

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

Chehalis Power Generating, L.P.

Docket No. ER05-1056-011

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING, AND SETTING
ASIDE PRIOR ORDER, IN PART

(Issued September 17, 2020)

1. On May 19, 2017, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded this case to the Commission to determine how to balance the equities when ordering the recoupment by Chehalis Power Generating, L.P. (Chehalis)¹ of refunds originally paid by Chehalis to the Bonneville Power Administration (Bonneville).² On June 1, 2020,³ the Commission issued an order based on the D.C. Circuit's guidance, and found that it was equitable for Chehalis to recoup refunds from Bonneville as if the Commission had treated its filing as an initial rate subject to a Federal Power Act (FPA) section 206⁴ investigation, plus interest. The Commission directed Bonneville to issue payment to Chehalis consistent with the June 2020 Order, and to file a report within 120 days of the date of the June 2020 Order detailing the payment made to Chehalis. On July 1, 2020, Chehalis filed a request for rehearing of the June 2020 Order.
2. Pursuant to *Allegheny Defense Project v. FERC*,⁵ the rehearing request filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of

¹ Consistent with the Commission's prior orders as well as the parties' pleadings, the Commission will refer to the substituted petitioner, TNA Merchant Projects, Inc., as "Chehalis."

² *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354 (D.C. Cir. 2017) (Remand Order).

³ *Chehalis Power Generating, L.P.*, 171 FERC ¶ 61,188 (2020) (June 2020 Order).

⁴ 16 U.S.C. § 824e.

⁵ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

the FPA,⁶ however, we are modifying the discussion in the June 2020 Order and setting aside the order, in part, as discussed below.⁷

I. Background

3. This case has a long history, dating back to 2005, which is recounted at length in the Commission's earlier orders.⁸ As relevant here, in 2008, the Commission ordered Chehalis to refund a portion of the rates for reactive power service it had charged Bonneville because they were not just and reasonable.⁹ In 2013, following a voluntary remand, the Commission determined that Chehalis should not have been required to pay these funds and that Chehalis should recover the funds previously refunded to Bonneville, with interest.¹⁰ However, in a July 16, 2015 rehearing order, the Commission determined that it could not order recoupment because the Commission's refund authority does not extend to exempt public utilities such as Bonneville.¹¹ On

⁶ 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁷ *Allegheny Def. Project*, 964 F.3d at 16-17.

⁸ *Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144 (2005), *order on reh'g*, 113 FERC ¶ 61,259 (2005), *vacated sub nom. TNA Merchant Projects, Inc. v. FERC*, 616 F.3d 588 (D.C. Cir. 2010), *order on remand sub nom. Chehalis Power Generating, L.P.*, 134 FERC ¶ 61,112 (2011), *order on reh'g*, 141 FERC ¶ 61,116 (2012), *order on voluntary remand*, 145 FERC ¶ 61,052 (2013), *reh'g denied*, 152 FERC ¶ 61,050 (2015), *reh'g denied*, 153 FERC ¶ 61,194 (2015), *rev'd in part*, Remand Order, 857 F.3d 354.

In a separate but related hearing, a presiding judge found, and the Commission agreed, that Chehalis's proposed rate was not just and reasonable, and that Chehalis must make refunds to Bonneville of the amounts Chehalis had received in excess of the just and reasonable rate. *See Chehalis Power Generating, L.P.*, 123 FERC ¶ 61,038, at ordering para. (C) (2008) (Order on Initial Decision); *cf. Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144, at PP 21-23 (2005); *Chehalis Power Generating, L.P.*, 118 FERC ¶ 63,009 (2007).

⁹ Order on Initial Decision, 123 FERC ¶ 61,038 at ordering para. (C).

¹⁰ *Chehalis Power Generating, L.P.*, 145 FERC ¶ 61,052 at PP 11, 14.

