

120 FERC ¶ 61,139
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Deseret Generation & Transmission
Cooperative, Inc.

Docket No. ER06-861-001

ORDER ON REHEARING

(Issued August 7, 2007)

1. On June 9, 2006, the Commission issued an order¹ that accepted, in part, and rejected, in part, proposed market-based rate tariff revisions filed by Deseret Generation & Transmission Cooperative, Inc. (Deseret).² El Paso E&P Company, L.P., El Paso Production Oil & Gas Gathering, L.P., El Paso Field Operating Company, and El Paso Field Services, L.P. (collectively, El Paso Parties) filed a request for rehearing of the June 9 Order.
2. Chevron U.S.A Inc. (Chevron) ConocoPhillips Company (ConocoPhillips), Questar Pipeline Company, Questar Gas Company, Questar Gas Management Company, and Questar Exploration and Production Company (collectively, Questar Group), and Shell Exploration and Production Co. (Shell) (collectively, Petitioners) also filed a request for rehearing.³ In this order, the Commission denies these requests for rehearing as discussed below.

¹ *Deseret Generation & Transmission Cooperative, Inc.*, 115 FERC ¶ 61,306 (2006) (June 9 Order).

² Deseret received market-based rate authority on May 27, 1999, with its latest updated market power analysis accepted February 6, 2006. See *MEP Investments, LLC*, 87 FERC ¶ 61,209 (1999), and *Deseret Generation & Transmission Cooperative, Inc.*, Docket No. ER99-2506-003, (unpublished letter order).

³ Petitioners are retail electric customers of Moon Lake Association, Inc. and/or Bridger Valley Electric Association - two of Deseret's six affiliates.

Background

3. The June 9 Order addressed Deseret's proposed tariff revisions to: (1) add Wholesale Rate Schedule "C" (Schedule C)⁴ to its market-based rate tariff in order to provide specific terms and conditions upon which Deseret states that it will engage in certain market-based rate sales with its six member cooperatives (members),⁵ and (2) remove market behavior rules from its tariff.

4. Deseret argued that Schedule C would provide specific terms and conditions under which Deseret would engage in certain market-based rate sales to its members that, in turn, serve specific industrial load with peak demand of more than 2.5 MW. Deseret sought to have such terms and conditions as part of its market-based rate tariff for the sake of clarity to its members, and to ensure that the Commission is fully apprised of Deseret's transactions with its members. Deseret stated that the terms of Schedule C provide a formulaic, market-based rate pricing mechanism for potential transactions to serve industrial loads. Deseret further stated that specific pricing terms for an energy and demand rate, as well as commercial terms and conditions such as billing and metering requirements and security and performance requirements are contained in Schedule C. According to Deseret, the rates, terms and conditions of Schedule C would be backstop rates for service to certain industrial loads that may be applied in the absence of a longer-term, negotiated contract. Deseret also claimed that its current authorization to sell at market-based rates permits such sales as are included in Schedule C.

5. El Paso Parties and Petitioners protested Deseret's proposed tariff revisions and additionally argued that Deseret was seeking authority to charge market-based rates to its affiliated member cooperatives that have franchised service territories without providing any pricing safeguards to protect the member cooperatives' captive customers. El Paso Parties and Petitioners stated that Deseret failed to include provisions precluding market-based rate sales to affiliates without first receiving Commission authorization, and questioned whether Deseret was justified in charging market-based rates for loads within the service territories of its members, whose sales in turn would be to captive customers.

⁴ FERC Electric Tariff, First Revised Volume No. 3, First Revised Sheet Nos. 2-3 (supersedes Original Sheet Nos. 2-3).

⁵ Deseret's member cooperatives are Bridger Valley Electric Association, Dixie-Escalante Rural Electric Association, Inc., Flowell Electric Association, Inc., Garkane Energy, Moon Lake Electric Association, and Mt. Wheeler Power, Inc.

6. The June 9 Order rejected Deseret's proposal to add Schedule C to the tariff. The Commission found Schedule C to be unnecessary and noted that Deseret, by its own declaration, claimed it does not need to file Schedule C in order to transact with its members at market-based rates. The Commission added that under its regulations "any market-based rate agreement pursuant to a tariff shall not be filed with the Commission."⁶

7. The June 9 Order also found that Schedule C appeared to include cost-based tariff elements and noted that Commission policy does not permit a cost-based tariff to be included as a part of a market-based rate tariff.⁷

8. Additionally, the June 9 Order stated that, "in cases where affiliates are entering into market-based rate sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted. However, the Commission has found that affiliate abuse is not a concern for cooperatives owned by other cooperatives, where the cooperative's ratepayers are its members. Accordingly, wholesale power sales to its members by Deseret, a cooperative whose customers are its member cooperatives, do not raise issues of affiliate abuse and do not require prior approval from the Commission as suggested by the protestors."⁸

Requests for Rehearing

9. El Paso Parties and Petitioners seek rehearing with respect to the Commission's finding that Deseret may sell to its member cooperatives at market-based rates without receiving specific authorization from the Commission.

