

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

United States Department of Energy
- Southeastern Power Administration
(Jim Woodruff Project)

Docket No. EF04-3031-001

ORDER DENYING REHEARING

(Issued July 20, 2006)

1. This order denies a request for rehearing filed by Southeastern Federal Power Customers, Inc. (SFPC) of the Commission's order issued in this proceeding on April 18, 2005, which confirmed and approved on a final basis rates of the Southeastern Power Administration (Southeastern).¹

Background

2. On September 13, 2004, the Deputy Secretary of Energy filed a request for final confirmation and approval of Southeastern's Rate Schedules JW-1-H and JW-2-E for the sale of power from Southeastern's Jim Woodruff Project² for the period September 20, 2004 through September 19, 2009.³

¹ *United States Department of Energy - Southeastern Power Administration (Jim Woodruff Project)*, 111 FERC ¶ 61,067 (2005) (April 18 Order).

² The Jim Woodruff Project is a multipurpose hydroelectric project, whose power output is sold to Florida Power Corporation and preference customers in Florida.

³ Rate Schedules JW-1-H and JW-2-E superseded the previous rate schedules, which were approved on a final basis in *United States Department of Energy – Southeastern Power Administration (Jim Woodruff Project)*, 103 FERC ¶ 62,003 (2003).

3. SFPC protested, requesting that the Commission reject the proposed rates as inconsistent with the Flood Control Act of 1944 (Flood Control Act),⁴ not complying with the standards of the Department of Energy's Delegation Order⁵ and the Department of Energy's Order No. RA 6120.2, and an arbitrary and capricious exercise in ratemaking. SFPC also requested that the Commission return the proposed rate to the Department of Energy with instructions to develop a lower rate that is consistent with the Flood Control Act.

4. In the April 18 Order, the Commission found that Southeastern's proposed rates merited final confirmation and approval. The Commission found that the revenues generated by the proposed rates recover no more than Southeastern's annual costs and the remaining federal investment, and thus that the rates were the lowest possible to customers consistent with sound business principles, and that Southeastern's Power Repayment Study (PRS) was prepared in a manner consistent with Department of Energy Order No. RA 6120.2.

5. SFPC has challenged the April 18 Order on rehearing. SFPC requests that the Commission return the filing to the Department of Energy with instructions to develop a lower rate that is consistent with applicable law. SFPC asserts that Southeastern's rate schedules are neither consistent with the Flood Control Act nor with Department of Energy Order No. RA 6120.2 because the rates do not yield the lowest possible rate consistent with sound business principles.

Discussion

6. The Commission will deny rehearing. In doing so, the Commission bears in mind the nature of and limits on its role in reviewing Southeastern's proposed rates.

7. The Secretary of Energy has delegated the authority to confirm and approve Southeastern's rates on a final basis to the Commission,⁶ and established the scope of Commission review. The scope of Commission review is limited to:

⁴ See 16 U.S.C. § 825s (2000).

⁵ Department of Energy Delegation Order No. 00-037.00, I FERC Stats. & Regs. ¶ 9919 (2001) (Delegation Order).

⁶ *Id.*

- whether the rates are the lowest possible to customers consistent with sound business principles;
- whether the revenue levels generated by the rates are sufficient to recover the costs of producing and transmitting the electric energy including the repayment, within the period of cost recovery permitted by law, of the capital investment allocated to power and costs assigned by Acts of Congress to power for repayment; and
- the assumptions and projections used in developing the rate components that are subject to Commission review.⁷

8. The Commission is expressly prohibited from reviewing policy judgments and interpretations of laws and regulations made by the power generating agencies.⁸ Moreover, while the Commission may reject the rate determinations of Southeastern's Administrator, it may do so only if it finds them to be arbitrary, capricious, or in violation of the law, if they violate Department of Energy regulations (*e.g.*, Department of Energy Order No. RA 6120.2, which prescribes financial reporting policies, procedures, and methodologies), or if they violate agreements between Southeastern's Administrator and the applicable power generating agency.⁹

9. The Commission thus considers its role as that of an appellate body which reviews the record developed by the Administrator. In other words, the Commission does not develop a record on its own. Consequently, the Commission only confirms and approves, or remands, the rates submitted to it for final review.¹⁰

⁷ *Id.* at P 1.3.

⁸ *Id.* The power generating agencies include the Bureau of Reclamation, the Army Corps of Engineers, and the International Boundary and Water Commission. These agencies build and operate various projects. The power marketing administrations, such as Southeastern, market the output of the projects.

