

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

ExxonMobil Chemical Company and
ExxonMobil Refining & Supply Company

Docket No. EL05-65-001

v.

Entergy Services, Inc. and Entergy
Services Operating Companies

ORDER DENYING REQUESTS FOR RECONSIDERATION AND REHEARING
AND PROVIDING CLARIFICATION

(Issued September 7, 2005)

1. In a February 2005 complaint, ExxonMobil Chemical Company and ExxonMobil Refining & Supply Company (ExxonMobil) alleged that (1) the netting restriction of a 1999 Agreement of Electric service (Electric Service Agreement) between ExxonMobil and Entergy Services, Inc. and Entergy Operating Companies (Entergy) is unlawful and (2) Entergy unlawfully bills a Monthly Facilities Charge to ExxonMobil. In an April 18 Order, the Commission denied the first allegation and set for evidentiary hearing issues related to the second allegation.¹ On May 18, 2005, ExxonMobil filed a pleading styled as a request for rehearing of the April 18 Order. Entergy also filed a request for rehearing.

2. As discussed below, because the first allegation of ExxonMobil's complaint arises under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA),² formal rehearing does not lie. While ExxonMobil has styled its pleading as a request for rehearing, we will treat the pleading with regard to the first allegation as a request for reconsideration, which we deny. We also deny requests for rehearing by both ExxonMobil and Entergy with regard to the Commission's setting for hearing issues related to the second allegation of the complaint. However, the Commission provides clarification with regard the issues set for hearing.

¹ *ExxonMobil Chemical Co.*, 111 FERC ¶ 61,063 (2005) (April 18 Order).

² 16 U.S.C. § 824a-3 (2000).

Background

ExxonMobil Complex and Related Contracts with Entergy

3. ExxonMobil operates a chemical manufacturing facility and a petroleum refinery complex located in Baton Rouge, Louisiana that spans 1700 acres (Complex). ExxonMobil owns and/or operates two qualifying facilities (QFs) that are located at the Complex. The three substations located at the Complex are interconnected to Entergy's 230 kV transmission grid at three separate points.³

4. To support ExxonMobil's sale of energy to third parties from the Complex, on May 28, 1999, ExxonMobil and Entergy Gulf States, Inc. (an Entergy Operating Company) executed an Interconnection and Operating Agreement (IOA). The IOA is on file with the Commission as a jurisdictional rate schedule.⁴

5. Also on May 28, 1999, ExxonMobil and Entergy Gulf States, Inc. executed a "1999 Agreement of Electric Service" (Electric Service Agreement), pursuant to which Entergy purchases power from the ExxonMobil Complex and Entergy provides back-up service to the Complex. The Electric Service Agreement, unlike the IOA, is not on file with the Commission. Subsection E of Article VI of the Electric Service Agreement contains a provision prohibiting the netting of generation and load for the Complex.⁵ The Electric Service Agreement also provides for (in Article VII, section A) the development of a Monthly Facilities Charge under which ExxonMobil compensates Entergy for costs incurred by Entergy for constructing facilities for ExxonMobil's benefit and for modification of the Entergy transmission system or other facilities that are required to provide services specified in the Electric Service Agreement. Rider A to the Electric Service Agreement sets forth the Monthly Facilities Charge and Entergy's investments in specified facilities.

³ See April 18 Order, 111 FERC ¶ 61,063 at P 3-4, for additional details regarding the Complex.

⁴ The IOA was approved by a Commission Letter Order at 90 FERC ¶ 61,272 (2000), as part of a settlement agreement in Docket No. ER99-3252-000.

⁵ Subsection E of Article VI provides that: "[i]n no event will generation from either Esso Substation, Exxon Substation, Enco Substation or 1A steam turbine generator be used to offset load at any Point of Delivery other than the point to which that generation is physically connected."

ExxonMobil Complaint

6. On February 17, 2005, ExxonMobil filed a complaint alleging that: (1) the netting restriction of the Electric Service Agreement between ExxonMobil and Entergy is unlawful and (2) Entergy unlawfully bills a Monthly Facilities Charge to ExxonMobil for network upgrades.

