

108 FERC ¶ 61,077
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 475

East Texas Electric Cooperative, Inc.

v.

Docket No. EL98-66-000

Central and South West Services, Inc.,
Central Power and Light Company,
West Texas Utilities Company,
Public Service Company of Oklahoma, and
Southwestern Electric Power Company

OPINION AND ORDER
AFFIRMING INITIAL DECISION

Issued: July 28, 2004

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APPEARANCES

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Montina M. Cole, Esq., Sherry A. Quirk, Esq., and T. Alana Deere, Esq., on behalf of Rayburn Country Electric Cooperative, Inc.

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

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I. Introduction

1. In this order we affirm an Initial Decision¹ that found that East Texas Electric Cooperative, Inc. (ETEC) is not entitled to credits from Central and South West Services, Inc., Central Power and Light Company, West Texas Utilities Company, Public Service Company of Oklahoma, and Southwestern Electric Power Company (SWEPCO) (referred to collectively as CSW) for its interconnected transmission facilities.

¹East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., Central Power and Light Company, West Texas Utilities Company, Public Service Company of Oklahoma and Southwestern Electric Power Company, 89 FERC ¶63,005 (1999).

II. Background

A. The Complaint

2. On July 27, 1998, ETEC² filed a Complaint asserting that CSW violated section 30.9 of its Open Access Transmission Tariff ("OATT") by denying ETEC credits for transmission facilities it owns that are interconnected to CSW's system.

3. The Commission, in an order dated September 17, 1998,³ set the complaint for hearing, stating:

We find that the question of whether and to what extent East Texas' transmission facilities are integrated with the CSW grid for which a credit is appropriate presents factual issues which will require an evidentiary hearing.

84 FERC at 62,194. The Commission thus ordered a hearing concerning:

whether and to what extent East Texas' transmission facilities warrant a credit under CSW's Open Access Transmission Tariff.

84 FERC at 62,195.

B. The Initial Decision

4. In an Initial Decision, dated October 29, 1999, the presiding administrative law judge analyzed each facility for which ETEC claimed a credit. These facilities were built to accommodate a new power supply arrangement for ETEC's member, Tex-La. ETEC built two 138 kV transmission lines to connect certain of its distribution loads located in

²ETEC is a generation and transmission (G&T) cooperative whose member/owners are G&T cooperatives. ETEC's three member owners are Northeast Texas Electric Cooperative (NTEC), Sam Rayburn G&T Cooperative, Inc. and Tex-La Electric Cooperative of Texas, Inc. (Tex-La).

³East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., Central Power and Light Company, West Texas Utilities Company, Public Service Company of Oklahoma and Southwestern Electric Power Company, 84 FERC ¶61,233 (1998).

the Electric Reliability Council of Texas (ERCOT) directly to the alternating current transmission lines in the Southwest Power Pool (SWPP). These are the lines for which ETEC seeks a credit.

5. According to the judge, all the facilities for which ETEC seeks a credit fall into two groups ■the South Loop and the North Loop. The South Loop is 85 miles long and operates at 138 kV, and connects directly to SWEPCO's system. ETEC's North Loop is about 63 miles long and also operates at 138 kV. Several segments of the North Loop are owned by Wood County Electric Cooperative, Inc. (Wood County), which remotely monitors and controls the various switches on the North Loop.⁴ The North Loop is never normally operated as a closed circuit nor is ETEC directly connected to SWEPCO's system at the North Loop.

6. The facilities for which ETEC claimed credits were described by the judge as:

1. Three 138 kV transmission line segments owned by Wood County, the high voltage portion of six substations owned by Wood County that function as points of delivery from ETEC to Tex-La for the benefit of Wood County loads, and a switching station owned by Wood County;
2. the high voltage portion of substations connected to the South Loop that function as points of delivery from ETEC to Tex-La for the benefit of Houston County Electric Cooperative, Inc. (Houston County) loads or to Tex-La for the benefit of Cherokee County Electric Cooperative Association (Cherokee County) loads;
3. five 138 kV transmission line segments owned by ETEC that are part of the North Loop;
4. two ETEC-owned 138 kV radial transmission line segments attached to the South Loop that enable ETEC to deliver power to Houston County loads; and
5. the remaining 138 kV transmission line segments owned by ETEC that are part of the South Loop.