10. In particular, El Paso Parties request that the Commission (1) require Deseret to justify charging market-based rates to captive customers under section 205 of the FPA; and (2) initiate a section 206 proceeding to determine if Deseret should be allowed to charge market-based rates to captive customers. El Paso Parties note that the Commission has previously raised concerns regarding the effect the sales of electric power at market-based rates to franchised public utilities can have on the utility's captive customers. El Paso Parties argue that those same concerns apply to sales by a

⁶ June 9 Order, 115 FERC ¶ 61,306 at P 12. The order accepted Deseret's revision that removed the market behavior rules from its market-based rate tariff.

⁷ *Id.* at P 13.

⁸ *Id.* at P 14.

cooperative to its affiliated members, because if Deseret is permitted to sell to its affiliated member cooperatives at market-based rates, then the member cooperatives may pass the rates through to captive industrial customers, like the El Paso Parties.

11. Petitioners seek rehearing of Paragraph 14 of the June 9 Order referenced above.⁹ Petitioners claim that the Commission failed to adequately justify its decision to exempt electric cooperatives from rules that prevent affiliate abuse by non-cooperative public utilities or explain why a captive customer's role as a shareholder-member of the cooperative insulates it from harm from affiliate abuse. Petitioners assert that the Commission's failure to protect Petitioners and other similarly situated captive customers from affiliate abuse is unduly preferential and discriminatory and may result in unjust and unreasonable market-based rates.

12. El Paso Parties and Petitioners specifically challenge the Commission's reliance on *Peoples Electric Corporation*¹⁰ and *Old Dominion Electric Cooperative*.¹¹ Both raise issues regarding *Hinson Power Company*,¹² a case cited in *Peoples Electric* and *Old Dominion*, claiming that *Hinson* is premised on the absence of captive customers. Petitioners also state that the decision in *Hinson* did not address affiliate abuse because *Hinson* and the affected electric cooperative were not affiliated. Petitioners add that the Commission did include provisions in *Hinson* that are designed to protect captive retail customers in the event that *Hinson* became affiliated with a utility "that has a franchised service area." Deseret filed an answer to both rehearing requests. The Petitioners submitted an answer to Deseret's Answer.

Discussion

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to an answer and/or rehearing unless otherwise ordered by the decisional authority. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits answers to requests for rehearing. Accordingly, we will reject Deseret's answer and Petitioners' answer.

⁹ See *supra* P 8.

¹⁰ 84 FERC ¶61,215 at 62,042 (1998).

¹¹ 81 FERC ¶ 61,044 at 61,236 (1997).

¹² 72 FERC ¶ 61,190 (1995).

14. We will deny the requests for rehearing of El Paso Parties and Petitioners. In the June 9 Order, we noted that, in cases where affiliates are entering into market-based rate sales agreements, although it is essential that ratepayers be protected and that transactions be above suspicion, affiliate abuse is not a concern for cooperatives owned by other cooperatives, where the cooperative's ratepayers are its members.¹³ Accordingly, we found that wholesale power sales to its members by Deseret, a cooperative whose customers are its member cooperatives, did not raise issues of affiliate abuse and did not require prior approval from the Commission as suggested by the protestors.

15. The June 9 Order is consistent with existing Commission precedent holding that there are no affiliate abuse concerns raised where the ratepayers are the owners of the cooperative, because any profits earned will ultimately benefit ratepayers.¹⁴

16. To the extent that El Paso Parties and Petitioners are raising questions challenging the Commission's market-based rate policy, those issues are addressed in the context of the Commission's market-based rate rulemaking proceeding in Order No. 697. In that proceeding, both El Paso Parties and Petitioners submitted comments¹⁵ concerning the same matters at issue in the instant proceeding (exempting electric cooperatives from requirements that protect captive customers from affiliate abuse) on the Notice of Proposed Rulemaking (NOPR) issued in that docket. In Order No. 697, the Commission found that where a cooperative is involved, the cooperative's members are both the ratepayers and the shareholders and any profits earned by the cooperative will enure to the benefit of the cooperative's ratepayers.¹⁶ Accordingly, we find that the Commission's decision on the issue protecting captive customers from affiliate abuse in Order No. 697 addresses El Paso Parties and Petitioners' arguments on this issue in the instant proceeding.

¹³ June 9 Order, 115 FERC ¶ 61,306 at P 14.

¹⁴ *Peoples Electric*, 84 FERC ¶ 61,215 at 62,042; *Old Dominion*, 81 FERC ¶ 61,044 at 61,236 (“Such preferences could result in captive customers of public utilities paying more than the market price for power used to serve them. This concern is not present here because Old Dominion is a cooperative and its ratepayers are its owners.”).

¹⁵ El Paso E&P Company, L.P., August 7, 2006 Comments at 2-9; Chevron U.S.A. Inc., August 7, 2006 Comments at 10-12.

¹⁶ *Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities*, Order No. 697, FERC Statutes and Regulations ¶ 31,252 at P 526 (2007).

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The Commission orders:

The requests for rehearing of El Paso Parties and Petitioners are denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.