

142 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England, Inc.,
Green Mountain Power Corporation and
Central Vermont Public Service Corporation

Docket No. ER12-2304-001

ORDER DENYING REHEARING

(Issued February 25, 2013)

1. This order addresses the October 23, 2012 joint request for rehearing submitted by Vermont Electric Cooperative, Inc. (VEC) and Washington Electric Cooperative, Inc. (WEC), and WEC's separate October 24, 2012 request for clarification or rehearing, of the Commission's September 24, 2012 Order.¹ The September 24, 2012 Order established hearing and settlement judge procedures for proposed revised rate schedules and notices of cancellation submitted by Green Mountain Power Corporation (Green Mountain) and Central Vermont Public Service Corporation (Central Vermont) (together, Applicants), related to their merger. We will deny the requests for rehearing and clarification.

I. Background

A. Merger Order and Green Mountain's Compliance Filing

2. On March 6, 2012, the Commission authorized Gaz Metro LP to acquire Central Vermont and for Green Mountain to subsequently merge with Central Vermont.²

3. Subsequently, on July 26, 2012, the Applicants submitted, under section 205 of the Federal Power Act (FPA),³ revised Schedule 21-GMP and revised Schedule 20A-GMP

¹ *ISO New England, Inc., et al.*, 140 FERC ¶ 61,239 (2012) (September 24, 2012 Order).

² *Central Vermont Pub. Serv. Corp., et al.*, 138 FERC ¶ 61,161 (2012) (Merger Order).

³ 16 U.S.C. § 824d (2006).

(jointly, Schedules)⁴ to the ISO New England, Inc. Transmission, Markets and Services Tariff (Tariff), and notices of cancellation for the then-effective Schedules 21-CV and 20A-CV, to implement proposed new rates pursuant to the merger. VEC and WEC protested the filing. As relevant here, VEC argued that the proposed Schedules and notices of cancellation represented the Applicant's unilateral attempt to abrogate a Commission-accepted 1991 Vermont Transmission Agreement (1991 VTA), in violation of the *Mobile-Sierra* "public interest" presumption.⁵ VEC asserted that the Schedules were inconsistent with the 1991 VTA, because, according to VEC, Green Mountain's proposed revenue requirements formula in Schedule 21-GMP impermissibly includes payments for certain transmission facilities that Green Mountain makes to Vermont Electric Power Co. (VELCO) under, *inter alia*, the 1991 VTA and the Commission-approved Settlement Agreement in Docket Nos. EL07-11-000, et al. VEC stated that, by including these transmission charges in Schedule 21-GMP, Green Mountain would reallocate those charges to other VELCO customers through a unilateral modification of the 1991 VTA, in violation of the *Mobile-Sierra* "public interest" presumption.⁶ VEC argued that the proposed rates contravene an existing contract, i.e., the 1991 VTA, and, therefore, the proposed tariff revisions cannot become effective without satisfying the public interest standard.⁷ WEC's protest assailed the use of a "postage stamp rate" instead of a "license plate rate," and further disputed the five-year phase-in period for the Schedule 21-GMP LNS rate.⁸

4. In the September 24, 2012 Order, the Commission preliminarily found that the proposed Schedules 21-GMP and 20A-GMP and notices of cancellation had not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.⁹ Accordingly, the Commission accepted the

⁴ Schedule 21-GMP provides post-merger rates for Local Network Transmission Service (LNS) and Local Point-to-Point Service. Schedule 20A-GMP contains terms and conditions relative to the use of Green Mountain's post-merger share of the Hydro-Quebec Phase II Transmission Line.

⁵ VEC August 16, 2012 Protest at 18-19, 28 (citing *United Gas Pipe Line v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*)).

⁶ VEC August 16, 2012 Protest at 28.

⁷ *Id.*

⁸ As further explained in the September 24, 2012 Order, the phase-in period is intended to mitigate the impacts, including rate increases and decreases, experienced by customers due to the blending of Green Mountain's and Central Vermont's rates.

