

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Barton Village, Inc.,
Village of Enosburg Falls Water & Light
Department,
Village of Orleans, and
Village of Swanton Village, Vermont

Docket No. EL92-33-010

v.

Citizens Utilities Company

ORDER DENYING REHEARING

(Issued June 28, 2005)

1. This case is on remand from the United States Court of Appeals for the Second Circuit. In an order issued on June 17, 2004, as amended on July 8, 2004,¹ the court affirmed in part and remanded in part Commission orders² which dismissed a 1992 complaint filed by a group of municipal electric companies in Vermont (Villages)³ against Citizens Utilities Company (Citizens), concerning rates Citizens charged the Villages from 1963 to 1982. The court affirmed the Commission's previous orders with respect to our decision (1) denying the Villages "prior notice" refunds;⁴ (2) rejecting the

¹ *Barton Village, Inc. v. FERC*, No. 02-4293, 2004 U.S. App. LEXIS 14105 (2nd Cir. July 8, 2004) (July 8 Order).

² *Barton Village, Inc. v. Citizens Utilities Co.*, 99 FERC ¶ 61,111 (April 2002 Order), *reh'g denied*, 100 FERC ¶ 61,244 (2002) (September 2002 Order).

³ The Villages consist of Barton Village, Inc., the Village of Enosburg Falls Water and Light Department, the Village of Orleans, and the Village of Swanton Village, Vermont.

⁴ These were refunds companies were required to pay for charging rates pursuant to jurisdictional tariffs or agreements that were not timely filed with the Commission.

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Villages' argument that the Commission was required to consider certain findings by the Vermont Board of Public Service; (3) denying the Villages' request for an evidentiary hearing; and (4) holding that Citizens' interchange rates were formula rates. The court vacated and remanded solely the Commission's "determination that the filed rates were reasonable on the ground that FERC's order did not provide sufficient support for this conclusion."⁵

2. On February 14, 2005, the Commission issued its Order on Remand in this proceeding.⁶ There, consistent with the court's instructions, we explained the manner in which we had conducted our review of Citizens' rates for the period 1963-1982, and the basis for our conclusion that they were just and reasonable. The Villages and the Vermont Department of Public Service jointly filed a request for rehearing of the Order on Remand.⁷ In this order, we deny rehearing.

Background

3. The seemingly interminable history of this case is set in out in detail in our prior orders, and need not be repeated. As relevant here, the Order on Remand explained that, based on the record compiled in this proceeding, Citizens charged the Villages rates for capacity and energy based on incremental purchased power costs. The Order on Remand indicated that the information provided by Citizens, combined with information already on file, was sufficient to review Citizens' rates, in spite of the fact that Citizens was unable to locate invoices pertaining to the year 1967.⁸

4. While the Villages complained that Citizens had erroneously applied "capacity deficiency" charges to them, we found that Citizens was not precluded from passing these

See Central Maine Power Co., 56 FERC ¶ 61,200, *reh'g denied*, 57 FERC ¶ 61,083 (1991) (*Central Maine*); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 62 FERC ¶ 61,139, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (*Prior Notice*). The Commission distinguished such refunds, which were limited to the time value of the money that had been paid to the company, from refunds that might be required because such late-filed rates were not just and reasonable.

⁵ July 8 Order at 4.

⁶ *Barton Village, Inc. v. Citizens Utilities Co.*, 110 FERC ¶ 61,147 (2005).

⁷ For convenience, we refer to petitioners collectively as the Villages.

⁸ Order on Remand at P 8, 14.

charges through to the Villages under its formula rate.⁹ The Commission further determined that the Villages failed to show that Citizens' charges were excessive as compared to other available resources.¹⁰

5. The Order on Remand went on to explain that the Villages had properly paid Citizens' subtransmission costs (and a pro rata share of the Vermont Electric Company's transmission costs) when Citizens purchased power on behalf of the Villages and was the transmission provider. In this regard, the Commission also evaluated Citizens' comparison of costs per Village on a total cost basis with the rates actually charged, which revealed that for each year Citizens had under recovered its costs from the Villages. We also rejected the Villages' contention that Citizens' use of a 5 percent loss factor for transmission losses was unsupported.¹¹

