

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PACIFICORP,

Plaintiff-Petitioner,

CV 02-1238-HA

v.

OPINION AND
ORDER

BONNEVILLE POWER ADMINISTRATION
and STEPHEN J. WRIGHT,

Defendants-Respondents.

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HAGGERTY, Chief Judge:

Before the court is PacifiCorp's petition for an order compelling arbitration (Doc. #1) and Bonneville Power Administration's (BPA) motion for summary judgment (Doc. #18). For the following reasons, PacifiCorp's petition for an order compelling arbitration is granted and BPA's motion for summary judgment is denied.

BACKGROUND

PacifiCorp is an electric utility, and defendant BPA is a federal agency established within the Department of Energy. Both parties provide electricity to customers throughout the Pacific Northwest. On August 9, 1973, the parties executed an Exchange Agreement, which provides that the parties will supply power for delivery to one another's customers. The Exchange Agreement creates an "exchange energy account." When one party supplies power to a customer for the other party's benefit, the supplying party receives a credit in the account. At the end of the month, the party with the net balance of energy credits is compensated for the excess energy it supplied on behalf of the other party. If PacifiCorp's number of credits exceeds BPA's number in the account, then PacifiCorp is compensated at a rate of 2.5 mills (\$.025) per kilowatt-hour. According to BPA, the 2.5 mills rate factor is "hopelessly out of date" and represents "less than 10 percent of the value of energy." BPA's Reply at 18.

On May 4, 1982, the parties executed a General Transfer Agreement (GTA). The GTA enables the parties to supply power to their customers located on the other's transmission lines. Meters placed at specific locations along the lines measure the energy demand.

The Transfer Agreement requires PacifiCorp to supply power to the Dorena substation. A transmission line connects the Martin Creek substation to the Dorena and Latham substations. PacifiCorp is responsible for serving the Dorena load, while BPA is solely responsible for serving Latham. A meter at the Martin Creek substation determines the power needs of both Latham and Dorena. Latham's typical hourly load is 11 megawatts (MW). The Dorena hourly load is determined by subtracting the Latham load from the meter reading at Martin Creek.

During the period of November 16, 2000, through April 4, 2001, a meter error at Martin Creek caused PacifiCorp to supply all of the power for both Dorena and Latham. PacifiCorp's hourly load obligation increased by 11 MW to 13 MW. Neither party was aware of the error. Pursuant to its obligations under the GTA, PacifiCorp's system automatically supplied power to Dorena and Latham based on the increased demand indicated by the faulty meter. According to PacifiCorp, this increased demand forced PacifiCorp to purchase replacement power in the open market at a time of historically high energy prices on the west coast. PacifiCorp contends that it purchased power at rates 10 to 100 times the normal rate for power. The total amount of lost power was 38,000 MW hours. PacifiCorp estimates that it lost more than \$10 million, while BPA contends PacifiCorp's damages are far lower.

Following discovery of the error, the parties discussed different methods for compensating PacifiCorp for the excess power it supplied. BPA offered to replace the lost power, while PacifiCorp

argued that it should receive monetary compensation at a rate equivalent to the elevated prices it paid during the west coast energy crisis.

STANDARDS

The issue before the court is not whether BPA should replace the lost power or compensate PacifiCorp according to market conditions. The narrow issue here is whether the relevant provisions of the Exchange Agreement and GTA mandate that the parties arbitrate the current dispute. The Federal Arbitration Act ("FAA") provides that written agreements to arbitrate disputes "shall be valid, binding, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If a claim is referable to arbitration under a written agreement, the court must direct that issue to arbitration and stay the trial of the remaining issues until arbitration is completed. *Id.* at § 3. Agreements to arbitrate shall be "rigorously enforce[d]." *Dean Witter Reynolds, Inc., v. Byrd*, 470 U.S. 213, 221 (1985). Under the Ninth Circuit's interpretation of section 4 of the FAA:

[T]he district court must order arbitration if it is satisfied that the making of the agreement for arbitration is not in issue. Therefore, the district court can only determine whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms.

Howard Elec. & Mech. v. Frank Briscoe Co., 754 F.2d 847, 849 (9th Cir. 1985) (internal citations omitted).

A district court's narrow review of the arbitrability of designated issues is limited to a determination of: (1) whether a valid agreement to arbitrate exists; and (2) whether the arbitration agreement encompasses the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

With regard to BPA's motion, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not proper if material factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

After reviewing the precise language of the arbitration clause at issue, the court determines that, irrespective of any generalized presumptions favoring arbitration, the agreement covers the dispute at issue, and arbitration is warranted.

DISCUSSION

A. Jurisdiction over the Claims

Defendant-Respondent BPA is a federal agency. There must be an explicit waiver of sovereign immunity in order to entertain a lawsuit against the United States. *McQuade v. United States*, 839 F.2d 640, 642 (9th Cir. 1988); *Holloman v. Watt*, 708 F.2d 1399, 1401-02 (9th Cir. 1983). The court must also find a grant of jurisdiction in order to proceed. *Marcus Garvey Square v. Winston Burnett Constr. Co.*, 595 F.2d 1126, 1131 (9th Cir. 1979).

