

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 Nos. EL92-33-009

v.

Citizens Utilities Company

ORDER ON REMAND

(Issued February 14, 2005)

1. On June 17, 2004, the United States Court of Appeals for the Second Circuit, issued an unpublished order¹ on review of Commission orders² which dismissed a complaint filed by a group of municipal electric companies in Vermont (Villages)³ against Citizens Utilities Company (Citizens). The complaint, which was filed by the Villages in 1992, was based on Citizens' failure to file with the Commission a number of agreements with the Villages for jurisdictional service for a period beginning in the 1950s. The June 17 Order substantially affirmed the Commission's orders. However, the court remanded one issue for further proceedings, namely, the basis on which the Commission determined that Citizens' pre-1983 rates were just and reasonable.

¹ *Barton Village, Inc. v. FERC*, No. 02-4293 (2nd Cir. June 17, 2004) (June 17 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.

2. In this order, the Commission more fully explains the basis of its determination that the rates at issue were just and reasonable. This order benefits the customers by hopefully bringing this proceeding to its final resolution.⁴

Background

3. In a series of orders issued between 1993 and 1995, the Commission held that certain agreements governing transactions between the Villages and Citizens were jurisdictional and should have been filed with the Commission by Citizens, but that refunds by Citizens to the Villages were not appropriate.⁵ While these orders were for the most part affirmed in a 1996 appeal, the court remanded the case to the Commission for consideration of Citizens' pre-1983 power sales agreements.⁶ Therefore, on remand from the court's order, the Commission directed Citizens to file any heretofore unfiled pre-1983 agreements.⁷

4. By October 1, 1999, Citizens managed to file as complete a record as possible of these transactions. In the April 2002 Order, the Commission accepted Citizens' filing and dismissed the Villages' complaint. In so doing, we held that waiver of the agency's prior notice requirement was appropriate under the circumstances, and that refunds by Citizens were not called for. Concerning the rates themselves, the Commission said only that "[o]ur review of the material at issue . . . leads us to conclude that Citizens did not collect excess revenues and that the rates appear to be cost-justified."⁸

⁴ The Commission has consistently during the course of this proceeding urged the parties to settle their differences. After the remand leading to this order, we offered the services of our Office of Dispute Resolution Services, to no avail.

⁵ *Barton Village, Inc. v. Citizens Utilities Co.*, 61 FERC ¶ 61,329 (1993), *reh'g denied*, 68 FERC ¶ 61,005 (1994), *reh'g denied*, 73 FERC ¶ 61,303 (1995).

⁶ *Barton Village, Inc. v. Citizens Utilities Co.*, 106 F.3d 442 (D.C. Cir. 1996) (unpublished opinion).

⁷ *Barton Village, Inc. v. Citizens Utilities Co.*, 87 FERC ¶ 61,031 (1990).

⁸ April 2002 Order, 99 FERC at 61,488.

5. In the September 2002 Order, the Commission denied requests for rehearing by the Villages and the Vermont Department of Public Service on a number of issues. While the Villages did make specific arguments concerning the quality of Citizens' cost support for its rates, we rejected these claims on the ground that they "should have been raised in [Citizens'] protest, not on rehearing."⁹

6. As we mentioned above, in its June 17 Order, the court affirmed the Commission's orders in nearly every respect. However, on the issue of whether the rates filed by Citizens were just and reasonable, the court held that our explanation on this point was legally insufficient:

FERC's order provides that "the material submitted is sufficient for conducting a rate review" and "Citizens did not collect excess revenues and [] the rates appear to be cost-justified." . . . However, FERC fails to explain which facts it found probative in reaching these conclusions and even neglects to explain how it conducted its rate review.^[10]

Discussion

7. Consistent with the court's instructions, we will explain the manner in which we conducted our review of Citizen's rates, both for capacity and energy as well as for transmission, and the basis for our conclusion that the rates in question were just and reasonable.

8. The record in this case shows that Citizens charged the Villages rates for capacity and energy rates which were filed with the Commission (though the service agreements may not have been),¹¹ and that its rates for this power were based on incremental

⁹ September 2002 Order, 100 FERC ¶ 61,244 at P 12 & n.26, citing *Niagara Mohawk Power Corp.*, 96 FERC ¶ 61,011 at 61,044 (2001).

¹⁰ June 17 Order at 3 (citation omitted).

¹¹ Rate Schedules FPC No. 6 with Swanton Village, Vermont; FPC No. 7 with Barton Village, Vermont; and FPC No. 8 with the Corporation of Enosburg Falls, Vermont. These rate schedules were all filed on February 5, 1964, and made effective on March 7, 1964. *See also* Villages' Protest at 3 (October 21, 1999).

purchased power costs.¹² Citizens supported its charges with billing invoices to the Villages and details of actual incremental purchases of power. These purchases reflected Citizens' incremental system power costs for that month.¹³

9. In response, the Villages complained that Citizens charged them rates substantially in excess of the rates on file because some of the invoices had entries for "capacity deficiency," a category they maintained was not mentioned in the filed interchange agreements.