7. The April 18 Order rejected as unfounded the first allegation because the relevant provisions of the Electric Service Agreement are exempt from section 205 of the Federal Power Act (FPA)⁶ under our regulations implementing section 210 of PURPA and the parties voluntarily entered into an agreement regarding the terms and conditions of PURPA sales. With regard to the second allegation, the Commission set for hearing the issues of whether the network upgrades and related charges are subject to Commission jurisdiction and, if so, when they became subject to the Commission's jurisdiction, whether the Monthly Facilities Charge violated the Commission's policy prohibiting "and" pricing, and Entergy's potential refund obligations related to the Monthly Facilities Charge.

8. On May 18, 2005, ExxonMobil and Entergy filed requests for rehearing of the April 18 Order.

Discussion

A. Procedural Matters

9. Because the first allegation of ExxonMobil's complaint arises under section 210 of PURPA, formal rehearing does not lie, either on a mandatory or discretionary basis.⁷ Thus, while ExxonMobil has styled its pleading as a request for rehearing, we will treat the pleading with regard to the first allegation, in our discretion, as a request for reconsideration.

10. ExxonMobil argues that the Commission's rejection of ExxonMobil's April 8, 2005 answer to Entergy's answer was arbitrary and capricious. It also states that it incorporates by reference the answer to make it part of its rehearing. The April 18 Order stated the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to an answer, such as ExxonMobil's pleading, unless

⁶ 16 U.S.C. § 824d (2000).

⁷ See *Southern California Edison Company*, 71 FERC ¶ 61,090 at 61,305 (1995); *New York State Electric & Gas Corp.*, 72 FERC ¶ 61,067 at 61,340 (1995).

otherwise ordered by the decisional authority.⁸ Thus, to the extent ExxonMobil is requesting rehearing of the decision to reject the answer, we deny the request. Moreover, our Rules of Practice and Procedure require that a request for rehearing “state concisely the alleged error in the final decision or order” and “set forth the matters relied upon by the party requesting rehearing. . . .”⁹ These requirements are not satisfied by incorporating by reference a previously-filed pleading. Such practice neither informs the Commission which arguments from the referenced pleading are relevant to the request for rehearing nor indicates how the arguments may have changed in light of our final order. Accordingly, we reject ExxonMobil’s incorporation by reference the previously-filed answer to make it part of its request for rehearing.

B. Request for Reconsideration

1. April 18 Order

11. The April 18 Order stated:

ExxonMobil frames the issue as whether the netting restriction is just and reasonable under the FPA and consistent with Commission precedent. However, what is at issue is a contract for the sale of power from a QF. The netting provision that ExxonMobil objects to is really a provision concerning how the sale of the electric power from the QFs is to be measured – whether the sale is to be measured at one point as ExxonMobil urges it should be, or at three points as provided for in the Electric Service Agreement.^[10]

12. The April 18 Order explained that the Commission’s regulations exempt most QF’s, including those of ExxonMobil, from most provisions of the FPA, including sections 205 and 206. As a result, the Commission does not directly exercise FPA jurisdiction over contracts for the sale of power from such QFs but, rather, exercises authority over such arrangements pursuant to PURPA. The Commission further explained that “ExxonMobil’s challenge to the netting provisions in its contract with Entergy is fundamentally a challenge to the implementation of PURPA and is thus properly viewed as a petition to initiate an enforcement action pursuant to PURPA.”¹¹ Characterized as such, the Commission denied a request for enforcement under PURPA.

⁸ April 18 Order, 111 FERC ¶ 61,063 at P 12.

⁹ 18 C.F.R. §§ 385.713(c)(1) and (3) (2005).

¹⁰ April 18 Order, 111 FERC ¶ 61,063 at P 14.

¹¹ *Id.* at P 15.