⁴Wood County is a distribution cooperative which is a member/owner of NTEC and Tex-La, two of the three G&T cooperatives that constitute ETEC's membership.

7. The judge noted that section 30.9 of CSW's OATT, which tracks section 30.9 of the *pro forma* tariff in Order No. 888-A,⁵ provides for a credit as follows:

Network Customer Owned Transmission Facilities: The Network Customer that owns existing transmission facilities that are integrated with the Transmission Provider's Transmission System may be eligible to receive consideration either through a billing credit or some other mechanism. In order to receive such consideration the Network Customer must demonstrate that its transmission facilities are integrated into the plans or operations of the Transmission Provider to serve its power and transmission customers. For facilities constructed by the Network Customer subsequent to the Service Commencement Date Under Part III of the Tariff, the Network Customer shall receive credit where such facilities are jointly planned and installed in coordination with the Transmission Provider. Calculation of the credit shall be addressed in either the Network Customer's Service Agreement or any other agreement between the Parties.⁶

8. With respect to the facilities owned by Wood County, the judge found that ETEC is not eligible for credits for facilities it does not own. The judge stated:

Section 30.9 of Order No. 888-A specifically provides that "a customer may receive credit for its *own* facilities." The plain language of the Order therefore limits credits to facilities owned by network customers. ETEC offers no convincing reasons why it should receive credits for facilities it did not build and does not pay to use. ETEC witness Mr. Robert M. Gross admitted in his testimony that ETEC is under no contractual obligation to pay a portion of the costs of owning and maintaining Wood County facilities and that Wood County alone bears these costs. ETEC merely

⁵Promoting 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, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶31,048 (1997), *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 in relevant part*, Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd*, New York v. FERC, 535 U.S. 1 (2002).

⁶Ex. ETEC-66.

contends that it is entitled to credits because the Wood County "facilities are used to serve portions of the distribution cooperative load assigned to ETEC." Wood County does not seek a credit for the facilities it owns. Rather, ETEC is claiming the credits regardless of its lack of an ownership interest in the facilities, simply because Wood County is one of its members and ETEC uses the Wood County facilities to serve a part of its assigned load. The Commission makes no provision for a billing credit under these circumstances. (emphasis in original; footnotes omitted).

89 FERC at 65,007-08.

9. The judge next rejected CSW's contention that the credits were barred by the terms of the Power Supply Agreement (PSA) between SWEPCO and ETEC. 89 FERC at 65,008.

10. More relevant here, the judge found that the Commission's test for determining whether a transmission customer is entitled to credits is found in Order No. 888-A, and provides for a credit for transmission facilities that are "integrated into the plans or operations of the transmission provider to serve its power and transmission customers." 89 FERC at 65,009 (*citing* Order No. 888-A, FERC Stats. & Regs. at 30,271). The judge continued that the customer's facilities "must not only be integrated with the transmission provider's system, but must also provide additional benefits to the transmission grid in terms of capability and reliability, and be relied upon for the coordinated operation of the grid." 89 FERC at 65,009 (*citing* Order No. 888-A, FERC Stats. & Regs. at 30,271).

11. Following a detailed factual analysis of the ETEC facilities for which ETEC claimed a credit, *see* 89 FERC at 65,010-17, the judge concluded:

The record before me in this case demonstrates that ETEC's facilities on the North and South Loop are not integrated into CSW's plans or operations to serve CSW's power and transmission customers. Accordingly, I find that ETEC is not entitled to credits from CSW for its interconnected transmission facilities and that CSW did not violate section 30.9 of its Open Access Transmission Tariff by denying such credits.

89 FERC at 65,017.

C. Exceptions to the Initial Decision

12. ETEC excepts to the Initial Decision's rejection of a credit for the cost of transmission facilities owned by ETEC and by Wood County.

13. ETEC excepts to the test applied by the judge for determining whether a credit is warranted. ETEC states:

the Commission' precedent on credits for customer-owned transmission facilities . . . creates an impossible, irrational, and hypocritical test for transmission facilities eligible for credits. The Initial Decision applies the Commission's prior cases on transmission credits in a literal and scholastic fashion bereft of any consideration of policy or purpose.

