

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sacramento Municipal Utility District

Docket No. EL04-2-000

v.

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

ORDER DENYING COMPLAINT

(Issued December 23, 2003)

1. In this order, we deny the 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) contending that the California utilities have refused to honor SMUD's exercise of its right of first refusal under Order No. 888¹ to extend the term of service under an August 1, 1967 transmission contract between SMUD and the California utilities. This decision benefits customers because the order ensures that service will be rendered under the rates, terms and conditions of an open access transmission tariff.

¹See 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 in relevant part 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, 122 S. Ct. 1012 (2002).

Background

2. On August 1, 1967, SMUD and the California utilities executed a contract for 200 MW of extra high voltage transmission and exchange service (EHV contract) that has a termination date of January 1, 2005. SMUD states that in a December 19, 1984 amendment, the EHV contract was revised to extend the term “for the existing life of the Intertie” contingent “[u]pon satisfaction of Sections 11.3 and 11.4 of the [1984 Memorandum of Understanding] as to participation of [the California utilities] and [SMUD] in the [California-Oregon Transmission] Project.”
3. SMUD states 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 “for the existing life of the Intertie” under the 1984 Memorandum of Understanding (MOU). However, according to SMUD, to avoid any dispute over whether the California utilities have satisfied the relevant provisions of the MOU, SMUD stated its willingness to execute a further amendment to the EHV contract to extend its original terms until January 1, 2025 under the right of first refusal provisions of Order No. 888.
4. SMUD states that on April 14, 2003, PG&E,² 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 expire³ 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. SMUD states that while PG&E expressed its willingness to discuss other arrangements, the parties were subsequently unable to agree on future terms.

Complaint

5. On October 8, 2003, SMUD filed a complaint against the California utilities requesting “fast track” processing procedures in order to obtain a decision sufficiently in advance of the EHV contract expiration on January 1, 2005 to permit SMUD to plan its operations without the risk of service interruptions.

²SMUD 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.

³SMUD states that expiration of PG&E’s contractual arrangement involving third parties does not relieve PG&E of its right-of-first-refusal obligations. SMUD argues that PG&E’s long-term planning must account for rights of first refusal. Citing Tenaska Services Co. v. Southwest Power Pool, Inc., 102 FERC ¶ 61,140 (2003).

6. In its complaint, SMUD states that under the right of first refusal provisions in Section 2.2 of the pro forma OATT, it has the right to extend the EHV contract to continue its existing transmission service. SMUD argues that the right of first refusal provides all long-term firm transmission customers with the right, upon the expiration of their transmission service agreements or the time their agreements become subject to renewal or rollover, to continue to take service from their existing providers. SMUD states that the only limitations the Commission has placed on transmission customers' rollover rights are that: (1) the underlying transmission service agreement must have been a long-term agreement of at least one year; (2) the existing transmission customer seeking to exercise its rollover rights must agree to match the rate offered by another potential transmission customer seeking the same transmission capacity (up to the transmission provider's maximum filed transmission rate); and (3) the existing transmission customer must agree to accept a contract term at least as long as that offered by the potential transmission customer.

7. SMUD states that its EHV contract with the California utilities comes within the scope of Order No. 888's right of first refusal provisions because the EHV contract has a term of more than a year, SMUD is an existing customer under the EHV contract and it has expressed its willingness to match the rates offered by another potential customer, up to the transmission provider's maximum filed transmission rate and to accept a contract term at least as long as that offered by a potential customer.⁴ Thus, SMUD argues, it is entitled to exercise its right of first refusal and to obtain the requested 200 MW of long-term transmission service under the EHV contract.

8. SMUD acknowledges that the Commission has approved of directing transmission customers to take transmission service under regional open access transmission tariffs as bilateral agreements expire, but argues that this policy is inapplicable to SMUD's situation since the contract has not yet expired. SMUD states that both CAISO and PG&E are bound to honor the pre-CAISO EHV contract. SMUD agrees with PG&E's assessment that PG&E must reserve the right to use its system to honor pre-CAISO contracts, but is not permitted to further encumber CAISO's use for open access without its approval. SMUD argues, however, that continued use of PG&E's facilities to render service under the EHV contract pursuant to an extension of the contract under a right of first refusal will not further encumber CAISO's use of these facilities.

