

110 FERC ¶ 61,156
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Consumers Power Company

Docket No. PR97-1-003

ORDER DENYING REHEARING AND REJECTING COMPLIANCE FILING

(Issued February 14, 2005)

1. On April 20, 2004, the Commission issued an order clarifying that in rejecting a proposed title transfer tracking (TTT) rate filed by Consumers Energy Company (Consumers), formerly Consumers Power Company, “refunds (with interest) are appropriate to customers who paid the erroneous rate.”¹ Additionally, we required Consumers to make a compliance filing, proposing a fair and equitable TTT rate to be effective October 1, 1996 (the date of its original filing). Consumers filed a request for rehearing of the Clarification Order, largely relating to matters resolved in our previous orders in this proceeding. Additionally, Dynegy Marketing and Trade (Dynegy) filed a request for rehearing, contesting the Commission’s requirement that Consumers refile its TTT rate. In this order, we deny the requests for rehearing, and reject Consumers’ compliance filing as it provides no cost support for its proposal.
2. Our action benefits customers by ensuring that they pay fair and equitable rates for the non-physical transfer of natural gas.

Background

3. Consumers is a Hinshaw pipeline with facilities in the State of Michigan. The Commission reviewed Consumers’ proposed TTT rate for gas transported under its blanket certificate as a petition for rate approval under the fair and equitable standard set

¹ *Consumers Power Co.*, 107 FERC ¶ 61,061 at P 6 (2004) (Clarification Order).

forth in section 284.123(b) (2) of the Commission's regulations.² On September 27, 2002, the Commission applied that standard in rejecting Consumers' proposal on the ground that Consumers had failed to justify its proposal to charge the tracking fee on a volumetric basis, rather than on a per-transaction basis. The Commission found that a volumetric rate was not fair and equitable because the cost of the service is more a function of each transaction, rather than of the volumes transferred.³

4. In December 2003, we denied Consumers' request for rehearing of the September 2002 Order, rejecting, *inter alia*, Consumers' claim that the Commission is without jurisdiction over non-physical title transfers of natural gas.⁴ However, a statement in the December 2003 Order to the effect that no refunds were at issue spawned requests for clarification and/or rehearing by Dynegy and other customers of Consumers, asserting that Consumers had been charging them the TTT rate from the time of its original filing on October 1, 1996.

5. On April 20, 2004, the Commission issued the Clarification Order, correcting its prior statement that no refunds were at issue. As the Commission explained,

Consumers proposed the subject rate pursuant to section 4 of the Natural Gas Act [NGA][⁵] and, as provided under our regulations, the proposed rate went into effect subject to refund. Because Consumers failed to meet its burden under section 4 to support its proposed rate, refunds (with interest) are appropriate to customers who paid the erroneous rate, to the extent that they paid more than they would have under a fair and equitable TTT rate.[⁶]

6. Having established the legitimacy of refunds, however, the Commission was faced with the problem of how to measure them. Our previous orders had not established a fair and equitable TTT rate, but only required that any such rate must be cost-supported. The Commission, therefore, required Consumers to propose a new TTT rate on this basis, to

² 18 C.F.R. § 284.123 (b) (2003). Consumers had originated this proceeding by filing a revised statement of operating conditions pursuant to section 284.123(e), 18 C.F.R. § 284.123 (e) (2004), a course of action we determined was inappropriate.

³ *Consumers Power Co.*, 100 FERC ¶ 61,354 (2002) (September 2002 Order).

⁴ *Consumers Power Co.*, 105 FERC ¶ 61,369 (2003) (December 2003 Order).

⁵ 15 U.S.C. § 717c (2000).

⁶ Clarification Order, 107 FERC ¶ 61,061 at P 6.

be effective October 1, 1996. Once Consumers' fair and equitable rate was approved, the Commission reasoned, we would be in a position to require Consumers to make refunds of the difference between the new legitimate rate and the rejected rate to all customers who paid the former rate, with interest.

