

143 FERC ¶ 61,223
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.

Berry Petroleum Company

Docket Nos. ER12-2233-000
ER12-2233-001

ORDER GRANTING REHEARING AND DISMISSING REFUND REPORT

(Issued June 7, 2013)

1. On September 7, 2012, the Commission issued an order authorizing Berry Petroleum Company (Berry Petroleum) to sell energy, capacity, and ancillary services at market-based rates.¹ In addition, the Commission denied Berry Petroleum's request for waiver of the Commission's prior notice requirement and directed Berry Petroleum to make refunds. On October 9, 2012, Berry Petroleum filed a request for rehearing of the September 7 Order. On October 24, 2012, Berry Petroleum submitted a refund report in compliance with the directives of the September 7 Order. For the reasons discussed below, we grant rehearing and dismiss Berry Petroleum's refund report as moot.

I. Background

2. On July 11, 2012, Berry Petroleum filed an application with the Commission seeking authority to sell energy, capacity, and ancillary services at market-based rates. Berry Petroleum also requested waiver of the Commission's prior notice requirement in order to allow its market-based rate authorization and accompanying tariff to become effective on April 1, 2012.² Berry Petroleum stated that its facilities³ were self-certified

¹ *Berry Petroleum Co.*, 140 FERC ¶ 61,186 (2012) (September 7 Order).

² *Berry Petroleum Company*, Application, Docket No. ER12-2233-000, at 9-12 (Filed July 11, 2012) (Application).

³ According to Berry, its facilities consist of: (1) a 42 MW combined heat and power facility in Newhall, California; (2) a 38 MW combined heat and power facility in Kern County, California; and (3) an 18 MW combined heat and power facility in Kern County, California. Application at 2.

as qualifying facilities (QF) when sales of excess power from those facilities were exempted from Commission rate regulation under section 205 of the Federal Power Act (FPA) and under contracts approved by the California Public Utilities Commission (California Commission) as part of its implementation of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (2006).⁴

3. Berry Petroleum stated that it entered into new contracts with Southern California Edison Company (SoCal Edison) and Pacific Gas & Electric Company (PG&E) (Transition Agreements) on April 1, 2012 as part of the California Commission-approved Qualifying Facility and Combined Heat and Power Program Settlement Agreement (QF/CHP Settlement), which terminated the historical PURPA contracts and established a new Qualifying Facility and Combined Heat and Power Program (QF/CHP Program) in California. Berry Petroleum noted that the QF/CHP Settlement established transition contracts (Transition PPAs) that replaced the long-term PURPA contracts, like those under which Berry previously sold its power to SoCal Edison and PG&E, and that Berry Petroleum's Transition Agreements were Transition PPAs under the QF/CHP Settlement. In its Application, Berry Petroleum stated that it came to understand that its Transition Agreements no longer met the requirements for exemption from section 205 of the FPA after it had executed the Transition Agreements; thus, it did not seek regulatory approval for those sales in advance.⁵

4. In the September 7 Order, the Commission granted Berry Petroleum market-based rate authority but denied Berry Petroleum's request for waiver of the prior notice requirement.⁶ The Commission stated that section 205 of the FPA requires that rates be timely filed with the Commission.⁷ In this regard, the Commission explained that it cannot "ignore its statutory duty to determine whether rates are just and reasonable by permitting utilities to submit filings whenever convenient," and that it "must have the opportunity to examine proposed rates, terms, and conditions of jurisdictional service before that service commences."⁸ The Commission additionally noted its prior decisions

⁴ Application at 9-12

⁵ *Id.* at 18.

⁶ September 7 Order, 140 FERC ¶ 61,186 at PP 23-24.

⁷ *Id.* P 23 (citing 16 U.S.C. § 824d (2006); *El Paso Elec. Co.*, 105 FERC ¶ 61,131, at PP 9-11 (2003) (*El Paso*)).

⁸ *Id.* (quoting *El Paso*, 105 FERC ¶ 61,131 at P 14).

explaining that the Commission would grant waiver of the prior notice requirement for proposals to charge market-based rates only in extreme or extraordinary circumstances.⁹

5. The Commission determined that Berry Petroleum failed to demonstrate extraordinary circumstances warranting waiver of the prior notice requirement. In particular, the Commission stated that an applicant's lack of awareness does not constitute extraordinary circumstances.¹⁰ Consequently, the Commission required Berry Petroleum to refund its customers the time-value of the gross revenues collected for the period that rates were collected without market-based rate authority.