⁴SMUD states that the right of first refusal applies not only to transmission agreements entered into after Order No. 888, but also to contracts entered into prior to Order No. 888, such as the EHV contract. Citing Public Service Company of New Mexico, 85 FERC ¶ 61,240 (1998).

Notice of Filings and Responsive Pleadings

9. Notice of SMUD's filing was published in the Federal Register, 68 Fed. Reg. 60,355 (2003), with interventions or protests due on or before November 7, 2003. A subsequent notice was published on October 14, 2003 which shortened the comment period to October 30, 2003. Motions to intervene were timely filed by the California Electricity Oversight Board, the Modesto Irrigation District (MID), the Metropolitan Water District of Southern California and the California Department of Water Resources State Water Project (SWP). SWP also filed comments in support of SMUD's complaint. On October 30, 2003, PG&E and SCE, jointly, and SDG&E filed answers to the complaint. The CAISO also filed a motion to intervene and answer.

Answers to Answers

10. On November 13, 2003 SMUD filed an answer to the answers and SWP and MID filed motions in support of SMUD's answer. On November 17, 2003, PG&E and SCE filed a joint response to SWP's comments. On November 26, 2003, PG&E and SCE filed a joint response to SMUD's response. On December 2, 2003, SMUD filed a response to PG&E and SCE's November 26, 2003 response.

Answers to Complaint

PG&E and SCE

11. PG&E and SCE contend that the Commission should dismiss SMUD's complaint because SMUD has failed to provide a legal basis for its claim. PG&E and SCE argue that SMUD does not have a regulatory right to the relief it seeks. PG&E and SCE assert that the right of first refusal provision in Order No. 888 is inapplicable to SMUD because the service model of the Order No. 888 pro forma open access transmission tariff (OATT) no longer applies to the California utilities' transmission systems. PG&E and SCE state that the California utilities no longer offer transmission service because, in 1998, the California utilities became Participating Transmission Owners (PTOs) in the CAISO and turned operational control of their transmission facilities over to the CAISO. Thus, even if a right of first refusal applied, the California utilities no longer have the right to grant that extension – only the CAISO may do so.⁵ Furthermore, PG&E and SCE argue, SMUD has no right to roll over its existing EHV contract under the CAISO Tariff which now governs the use of the California utilities' network transmission facilities because the CAISO Tariff offers no long-term transmission service and no right of first refusal.

⁵Pacific Gas and Electric Company, et al., 81 FERC ¶ 61,122 (1997).

12. PG&E and SCE further argue that SMUD has no contractual right to the relief it seeks. PG&E and SCE maintain that the EHV contract between SMUD and the California utilities has a finite term with no right to extend and, therefore, SMUD does not have a right under its EHV contract to the extension it seeks.⁶ Moreover, PG&E and SCE state, while the CAISO is obligated under the CAISO Tariff to honor contracts in existence prior to the start of the CAISO operations (Existing Contracts), such as the SMUD EHV contract, that obligation was intended only as a transitional feature and lasts only until those contracts expire on their own terms. According to PG&E and SCE, the only Existing Contracts that can be extended or expanded are those where the right to do so was expressly included in the contract prior to commencement of the CAISO operations.

13. Additionally, PG&E and SCE contend that to grant the complaint would be contrary to the Commission's policy of providing uniform open access because SMUD would effectively receive preferential service compared to the other CAISO customers.

CAISO

14. CAISO states that the Commission should deny SMUD's complaint. CAISO contends that SMUD has misconstrued the concept of a right of first refusal in Order No. 888 because the right of first refusal in Order No. 888 applies only to service taken pursuant to the Order No. 888 pro forma OATT and is not an independent right imposed pursuant to Section 206 of the Federal Power Act on a pre-existing agreement. CAISO states that SMUD has also misconstrued the application of Order No. 888's right of first refusal provisions to the current California market structure. Furthermore, CAISO maintains, SMUD's request would materially impair CAISO's ability to exercise operational control over the relevant lines or facilities.

15. In addition, CAISO states that the complaint ignores the recognition in a recent Commission order⁷ that requests for continued transmission service should be made pursuant to the terms of the CAISO Tariff. CAISO also states that this would be consistent with the Commission's actions in the context of the natural gas industry where

⁶PG&E and SCE also state that while SMUD does not rely on the 1984 MOU for the relief it seeks in its complaint, for the avoidance of doubt, they affirmatively deny that the conditions subsequent required by the amendment and the MOU have been satisfied.

