

134 FERC ¶ 61,112  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Chehalis Power Generating, L.P.

Docket No. ER05-1056-005

ORDER ON REMAND

(Issued February 17, 2011)

1. This case is before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).<sup>1</sup> At issue is whether the rate schedule 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).<sup>2</sup>

2. The Commission originally found that the rate schedule Chehalis proposed for supplying reactive power to Bonneville was a changed rate rather than an initial rate.<sup>3</sup> The Commission based this decision on its finding that an initial rate requires a new

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<sup>1</sup> *TNA Merchant Projects, Inc. v. FERC*, 616 F.3d 588 (D.C. Cir. 2010) (*TNA Merchant Projects*). On October 20, 2010, TNA Merchant Projects, Inc. (TNA) filed a motion with the Commission to substitute itself for Chehalis Power Generating, L.P. (Chehalis). 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." *Id.* at 589 n.1. We will also refer to the petitioner, TNA, as "Chehalis."

<sup>2</sup> 16 U.S.C. § 824d(e) (2006).

<sup>3</sup> *Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144, at P 23 (2005).

customer and a new service. Chehalis had been providing reactive power to Bonneville pursuant to an interconnection agreement; therefore the Commission reasoned that Bonneville was neither a new Chehalis customer, nor was Chehalis's provision of reactive power a new service. In sum, the Commission found that the proposed rates were changed, not initial, rates.<sup>4</sup> On rehearing, the Commission reaffirmed the finding.<sup>5</sup>

3. Chehalis petitioned the D.C. Circuit for review of the Commission's orders. The D.C. Circuit remanded the case to the Commission on a single issue: whether or not the rate for reactive power should have been filed with the Commission.

4. We find that the rate for reactive power that Chehalis provided to Bonneville should have been filed, thus making Chehalis's filing a changed rate, but, in any event, whether or not a pre-existing rate had, in fact, been filed with the Commission is not part of our longstanding test for the determination of what constitutes a changed versus an initial rate. The rate schedule Chehalis has proposed for supplying reactive power to Bonneville is thus a changed rate subject to the suspension and refund provisions of section 205(e) of the FPA.

## **I. Background**

5. 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."<sup>6</sup>

6. 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.<sup>7</sup> 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."<sup>8</sup> The Commission stated that "Chehalis has been providing reactive power to BPA pursuant to an interconnection

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<sup>4</sup> *Id.*

<sup>5</sup> *Chehalis Power Generating, L.P.*, 113 FERC ¶ 61,259, at P 10-15 (2005).

<sup>6</sup> Chehalis May 31, 2005 Filing Letter at 6.

<sup>7</sup> *Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144 at P 1, 21.

<sup>8</sup> *Id.* P 23.

agreement, albeit without charge. Thus, the proposed rates for reactive power in the instant proceeding are not initial rates, but are changed rates.”<sup>9</sup>

7. On December 15, 2005, the Commission denied Chehalis’s rehearing. The Commission explained that its well-settled precedent established that an initial rate is a rate for a new service to a new customer.<sup>10</sup> Finding that Chehalis had already been providing reactive power to Bonneville, the Commission denied rehearing, explaining that Chehalis was not providing a new service to a new customer.<sup>11</sup>

8. On May 23, 2008, Chehalis petitioned the D.C. Circuit for review.<sup>12</sup> On August 10, 2010, the D.C. Circuit remanded the case to the Commission.

## II. Remand

9. 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.”<sup>13</sup> 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*.”<sup>14</sup>

10. 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

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<sup>9</sup> *Id.*

<sup>10</sup> *Chehalis Power Generating, L.P.*, 113 FERC ¶ 61,259 at P 11; *accord id.* P 13-15.

<sup>11</sup> *Id.* P 11-12.

<sup>12</sup> 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. *Chehalis Power Generating, L.P.*, 123 FERC ¶ 61,038 (2008).