10. In our September 2002 Order, the Commission explained that Citizens' rate was a formula rate, which could fluctuate from month to month, depending on the costs Citizens incurred to serve the Villages.¹⁴ Thus, Citizens should not have been precluded from passing through capacity deficiency charges to the Villages, as they appear to have been initially billed to Citizens as additional charges associated with Citizens' power purchases.

11. The Commission finds that the Villages' claim also suffers from their failure to show that the incremental charges billed by Citizens were excessive as compared to other available resources. According to Citizens, service under the Vermont Electric Company (VELCO) tariff was available during the entire period of time at issue here, and the Villages utilized VELCO's transmission facilities for several decades, as well as other supply alternatives.¹⁵ This evidence suggests that the Villages knew the market value of power during the relevant time period and could not find lower cost power. It further indicates that Citizens was purchasing power to serve the Villages as a supplier of last resort.

¹² Specifically, the agreements between Citizens and the Villages provided for sales of power at a price equal to the actual incremental cost, *i.e.*, the additional out-of-pocket costs incurred in order to make the sales, plus 4 mills (or four-tenths of one cent (\$0.004)) per kWh.

¹³ For example, for December 1981, Citizens showed a system power reservation of 1,800 kW for Enosburg with a base cost for capacity of \$1.425/kW/Mo. (adjusted by 5 percent for Citizens' transmission losses). Citizens added to those capacity charges its incremental energy charge of 35.9 mills per kWh, plus the 4 mills per kWh additional charge. Thus, Enosburg's total cost was \$24,246.00 for 540,000 kWh used December 1981.

¹⁴ 100 FERC ¶ 61,244 at P 10.

¹⁵ See First Affidavit of Kevin W. Perry at P 12 (filed on May 5, 1999).

12. With respect to the transmission service associated with these purchase and resale transactions (for which Citizens failed to file service agreements with the Commission), Citizens advised that under Rate Schedule FPC No. 10, it was billing VELCO for recovery of the costs of Citizens' subtransmission facilities, *i.e.*, 46-kV radial subtransmission system, used to serve the Villages, pursuant to a formula rate based on Citizen's total original costs. VELCO, in turn, passed through in its bills to the Villages these charges for what, in effect, was end-to-end transmission service within the State of Vermont from Citizens to the Villages.¹⁶ The Villages thus properly paid Citizens' subtransmission costs (and a pro rata share of VELCO's transmission costs) when Citizens purchased power on behalf of the Villages and was the transmission provider.

13. Moreover, when Citizens amended its compliance filing in this proceeding with cost support on September 2, 1999, its "Transmission Cost Analysis" utilized a levelized fixed charge rate¹⁷ applied to the gross transmission plant balance at year-end (developed from information in the FERC Form No. 1,¹⁸ stated on a per kWh basis).¹⁹ Citizens advised that transmission costs were analyzed on a per kWh basis (volumetric), rather than on a per kW basis (demand), out of necessity because customer kW demand data

¹⁶ *Id.* at P 11.

¹⁷ A fixed charge rate develops a ratio of a utility's fixed costs (*i.e.*, depreciation, return (overall and on equity) on investment, taxes, and operating and administrative expenses) to its investment (plant-in-service). That ratio is then applied to gross plant-in-service, to produce a fixed cost of service. *See generally*, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,514 at 33,148-49 (1995) and 72 FERC ¶ 61,047 at 61,280 (1995); *accord Maine Public Service Co.*, Opinion No. 434, 85 FERC ¶ 61,412 at 62,563 (1998); *Northwest Utilities Service Co.*, 73 FERC ¶ 61,152 at 61,436 (1995), *reh'g denied*, 74 FERC ¶ 61,107 (1996); *Jersey Central Power & Light Company*, 38 FERC ¶ 61,275 at 61,927 (1987).

¹⁸ FERC Form No. 1, *see* 18 C.F.R. § 141.1 (2004), is an electric utility's annual report containing detailed financial and operating data.

¹⁹ *See* First Affidavit of William R. Hopkins at P 6 (filed on September 2, 1999). The rate reflected operations and maintenance expenses, taxes other than income, the transmission related share of administrative and general expenses, a sinking fund-based depreciation rate, a rate of return based on Citizens' cost of capital, and appropriate historical statutory rates for federal and Vermont income taxes.

were not available for the earlier period now under analysis.²⁰ Citizens' comparison of costs per Village, and on a total cost basis, with the rates actually charged, showed that for each year Citizens significantly underrecovered its costs from the Villages. Further, Citizens added, its analysis was conservative because the Villages appeared to have used the supplies from Citizens as increments on top of their other supplies, *i.e.*, usually for intermediate or peaking purposes, and at a lower load factor which produced a higher per unit kWh cost relative to other customers.²¹ The Villages have not disputed these usage claims.

14. As the discussion above indicates, the Commission found the information provided by Citizens, combined with information already on file, sufficient to review Citizens' rates. It is true that Citizens admitted that it was unable to locate invoices pertaining to 1967.²² However, when dealing with vintage data for a 20-year period, the omission of a single year does not change our conclusion that, in light of the available information for years before and after 1967, the rates charged throughout this period (including those for 1967) were just and reasonable.

