UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Old Dominion Electric Cooperative

v. Docket No. EL98-6-002

Public Service Electric and Gas
Company

ORDER DENYING REHEARING

(Issued July 13, 2004)

1. On November 21, 2003, Old Dominion Electric Cooperative (ODEC) sought rehearing of a Commission order issued October 22, 2003.[1] For the reasons discussed below, we will deny rehearing.

Background

2. On January 24, 2003, ODEC filed a motion, pursuant to Rule 716 of the Commission's Rules of Practice and Procedure,[2] seeking to reopen and re-litigate a final order issued December 4, 1998.[3] The Complaint Order addressed ODEC's request seeking to revise a 1992 bundled, wholesale power sales agreement (Agreement) with Public Service Electric and Gas Company, following the restructuring of PJM

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[1] *See* Old Dominion Electric Cooperative v. Public Service Electric and Gas Company, 105 FERC ¶ 61,094 (2003) (October 22 Order).

[2] 18 C.F.R. § 385.716 (2003).

[3] *See* Old Dominion Electric Cooperative v. Public Service Electric and Gas Company, 84 FERC ¶ 61,155 (1998) (Complaint Order).

Interconnection, L.L.C. (PJM) into an independent system operator (ISO).[4] In the Complaint Order, we dismissed ODEC's contract-specific claims, finding that ODEC's requested remedy had already been addressed by the Commission's generic, non-contract specific findings in our order on PJM's restructuring.[5] Neither ODEC nor any other party sought rehearing of the Complaint Order.

3. In its subsequent motion to reopen those proceedings, however, ODEC argued that it should be permitted to the re-litigate the contract-specific claims dismissed in the Complaint Order. ODEC argued that it should be permitted to do so due to the reversal and remand of our generic, non-contract specific determinations by the U.S. Court of Appeals for the District of Columbia Circuit in *Atlantic City Electric Company, et al. v. FERC*.[6]

4. In the October 22 Order, we denied ODEC's motion. In doing so, we noted that under Rule 716, the evidentiary record in a proceeding may be reopened by the presiding officer or by the Commission for good cause shown, "[t]o the extent permitted by law [and] for the purpose of taking additional evidence." We also found, however, that while Rule 716 authorizes (but does not require) the Commission to reopen a proceeding for the limited purpose of hearing additional evidence, when appropriate, *i.e.*, when the movant demonstrates that this action is warranted by any changes in conditions of fact or of law or by the public interest, Rule 716 does not apply (and cannot apply) in a case in which a final, non-appealable order has issued. We held that, in this instance, ODEC's motion

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[4] In its complaint, ODEC asserted that it was entitled to seek a unilateral revision to the Agreement under two separate provisions set forth therein without a showing that the contract revisions it sought satisfied the *Mobile-Sierra* public interest standard or review.

[5] *See* Complaint Order, 84 FERC at 61,844 (*citing* Pennsylvania-New Jersey-Maryland Interconnection, 81 FERC ¶ 61,257 at 62,281-82 (1997)) (PJM Restructuring Order). In the PJM Restructuring Order, we held that certain existing agreements of PJM's members must be modified, consistent with our establishment of a region-wide rate structure under the PJM ISO.

[6] 295 F.3d 1 (D.C. Cir. 2002) (*Atlantic City*). In *Atlantic City*, the court held that the Commission's generic ruling approving the revision of pre-ISO, wholesale power sale agreements (including the ODEC Agreement) failed to satisfy the particularized public interest showing required by the *Mobile-Sierra* doctrine. The court also held that, in considering ODEC's proposed contract revisions, the Commission could not apply a just and reasonable standard of review (the theory advanced by ODEC in its compliant), because the ODEC Agreement, by its terms, required application of the higher, public interest standard of review.

could not overcome the need for finality in the administrative process and, in particular, the statutory requirements relating to rehearing requests and judicial review under section 313 of the Federal Power Act (FPA).[7]

Request for Rehearing

5. On rehearing, ODEC renews its prior assertion that the Complaint Order, while final, should be reopened in this case given the equities involved, the procedural history at issue, and the unique circumstances of this proceeding. Specifically, ODEC argues that, while it did not seek rehearing of the Complaint Order when it had the opportunity to do so, it chose not to because the ultimate outcome it sought in the underlying complaint had already been provided in the PJM Restructuring Order (albeit under a different, non-contract specific theory that was subject to rehearing and appeal).

Discussion

6. We will deny rehearing. ODEC's arguments on rehearing were fully addressed by the Commission in the October 22 Order. In the October 22 Order, we reviewed the procedural history of this case in its entirety and also discussed each of the underlying substantive issues presented. We held, however, that none of these considerations would permit us to reopen a final order under the circumstances presented here.

7. In fact, ODEC chose not to seek rehearing of the Complaint Order based on ODEC's stated reliance on another ruling (the PJM Restructuring Order), which, at the time, was subject to both rehearing and appeal. ODEC chose this course of action, however, at its own risk. Specifically, ODEC could have sought rehearing of the Complaint Order and so sought to preserve its rights with respect to its contract-specific claims (and thus preserve the potential refund implications relating to those claims). When the time for rehearing expired, however, the Complaint Order became final and non-appealable.

8. ODEC argues that the court's ruling in *Atlantic City* constitutes changed facts and circumstances justifying its motion to reopen and re-litigate its complaint. However, even assuming that Rule 716 could be used in this instance to overcome the statutory requirements relating to rehearing requests and judicial review under section 313 of the FPA (which the October 22 Order held that it could not), ODEC's claim is overstated in any event. In fact, the potential risk posed by the court's ultimate ruling in *Atlantic City* was fully known, or knowable, to ODEC during the period in which it could have sought rehearing of the Complaint Order.

[7] 16 U.S.C. § 8251 (2000).

9. Moreover, ODEC undervalues the need for finality in litigation before the Commission. If ODEC was allowed to reopen its complaint on the facts presented here, it is conceivable, and indeed likely, that no Commission proceeding or order would ever truly be final. There would always be a potential that some change in circumstances months or even years later would warrant one party or another asking the Commission to reopen a long-closed proceeding or reconsider a prior order. The implications of such actions on the Commission and the industries it regulates cannot be discounted.

The Commission orders:

ODEC's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.