

and that RECO's role would be that of an agent for BGS customers. PSE&G states that section 13.2 of the Agreement provides that "[E]ach BGS-FP Supplier shall at all times be deemed to hold title to electric energy until delivery to the retail meter of the Customer at which time title shall be deemed to pass to such Customer." Thus, PSE&G argues that Commission approval is not required in order for CEE to bid in the BGS auction to sell to RECO.

Alternatively, if the Commission does assert jurisdiction over BGS Agreements, PSE&G requests that it grant blanket waivers to all similarly-situated companies.

11. In response to PS&G's protest, Applicants state:

In view of the February 3, 2003 date for submitting bids in New Jersey's BGS auction, [Applicants] simply seek to clarify that the Commission does not have to resolve the wholesale-retail jurisdictional issue raised by PSE&G prior to February 3rd in order for CEE to participate in the RECO auction. It would suffice for the Commission to simply waive any affiliate-transaction limitations of [Applicants'] electric tariffs or codes of conduct insofar as they might apply. Granting such waivers prior to February 3rd would serve the public interest by enabling CEE to participate in the auction and thereby would increase overall participation and competition in the BGS auction. [Applicants] have no objection to PSE&G's alternative proposal that the Commission grant blanket waivers to permit participation in the BGS auction to all companies that are similarly situated to CEE and RECO.<sup>13</sup>

12. As noted above, Applicants' transmittal letter assumes that, if CEE is a successful bidder, the proposed transaction would involve a wholesale sale by CEE to its affiliate RECO that requires Commission approval. In these circumstances, we will assume (without deciding) that we have jurisdiction.<sup>14</sup>

<sup>13</sup> Applicants' Answer at 2.

<sup>14</sup> We note that the *pro forma* Agreements contain several indicia that would suggest a finding that entry by a successful bidder into the requisite BPU-approved supply agreement and performance thereunder will result in a wholesale sale. (The relevant provisions are the same in the BGS-FP Agreement and the BGS-HEP Agreement.) As an initial matter, the parties to the Agreements are the BGS Supplier (here, CEE) and the electric distribution company (here, RECO). There is no provision in the Agreements that establishes privity of contract between the retail customers and the BGS Supplier; retail customers cannot enforce the contract against the BGS Supplier, nor can the BGS Supplier enforce the contract against the retail customer. (E.g., BGS-FP Agreement, Article 2.1). Further, the electric distribution company (here, RECO) would execute the contract in its own name and be obligated to pay the BGS Supplier from its own funds. (E.g., BGS-FP Agreement, Article 2.2). The Agreements also provide that the agreement is a "legal and binding obligation of the Company [*i.e.*, RECO]." (E.g., BGS-FP Agreement, Article 3.2). In addition, the "Company's performance under this agreement is not contingent upon the

The BGS competitive bid process described by Applicants alleviates the Commission's concerns regarding affiliate abuse. Therefore, we will grant Applicants' request for authorization for CEE to make sales to its affiliate RECO, pursuant to CEE's market-based rates tariff, as part of CEE's participation in the BPU-approved statewide auction process.

13. Because we believe that the BPU auction process alleviates our concerns as to affiliate abuse, the Commission would authorize similarly-situated public utilities (with Commission-approved market-based rate tariffs and with tariff prohibitions on affiliate sales absent prior Commission authorization) to make sales to their affiliates as part of their participation in the BPU-approved auction. Such similarly-situated public utilities must either make an appropriate section 205 filing<sup>15</sup> or file a petition explaining why they believe we lack jurisdiction.<sup>16</sup>

#### *The Commission orders:*

(A) Applicants' application for authorization for CEE to make sales to its affiliate RECO, pursuant to CEE's market-based rates tariff, as part of CEE's participation in the BPU-approved statewide auction process is hereby granted, as discussed in the body of this order.

(B) The Secretary shall promptly publish this order in the **Federal Register**.

performance of [the retail] Customers or the ability of [the retail] Customers to pay rates;" the Company's non-payment, insolvency, illegality (including Federal Energy Regulatory Commission obligations), or material breach are all events of default for the Company and upon default, the BGS Supplier would receive damages from RECO, including liquidation and termination; and certain PJM penalties and costs are allocated among the BGS Supplier and the Company. (E.g., BGS-FP Agreement, Articles 3.2, 5.1 and 5.3). Further, the Agreements provide that to the extent that the Agreement is deemed to be subject to the Commission's jurisdiction, the standard of review for changes to any sections of the Agreement specifying the rate(s) or other material economic terms and conditions will be the *Mobile-Sierra* "public interest" standard of review. (E.g., BGS-FP Agreement, Article 11.2).

<sup>15</sup> See *Aquila, Inc.*, 101 FERC ¶ 61,331 at P 12 (2002).

