

121, FERC ¶ 61,127
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.

Montana Consumer Counsel

Docket No. EL07-94-000

v.

PPL Montana, LLC,
PPL EnergyPlus, LLC,
PPL Colstrip I, LLC, and
PPL Colstrip II, LLC

ORDER DISMISSING COMPLAINT

(Issued November 2, 2007)

1. In this order, the Commission dismisses a complaint filed by Montana Consumer Counsel (MCC) against PPL Montana, LLC, PPL EnergyPlus, LLC, PPL Colstrip I, LLC, and PPL Colstrip II, LLC (PPL Companies). MCC states that it filed the complaint out of an abundance of caution to ensure that the Commission's jurisdiction to order refunds is clear in the event that the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) reverses a decision of the Commission finding that PPL Companies lack horizontal market power and thus may make wholesale sales at market-based rates. We dismiss the complaint as unnecessary because we find that, if the Commission's decision is overturned on review, the Commission has the authority to correct its action, including ordering refunds.

Background

2. In an order issued on May 18, 2006, the Commission determined that PPL Companies had rebutted a presumption of market power in the control area operated by NorthWestern Corporation (NorthWestern) and satisfied the Commission's generation market power standard for the grant of market-based rate authority.¹ MCC and the

¹ *PPL Montana, LLC*, 115 FERC ¶ 61,204 (2006) (May 18 Order), *reh'g denied*, 120 FERC ¶ 61,096 (2007) (July 27 Order) (Market-Based Rate Proceeding); *appeal pending sub nom. Montana Consumer Counsel v. FERC*, Docket No. 07-73256 (9th Cir. filed Aug. 16, 2007).

Montana Public Service Commission (Montana Commission) filed a joint request for rehearing. The Commission denied the request for rehearing, finding that the May 18 Order properly found that PPL Companies had rebutted the presumption of market power in the NorthWestern control area and that PPL Companies satisfied the Commission's generation market power standard for the granting of market-based rate authority.

3. On September 5, 2007, MCC filed a complaint against PPL Companies alleging that the wholesale rates charged by PPL Companies under a wholesale power contract with NorthWestern that provides for delivery of electric energy from July 1, 2007 through June 30, 2014 (July 2007 contract), are unjust and unreasonable under the Federal Power Act² (FPA). MCC states that it opposed the Commission's grant of market-based rate authority to PPL Companies and has filed a petition for review of that grant of market-based rate authority with the Ninth Circuit. MCC argues that PPL Companies have market power which is reflected in the rates PPL Companies charge and that, as a result of that market power, MCC requests that the Commission institute an investigation into the justness and reasonableness of PPL Companies' rates and set a refund effective date for those rates.

4. MCC explains that it is filing the instant complaint "as a protective matter" so that if the Ninth Circuit reverses the Commission's grant of market-based rate authority in the market-based rate proceeding, Montana consumers will be protected and the Commission's authority to grant refunds will be clear. MCC states that it believes that refunds will be available to Montana consumers for all sales made pursuant to the market-based rate authority granted in the market-based rate proceeding if and when that decision is reversed. However, "[o]ut of an abundance of caution, [MCC] requests that the Commission set a refund effective date so that the Commission's jurisdiction to order refunds will be clear."³

Notice and Pleadings

5. Notice of MCC's complaint was published with answers and comments due no later than October 5, 2007. MCC also filed a draft protective order to govern distribution of protected materials included in the body and appendixes of the complaint. PPL Companies then filed an amended draft protective order which MCC accepted and filed with the Commission on September 19, 2007.

6. REC Silicon, Inc. (REC Silicon), an industrial customer of PPL Companies, filed a motion for leave to intervene in support of MCC. REC Silicon states that it supports

² 16 U.S.C. § 824(d) (a) (2001).

³ Complaint at 4.

