UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Union Power Partners, L.P.

v. Docket No. EL05-1-000

Entergy Services, Inc.
Entergy Operating Companies

ORDER GRANTING COMPLAINT

(Issued February 20, 2007)

1. The order grants a complaint by Union Power Partners, L.P. (Union) requesting that the Commission direct Entergy Operating Companies and Entergy Services, Inc. (collectively Entergy) to reclassify certain facilities as network facilities and to provide transmission credits with interest for all network upgrades.

I. Background

2. Union is the owner and operator of a 2,200 MW combined-cycle generating facility located in Union County, Arkansas. On April 26, 2001, Union entered into an Amended and Restated Interconnection Agreement (IA) with Entergy to connect its facility with Entergy's El Dorado Substation.[1] Under the IA, Union was required to pay for the upgrades of facilities classified as direct assignment facilities.

3. On October 4, 2004, Union filed a complaint, alleging that Entergy is violating the Commission's transmission policy prohibiting "and" pricing by failing to provide transmission credits with interest to Union for the construction of facilities that, in fact, are properly classified as network upgrades. Union contends that its complaint conforms

[1] *See Entergy Services, Inc.*, Docket No. ER01-1367-000 (April 26, 2001) (unpublished letter order).

to the principles applied by the Commission in *Duke Hinds*[2] for addressing impermissible "and" pricing associated with network facilities paid for pursuant to an interconnection agreement. Citing *Duke Hinds* and *PG&E*, Union argues that the just and reasonable standard of review is the appropriate standard because section 23.4 of its IA and Entergy's Open Access Transmission Tariff (OATT) allow it to request changes under section 206 of the Federal Power Act (FPA)[3] on the grounds that Entergy's rates are not "just and reasonable" and should be required to conform with Commission pricing policy. Union further argues that, in the IA, Entergy applies the same transmission pricing practice found unjust and unreasonable in *Duke Hinds* and that Entergy therefore should provide transmission credits of $26.3 million, plus interest, to Union and make conforming revisions to Union's IA.

II. Notice of Filing and Responsive Pleadings

4. Notice of Union's filing was published in the *Federal Register*, 69 Fed. Reg. 60,848 (2004), with interventions, answers and protests due on or before October 25, 2004. The Arkansas Public Service Commission filed a timely notice of intervention and Cottonwood Energy Company, LP filed a timely motion to intervene. Calpine Corporation (Calpine) filed a motion to intervene one day out of time.

5. On October 25, 2004, Entergy filed an answer to Union's complaint. On November 9, 2004, Union filed a response to Entergy's answer (Response). On November 23, 2004, Entergy filed an answer to the Response, and on December 9, 2004, Union filed an answer to that answer.

6. In its answer, Entergy contends that the Commission decision in *Duke Hinds* exceeded the scope of section 206 of the FPA. Entergy contends that refunding previously Commission-accepted and already-collected charges would constitute retroactive relief.

7. Entergy asserts that the IA provides credits only for Union's investment in optional system upgrades and that all of the facilities at issue in Union's complaint are necessary for the safe and reliable integration of Union's generating facility with the Entergy Transmission System and thus could not qualify as credit-eligible optional system upgrades. Entergy further asserts that Union has paid for direct assignment facilities and separately been subject to Entergy's embedded transmission rate applicable

[2] Union cites *Duke Energy Hinds, LLC, et al*., 102 FERC ¶ 61,068 (2003) (*Duke Hinds II*), *order on reh'g*, 117 FERC ¶ 61,210 (2006) (*Duke Hinds III)* and *Pacific Gas and Electric Co., et al.,* 102 FERC ¶ 61,070 (2003), *order on reh'g,* 102 FERC ¶ 61,212 (2003) (*PG&E*), *order on reh'g*, 117 FERC ¶ 61,294 (2006).

[3] 16 U.S.C. § 824e (2000).

to any Entergy customer requesting transmission delivery service, a cost allocation that is clearly consistent with the Commission's established pricing policies under the *pro forma* OATT. Entergy argues that any requirement to provide transmission credits for the facilities at issue will violate the Energy Policy Act of 1992 (EPAct 1992) which provides that when transmission service (and thus interconnection service) is required to be provided, a utility's other customers should not have to bear the costs of that service. Entergy states that section 722 of EPAct 1992 (section 212 of the FPA) imposes the restriction that rates and charges for transmission service provided under FPA section 211 are to be recovered from the applicant for the service and not from the transmission provider's existing wholesale, retail, and transmission customers.[4] Entergy states that the Commission has agreed that this restriction applies to transmission service provided under any section of the FPA, including sections 205 and 206. Entergy further contends that Union fails to establish that the facilities at issue actually benefit all (or any) of Entergy's other transmission customers.

8. In regard to the metering facilities, Entergy argues that Union's request for credits associated with metering facilities should be rejected because the sole purpose of these facilities is to monitor the operations of the Union facility.

9. In its response, Union clarifies that its complaint does not intend to allege that the disputed metering facilities, worth approximately $540,000, are transmission equipment. Union agrees with Entergy that the meters in question are directly assignable to Union.

