

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ExxonMobil Corporation

v.

Docket No. EL03-230-001

Entergy Services, Inc.

ORDER DENYING REHEARING AND CLARIFICATION

(Issued June 8, 2007)

1. On January 19, 2007, the Commission issued an order in *ExxonMobil Corporation v. Entergy Services, Inc.*¹ In that order, the Commission granted ExxonMobil Corporation's (ExxonMobil) complaint and directed Entergy Services, Inc. (Entergy) to reclassify certain transmission facilities and provide ExxonMobil with transmission credits for the cost of those facilities.² On February 20, 2007, ExxonMobil filed a request for rehearing and a request for clarification of the Commission's order in *ExxonMobil*. We will deny the request for rehearing and deny the request for clarification.

I. Background

2. ExxonMobil owns and operates an oil refinery in Beaumont, Texas. On September 28, 2001, Entergy filed an interconnection, operation and generator imbalance agreement (IA) to accommodate ExxonMobil's single 165 MW combustion turbine generator unit. On December 7, 2001, the Commission accepted the IA for filing pursuant to delegated authority.³ The IA identified certain facilities in that agreement as interconnection facilities (Original Transmission Facilities) and directly assigned the cost of these facilities to ExxonMobil, without requiring Entergy to provide transmission credits.

¹ 118 FERC ¶ 61,032 (2007) (*ExxonMobil*).

² *Id.* P 1, 14.

³ See *Entergy Services, Inc.*, Docket No. ER02-144-000 (unpublished letter order dated December 7, 2001) (*December 7 Order*).

3. ExxonMobil then installed two additional generators. When Entergy filed an unexecuted, revised IA to accommodate the expanded facilities (New Transmission Facilities), ExxonMobil intervened in the proceeding and protested, stating that *all* of the facilities (both Original and New Transmission Facilities) are located at or beyond the point of interconnection on the Entergy network and are, therefore, network upgrades subject to transmission credits.

4. The Commission granted ExxonMobil's protest with respect to the New Transmission Facilities. With respect to the Original Transmission Facilities, the Commission found that ExxonMobil's request that the Commission direct Entergy to reclassify the Original Transmission Facilities as network upgrades rather than as direct assignment facilities was, in effect, a complaint. The Commission rejected this portion of ExxonMobil's protest, without prejudice to ExxonMobil's filing a separate complaint on that issue.⁴

5. ExxonMobil then filed a complaint on September 16, 2003, requesting that the Commission direct Entergy to reclassify the Original Transmission Facilities as network upgrades rather than as direct assignment facilities, and provide ExxonMobil with transmission credits accordingly. The Commission granted that complaint and, as noted above, directed Entergy to provide ExxonMobil with transmission credits for the cost of those facilities.⁵ It also directed Entergy to file revisions to its IA reflecting the Commission's decision and to file a compliance report within 15 days after making the required credits.⁶

6. The Commission noted that section 206(b) of the Federal Power Act (FPA),⁷ as it was in effect at the time that ExxonMobil filed its complaint, requires that the Commission must, when it institutes an investigation on a complaint, establish a refund effective date that is no earlier than 60 days after the date on which the complainant filed the complaint, and not later than five months after the expiration of the 60-day period.⁸ Unlike other cases dealing with credits for network upgrades, transmission had not

⁴ See *Entergy Services, Inc.*, 104 FERC ¶ 61,084 at P 13 (2003).

⁵ *ExxonMobil*, 118 FERC ¶ 61,032 at P 1, 14.

⁶ *Id.* 14-16.

⁷ 16 U.S.C § 824e(b) (2000).

⁸ *ExxonMobil* 118 FERC ¶ 61,032 at P 15. The Commission also noted that the Energy Policy Act of 2005, Pub. L. No. 109-58, Sec. 1285, 119 Stat. 594, 980-81 (2005), amended section 206(b) of the FPA 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. *Id.* n.10.

commenced when ExxonMobil filed its complaint.⁹ To afford ExxonMobil maximum protection, the Commission set the refund effective date at the latest possible date, *i.e.*, five months after the 60 days after ExxonMobil filed its complaint, which is April 15, 2004.¹⁰

7. The Commission directed Entergy to provide ExxonMobil with any transmission credits that accrued during the 15-month refund effective period, April 15, 2004, through and including July 15, 2005, with interest calculated in accordance with 18 C.F.R. § 35.19a(a)(2)(iii) (2006).¹¹ The Commission also required Entergy to provide ExxonMobil credits on a prospective basis from the date of the Commission's order, and to file a compliance report within 15 days after making the required credits.¹²

