

130 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer and Philip D. Moeller.

Arkansas Electric Cooperative Corporation

Docket No. EL05-15-009

v.

Entergy Arkansas, Inc.

ORDER CONDITIONALLY ACCEPTING REFUND REPORT
AND ORDERING FURTHER REFUNDS

(Issued January 8, 2010)

1. This order addresses the refund report submitted by Entergy Services, Inc. (Entergy) on behalf of Entergy Arkansas, Inc., in compliance with Opinion No. 488.¹ In this order, we will conditionally accept the refund report, subject to Entergy submitting a further refund report.

I. Background

2. Opinion No. 488 involved the interpretation of certain provisions contained in a power coordination, interchange and transmission service agreement (Power Agreement) between Entergy and Arkansas Electric Cooperative Corporation (AECC). In an initial decision issued January 26, 2006,² the presiding judge ruled that certain general billing provisions should be interpreted to allow Entergy to take transmission system operating constraints into account in determining the availability of AECC's generation units for purposes of billing, which would permit Entergy to bill AECC at the higher replacement energy cost for energy deemed purchased from Entergy to supply the energy

¹ *Arkansas Electric Cooperative Corp. v. Entergy Arkansas, Inc.*, Opinion No. 488, 117 FERC ¶ 61,099 (2006), *reh'g denied*, Order on Rehearing, 119 FERC ¶ 61,314 (2007).

² *Arkansas Electric Cooperative Corp. v. Entergy Arkansas, Inc.*, Initial Decision, 114 FERC ¶ 63,015 (2006).

requirements of AECC's customers. Opinion No. 488 reversed the presiding judge's decision and found that Entergy could not bill AECC at the higher replacement energy rate when circumstances did not warrant it and ordered Entergy to refund all excess amounts improperly billed, with interest, to AECC.

II. Entergy's Refund Report

3. On October 5, 2007, Entergy submitted a refund report, which reflected refunds paid to AECC from the refund effective date of December 24, 2004, established by the Commission in its Hearing Order,³ through September 30, 2006, with interest computed under section 35.19a of the Commission's regulations.⁴ Entergy states that the refunds were paid to AECC by wire transfer on September 20, 2007 and by way of a credit totaling \$18,545,805.76 on AECC's service bill for August 2007. Entergy states that the total refund due to AECC was \$22,106,806.84, which includes the associated interest that totaled \$2,405,837.57. Entergy states that after it credited \$1,115,384.03 and \$1,147,518.76 from the amounts AECC withheld from its July 2005 and August 2005 service bills, respectively, it refunded to AECC \$1,298,098.29 via wire transfer on September 20, 2007.

III. Notice of Filing and Responsive Pleadings

4. Notice of the refund report was published in the *Federal Register*, 72 Fed. Reg. 60333 (2007), with interventions and protests due on or before November 5, 2007. On October 22, 2007, AECC filed a protest. Entergy filed an answer to the protest on November 6, 2007. AECC filed an answer to Entergy's answer on November 16, 2007. AECC filed a supplemental protest on June 27, 2008 expressing concerns over any delay in this proceeding due to an appeal filed by Entergy to the United States Court of Appeals for the District of Columbia Circuit, which was since denied on June 12, 2009.⁵ AECC also interpreted a statement in Entergy's brief in the aforementioned appeal as an admission that Entergy must refund certain amounts collected since July 1, 2004. Entergy filed an answer to AECC's supplemental protest on July 14, 2008 stating that the statement in its brief does not conflict with its position on the refund effective date in this proceeding and further stating that its representations to the Court of Appeals and the Commission are consistent and do not constitute any admission.

³ *Arkansas Electric Cooperative Corp. v. Entergy Arkansas, Inc.*, 109 FERC ¶ 61,327 (2004) (Hearing Order).

⁴ 18 C.F.R. § 35.19a (2009).

⁵ *Entergy Services, Inc. v. FERC*, 568 F.3d 978 (D.C. Cir. 2009).

AECC's Protest

5. AECC states that Entergy's refund report reveals that it failed to provide refunds and interest for the period from July 1, 2004, the date Entergy began improperly billing AECC, through December 23, 2004. While AECC acknowledges that Entergy refunded overcharges beginning on the refund effective date specified in the Hearing Order, it argues that Entergy did not provide refunds from the date that the improper billing began. AECC asserts that Opinion No. 488 requires Entergy to refund all excess amounts improperly billed *without limitation*.⁶ AECC asserts that, as a result, Entergy failed to refund to AECC overcharges that AECC estimates to total more than \$2.5 million, not including interest.

6. AECC asserts that, with respect to the Commission's authority under section 206(a) of the Federal Power Act (FPA), the Commission can institute a proceeding to determine whether a rate is unjust or unreasonable and, further, that under section 206(b) the Commission has the authority to establish a refund effective date not earlier than the date of the filing of the complaint nor later than five months after such filing. However, AECC states, to the extent that the Commission determines that a public utility failed to comply with the terms and conditions of the current filed rate, as opposed to finding the rate unjust or unreasonable and changing it, the Commission is not bound by any timing limitations on its authority to require refunds.⁷ AECC also states that some courts have held that the Commission's authority to issue refunds for violating the filed rate derives

⁶ See AECC Protest at 2 (emphasis added) *citing* Opinion No. 488, 117 FERC ¶ 61,099 at Ordering Para. (C).