III. Discussion

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214, all timely notices of intervention and motions to intervene serve to make the parties that file them parties to this proceeding. Given the early stage of this proceeding, and the absence of any prejudice or delay, we will accept Calpine's request for rehearing filed one day out-of-time.

11. While the Commission, pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (a)(2) (2006), generally prohibits answers to answers, the Commission will accept that portion of Union's Response that clarifies the record in regard to Union's funding of metering facilities. That portion eliminates confusion on the issue. We will not accept the remainder of Union's Response, or the further answers of Entergy and Union.

[4] *See* Energy Policy Act of 1992, at §§ 721,722 (codified at 16 U.S.C. §§ 824j, 824k (2000)).

12. On November 17, 2006, the Commission issued an order on rehearing of *Duke Hinds II*.[5] As that order discusses each substantive issue raised in the instant proceeding, we will not now discuss them further here.[6] The upgrades at issue here are all at or beyond the point of interconnection and thus should properly be classified as network upgrades.

13. In accordance with our determination in *Duke Hinds III*, we will grant Union's complaint and order Entergy to pay credits for all of the network facilities paid for by Union. These include upgrades that Entergy has classified as Interconnection Facilities, Optional System Upgrades and Required System Upgrades but, as acknowledged by Union, do not include the metering equipment listed in Appendix C of Union's complaint. We will direct Entergy to file revisions to its IA reflecting this decision within 30 days of the date of this order.

14. In cases where, as here, the Commission institutes an investigation on a complaint under section 206 of the FPA, section 206(b), as it was in effect at the time that Union filed its complaint, requires that the Commission establish a refund effective date that is no earlier than 60 days after the date a complaint was filed, but no later than five months after the expiration of such 60-day period.[7] Union began operation in January, 2003 and filed its complaint on October 4, 2004. Accordingly, we will set the refund effective date at December 3, 2004, 60 days after the date the complaint was filed.

15. Section 206 of the FPA states that the Commission may order a refund of any amount paid, for the period after the refund effective date through a date fifteen months

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[5] *Entergy Services Inc.*, 117 FERC ¶ 61,210 (2006) (*Duke Hinds III)*.

[6] *Id.* at P 21–24 (upholding the Commission's long-standing transmission service pricing policy and that when a generator pays for upgrades located "at or beyond" the point of interconnection to the transmission grid, it is entitled to credits, with interest, because these are network upgrades); P 26 (stating that this pricing policy does not violate FPA section 212 and does not result in a subsidy by wholesale, retail and transmission customers because the integrated transmission grid is a cohesive network and upgrades benefit all users, not just the newly-interconnecting generator;) P 32-36, 40 (finding that *Duke Hinds II* did not violate the filed rate doctrine and the rule against retroactive ratemaking by requiring refunds).

[7] We note that section 206(b) of the FPA was amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980–81 (2005), to require that in the case of a proceeding instituted on a complaint, the refund effective date shall not be earlier than the date of the filing of such complaint or later than five months after the filing of such complaint.

after such refund effective date.[8] Therefore, Entergy is directed to provide Union with any credits that would have been accrued from the refund effective date, December 3, 2004, through March, 3, 2006, which is fifteen months after the refund effective date, with interest calculated in accordance with 18 C.F.R. § 35.19(a)(2)(ii). Further, Entergy is required to provide Union credits on a prospective basis from the date of this order and to revise the IA accordingly. Entergy must file a compliance report, within fifteen (15) days after making the required credits.

16. Pursuant to Article 11.4.1 of the Large Generator Interconnection Agreement, which provides for a maximum 20-year refund period, credits for the four distinct periods at issue are to be calculated as follows: Credits accrue over a 20-year period commencing from commercial operation of the generator. For the period from commercial operation until December 3, 2004, any credits that would have been earned are not recoverable, and interest on those credits will not be paid.[9] From December 3, 2004 through March 3, 2006, the credits earned are recoverable, and Entergy must pay Union credits for this period with interest, as discussed above. From the end of the 15-month refund effective period until the date of the Commission order, any credits that would have been earned are not recoverable, and interest on those credits would also not be paid. Finally, to the extent that Union has not previously taken service for which credits either did accrue or would have accrued, Entergy must provide Union credits with interest on a prospective basis from the date of this order.

The Commission orders:

(A) Union's complaint is hereby granted

(B) Entergy is hereby directed to file, within 30 days of this order, a revised IA reflecting the provision of credits as discussed in the body of this order.

(C) Within 30 days of this order, Entergy is hereby directed to provide Union any credits that would have been accrued from the refund effective date, December 3, 2004, through March 3, 2006, with interest calculated in accordance with 18 C.F.R. § 35.19(a)(2)(ii). Further, the Entergy is hereby required to provide Union credits on a prospective basis from the date of this order, as discussed in the body of this order.

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[8] 16 U.S.C. § 824e (b).

[9] In *Duke Hinds III*, we provided an example of how the dollar amount of the credits was to be reduced to account for transmission service payments made before the refund effective date. *Duke Hinds III* at P 34. In this case, this example would also apply to the period from the end of the 15-month refund effective period until the date of the Commission order.

(D) Entergy is hereby directed to file a compliance report, within fifteen (15) days after providing credits.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.