The Administrative Dispute Resolution Act (ADRA) makes clear that if a federal agency enters into an agreement to arbitrate a particular dispute, sovereign immunity defenses are inapposite. See 5 U.S.C. §§ 575(a), 576. If a party can demonstrate "[a]n agreement to arbitrate a matter," then the claim shall not be dismissed merely because the United States is the defendant. 5 U.S.C. § 576.

As discussed below, the court finds that the parties previously entered into a valid contract to arbitrate certain disputes involving changed conditions that substantially affect the 2.5 mills rate factor.

Rather than find a general agreement to arbitrate all disputes arising out of the relevant contracts, the court finds that the parties have agreed to arbitrate the specific matters now at issue. If the "federal agency prepared [the] agreement, including its arbitration provision, sovereign immunity does not shield the agency from engaging in the arbitration process." *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 423 (2001) (citing *United States v. Bankers Ins. Co.*, 245 F.3d 315, 319-20 (4th Cir. 2001)). According to the ADRA and BPA's explicit agreement to arbitrate this dispute, sovereign immunity has been waived, and this court has subject matter jurisdiction over the claims at issue.

B. Applicability of the Exchange Agreement

The parties disagree as to whether the Exchange Agreement applies to this dispute. Section 2 of the Exchange Agreement states that "sections 4 and 5 shall terminate 20 years from the date of execution." Consequently, these sections of the agreement expired on August 9, 1983. However, the parties still use the exchange energy account created by the Exchange Agreement to track energy flow and compensate parties for supplied excess energy. At the end of each month, PacifiCorp and BPA continue to tally energy credits and compensate the party with the net balance of credits at a rate of 2.5 mills per kilowatt-hour.

Although the section of the Exchange Agreement dealing with the exchange energy account remains in effect, the remainder of the contract cannot govern this dispute because it fails to reference Dorena as a point of delivery. Like the GTA, the Exchange Agreement applies only to specific points of delivery. Unlike the GTA, the Exchange Agreement does not list Dorena as a point of delivery under the agreement. PacifiCorp attempts to undermine the plain language of the Exchange Agreement by

arguing that it still governs the dispute because monthly statements sent by BPA to PacifiCorp reference the Exchange Agreement by contract number. First and foremost, PacifiCorp cites no authority for the proposition that billing statements may add points of delivery not contained within the four corners of the contract. Further, a closer look at the bill reveals that the GTA governs the transaction. The reference to the Exchange Agreement in the billing statement only establishes the process for depositing energy credits in the energy exchange account. These credits are deposited in the exchange account pursuant to the energy transfers that take place under the GTA.

Both the GTA and the Exchange Agreement apply only to specifically defined points of delivery. The Exchange Agreement does not reference the Dorena substation as a point of delivery, and therefore it does not apply to the events of this litigation.

Notwithstanding the above discussion, the energy exchange account created by the Exchange Agreement is directly relevant to the litigation. Use of the exchange account is incorporated into the GTA. Further, the parties' course of performance demonstrates that the 2.5 mills rate factor is utilized to compensate one another for energy credits. Insofar as it creates the exchange account and defines the 2.5 mills rate factor, the Exchange Agreement remains relevant to the issues in dispute.

C. Applicability of the General Transfer Agreement

BPA contends that the GTA does not govern the dispute because Latham is not a named point in the contract. Section 5 of the GTA states, "Electric power and energy shall be made available by the Transferor at all times during the term hereof at the points of delivery described in Exhibits B and C" In this case, PacifiCorp was the transferor of electric power to Dorena. By its express terms, the GTA applies only to deliveries involving "points of delivery described in Exhibits B and C"

Because Latham is not a named point in the GTA, BPA argues that the contract does not apply to this dispute.

Unlike the Exchange Agreement discussed above, the GTA names Dorena as a point of delivery. Thus, in order for the GTA to apply to the dispute at issue, PacifiCorp's obligation to supply power to Dorena must have precipitated the excess supply of energy that led to the 11 MW load being sent to Latham. The court finds that the event would not have occurred but for PacifiCorp's service obligations to a named point in the contract. In the process of supplying electricity to Dorena, the Martin Creek meter error caused PacifiCorp to send excess energy through the transmission system. If PacifiCorp were not required to serve a named point in the contract under the GTA, this misdirection of energy would not have occurred. Thus, PacifiCorp sent the additional electricity through the transmission system with the belief that it was supplying energy to Dorena—a named point in the agreement.

BPA contends that the Martin Creek error would have occurred even if the Dorena substation did not exist because the transmission line also connects Martin Creek to the Village Green substation. However, Village Green is also a named point in the GTA. Accordingly, the GTA governs the dispute arising out of the incident because the incident directly involves a named point in the GTA, whether the relevant point is Dorena or Village Green.