2. ExxonMobil Request for Reconsideration

13. ExxonMobil argues that the Commission erred in finding that resolution of this issue is governed by PURPA. It contends that “the issue here involves the transmission in interstate power by a utility on behalf of a QF,” a matter clearly subject to the Commission’s exclusive jurisdiction under the FPA.¹² ExxonMobil claims that the purpose of excluding QFs from sections 205 and 206 of the FPA was to free them from the burdens of cost-of-service ratemaking and not to exclude QF sales from the “generic protections of the FPA.” In that regard, ExxonMobil characterizes its complaint not as raising PURPA implementation issues but, rather, alleging that Entergy is using its monopoly control over transmission facilities to impose terms on the internal operation of ExxonMobil’s generation resource.

3. Commission Determination

14. We are not persuaded by ExxonMobil’s arguments. In its complaint, ExxonMobil explained that Article VI of the Electric Service Agreement:

specifies how billing quantities are determined for various services. Subsection B thereof addresses the measurement of electric energy delivered to the Entergy electric grid by ExxonMobil for sales to ExxonMobil’s wholesale third-party customers and/or avoided cost sales to Entergy from each Point of Delivery during each 30-minute interval.^[13]

This explanation is consistent with the language of Article VI of the Electric Service Agreement, titled “Determination of Billing Quantities,” which sets forth the method of determining quantities of electric energy delivered to the Entergy electrical grid by Exxon.¹⁴

¹² ExxonMobil at p. 8.

¹³ *Id.* at p. 16. ExxonMobil then quoted the netting restriction contained in Subsection E of Article VI.

¹⁴ *See* Electric Service Agreement, Article VI, p. 15-17.

15. After examining both ExxonMobil's pleading and the underlying contract, we found that the provision at issue relates to how the sale of the electric power from the QFs is to be measured. ExxonMobil's attempt to now characterize the issue as one relating to "the transmission in interstate power by a utility on behalf of a QF" is not persuasive.¹⁵

16. ExxonMobil argues that our recent Small Generator Interconnection Final Rule indicates that the Commission has jurisdiction over this dispute. In particular, it refers to language stating that:

When an electric utility is required to interconnect under section 292.303 of the Commission's regulations, that is, when it purchases the QF's total output, the state has authority over the interconnection and the allocation of interconnection costs. But when an electric utility interconnecting with a QF does not purchase all of the QF's output and instead transmits the QF's power in interstate commerce, the Commission exercises jurisdiction over the rates, terms, and conditions affecting or related to such service, such as interconnections.[¹⁶]

17. ExxonMobil contends that, because it sells power not only to Entergy but to third parties, which is transmitted on Entergy's transmission facilities, the Commission has FPA jurisdiction over the interconnection with Entergy and Entergy's transmission on its interstate facilities. While ExxonMobil's statement is true, it is irrelevant to the netting restriction at issue. The fact that ExxonMobil makes third-party sales does not convert a PURPA provision of the Electric Service Agreement into a Commission-jurisdictional contract for transmission service.

18. As a general matter, a PURPA power agreement which is not on file with the Commission cannot set the terms and conditions for transmission service on Entergy's transmission system. Rather, issues regarding transmission service on Entergy's

¹⁵ ExxonMobil at p. 8. Moreover, ExxonMobil's argument constitutes a collateral attack on a prior Commission order denying an earlier ExxonMobil complaint in which it argued that the Complex should be treated as a single Point of Receipt so that when ExxonMobil's customers purchase capacity or energy from the Exxon Complex, the capacity or energy would be aggregated. *ExxonMobil Chemical Company and ExxonMobil Refining & Supply Company v. Entergy Gulf States, Inc.*, 91 FERC ¶ 61,106 (2000) (*ExxonMobil*).

¹⁶ Standardization of Small Generator Interconnection Agreements and Procedures, Order No. 2006, 111 FERC ¶ 61,220 at P 516 (2005) (footnotes omitted).

transmission system are to be determined based on the terms and conditions of Entergy's open access transmission tariff (OATT). The netting restriction, thus, cannot apply to Commission jurisdictional transmission service because the Electric Service Agreement is not on file with the Commission and is not a term and condition of Entergy's OATT.

