

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Entergy Services, Inc.

Docket No. ER01-2201-003

Generator Coalition

v.

Docket No. EL02-46-002

Entergy Services, Inc.

ORDER DENYING REHEARING

(Issued July 10, 2003)

Summary

1. This order denies rehearing of the Commission's requirement that Entergy¹ refund charges that it collected under its "schedules first" policy, in which it allocated all of a qualifying facility's (QF)² output to its schedule and, in the event of shortfall in the generation of electric energy, served the QF's host load under retail rates. This order benefits customers by returning to the QF host loads on Entergy's system charges that Entergy improperly collected from them.

Background

¹Entergy Services, Inc., Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (collectively, Entergy).

²A QF is a cogeneration facility or a small power production facility that is a qualifying facility under Part 292 of the Commission's regulations. 18 C.F.R. Part 292 (2003); see 16 U.S.C. §§ 796(17), (18) (2000). Many QFs (especially cogeneration facilities) are associated with and, typically, interconnected with and supply electric energy to, an industrial customer, generally referred to as their "host load." See International Paper Company, Initial Brief at 3, n.5.

2. On May 5, 2003, the Commission issued an order finding that Entergy's practice of allocating all of a QF's output to its schedule and, in the event of a shortfall of electric energy, serving the QF's host load under retail rates (Entergy's "schedules first" policy) was unreasonable and unduly discriminatory. The Commission directed Entergy to implement a "host loads" first policy and to make refunds, with interest, of the rates that it had improperly collected.³ Under a host loads first policy, QFs may, if they choose, allocate their electric energy to their host loads first and to their schedules second, and, in the event of a shortfall in electric generation, receive Deficient Energy under Entergy's Generator Imbalance Agreement (GIA).⁴

3. On June 4, 2003, Entergy filed a request for rehearing of that portion of the Commission's May 5 order that directs Entergy to refund, with interest, the charges that it collected under its schedules first policy. Entergy argues that the direction to make refunds: (a) violates the filed-rate doctrine; (b) violates the Commission's policy that changes in rate design should be prospective only; and (c) improperly orders refunds of retail rates that are subject only to state, and not to Commission, jurisdiction.

4. On June 16, 2003, Joint Intervenors filed an answer to Entergy's request for rehearing.

Discussion

5. Because we find none of Entergy's arguments persuasive, as explained below, we will deny rehearing of the May 5 order.

Preliminary Matter

6. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure⁵ states that the Commission will not permit answers to requests for rehearing. We will, therefore, reject Joint Intervenors' answer to Entergy's request for rehearing.

The Filed Rate Doctrine

³Entergy Services, Inc., 103 FERC ¶ 61,125 (2003) (May 5 Order).

⁴Compare id. at P 9 with id. at P 11.

⁵18 C.F.R. § 385.713(d)(2) (2003).

7. Entergy argues that "a careful reading of the Commission's July 27, 2001 order, which ruled on Entergy's June 1 filing, reveals that the allocation of QF output was not an issue originally set for hearing in Docket No. ER01-2201."⁶ Entergy is incorrect. The Commission set the issue of the proper allocation of QF output for hearing in this docket in Entergy I, in which Entergy proposed to revise its standard Generator Imbalance Agreement (GIA).⁷

8. In that order, the Commission accepted for filing Entergy's proposed revisions to its standard GIA, suspended them for a nominal period, made them effective August 1, 2001, subject to refund, and established hearing procedures.⁸ In testimony submitted in support of the proposed revisions, Entergy's witness noted that under the revised GIA, the output of a facility now would be "deemed to go first to serve the scheduled transactions and the remainder [would be] deemed to go to serve the Network Load."⁹ Two of the intervenors in Entergy I, Occidental Chemical Corporation and Joint Movers, protested this schedules first policy.¹⁰ These intervenors argued that Entergy's schedules first policy would expose QF host loads to "potentially millions of dollars of required purchases of Entergy's more expensive retail backup power, with demand ratchets."¹¹ And they feared that Entergy's schedules first policy "would unduly discriminate against generators (such as QFs) that have both their own native load and also make merchant

⁶Entergy Rehearing at 6, citing Entergy Services, Inc., 96 FERC ¶ 61,148 (2001) (Entergy I).

⁷Entergy's GIA contains the rates, terms and conditions under which Entergy agreed to supply, and the generators agreed to take, generator imbalance service as part of the settlement approved in Entergy Services, Inc., 90 FERC ¶ 61,272 (2000) (Entergy II).

⁸Entergy I, 96 FERC at 61,635, 61,639.

⁹Verified Statement of John D. Hurstell at 7; accord id. at 7-8; see also Article I, Section I, sub-sections D, N, and S of Entergy's Revised GIA.