6. On October 24, 2012, Berry Petroleum submitted a refund report indicating that it refunded \$12,033.54 to SoCal Edison and \$29,624.37 to PG&E.¹¹

II. Request for Rehearing and Responsive Pleadings

7. Berry Petroleum argues that, in denying Berry Petroleum's request for waiver of the prior notice requirement and consequently ordering refunds, the September 7 Order relies on inapplicable precedent.¹² First, Berry Petroleum asserts that, unlike the applicants in *Trigen-St. Louis*, Berry Petroleum's delay in filing was not caused by oversight, neglect, or ignorance. Rather, Berry Petroleum asserts that the delay in this case was caused by regulatory uncertainty surrounding the jurisdictional status of Transition PPAs under the QF/CHP Settlement.¹³ Further, Berry Petroleum states that, whereas the sales at issue in *Trigen-St. Louis* were made into a competitive market, the Transition Agreements govern sales of energy and capacity from cogeneration QFs solely

⁹ *Id.* (*Cent. Me. Power Co.*, 56 FERC ¶ 61,200, *order on reh'g*, 57 FERC ¶ 61,083 (1991); *Cent. Hudson Gas & Elec. Co.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,984, *clarified*, 65 FERC ¶ 61,081 (1993); 18 C.F.R. § 35.19a (2012)).

¹⁰ *Id.* P 24 (citing *Trigen-St. Louis Energy Corp.*, 120 FERC ¶ 61,044 (2007) (*Trigen-St. Louis*); *OREG 1, Inc.*, 135 FERC ¶ 61,150 (2011) (*OREG 1*), *order denying reh'g*, 138 FERC ¶ 61,110 (2012)).

¹¹ Berry Petroleum Company, Refund Report, Docket No. ER12-2233-000, at 4 (Filed Oct. 24, 2012).

¹² Berry Rehearing Request at 2.

¹³ *Id.* at 4 (citing *Trigen-St. Louis*, 120 FERC ¶ 61,044).

to the connected investor-owned utilities at contracted rates and pursuant to a contract that had been approved by the state regulatory body.¹⁴

8. Furthermore, Berry Petroleum argues that the September 7 Order departs from prior precedent without explanation.¹⁵ Moreover, Berry Petroleum states that the Commission has frequently granted waiver of the prior notice requirement to permit rates to become effective on the date of filing or a day after the date of filing, even in the absence of extraordinary circumstances.¹⁶

9. Berry Petroleum additionally argues that the September 7 Order does not give due consideration to the facts presented in support of Berry Petroleum's claim that extraordinary circumstances warrant waiver of the prior notice requirement.¹⁷ In particular, Berry Petroleum states that its delay in seeking market-based rate authority "concerns uncertainty on the part of all parties to the lengthy overhaul of the [qualifying facility] contracting requirements in California, a process that was beyond Berry Petroleum's control."¹⁸ Berry Petroleum explains that the rates in the Transition Agreements were developed as part of the QF/CHP Settlement, which was adopted by the California Commission to transition qualifying facilities in California from long-term contracts under PURPA to Transition PPAs and, in coming years, to long-term replacement contracts. Berry Petroleum adds that, despite entering the Transition Agreements pursuant to the terms of the QF/CHP Settlement, uncertainty concerning the jurisdictional status of Transition PPAs has yet to be resolved. Lastly, Berry Petroleum states that it sought market-based rate authority out of an abundance of caution and submitted its application as soon as practicable after deciding that it should apply for

¹⁴ *Id.* Berry Petroleum also argues that the Commission improperly relied on *OREG 1*, which Berry Petroleum states addressed a series of late-filed qualifying facility certifications and did not address a request for waiver of the prior notice requirements. *Id.* at 4 (citing *OREG 1*, 135 FERC ¶ 61,150 at PP 1-3).

¹⁵ *Id.* at 2. For example, Berry Petroleum contends that, in *Lumberton Power, LLC*, the Commission granted two applications for market-based rate authority that requested an effective date one day after filing, despite a protest challenging the request for waiver and the applicants' failure to raise any specific claim of extraordinary circumstances. *Id.* at 5 (citing *Lumberton Power, LLC*, 117 FERC ¶ 61,050 (2006)).