19. ExxonMobil argues that “[a]t root, the management of internal resources at the ExxonMobil Complex is a form of self-supplied balancing service,” which the Commission recognized in Order No. 2003 as a type of interconnection service.¹⁷ We reject ExxonMobil's argument. First, it has not shown that Article VI of the Electric Service Agreement, which we have found to relate to billing determinants, in fact relates to balancing service. Moreover, article 4.3.1 of the LGIA, to which ExxonMobil refers, provides that the interconnection customer is responsible for matching actual output and scheduled delivery as measured at the point of interconnection. In the earlier ExxonMobil complaint, the Commission found that ExxonMobil is not entitled to have its three substations be treated as a single point of receipt.¹⁸ Thus, ExxonMobil's argument in this proceeding that it should be allowed to aggregate load and generation across the entire Complex, at all three substations, is not only inconsistent with the provision of Order No. 2003 which it cites for support but is a collateral attack on the Commission's determination in the earlier complaint proceeding.¹⁹

¹⁷ ExxonMobil request for rehearing at 10, *citing* Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 334 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004); *see also order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004). We note that Order No. 2003-A removed balancing service from article 4.3 of the Standard Large Generator Interconnection Agreement (LGIA) because delivery service requirements are addressed elsewhere in the pro form OATT. FERC Stats. & Regs. ¶ 31,160 at P 667. Order No. 2003-B affirmed this decision and allowed Transmission Providers to include the provision in individual LGIAs, subject to Commission approval. 109 FERC ¶ 61,287 at P 74-75.

¹⁸ *ExxonMobil*, 91 FERC at 61,380-82.

¹⁹ ExxonMobil argues that the netting of load for the entire Complex is analogous to our station power precedent that allows netting across multiple generators. The Commission, however, has only permitted netting across multiple generators in the context of the terms and conditions of an independent system operator tariff. *See, e.g., PJM Interconnection, LLC*, 95 FERC ¶ 61,333 at 62,190 (2001). Station power precedent is inapplicable to the circumstances in this proceeding where there is no ISO tariff and the supply of load is determined by the terms of the individual contract between ExxonMobil and Entergy.

20. ExxonMobil also argues that the Commission erred in finding that ExxonMobil and Entergy “freely negotiated” the netting restriction in the Electric Service Agreement and that ExxonMobil failed to provide sufficient support for its claim that it was “forced” to accept the contract provision in dispute.²⁰ According to ExxonMobil, it did not freely negotiate the netting restriction. Rather, it points out that Article III of the Electric Service Agreement (Points of Delivery and Points of Receipt) states that the parties were unable to agree whether electricity will be transmitted from the Complex from a single receipt point or multiple receipt points. Article III continues that the agreement would reflect multiple points of receipt and ExxonMobil reserved its right to challenge the provision with the Commission.

21. We reaffirm our earlier conclusion that ExxonMobil has not provided sufficient evidence demonstrating that it was forced or coerced into agreeing to the netting restriction. ExxonMobil’s reference to the reservation of rights in Article III of the Electric Service Agreement does not constitute evidence of coercion or lack of free negotiations. Rather, it is indicative of a disagreement and compromise among the parties. Moreover, consistent with the reservation of rights, ExxonMobil argued in the earlier complaint proceeding that the Complex should be treated as a single point of receipt and the Commission ruled against ExxonMobil.²¹ We are not persuaded that ExxonMobil was forced or coerced to accept a contract term when the parties disagreed, ExxonMobil was given the opportunity to raise the issue with the Commission, and the Commission found that ExxonMobil’s position was incorrect.

22. Accordingly, we deny ExxonMobil’s request for reconsideration with regard to the netting restriction.

C. Requests for Rehearing – Monthly Facilities Charge

1. April 18 Order

23. In its complaint, ExxonMobil argued that Entergy unlawfully billed Monthly Facilities Charges to ExxonMobil on interconnection facilities that are part of Entergy’s integrated network. The April 18 Order set the matter for evidentiary hearing (and subject to settlement judge procedures) because the pleadings were not clear with regard to which Monthly Facilities Charges relate to the support of third-party transactions from

²⁰ April 18 Order, 111 FERC ¶ 61,063 at P 17-18.