<sup>16</sup> In the Prior Notice Order, the Commission advised that "[t]o the extent a utility remains uncertain, even after consulting this order and the Appendix, as to its obligation to file rates and charges for a particular transaction or type of transaction, it should assume the initiative to seek a specific ruling. The easiest and most efficient way to do this is to file the agreement pursuant to part 35 of the Commission's regulations \* \* \* and simultaneously request the Commission to disclaim jurisdiction." See Prior Notice and Filing Requirements Under part II of the Federal Power Act, 64 FERC ¶ 61,139 at 61,977-78 (1993) (Prior Notice Order) (emphasis deleted).

By the Commission.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. 03-3114 Filed 2-6-03; 8:45 am]

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. EL02-88-000, et al.]

#### Before Commissioners: Pat Wood, III, Chairman; William L. Massey, and Nora Mead Brownell; Pacific Gas and Electric Company et al.; Order Partially and Fully Granting Rehearings and Partially Granting Complaints

Issued January 29, 2003.

In the matter of: ER02-1330-002, EL02-88-000, EL03-3-000 and ER02-1472-001, EL03-4-000 and ER02-1151-001, EL03-5-000 and ER02-1069-001, EL03-13-000 and ER02-2243-002, EL03-12-000; Pacific Gas and Electric Company, Wrightsville Power Facility, LLC v. Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Services, Inc., Entergy Services, Inc., Kinder Morgan Michigan, LLC v. Michigan Electric Transmission Company, LLC; Order Partially and Fully Granting Rehearings and Partially Granting Complaints.

1. In this order, we partially and fully grant the requests for rehearing and partially grant the complaints in the above-captioned proceedings and hold that the interconnection agreements (IAs) in these dockets must be modified to conform with our recent decision in *Duke Hinds II*.<sup>1</sup> Our holdings here benefit the public interest by assuring that the rates, terms, and conditions for interconnection service are just and reasonable, and provide the parties with a reasonable means to ensure the reliable operation, protection, and integrity of their transmission systems.

2. More specifically, we partially grant rehearing in *Pacific Gas and Electric Company*<sup>2</sup> (Docket No. ER02-1330-002) and find that the IA in this docket is unjust and unreasonable. We also partially grant the rehearings in *Entergy Gulf States, Inc.*<sup>3</sup> (Docket No. ER02-1472-001); *Entergy Services, Inc.*<sup>4</sup> (Docket No. ER02-1151-001); *Entergy Services, Inc.*<sup>5</sup> (Docket No. ER02-1069-001); and fully grant the rehearing in *Entergy Services, Inc.*<sup>6</sup> (Docket No. ER02-2243-002) and find that the IAs

<sup>1</sup> *Entergy Services, Inc.*, EL02-107-000, et al. (January 28, 2003) (*Duke Hinds II*).

<sup>2</sup> 101 FERC ¶ 61,079 (2002) (PG&E).

<sup>3</sup> 99 FERC ¶ 61,234 (2002).

<sup>4</sup> 99 FERC ¶ 61,097 (2002).

<sup>5</sup> 99 FERC ¶ 61,077 (2002).

<sup>6</sup> 100 FERC ¶ 61,397 (2002).

in these dockets are unjust and unreasonable under section 206 of the Federal Power Act (FPA).<sup>7</sup> We also partially grant the complaints filed by Wrightsville Power Facility, L.L.C. (Wrightsville Power) in Docket No. EL02–88–000 and by Kinder Morgan Michigan, LLC (Kinder Morgan) in Docket No. EL03–12–000.<sup>8</sup> In each of these cases, we direct modification to the respective IAs.

### Background

3. On March 15, 2002, the Commission issued an order in *Duke Hinds I*.<sup>9</sup> In that proceeding, Entergy, the transmission provider, had filed a revision to an unexecuted IA to reflect Duke's, the generator's, election of certain additional upgrades that were not included in the original, executed IA, which had been previously accepted by the Commission. The Commission accepted the revisions, stating that, once the Commission accepts an IA, where the interconnecting generator assumed the responsibility, without protest, "to pay, on a direct assignment basis without credit, for certain facilities," the generator is "bound to the terms and conditions of the [original interconnection agreement] into which it willingly entered."<sup>10</sup> Further, the Commission stated that it "can act on behalf of a party to revise terms and conditions to which the parties have agreed and which the Commission has accepted, only if it finds that the contract is contrary to the public interest under Section 206 [of the FPA]."<sup>11</sup>

4. Duke sought rehearing and filed a complaint, pointing to language in the IA which specifically reserved the parties' rights to request changes to the IA under section 205<sup>12</sup> or 206 of the FPA.

