

in these dockets are unjust and unreasonable under section 206 of the Federal Power Act (FPA).⁷ 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. EL03–12–000.⁸ 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*.⁹ 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."¹⁰ 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]."¹¹

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 205¹² 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 interest¹³ 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."¹⁴ 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.¹⁵

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*¹⁶ (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

¹³ 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.

¹⁴ *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).

¹⁵ 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).

¹⁶ 101 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 provisions¹⁷ 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;

¹⁷ 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.

⁷ 16 U.S.C. 824e (2000).

⁸ 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.

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

¹⁰ *Id.*

¹¹ *Id.* at ¶ 62,262.

¹² 16 U.S.C. 824d (2000).