additional 23.4% of the total cost.

4. On March 1, 2001, ATSI filed the Agreement with the Commission in Docket No. ER01-1360-000. In this filing, ATSI stated that the cost of construction plus taxes would be \$222,100. Zelienople did not intervene or protest, and the Commission accepted the Agreement for filing, by delegated letter order, on April 4, 2001.

5. On March 28, 2003 ATSI sent Zelienople a bill for the construction for \$265,875.83. Of that amount, \$215,458.53 was for the actual cost of construction and \$50,417.30 was the tax gross-up charge. Zelienople did not pay but, rather, on June 18, 2003, replied by letter with a proposal that ATSI eliminate the tax costs and either: (1) roll in the costs to its entire system; or (2) sell the line to Zelienople for \$115,000 (the amount Zelienople's engineers had estimated for the construction costs).

6. On July 3, 2003, ATSI sent a second invoice requesting payment of \$265,875.83, plus an additional interest accrued amount of \$2715.37. On July 9, 2003, ATSI rejected the proposals in Zelienople's June 18 letter, and stated that the primary cause of the difference between the estimated and actual construction costs was delay caused by Zelienople's delays in completing its substation. On July 16, 2003, Zelienople sent a letter offering to pay \$180,000 and to meet to discuss "issues raised in your letter of July 9, 2003 relative to construction delays and tax costs." On July 23, 2003, ATSI responded that it would be willing to accept an immediate initial payment of \$222,100 (the amount ATSI estimated when it filed Docket No. ER01-1360-000), and then meet.

7. On August 19, 2003, Zelienople filed the instant complaint, maintaining that ATSI has demanded from Zelienople "unjust, unreasonable, unduly discriminatory, preferential, or otherwise unlawful" charges.² More specifically, Zelienople argues that:

² Complaint at 1.

(1) the costs should be rolled in, not directly assigned; (2) ATSI should sell the Facility to Zelienople; (3) ATSI has treated other municipal systems differently; (4) the costs ATSI claims have not been shown to be just and reasonable; and (5) ATSI has not justified the tax payment.

8. Notice of the complaint was published in the Federal Register, with comments, protests, and interventions due on or before August 28, 2003.³ None was filed.

9. On September 10, 2003, ATSI filed an answer (Answer). ATSI points out that, under section 206 of the Federal Power Act (FPA),⁴ Zelienople bears the burden of proof in a complaint proceeding. ATSI argues that: (1) these costs are properly directly assigned as the Facility is a one-directional radial line that benefits only Zelienople; (2) Commission precedent does not require ATSI to sell the Facility; (3) different deals with other municipalities is not discrimination; (4) Zelienople is relying on estimated, not actual costs; and (5) Zelienople is responsible for the tax payment.

10. On September 25, 2003, Zelienople filed a motion to reply to ATSI's Answer and an answer to that Answer (September 25 Answer). Zelienople disagrees that the Facility is a sole-use facility and, in support, points to a dotted line in the 2000 Facility Study labeled "Future 138 kV line," and that the "ATSI Form 1 report for the year 2001 shows that ATSI had made substantial expenditures [\$6,354,268] to its 138 kV transmission system at the Maple substation . . . which are included by ATSI in all of its existing rolled-in transmission rates."⁵ Zelienople also argues that there is "no evidence or claimed proof to establish ATSI's claimed construction costs, which greatly exceed those determined as necessary by [Zelienople,] are the just and reasonable cost of service."⁶ Thus, Zelienople believes that an evidentiary hearing is needed to determine the appropriate cost, as well as its claim of discrimination.⁷ Zelienople also maintains that

³ 68 Fed. Reg. 51,770 (2003).

⁴ 16 U.S.C § 824e (2000).

⁵ September 25 Answer at 3. Zelienople also argues that "ATSI provides no distinction between these [rolled-in upgrades] and the \$265,587.83 it claims for the upgrades of its 138 kV line to serve Zelienople's new substation." Complaint at 6.

⁶ *Id.* at 8. Zelienople further argues that ATSI had never before the Answer requested evidentiary support for Zelienople's claim that the "actual" costs are excessive, but that its provision of the cost estimate met the conditions for a section 206 hearing.

