145 FERC ¶ 61,052
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Chehalis Power Generating, L.P. Docket No. ER05-1056-007

ORDER ON VOLUNTARY REMAND AND CLARIFYING POLICY ON FILING OF REACTIVE POWER SERVICE RATE SCHEDULES

(Issued October 17, 2013)

1. This case is before the Commission on voluntary remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Below, the Commission continues to affirm its finding that the rate schedule Chehalis Power Generating L.P. [1] (Chehalis) proposed for supplying Reactive Supply and Voltage Control from Generation Sources Service (reactive power) to the Bonneville Power Administration (Bonneville or BPA) is a changed rate subject to the suspension and refund provisions of section 205(e) of the Federal Power Act (FPA).[2] However, the Commission clarifies its policy related to jurisdictional reactive power rate schedules for which there is no compensation, requiring that such rate schedules containing the rates, terms, and conditions for reactive power service be filed with the Commission on a prospective basis. This policy will ensure that ratepayers are protected from, *inter alia*, excessive rates, as the Commission will have the ability to suspend and refund any changed rates upon filing.

[1] On October 20, 2010, TNA Merchant Projects, Inc. (TNA) filed a motion with the Commission to substitute itself for Chehalis. In appeal proceeding No. 08-1201, the D.C. Circuit granted a similar motion and substituted TNA as petitioner in place of Chehalis because TNA owned all the equity interests in Chehalis at the time Chehalis filed its petition for review, and while TNA sold the equity interests, it nevertheless retained the rights to the claims made in this proceeding. For consistency with the Commission's earlier orders and the parties' pleadings, the D.C. Circuit continued to refer to the petitioner as "Chehalis." *TNA Merchant Projects v. FERC*, 616 F.3d 588, 589 n.1 (D.C. Cir. 2010) (*TNA Merchants Projects*). We will also refer to the petitioner, TNA, as "Chehalis."

[2] 16 U.S.C. § 824d(e) (2006).

I. Background

2. On May 31, 2005, Chehalis submitted a proposed rate schedule to the Commission setting forth proposed rates for Chehalis's provision of reactive power to Bonneville. Chehalis denominated the rate as "initial" stating that "[t]he reactive power service that is the subject of the submitted rates is a new service offered by Chehalis in that it has never sought to charge for this service before."[3]

3. On July 27, 2005, the Commission accepted Chehalis's reactive power rate schedule, suspended it for a nominal period, made it effective subject to refund, and established hearing and settlement judge procedures.[4] In that order, the Commission found that the reactive power rate schedule was not an initial rate, because "[a]n initial rate must involve a new customer and a new service."[5] The Commission stated that "Chehalis has been providing reactive power to BPA pursuant to an interconnection agreement, albeit without charge. Thus, the proposed rates for reactive power in the instant proceeding are not initial rates, but are changed rates."[6]

4. On December 15, 2005, the Commission denied Chehalis's rehearing request. The Commission explained that its well-settled precedent established that an initial rate is a rate for a new service to a new customer.[7] Finding that Chehalis had already been providing reactive power to Bonneville, the Commission denied rehearing and explained that Chehalis was not providing a new service to a new customer.[8]

5. On May 23, 2008, Chehalis petitioned the D.C. Circuit for review.[9] On August 10, 2010, the D.C. Circuit remanded the case to the Commission on a single

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[3] Chehalis May 31, 2005 Filing Letter at 6.

[4] *Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144, at PP 1, 21 (2005).

[5] *Id.* P 23.

[6] *Id.*

[7] *Chehalis Power Generating, L.P.*, 113 FERC ¶ 61,259, at P 11 (2005); *accord id.* PP 13-15.

[8] *Id.* PP 11-12.

