UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 382

(Docket No. RM00-7-012)

Revision of Annual Charges to Public Utilities
(Westar Energy, Inc. and Kansas Gas & Electric Company)

(Issued March 15, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule; Order on Remand and Announcing Policy on Submission of Corrected Electric Annual Charge-Related Data.

SUMMARY: In this order, the Federal Energy Regulatory Commission (Commission) addresses issues raised by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) on remand in Westar Energy Inc., Docket No. RM87-3-000. The Commission here affirms its regulation at 18 C.F.R. § 382.201 (2006), adopted in Order No. 641, allowing correction of transmission volumes, but in response to the remand allows Westar Energy, Inc. to submit corrected transmission volumes out-of-time.

The Commission clarifies going forward that it will accept timely FERC Reporting Requirement No. 582 (FERC 582) corrections but will accept only those late-filed FERC 582 corrections that are discovered through a Commission-conducted audit and that correct previously under-reported transmission volumes. When a public utility underreports, it is assessed comparatively smaller annual charges, and other public

utilities are assessed relatively larger annual charges thereby subsidizing those utilities who underreport.

EFFECTIVE DATE: This order on remand will be effective March 15, 2007.

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SUPPLEMENTAL INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Revision of Annual Charges to Public Utilities (Westar Energy, Inc. and Kansas Gas & Electric Company)	Docket No. RM00-7-012

ORDER ON REMAND AND ANNOUNCING POLICY ON SUBMISSION OF CORRECTED ELECTRIC ANNUAL CHARGE-RELATED DATA

(Issued March 15, 2007)

1. This order addresses issues raised by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) on remand.[1] The Commission here affirms its regulation allowing correction of transmission volumes,[2] adopted in Order No. 641,[3] but in response to the remand allows Westar Energy, Inc. (Westar) to submit corrected transmission volumes out-of-time. The Commission clarifies going forward that it will

[1] Westar Energy Inc., Docket No. RM87-3-000 (Apr. 8, 2004) (unpublished letter order), reh'g denied sub nom. Revision of Annual Charges to Public Utilities (Westar Energy, Inc. and Kansas Gas and Electric Company), 111 FERC ¶ 61,086 (2005), remanded sub nom. Westar Energy, Inc. v. FERC, 473 F.3d 1239 (D.C. Cir. 2007).

[2] 18 C.F.R. § 382.201 (2006).

[3] Revision of Annual Charges to Public Utilities, Order No. 641, FERC Stats. & Regs. ¶ 31,109 (2000), reh'g denied, Order No. 641-A, 94 FERC ¶ 61,290 (2001).

accept timely FERC Reporting Requirement No. 582 (FERC 582) corrections but will accept only those late-filed FERC 582 corrections that are discovered through a Commission-conducted audit and that correct previously under-reported transmission volumes.[4]

Background

2. As required by Section 3401 of the Omnibus Budget Reconciliation Act of 1986,[5] the Commission's regulations provide for the payment of annual charges by public utilities.[6] The Commission intends that its electric annual charges in any fiscal year will recover the Commission's estimated electric regulatory program costs (other than the costs of regulating Federal Power Marketing Agencies (PMAs) and electric regulatory program costs recovered through electric filing fees) for that fiscal year. In the next fiscal year the Commission adjusts the annual charges up or down, as appropriate, both to eliminate any over-or under-recovery of the Commission's actual costs and to eliminate any over- or under-charge of any particular public utility. The Commission accomplishes

[4] When a public utility underreports, it is assessed comparatively smaller annual charges, and other public utilities are assessed relatively larger annual charges. The effect is that the underreporting utility pays less than its fair share of the Commission's costs, and is effectively subsidized by other utilities who will pay more than their fair share of the Commission's costs.

[5] 42 U.S.C § 7178 (2000).

[6] 18 C.F.R. 382.201 (2006).

this by recalculating the annual charges and carrying over any over- or under- charge from the prior year as a credit or debit on the next fiscal year's annual charges bill.[7]

3. In calculating annual charges, the Commission determines its total electric regulatory program costs and subtracts all PMA-related costs and electric filing fee collections to determine its collectible electric regulatory program costs. That amount is charged to public utilities that provide transmission service. Public utilities that provide transmission service and thus are subject to annual charges must submit FERC 582 to the Office of the Secretary by April 30 of each year, providing data for the previous calendar year.[8] The reports include their transmission of electric energy in interstate commerce, as measured by: (1) unbundled wholesale transmission; (2) unbundled retail transmission; and (3) bundled wholesale power sales which, by definition, include a transmission component, where the transmission component is not separately reported as unbundled transmission.