²¹ *ExxonMobil*, 91 FERC ¶ 61,106.

the Complex, when such facilities became subject to Commission jurisdiction, whether Entergy has violated the Commission's "and" pricing policy, and Entergy's possible refund liability.²²

2. Requests for Rehearing

24. ExxonMobil argues that the Commission erred in setting for hearing the issue whether Entergy charged a rate, *i.e.*, the Monthly Facilities Charge, for the transmission of electricity that was not approved by the Commission and in failing to direct that Entergy immediately terminate collection of the unauthorized charges. ExxonMobil claims that there is no dispute, based on the existing record, that Entergy has charged unfiled rates for the interconnection facilities at the Complex. To support its position, ExxonMobil cites to an Entergy affidavit stating that "ExxonMobil pays facilities charges for some of these Entergy-owned transmission grid facilities, pursuant to a state-approved retail rate," and acknowledging that the substations at the Complex are interconnected to Entergy's transmission system at three different points.²³ According to ExxonMobil, the only issue properly set for hearing was Entergy's refund obligation. ExxonMobil also claims that the Commission should have summarily found that Entergy engages in impermissible "and" pricing by charging both Monthly Facilities Charges and its transmission rates for service on jurisdictional facilities.

25. Entergy also argues that the Commission erred in setting the matter for evidentiary hearing. Entergy contends that the Commission lacks jurisdiction to modify the rates at issue, which are contained in a bundled retail rate schedule approved by a state regulator. According to Entergy, because the Commission has no jurisdiction over the matter, it had no need to set for hearing the issue of when the facilities became subject to Commission jurisdiction. Further, it contends that ExxonMobil cannot seek to unilaterally modify the IOA to address costs associated with the interconnection facilities without satisfying the "public interest" standard under the *Mobile-Sierra* doctrine.

26. Entergy claims that the Commission erred in setting for hearing which Monthly Facilities Charges relate to the support of third-party transactions and which are exempt because they relate to sales from the ExxonMobil QFs to Entergy. According to Entergy, the charges relate exclusively to facility investments incurred in 1977 and 1978, many years before ExxonMobil built its first QF at the Complex. Entergy thus contends that the facilities at issue were built exclusively for the purpose of Entergy serving ExxonMobil's retail load, and not for ExxonMobil to make power sales. Further, according to Entergy, the April 18 Order erred by failing to recognize that the facilities at

²² April 18 Order, 111 FERC ¶ 61,063 at P 26-28.

²³ Entergy Answer, Broussard Affidavit at P 7-8.

issue are unrelated to the interconnection of ExxonMobil's generation and, therefore, do not qualify as network upgrades regardless of what transactions are supported by the facilities. Entergy also contends that network upgrades, as defined in Order No. 2003, excludes preexisting facilities, such as the facilities at issue here.

3. Commission Determination

27. ExxonMobil has not provided any new arguments or information that would persuade us that the matters related to the Monthly Facilities Charge can be addressed summarily. The Entergy affidavit does not resolve our concerns regarding "which Monthly Facilities Charges relate to the support of third party transactions" and "when such facilities became subject to Commission jurisdiction."²⁴ Accordingly, the Commission denies ExxonMobil's request for rehearing on this issue.

28. Entergy's arguments are based on the premise that the Commission lacks jurisdiction because the Monthly Facilities Charge is embedded in a bundled retail contract approved by a state regulator. Contrary to Entergy's position, the presence of the rate in a retail contract does not control whether the Monthly Facilities Charge is subject to Commission jurisdiction.²⁵ Rather, the proper inquiry is whether Entergy is providing a Commission-jurisdictional service. When an electric utility interconnected with a QF does not purchase all of the QF's output and instead transmits a portion of the QF power to a third party in interstate commerce, the Commission exercises jurisdiction over the rates, terms and conditions affecting or relating to such service.²⁶ Once the facilities were used by ExxonMobil to transmit electricity for third party sales, the rates, terms and conditions of such transmission service became subject to Commission jurisdiction.