¹⁰See Motion to Intervene and Protest of Occidental Chemical Corporation at 5-6 (filed June 22, 2001); Motion to Intervene and Protest of Joint Movers at 8-9 (filed June 22, 2001).

¹¹Motion to Intervene and Protest of Joint Movers at 9; accord Motion to Intervene and Protest of Occidental Chemical Corporation at 6.

sales and would unduly advantage Entergy's merchant generation" ¹² In its answers to the protests, which the Commission accepted, ¹³ Entergy responded to intervenors' arguments regarding its schedules first policy, arguing that its schedules first policy is a reasonable and appropriate way to reduce reliance on Deficient Energy. ¹⁴ That policy, then, was before the Commission for its consideration when the Commission issued Entergy I.

9. While it is true that Entergy's schedules first policy was not among the issues that the Commission expressly discussed in Entergy I, the Commission did not in that order discuss all of the issues before it. Rather, the Commission stated:

Entergy has proposed numerous modifications to its GIA, and the reasonableness of many of these modification is contested. In the discussion that follows we address certain of those issues and set the remainder for trial-type evidentiary hearing. [¹⁵]

Entergy's schedules first policy was one of the contested modifications of the GIA that the Commission set for hearing without discussion when it stated:

With respect to the remaining issues not addressed above, we find that Entergy has failed to adequately explain or provide the support needed to justify the revised terms and conditions of the GIA. Accordingly, we will set these matters for hearing. [¹⁶]

10. Entergy's later pleadings in this proceeding further contradict its assertion that the Commission did not set its schedules first policy for hearing. In its opposition to Joint Movers' motion for waiver of the initial decision on the allocation of QF output, Entergy

¹²Motion to Intervene and Protest of Joint Movers at 9.

¹³See Entergy I, 96 FERC at 61,637.

¹⁴Entergy Answer at 13-14 (filed July 9, 2001).

¹⁵Id. at 61,637 (emphasis supplied).

¹⁶Id. at 61,638. See, e.g., Wisconsin Power & Light Co., 59 FERC ¶ 61,252 at 61,916 n.23, reh'g denied, 60 FERC ¶ 61,949 (1992) (hearing is not limited to issues explicitly mentioned in Commission order); Cincinnati Gas and Electric Co., 59 FERC ¶ 61,072 at 61,291 (1992) (hearing is not limited to issues explicitly mentioned in Commission order).

stated that the matter "already has been set for hearing by the Commission."¹⁷ And in their Joint Issues List the parties agreed that within the scope of this proceeding was the following issue:

Is it appropriate for Entergy to allocate the generation output of a facility to first serve scheduled transactions and the remainder to serve unscheduled QF host loads, with shortfalls to [the] QF host load[s] served [by Entergy] under [Entergy's] applicable retail rates schedules [i.e., Entergy's schedules first policy]?¹⁸

11. Entergy nevertheless argues on rehearing that its schedules first policy:

was never suspended or put into effect subject to refund under Section 205(e). In short, Entergy had no reasonable expectation that it would be subject to a retroactive refund obligation pursuant to Section 205(e). Instead, during the course of the settlement talks, the QFs raised Entergy's QF allocation methodology as a disputed issue, and Entergy agreed to use expedited hearing procedures to adjudicate the allocation of QF output on a prospective basis as part of the GIA Settlement Agreement.¹⁹

12. As we noted above, the issue was squarely presented and was set for hearing. From the outset, therefore, Entergy was on notice that the issue was present and that its rates might be subject to refund under Section 205(e) of the Federal Power Act, 16 U.S.C. § 824d(e) (2000), on this issue. The parties' pleadings (including Entergy's own pleadings), referenced above, contradict Entergy's assertion that the issue arose for the first time during later settlement talks.

13. And there is nothing in the GIA Settlement Agreement, see supra note 7, to indicate that adjudication was to be on a prospective basis only. Indeed, this issue was not part of the GIA Settlement Agreement, and the statement of this issue that the parties included in their joint motion for waiver of the initial decision in this proceeding neither precludes refunds nor says anything about a decision being effective prospectively only.

¹⁷Entergy Answer at 1 (filed January 29, 2002).

¹⁸May 5 Order, 103 FERC ¶ 61,125 at P 8 & n.14.

¹⁹Entergy Rehearing at 6 (emphasis in original).

14. In short, Entergy filed an amended GIA and subjected its schedules first policy to review,²⁰ and, as noted above, the Commission set that policy for hearing. Entergy was on notice from that time forward that it might have to refund the charges it improperly collected. Nothing in this proceeding suggests to the contrary. Refunds, therefore, are proper in this proceeding.