D. Disputes Governed by the Arbitration Clause of the General Transfer Agreement

As a threshold matter, BPA contends that the GTA does not authorize the payment of monetary compensation for the supply of energy. According to BPA, the GTA only allows a party to be paid for transmission services, rather than for the energy itself. The language of the GTA and the parties'

practices indicate that BPA's reading of the agreement is too narrow. The GTA references the Exchange Agreement and the exchange account, which is used to calculate each party's credits and provide compensation for excess energy supplied at a rate of 2.5 mills per kilowatt-hour. GTA Section 6; General Wheeling Provisions (GWP) Section 19 (referring to "any credit in any exchange energy account to be made").

Section 20 of the GWP attached to the GTA contains a narrowly crafted arbitration clause. BPA correctly notes that the clause is limited in scope and does not mandate that all disputes arising out of the agreement be arbitrated. Rather, the GTA only requires arbitration when certain precise questions of fact are disputed. The arbitration clause of the GTA lists nine arbitrable questions of fact: "If the parties do not agree on the determination of any question of fact hereinafter stated, such determination will be made by arbitration." GWP Section 20. The two questions that are relevant to this inquiry address adjustments for inaccurate metering (Section 7) and adjustments for changes of conditions (Section 19).

I. Adjustment for Inaccurate Metering

The arbitration provision of the GWP provides that "Adjustment for Inaccurate Metering" shall be a "question of fact" subject to arbitration. Section 7, entitled "Adjustment for Inaccurate Metering," states, "If any meter mentioned in this agreement fails to register," a corrected measurement shall be made to determine any credit in the exchange energy account and "any money compensation to be paid" to the transferring party.

In this case, the meter used at Martin Creek to determine the Dorena load failed, causing PacifiCorp to supply excess power in late 2000 through the first quarter of 2001. Consequently,

PacifiCorp supplied 13 MW in response to the perceived Dorena load, rather than the normal 2 MW hourly load. By the GWP's express terms, the parties have agreed to arbitrate the issue of whether a named meter failed to register and the amount of any monetary compensation to be paid to PacifiCorp.

2. Adjustment for Change of Conditions

The core issue of this litigation is whether BPA should compensate PacifiCorp at the 2.5 mills per kilowatt-hour rate or at a rate that reflects the elevated market conditions of the time. This ultimate issue is not for the court to resolve. Rather, the inquiry here is limited to the basic question of whether the issue is subject to arbitration. Clearly it is. The GTA states, "If the parties do not agree on the determination of any question of fact" listed, then that question of fact must be put to a neutral arbitrator.

GWP Section 20. Among those questions is the "Adjustment for Change of Conditions":

If changes in conditions hereafter occur which substantially affect any factor required by this agreement to be used in determining (a) any credit in any exchange energy account to be made, money compensation to be paid . . . such factor will be changed in a manner which will conform to such changes of conditions.

GWP Section 19.

Because "the parties do not agree" (GWP Section 19) on the question of whether "changes in conditions" (GWP Section 20) have occurred, the question of fact must go to the arbitrator.

PacifiCorp contends that the 2.5 mills rate factor is not a "factor" for purposes of section 19. Section 4(c) of the GTA lists several factors that can be adjusted based on changed conditions. However, section 4(c) does not claim to stand as an exclusive list of relevant factors involving changed conditions. Section 19 applies to "any factor required by this agreement to be used in determining . . . any credit in any exchange energy account to be made . . . [or] money compensation to be paid . . ."

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GTA Section 19 (emphasis added). The 2.5 mills rate is the crucial factor used by the parties in determining monetary compensation for credits contained in the exchange account. The court makes no finding as to whether the market conditions of late 2000 and early 2001 constitute a change of conditions that "substantially affects" the 2.5 mills rate factor. Rather, the court merely finds that the parties agreed to arbitrate the question of whether the market forces of late 2000 and early 2001 constitute such a change of conditions.

Finally it should be noted that BPA predicts a parade of horrors that will allegedly result from an order compelling arbitration. BPA argues that it will be forced to arbitrate a wide range of questions contained in its contracts with other utilities that contain nearly identical language. The court takes no position on the status of other contracts to which BPA is a party. The court does, however, follow the common law principle that ambiguities in a contract are construed against the drafting party. *See Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 406 (9th Cir. 1992). Here, BPA composed and imposed the cryptic terms of its arbitration clause on its contracting parties. If BPA does not wish to arbitrate incidents involving misdirected energy such as here, the agency can always amend its contracts to provide clearer language.

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CONCLUSION

For the foregoing reasons, PacifiCorp's petition for an order compelling arbitration (Doc. #1) is GRANTED, and BPA's motion for summary judgment (Doc. #18) is DENIED.

This matter is submitted to arbitration in accordance with the parties' agreement for resolution of all issues.

IT IS SO ORDERED.

DATED this 1 day of May, 2003.

/s/ Ancer L. Haggerty

Ancer L. Haggerty
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 2003, I served a copy of the foregoing Docketing Statement via FedEx next-business-day delivery upon each of the following counsel:

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I also certify that on this same day I sent via FedEx next-business-day delivery two copies of foregoing Docketing Statement to the Clerk of the Court for filing.



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