5. On January 28, 2003, the Commission issued *Duke Hinds II*. In *Duke Hinds II*, the Commission agreed with Duke that the revised IA was subject to review under a just and reasonable standard because the agreement contained provisions that allowed either party unilaterally to request changes to the IA under section 205 or 206 of the FPA. Further, the Commission found that the more

stringent public interest<sup>13</sup> standard of review was not the appropriate standard of review; in *Duke Hinds I*, the Commission had "failed to recognize \* \* \* the existence of specific provisions [in the interconnection agreement] preserving [the generator's] statutory right to file a complaint under section 206 and have the Commission revise the [IA] if we find [it] to be unjust and unreasonable."<sup>14</sup> The Commission then directed Entergy to revise its interconnection agreement to reclassify certain facilities as network upgrades and to provide the generator with transmission credits, plus interest, for the costs associated with those facilities, consistent with long-held Commission policy.<sup>15</sup>

### Discussion

6. We will grant the above-captioned requests for rehearing and complaints. All of these IAs involve crediting issues that are inconsistent with Commission Policy. Further, each of the respective Commission-accepted IAs contain language, similar to the language found in the *Duke Hinds II* IA, preserving the rights of the parties to unilaterally seek revisions to their agreements, under sections 205 and 206 of the FPA. Thus, the Commission should evaluate these IAs under the just and reasonable, and not public interest, standard.

#### 1. PG&E

7. In *Pacific Gas and Electric Company*<sup>16</sup> (Docket No. ER02–1330–002), the Commission conditionally accepted for filing, as modified, several executed agreements, to be effective May 17, 2002, relating to the

<sup>13</sup> See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*). Under the *Mobile-Sierra* doctrine, where the Commission has accepted a contract that contains a provision precluding changes to that contract, the Commission can act on behalf of a party to revise terms and conditions only if the Commission finds that the contract is contrary to the public interest, under section 206 of the FPA.

<sup>14</sup> *Duke Hinds II*, slip op. at P 21. See also *Papago Tribal Utility Authority v. Federal Energy Regulatory Commission*, 723 F.2d 950, 954 (DC Cir. 1983).

<sup>15</sup> See *Consumers Energy Company (Consumers)* 95 FERC ¶ 61,233 at 61,804 (2001); *reh'g denied*, 96 FERC ¶ 61,132 at 61,561 (2001) (holding that all network upgrade costs should be credited back to the customer that funded the upgrades once delivery service begins). *American Electric Power Service Corp.*, 91 FERC ¶ 61,308 at 62,051 (2000), *order denying reh'g and granting clarification*, 94 FERC ¶ 61,166 (2001), *order dismissing request for clarification*, 95 FERC ¶ 61,130 (2001), *appeal docketed sub nom. Tenaska, Inc. v. FERC*, No. 01–1194 (DC Cir. April 23, 2001) (*AEP*) (stating the Commission's policy on crediting and interest on credits).

<sup>16</sup> 101 FERC ¶ 61,079 (2002) (Docket Nos. ER02–1330–000; ER02–1330–001).

interconnection of PG&E's transmission system and Los Medanos Energy Center LLC (LMEC), subject to the outcome of any future Commission action in the *Duke Hinds I* rehearing and complaint proceedings. We will now partially grant rehearing with respect to this issue and establish a May 17, 2002 refund effective date, the date the agreements became effective. Specifically, we find that because the agreements at issue contain provisions<sup>17</sup> that allow either party unilaterally to request changes to them under section 205 or 206 of the FPA, the just and reasonable standard applies, consistent with *Duke Hinds II*, and thus the agreements must be modified to be consistent with Commission policy. We will direct PG&E to file such modifications within 30 days of the date of this order.

#### 2. Other IA-Related Rehearing Requests

8. In addition, we have reviewed the IAs, and their corresponding pending requests for rehearing, in other proceedings and partially and fully grant those rehearings. Because the IAs at issue also contain provisions that allow either party unilaterally to request changes to them under section 205 or 206 of the FPA, the just and reasonable standard applies, consistent with *Duke Hinds II*. We find that these agreements must be modified to be consistent with Commission policy. Specifically, in this regard, we partially grant the requests for rehearing in Entergy Gulf States, Inc. (in Docket No. ER02–1472–001); Entergy Services, Inc. (in Docket No. ER02–1151–001); Entergy Services, Inc. (in Docket No. ER02–1069–001); and fully grant the request for rehearing in Entergy Services, Inc. (in Docket No. ER02–2243–002).

9. Accordingly, pursuant to Section 206 of the FPA, the Commission will direct modification to the IAs in those proceedings, in accordance with our ruling in *Duke Hinds II* and Commission policy, within 30 days of the date of this order.