¹⁶ *Id.* at 6 (citing *El Segundo Power, LLC*, 84 FERC ¶ 61,011 (1998)).

¹⁷ *Id.* at 2, 6-8.

¹⁸ *Id.* at 7.

market-based rate authority, in case it is ultimately determined that Transition PPAs and the Transition Agreements are subject to the requirements of section 205 of the FPA.¹⁹ Thus, Berry Petroleum concludes that it did not neglect or delay in meeting its obligations and, instead, sought to fulfill those obligations aggressively in light of this regulatory uncertainty.

10. The California Commission filed an amicus brief in support of Berry Petroleum's request for rehearing (Amicus Brief). SoCal Edison and PG&E subsequently filed a motion to intervene out-of-time and motion for clarification (Joint Motion for Clarification). In turn, the California Commission filed a supplemental amicus brief (Supplemental Amicus Brief). Berry Petroleum filed a motion for extension of time to respond to the Amicus Brief, the Joint Motion for Clarification, and the Supplemental Amicus Brief. Berry Petroleum later filed an answer (Berry Petroleum Answer).

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), we will deny SoCal Edison's and PG&E's motion to intervene in this proceeding. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. SoCal Edison and PG&E have not met this higher burden of justifying their late intervention.²⁰ Moreover, the California Commission filed neither a notice of intervention nor a motion to intervene and is therefore not a party to this proceeding. In turn, because SoCal Edison, PG&E, and the California Commission are not parties to this proceeding, they lack standing to seek rehearing of the September 7 Order under the FPA and the Commission's

¹⁹ *Id.* at 7-8.

²⁰ *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

regulations,²¹ and thus, we will dismiss the Joint Motion for Clarification and the Amicus Brief and Supplemental Amicus Brief.²²

12. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2012), prohibits an answer to a request for rehearing. Thus, we will reject the Berry Petroleum Answer.

B. Substantive Matters

13. As discussed below, we will grant rehearing of the September 7 Order's requirement that Berry Petroleum make refunds.

14. In an order issued contemporaneously with this decision, we find that Transition PPAs are exempt from the requirements of section 205 of the FPA because the Transition PPAs, executed pursuant to the terms of the QF/CHP Settlement, are pursuant to the California Commission's implementation of section 210 of PURPA.²³ As such, the Transition Agreements, which are Transition PPAs, are exempt from the requirements of section 205. Consequently, we find that Berry Petroleum was not required to obtain market-based rate authority before executing the Transition Agreements and that waiver of the prior notice requirement was unnecessary. Refunds, therefore, need not have been made.²⁴

15. Furthermore, given our decision to grant rehearing of the September 7 Order's requirement that Berry Petroleum make refunds, we will dismiss Berry Petroleum's refund report as moot. As noted above, on October 24, 2012, Berry Petroleum submitted a refund report indicating that it refunded \$12,033.54 to SoCal Edison and \$29,624.37 to

²¹ See 16 U.S.C. § 8251(a) (2006); 18 C.F.R. § 385.713(b) (2012); *S. Co. Servs., Inc.*, 92 FERC ¶ 61,167 (2000).

²² Although the California Commission styles its pleadings as amicus briefs, we find that the Amicus Brief and Supplemental Amicus Brief, in substance, constitute a request for rehearing of the September 7 Order. See *Stowers Oil & Gas Co.*, 27 FERC ¶ 61,001, at 61,002 n.3 (1984).

²³ *S. Cal. Edison Co.*, 143 FERC ¶ 61,222 (2013).

²⁴ Because, consistent with our actions in *S. Cal. Edison Co.*, *supra* note 23, we grant rehearing in this case on the grounds that the Transition Agreements are exempt from the requirements of section 205 of the FPA, we need not address the substantive arguments raised by Berry Petroleum in its request for rehearing.

PG&E.²⁵ Given that we have now found that the refunds, which have already been made, need not have been made, we find it appropriate for Berry Petroleum to recoup the refunds from SoCal Edison and PG&E.²⁶

The Commission orders:

Berry Petroleum's request for rehearing of the September 7 Order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁵ Berry Petroleum Company, Refund Report, Docket No. ER12-2233-000, at 4 (filed Oct. 24, 2012).

²⁶ See, e.g., *Entergy Power, Inc.*, 64 FERC ¶ 61,318 (1993).