⁹ September 24, 2012 Order, 140 FERC ¶ 61,239 at P 21.

proposed Schedules and notices for filing, suspended them for a nominal period to become effective September 24, 2012 or on the closing date of the merger, which occurs later, and established hearing and settlement judge procedures.¹⁰

II. Requests for Rehearing

A. VEC and WEC Joint Request for Rehearing

5. Together, VEC and WEC assert that the Commission erred in the September 24, 2012 Order by failing to acknowledge the *Mobile-Sierra* argument raised by VEC that accepting Applicants' rate proposal would abrogate an important cost allocation aspect of a long-standing filed contract that is not subject to unilateral modification. VEC and WEC also assert that the Commission erred by failing to determine whether the Applicants had met the requirements to advance a rate modification that, according to VEC and WEC, is barred by *Mobile-Sierra*.¹¹ They reiterate that the *Mobile-Sierra* "public interest" presumption applies to the 1991 VTA and that acceptance of the Schedules and notice of cancellation, even for purposes of setting them for hearing, abrogates elements of the 1991 VTA, thereby violating the *Mobile-Sierra* "public interest" presumption.¹²

6. They argue that the Commission erred by allowing the proposed rates to become effective, "even on an interlocutory basis and subject to refund,"¹³ without applying *Mobile-Sierra*'s "public interest" standard of review. According to VEC and WEC, the proposed tariff revisions represent a unilateral contract modification that requires the Applicants to demonstrate that the public interest standard has been satisfied.¹⁴ VEC and WEC further state that the September 24, 2012 Order seems to accept the Schedules and notices of cancellation pursuant only to section 205 of the FPA, when the Commission should have instructed that the public interest standard applies to the 1991 VTA.

¹⁰ *Id.*

¹¹ VEC and WEC October 23, 2012 Joint Request for Rehearing at 2.

¹² *Id.* at 3-5. Because we are denying rehearing on procedural grounds, we need not recite the details of VEC and WEC's substantive *Mobile-Sierra* claim in the instant order.

¹³ *Id.* at 6.

¹⁴ *Id.* at 7 (citing *Borough of Lansdale v. FPC*, 494 F.2d 1104 (D.C. Cir. 1974)).

B. WEC's Motion for Clarification and Alternative Request for Rehearing

7. WEC states that the September 24, 2012 Order mischaracterized three of WEC's arguments and that the Commission should clarify them to avoid confusion about the issues set for hearing.

8. WEC first contends that the September 24, 2012 Order incorrectly characterized WEC's challenge to the postage stamp rates as being limited to the phase-in period, when, in fact, WEC objects to the proposed postage stamp rate structure in its entirety. WEC states that the September 24, 2012 Order similarly narrowed WEC's objection to the phase-in proposal, as being concerned with only the five-year duration; WEC avers that the phase-in proposal has numerous deficiencies, of which the duration is only one. Lastly, WEC contends that the September 24, 2012 Order erroneously rejected WEC's August 31, 2012 pleading as an impermissible answer to a protest. WEC avers that the pleading was not an answer to a protest, but rather was filed as a matter of right under Rule 213(a)(3),¹⁵ as an answer in support of VEC's motion to reject Green Mountain's filing on *Mobile-Sierra* grounds.

9. To the extent that the Commission declines to clarify the three issues raised in WEC's motion for clarification, WEC requests rehearing.

III. Discussion

10. For the reasons discussed below, we will deny the requests for rehearing and clarification.

11. VEC and WEC argue that the Commission failed to acknowledge VEC's *Mobile-Sierra* argument in the September 24, 2012 Order. We disagree. In the September 24, 2012 Order, the Commission summarized VEC's argument that the Applicants' inclusion in the Annual Transmission Revenue Requirement of directly-assigned "Specific Facilities," as defined in the Commission-accepted 1991 VTA, violates the 1991 VTA.¹⁶ Moreover, it was unnecessary for the Commission to further detail VEC's arguments in support of its claim that the Commission should reject the filing because it violated the 1991 VTA, which VEC claimed was not subject to unilateral modification. Whether the *Mobile-Sierra* "public interest" standard of review applies in this case depends first on whether the proposed Tariff revisions in fact change the terms of the 1991 VTA. This is

¹⁵18 C.F.R. § 385.213(a)(3) (2012).