6. Finally, the Order on Remand provided the Commission's own independent fixed charge analysis for the transmission services that Citizens provided in delivering power to the Villages between 1963 and 1982. Our analysis demonstrated that the transmission-related rates charged to the Villages for the years 1963 through 1982 were reasonable, in that our calculations produced a higher figure than that billed by Citizens to the Villages for each year.¹²

7. On March 16, 2005, the Villages filed their request for rehearing of the Order on Remand. We discuss the arguments raised by the Villages below. On March 25, 2005, Citizens filed a motion for leave to file a response to the Villages' request for rehearing. On April 12, 2005, the Villages filed an answer opposing Citizens' motion for leave to respond.

Discussion

Preliminary Matters

8. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2004), prohibits an answer to a request for rehearing. Accordingly, we will reject Citizens' response and dismiss the Villages' answer to Citizens' response as moot.

⁹ *Id.* at P 9-10.

¹⁰ *Id.* at P 11.

¹¹ *Id.* at P 12-13, 15.

¹² *Id.* at P 16.

Request for Rehearing

9. We will deny rehearing. The arguments made by the Villages in their request for rehearing can be divided into two categories: those that are appropriately before the Commission, and those that are not. We deal with the latter group first, and then address the claims the Villages have properly raised. Finally, the Commission also denies rehearing on an alternative ground, namely that, even if Citizens' rates from the 1963 through 1982 period were not just and reasonable, we would not require Citizens to make refunds to the Villages, based on the equities presented by the circumstances of this case.

The Commission Rejects the Villages' Arguments Which Are Beyond the Scope of this Proceeding

10. At the outset, the Villages argue that the Order on Remand fundamentally misconstrued the court's instructions by merely demonstrating the basis on which it found Citizens' rates just and reasonable. Instead, the Villages maintain, the court

did not instruct the Commission to explain its reasoning underlying its 2002 determination that Citizens' rates were just and reasonable. The Court *vacated* that determination. Therefore, the Commission's obligation on remand was to take a fresh look at the record.^[13]

This means, the Villages argue, that the Commission cannot adhere to its "previous refusal to address 'specific arguments concerning the quality of Citizens' cost support for its rates.'"¹⁴

11. The Villages go on to make various specific allegations concerning Citizens' cost support, most of which the Commission had rejected previously in its April 2002 Order because they had been raised for the first time on rehearing.¹⁵ The Villages also contend that the Commission committed error by failing to recognize that certain data contained in Citizens' filings had been ruled suspect by the Vermont Public Service Board. Furthermore, the Villages argue at some length that the Commission must hold an evidentiary hearing concerning these contentions, as issues of credibility are involved.¹⁶ In this regard, the Villages rely on Rule 801 of the Commission's Rules of Practice and

¹³ Request for Rehearing at 6 (emphasis in original).

¹⁴ *Id.*, quoting Order on Remand at P 5.

¹⁵ April 2002 Order, 99 FERC ¶ 61,111 at P 12.

¹⁶ Request for Rehearing at 13-25.

Procedure,¹⁷ which under their interpretation “provides that a failure to request an evidentiary hearing in a protest does not constitute a waiver of the right to make such a request on rehearing.”¹⁸

12. The Commission rejects these arguments as beyond the scope of the court’s mandate. The basis of the court’s remand is quite clear: In reaching its decision that Citizens’ rates for the 1963-1982 period were just and reasonable,

FERC fails to explain which facts it found probative in reaching these conclusions and even neglects to explain how it conducted its rate review. Therefore, we vacate and remand FERC’s determination that the filed rates were reasonable on the ground that FERC’s order did not provide sufficient support for this conclusion.^[19]

In the very next line of the opinion, the court went on to state that it had “considered and rejected Petitioners’ remaining arguments.”²⁰

13. The Villages’ expansive reading of the court’s mandate cannot be sustained in light of the actual language contained in the court’s opinion, which remanded *solely* for the Commission to explain the basis upon which it upheld Citizens’ rates for the 1963-1982 period. Thus, to the extent that the Villages are reiterating contentions rejected by the April 2002 Order as not properly preserved, the court has already ruled against them.