ETEC Brief on Exceptions at 2. ETEC claims that it is difficult to harmonize the Commission's orders on transmission credits so that they state a reasonable rule, and that the Commission's precedent is in conflict with the Commission's rules. ETEC admits that the Initial Decision is mostly accurate in its description of the facts of the case, but that the core dispute in the case is over the Commission's policy and law on transmission credits. ETEC urges the Commission to "start over, articulate its reasons, and develop a rational case law policy on transmission credits." ETEC Brief on Exceptions at 6. ETEC claims that a proper policy and application of the Commission's regulations would lead to ETEC being granted credits. Finally, ETEC claims that Wood County's facilities satisfy the Commission's transmission credit rule.

14. CSW also excepted to the Initial Decision. CSW claims that the judge erroneously ruled that the PSA between SWEPCO and ETEC does not bar ETEC from requesting credits.

15. CSW and ETEC each filed a Brief Opposing Exceptions. Commission Trial Staff also filed a Brief Opposing Exceptions. Trial Staff urges the Commission to affirm the Initial Decision.

III. Discussion

16. Three issues are raised on exceptions to the initial decision: (1) whether the PSA barred ETEC from seeking credits; (2) whether ETEC should receive a credit for facilities it does not own, *i.e.*, the facilities owned by Wood County; and (3) whether ETEC's facilities for which it claims a credit are integrated into the plans or operations of CSW so as to qualify for a credit. We will affirm the initial decision.

A. The PSA Does Not Bar ETEC From Seeking Credits

17. The PSA between SWEPCO and ETEC, which provides for a power sale between SWEPCO and ETEC, is silent on the issue of whether or not ETEC is entitled to credits for its transmission facilities in the rates it is charged for transmission provided under the OATT. CSW contended that the PSA bars ETEC from claiming customer credits. CSW argued that the PSA embodies an agreement reached by ETEC and SWEPCO after long and difficult bargaining concerning the financial responsibility of each of the parties for construction of certain facilities, and that an award of credits would upset the bargain agreed to by the parties. CSW further claimed that, in Amendment No. 1 to the PSA, ETEC waived its right to seek credits.

18. The judge found that the PSA, and its silence on the issue of credits, cannot be interpreted as a waiver of ETEC's right to seek credits. The judge explained that the PSA, which was signed in 1993, is understandably silent on the issue of customer credits because the Commission did not announce its policy on credits until 1994. Neither ETEC nor SWEPCO, in 1993, could have contemplated that credits might be available in the future. With respect to CSW's reliance on Amendment No. 1, which was executed several years later and which is silent on the issue of credits, the judge stated that there is nothing in the language of Amendment No. 1 that supports the argument that ETEC expressly agreed to waive its right to credits. The judge reasoned that the fact that ETEC agreed to build and pay for certain facilities does not bar it from later claiming credits for the investment it made; the judge stated that the right to the credits is not a contractual right, but that credits are rooted in Commission precedent. The judge concluded that the silence of the PSA and Amendment No. 1 on the subject of customer credits cannot operate to deprive ETEC of the "Commission-given right to seek credits." 89 FERC at 65,008.

19. On exceptions, CSW essentially repeats the arguments it made to the judge concerning the PSA.

20. Nothing raised on exceptions warrants our reversing the judge's decision on this issue, and we will affirm the judge's decision that ETEC's right to seek credits is not barred by the PSA. In any event, the PSA between SWEPCO and ETEC and the OATT

involve different services and their rates for those services are not dependent upon each other; that is, the silence of the PSA between SWEPCO and ETEC can not decide whether or not, under the OATT, ETEC is entitled to credits in its transmission rates for transmission service provided under the OATT.

B. ETEC Cannot Claim Credits for Facilities Owned by Others

21. The judge found that Order No. 888-A provides that "a customer may receive credit for its own facilities"⁷ The judge concluded that the plain language of Order No. 888-A limits credits to customer-owned facilities. The judge continued that ETEC had offered no convincing reasons why it should receive credits for Wood County's facilities that it did not build and does not pay to use.⁸

22. On exceptions, ETEC argues that the Commission should treat G&T cooperatives and their members as a single customer for purposes of determining whether that customer should receive credits for transmission facilities.

23. As the judge found, Order No. 888-A provides that customers may only seek credits for their own facilities. No provision is made for a customer to seek credits for facilities owned by others.⁹ Moreover, as noted by the judge, not only does ETEC not own the Wood County facilities, it does not pay for them in any way. We thus see no merit in ETEC's argument, and we affirm judge on this issue.

