

104 FERC ¶ 61,148
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

TRANSLink Development Company, LLC

Docket No. ER03-83-003

ORDER GRANTING REHEARING

(Issued July 28, 2003)

1. On June 18, 2003, Nebraska Public Power District (NPPD) submitted a request for rehearing of the Commission's order on rehearing and clarification issued on May 21, 2003.¹ In this order, the Commission grants rehearing to NPPD. This order benefits customers by encouraging the participation of public power agencies in regional transmission organizations (RTOs).

Background

2. On October 24, 2002, the Midwest Independent Transmission System Operator Inc. (Midwest ISO) filed revised tariff sheets with the Commission in order to include the Independent Transmission Companies (ITC) in the Midwest ISO. Among other things, the filing included Section 2.6 of Attachment V.1 - TRANSLink which allowed public power entities, such as NPPD, to participate as independent transmission companies within the Midwest ISO. Specifically, Section 2.6 of proposed Attachment V.1 - TRANSLink provides that any conflict or inconsistency between the Midwest ISO OATT and an operating agreement between TRANSLink and a TRANSLink Participant that is not a public utility shall be governed by the operating agreement.²

¹TRANSLink Development Co., LLC, 103 FERC ¶ 61,208 (2003) (May 21 Order).

²Section 2.6 of proposed Attachment V.1 - TRANSLink provides that:

Any Transmission Service the Transmission Provider provides under the RTO tariff using the transmission facilities of a TRANSLink Participant that is not a public utility under the Federal Power Act and which has an operating agreement with TRANSLink shall not conflict with or be

(continued...)

3. In the December 19 Order,³ the Commission concluded that an operating agreement with a participant cannot automatically take precedence when conflicts exist between TRANSLink's operating agreement and the Midwest ISO OATT. The Commission further explained that while it recognized that certain operating agreement provisions may reflect contractual arrangements or treaty or statutory obligations of the parties, and that the ability of such parties to participate in TRANSLink or Midwest ISO may hinge on provisions in the operating agreements, the Commission must weigh the need to ensure independence of the RTO and operation of an efficient non-discriminatory transmission grid with the legal obligations of the parties joining the RTO. The December 19 Order therefore required TRANSLink to file revised tariff sheets modifying Section 2.6 to provide specific information relating to the provisions of the operating agreements with non-public utility participants where a conflict between these provisions and the Midwest ISO OATT could adversely affect the ability of a non-public utility participant to participate in TRANSLink or the Midwest ISO. The order also required TRANSLink to provide an explanation of why these provisions are essential.

4. In the May 21 Order, the Commission, among other things, accepted the proposed Section 2.6 of Attachment V.1 - TRANSLink, subject to the condition that the Commission would decide when and to what extent a conflict existed. The Commission explained that it could not allow participants unfettered discretion to unilaterally disregard the terms of the OATT because they may believe that some provision of the OATT conflicts with or is inconsistent with a TRANSLink operating agreement.

Request for Rehearing

5. NPPD contends that the Commission erred by imposing the condition on Section 2.6 of Attachment V.1 - TRANSLink. NPPD argues that the provisions in Section 2.6 are essential to allow public power entities to participate in a RTO since they provide the assurance that, should a conflict arise between the tariff and the operating agreement, the entities will continue to be in compliance with state law. NPPD further argues that it does

²(...continued)

inconsistent with the provisions of said TRANSLink operating agreement. Any conflict or inconsistency arising between the Tariff and such operating agreement between TRANSLink and said TRANSLink Participant that is not a public utility under the Federal Power Act shall be governed by and decided pursuant to the provisions of said operating agreement

³ TRANSLink Development Co., LLC, 101 FERC ¶ 61,316 (2002) (December 19 Order).

not have "unfettered discretion" in determining whether a conflict exists between the Midwest ISO OATT and a TRANSLink operating agreement. NPPD states that it is regulated by a Board of Directors that is similar to a state regulatory commission and the Board's decision are subject to appeal and review in state court. Therefore, NPPD contends, it does not have "unfettered discretion" in its decision-making process since it cannot engage in any action that state law does not permit.

6. In addition, NPPD contends that the Commission's decision is inconsistent with its prior approval of NPPD's operating agreement with TRANSLink, where the Commission approved Section 15.15 of the Nebraska Public Power Operating Agreement, which gives NPPD authority to take action and make necessary determinations to remain compliant with state law. NPPD argues that the proposed provision in Section 2.6 simply recognizes that public power entities cannot incur obligations arising from their participation in a regional tariff that are inconsistent with their governing laws, a proposition that the Commission has previously accepted.

7. NPPD also states that if Section 2.6 is "used by any public power entity in any manner that the Commission finds to be creating unjust and unreasonable rates or terms and conditions of transmission service, the Commission has the full authority to exercise appropriate jurisdiction over the Midwest ISO and TRANSLink . . . to ensure that the terms, and conditions of service provided are just and reasonable."⁴

8. NPPD therefore requests that the Commission grant its rehearing request and clarify that the language of Section 2.6 will remain without modification, allowing governing boards of public power entities to determine, subject to state court review, when a conflict exists between state law and the OATT.

Discussion

9. The Commission recognizes the concerns that public power entities have regarding their voluntary participation in an RTO and will grant rehearing as discussed below. In light of the fact that public power entities are not public utilities under the Federal Power Act (FPA)⁵ and that the NPPD Board's decisions are subject to court review, we will reverse our earlier conclusion that only this Commission may determine whether a

⁴NPPD Rehearing at 6.

⁵See 16 U.S.C. § 824 (2000).

conflict exists between state law and the OATT.⁶ Accordingly, we will adopt a new, revised Section 2.6:

[t]he participation in this OATT by an ITC participant that is not a public utility under the Federal Power Act, but rather is a public-power entity, is subject in all respects to the laws and regulations of the state of its creation and to rate schedules adopted by its governing board under state law. FERC has exclusive jurisdiction to interpret the provisions of the OATT and how they would apply to such non-public utility entities. However, in the event that the governing boards of such non-public utility entities, subject to state court review, determine that a conflict exists between applicable state law or regulations or rate schedules and provisions of the OATT as interpreted by FERC, such state law, regulations or rate schedules shall govern with respect to the application of the OATT to such non-public utility entities. Should the governing board of such non-public utility entity determine that such a conflict exists, that entity must make a filing with FERC notifying FERC that the governing board has determined that such a conflict exists and explaining both what the conflict is (including what state law or regulations or rate schedules and what OATT provisions are at issue) and what actions the governing board is taking in response to that determination.

10. Moreover, as NPPD acknowledges, if Section 2.6 is used by any public power entity in any manner that the Commission finds unjust, unreasonable, or unduly discriminatory or preferential, the Commission retains the authority to exercise jurisdiction over the Midwest ISO and TRANSLink to ensure that the rates, terms, and conditions of service provided are just, reasonable, and not unduly discriminatory or preferential.

⁶We note that it is still for this Commission to interpret the OATT, however.

The Commission orders:

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

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.