8. The Commission noted that transmission credits accrue over a 20-year period beginning with the commercial operation of the generator.¹³ The Commission directed Entergy to provide ExxonMobil with transmission credits as follows: (a) before April 15, 2004 (the start of the refund effective period), Entergy provides no transmission credits; (b) from April 15, 2004 through and including July 15, 2005 (the refund effective period), Entergy provides transmission credits, with interest; (c) from the end of the 15-month refund effective period (July 15, 2005) until the date of the Commission order (January 19, 2007), Entergy provides no transmission credits; (d) to the extent that ExxonMobil has not previously taken service for which credits either did accrue or would have accrued, Entergy must provide ExxonMobil transmission credits with interest on a prospective basis from the date of the Commission's order.¹⁴

⁹ ExxonMobil filed its complaint on September 16, 2003; however, the generating facilities that are the subject of the complaint did not begin commercial operation until December 2004.

¹⁰ *Id.* P 15 (citations omitted). The Commission noted that transmission credits accrue from the date of commercial operation of the generator. *Id.*

¹¹ *Id.* citing 16 U.S.C. § 824e(b) (2000). We note that in *ExxonMobil* the Commission inadvertently referenced 18 C.F.R. § 35.19a(a)(2)(ii) (2006).

¹² *Id.*

¹³ Article 11.4.1 of the Large Generator Interconnection Agreement provides for a maximum 20-year refund period. *Id.* P 17.

¹⁴ *Id.*

9. The Commission codified its rules regarding the interconnection of large generating facilities with the transmission network in Order No. 2003.¹⁵ In that order, the Commission required all public utilities that own, control, or operate facilities used for transmitting electric energy in interstate commerce to have on file with the Commission standard procedures and a standard agreement for interconnecting to their transmission systems generating facilities capable of producing more than 20 megawatts of power (“large generating facilities”). As relevant here, Order No. 2003 provides that, unless the transmission provider and the interconnection customer agree otherwise, the interconnection customer must initially fund the cost of any network upgrades used to interconnect its generating facility with a non-independent transmission provider’s transmission system. The transmission provider must then reimburse the interconnection customer on a dollar-for-dollar basis, with interest. This reimbursement is in the form of credits against the rates the interconnection customer pays for the delivery component of transmission service.¹⁶

¹⁵ *Standardization of Generator Interconnection Agreements and Procedures*, Order No 2003, 68 *Fed. Reg.* 49,845 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,146 (2003) (Order No. 2003); *order on reh’g*, Order No. 2003-A, 69 *Fed. Reg.* 15,932 (Mar. 26, 2004), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,160 (2004) (Order No. 2003-A); *order on reh’g and directing compliance*, Order No. 2003-B, 70 *Fed. Reg.* 265 (December 20, 2004), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,171 (2005) (Order No. 2003-B), *order on reh’g*, Order No. 2003-C, 70 *Fed. Reg.* 37,662 (June 30, 2005), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,190 (2005) (Order No. 2003-C); *see also Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004), *aff’d*, *National Association of Regulatory Commissioners v. FERC*, 475 F. 3d 1277 (2007).

¹⁶ Order No. 2003-B at P 10. The transmission provider must fully reimburse the interconnection customer either within five years of the date of commercial operation of the interconnecting generator by providing payments to the interconnection customer on a dollar-for-dollar basis (transmission credits) for the non-usage sensitive portion of transmission charges, or through a mutually acceptable alternative that returns, with interest, all amounts advanced for network upgrades. Full reimbursement may not extend beyond twenty years from the generator’s commercial operation date. That is, if the transmission provider has not fully reimbursed, with interest, the upfront payments for network upgrades, it must, at the end of twenty years from the commercial operation date of the generator, make a balloon payment to the interconnection customer. *See* Order No. 2003-B at P 35-36.

II. Request for Rehearing and Clarification

A. Rehearing

10. ExxonMobil argues that the Commission erred in holding that the transmission credits and interest that Entergy must provide to ExxonMobil are refunds subject to the limitations of section 206(b) of the FPA. According to ExxonMobil, Order No. 2003 established that the upfront payment for network upgrades is in the nature of a loan that the interconnecting customer provides to the utility as a “convenient means of financing,”¹⁷ and the transmission credits and interest do not involve a rate or charge that is subject to refund under FPA section 206(b).¹⁸

11. ExxonMobil asserts that the Commission has repeatedly stated that an interconnection customer making upfront payments for network upgrades is entitled to complete recovery of the costs of such facilities. ExxonMobil maintains that, because the Commission did not act on its complaint within the refund period, the result of the Commission decision in *ExxonMobil* is to deny ExxonMobil complete recovery of the monies that it expended on network upgrades.¹⁹

