

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

CinCap VII, LLC

Docket Nos. ER00-1831-005
ER02-319-003

CinCap Madison, LLC

Docket Nos. ER00-1784-006
ER02-322-004

ORDER DISMISSING REHEARING

(Issued December 23, 2003)

1. This order dismisses a request for rehearing of letter orders issued in these proceedings on April 19, 2002, pursuant to delegated authority. The April 19 Orders accepted notices of change in status and amendments to the market-based rate tariffs of CinCap VII, LLC and CinCap Madison, LLC (collectively, Applicants). Our order benefits customers because it clarifies the relationship between dockets in which individual applicants seek authorization to charge market-based rates and the investigation of market-based rate tariffs in Docket No. EL01-118 (Investigation).¹

I. Background

2. On November 13, 2001, as amended on February 26, 2002, Applicants submitted notices of change in status and amendments to their market-based rate tariffs and codes of conduct to reflect changes to their names and upstream ownership, and to conform the tariff and code of conduct to that approved by the Commission for similarly-situated affiliates of Applicants. Pursuant to the changes in upstream ownership, Applicants are indirect wholly-owned subsidiaries of Cinergy Corp.²

¹ Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 97 FERC ¶ 61,220 (2001) (Initial Order); 105 FERC ¶ 61,218 (2003) (November 17 Order).

² See Duke Energy Vermillion, LLC, et al., 96 FERC ¶ 62,246 (2001).

3. In letter orders dated April 19, 2002, the Director, Division of Tariffs and Rates – Central found that the notices of change in status complied with the Commission’s requirements for market-based rates and accepted them for filing. The Commission’s acceptance of the notices was made subject to any tariff condition adopted in the Investigation.

II. Request for Rehearing

4. Applicants request rehearing of both April 19 letter orders, stating that “the open-ended refund condition contemplated by the proposals sets forth in the Commission’s Investigation is contrary to legal precedent and the [Federal Power Act (FPA)].”³ They assert that the Initial Order allows the possibility of retroactive refunds and does not state with sufficient clarity what activities will give rise to refund liability. Applicants argue that the Commission should anticipate what behavior will trigger refunds and state that any refunds will be ordered only prospectively from the initiation of a complaint proceeding.

5. Applicants also argue that, if an industry-wide proceeding is conducted under Section 206 of the FPA,⁴ the Commission must demonstrate that there is an industry-wide basis for conducting the inquiry. They state that the Commission has not met this burden in the Investigation, let alone justified the refund condition in the instant dockets. Finally, Applicants argue that, in conditioning a market-based rate authorization under Section 205 of the FPA⁵ on the outcome of a Section 206 investigation, the Commission has eroded the finality requirements inherent in Section 206, and collapsed the separate provisions into a hybrid ratemaking provision that exceeds the Commission’s statutory authority.

III. Discussion

6. We will dismiss Applicants’ request for rehearing. Applicants’ arguments all challenge determinations made in the Investigation. Cinergy Corp., the parent company of both Applicants, intervened in the Investigation on behalf of itself and Applicants, and their arguments could have been appropriately raised in that proceeding. Raised here, they amount to an impermissible collateral attack on the Investigation. We further note that the request for rehearing is moot with respect to CinCap Madison, LLC, because its tariff was canceled in April 2003.⁶

³ Request for Rehearing at 2 (citations omitted).

⁴ 16 U.S.C. § 824e (2000).

⁵ 16 U.S.C. § 824d (2000).

⁶ See Letter Order, Docket No. ER03-525-000 (April 18, 2003).

The Commission orders:

Applicants' request for rehearing is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.