29. Entergy's argument that ExxonMobil cannot unilaterally seek to modify the IOA unless it satisfies the *Mobile-Sierra* public interest standard turns the issue on its head. Entergy cannot charge ExxonMobil for jurisdictional services that are not on file with and approved by the Commission. The omission of such charges from the IOA does not

²⁴ April 18 Order, 111 FERC ¶ 61,063 at P 27-28.

²⁵ *Cf. Entergy v. FERC*, 400 F.3d 5 (D.C. Cir. 2005) (Entergy's collecting retail rates from QF host loads under a state commission-approved tariff was not relevant to the Commission's decision to order refunds because the Commission found that Entergy was providing a wholesale service).

²⁶ *See* April 18 Order, 111 FERC ¶ 61,063 at P 27.

preclude ExxonMobil from complaining about the unfiled rate. Rather, the filed rate doctrine precludes Entergy from charging a rate subject to Commission jurisdiction that is not on file with the Commission.²⁷

30. According to Entergy, the Monthly Facilities Charge relates to facility investments incurred in the 1970s, before ExxonMobil owned any QFs and before it had the capability of selling energy. Entergy contends that these facts prove that the Monthly Facilities Charge exclusively support retail sales to ExxonMobil. We reject Entergy's argument. First, Rider A to the Electric Service Agreement, which sets forth Entergy's investment in facilities and the related Monthly Facilities Charge, references Entergy investments in the transmission facilities at the Complex as late as 1998 and 1999. This reinforces the need for an evidentiary hearing to sort out which charges relate to jurisdictional transmission service and when such service began. Moreover, when Entergy transmits ExxonMobil's QF power to third parties in interstate commerce, the Commission exercises jurisdiction over the rates, terms and conditions affecting or relating to such service. That Entergy originally constructed the facilities to support retail sales to ExxonMobil is not relevant.²⁸

31. Finally, Entergy contends that, because pre-existing facilities may one day support third-party transactions from an interconnected generator, the cost of such facilities are not converted into interconnection-related costs. It then claims that the Commission erred in setting the matter for hearing because the undisputed facts show that the facilities at issue were constructed decades earlier to increase the reliability of serving load and not for interconnecting generation. The Commission rejects Entergy's argument on this issue. If Entergy is charging for the same service under the Electric Service Agreement and its transmission rates, Entergy would be in violation of our "and" pricing policy. However, it is not clear from the pleadings whether Entergy is, in fact, charging twice for the same service in violation of our "and" pricing policy. Thus, Entergy's argument does not alter our conclusion that this is a matter to be determined in the hearing ordered in this proceeding. Accordingly, the Commission denies Entergy's request for rehearing on this issue.

²⁷ See *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571 (1981) (the filed rate doctrine forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority).

²⁸ See Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 814 (the Commission's jurisdiction over a QF's interconnection to a transmission system "applies to a new QF that plans to sell its output to a third party, and to an existing QF interconnected to a Transmission System that historically sold its total output to an interconnected utility or on-site customer and now plans to sell output to a third party").

32. The pleadings indicate that there is a lack of clarity regarding the matters set for evidentiary hearing. The Commission clarifies that all relevant facilities should be considered regardless of when they were constructed or how they were labeled in this proceeding. The hearing should focus on the function of the facilities used to provide service under the IOA and those used for third party transmission service. Further, we clarify the scope of the ALJ proceeding includes whether the transmission network upgrades and related charges are subject to Commission jurisdiction (including the IOA and third party transmission service) and, if so, “when they became subject to the Commission’s jurisdiction.”²⁹

The Commission orders:

(A) The Commission hereby denies ExxonMobil’s request for reconsideration and rehearing, as discussed in the body of this order.

(B) The Commission hereby denies Entergy’s request for rehearing, as discussed in the body of this order.

(C) The Commission hereby clarifies the issues set for evidentiary hearing, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁹ April 18 Order, 111 FERC ¶ 61,063 at P 1.