14. The court, moreover, rejected the Villages’ claim that the Commission should have relied on a 1997 order by the Vermont Public Service Board.²¹

15. Finally, the court specifically sustained the Commission’s finding that the Villages were not entitled to an evidentiary hearing. Indeed, the court agreed with the Commission that the Villages had “failed to adequately preserve this issue.”²² In short,

¹⁷ 18 C.F.R. § 385.801 (2004).

¹⁸ Request for Rehearing at 30.

¹⁹ July 8 Order at 4.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

the Villages' renewed request for an evidentiary hearing, and their various arguments in support thereof, are at this time beyond the scope of this proceeding.

16. The Villages' assertion that Rule 801 of the Commission's Rules of Practice and Procedure authorizes their late request for an evidentiary hearing is without merit. That rule is under Subpart H of those rules, governing "Shortened Procedures." It only applies to situations in which the parties have waived a hearing to permit summary disposition of their case. As the Villages never invoked this special procedure, their request for a hearing under Rule 801 is improper.

**In Any Event, Refunds are Inappropriate in This Proceeding
Based on the Equities Presented by the Circumstances of the
Case**

17. While the Villages are barred from now pursuing arguments that were previously before the court and rejected, the Commission's cost of service analysis appeared for the first time in the Order on Remand. Thus, to the extent that the Villages raise arguments specifically directed at that analysis, they are appropriately raised.

18. The Commission stands by its cost of service analysis; nothing the Villages have presented undercuts that analysis or our conclusion. For example, the Villages claim that, in performing its analysis, the Commission placed "selective reliance" on material contained in Citizens' FERC Form No. 1, on file with the Commission, and other data submitted by Citizens in the course of this proceeding.²³ The fact is that for transactions of this vintage, the Commission had to piece together the data it could, which we believe provided a sufficient record on which to base our conclusions.

19. The Villages also object that, contrary to Commission precedent, we erred in evaluating Citizens' interchange sales to the Villages as "unrelated to Citizens' interchange purchases and exchange transactions."²⁴ However, the precedent on which the Villages rely stands for no such general proposition.²⁵ In any event, while the

²³ Request for Rehearing at 42-43.

²⁴ *Id.* at 43-46. In this regard, the Villages rely on *Green Mountain Power Corp.*, 61 FERC ¶ 61,203 at 61,755-56 (1992) (*Green Mountain*), and *Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co.*, 37 FERC ¶ 61,323 at 61,943 (1986), *reh'g denied*, 38 FERC ¶ 61,194 (1987) (*SMUD*).

²⁵ In *Green Mountain*, the Commission employed a capacity charge leveled by the utility in a different sale to the same customer as a proxy to establish a remedy. In *SMUD*, the question was whether certain exchange transactions under a particular

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Villages insist that case involves interchange transactions, the record indicates otherwise. For example, the Villages allege that Citizens' "transactions with Barton Village were bilateral throughout the entire two-decade period."²⁶ The Commission's review of the relevant documents, however, reveals that Barton had a contract to sell Citizens energy from hydropower which was separate from the service Citizens was providing Barton. The Villages point to nothing in Citizens' contract to sell power to Barton that would require Barton's purchases of hydropower to be reflected as an offset or credit under that contract.

20. In any event, we will also deny rehearing on an alternative basis. Assuming *arguendo* that the Villages are correct and Citizens' rates for the period from 1963 through 1982 were not just and reasonable, the Commission would exercise its discretion not to order refunds because it would not be equitable under the circumstances presented by this case.

21. In *Towns of Concord v. FERC*, 955 F.2d 67 (D.C. Cir. 1992) (*Concord*), the court explained the relevant standard the Commission should apply with respect to refunds under the FPA:

Customer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. Because the equitable aspects of refunding past rates are . . . inextricably entwined with the [agency's] normal regulatory responsibility, absent some conflict with the explicit requirement of the core purposes of a statute, we have refused to constrain agency discretion by imposing a presumption in favor of refunds. . . . The agency need only show that it considered relevant facts and . . . struck a reasonable accommodation among them, . . . and that its order granting or denying refunds was equitable in the circumstances of this litigation.^[27]

contract were sufficiently integrated to be within the Commission's jurisdiction, which is not at issue here.