12. ExxonMobil notes that the Commission’s order refers to article 11.4.1 of the Large Generator Interconnection Agreement (LGIA). ExxonMobil states that article 11.4.1, which is entitled “Repayment of Amounts Advanced for Network Upgrades,” does not refer to four distinct periods during which an interconnecting entity may receive refunds for upfront payments for network upgrades. ExxonMobil states that article 11.4.1 provides that the interconnection customer is entitled to a cash payment equal to the total amount that the interconnection customer paid to the transmission provider for the construction of Network Upgrades, with interest from the first payment for Network Upgrades through the date of final payment of the entire amount that the interconnecting customer paid to the transmission provider for the construction of the upgrades.²⁰

¹⁷ Rehearing at 9. For support, ExxonMobil cites Commission statements in Order Nos. 2003-A and 2003-C. In Order No. 2003-A, the Commission referred to upfront payments for the construction of facilities to interconnect to the transmission network as “a financing mechanism that is designed to facilitate the efficient construction of Network Upgrades.” Order No. 2003-A at P 612. The Commission also stated in Order No 2003-C that it viewed a transmission customer’s up front payments for network upgrades as “essentially a loan from the Interconnection Customer to the Transmission Provider or Affected System Operator.” Order No. 2003-C at P 9 n.9.

¹⁸ Rehearing at 9-12.

¹⁹ *Id.* at 13-15.

²⁰ *Id.* at 17, *citing* Article 11.4.1 of the LGIA.

13. ExxonMobil further contends that the maximum 20-year full-repayment payback period that article 11.4.1 of the LGIA contemplates is inconsistent with the section 206 refund period. ExxonMobil asks the Commission to find that article 11.4.1 of the LGIA is inconsistent with the four distinct periods for the payment of transmission credits contained in *ExxonMobil*, and provides for full reimbursement to ExxonMobil of the amounts that it advanced to Entergy for the construction of network upgrades, plus interest.²¹

B. Clarification

14. ExxonMobil also requests clarification of the Commission's order in *ExxonMobil*. ExxonMobil states that, in another docket,²² Entergy is already paying transmission credits for other network upgrades (New Transmission Facilities) that ExxonMobil financed at Beaumont, Texas. ExxonMobil wants to ensure that Entergy pays separate transmission credits for the transmission upgrades involved in this proceeding. ExxonMobil asks the Commission to clarify that, following its payments of transmission credits for the other transmission facilities (New Transmission Facilities), Entergy must *then* pay to ExxonMobil transmission credits for the network upgrades involved in this proceeding (Original Transmission Facilities).²³ ExxonMobil also asks the Commission to direct Entergy to pay, in a lump sum, with interest, the portion of the upfront payments for network upgrades allocable to the recovery period of April 15, 2004 through and including July 15, 2005.²⁴

III. Discussion

A. Refunds

15. We will deny rehearing. ExxonMobil argues that “transmission credits are not rates or charges . . . that are subject to refund,”²⁵ but rather are, in essence, a loan from the interconnection customer to the transmission provider for the construction of network upgrades.²⁶ ExxonMobil is incorrect in calling the upfront interconnection payment a loan or a “convenient means of financing.”

²¹ *Id.* at 17-18.

²² ExxonMobil refers to Docket No. ER03-851-000. *See Entergy Services, Inc.*, 104 FERC ¶ 61,084 (2003), *order on reh'g*, 111 FERC ¶ 61,181 (2005).

²³ Rehearing at 2-3, 18-19.

²⁴ *Id.* at 2-3, 16, 19.

²⁵ Rehearing at 12 (emphasis omitted).

²⁶ *Id.* at 10-12.

16. In Order No. 2003, the Commission analogized the upfront interconnection payment to a loan to make it easier to explain the transaction involved. But the loan analogy only goes so far. Loans are commercial transactions, enforceable in a court of law.²⁷ Even though the interconnecting customer usually receives complete reimbursement of the upfront payment for the construction of network upgrades,²⁸ the payment is not a loan. Indeed, no repayment is required if the generator does not go into commercial operation.²⁹

17. Rather, the upfront payment is a Commission jurisdictional term or condition applicable to interconnection service. Although it is not a rate for service in the traditional sense that the customer receives a service for its payment, it is a term or condition for interconnection service that charges the customer and provides an opportunity for refund. As a charge with an opportunity for refund, the payment serves as a mechanism to encourage the customer to make efficient siting decisions.