MCC's request for an investigation into whether PPL Companies' rates are just and reasonable and urges the Commission to grant the relief requested by MCC. REC Silicon argues that, based on its experience with PPL Companies, PPL Companies are using their market power to charge consumers unjust and unreasonable rates.

7. PPL Companies filed an answer to MCC's complaint stating that MCC's complaint should be dismissed with prejudice. PPL Companies argue that MCC's complaint is barred by *res judicata* and collateral estoppel and that MCC's complaint is an improper attempt to initiate a new section 206 proceeding solely to expand the amount of refund protection available while MCC awaits the Ninth Circuit's decision on the underlying Commission grant of market-based rate authority to PPL Companies.

8. On October 22, 2007, MCC filed a reply to PPL Companies' answer to the complaint.

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), REC Silicon's timely, unopposed motion to intervene serves to make REC Silicon a party to this proceeding. 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 unless otherwise ordered by the decisional authority. We are not persuaded to accept MCC's answer and will, therefore, reject it.

Commission Determination

10. We will dismiss MCC's complaint. We find the complaint unnecessary to ensure that Montana consumers are adequately protected in the event that the Ninth Circuit overrules the Commission's decision.

11. The Supreme Court has held that, where an administrative decision has been overturned by an action of judicial review, the Commission has the power to "undo what is wrongfully done by virtue of its order."⁴ This authority to remedy the wrong of an order overturned by judicial review includes the power to order refunds.⁵

⁴ *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 at 229 (1965) (*Callery*).

⁵ *Callery* at 229-30. In *Clearinghouse*, the D.C. Circuit extended the Commission's authority to order refunds under *Callery* to require customers to pay surcharges to a pipeline. The court explained that, without such authority, parties would be "substantially and irreparably injured by [Commission] errors, and judicial review would be powerless to protect them from much of the losses so incurred." *National Gas Clearinghouse v. FERC*, 965 F.2d 1066 at 1074 (D.C. Cir. 1992).

12. MCC concedes that it filed the complaint out of an abundance of caution to ensure that consumers will be protected and will be able to receive refunds if the Ninth Circuit finds that the Commission erred in granting PPL Companies market-based rate authority. MCC also states that it believes that refunds will be available to Montana consumers for all sales made pursuant to the market-based rate authority granted in the market-based rate proceeding if and when that decision is reversed.

13. We agree that consistent with the “general principle of agency authority to implement judicial reversals,”⁶ the Commission already possesses the power to order refunds should the Ninth Circuit determine that the Commission erred in granting PPL Companies continued market-based rate authority. We note that the Commission has invoked its authority under *Callery* to correct errors resulting from orders overturned by judicial review.⁷ Accordingly, MCC need not file a complaint “out of an abundance of caution” to preserve the right of Montana consumers to receive refunds.⁸ On this basis, we will dismiss the complaint.

The Commission orders:

MCC’s complaint is hereby dismissed for the reasons stated above.

By the Commission.

(S E A L)

⁶ *Clearinghouse* at 1073.

⁷ See *Southern California Edison Company*, 58 FERC ¶ 61,115 (1992) (Commission can order surcharges on amounts previously refunded to customers where such refunds were in error); *El Paso Natural Gas Company*, 52 FERC ¶ 61,186 (1990) (recoupment of lost revenues due to remanded orders through a surcharge does not constitute retroactive ratemaking or violate the filed rate doctrine); *Tarpon Transmission Company*, 53 FERC ¶ 61,033 (1990) (Commission has authority to order refunds where it erroneously failed to place conditions on initial rates); *Southwestern Public Service Company*, 48 FERC ¶ 61,156 (1989) (Commission may require interest on surcharges to make a company whole); *Public Service Company of Indiana*, 14 FERC ¶ 61,058 (1981) (Commission’s authority under *Callery* includes the authority to order interest on refunds).

⁸ In light of our dismissal of the complaint on this basis, we need not address PPL Montana’s claim that the complaint is barred by *res judicata* and collateral estoppel.

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.