

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sacramento Municipal Utility District

Docket No. EL04-2-001

v.

Pacific Gas and Electric Company,
Southern California Edison Company
and San Diego Gas & Electric Company

ORDER DENYING REHEARING

(Issued June 2, 2004)

1. This order denies the requests for rehearing of an order issued on December 23, 2003¹ in which the Commission denied a complaint filed by Sacramento Municipal Utility District (SMUD) against Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) (collectively, California utilities) alleging that the California utilities had refused to honor SMUD's exercise of its right of first refusal under Order No. 888² to extend the term of service under an August 1, 1967 transmission contract between SMUD and the California utilities.

¹ Sacramento Municipal Utility District v. Pacific Gas and Electric Co., et al., 105 FERC ¶ 61,358 (2003) (December Order).

² See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd sub nom. Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

Background

2. On October 8, 2003, SMUD filed a complaint against the California utilities alleging that the California utilities had violated the right of first refusal provisions in section 2.2 of the pro forma OATT by refusing to extend the term of a contract for 200 MW of extra high voltage transmission and exchange service (EHV contract) executed by SMUD and the California utilities on August 1, 1967 that has a termination date of January 1, 2005. SMUD stated that in a letter dated January 31, 2003, it notified the California utilities of its desire to continue to take service under the EHV contract and stated its willingness to extend the contract until January 1, 2025 under the right of first refusal provisions of Order No. 888.
3. SMUD stated that on April 14, 2003, PG&E,³ on behalf of the California utilities, refused SMUD's request to extend the EHV contract because: (1) PG&E's own ability to continue to provide service was uncertain since third-party contracts necessary to fulfill the EHV contract with SMUD will expire and (2) Order No. 888's right of first refusal mechanism was incompatible with the California Independent System Operator Corporation (CAISO) open access transmission system.
4. In the December Order, the Commission denied SMUD's complaint. In the December Order, the Commission explained that the intent of the Order No. 888 right of first refusal provision is to ensure that a customer receiving long-term transmission service (one year or more in duration) could continue to receive transmission service, so long as it was willing to take service under the pertinent open access transmission tariff and match any competing request for service. We further explained that the Order No. 888 right of first refusal provision does not contemplate contract extension beyond the term of the relevant contract and, accordingly, we rejected SMUD's request to compel extension of the EHV contract.
5. Furthermore, we noted that even if SMUD had requested conversion to tariff service as provided in Order No. 888, extension of SMUD's current service would not be possible. We indicated that SMUD would have to take service under the CAISO tariff, the only relevant tariff, since the California utilities have turned over operational control of their transmission facilities to the CAISO. As we explained, the right of first refusal provision in Order No. 888 is not applicable to customers in the CAISO service territory (such as SMUD) because the service model of the Order No. 888 pro forma tariff does not apply to the California utilities' transmission systems. Such concepts no longer have meaning in the context of the CAISO's day-ahead and hour-ahead transmission

³ SMUD states that while SCE and SDG&E are signatories to the EHV contract, the transmission capacity made available under the EHV contract is capacity owned by PG&E.

scheduling system, where all customers have non-discriminatory access to transmission service and long-term transmission service is not offered. We further noted that, under the CAISO tariff, SMUD will be able to receive transmission service to the extent it is willing to pay the CAISO tariff rate.

Request for Rehearing and Other Pleadings

6. On January 21, 2004, SMUD filed a request for rehearing of the December Order. SMUD argues that the Commission erred in denying SMUD right of first refusal protection for continued firm transmission service on the ground that the Order No. 888 right of first refusal provision does not contemplate contract extension beyond the term of the relevant contract. SMUD argues that the Commission appears to have misconstrued its complaint. SMUD contends that it was not seeking an extension of the EHV contract as such; rather, it sought to continue the long-term, firm transmission service underlying the EHV contract.

