

125 FERC ¶ 61,228
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellingshoff.

Public Utilities With Existing Contracts in the
California Independent System Operator
Corporation Region

Docket No. ER04-928-005

California Independent System Operator
Corporation

Docket No. ER02-1656-037

ORDER ON REMAND

(Issued November 25, 2008)

1. In this order, we address, on a voluntary remand, Sacramento Municipal Utility District's (SMUD) request for rehearing of the Commission's order issued in July 2005 and the Commission's determination in a subsequent rehearing order, dated October 2006.¹ In the July 2005 Order, the Commission defined the universe of existing transmission contracts² which will be in place upon implementation of the CAISO's Market Redesign and Technology Upgrade (MRTU)³ and addressed the applicable standard of review for the contracts in question. In the October 2006 Rehearing Order,

¹ *Cal. Indep. Sys. Operator Corp.*, 112 FERC ¶ 61,007 (2005) (July 2005 Order) and *Cal. Indep. Sys. Operator Corp.*, 117 FERC ¶ 61,087 (2006) (October 2006 Rehearing Order).

² An existing transmission contract is a contractual obligation of a California Independent System Operator (CAISO) Participating Transmission Owner (PTO), established prior to the start-up of the CAISO, to provide transmission service to another party in accordance with terms and conditions specified in the contract, utilizing transmission facilities owned by the PTO that have been turned over to the CAISO operational control pursuant to the Transmission Control Agreement.

³ *See, e.g., Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274 (2006).

the Commission denied SMUD's request for rehearing and reaffirmed that three of SMUD's existing transmission contracts are subject to the just and reasonable standard of review for any modifications.

2. In this order, as discussed below, we reverse this determination and find that the three existing transmission contracts in question are subject to the "mixed" standard of review. We therefore, grant SMUD's rehearing on this issue.

Background

3. In an effort to catalog the existing transmission contracts to be honored under the CAISO's MRTU, the Commission directed⁴ public utility parties providing service under existing transmission contracts (and non-jurisdictional parties on a voluntary basis) to submit to the Commission certain information pertaining to their existing transmission contracts, including whether any modification to the existing transmission contract is subject to a just and reasonable standard of review or a *Mobile-Sierra* public interest standard of review.⁵

4. Pursuant to the Commission directive, various PTOs with existing transmission contracts filed with the Commission summaries of their existing transmission contracts. In addition, certain parties receiving service under existing transmission contracts voluntarily filed summaries to provide their own representation of the information requested by the Commission. SMUD was among those parties.

5. The July 2005 Order set forth the universe of relevant existing transmission contracts and, among other things, addressed the issue of the applicable standard of review for the contracts identified in the existing transmission contract filings. On the issue of the applicable standard of review, the Commission found that 24 contracts are subject to the just and reasonable standard of review, 8 contracts were characterized as having the *Mobile-Sierra* public interest standard of review, and 22 were characterized as "mixed."⁶ The Commission stated that "mixed" contracts contain provisions providing for both the public interest standard of review and the just reasonable standard of review, depending on which party initiates a contractual modification, or depending on which of

⁴ *Cal. Indep. Sys. Operator Corp.*, 107 FERC ¶ 61,274, *order on reh'g*, 108 FERC ¶ 61,254 (2004), *order on reh'g*, 110 FERC ¶ 61,041 (2005).

⁵ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power*, 350 U.S. 348 (1956) (*Sierra*).

⁶ July 2005 Order, 112 FERC ¶ 61,007 at P 14.

the contractual provisions is being challenged.⁷

6. Specifically, in regard to one of SMUD's contracts, the South of Tesla Principles (SOTP) Agreement, the Commission determined, based on the language in the contract, that it had a "mixed" standard of review.⁸ The Commission based its finding on the fact that the SOTP Agreement expressly provided for unilateral rate filings under Federal Power Act (FPA) section 205,⁹ but was silent as to changes to non-rate terms.¹⁰ The Commission agreed with SMUD that only rate changes are subject to the just and reasonable standard, while non-rate terms and conditions are subject to the more stringent *Mobile-Sierra* public interest standard.¹¹