<sup>13</sup> *TNA Merchant Projects*, 616 F. 3d 588, at 591-92.

<sup>14</sup> *Id.* at 592 (*emphasis supplied*).

rates, the Commission therefore could not suspend and order refunds here.<sup>15</sup> The court remanded the case to the Commission to consider this argument.<sup>16</sup>

### **III. Motion and Answers**

#### **A. Chehalis Motion**

11. On October 20, 2010, Chehalis filed a motion for an order requiring Bonneville to repay the amounts that Chehalis has already refunded to Bonneville.

12. In support of its motion, Chehalis repeats the argument that it made before the D.C. Circuit “that the only rates that are subject to section 205(e)’s suspension and refund provisions are those that change a rate already on file with the Commission pursuant to section 205(c).”<sup>17</sup> Chehalis states that the only previous rate at issue in this case is the one contained in the interconnection agreement between Chehalis and Bonneville, and since that agreement was not filed with the Commission, its proposed reactive power rate cannot be a changed rate.<sup>18</sup>

13. Chehalis further argues that, since the Commission has committed legal error by ordering it to refund rates charged for reactive power to Bonneville, the Commission must remedy such error by ordering Bonneville to repay such funds to Chehalis, with interest.<sup>19</sup>

#### **B. Bonneville Answer**

14. On November 4, 2010, Bonneville filed an answer. Bonneville urges the Commission to again find that Chehalis’s proposed rate for the provision of reactive power to Bonneville is a changed rate. Bonneville states that an initial rate filing is one

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<sup>15</sup> *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.*

<sup>16</sup> *Id.* at 593.

<sup>17</sup> Chehalis Motion at 4.

<sup>18</sup> *Id.* Chehalis also argues that transmission utilities, not generators such as Chehalis, are required to have standard interconnection agreements in their tariffs, and that the Commission has never required generators to file interconnection agreements. *Id.* at 5-6.

<sup>19</sup> *Id.* at 9.

that provides for a new service to a new customer and that both the customer and the service must be new.<sup>20</sup> Bonneville asserts that Chehalis provided reactive power to Bonneville well before 2005, when Chehalis first filed its rate schedule for such service with the Commission.<sup>21</sup> Therefore, Bonneville concludes, Chehalis's proposed rate for the provision of reactive power to Bonneville is not an initial rate.

15. Section 205 requires that the rate for provision of reactive power service should have been filed, argues Bonneville, but a failure to do so does not mar its effectiveness, or indeed, its existence. Bonneville was a customer of Chehalis's affiliate before 2005 and to hold otherwise would elevate "form over substance."<sup>22</sup>

### C. Chehalis Reply

16. On November 18, 2010, Chehalis filed a reply to Bonneville's answer.

17. Chehalis concedes that it had been providing reactive power to Bonneville before it filed its rate schedule, but states that that fact did not persuade the D.C. Circuit before and therefore does not have merit now.<sup>23</sup> Chehalis also takes issue with Bonneville's conclusion that Chehalis should have filed it, because Bonneville admits that requiring generators to do so would require the Commission to revisit its filing requirements.<sup>24</sup> Chehalis also states that Bonneville's argument that Bonneville was a customer of a Chehalis affiliate before 2005 is a new argument not raised in these proceedings before, and an argument that would convert large volumes of wholesale sales into retail sales.<sup>25</sup>

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<sup>20</sup> Bonneville Answer at 5.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.* at 11. Bonneville states that the interconnection agreement between Chehalis and Bonneville is subject to FPA section 205. First, the reactive power is tied to wholesale sales and transmission in interstate commerce. Second, the interconnection agreement is subject to FPA section 205 because Chehalis is a public utility, having filed a market-based rate schedule with the Commission in 2003.

<sup>23</sup> Chehalis Reply at 1-2.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.* at 4.