4. Importantly, the Commission uses that data to allocate its collectible electric regulatory program costs among all public utilities that provide transmission service;

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[7] 18 C.F.R. § 382.201 (2006); see, e.g., Order No. 641, FERC Stats. & Regs. ¶ 31,109 at 31,841-42; accord Annual Charges under the Omnibus Budget Reconciliation Act of 1986 (CNG Power Services), 87 FERC ¶ 61,074 at 61,302 (1999) (CNG); Annual Charges Under the Omnibus Budget Reconciliation Act of 1986 (Phibro Inc.), 81 FERC ¶ 61,308 at 62,424-25 (1997).

[8] 18 C.F.R. § 382.201 (2006).

changing the amount owed by one public utility has an effect on the amount owed by all of the others. The Commission issues bills for annual charges based on each public utility's transmission service (as reported in the FERC 582) as compared to the total of all public utilities' transmission service, and the bills must be paid within 45 days of the date on which the Commission issues the bills.[9] The regulations allow public utilities to make corrections to their previously filed FERC 582s, but they must do so within a specified time:

> Corrections to the information reported on [FERC] 582, as of January 1, 2002, must be submitted under oath to the Office of the Secretary on or before the end of each calendar year in which the information was originally reported (i.e., on or before the last day of the year that the Commission is open to accept such filings).[10]

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[9] See, e.g., Order No. 641, FERC Stats. & Regs. ¶ 31,109 at 31,848-20; Order No. 641-A, 94 FERC at 62,037.

[10] 18 C.F.R. § 382.201(c)(2) (2006).

The Commission adjusts the annual charges in the following fiscal year (FY), using this corrected information, in order to eliminate any over or under recovery both of the Commission's actual costs and of the charges to each public utility.[11]

Earlier Filings and Orders

5. On December 18, 2003, Westar submitted a corrected FERC 582 for both 2002 and 2003, correcting the data reported for the years 2001 and 2002, respectively. Westar explained that its internal review, prompted by a change in the Commission's reporting requirements, revealed that it had over-reported transmission in several particulars. Westar requested a waiver of the Commission's regulations, observing that the Commission had permitted another company, Kansas City Power and Light Company (KCPL), to file a correction for calendar year 2001 in 2003.[12]

6. By letter order dated April 8, 2004, the Director of the Commission's Division of Financial Services, Office of the Executive Director, accepted Westar's corrections for FY 2003 (reporting corrected calendar year 2002 transmission data), but rejected Westar's proposed corrections for FY 2002 (reporting corrected calendar year 2001

[11] See Order No. 641, FERC Stats & Regs. ¶ 31,109 at 31,857; Revision of Annual Charges to Public Utilities (California Independent System Operator, Inc.), 101 FERC ¶ 61,043 at 61,163, reh'g dismissed, 101 FERC ¶ 61,326 at P 9 (2002) (CAISO); accord CNG, 87 FERC at 61,303.

[12] Kansas City Power & Light, Docket No. FA03-17-000 (August 14, 2003).

transmission data) on the ground that it was untimely under section 382.201(c)(2) of the Commission's regulations. On May 7, 2004, Westar sought rehearing.

7. The Commission subsequently denied rehearing for four reasons: first, the Commission's regulations expressly provided that corrections be made by the end of the calendar year in which the information was originally filed; second, the broader interest in preserving the finality of annual charges weighed against Westar's individual interest in allowing an untimely correction; third, the Commission had offered no assurances that it would correct erroneously filed information beyond the deadline for filing corrected information expressly spelled out in the regulations; and fourth, Westar and KCPL were not similarly situated because the Commission itself caused KCPL's late filing and it would, therefore, have been inequitable to reject KCPL's out-of-time corrections to the detriment of the company.[13]

8. Westar filed a petition for review with the D.C. Circuit, and on January 16, 2007, the D.C. Circuit vacated and remanded the Commission's not allowing Westar's corrected FERC 582 for FY 2002, finding the Commission's order provided no basis "in fact or in logic for the Commission's refusal to treat Westar as it had treated KCPL."[14]

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[13] 111 FERC ¶ 61,086 at P 10-12.

[14] 473 F.3d. at 1243.

Discussion

9. In light of the D.C. Circuit's finding, and to bring this matter to an expeditious conclusion, the Commission will allow Westar to submit the corrected FY 2002 transmission volumes that the Commission had previously rejected because they had been filed out-of-time.

