

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Vermont Electric Cooperative, Inc.

Docket No. ER05-670-001

ORDER DENYING REHEARING

(Issued October 4, 2005)

1. On May 31, 2005, Barton Village, Inc., and the Village of Enosburg Falls (collectively, “Vermont Villages”) filed a request for rehearing of the Commission’s order issued April 28, 2005 in this proceeding.¹ In the April 28 Order, the Commission accepted Vermont Electric Cooperative, Inc.’s (VEC’s) Second Annual Formula Rate Update of local transmission rates under its Open Access Transmission Tariff (OATT) and transmission rates under two rate schedules, effective on the dates requested by VEC. In addition, the Commission instituted, under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000), an investigation and hearing concerning the continued justness and reasonableness of VEC’s rate formulas. For the reasons discussed below, we deny the rehearing request.

I. Background

2. VEC purchased the remaining electric transmission assets of Citizens Communications Company (Citizens) in 2004. To effectuate this purchase, on December 24, 2003, VEC filed in Docket No. ER04-341-000, under section 205 of the FPA, a request for the Commission to transfer to VEC, as Citizens’ successor in interest, Citizens’ Vermont Electric Division’s OATT, as well as certain grandfathered service agreements and their associated rate schedules.² The OATT and rate schedules VEC

¹ *Vermont Electric Cooperative, Inc.*, 111 FERC ¶ 61,127 (2005) (April 28 Order).

² These grandfathered agreements included the Block Loading Facilities Transfer Agreement (“BLFTA”), formerly Citizens Rate Schedule FERC No. 28 (as amended), now VEC First Revised Rate Schedule FERC No. 4 (Schedule No. 4). Three other grandfathered agreements, referred to by parties as the “FPC-10” contracts, formerly Citizens Rate Schedule Nos. 29, 31 and 32 (as amended) are now VEC First Revised Rate Schedule FERC No. 6 (Schedule No. 6).

sought to assume contained cost-based formula rates,³ and required recalculation of the charges on an annual basis, by applying prior calendar year results to determine charges for the following year.⁴ On February 12, 2004, the Commission conditionally accepted, subject to modification, VEC's request to assume Citizens' OATT and rate schedules to render jurisdictional service.⁵ On May 3, 2004, in Docket No. ER04-794-000, VEC made its first annual filing to update its adopted formula rates. This filing was uncontested and, on July 30, 2004, the Commission accepted the 2004 annual filing in an unpublished letter order.⁶

3. On March 2, 2005, VEC filed its Second Annual Formula Rate Update to its OATT and Schedule Nos. 4 and 6, in which VEC did not propose any changes to the underlying rate formulas (March 2 Filing).⁷ VEC's OATT contains a formula rate for firm point-to-point, non-firm point-to-point, and network transmission services, which is adjusted annually on May 1. VEC proposed to increase its rates for these services.⁸ There are separate transmission charges for firm and non-firm point-to-point transmission service over the Phase I/Phase II HVDC facilities, which are adjusted on June 1 of each year, and VEC proposed to decrease its rates for service over these facilities. VEC's Schedule Nos. 4 and 6 have formula rate provisions, and the charges produced by these schedules are adjusted annually on July 1. In its March 2 Filing, VEC proposed to increase its rates under Schedule No. 4, and to decrease its rates under Schedule No. 6. In its filing, VEC explained that it developed the proposed rates for its OATT and Schedule No. 4 service by applying to its plant accounts the 21.5 percent fixed carrying charge that is part of the Commission-approved formula rate.⁹ On April 28, 2005, the

³ *Vermont Electric Cooperative, Inc.*, 106 FERC ¶ 61,131 at P 3 (2004) (February 12 Order); VEC Answer at 3.

⁴ VEC Answer at 3.

⁵ *Vermont Electric Cooperative, Inc.*, 106 FERC ¶ 61,131 at P 17 and Ordering Paragraph (A) (2004).

⁶ *Vermont Electric Cooperative, Inc.*, Docket Nos. ER04-794-000 and -001 (July 30, 2004) (unpublished letter order).

⁷ March 2 Filing at 2.

⁸ VEC states that the OATT charges produced by the formula rates are applicable to the new VEC-specific Local Service Schedule included in the ISO New England Tariff, FERC Electric Tariff No. 3, and to the Local Service Schedule that may be filed with the Commission in the future. *Id.* at 1 and 3.

⁹ VEC's formula rates include a component based on the sum of the transmission plant accounts applied to the 21.5 percent fixed carrying charge, as well as formula components that calculate all transmission revenues and system peak load data.