[9] In the meantime, the Commission, having ordered settlement and hearing procedures on the proper rate for the reactive power, determined a just and reasonable rate and ordered Chehalis to make refunds to Bonneville. *Order on Initial Decision*, 123 FERC ¶ 61,038, at P 13 (2008).

issue: whether or not the rate for reactive power should have been filed with the Commission. In its remand order, the D.C. Circuit observed that, while Chehalis had advanced "a host" of grounds for reversing the Commission's orders, and while the Commission had provided responsive arguments, the court would address only one of Chehalis's arguments, one that the court stated that the Commission "entirely failed to address."[10] That argument is that "the only rates that are subject to § 205(e)'s suspension and refund provisions are those that change a rate already *on file with* FERC."[11]

6. The D.C. Circuit summarized Chehalis's "on file with" argument as follows: before May 31, 2005, Chehalis had not filed a rate schedule—pursuant to FPA section 205(c)—for the reactive power it provided to Bonneville. Because Chehalis had not previously filed a rate schedule for the reactive power it provided to Bonneville, Chehalis stated that there could be no change in rates under the FPA. And because FPA section 205(e) limits the Commission's power to suspend rates and order refunds to changed rates, the Commission therefore could not suspend and order refunds here.[12] The court remanded the case to the Commission to consider this argument.[13]

7. In its order on remand, the Commission found that the rate for reactive power that Chehalis provided to Bonneville should have been filed, thus making Chehalis's filing a changed rate, subject to the suspension and refund provisions of section 205(e) of the FPA.[14] The Commission noted that, in any event, whether or not a pre-existing rate had, in fact, been filed with the Commission was not part of the Commission's longstanding test for the determination of what constitutes a changed versus an initial rate.[15] The Commission's well settled precedent was that an initial rate was one that involved both a new service and a new customer.[16] Because the record in the case showed that Chehalis

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[10] *TNA Merchant Projects*, 616 F.3d at 591-92.

[11] *Id*. at 592 (*emphasis supplied*).

[12] *Id*. The D.C. Circuit correctly observed that neither Bonneville nor Chehalis disputes that Chehalis did not file a rate schedule for reactive power service before May 31, 2005. *Id*.

[13] *Id*. at 593.

[14] *Chehalis Power Generating, L.P.*, 134 FERC ¶ 61,112, at PP 19-21 (2011) (Remand Order).

[15] *Id.* P 4.

[16] *Id.* P 21.

had been providing reactive power service to Bonneville since 2003, the proposed rate schedule for the provision of reactive power filed on May 31, 2005 did not propose a rate for a new service and a new customer.[17]

8. The Commission denied rehearing of its Remand Order, stating that section 205 of the FPA required that rates, terms, and conditions of jurisdictional services must be filed with the Commission, and because reactive power is a jurisdictional service, Chehalis should have filed its rate schedule for reactive power. Accordingly, the Commission found it was fair to treat Chehalis's proposed rate schedule at issue as a changed rate.[18] The Commission also rejected Chehalis's contention that the Commission's action was contrary to its precedent "cancelling and rejecting generators' rate schedules when there is no longer any compensation associated with the obligation to follow a voltage schedule."[19] The Commission distinguished *Hot Spring Power Co., L.P.*[20] and other similar cases cited by Chehalis on the ground that, while the purchasing utilities involved were not obligated to pay the generators for within-the-deadband reactive power, the generators in those cases all had, in fact, filed rates.[21]

9. On appeal of the Remand Order and Rehearing Order, Chehalis contends that the Commission erred by determining: (1) that the interconnection agreement between Chehalis and BPA was required to be filed prior to May 2005, even though it did not contain rates for reactive power service and Chehalis was not proposing to collect charges for such service prior to that date, and (2) that the proposed rate schedule for supply of reactive power service filed by Chehalis in May 2005 was a change in rates that could be suspended and made subject to refund under section 205(e) of the FPA. Chehalis specifically argued that, in prior Commission orders, when the generators cancelled their existing reactive power rate schedules, the Commission accepted those

[17] *Id.*

[18] *Chehalis Power Generating, L.P.*, 141 FERC ¶ 61,116, at P 17 (2012) (Rehearing Order).

[19] *Id.* P 20.

[20] 113 FERC ¶ 61,080 (2010).