⁹ *Id.*

¹⁰ *See, e.g., United States Department of Energy - Western Area Power Administration (Boulder Canyon Project)*, 61 FERC ¶ 61,229, at 61,844 (1992) (*WAPA*), *aff'd in relevant respects, Overton Power District No. 5 v. Watkins*, 829 F. Supp. 1523 (D. Nevada 1993), *vacated and remanded with directions to dismiss, Overton Power District No. 5 v. O'Leary*, 73 F. 3d 253 (9th Cir. 1996); *United States Department of*
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10. In its evaluation of Southeastern's proposed rates, the Commission found that the revenues generated by those rates recover no more than Southeastern's annual costs and the remaining federal investment.¹¹ The Commission thus concluded that they were the lowest possible rates consistent with sound business principles. The Commission also noted the PRS had been prepared in accordance with Department of Energy Order No. RA 6120.2.¹²

11. Noting that SFPC did not challenge the costs associated with the new plant investment or the reasonableness of those costs, but rather objected only to the timing of recovery, the Commission stated that SFPC had failed to demonstrate that Southeastern's proposed timing of recovery violated Department of Energy Order No. RA 6120.2. The Commission refused to substitute its policy judgment as to the timing of recovery for Southeastern's policy judgment.¹³

12. Expanding on their protest, SFPC alleges that Southeastern violated the Flood Control Act's mandate that power sales be "at the lowest possible rates to consumers consistent with sound business principles."¹⁴ SFPC urges that rates could have been lower and yet still consistent with Department of Energy Order No. RA 6120.2 if Southeastern had implemented SFPC's suggestion to defer rate recovery of interest payments on new plant investment for three years.¹⁵ Even if deferring the collection of interest for three years were consistent with Department of Energy Order No. RA 6120.2 – which Southeastern persuasively found it was not¹⁶ – we find that SFPC has failed to

Energy - Western Area Power Administration (Salt Lake City Area Integrated Projects), 59 FERC ¶ 61,058, at 61,240-41 & nn.17 & 20, *reh'g denied*, 60 FERC ¶ 61,002 (1992).

¹¹ SFPC, we note, concedes this point. *See* SFPC Request for Rehearing at 5.

¹² April 18 Order, 111 FERC ¶ 61,067 at P 12.

¹³ *Id.* at P 13.

¹⁴ 16 U.S.C. § 825s (2000).

¹⁵ SFPC Request for Rehearing at 6. Under Department of Energy Order No. RA 6120.2, section 12, a Power Marketing Administration may defer rate recovery of interest payments "in unusual circumstances for short periods of time." Whether the present circumstances are "unusual," and whether a 3-year deferral is a "short" period of time, SFPC does not explain.

¹⁶ Southeastern explained that deferring rate recovery of interest payments on new plant investment would result in the interest on the new plant investment not being repaid
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provide any basis, beyond merely lowering current rates, why it was unreasonable for Southeastern to structure its proposed rates in this way;¹⁷ the interest payments for the new plant investment are costs legitimately incurred that need to be collected.¹⁸ Moreover, Department of Energy Order No. RA 6120.2, section 12 permits, but does not require, Southeastern to defer rate recovery of interest payments in unusual circumstances for short periods of time. Southeastern exercised its discretion and made a policy decision not to defer recovery, and instead opted to recover interest on its new plant investment now rather than later.¹⁹ We cannot second-guess that policy decision.²⁰

until 2020, more than thirteen years after the interest on the federal investment was incurred. Southeastern found that time too long to qualify for the Department of Energy Order No. RA 6120.2, section 12 exception (which allows Power Marketing Administrations to defer rate recovery of interest payments “for a possible initial short transition period”) to the requirement that “expected revenues [be] at least sufficient to recover [interest expenses] annually.” *See* Rate Order No. SEPA-45 (2004) (placing rate schedules into effect on an interim basis under authority delegated to the Deputy Secretary by the Delegation Order).

¹⁷ *See United States Department of Energy – Western Area Power Administration (Salt Lake City Area Integrated Projects)*, 60 FERC ¶ 61,002, at 61,011 (1992) (upholding challenged rates against accusation that Western’s forecasts were unreasonable where protestor failed to provide persuasive arguments as to why).

¹⁸ *See United States Department of Energy – Southeastern Power Administration*, 55 FERC ¶ 61,016, at 61,045-46 (1991) (upholding rates reflecting increases in O&M costs because they were costs legitimately incurred by Southeastern, and thus appropriately included in its revenue requirement); *United States Department of Energy – Southeastern Power Administration*, 36 FERC ¶ 61,079, at 61,198 (1986) (refusing to find Southeastern’s rates arbitrary, capricious or in violation of law or applicable regulations where, *inter alia*, the rates did not overcollect revenues).

¹⁹ *See WAPA*, 61 FERC ¶ 61,229, at 61,846 (upholding Western’s policy judgment to expense rather than amortize its replacements as consistent with Department of Energy Order No. RA 6120.2 and “consistent with sound business principles”).