10. The Commission does, however, reiterate its continued commitment to the policy reflected in Part 382 of the Commission's regulations, namely that corrected transmission volumes must be filed by the end of the calendar year in which the transmission volumes were originally filed. This is what the Commission's regulations require.[15] The court found, while vacating and remanding the Commission's determination as to Westar, that the first three of the Commission's four reasons for denying Westar's request both alone and together justify this policy: (1) the regulations expressly required filing of corrections by a date certain; (2) waiving the deadline would undermine the certainty that the annual charges would not be indefinitely subject to change; and (3) the Commission has never suggested it would ignore the deadline spelled out in its regulations.[16]

[15] 18 C.F.R. § 382.201(c)(2) (2006).

[16] 473 F.3d. at 1241-42. As noted above, it was the Commission's failure to adequately explain the fourth reason that led to the remand.

11. We also announce a policy, going forward, as to when we will waive the regulation and allow untimely submissions. The Commission's policy going forward will be to grant waiver and accept only those late-filed corrections discovered through a Commission-conducted audit in order to remedy an underreporting of transmission volumes (and thus where other utilities have subsidized the underreporting utility).

12. As stated above, the Commission allocates its collectible electric regulatory program costs among public utilities. A reduction in the amount owed by one utility necessarily has an effect, an increase, on the amount owed by all of the others. Therefore, if a utility does not accurately report its transmission volumes, the Commission cannot charge it appropriately.[17] The allocation of costs based on transmission volumes creates a natural incentive for utilities to underreport their transmission volumes in a given year. Just as public utilities have a natural incentive to

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[17] As we have noted, the transmission volumes utilities report are the utilities' data. These data are, moreover, filed under oath. 18 C.F.R. § 382.201(c)(1) (2006); see Revision of Annual Charges to Public Utilities (PJM Interconnection), 105 FERC ¶ 61,093 at P 8 (2003); Midwest Independent Transmission System Operator, Inc., 103 FERC ¶ 61,048 at P 13-14, reh'g denied, 104 FERC ¶ 61,060 (2003); CAISO, 101 FERC ¶ 61,326 at P 9; CAISO, 101 FERC ¶ 61,043 at P 10. While utilities are thus required to report complete and accurate data (by April 30 of each year), we nevertheless recognize that utilities may err in their reporting, and so we allow corrections to be filed up to eight months following their original filing, i.e., by the end of the calendar year.

"abuse their market power,"[18] so, by analogy, public utilities subject to reporting transmission volumes for purposes of calculating their proportionate share of the Commission's collectible electric regulatory program costs have similar incentives to underreport their transmission volumes and thereby reduce the costs allocated to them. The effect of such underreporting is an inequitable subsidization by other utilities of any utility that underreported. The agency's audit process provides a check on that natural incentive. Therefore, the Commission will allow late-filed corrections resulting from an audit revealing that a utility has underreported its transmission volumes and consequently forced other utilities to bear costs that should have been borne by the underreporting utility. The Commission thus retains its ability to make right the situation where the remainder of the industry has paid amounts which rightfully were owed by another.[19]

13. However, the reverse is not true. Overreporting does not raise the same concerns as underreporting; if a company overreports its transmission volumes and fails to file corrections by the deadline, it does so to its detriment and harms no one but itself. Errors of overreporting discovered after the deadline, by Commission-conducted audit or otherwise, thus may not be corrected. The D.C. Circuit acknowledged that any one of the

[18] Pennsylvania Elec. Co. v. FERC, 11 F.3d 207, 211 n.5 (D.C. Cir. 1993); Nat'l Fuel Gas Supply Corp. v. FERC, 468 F.3d 831, 834-835 (D.C. Cir. 2006); United Distribution Cos. v. FERC, 88 F.3d 1105, 1122 & n.4 (D.C. Cir. 1996); Associated Gas Distribs. v. FERC, 824 F.2d 981, 1010 (D.C. Cir. 1987).

[19] If the Commission finds that the underreporting was intentional, it may seek to invoke its civil penalty authority as well.

first three justifications provided by the Commission, described above, justify a Commission policy of not accepting a corrected FERC 582 after the deadline. Indeed, the Commission need not have structured its regulation to allow corrections at all. The data the utilities must report is, after all, the utilities' data, and that data must be filed under oath; in other words, full and complete reporting at the outset should be the norm. The Commission, however, elected to build leniency into its requirement to submit transmission volumes, in the form of an 8-month window from the April 30 filing deadline to the December 31 corrections deadline. That 8-month window provides more than sufficient time for utilities to identify and correct their overreporting.

The Commission orders:

(A) The Commission hereby grants waiver of the annual charges reporting requirement, FERC 582, to allow Westar to submit corrected information for FY 2002 (reporting corrected calendar year 2001 transmission data). The upcoming annual charges will be calculated to reflect this corrected information.

(B) The Secretary is hereby directed to publish this order in the Federal Register.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.