7. In regard to three other contracts between SMUD and Pacific Gas & Electric Company (PG&E), the Interconnection Agreement, the Slab Creek Agreement, and the Camp Far West Agreement,¹² the Commission concluded that any modifications to these contracts are subject to the just and reasonable standard of review.¹³ In its determination, the Commission relied on an Administrative Law Judge's (ALJ) finding in an earlier proceeding, affirmed by the Commission, that the just and reasonable standard applied to modifications of SMUD's existing transmission contracts.¹⁴

8. Subsequently, SMUD and certain other parties filed requests for rehearing of the July 2005 Order, challenging the Commission's determinations regarding the applicable standard of review for these parties' respective existing transmission contracts.

9. Specifically, SMUD challenged the Commission's determination that proposed modifications to the SMUD-PG&E Interconnection Agreement, the Slab Creek Agreement, and the Camp Far West Agreement should be reviewed under the just and

⁷ *Id.*

⁸ *Id.* P 25.

⁹ 16 U.S.C. § 824d.

¹⁰ July 2005 Order, 112 FERC ¶ 61,007 at P 26.

¹¹ *Id.*

¹² Rate Schedule Nos. 136, 88, and 91, respectively.

¹³ July 2005 Order, 112 FERC ¶ 61,007 at P 24

¹⁴ *Id.*; October 2006 Rehearing Order, 117 FERC ¶ 61,087 at P 16-17 (citing *Pacific Gas & Elec. Co.*, 95 FERC ¶ 63,022, at 65,210 (2001) (June 2001 Initial Decision), *aff'd*, 100 FERC ¶ 61,160, at Ordering Para. (A) (2002)).

reasonable standard. SMUD argued that the Commission determination is not based on substantial evidence or any Commission precedent because the finding cited to a blank footnote. In the October 2006 Rehearing Order, the Commission explained that the “content of footnote 18 was accidentally omitted in the process of publishing the July 2005 Order”¹⁵ and that footnote 18 referred to the June 2001 Initial Decision (and the Commission order affirming it) finding that the existing transmission contracts in question are subject to the just and reasonable standard of review.¹⁶

10. SMUD further argued that because the existing transmission contracts in question are silent as to the applicable standard of review to changes to its non-rate terms and conditions, the non-rate terms and conditions should be subject to the public interest standard of review.

11. The October 2006 Rehearing Order failed to address this issue. SMUD filed a petition for appeal with the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court). The Commission sought a voluntary remand of this proceeding to address the above argument SMUD made in its rehearing request of the July 2005 Order. The D.C. Circuit Court granted the Commission’s request for voluntary remand in April 2008.¹⁷

SMUD’s Rehearing Request

12. SMUD argues that because the existing transmission contracts in question are silent as to the applicable standard of review to changes to non-rate terms and conditions, the non-rate terms and conditions should be subject to the public interest standard of review. While SMUD acknowledges that the contracts in question contain provisions granting PG&E the unilateral right to file changes with the Commission in rates and rate methodologies under section 205 of the FPA, it argues that the contracts do not grant PG&E the right to make unilateral modifications to the non-rate terms and conditions. In support of its position, SMUD points to the Commission’s finding in regard to the SOTP Agreement.¹⁸ According to SMUD, similar to the SOTP Agreement, the three contracts at issue contain provisions expressly reserving the right to change the rates and rate

¹⁵ *Id.* P 16.

¹⁶ *Id.* P 17.

¹⁷ *Sacramento Mun. Util. Dist. v. FERC*, No. 06-1420 (Apr. 4, 2008).