⁷89 FERC at 65,007 (quoting, FERC Stats. & Regs. at 30,271 (emphasis added by judge)).

⁸The judge noted that ETEC's witness admitted that ETEC had no obligation to pay any portion of the costs of owning and maintaining Wood County's facilities, and that Wood County alone bears these costs.

⁹ CSW also claims that the judge erroneously failed to find that the issue of whether any facilities owned by Country Electric Cooperative, Inc. (Rayburn Country) are integrated with the CSW transmission system is beyond the scope of this proceeding. The Commission set for hearing issues concerning ETEC's facilities. 84 FERC at 62,194-95. Thus, CSW is correct in its assertion that the issue of whether facilities owned by Rayburn Country are integrated with the CSW transmission system is outside the scope of this proceeding.

C. ETEC's Facilities Are Not Integrated with CSW's Transmission System and ETEC is Not Entitled to Credits

24. ETEC claims that the judge erred in finding that the facilities ETEC owns, and for which it claims credits are not entitled to credits. ETEC's claim rests on its argument that the Commission's precedent on credits for customer-owned transmission facilities "creates an impossible, irrational, and hypocritical test for transmission facilities eligible for credits." ETEC Brief on Exceptions at 2. ETEC particularly faults the judge's use of an "Entergy style load flow test." *Id.* at 38. As explained below, we will affirm the judge's decision on the issue of credits.

25. Traditionally, the Commission has required that a customer claiming credits must demonstrate that its facilities not only are integrated with the transmission provider's system, but also provide additional benefits to the transmission grid in terms of capability and reliability and can be relied on by the transmission provider for the coordinated operation of the grid.¹⁰

26. Thus the Commission has provided for credits for customer-owned transmission facilities in the *pro forma* tariff upon an appropriate showing:¹¹

30.9 Network Customer Owned Transmission Facilities: The Network Customer that owns existing transmission facilities that are integrated with the Transmission Provider's Transmission System may be eligible to receive consideration either through a billing credit or some other mechanism. In

¹⁰Order No. 888-A, FERC Stats. & Regs. at 30,271.

¹¹*Id.* The Commission applied this integration test prior to Order No. 888-A. *See* Florida Municipal Power Agency v. Florida Power & Light Company, 67 FERC ¶ 61,167 (1994) (*FMPA*), *reh'g denied*, 74 FERC ¶ 61,006 (1996), *reh'g dismissed and denied*, 96 FERC ¶ 61,130 (2001), *aff'd*, 315 F.3d 362 (D.C. Cir. 2003). In *FMPA*, the Commission concluded that, although FMPA owned transmission facilities that were interconnected with Florida Power & Light Company's (Florida Power) facilities, the FMPA facilities were not integrated, *i.e.*, they were not used by Florida Power to provide transmission service to FMPA or any other party nor were they used by Florida Power to provide transmission service to its non-FMPA customers. Therefore, the Commission found that a credit was not appropriate. *See* 74 FERC at 61,010-11.

Indeed, the approach to credits that the Commission took in Order No. 888 was informed by its experience in FMPA.

order to receive such consideration the Network Customer must demonstrate that its transmission facilities are integrated into the plans or operations of the Transmission Provider to serve its power and transmission customers. For facilities constructed by the Network Customer subsequent to the Service Commencement Date under Part III of the Tariff, the Network Customer shall receive credit where such facilities are jointly planned and installed in coordination with the Transmission Provider. Calculation of the credit shall be addressed in either the Network Customer's Service Agreement or any other agreement between the Parties.

27. The Commission stated that the intent of section 30.9 of the *pro forma* tariff was that, for a customer to be eligible for a credit, its facilities must not only be integrated with the transmission provider's system, but must also provide additional benefits to the transmission grid in terms of capability and reliability, and be relied upon for the coordinated operation of the grid. The Commission continued that the mere fact that a transmission customer's facilities may be interconnected with a transmission provider's system does not prove that the two systems comprise an integrated whole such that the transmission provider is able to provide transmission service to itself or other transmission customers over these facilities.¹²

28. The Commission also explained that this standard was premised on a fundamental cost allocation concept that applied to the transmission provider as well as the customer: just as the transmission provider cannot charge the customer for facilities not used to provide transmission service, the customer cannot get credits for facilities not used by the transmission provider to provide service.¹³

29. On at least two occasions recently, the District of Columbia Circuit has spoken approvingly of this integration test,¹⁴ and the Commission used this same approach in December 2003. See *Florida Power & Light Company*, 105 FERC ¶ 61,287 (2003).