Commission accepted VEC's proposed rates, effective on the dates requested by VEC. In addition, however, the Commission established an investigation, under section 206 of the FPA, in Docket No. EL05-98-000, into the continued justness and reasonableness of VEC's rate formulas, including VEC's continued use of a 21.5 percent fixed carrying charge.¹⁰ The Commission further established hearing procedures, which were held in abeyance until the conclusion of settlement judge procedures, to facilitate consensual resolution of the proceeding.¹¹

II. Discussion

A. Request for Rehearing

4. The crux of Vermont Villages' request for rehearing is that the Commission's April 28 Order "is premised on the erroneous notion that VEC's filed rates are formula rates."¹² Vermont Villages asserts that the April 28 Order "uncritically accepts" VEC's characterization of its filed rates as formula rates, whereas, in Vermont Villages' view, there is no record evidence to support that proposition, at least with respect to VEC's transmission contracts.¹³ Vermont Villages assert that *Central Power & Light Co.*, 11 FERC ¶ 61,102 (1980) (*CP&L*), requires the Commission expressly to approve an automatic adjustment clause as the rate, rather than merely accept the contract containing the clause.¹⁴ Vermont Villages argue that the Commission never approved the BLFTA (Schedule No. 4) as a self-adjusting formula rate, and the Commission's February 2004 Order cannot be construed as doing such.¹⁵ While Vermont Villages acknowledge that the BLFTA "assuredly confers contractual authority on VEC to adjust its rates annually," they argue that the contract cannot remove the statutory requirement that such changes must be effectuated by filings with the Commission.¹⁶ Vermont Villages further argue that VEC's March 2 filing, therefore, was misleading and a nullity, because VEC does not have self-adjusting formula transmission rates. In addition, Vermont Villages assert that, since VEC's proposed adjustments to its BLFTA are not effective until July 1, 2005, those adjusted rates are essentially suspended; but, even if they were not essentially

¹⁰ *Id.* at P 10 and Ordering Paragraph (B).

¹¹ *Id.* at P 11 and Ordering Paragraphs (E)–(G).

¹² Vermont Villages Rehearing Request at 1.

¹³ *Id.*

¹⁴ *Id.* at 2 (citing *CP&L*, 11 FERC at 61,227–28).

¹⁵ *Id.* at 2–3.

¹⁶ *Id.* at 3.

suspended, the Commission's failure to suspend those rates should not preclude the Commission from rejecting them on rehearing as a "patent nullity."¹⁷

B. Commission Determination

5. The Commission will deny the request for rehearing. First, contrary to Vermont Villages' contention, VEC's rates are formula rates. The Commission expressly recognized that VEC's pertinent rates are formula rates in the proceeding in Docket No. ER04-341-000, which resulted in the February 12 Order.¹⁸ In fact, Vermont Villages expressly complained in its conditional protest (later withdrawn), which it filed in that proceeding along with the Vermont Public Power Supply Authority, that VEC had not filed "specific numeric rates for transmission service under Rate Schedules Nos. 4 through 7 or for its OATT."¹⁹ In addition, Vermont Villages withdrew its conditional protest in part because VEC committed that it was not at that time seeking waivers that would allow it to implement "'formula' transmission rates adjustments" without making the filings required by the Commission's regulations.²⁰ This commitment became one of the conditions under which the Commission accepted VEC's filed rates.²¹ Consequently, when the February 12 Order conditionally accepted VEC's OATT and rate schedules for filing, see *id.* at P 17, the Commission, consistent with *CP&L*, accepted contracts and rates schedules that included the formula rates. Furthermore, the pertinent approved rates, including Schedule No. 4, provide for annual updates. Indeed, the filing at issue in this proceeding is the second such annual update.²² Consequently, insofar as VEC did not propose any changes to its underlying rate formulas, VEC's Second Annual Formula Rate Update constituted a valid section 205 filing, and not a "patent nullity."

6. In addition, Vermont Villages' argument that rates under Schedule No. 4, the BLFTA, are "essentially suspended" because they did not go into effect until the July 1, 2005 effective date requested by VEC, Rehearing Request at 4, misconstrues the nature of suspension authority. Rate suspension is at the Commission's discretion, see 18 C.F.R. § 2.4(g) (2005), and rates are never "essentially suspended," but rather

¹⁷ *Id.* at 4.

¹⁸ See February 12 Order, 106 FERC ¶ 61,131 at P 12.

¹⁹ See *id.* See also Motion to Intervene Comments, and Conditional Protest of Vermont Villages and Vermont Power Supply Authority, Docket No. ER04-341-000, at 7 (filed January 14, 2004).

²⁰ See *id.* at P 13 (emphasis added).

²¹ *Id.* at P 17.

²² See *supra* note 6 and accompanying text.

expressly suspended, *see id.* at 2.4(b), which the Commission did not do in this proceeding. Indeed, VEC requested a July 1 effective date pursuant to its rate schedule. *See* First Revised Rate Schedule No. 4 at Article III, Original Sheet Nos. 14-17. Moreover, the Commission cannot suspend a rate once it has been accepted and becomes effective, *see* 18 C.F.R § 2.4(a) (2005); *Consumers Power Co.*, 80 FERC ¶ 61,316 at 62,077 (1997), as is the case with the Schedule No. 4 and the other rates at issue in this proceeding.

The Commission orders:

Vermont Villages' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.