7. Accordingly, the Commission ordered Consumers to make a compliance filing, proposing a fair and equitable TTT rate, which would be the basis upon which refunds would be made.

Discussion

The Requests for Rehearing

8. In the September 2002 and December 2003 Orders, the Commission established that Consumers' TTT service was subject to our NGA section 4 jurisdiction and that Consumers must charge for this service on a per transaction, rather than a volumetric basis. Of the arguments that Consumers raises on rehearing, most relate to issues which the Commission resolved in these earlier orders, rather than the Clarification Order. Some of the arguments repeat contentions Consumers made in its prior request for rehearing, while others are new arguments that nonetheless relate to issues resolved in our earlier orders. In either case, the Commission rejects these arguments as not properly before us now.⁷

9. On this basis, we are not considering the following arguments: Consumers' contentions that the Commission does not have jurisdiction over the title transfers engaged in by Consumers;⁸ that the proposed rates are not subject to section 4 of the NGA;⁹ that we have illegally subjected Consumers to the requirements established by Order No. 587, which solely governs interstate natural gas pipelines;¹⁰ that we

⁷ See *AES Warrior Run, Inc. v. Potomac Edison Co.*, 106 FERC ¶ 61,181 at P 1 & n.3 (2004), citing *American Transmission Company LLC*, 96 FERC ¶ 61,193 (2001); *accord*, *California Independent System Operator Corporation*, 96 FERC ¶ 61,267 at 62,021 n.5 (2001); *Southwestern Public Service Company*, 65 FERC ¶ 61,088 at 61,533 (1993).

⁸ Consumers' Request at 15-16.

⁹ *Id.* at 16-17.

¹⁰ *Id.* at 21-23.

mischaracterized Consumers' allegations that the Commission did not regulate title transfer tracking until 2002;¹¹ that the Commission erroneously disallowed calculation of a TTT service rate on a volumetric basis;¹² and that Consumers should have been afforded an opportunity for an oral hearing.¹³

10. Consumers does, however, raise three issues which relate to the Clarification Order's determination that refunds are appropriate here. First, Consumers complains that the Clarification Order fails to make clear that its orders in this proceeding relate only to an interstate TTT service fee charged and collected in connection with Consumers' blanket certificate transportation service.¹⁴ Because the Commission's orders do only apply to that situation, Consumers maintains, these customers

do not ultimately require any refunds because no Consumers customer served subject to FERC's jurisdiction has ever been charged a TTT service fee in connection with such service. . . . [R]efunds are clearly not required for customers that do not and never did exist.¹⁵

It appears, therefore, that Consumers is asserting that the TTT transactions under which the parties seek refunds were not performed under its blanket certificate.

11. The Commission denies Consumers' request for rehearing on this issue. While we agree with Consumers that our jurisdiction is limited to the TTT service performed in connection with service under its blanket certificate, the factual question of whether any of the complaining customers actually received such service is not a legal issue appropriate for consideration in the context of a rehearing request. Rather, it is a factual matter that should be examined and resolved with Consumers' compliance filing, discussed below.

¹¹ *Id.* at 24-25.

¹² *Id.* at 25-27.

¹³ *Id.* at 29.

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 15.

12. Consumers second argument relevant to the refund issue is that in the cases in which the Commission rejected a volumetric methodology for the TTT services of interstate pipelines, no “mention [was] made of the need for any refund.”¹⁶ We reject Consumers’ contention. The proceedings referred to by Consumers were unopposed. There was also no indication that the volumetrically derived rates in these proceedings were ever charged or collected. Thus, these cases do not provide any precedent for the situation before us.