²⁶ Request for Rehearing at 8.

²⁷ 955 F.2d at 75-76 (citations and internal quotations omitted), citing *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301, 309 (1935); *Public Serv. Comm'n v. Economic Regulatory Admin.*, 777 F.2d 31, 36-38 (D.C. Cir. 1985); *Wisconsin Electric Power Co. v. FERC*, 602 F.2d 452, 457 (D.C. Cir. 1979); *Moss v. Civil Aeronautics Board*.

(continued...)

22. Looking at the specific circumstances here, we begin by noting the Commission's 1993 finding "that it would not be in the public interest to require the filing of agreements that expired prior to the August 2, 1991, issuance of *Central Maine*."²⁸ The only exception we made to this general wiping clean of the slate was in the event the company's failure to file was subject to a pending complaint. The Villages' complaint was the sole example.

23. In their complaint, the Villages alleged that, under the Commission's *Central Maine* precedent, refunds were appropriate because Citizens had missed the amnesty period we had established for late-filing companies, not because the rates at issue were unjust and unreasonable. In fact, the Villages initially abjured refunds based on the rates themselves not being just and reasonable:

According to the Commission's Policy Statement [*e.g.*, *Central Maine*], the Commission will require refunds, with interest pursuant to 18 C.F.R. § 35.19a, to customers of all amounts collected in excess of the variable [Operating and Maintenance] expenses incurred by a public utility failing to comply with the filing deadline published in the *Federal Register*. . . . The [] Villages believe that the rates collected from them by [Citizens] above or without a filed rate were neither just and reasonable, *but there is no need for the Commission to reach this issue. Under the Commission's policy, refunds are ordered, not because the late-filed or non-filed rates are found to be unjust and unreasonable, but because of the failure to file them in a timely manner.*[²⁹]

24. By now in this proceeding, however, the Commission has long since denied refunds to the Villages due to Citizens' late filing, both before and after 1963, and these decisions have been upheld by the courts.³⁰ Thus, the only potential remedy left in this

521 F.2d 298, 309-309 (D.C. Cir. 1975); *cf.* Restatement of Restitution § 1, comment c (1937).

²⁸ *Prior Notice*, 62 FERC at 61,824.

²⁹ Complaint of Barton Village, *et al.* at 15 (June 5, 1992) (citations omitted; emphasis supplied).

³⁰ On its own motion, the Commission determined that Citizens' post-1982 rates were just and reasonable, *Barton Village, Inc. v. Citizens Utilities Co.*, 68 FERC ¶ 61,005 at 61,033-34 (1994), a finding that was affirmed on appeal. *Barton Village, Inc. v. FERC*, 106 F.3d 442 (D.C. Cir. 1996) (unpublished decision).

case (*i.e.*, refunds for allegedly unjust and unreasonable rates from 1963 through 1982) is one that the Villages originally did not even seek.

25. A further consideration, of course, is the obvious age of the alleged FPA violation. The period for which Citizens seeks redress, in a complaint brought in 1992, begins some thirty years earlier, during the Kennedy administration, and ends more than twenty years ago, halfway through President Reagan's first term.

26. In weighing the equities here, the Commission finds nothing in the core purpose of the FPA that would mandate refunds under these circumstances. The basic remedial sections of the Act hardly contemplate refunds of unjust rates now more than forty years old.³¹ It is true that our decision means that a group of ratepayers *may* have been subject to unjust and unreasonable charges in the distant past. However, no complaint was brought by those ratepayers on this basis during all of those years. Moreover, the Commission finds that the expenditure of resources that would be required to address the matter (especially in light of the Villages' contention that an evidentiary hearing would now be necessary concerning twenty to forty year old rates), far outweighs the benefits of pursuing a remedy for allegations of injury so remote in time.

The Commission orders:

The Villages' request for rehearing is hereby denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

³¹ See 16 U.S.C. §§ 824d, e (2000).