7. SMUD further argues that the Commission erred in concluding that the right of first refusal provision in Order No. 888 is inapplicable to customers in the CAISO service territory (such as SMUD). SMUD maintains that notwithstanding the CAISO service model, Order No. 888 does not provide for an exception to the right of first refusal provisions. Moreover, SMUD asserts, even if Order No. 888 contained provisions permitting individual waivers of the obligation to provide long-term firm transmission customers the right to continue firm transmission service on a long-term basis under the right of first refusal, the Commission has not granted such a waiver to the California utilities or the CAISO. Furthermore, SMUD argues that because the CAISO tariff does not offer long-term firm transmission service, the CAISO is violating prior Commission directives⁴ and the California utilities (or the CAISO acting on behalf on the California utilities) should, therefore, be ordered to honor SMUD's right of first refusal.

8. SMUD contends that the December Order effectively announced a new policy to deny the right of first refusal protection to long-term firm transmission customers where the transmission provider currently offers only day-ahead and hour-ahead service. This new policy, SMUD argues, was an unlawful modification of Order No. 888 and was retroactively applied to deny SMUD relief. Finally, SMUD argues that the Commission arbitrarily denied waiver of its rule barring answers to answers.

⁴ Citing Pacific Gas & Electric Co., et al., 80 FERC ¶ 61,128 (1997) and California Independent System Operator Corp., 87 FERC ¶ 61,143 (1999), order on reh'g, 88 FERC ¶ 61,156, order on reh'g, 94 FERC ¶ 61,343 (2001).

9. On January 22, 2004, the Modesto Irrigation District and Metropolitan Water District of Southern California⁵ and the State Water Project of the California Department of Water Resources (SWP) filed requests for rehearing which adopt the arguments made by SMUD.

10. On February 5, 2004, the California utilities filed a motion for leave to answer and joint answer stating that the Commission should deny SMUD's request for rehearing because SMUD has failed to demonstrate any error in the December Order.

Discussion

11. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2003), prohibits an answer to a request for rehearing. We will accordingly reject the California utilities' answer to SMUD's request for rehearing.

12. We will deny SMUD's request for rehearing. The December Order has already addressed the arguments raised by SMUD on rehearing, and our review of SMUD's request indicates that it does not include any new evidence that would convince us to change any aspect of the December Order. Specifically, the Commission found that the California utilities no longer provide transmission service under an Order No. 888 pro forma tariff since they have turned over operational control of their facilities to the CAISO. Moreover, the Commission concluded that the CAISO tariff was the only relevant tariff for transmission service and that SMUD would have non-discriminatory access to transmission service under the CAISO tariff.

13. We also reject SMUD's argument that the December Order implemented a new policy to deny the right of first refusal protection in Order No. 888 to long-term firm transmission customers where the transmission provider offers only day-ahead and hour-ahead service. As discussed above, the Commission-approved CAISO tariff⁶ is the relevant tariff here for transmission service and that tariff supersedes the Order No. 888 pro forma tariff. The December Order did not alter any existing provision of the CAISO tariff, which already did not contain right of first refusal provisions.

⁵ While the Modesto Irrigation District and the Metropolitan Water District of Southern California have captioned their pleadings as "Comments in Support of the Sacramento Municipal Utility District's Request for Rehearing," we will treat them as requests for rehearing.

⁶ See California Independent System Operator Corporation, 87 FERC ¶ 61,143, order on reh'g, 88 FERC ¶ 61,156 (1999), order on reh'g, 94 FERC ¶ 61,343 (2001).

14. SMUD raises again on rehearing the issue of the lack of availability of long-term firm transmission service under the CAISO's current tariff. We note that this is not the appropriate forum in which to address SMUD's concerns about the CAISO market structure. The CAISO's comprehensive market redesign proposal in Docket No. ER02-1656-000 is an ongoing proceeding to resolve market design issues. SMUD should pursue its concerns regarding long-term transmission service in that proceeding.

15. SMUD contends that the Commission's decision to deny its request for waiver of Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a)(2) (2003), which prohibits an answer to answer, was arbitrary. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), provides that an answer may not be made to an answer "unless otherwise ordered by the decisional authority." The Commission exercised its discretion and determined not to accept SMUD's answer.⁷ SMUD has not persuaded us to do otherwise.

The Commission orders:

SMUD's request for rehearing of the December Order is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁷ See *The Power Company of America, L.P. v. FERC*, 245 F.3d 839 (D.C. Cir. 2001) (Court gave deference to Commission's application of its own procedural rule).