18. Were we to take the loan analogy to its logical conclusion, we could direct Entergy to return to ExxonMobil the monies that it collected between the end of the refund effective date and the date of the Commission's order, as ExxonMobil requests. But this is precisely what the Commission cannot do, because that would violate the filed rate doctrine.³⁰

19. We also note that the policy considerations underlying Order No. 2003 were to give generators an incentive to efficiently site on the transmission network³¹ and to

²⁷ If the upfront payment were a commercial loan, the Commission would have no authority over the loan and could neither direct an interconnecting customer to make such a loan nor order a utility to repay it. The Commission can only order the repayment of unreasonable rates and charges.

²⁸ See Order No. 2003-A at P 616-618 (interconnection customer is entitled to reimbursement for all of the costs that it incurs in financing network upgrades, plus interest); Order No. 2003-B at P 35-36 (full reimbursement shall not extend beyond 20 years from the Commercial Operation Date). See also Order No. 2003-B at P 36; *Intergen Services, Inc.*, 107 FERC ¶ 61,143 at P 16, 19 (2004) (the upfront payment for network upgrades is a source of funds for network upgrades and an incentive for interconnecting customers to make efficient siting decisions; it is not a rate for service or the means whereby a transmission provider recovers its costs).

²⁹ Article 11.4.1 of the LGIA.

³⁰ Under the filed rate doctrine, the rate on file with the Commission is the only lawful rate. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 126-127 (1990); *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915); *Kansas City Southern R. Co. v. Carl*, 227 U.S. 639, 653 (1913).

³¹ Order No. 2003-A, at P 613; Order No. 2003-B at P32, 33.

prevent “and” pricing, so that the transmission customer does not have to pay *both* incremental costs and an average embedded cost rate for the use of the transmission system.³² The upfront payment, then, is a mechanism for transferring the risk of siting and construction from the transmission provider to the generator,³³ while at the same time preventing the transmission provider from engaging in “and” pricing. These policy considerations have nothing to do with loans, even if the Commission *could* order generators to make loans to transmission providers, which it has not the statutory authority to do.

20. ExxonMobil is also incorrect in its interpretation of section 206 of the FPA. ExxonMobil did not protest the IA for the Original Transmission Facilities when it was first filed with the Commission under section 205 of the FPA.³⁴ The *December 7 Order* accepted the IA for filing and allowed it to become effective; the IA, as filed and accepted, did not provide for transmission credits. Immediately upon acceptance, the IA became the filed rate; the Commission could only revise that rate under section 206.³⁵ Indeed, if section 206 of the FPA did not apply, there would be no statutory basis for directing the payment of transmission credits in this proceeding.³⁶

21. As the Commission noted in *ExxonMobil*, section 206(b) of the FPA, as it was in effect when ExxonMobil filed its complaint, places certain restrictions on the refund protection that the Commission can afford complainants. Under section 206(b), as it was in effect when ExxonMobil filed its complaint, the Commission could only set a refund effective date that was no earlier than 60 days after the complainant filed the complaint, but no later than five months after 60 days after the filing of the complaint. Here, as noted above, to afford ExxonMobil maximum protection, the Commission established the

³² Order No. 2003, at P 694; Order No. 2003-A, at P. 8; Order No. 2003-B, at P 54; *Duke Energy Hinds, LLC*, 117 FERC ¶ 61,210 at P 22, 23 (2006) (*Duke Hinds III*).

³³ See *National Association of Regulatory Utility Commissioners v. FERC*, 475 F.3d 1277 at 1285-1286 (2007).

³⁴ 16 U.S.C. § 824d (2000).

³⁵ *Entergy Gulf States*, 119 FERC ¶ 61,051 at P 19 (2007).

³⁶ ExxonMobil filed its complaint “[p]ursuant to [s]ection 206 of the Federal Power Act” See ExxonMobil complaint filed Sept. 16, 2003 in Docket No. EL03-230-000.

refund effective date as late as possible, *i.e.*, April 15, 2004. The Commission could not direct Entergy to pay transmission credits *before* the commencement of the refund effective date because section 206(b) of the FPA did not permit it to do so.³⁷