⁷ Zelienople also states that ATSI ignores the standards of section 205 of the FPA, 16 U.S.C. § 824d (2000).

the estimated in-service date was “just that, an estimate,”⁸ and that Zelianople was not solely responsible for construction delays. Finally, Zelianople argues that “under Florida Power & Light Company, 98 FERC ¶ 61,276 at 62,149 (2002) [FP&L], the Commission properly ruled that the [tax] payments would be required only if the IRS so decides.”⁹

11. On October 10, 2003, ATSI filed an answer to Zelianople’s September 25 Answer (October 10 Answer). ATSI requests that the Commission deny the motion to file the September 25 Answer and reject the filing as a prohibited answer to an answer. ATSI also reiterates that the Facility is a direct assignment facility, and maintains that the notation referencing a “Future 138 kV line” in the 2000 Facility Study was “merely for hypothetical purposes. ATSI has no intentions or plans to build this line.”¹⁰ ATSI also states that Zelianople is incorrect in claiming that the \$6,354,268 is rolled into its transmission rates, even though those upgrades do benefit its entire system.¹¹ ATSI also disagrees with Zelianople’s reading of FP&L, maintaining that it stands for the requirement that tax gross-up payments are required “unless the IRS decides that they do not [apply].”¹² Finally, ATSI argues that Zelianople is trying to turn the Section 206 burden on its head regarding the construction costs, and that the simple fact of a difference between the estimated costs in cost studies that Zelianople has still not provided and actual costs of construction is insufficient to meet Zelianople’s burden of proof.

⁸ September 25 Answer, Affidavit of Edward Sullivan at 2.

⁹ Id. at 9.

¹⁰ October 10 Answer at 5; see also id., Affidavit of Richard J. O’Callaghan at 2; Answer at 9.

¹¹ In support, ATSI points out that its current transmission rate was effective September 1, 2000, so the 2001 upgrades could not have been included. See American Transmission Systems, Inc., et al., 90 FERC ¶ 61,256 (2000).

¹² Id. at 6 (emphasis omitted).

Discussion

Procedural Matter

12. Notwithstanding that Rule 213(a)(2) of the Commission's Rules of Practice and Procedure generally prohibits an answer to an answer,¹³ we will grant Zelianople's motion and accept its September 25 Answer as well as ATSI's October 10 Answer, as they provide information that assist in our understanding and resolution of this dispute.

Burden of Proof

13. We will deny the complaint. As a preliminary matter, we note that ATSI is correct that Zelianople bears the burden of proof in this section 206 proceeding.¹⁴ When ATSI filed the Agreement in Docket No. ER01-1360-000, ATSI bore the burden of supporting that filing under section 205; had Zelianople intervened and protested the Agreement, ATSI would have had the burden of proving that it was just and reasonable.¹⁵ However, once the Agreement has been accepted by the Commission for filing, a complainant challenging the Agreement bears the burden of proving that it is unjust and unreasonable. Here, Zelianople has failed to satisfy that burden.

Direct Assignment

14. In support of its claim that the Facility is actually intended to benefit the entire ATSI system, Zelianople points to the notation in the 2000 Facility Study labeled "Future 138 kV line."

15. In reply, ATSI maintains that the Facility is a direct assignment facility. In support, ATSI denies that it intends to build any future 138 kV line and states that, thanks to the new Facility, Zelianople's transmission bills have been reduced by approximately \$5500 per month. In addition, ATSI states that the Facility is a single, radial feed from the Maple substation to Zelianople's substation located on Zelianople's side of the point of interconnection, that energy flows in one direction only, that ATSI cannot provide

¹³ 18 C.F.R. § 385.213(a)(2) (2003).

¹⁴ See 16 U.S.C. § 824e(b) (2000). ("In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant.")

¹⁵ See 16 U.S.C. § 824d(e) (2000).

transmission service to itself or other customers over it, that an outage would have no effect on ATSI's transmission system, and that it provides no benefits to the transmission grid in terms of capability or reliability.¹⁶

16. We are not convinced that hypothetical evidence of future construction from a facility study almost four years ago, with no more recent support,¹⁷ in the face of an absolute denial by ATSI, indicates that ATSI is planning to construct a new 138 kV line. Moreover, given that Zelianople has not alleged that ATSI's denial is false, we do not believe that there is any reason to set this issue for an evidentiary hearing. We find that the Facility is a sole-use interconnection facility.¹⁸ Accordingly, we see no reason not to directly assign the costs of construction to Zelianople, as provided for in the Agreement.¹⁹

Discrimination

17. Zelianople raises two issues of alleged discrimination: (1) that ATSI has permitted the Village of Grafton, Ohio to build and own a connection line; and (2) that the Village of Woodville, Ohio has a contract with ATSI which limits Woodville's construction cost payments to estimated, not actual, costs. In reply, ATSI argues that the Commission has permitted transmission providers to negotiate different arrangements with different customers and, in support, cites Virginia Electric and Power Company.²⁰

18. We find that Zelianople has failed to meet its burden of proof regarding this issue. As ATSI states, in VEPCO, the Commission held that "individual transmission providers and generators requesting service should be free to negotiate concerning their individual

¹⁶ October 10 Answer at 4-5.