13. Finally, the Commission rejects Consumers’ position that the Commission’s delay in deciding this case was arbitrary and capricious.¹⁷ Presumably, Consumers is seeking to avoid any refund liability on this basis. However, passage of time is but one equitable factor to be considered by the Commission in determining the propriety of a refund remedy.¹⁸ The Commission does not believe that the delay in this case, in the absence of Consumers demonstrating any other factors militating against refunds (such as financial hardship), forms the basis for excusing Consumers from making whole those customers who were charged an illegal rate.

14. Dynegy’s request for rehearing of the Clarification Order attacks the Commission’s directive that Consumers file a proposed TTT rate to be effective on October 1, 1996. This would have the result, Dynegy complains, that “Consumers’ refund liability will be limited to the difference in the amounts paid for the disallowed TTT rate and ultimately approved rate.”¹⁹

15. In support of its position, Dynegy first alleges that “retroactive implementation of changes” to Consumers’ TTT rate “is not consistent with the treatment accorded other

¹⁶ *Id.* at 23, citing *Vector Pipeline L.P.*, Docket No. RP02-479 (*Vector*); *Maritimes & Northeast L.L.C.*, Docket No. RP02-489; *Algonquin Gas Transmission Co.*, Docket No. RP02-492.

¹⁷ While we rejected this contention in our December 2003 Order (105 FERC ¶ 61,369 at P 13 & n.20), it was under the assumption that no refunds were at issue. We therefore consider the question again in the context of the Clarification Order.

¹⁸ See *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1581 (D.C. Cir. 1993).

¹⁹ Dynegy Rehearing Request at 5.

similar tariff filings,” in which new TTT rates were made prospectively effective.²⁰ Next, Dynegy argues that “Commission policy against retroactive changes in rate design would be violated by retroactive implementation of a revised TTT charge.”²¹ Finally, Dynegy maintains that allowing Consumers to revise its TTT rate retroactively would violate the filed rate doctrine.²² On the latter point, Dynegy asserts that the Commission has broad authority in cases under section 284.123 to “order refunds of *any amounts* . . . to ensure that the rates charged are fair and equitable.”²³

16. The Commission denies Dynegy’s request for rehearing. At the outset, we emphasize that in this proceeding, Consumers filed and began charging customers its TTT rate on October 1, 1996. Because we subsequently determined that the filed rate was not fair and equitable, the customers who had been charged the rate (including Dynegy) have sought refunds. We therefore required Consumers to calculate a fair and equitable rate for the period in question to provide an appropriate measure for such refunds (*i.e.*, the difference between the rate Consumers’ charged and the fair and equitable rate). Dynegy, however, would prefer that Consumers disgorge *all* of the money it collected under the rejected rate, rather than be liable for such a “limited” refund. Not surprisingly, Dynegy cites neither precedent nor rationale for the proposition that it should have received TTT service from Consumers for free, rather than at a fair and equitable rate.

17. None of the precedent relied on by Dynegy supports its argument. First, the Commission established in Opinion No. 294 (which is cited by Dynegy) that refunds for filings in cases arising under section 284.123(b)(ii) of the Commission’s regulations do not violate the filed rate doctrine, as the parties were on notice that the proposed rate was

²⁰ *Id.* at 5-6, citing *Kern River Gas Transmission Co.*, 100 FERC ¶ 61,379 (2003); *CNG Transmission Corp.*, 89 FERC ¶ 61,278 (1999); *National Fuel Gas Supply Corp.*, 80 FERC ¶ 61,029 (1997); *Columbia Gulf Transmission Corp.*, 76 FERC ¶ 61,104 (1996).

²¹ *Id.* at 7, citing *Consumers Energy Co.*, 89 FERC ¶ 61,138 (1999); *Connecticut Light and Power Co.*, Opinion No. 114-A, 15 FERC ¶ 61,056 (1981).

²² *Id.* at 8-10.