Rate Design

15. Entergy argues that "[t]he May 5 order violates the Commission's policy that changes in rate design should be prospective only."²¹ There are two short answers to this argument. The first is that the May 5 Order did not involve a change in rate design. In the May 5 Order the Commission found that Entergy should not have been charging QF host loads under its schedules first policy; instead, it should have been collecting Deficient Energy charges from QFs. This is not a change in rate design, this is merely finding that Entergy billed the wrong customers at the wrong rates.

16. The second answer is that, even if this were a rate design issue, and, as noted above, it is not, still, the rationale underlying a policy of prospective application, *i.e.* that customers cannot undo past economic decisions,²² would not apply here. Rate design affects customer consumption patterns, and a rate design change cannot affect those consumption patterns retroactively since consumption (based on the prior rate design) has already taken place.²³ Thus, rate design changes are typically made effective prospectively. That is not the fact pattern here. Here, the issue is simply whether the shortfall of electric energy should have been billed to QF host loads or to the QFs as Deficient Energy under Entergy's revised GIA. And Entergy simply mis-charged: charging QF host loads up to 1,800 times the Deficient Energy charge that they should have been collecting from QFs.²⁴ In this situation, refunds are proper.

Jurisdiction

²⁰See supra P 7-9.

²¹Entergy Rehearing at 8.

²²See, *e.g.*, Consumers Energy Co., Opinion No. 429-A, 89 FERC ¶ 61,138 at 61,397 (1999), reh'g denied, Opinion No. 429-B, 95 FERC ¶ 61,084 (2001).

²³*Id.*

²⁴See May 5 Order, 103 FERC ¶ 61,125 at P 27.

17. Entergy argues that the Commission has no jurisdiction to direct Entergy to make refunds, since it was collecting retail rates from QF host loads under "state utility commission-approved tariffs."²⁵ It submits that "the regulation of state-jurisdictional retail service through the imposition of refunds of previously-collected rates is clearly beyond FERC's authority."²⁶

18. The ordering of refunds in this proceeding has nothing to do with the regulation of retail rates. In the May 5 Order, the Commission did not find that retail rates were unjust or unreasonable; it found that Entergy should have been charging QFs for Deficient Energy under the GIA. That is, the Commission found that Entergy was providing a wholesale service, *i.e.*, the provision of Deficient Energy under its GIA, and that Entergy should have been charging a wholesale rate, *i.e.*, charging QFs Deficient Energy charges.

19. The May 5 Order found that Entergy's schedules first policy is unreasonable and unduly discriminatory. Because Entergy does not contest this finding, Entergy, in effect, concedes that, although it charged QF host loads, it had no lawful right to do so.²⁷ The Commission has, and must have, the power to correct this wrong.²⁸ Entergy cannot successfully argue that because it improperly charged customers retail rates for a wholesale service, it does not have to refund the monies collected.²⁹ Rather, the

²⁵Entergy Rehearing at 11.

²⁶*Id.* (citation omitted).

²⁷Entergy's rates to host loads were not the rates on file with the Commission for Deficient Energy, and under Section 205 of the Federal Power Act, 16 U.S.C. § 824d (2000), any rate for a Commission-jurisdictional service that is not on file with the Commission is "unlawful."

²⁸*See* *Towns of Concord, Norwood, and Wellesley Massachusetts v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992); *Niagara Mohawk Power Corp. v. FERC*, 379 F.2d 153, 159 (D.C. Cir. 1967); *Louisiana Public Service Commission v. FERC*, 174 F.3d 218, 224 n.6 D.C. Cir. 1999).

²⁹Indeed, such an argument, if successful, would create a gap in regulation analogous to the gap in regulation that the FPA was intended to fill; that is, charging for services that are Commission-jurisdictional, but escaping Commission regulation by claiming the rates being charged are state-jurisdictional. *See generally* *Jersey Central Power & Light Company*, 319 U.S. 61 (1943); *FPC v. Florida Power & Light Company*, 404 U.S. 453 (1972); *Connecticut Light & Power Company v. FPC*, 324 U.S. 515 (1945);
(continued...)

Commission has the authority under Section 205 of the FPA, 16 U.S.C. § 824d (2000), to direct refunds of amounts improperly charged for Commission-jurisdictional services. In this instance the service being provided was Deficient Energy under the GIA, and so the proper charge was the Deficient Energy charge under the GIA. All amounts collected in excess of that charge are properly subject to refund.

The Commission orders:

The request for rehearing is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁹(...continued)

cf. Public Utilities Commission v. Attleboro Steam Company, 273 U.S. 83 (1927). If the services being provided are Commission-jurisdictional, the rates being charged also must be Commission-jurisdictional.