22. ExxonMobil is thus allowed to receive transmission credits for the fifteen-month refund effective period that section 206 prescribes, *i.e.*, April 15, 2004 through and including July 15, 2005. It cannot, however, receive transmission credits or interest on those credits from July 16, 2005 to the date of the Commission's order, January 19, 2007, because the Commission would be ordering Entergy to give back to a customer money that it collected after the expiration of the refund effective period and before the date of the Commission's order in violation of the filed rate doctrine.³⁸ However, to the extent that ExxonMobil has not previously taken service for which transmission credits either did accrue or would have accrued, ExxonMobil is entitled to receive transmission credits, with interest, on a prospective basis from the date of the Commission's order.³⁹ This is the maximum protection that the Commission can afford ExxonMobil under the FPA.⁴⁰

B. Clarification

23. ExxonMobil requests that we clarify that Entergy must pay ExxonMobil, in a lump sum, with interest, the portion of the upfront payment for network upgrades

³⁷ See *Duke Hinds III*, 117 FERC ¶ 61,210 at P 32 (2006). In any event, the generator entered commercial operation in December, 2004. Commission rules do not permit the accrual of transmission credits before the date of the commercial operation of the generator. See *ExxonMobil*, 118 FERC ¶ 61,032 at P 15.

³⁸ *Duke Hinds III*, 117 FERC ¶ 61,210 at P 32. ExxonMobil asks the Commission to find that article 11.4.1 of the LGIA provides for full reimbursement of its upfront payments to Entergy for Network Upgrades. We note that, although Article 11.4.1 of the LGIA requires full reimbursements with interest of amounts paid for network upgrades, that Article is subject to the requirements of section 206 and the filed rate doctrine.

³⁹ *ExxonMobil*, 118 FERC ¶ 61,032 at P 17 ExxonMobil is entitled to receive transmission credits for the Original Facilities equal to the total of ExxonMobil's upfront payments for network upgrades *less* the sum of the transmission service payments associated with the transmission service that ExxonMobil took from the end of the 15-month refund effective period (July 15, 2005) until the date of the Commission order (January 19, 2007). For a hypothetical calculation of how this would work, see *Duke Hinds III*, 117 FERC P 34.

⁴⁰ To this same effect, see *Mirant Las Vegas, LLC v. Nevada Power Company*, 118 FERC ¶ 61,034 at P 18-20 (2007) (four distinct periods for recovery of transmission credits); *Tenaska Alabama II Partners, LP v. Alabama Power Co.*, 118 FERC ¶ 61,037 at P 23-25 (2007) (same).

allocable to the recovery period of April 15, 2004 through and including July 15, 2005. ExxonMobil also asks that we further clarify that Entergy must pay 100 percent of the remaining value of the network upgrades prospectively, with interest accumulating from the date of the Commission's order. ExxonMobil is especially concerned that the prospective payments begin *after* Entergy has finished providing transmission credits that relate to ExxonMobil's upfront payments that are the subject of Docket No. ER03-851-000 (New Transmission Facilities).⁴¹ ExxonMobil wants to ensure that Entergy will not be able to offset the transmission credits that we are requiring Entergy to pay to ExxonMobil for the Original Facilities with transmission credits that Entergy is already paying to ExxonMobil for the New Facilities that ExxonMobil paid for at the same cogeneration facility that is involved in this proceeding.⁴²

24. We will deny the request for clarification. We conclude that the findings in our earlier order are correct; that is, section 206(b) and the rule against retroactive ratemaking limit the amount of transmission credits that we can direct Entergy to pay to ExxonMobil.⁴³

25. Nor do we find that our earlier order was unclear as to the transmission credits that Entergy must pay to ExxonMobil for the refund effective period. As we provided in that order, for the period from April 15, 2004 through and including July 15, 2005, and prospectively from the date of the Commission order (January 19, 2007), Entergy must pay to ExxonMobil transmission credits with interest calculated in accordance with 18 C.F.R. § 35.19a(a)(2)(iii).⁴⁴

26. Finally, as to an offset of transmission credits, our earlier order did not concern transmission credits for the New Transmission Facilities, so there is nothing to clarify. Our orders with respect to the Original Transmission Facilities and the New Transmission Facilities deal with different network upgrades. Entergy must separately reimburse ExxonMobil for each group of network upgrades as we have directed in our orders.

⁴¹ Rehearing at 3.

⁴² *Id.* at 5, 18-19.

⁴³ *See* discussion of refunds, *supra*.

⁴⁴ *ExxonMobil*, 118 FERC ¶ 61,032 at P 16-17. There are no special circumstances here, such as upfront payments for network upgrades by someone other than the transmission provider's customer (*see Southern California Edison Company*, 117 FERC ¶ 61,103 at P 39 (2006)), that would warrant a lump sum payment.

The Commission orders:

- (A) The request for rehearing is hereby denied, as discussed above.
- (B) The request for clarification is hereby denied, as discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.