²⁰ *E.g., United States Department of Energy – Western Area Power Administration (Boulder Canyon Project)*, 115 FERC ¶ 61,052, at P 10 (2006); *cf. United States Department of Energy – Western Area Power Administration (Central Valley Project)*, 64 FERC ¶ 61,332, at 63,420 (1993) (holding that once the Commission determines that applicable criteria in the Delegation Order have been met, it is not within the

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13. At bottom, SFPC's request for rehearing amounts to little more than a claim that deferral of the rate recovery of interest on new plant investment would lower Southeastern's rates, and therefore Southeastern must defer the rate recovery of interest on new plant investment. However, this logic would justify continuous deferral of the recovery of costs anytime and every time deferral would be permissible. While doing so would, indeed, result in lower rates in the short-term, it would hardly be lower rates "consistent with sound business principles."

14. In its request for rehearing, SFPC also alleges that Southeastern violated Department of Energy Order No. RA 6120.2 in formulating the disputed rates by failing to account for costs related to new plant investment in an earlier 2002 PRS. SFPC recognizes that this 2002 study was at issue in an earlier docket, but asserts that this information was not available until recently. SFPC is effectively seeking to relitigate an earlier docket. This, we will not allow SFPC to do. In any event, the Commission has stated that it will not consider information beyond the record developed by the Administrator because doing so would amount to reviewing a constantly "moving target."²¹

15. SFPC further argues that Southeastern has been inconsistent in interpreting Department of Energy Order No. RA 6120.2. SFPC asserts that, because Southeastern proposed to collect capitalized deficits from the years 1999, 2000, and 2001 eight years after each was first incurred, it was arbitrary and capricious to find that thirteen years was too long to defer collection of interest. Capitalized deficits, addressed in Department of Energy Order No. RA 6120.2, sections 8(c)(2) and (3), are not the same as deferred

Commission's discretion to review a Power Marketing Administration's rate design); *United States Department of Energy – Western Area Power Administration (Salt Lake City Integrated Projects)*, 62 FERC ¶ 61,159, at 62,109 (1993) (rejecting protestor's request that Commission review Western's rate design as beyond the scope of the Commission's review because, under the Delegation Order, the Commission's role is to ensure that Western's revenues, in the aggregate, are sufficient to recover the costs of producing and transmitting the electric energy).

²¹ See *United States Department of Energy – Southeastern Power Administration (Cumberland System of Projects)*, 91 FERC ¶ 61,272, at 61,925 (2000) (rejecting SFPC's contention that the Commission should consider data that became available after Southeastern filed its proposed rates because the regulatory scheme "provides that the Commission must review the data presented at the time of the request for final approval, and not later data that have never been the subject of the regulatory process specified for developing such rates").

interest, addressed in section 12(a)(3). Moreover, the Department of Energy has granted discretion to Power Marketing Administrations to defer rate recovery of interest in unusual circumstances and for short periods of time, and Southeastern may exercise this discretion on a case by case basis.²² SFPC has not provided anything beyond its allegation that the rates are not as low as possible, *i.e.*, are not as low as SPFC would like, to suggest that Southeastern lacked a reasoned basis in exercising its discretion to not defer rate recovery of interest.²³

16. Lastly, SFPC requests clarification of the Commission's statement in the April 18 Order that "since the revenues generated by the proposed rates recover no more than Southeastern's annual costs and the remaining federal investment, the rates are the lowest possible to customers."²⁴ SFPC asserts that this statement implies that Power Marketing Administrations may forego a reasonable payment schedule in favor of accelerated cost recovery. That is not what is at issue here. In this proceeding, Southeastern was not inappropriately front-loading its rate schedules to accelerate repayment, but was instead seeking timely recovery of annual interest payments due on federal investments. If a Power Marketing Administration were to design a payment schedule that inappropriately accelerated repayment on a federal investment, its PRS would reveal that to be the case, and the Department of Energy regulations would require the Power Marketing Administration to adjust the rates downward accordingly.²⁵

17. In the April 18 Order, we found, based on the record before us, that the challenged rate schedules were consistent with the standards by which they must be judged and that

²² See *United States v. City of Fulton*, 475 U.S. 657, 670 (1986) (stating that the Flood Control Act grants the Department of Energy and Southeastern wide discretion in implementing that statute); *Cent. Elec. Power Coop. v. Se. Power Admin.*, 338 F.3d 333, 337 (4th Cir. 2003) (noting that "[Southeastern] enjoys considerable discretion in determining how to structure the recovery of [revenue shortfalls]" since issues of rate design are fairly technical and involve policy judgments that lie at the core of the regulatory mission (citations omitted)).

²³ See *United States Department of Energy – Southeastern Power Administration*, 36 FERC ¶ 61,079, at 61,198 (1986) (refusing to find Southeastern's rates arbitrary and capricious where protestor did not establish that Southeastern lacked a reasoned basis for its decisions).

²⁴ April 18 Order, 111 FERC ¶ 61,067 at P 12.

²⁵ See *WAPA*, 61 FERC ¶ 61,229 at 61,845 n.17.

they merited final confirmation and approval. SFPC has not persuaded us that we erred. Accordingly, we will deny SFPC's request for rehearing.

The Commission orders:

SFPC's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.