15. We also reject the Villages' contention during this proceeding that Consumers' use of a 5 percent loss factor for transmission losses had not been supported. In fact, the 5 percent loss factor for transmission losses was included in Rate Schedule FPC No. 10 and thus accepted by the Commission as appropriate for losses associated with Citizens' radial 46 kV sub-transmission system during the relevant time period.

16. Finally, the Commission performed its own independent fixed charge analysis for the transmission services that Citizens provided in delivering power to the Villages between 1963 and 1982 using data from Citizens' FERC Form No. 1s. This analysis was tailored to the transmission services that Citizens provided to the Villages and adjusted to reflect the transmission costs that Citizens paid to VELCO and recorded in FERC Account No. 555, Purchased Power.²³ This analysis demonstrated that the transmission-related rates charged to the Villages for the years 1963 through 1982 are

²⁰ *Id.* at P 5.

²¹ *Id.* at P 13. For example, for the illustration provided in footnote 13, *supra*, the load factor for Enosburg for December 1981 was only 40.3 percent.

²² Fourth Affidavit of Kevin W. Perry (filed September 2, 1999) at P 3.

²³ 18 C.F.R. Part 101, Account 555 (2004).

cost supported. In each year, our calculations produce a higher figure than that billed by Citizens to the Villages.²⁴ Thus, we likewise conclude, based our fixed charge analysis, that the transmission-related rates charged to the Villages were just and reasonable.

The Commission orders:

In view of the foregoing, the Villages' complaint is hereby dismissed.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

²⁴ The actual figures are provided in the appendix to this order.

APPENDIX

| | <u>1963</u> | <u>1964</u> | <u>1965</u> | <u>1966</u> | <u>1967</u> | <u>1968</u> | <u>1969</u> | <u>1970</u> | <u>1971</u> | <u>1972</u> |
|--|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Citizens \$/kWh Transmission Expense | | | | | | | | | | |
| Citizens \$/kWh ^1 | 0.00251 | 0.00224 | 0.00265 | 0.00318 | 0.00304 | 0.00316 | 0.00288 | 0.00259 | 0.00285 | 0.00260 |
| VELCO \$/kWh ^1 | 0.00000 | 0.00000 | 0.00000 | 0.00000 | 0.00000 | 0.00000 | 0.00000 | 0.00004 | 0.00016 | 0.00031 |
| Sum Total \$/kWh | 0.00251 | 0.00224 | 0.00265 | 0.00318 | 0.00304 | 0.00316 | 0.00288 | 0.00263 | 0.00301 | 0.00291 |
| Fixed Charge \$/kWh ^2 | | | | | | | | | | |
| VELCO \$/kWh ^1 | 0.00379 | 0.00365 | 0.00392 | 0.00445 | 0.00393 | 0.00370 | 0.00348 | 0.00303 | 0.00319 | 0.00365 |
| Sum Total \$/kWh | 0.00379 | 0.00365 | 0.00392 | 0.00445 | 0.00393 | 0.00370 | 0.00348 | 0.00307 | 0.00335 | 0.00396 |
| | | | | | | | | | | |
| | <u>1973</u> | <u>1974</u> | <u>1975</u> | <u>1976</u> | <u>1977</u> | <u>1978</u> | <u>1979</u> | <u>1980</u> | <u>1981</u> | <u>1982</u> |
| Citizens \$/kWh Transmission Expense | | | | | | | | | | |
| Citizens \$/kWh ^1 | 0.00303 | 0.00311 | 0.00301 | 0.00302 | 0.00326 | 0.00352 | 0.00291 | 0.00263 | 0.00282 | 0.00297 |
| VELCO \$/kWh ^1 | 0.00040 | 0.00031 | 0.00047 | 0.00078 | 0.00076 | 0.00079 | 0.00080 | 0.00084 | 0.00140 | 0.00144 |
| Sum Total \$/kWh | 0.00343 | 0.00342 | 0.00348 | 0.00380 | 0.00402 | 0.00431 | 0.00371 | 0.00347 | 0.00422 | 0.00441 |
| Fixed Charge \$/kWh ^2 | | | | | | | | | | |
| VELCO \$/kWh ^1 | 0.00415 | 0.00463 | 0.00415 | 0.00419 | 0.00456 | 0.00509 | 0.00479 | 0.00426 | 0.00483 | 0.00534 |
| Sum Total \$/kWh | 0.00455 | 0.00494 | 0.00462 | 0.00497 | 0.00532 | 0.00588 | 0.00559 | 0.00510 | 0.00623 | 0.00678 |

^ 1 Source: Doc. No. EL92-33-000, First Affidavit of William R. Hopkins, Exhibit 1 and Exhibit 4, Sept. 2, 1999.

^ 2 Based on the FERC Form 1 data by year supplied by Citizens, assuming System Peak, 5 percent losses, and 5-day and 16-hour convention to determine \$/kWh