¹¹ *Chehalis Power Generating, L.P.*, 152 FERC ¶ 61,050 at P 29.

appeal, the D.C. Circuit disagreed, finding that the Commission “erred when it held that it lacked authority” and remanded the case to the Commission for the narrow purpose of “balanc[ing] the equities of this case to determine the amount of recoupment to which Chehalis is entitled,” including “whether something less than full recoupment might be warranted.”¹²

4. In the June 2020 Order, the Commission determined, solely for purposes of calculating an equitable recoupment remedy, it would treat Chehalis’s 2005 reactive power service filing as an initial rate that would have been accepted for filing but set for hearing under FPA section 206.¹³ Pursuant to this analysis, the Commission determined recoupment should apply to the rates charged from the original effective date of August 1, 2005 through the 60-day notice period, until September 30, 2005.¹⁴

5. On July 1, 2020, Chehalis filed its request for rehearing. On July 21, 2020, Bonneville filed a “Status Report Regarding Payment Pursuant to June 1, 2020 Order, and Statement on Claimant’s Request for Rehearing” indicating that it has had difficulty making recoupment payments to Chehalis.¹⁵ On July 30, 2020, Chehalis filed an answer to the Bonneville Status Report, arguing that the Commission should accord no weight to the Status Report and reject Bonneville’s filing as, in fact, an unauthorized answer to Chehalis’s request for rehearing.¹⁶ On August 21, 2020, Chehalis filed a supplement to its answer.¹⁷

6. On August 27, 2020, Bonneville filed a refund report, notifying the Commission that it has paid recoupment and interest in accordance with the June 2020 Order.¹⁸

¹² Remand Order, 857 F.3d at 356, 363.

¹³ June 2020 Order, 171 FERC ¶ 61,188 at P 44.

¹⁴ *Id.*

¹⁵ Bonneville July 21, 2020 Status Report Regarding Payment Pursuant to June 1, 2020 Order, and Statement on Claimant’s Request for Rehearing (Bonneville Status Report).

¹⁶ Chehalis July 30, 2020 Answer.

¹⁷ Chehalis August 21, 2020 Supplement to Answer.

¹⁸ Bonneville August 27, 2020 Report Regarding Payment.

II. Discussion

A. Procedural Matters

7. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (1) (2020), prohibits an answer to a request for rehearing. Accordingly, we reject the Bonneville Status Report as an impermissible answer to a request for rehearing, and, correspondingly, we also reject Chehalis's answer and supplement submitted in response.¹⁹

B. Substantive Matters

8. In Chehalis's request for rehearing, it argues that the Commission erred by: (1) failing to uphold the sanctity of the TransAlta Settlement,²⁰ including certain terms agreed to by the parties; (2) departing, without basis, from its previous order directing full recoupment to Chehalis; and (3) limiting recoupment based on assumptions of what would have occurred under section 206 of the FPA and without regard to the *Federal Register* publication date noticing the Commission's intent to initiate an investigation pursuant to FPA section 206.²¹ We are unpersuaded by these arguments with the exception of the argument on the *Federal Register* publication date. As described below, we set aside, in part, the June 2020 Order as it relates to the appropriate recoupment period.

9. First, Chehalis argues that the Commission erred by refusing to apply the terms of the TransAlta Settlement, which, according to Chehalis, indicate that its reactive power rate schedule would be an initial rate schedule not subject to suspension and refund. Chehalis argues that the Commission effectively ignored the TransAlta Settlement and failed to take into account the numerous benefits that Bonneville has enjoyed as a result

¹⁹ We note that, while the Commission in the June 2020 Order did direct Bonneville to submit a report, identifying the calculation and the amounts paid for recoupment, together with the calculation of interest, within 120 days of the date of the June 2020 Order, the Bonneville Status Report does not provide that information.

²⁰ As explained below, the settlement was executed by Bonneville and a number of generators, including Chehalis, to set forth a process and methodology for all of the generators party to the settlement to be compensated for reactive power. Docket No. ER04-810-000, TransAlta Centralia Generation, L.L.C., Offer of Settlement (Feb. 16, 2005) (TransAlta Settlement).