[21] Rehearing Order, 141 FERC ¶ 61,116 at P 20.

cancellations without suggesting that a replacement rate schedule must be filed for the supply of reactive power without compensation.[22]

10. Upon consideration of Chehalis's brief filed with the court, the Commission moved for a voluntary remand to more fully consider Chehalis's arguments. On June 18, 2013, the court granted the Commission's motion.

II. Commission Determination

11. The Commission finds that further explanation is required in this proceeding. Section 205 requires that rates, terms, and conditions for jurisdictional services must be filed with the Commission; the statute does not make such a filing optional, or otherwise grant discretion to utilities to decide whether or when they must file their rates, terms, and conditions.[23] If the provision of reactive power is a jurisdictional service,[24] and no one in this proceeding denies that it is, then the utility providing this service has an obligation to file a rate schedule governing the provision of this service. Accordingly, we reaffirm our finding that Chehalis should have earlier filed a rate schedule for its provision of reactive power service, making its later filing on May 31, 2005, a changed rate.

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[22] Brief of Petitioner, *TNA Merchant Projects, Inc. v. FERC*, No. 13-1008, at 28-29 (D.C. Cir. Apr. 15, 2013).

[23] 16 U.S.C. § 824d(c) (2006).

[24] *See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,703 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). Indeed, if it were not a jurisdictional service, then Chehalis should not have filed its proposed rate schedule and proposed reactive power rate in the first place, and the Commission should not have accepted it and should not have authorized Chehalis to charge the rate. Rather, Chehalis has recognized that this service is a jurisdictional service, which warrants a filing, as evidenced by the fact of Chehalis's filing.

12. However, the Commission also recognizes that it has previously accepted notices of cancellation of reactive power rate schedules where compensation was no longer involved. In order to clarify the Commission's policy related to reactive power service provided without compensation, the Commission finds that, on a prospective basis, for any jurisdictional reactive power service (including within-the-deadband reactive power service) provided by both existing and new generators, the rates, terms, and conditions for such service must be pursuant to a rate schedule on file with the Commission,[25] even though the rate schedule would provide no compensation for such service.[26] The Commission directs staff to conduct a workshop, in a generic proceeding, to explore the mechanics of public utilities filing reactive power rate schedules for which there is no compensation.

13. This policy is consistent with the Commission's precedent distinguishing between a changed rate and an initial rate.[27] In *Southwestern Electric Power Co.*, the Commission

[25] We note that our *pro forma* large generator interconnection agreement, in section 9.6, governs the provision of reactive power by an interconnection customer, i.e., by a generator, including the instance where an interconnection customer, i.e., a generator, may charge for reactive power outside the deadband. Absent payment to the transmission provider's own or affiliated generators, our longstanding policy has been that a transmission provider does not have to separately pay an interconnection customer, i.e., a generator, for reactive power within the deadband.

[26] 16 U.S.C. § 824d(c) (2006) (requiring that "every public utility shall file with the Commission . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services"); *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,987, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (stating that the Commission has considerable flexibility in determining what rates and practices are "for or in connection with," "affecting," "pertaining" or "relat[ing] to" jurisdictional service and, accordingly, must be filed for Commission review)*; Sulphur Springs Valley Elec. Coop.*, 107 FERC ¶ 61,284, at P 7 (2004) (finding that the public utility was obligated to file two agreements for jurisdictional services even though there were no specified charges or revenues associated with the agreements).

[27] *See, e.g., WPS Canada Generation, Inc.*, 103 FERC ¶ 61,193, at P 15 (2003) (finding that a particular facility had been providing reactive power service to Maine Public for years, although under different ownership, and, therefore, the proposed rates were changed rates rather than initial rates); *Calpine Oneta Power, L.P.*, 103 FERC

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defined an initial rate as one that provides for a new service to a new customer.[28] The Commission explained: "We believe that our broadened definition of a change in rate is consistent with and serves to further the policies which underlie the FPA. The primary purpose of the legislation is the protection of customers from excessive rates and charges."[29] The Commission emphasized that this definition of a changed rate allowed the Commission to give customers refund protection and, therefore, shield them from the ability of utilities to exploit any sort of regulatory lag by filing unjust and unreasonable rates.[30] Stressing this policy of protecting customers, the Commission stated: "Taking a