¹² Order No. 888-A, FERC Stats. & Regs. at 30,271.

¹³ *Id.* at 30,271 & n.277.

¹⁴ *East Texas Electric Cooperative, Inc. v. FERC*, 331 F.3d 131 (D.C. Cir. 2003); *Florida Municipal Power Agency v. FERC*, 315 F.3d 362 (D.C. Cir. 2003).

30. Thus, contrary to ETEC's claims, the Commission has followed a consistent policy when considering the merits of customer credit claims. The Commission has consistently required that a customer claiming credits must demonstrate that its facilities provide additional benefits to the transmission grid in terms of capability and reliability and that the transmission provider relies upon the customers' facilities for the coordinated operation of the grid.¹⁵

31. In the initial decision, the judge stated that the Commission had issued a ruling on the technical requirements for demonstrating integration in *Entergy Services, Inc.*, 85 FERC ¶61,163 (1998) (*Entergy*). In that case the Commission relied on a base load flow study of Entergy's system under normal and contingency conditions and then examined how those same studies would change if the system were not connected to the customer systems for which credits were claimed. The load flow studies showed that Entergy's other wholesale and retail customers would not be adversely affected if the load and facilities of the customers claiming credits were removed from the transmission system. On this basis the Commission determined that the customer facilities were not integrated with Entergy's.

32. In the case now before us, the judge rejected ETEC's contentions that a test other than the one used in *Entergy*, either a comparability test or what ETEC calls a system planning test, should be used to determine whether ETEC should receive customer credits. ETEC also faulted the use of the Entergy-style load flow study performed by CSW and relied on by the judge. ETEC repeats the same arguments on exceptions.

33. We will affirm and adopt the judge's decision on this issue. Since the issuance of the Initial Decision, the Commission addressed the *Entergy* decision on rehearing and affirmed both the test relied on by the judge in this case and the use of the Entergy-style load flow study relied on by the judge. *Entergy Services, Inc.*, 91 FERC ¶61,153 (2000).

34. Moreover, the test relied on by the judge, contrary to the arguments of ETEC, makes sense. As noted above, the Commission requires that a customer claiming credits must demonstrate that its facilities provide additional benefits to the transmission grid in terms of capability and reliability and that the transmission provider relies upon the customers' facilities for the coordinated operation of the grid. In other words, does the transmission provider use the transmission customer's facilities to provide needed transmission service to other customers (or are they part of the transmission provider's plans to provide such needed service). That is the proper test to assure that when the

¹⁵Order No. 888-A, FERC Stats. & Regs. at 30,271.

transmission provider pays these credits and seeks to recover the costs from other users of the transmission grid, the other users have received benefits in exchange for their payments. We therefore see no merit to ETEC's arguments.

The Commission orders:

The Initial Decision in this proceeding is hereby affirmed, as discussed in the body of this order.

By the Commission. Chairman Wood concurring with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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WOOD, Chairman, concurring:

This order affirms an initial decision finding that certain transmission facilities owned by East Texas are not entitled credits from CSW because the facilities are not integrated into the plans or operations of CSW to serve CSW's power and transmission customers. Because we have applied long-standing precedent regarding the integration standard to reach this conclusion, I support the order. However, I write separately to express misgivings about the integration standard. We have stated in other contexts that the transmission grid is a single piece of equipment such that system expansions are used by and benefit all users due to the integrated nature of the grid. See *Entergy Gulf States, Inc.* 99 FERC ¶ 61,095 at P 13 (2002). And, as I stated in my concurrence in *Florida Power & Light Company*, 105 FERC ¶ 61,287 (2003), if the parties were in a regional transmission organization (RTO) there would be no dispute because all transmission facilities within the RTO, whether owned by CSW or East Texas, would have been treated comparably and the rates would have reflected such treatment. Now that the parties in this case are part of the Southwest Power Pool, which we have recently concluded is an RTO (*Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110 (2004)), I expect this dispute will be fully addressed going forward.

Pat Wood, III
Chairman