²³ *Id.* at 9 (emphasis in original), citing Opinion No. 294, *Lear Petroleum Corp.*, 42 FERC ¶ 61,059 at 61,059 (1988).

provisional until approved by the Commission.²⁴ Second, our action here is not inconsistent with the cases in which the Commission approved a new TTT rate to be effective prospectively. In those cases, it appears that the companies had not begun charging the rate, so that there was no question of refunds. Finally, while the Commission has sometimes approved changes in rate design under the NGA solely on a prospective basis, our intent in those cases was to prevent pipelines from making refunds causing them to underrecover their cost of service.²⁵ This precedent, therefore, provides no support for Dynegy's position here.

Consumers' Compliance Filing

18. In its filing purporting to comply with the Clarification Order, Consumers first reiterates its position made on rehearing that "no Consumers' customer served subject to FERC jurisdiction has ever been charged a TTT service fee in connection with such service."²⁶ However, Consumers goes on to state that if it is "nevertheless expected to propose a fair and equitable *interstate* TTT rate," it suggests "a maximum interstate TTT rate of \$25 per transaction and a minimum rate of \$0.00."²⁷ Consumers bases its proposed rate solely on the Commission's approval of the same rate for TTT service in *Vector*.

19. On June 1, 2004, Dynegy filed comments on Consumers' compliance filing. In its comments, Dynegy notes that Consumers neither provided a cost basis for its newly proposed TTT rate, nor showed "that it did not otherwise collect all of the costs associated with the Proposed TTT Rate through its authorized transportation rates."²⁸ Nevertheless, Dynegy accepts Consumers' proposal as providing sufficient compensation, incidentally abandoning its position on rehearing concerning alleged retroactive application of Consumers' rate.²⁹

²⁴ Opinion No. 284, 42 FERC at 61,159-60. *See also Mustang Energy Corp. v. FERC*, 859 F.2d 1447, 1462 (10th Cir. 1988), *cert. denied*, 490 U.S. 1019 (1989).

²⁵ *E.g., Trunkline Gas Co.*, 62 FERC ¶ 61,198 at 62,407, *reh'g denied*, 64 FERC ¶ 61,030 (1993).

²⁶ Consumers' Letter of May 20, 2004, at 2.

²⁷ *Id.* (emphasis in original).

²⁸ Dynegy Comments at 2.

²⁹ *Id.* Dynegy did not, however, withdraw its request for rehearing, so that the Commission is obligated to respond to it.

20. On June 18, 2004, Consumers filed a motion for leave to file a response to Dynegy's answer to its protest and request for rehearing, and its response to them. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to such pleadings unless otherwise ordered by decisional authority. Not being persuaded to accept Consumers' answer, we reject it.

21. The Commission rejects Consumer's compliance filing, as its TTT rate must be based on its costs, not those of another pipeline.³⁰ We are therefore directing Consumers to file a new proposed rate in accordance with the prior orders in this case, effective as of October 1, 1996, with appropriate cost support.

22. Concerning Consumers' claim that none of the parties took TTT service subject to our jurisdiction, we will require any party intending to seek a refund in this proceeding to make a filing supporting their status as TTT customers in connection with the service provided under Consumers' blanket certificate during the relevant period.

23. Finally, while the Commission acknowledges Dynegy's concern about the protracted nature of this proceeding, we are nonetheless constrained to ensure that companies comply with our regulations. However, nothing prevents the parties from expeditiously reaching a settlement that would resolve this proceeding, if they are so inclined.

The Commission orders:

(A) The requests for rehearing are hereby denied.

(B) Consumers' compliance filing is hereby rejected.

(C) Consumers is hereby directed, within 15 days of the issuance of this order, to make a filing in compliance with the orders in this docket, proposing a fair and equitable TTT rate to be effective October 1, 1996, with appropriate cost support.

³⁰ In *Vector*, the pipeline supplied its cost support for the TTT rate that was ultimately approved by the Commission.

(D) Any party seeking a refund in this proceeding is hereby directed, within 15 days of the issuance of this order, to make a filing in this docket demonstrating their status as Consumers' TTT service customers during the relevant period.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.