10. In order to give maximum protection to customers, we will establish the refund date at the earliest date allowed. Accordingly, we will direct the Secretary to publish this order in the **Federal Register** and, for Docket Nos. EL03–3–000 and ER02–1472–001; EL03–4–000 and ER02–1151–001;

<sup>17</sup> Paragraph 11 of the Supplemental Letter Agreement (SLA) to the IAs states that, "notwithstanding any other provisions of the SLA, GSFA, or the GIA, PG&E and [LMEC] retain their full and respective rights under Sections 205 and 206 of the [FPA] to file to change or challenge any rate, term or condition in any agreement between them related to LMEC that is or may be on file with the [Commission]." See also Paragraph 5(a) of the SLA.

<sup>7</sup> 16 U.S.C. 824e (2000).

<sup>8</sup> We note that although we are partially granting most of the requests for rehearing and the complaints in the above captioned dockets, we plan to address the other issues raised in these proceedings, that are not addressed in this order, at a later date.

<sup>9</sup> Entergy Services, Inc., 98 FERC ¶ 61,290 at 62,261–62 (2002) (*Duke Hinds I*).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at ¶ 62,262.

<sup>12</sup> 16 U.S.C. 824d (2000).

EL03-5-000 and ER02-1069-001; EL03-13-000 and ER02-2243-002, the refund effective date will be 60 days from the date on which this order is published in the **Federal Register**.

### 3. Other IA-Related Complaints

11. We will also partially grant the complaints filed by Wrightsville Power Facility, L.L.C. (Wrightsville Power) in Docket No. EL02-88-000 and by Kinder Morgan Michigan, LLC (Kinder Morgan) in Docket No. EL03-12-000. We find that, because the agreements at issue contain provisions that allow either party unilaterally to request changes to them under section 205 or 206 of the FPA, the just and reasonable standard applies, consistent with *Duke Hinds II*, and thus the agreements must be modified to be consistent with Commission policy. Accordingly, we will direct modifications to the IAs in these proceedings within 30 days of the date of this order.

12. In order to give maximum protection to consumers, we will establish the refund date at the earliest date allowed. For Docket No. EL02-88-000, because Wrightsville Power filed a complaint on its own motion, we will establish the refund date as July 19, 2002, 60 days after it filed the complaint. For Docket No. EL03-12-000, because Kinder Morgan filed a complaint on its own motion, we will establish the refund date as December 16, 2002, 60 days after it filed the complaint.

#### *The Commission orders:*

(A) The requests for rehearing in Docket Nos. ER02-1330-002, ER02-1472-001, ER02-1151-001, and ER02-1069-001 are hereby partially granted, as discussed in the body of this order.

(B) The request for rehearing in Docket No. ER02-2243-002 is hereby granted.

(C) The complaints filed by Wrightsville Power Facility, L.L.C. (Wrightsville Power) in Docket No. EL02-88-000 and by Kinder Morgan Michigan, LLC (Kinder Morgan) in Docket No. EL03-12-000 are hereby partially granted, as discussed in the body of this order.

(D) The transmission providers in the instant dockets are hereby directed to modify their IAs, as discussed in the body of this order, within 30 days of the date of this order.

(E) The Secretary shall promptly publish this order in the **Federal Register**.

(F) This order is hereby effective as discussed in the body of this order.

By the Commission.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. 03-3113 Filed 2-6-03; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

January 31, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary permit

b. *Project No.:* 12385-000

c. *Date filed:* October 3, 2002

d. *Applicant:* Universal Electric Power Corporation

e. *Name and Location of Project:* The Grenada Dam Hydroelectric Project would be located on the Yalobusha River in Grenada County, Mississippi. The project would utilize the U.S. Army Corps of Engineers' existing Grenada Dam and Reservoir.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

g. *Applicant Contact:* Mr. Raymond Helter, Universal Electric Power Corporation, 1145 Highbrook Street, Akron, OH 44301, (330) 535-7115.

h. *FERC Contact:* James Hunter, (202) 502-6086.

i. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

j. *Description of Project:* The proposed project, using the Corps' existing Grenada Dam and Reservoir, would consist of: (1) Two 80-foot-long, 96-inch-diameter steel penstocks, (2) a powerhouse containing five generating units with a total installed capacity of 12.75 megawatts, (3) a 3-mile-long, 14.7-kilovolt transmission line connecting to an existing substation, and (4) appurtenant facilities. The project

would have an average annual generation of 78 gigawatthours.

k. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at <http://www.ferc.gov> using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1-866-208-3676 or e-mail [ferconlineSupport@ferc.gov](mailto:ferconlineSupport@ferc.gov). For TTY, call (202) 502-8659. A copy is also available for inspection and reproduction at the address in item g. above.

l. *Competing Preliminary Permit—* Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

m. *Competing Development Application—* Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

n. *Notice of Intent—* A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

o. *Proposed Scope of Studies under Permit—* A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work