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¶ 61,338, at P 11 (2003) (finding that the Oneta Project had been supplying reactive power to Public Service Company of Oklahoma, although without charge); *Public Service Co. of Colorado*, 74 FERC ¶ 61,354, at 62,087 & n.2 (1996) (finding that a power supply agreement with Glenwood Springs adds a new customer to an existing service and, therefore, constitutes a changed rate); *Northern States Power Co.*, 74 FERC ¶ 61,106, at 61,345 (1996) (finding that Northern States's filing was a changed rate because it unbundled its requirements rates to provide for separately-stated charges for various types of transmission); *Gulf States Utilities Co.*, 45 FERC ¶ 61,246, at 61,725 (1988) (finding that a rate schedule for transmission service was a changed rate because Gulf States was already providing service to Lafayette and Plaquemine and the present filing merely provided for a different service to existing customers); *Florida Power & Light Co. v. FERC*, 617 F.2d 809, 813-17 (D.C. Cir. 1980) (finding that the Commission had a reasonable basis for changing its policy so as to treat transmission agreement schedules as changed rates subject to the Commission's suspension and refund powers, in light of previously existing interchange agreements, rather than initial rates not subject to such powers).

[28] 39 FERC ¶ 61,099, at 61,293 (1987) (*Southwestern*).

[29] *Id.* (citing *Town of Alexandria v. FPC*, 555 F.2d 1020, 1028 (D.C. Cir. 1977); *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971); *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944)).

[30] The Commission recognizes that section 206 of the FPA has been modified since the issuance of *Southwestern*. While the new section 206 has eliminated some of the differences underlying the finding in *Southwestern*, a fundamental difference still exists between the refund protection provided under section 205 of the FPA (suspension and refund protection for the entire period the filed rate is collected prior to issuance of a final Commission order) and section 206 (refund protection limited to a 15-month period). Thus, the Commission reaffirms its definitions of initial and changed rates in

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broad view as to what constitutes a change in rate clearly serves, by making filings subject to the Commission's suspension and refund authority under section 205(e) of the FPA, to protect customers of electricity from excessive or exploitative rates."[31]

14. As we explain below, because our policy is being clarified and we are prospectively providing for the filing of rates, terms and conditions for the provision of reactive power service (even within-the-deadband reactive power service) for which there is no compensation, we find that it would be appropriate for Chehalis to recover the amounts it previously refunded to BPA, with interest calculated in accordance with 18 C.F.R. § 35.19a (2013).[32] The D.C. Circuit has recognized the Commission's authority to order recoupment of funds previously paid if the Commission provides adequate explanation.[33] In the instant case, we find the recoupment of funds would be appropriate.[34] The Commission is clarifying its policy and, as explained above, finding that, with regard to jurisdictional reactive power service (even within-the-deadband reactive power service) for which there is no compensation, on a prospective basis rate schedules governing the rates, terms, and conditions for such service must be on file with the Commission.[35] Therefore, given that we are applying this policy on a prospective basis, we find that it would be appropriate for Chehalis to recover the amounts previously refunded to BPA, with interest.

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order to carry out the primary purpose of the statute, i.e., to protect customers from excessive rates and charges. *See*, *e.g.*, *Southwestern*, 39 FERC ¶ 61,099.

[31] *Id*.

[32] *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (breadth of Commission discretion is at its zenith when fashioning remedies).

[33] *Black Oak Energy, LLC v. FERC*, 725 F.3d 230 (D.C. Cir. 2013).

[34] *Cf. Transmission Agency of Northern California v. FERC*, 495 F.3d 663 (2007).

[35] The Commission also clarifies that it does not intend to exercise its authority to impose enforcement sanctions for a jurisdictional entity's failure, prior to this order, to have a rate schedule on file for the provision of reactive power service without compensation. However, jurisdictional entities are reminded that they must submit filings on a timely basis in the future or face possible sanctions by the Commission.

The Commission orders:

The Secretary is hereby directed to promptly publish a copy of this order in the *Federal Register*.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.