⁷ AECC's Protest at 3-4 *citing, e.g., Duke Power Co. v. FERC*, 864 F.2d 823,831 (D.C. Cir. 1989) ("[T]he Commission's order requiring Duke to refund the unauthorized charges does not implicate, and therefore is not precluded by, the retroactivity provisions of sections 205 and 206 of the Federal Power Act As the Commission held, 'Duke's claim that such a change in a filed rate can only be made prospectively after a section 206 proceeding is only relevant if we assume that the filed rates permitted the recovery of amounts booked to Account No. 407 in the first instance. They do not.');" *Boston Edison Co. v. FERC*, 856 F.2d 361, 369 (1st Cir. 1988) ("While FERC may not amend an initial filing retrospectively in the usual case, it can enforce the terms of a filed rate and order refunds for past violations of one."); *NY Power Authority v. Consolidated Edison Co. of N.Y., Inc.*, 112 FERC ¶ 61,304, at P 56 (2005) ("[W]e are not retroactively changing a rate on file, but rather are enforcing the rates, terms, and conditions of several filed rate schedules.... Such action is clearly within our authority under FPA sections 205 and 206").

from section 309 of the FPA,⁸ which authorizes the Commission “to perform any and all acts ... as it may find necessary or appropriate to carry out the provisions of this Act.”⁹ AECC asserts that Entergy began the improper billing of AECC on July 1, 2004, and should be directed to comply with the Commission’s order to refund *all* amounts improperly billed, including the approximately \$2.5 million that Entergy refused to refund to AECC.¹⁰

7. AECC argues that the Commission did not find that the rate being charged to AECC was not just and reasonable, but instead the Commission found that Entergy’s billing AECC at the higher replacement energy cost for energy deemed purchased from Entergy did not conform to the specific billing provisions of the contract and that Entergy should have been billing the relatively inexpensive incremental fuel rate (i.e., substitute energy). AECC argues that, essentially, the Commission found that, beginning July 1, 2004, Entergy was not complying with the filed rate.¹¹

8. AECC argues that the mere fact that the Commission established a refund effective date according to section 206, essentially a ministerial action, does not mean that the date applies to any and all refund obligation imposed in this case. AECC states that it filed its complaint pursuant to sections 206 and 306 of the FPA, and it points to *Southwestern Elec. Coop, Inc. v. Soyland Power Coop., Inc. (Soyland)*,¹² to support its contention that such a ministerial act does not limit the Commission’s authority to impose refund obligations where a public utility has charged a customer an amount in excess of the filed rate. AECC also notes that the Commission made no express reference to the refund effective date in Opinion No. 488.

⁸ 16 U.S.C. § 825h (2006).

⁹ AECC Protest at 4 n.9, *citing, e.g., Pub. Util. Comm’n of the State of Calif. v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006) (“Section 309... gives FERC authority to order refunds if it finds violations of the filed tariff and imposes no temporal limitations.”); *Towns of Concord, Norwood, and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992) (“As to ordering refunds of amounts improperly collected in excess of the filed rate, the Commission’s authority may also be inferred from section 309 of the Act.”).

¹⁰ AECC Protest at 2.

¹¹ *Id.* at 4.

¹² *See* AECC Protest at 4-5 *citing* 95 FERC ¶ 61,254, at 61,886-87 (2001); *see also Public Service Co. of N.M. v. Southwestern Public Service Co.*, 113 FERC ¶ 61,153, at 61,604 n.18 (2005).

IV. Discussion

A. Procedural Matters

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Entergy's answers nor AECC's answer and will, therefore, reject them.

B. Commission Determination

10. We will conditionally accept Entergy's refund report, subject to Entergy providing further refunds of the amounts it collected in excess of its filed rate, with interest, to AECC. We agree with AECC that Entergy must provide these additional refunds for the period from July 1, 2004 through December 23, 2004.

11. In Opinion No. 488, the Commission found that starting on July 1, 2004, Entergy reinterpreted the billing provisions of the Power Agreement to account for transmission system operating constraints and billed AECC at the wrong rate.¹³ Therefore, Entergy failed to charge the filed rate for the entire period at issue. As AECC points out, because Entergy failed to charge its filed rate, Entergy is not limited to providing refunds only from the refund effective date specified in the Hearing Order;¹⁴ Opinion No. 488 requires Entergy to "refund all excess amounts improperly billed, with interest in accordance with the Commission's regulations."¹⁵ Thus, to remedy Entergy's failure to charge the filed rate, and to comply with Opinion No. 488, Entergy must provide additional refunds for the amounts it collected in excess of its filed rate, with interest pursuant to section 35.19a of the Commission's regulations,¹⁶ for the period from July 1, 2004 through December 23, 2004. In addition, Entergy must file with the Commission a refund report within 30 days after making such refunds.

¹³ Opinion No. 488, 117 FERC ¶ 61,099 at P 54.

¹⁴ Refunds may be ordered for a period prior to the refund effective date established in a hearing order when there is a violation of the filed rate. *See supra* note 7 (citing Constitutional and Commission precedent on refunds when a public utility fails to charge the filed rate); *accord* 16 U.S.C. § 824d(c) (2006) (all rates and charges must be filed with the Commission).

¹⁵ Opinion No. 488, 117 FERC ¶ 61,099 at Ordering Para. (C).

¹⁶ 18 C.F.R. § 35.19a (2009).

The Commission orders:

(A) Entergy's refund report is hereby conditionally accepted, as discussed in the body of this order.

(B) Entergy is hereby directed to provide, within 30 days of the date of this order, refunds to AECC, with interest in accordance with the Commission's regulations, from July 1, 2004 through December 23, 2004 for amounts improperly billed under the Power Agreement, and to file a refund report within 30 days thereafter, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.