⁷Citing Pacific Gas and Electric Company, et al., 104 FERC ¶ 63,029 at P 36 (2003).

the Commission ruled that conversion to open access, Part 284 transportation service was appropriate for shippers whose contracts for Part 157 service expire or terminate.⁸

SDG&E

16. SDG&E contends that SMUD's complaint, on its face, fails to state a claim against SDG&E because the evidence offered by the complaint shows that SMUD's issue is with PG&E only and fails to allege a specific claim against SDG&E. SDG&E further denies that PG&E's April 14, 2003 letter was "speaking for" SDG&E and states that it issued a separate response to SMUD in an April 11, 2003 letter.

17. Moreover, SDG&E argues, SMUD's complaint is not ripe and should be dismissed for several reasons. First, SDG&E states that SMUD's EHV contract is part of a package of Pacific Intertie-related contracts negotiated in the 1960s, many of which are set to expire over the next few years and it would be unjust and unreasonable to grant SMUD's extension without regard to the effect on the other Pacific Intertie-related contracts. Second, SDG&E states that PG&E is required to file a notice of termination of the EHV contract at least 60 days prior to cancellation and termination and SDG&E believes such a notice would provide a more appropriate opportunity for SMUD to object and request suspension of the termination. Third, SDG&E argues, the transmission capacity at issue has been turned over to the operational control of the CAISO, and the Commission is currently considering in a proceeding on the CAISO's Comprehensive Market Redesign Proposal (MD-02 proceedings) in Docket Nos. ER02-1656-003, *et al.*, the CAISO's proposal to address transmission rights such as those alleged in the complaint.

Comments

18. SWP states that the Commission should grant SMUD's complaint. SWP contends that while transmission service under existing transmission contracts was designed to maximize efficiencies and meet the needs of transmission customers, that is not true of transmission available from the CAISO. SWP also states that it disagrees with the position attributed to PG&E that the institution of the CAISO nullifies contract right of first refusal. SWP argues that even though the California utilities have purportedly turned over all of their transmission entitlements to CAISO, each of the California utilities has remaining contract entitlements on the Pacific Intertie. SWP argues that to allow the California utilities to continue their contractual entitlements while denying comparable treatment to transmission customers would be a clear violation of "comparable" treatment under Order No. 888.

⁸Citing Transcontinental Gas Pipe Line Corporation, 60 FERC ¶ 61,119 (1992).

19. In addition, SWP states that it also has an extra high voltage transmission service contract that will expire in January that it would like to rollover and asks the Commission to grant it similar relief.

Discussion

Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers to answers filed by SMUD, SWP, MID, SCE and PG&E and will, therefore, reject them.

Analysis

21. This order is not about a contractual dispute. The sole issue in SMUD's complaint before the Commission is whether the California utilities' refusal to honor SMUD's existing EHV contract beyond its own term based on Section 2.2 of the pro forma tariff violates Order No. 888.⁹

22. We will deny SMUD's complaint. The intent of the Order No. 888 right of first refusal provision is to ensure that a customer receiving long term 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. The Order No. 888 right of first refusal provision does not contemplate contract extension beyond the term of the relevant contract, as SMUD requests.¹⁰ Accordingly, SMUD's request to compel extension of the contract using this provision is rejected.

23. Furthermore, even if SMUD had requested conversion to tariff service as provided in Order No. 888, extension of SMUD's service at its current rates, terms and conditions

⁹While SMUD outlined the contractual history of the EHV contract and noted that PG&E has voiced its disagreement with SMUD's interpretation of the 1984 amendment to the EHV contract, it expressly states that "[b]ecause SMUD believes the right of first refusal renders this dispute moot, it simply notes the continued disagreement with PG&E on this point."

¹⁰See Order No. 888 at 31,665.

would not be possible. 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. The right of first refusal provision in Order No. 888 is not applicable to SMUD (or any other customer in the CAISO service territory) 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 scheduling system, where all customers have non-discriminatory access to transmission service and long-term transmission service is not offered. Nevertheless, under the CAISO tariff, SMUD will be able to receive transmission service to the extent it is willing to pay the CAISO tariff rate. Accordingly, while SMUD must, upon expiration of its EHV contract, take service under the rates, terms and conditions of the CAISO tariff, it would not be denied access to transmission service.

The Commission orders:

SMUD's complaint is hereby denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.