¹⁶ See September 24, 2012 Order, 140 FERC ¶ 61,239 at P 17 (citing VEC's August 16, 2012 Protest at 28, which raised several issues, including the *Mobile-Sierra* argument, in support of its claim).

a threshold factual issue in dispute that we have set for hearing.¹⁷ The Commission's application of the "public interest" standard of review in the September 24, 2012 Order would have, in fact, improperly prejudged that dispute.

12. Further, the September 24, 2012 Order did not approve the proposed rates; rather, it accepted them for filing and suspended them, to be subject to refund. The Commission's regulations explicitly state that permission to become effective "shall not constitute approval by the Commission of such rate schedule or tariff or part thereof or notice of cancellation."¹⁸ Accordingly, the September 24, 2012 Order did not approve the proposed Tariff revisions; on the contrary, the Commission expressly stated that the proposed Tariff revisions may be unjust and unreasonable and, therefore, accepted them for filing and suspended them, making them effective subject to refund, so that they could be further investigated at hearing. In short, the Commission established hearing and settlement judge procedures to explore the genuine issues of material fact raised by VEC and WEC, including the relationship between the proposed Tariff revisions and the 1991 VTA.¹⁹ If VEC and WEC disagree with the Commission's eventual determination on the *Mobile-Sierra* question, then they can request rehearing after the Commission issues an order on the initial decision that will be issued following the hearing process.

13. For similar reasons, we will not grant WEC's request for clarification. To the extent WEC disagrees with the September 24, 2012 Order's description of its arguments, it can raise or clarify those arguments at hearing.²⁰

14. We also disagree with WEC's argument that the September 24, 2012 Order erroneously rejected WEC's August 31, 2012 pleading as an impermissible answer to a protest. Although VEC styled its protest as a "motion to reject" and WEC styled its September 24, 2012 pleading as an "answer" to that motion, VEC's pleading was, in substance, a protest and WEC's responsive pleading was, in substance, an answer to that protest (albeit in support). We evaluate a pleading based on its substance, rather than its

¹⁷ *E.g., ASARCO, Inc. v. FERC*, 777 F.2d 764, 772 (D.C. Cir. 1985).

¹⁸ 18 C.F.R. § 35.4 (2012).

¹⁹ In its protest, VEC requested that if the Commission determines not to reject the filing, it should "set the matter for hearing, inclusive of all aspects of the rate and with specific direction to address the threshold questions about whether the 1991 VTA is affected and can be modified through this filing."

²⁰ *See, e.g., Boston Edison Co.*, 101 FERC ¶ 61,068, at P 9 n.4 (2002) (explaining that the Commission "typically do[es] not resolve matters in the background section of an order; rather, the background section of an order is just that, background." (citing *Southern Co. Services, Inc.*, 57 FERC ¶ 61,284, at 61,929 (1991))).

style or form.²¹ Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,²² prohibits an answer to a protest, and the September 24, 2012 Order appropriately rejected WEC's August 31, 2012 pleading as such.

The Commission orders:

VEC's and WEC's requests for rehearing and WEC's request for clarification or rehearing of the September 24, 2012 Order are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²¹ See, e.g., *Stowers Oil & Gas Co., et al., N. Natural Gas Co., Div. of Internorth, Inc.*, 27 FERC ¶ 61,001, at 61,002 n.3 (1984) ("Nor does the style in which a petitioner frames a document necessarily dictate how the Commission must treat it.").

²² 18 C.F.R. § 385.213(a)(2) (2012).