¹⁷ We also note that Zelianople did not raise the future construction objection in Docket No. ER01-1360-000, which was filed with the Commission nine months after the 2000 Facility Study.

¹⁸ As noted by ATSI, the delivery point fails the five-point test of integration adopted by the Commission in Opinion No. 454. Mansfield Municipal Electric Department, et al. v. New England Power Company, Opinion No. 454, 97 FERC ¶ 61,134, at 61,613-15 (2001).

¹⁹ We also note that ATSI states, and Zelianople does not dispute, that Zelianople is receiving savings of \$5500 per month from the Facility.

²⁰ 94 FERC ¶ 61,164 at 61,589 (2001) (VEPCO).

situations, subject, of course, to the Commission's review for reasonableness."²¹ Here, the burden of proof is on Zelianople to show why the circumstances among Zelianople, Grafton, and Woodville are the same. Without such evidence, we have no basis to conclude that different treatment in one respect – for Grafton, ownership of the facility; for Woodville, the cost of construction – amounts to undue discrimination.²²

Reasonableness of Costs

19. We also reject Zelianople's claim that the construction costs have not been shown to be just and reasonable. Again, we preliminarily note that the burden is on Zelianople to show that the costs are not just and reasonable. Again, Zelianople has failed to meet that burden. In support of its argument, Zelianople simply alleges that its costs in building the Facility would have been \$115,000, as estimated by Zelianople in cost studies conducted in 1999. This is insufficient, and Zelianople has not even submitted those studies for evaluation. Zelianople has not challenged that the actual cost of construction was \$215,458.53 (nor alleged that ATSI is responsible for inflating those costs) and, under section 2.1 of the Agreement, Zelianople committed to pay actual construction costs. We see no reason to abrogate that contractual commitment.

Tax Payment

20. In addition to requiring Zelianople to pay for the actual costs of construction, section 2.1 of the Agreement requires Zelianople to "reimburse ATSI for actual tax costs, which, as ATSI would incur such tax costs, are equal to an additional 23.4% of the total cost." However, Zelianople argues that "ATSI has not justified its 23.4% additional payment over the cost of facilities by Zelianople as a bona fide federal income tax payment by it."²³ Zelianople further argues, as noted above, that, in FP&L, the

²¹ Id. We note that, while Order No. 2003, Standardization of Generator Interconnection Agreements and Procedures, 68 FR 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), order on reh'g, Order No. 2003-A, 106 FERC ¶ 61,220 (2004),

has somewhat reduced this flexibility, VEPCO was in effect at the time the Agreement was negotiated.

²² See, e.g., Woolen Mills Association v. FERC, 917 F.2d 589,592 (D.C. Cir. 1990) ("mere allegations of disputed fact are insufficient to mandate a hearing; a petitioner must make an adequate proffer of evidence to support them").

²³ Complaint at 11 (capitalization omitted).

Commission ruled that such tax payments “would be recovered only if the IRS so decides.”²⁴

21. As pointed out by ATSI, Zelianople is misreading FP&L, which “does not stand for the proposition that the tax gross-up payments are required only if the IRS decides they do, it stands for the proposition that the tax gross-up payments are required unless the IRS decided they do not.”²⁵ In FP&L, the Commission held that we were unable to determine, on the record before us, if the IRS had revised its tax gross-up policy in such a way as to relieve the utility of its duty to pay taxes on its customer’s contribution-in-aid-of-construction payments, and that this issue “can only be resolved by the IRS.” We concluded that, if the customer “wants a definitive ruling, a request for a private letter ruling must be made to the IRS.”²⁶ Here, too, if Zelianople believes that the IRS would not require ATSI to make the tax payments for which the Agreement requires reimbursement, Zelianople can request a ruling by the IRS. Absent such a ruling, we conclude that Zelianople is not exempt from its contractual obligation.

The Commission orders:

(A) The September 25 Answer of Zelianople and the October 10 Answer of ATSI are hereby accepted for filing.

(B) Zelianople’s complaint is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁴ September 25 Answer at 9.

²⁵ October 10 Answer at 6 (emphasis in original).

²⁶ 98 FERC at 62,149.