²¹ Rehearing Request at 22-23.

of the TransAlta Settlement.²² Chehalis also asserts that the June 2020 Order is inconsistent with well-established policy requiring the enforcement of contracts, and that Bonneville and the Commission have failed to provide a sufficient basis for ignoring the protections afforded by the TransAlta Settlement.²³

10. We disagree. On February 16, 2005, Bonneville and a number of generators, including Chehalis, submitted the TransAlta Settlement. The TransAlta Settlement set forth a process and methodology for all of the generators which were parties to the settlement to be compensated for reactive power service. The TransAlta Settlement was approved by the Commission on April 19, 2005.²⁴ Section B of the TransAlta Settlement provides:

TransAlta may make an initial rate filing pursuant to Section 205 of the FPA for TransAlta's Big Hanaford plant as described in Section C.3 of this Settlement Agreement. Similarly, Goldendale, Hermiston and *Chehalis may make initial rate filings pursuant to Section 205 of the FPA applicable to each of their plants as described in Sections C.4 and C.5 of this Settlement Agreement.* Bonneville agrees that it will not challenge such filings, except as specifically described in Section C.1.c. below.

11. While Chehalis claims that this language *requires* the Commission to review its reactive power service rate schedule as an initial rate, we are not persuaded by this argument. The TransAlta Settlement simply sets forth what Chehalis "may" do; it does not bind the Commission to any particular determination or otherwise constrain its statutory authority. In fact, the TransAlta Settlement states that it is "intended solely to bind the Settling Parties [and] does not bind the Commission to any determination"²⁵ Moreover, even if, for sake of argument, the TransAlta Settlement could indeed have required the Commission to view the 2005 filing originally at issue here as an initial rate under FPA section 205, that would merely have warranted the Commission's accepting the rate for filing. The Commission would have retained the ability to exercise its FPA

²² *Id.* at 8-9 (arguing that the TransAlta Settlement: (1) reduced the charges payable to Bonneville for reactive power; (2) extended the period in which Bonneville received reactive power service at no charge; (3) reduced the amount charged for reactive power prior to September 30, 2006; and (4) limited the amount of charges for reactive power service that Bonneville might be obligated to pay, and preserved Bonneville's right to challenge the inputs proposed by the generator signatories).

²³ *Id.* at 9-10.

²⁴ *TransAlta Centralia Generation, L.L.C.*, 111 FERC ¶ 61,087 (2005).

²⁵ TransAlta Settlement, section A(2).

section 206 authority to set the filing for hearing, and ultimately to determine that recoupment is warranted based on the balancing of the equities reflected in the June 2020 Order.²⁶ Thus, we do not find the Commission's determination in this case, using an FPA section 206-based analysis, to be inconsistent with the terms of the TransAlta Settlement.²⁷

12. Second, Chehalis argues that the June 2020 Order represented an unexplained departure from the Commission's previous determination in this proceeding granting full recoupment, and that the court's Remand Order did not require the Commission to reverse its previous determination that full recoupment is warranted.²⁸ The Commission addressed, and rejected, these arguments in the June 2020 Order; the Commission's action in the June 2020 Order was adequately explained and the court's Remand Order required that we reconsider the equities, which we, in fact, have done.²⁹

13. Third, Chehalis argues that the Commission's decision to limit recoupment was arbitrary and capricious because: (1) it was based on assumptions of what would have occurred under section 206 of the FPA; and (2) it fails to put Chehalis into the position

²⁶ *E.g.*, June 2020 Order, 171 FERC ¶ 61,188 at P 44.

²⁷ *See, e.g., Cargill Power Markets, LLC v. Pub. Serv. Co. of N.M.*, 137 FERC 61,259, at P 40 (2011) (stating that while the Commission "recognize[s] the role of settlements in providing rate certainty . . . [t]he Commission has discretion to initiate FPA section 206 proceedings, either on its own motion or at the request of others") (citing 16 U.S.C. § 824e and *General Motors Corp v. FERC*, 613 F.2d 939, 944 (D.C. Cir. 1979); *S. Union Gas Co. v. FERC*, 840 F.2d 964, 968 (D.C. Cir. 1988); *Iroquois Gas Transmission System*, 69 FERC ¶ 61,165, at 61,631 (1994)).