¹⁸ The Commission determined that the SOTP Agreement is subject to the “mixed” standard of review. July 2005 Order, 112 FERC ¶ 61,007 at P 25-26, *reh’g denied*, October 2006 Rehearing Order, 117 FERC ¶ 61,087 at P 14.

methodologies under FPA section 205 and lack an identical provision in regard to non-rate terms and conditions. SMUD thus concludes that proposed changes to the non-rate terms and conditions in the contracts in question should be subject to the public interest standard of review.¹⁹

13. SMUD further argues that the June 2001 Initial Decision's finding that under the contracts at issue, PG&E has section 205 amendment rights²⁰ refers only to rate changes and is not applicable to non-rate terms and conditions in these contracts. SMUD explains that because the June 2001 Initial Decision addressed the issue of the legitimacy of PG&E's proposed rate increases under the existing transmission contracts, the ALJ's finding is limited to proposed changes to rate terms and not applicable to modifications to non-rate terms and conditions.

Commission Determination

14. Section 10.23 of the Interconnection Agreement provides in relevant part that

...nothing contained [in this agreement] shall be construed as affecting in any way PG&E's right unilaterally to file changes with FERC in rates and rate methodologies under [s]ection 205 of the [FPA]...

Section 14(c) of the Camp Far Agreement and section 14(c) of the Slab Creek Agreement state in relevant part that

[n]othing contained [in this agreement] shall be construed as affecting in any way the right of the Party furnishing services to unilaterally make application to the FERC for a change in rates under [s]ection 205 of the [FPA]...

15. Upon further review of the above quoted language and other provisions of the existing transmission contracts at issue, we conclude that, like the SOTP Agreement, the contracts in question expressly grant PG&E the section 205 amendment rights only in regard to rates. Accordingly, we find that the Interconnection Agreement, Camp Far Agreement and Slab Creek Agreement should be characterized, like the SOTP Agreement, as existing transmission contracts with the "mixed" standard of review.

¹⁹ In support, SMUD cites to *Texaco Inc. v. FERC*, 148 F.3d 1091 (D.C. Cir. 1998).

²⁰ June 2001 Initial Decision, 95 FERC ¶ 63,022 at 65,210.

16. In our determination in the October 2006 Rehearing Order, we relied on the findings in the June 2001 Initial Decision, which held that PG&E has the section 205 amendment rights under the contracts at issue. Although the ALJ's finding did not expressly specify whether the section 205 amendment rights exist in regard to rates only or to both rate and non-rate terms, we conclude that the ALJ's finding was limited only to proposed changes to rates under the contracts in question. The June 2001 Initial Decision addressed the issue of whether PG&E could charge its transmission customers the Reliability Services costs.²¹ The ALJ found (and the Commission affirmed) that the Reliability Services costs did not constitute a new service and were a proposed change to rates under the contracts at issue. To determine whether the proposed changes to rates should be accepted by the Commission, the ALJ first had to make a determination on the applicable standard of review for such changes. Based on the language in the contracts at issue, the ALJ concluded that the applicable standard of review is the just and reasonable standard.²² The issue in the June 2001 Initial Decision was strictly a rate issue and, in resolving it, the ALJ relied on the contractual language, which grants PG&E the right to seek changes to rates under the contracts pursuant to section 205 of the FPA. The ALJ thus concluded that the existing transmission contracts at issue "can be amended under [s]ection 205 of the [FPA] to seek to allocate [Reliability Service] costs to PG&E's transmission customers."²³ However, while the June 2001 Initial Decision determined that PG&E has the section 205 amendment rights under the contracts at issue with respect to changes to rates, it made no determination with respect to the standard of review applicable to proposed modifications to non-rate terms and conditions.

17. For the above stated reasons, we reverse our prior determination in regard to the contracts at issue and grant SMUD's rehearing.

The Commission orders:

SMUD's request for rehearing of the July 2005 Order is hereby granted and the

²¹ The Reliability Service costs at issue in the June 2001 Initial Decision consisted of Reliability Must Run and Out of Market dispatch costs that were charged or flowed through to PG&E under the tariff of the CAISO and, in turn, sought to be recovered by PG&E from its jurisdictional transmission customers. June 2001 Initial Decision, 95 FERC ¶ 63,022 at 65,198.

²² *Id.* at 65,210.

²³ *Id.* at 65,198.

October 2006 Rehearing Order is hereby reversed in relevant part for the reasons discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.