#### IV. Commission Determination

18. The Commission's determination of whether a rate is an initial or changed rate is significant because, under FPA section 205(e), the Commission can only suspend and order refunds when it is presented with a changed rate. The question presented by this case is whether Chehalis's proposed reactive power rate was or was not a changed rate. In its earlier orders in this proceeding, the Commission found that it was. But the D.C. Circuit concluded that there was one argument that those orders did not address: that Chehalis had not previously filed a rate for reactive power service. We address that argument here.

19. At the outset, we note that section 205 requires that rates 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.<sup>26</sup> If the provision of reactive power is a jurisdictional service, and no one in this proceeding denies that it is,<sup>27</sup> then the utility providing this service has an obligation to file a rate schedule governing the provision of this service. In sum, Chehalis should have filed a rate schedule, and on this basis alone it is fair to treat Chehalis's proposed rate schedule at issue here as a changed rate. Indeed, if Chehalis believes that its proposed rate schedule at issue here can and should be filed—as Chehalis does because Chehalis, in fact, filed it—then there is just as much reason to find that a rate schedule for the provision of reactive power should have been filed earlier when Chehalis first provided reactive power. Phrased differently, the Commission cannot reasonably find that Chehalis's proposed rate schedule for reactive power must be filed, but an earlier rate schedule for reactive power need not have been filed.

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<sup>26</sup> 16 U.S.C. § 824d(c) (2006).

<sup>27</sup> 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 Chehalis's filing.

20. We also do not agree with Chehalis that whether or not a rate schedule was actually on file with the Commission has a bearing on whether a proposed rate is an initial or changed rate. While Chehalis should have filed a rate schedule, its failure to do so did not convert the subsequent changed rate at issue here into an initial rate. To rule otherwise would elevate form over substance. Taken to its conclusion, moreover, Chehalis's argument that a rate schedule must have previously been filed before it can be considered changed leads to absurd results. If Chehalis's argument were accepted, service providers would have an incentive not to file rate schedules (which, after all, is a statutory requirement and not an option) until it is in their interest to do so, e.g., when they propose a significant increase in rates, because by delaying they could avoid suspension of the increase in rates.<sup>28</sup> In addition, we note that as a customer, not a provider, of the service that is the subject of this dispute, Bonneville did not have an obligation to file the stand-alone rate schedule for the provision of reactive power that Chehalis has filed.

21. The Commission's well-settled precedent is that an initial rate is one that involves both a new service and a new customer.<sup>29</sup> These two elements are the sole elements of what constitutes an initial rate. The record in this case shows that Chehalis has been

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<sup>28</sup> 16 U.S.C. § 824d(c) (2006).

<sup>29</sup> See, e.g., *WPS Canada*, 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 ¶ 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 State 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); and *Florida Power & Light Co. v. FERC*, 617 F.2d 809, 813-17 (D.C. Cir. 1980) (finding that Oneta's filing constituted a changed rate because Oneta was already providing reactive power to Public Service Company of Oklahoma under its interconnection agreement, albeit without charge).

providing reactive power service to Bonneville since 2003.<sup>30</sup> Therefore, when Chehalis filed its proposed rate schedule for the provision of reactive power on May 31, 2005, the rate schedule did not propose a rate for a new service and a new customer. Rather, the rate schedule was for a service that Chehalis had long been providing, and providing to Bonneville, and under FPA section 205(e) the Commission is thus entitled to suspend it and make it effective subject to refund.

The Commission orders:

(A) The Commission hereby responds to the question remanded to it by the D.C. Circuit, as set forth in the body of this order.

(B) Chehalis's motion for an order requiring Bonneville to repay the amounts that Chehalis has already refunded to Bonneville is hereby denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>30</sup> Bonneville Answer at 6 (explaining that Chehalis's generating facility commenced commercial operation in 2003 and began producing reactive power at that time; noting, also, that the parties' agreement required Chehalis to provide reactive power (citing a pleading that Chehalis filed earlier in this proceeding)).