²⁸ Rehearing Request at 10-16.

²⁹ *See* June 2020 Order, 171 FERC ¶ 61,188 at P 47 (explaining that the D.C. Circuit expressly opted not to direct recoupment of the entire amount that Chehalis had refunded to Bonneville, but instead instructed the Commission evaluate the equities, and, noting further, that the Commission interpreted the D.C. Circuit's direction to "more carefully" balance the equities as an indication that the Commission's prior award of full recoupment to Chehalis needed to be reconsidered). Moreover, while Chehalis faults Bonneville for not petitioning for review of the determination that full recoupment was equitable, the fact is that the D.C. Circuit remanded the issue of an appropriate remedy to the Commission and the Commission fully explained its determination on the balancing of the equities in the June 2020 Order. *Id.* PP 42-55.

that it would have been in if the Commission had initiated a section 206 proceeding because it fails to account for the *Federal Register* publication.³⁰

14. As to the first point, the Commission explained in the June 2020 Order that treating Chehalis's filing as one requiring action under FPA section 206 was appropriate.³¹ As to the second point, in the June 2020 Order, the Commission noted that Chehalis was entitled to recoup refunds for the rate charged during the 60-day notice period formerly allowed under section 206, and in practice that meant that recoupment applied to the rates charged from the original effective date of August 1, 2005 through September 30, 2005.³² On rehearing, Chehalis argues that at the time Chehalis made its initial filing, the earliest refund effective date permitted under section 206 of the FPA was 60 days after publication of notice of the Commission's intent to initiate an investigation in the *Federal Register*.³³ Chehalis argues that it typically takes between 15 and 30 days (or longer) after the issuance of a Commission order for notice of intent to initiate an investigation to be published in the *Federal Register*, and because the Commission did not take that into account, the recoupment period should be longer than that set out in the June 2020 Order.³⁴

15. We grant Chehalis's request that we consider the time it would have taken to publish notice in the *Federal Register*, and thus will allow 15 days from the date of issuance of the relevant order for a notice of intent to act to have been published in the *Federal Register*, which would allow the recoupment period to run from August 1, 2005 (when the rate first became effective) to October 10, 2005 (allowing 15 days for publication of notice and then 60 days thereafter).³⁵ Accordingly, we set aside, in part, the June 2020 Order as it relates to the appropriate recoupment period and we modify the

³⁰ Rehearing Request at 17-22.

³¹ June 2020 Order, 171 FERC ¶ 61,188 at PP 49-50; *cf. id.* PP 29-32 (describing the same arguments Chehalis made in its Reply Brief opposing an FPA section 206 remedy).

³² *Id.* P 44.

³³ Rehearing Request at 20-21.

³⁴ *Id.* at 21.

³⁵ This end date assumes that notice of the Commission's intent to initiate an investigation would not have been published until August 11, 2005, 15 days after the July 27, 2005 order, and then the statutorily-prescribed 60 additional days after that point to October 10, 2005. The recoupment period would begin, however, August 1, 2005, the date the rate became effective.

Commission's recoupment and refund report directives in that order to reflect the modified recoupment period from August 1, 2005 to October 10, 2005 adopted above. Given that Bonneville has paid recoupment and interest as reflected in its August 27, 2020 refund report, we also modify the recoupment and report directives in the June 2020 Order to provide that Bonneville recalculate the recoupment amounts and refile a refund report, as provided in the ordering paragraphs below.

The Commission orders:

(A) In response to Chehalis's request for rehearing, the June 2020 Order is hereby modified and set aside, in part, as discussed in the body of the order.

(B) Bonneville is hereby directed to recalculate and provide recoupment, with interest calculated pursuant to the methodology contained in 18 C.F.R. § 35.19a (2020), as discussed in the body of this order and the June 2020 Order, within 120 days of the date of the June 2020 Order.

(C) Bonneville is hereby directed to refile its refund report, identifying the calculation of and the amounts paid for recoupment, together with the calculation of interest, as discussed in the body of this order and the June 2020 Order, within 150 days of the date of the June 2020 Order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.