

119 FERC ¶ 61,051
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Gulf States, Inc.

Docket Nos. EL03-3-002
ER02-1472-006

ORDER GRANTING CLAFICATION AND DENYING REHEARING

(Issued April 19, 2007)

1. This order addresses a request for rehearing filed by Cottonwood Energy Company, LP (Cottonwood) of the Commission's December 18, 2006 order,¹ which denied the requests for rehearing, in part, and granted clarification, in part, as well as denied the requests for stay, of our orders in *PG&E I*,² *PG&E II*,³ and *Wrightsville*.⁴ In *PG&E III*, the Commission also accepted and directed modifications to the compliance filings submitted in response to those orders, consistent with our order issued in *Duke Hinds III*.⁵ For the reasons discussed below, we will deny Cottonwood's request for rehearing, but clarify the date on which interest begins to accrue for one Required System Upgrade.

¹ *Pacific Gas and Electric Company*, 117 FERC ¶ 61,294 (2006) (*PG&E III*).

² *Pacific Gas and Electric Company*, 101 FERC ¶ 61,079 (2002) (*PG&E I*).

³ *Pacific Gas and Electric Company*, 102 FERC ¶ 61,070 (2003) (*PG&E II*).

⁴ *Wrightsville Power Facility v. Entergy Arkansas, Inc.*, 102 FERC ¶ 61,212 (2003) (*Wrightsville*).

⁵ *Duke Energy Hinds, LLC v. Entergy Services, Inc.*, 117 FERC ¶ 61,210 (2006) (*Duke Hinds III*).

I. Background

2. On April 2, 2002, in Docket No. ER02-1472-000, Entergy Services, Inc., on behalf of Entergy Gulf States, Inc. (collectively, Entergy), filed revisions to its interconnection agreement with Cottonwood (Cottonwood IA).⁶ Cottonwood protested the filing because, among other things, Entergy had failed to properly classify all transmission upgrades, including certain facilities originally classified as Interconnection Facilities, as Network Upgrades. On May 31, 2002, the Commission accepted the revised Cottonwood IA, effective April 3, 2002, subject to Entergy's revising the IA to reclassify a new 500 kV circuit breaker at the Hartburg Substation (500 kV Breaker) as a Required System Upgrade, for which Cottonwood was entitled to transmission credits, with interest.⁷ The Commission also found that, consistent with our decision in *Duke Hinds I*,⁸ Entergy was not required to reclassify certain originally accepted Interconnection Facilities, as Network Upgrades.

3. On January 28, 2003, the Commission issued *Duke Hinds II*.⁹ The Commission granted a complaint filed by Duke¹⁰ against Entergy and found that Entergy was violating the Commission's long-standing transmission service pricing policy by unjustly and unreasonably charging Duke a transmission rate based on both the network average embedded costs and incremental costs. We directed Entergy, pursuant to section 206 of

⁶ The original Cottonwood IA was accepted by the Commission in an unpublished letter order, Docket No. ER01-550-000, on January 8, 2001.

⁷ *Entergy Gulf States, Inc.*, 99 FERC ¶ 61,234, at P 29, 33 (2002) (May 31, 2002 Order). The Commission also directed that Entergy remove a provision relating to the SeTrans Regional Transmission Organization (RTO).

⁸ *Entergy Services, Inc.*, 98 FERC ¶ 61,290 (2002) (*Duke Hinds I*). In *Duke Hinds I*, the Commission held that we would not "reopen" a previously accepted IA, which did not provide for transmission credits, and reclassify certain facilities.

⁹ *Duke Energy Hinds, LLC v. Entergy Services, Inc.*, 102 FERC ¶ 61,068 (2003) (*Duke Hinds II*).

¹⁰ Duke Energy Hinds, LLC (Duke Hinds), Duke Energy Hot Spring, LLC (Duke Hot Spring), Duke Energy Southaven, LLC (Duke Southaven), and Duke Energy North America, LLC (collectively, Duke).

the Federal Power Act (FPA),¹¹ to revise the three Duke IAs at issue and its future transmission rates to be consistent with Commission policy.

4. On January 29, 2003, in *PG&E II*,¹² the Commission issued a basket order addressing IAs that had provisions similar to those at issue in *Duke Hinds II*, including the Cottonwood IA.¹³ The Commission partially granted the rehearing requests and complaints, finding that the IAs at issue in each proceeding were unjust and unreasonable, and needed to be modified to conform to *Duke Hinds II*.¹⁴ For the Cottonwood IA, the Commission stated that “the refund effective date will be 60 days from the date on which this order is published in the Federal Register,” or on March 30, 2003.¹⁵

5. On February 28, 2003, Entergy submitted, under protest, a compliance filing modifying each IA, including the Cottonwood IA (Entergy Compliance Filing). Entergy modified each IA to provide that Interconnection Facilities charges would be refunded in the form of transmission credits, with interest, and reclassified the Interconnection Facilities located at or beyond the point of interconnection as Required System Upgrades, as directed in *PG&E II*. Entergy designated a March 30, 2003 effective date for the Cottonwood IA.¹⁶

¹¹ 16 U.S.C. § 824(e) (2000).

¹² On October, 25, 2002, in *PG&E I*, the Commission had directed PG&E to modify a proposed interim crediting mechanism that PG&E proposed to apply to all generators for interconnection costs, subject to the outcome of the *Duke Hinds* proceeding.

¹³ We note that, on February 26, 2003, in *Wrightsville*, the Commission addressed the issues raised in complaints and rehearing requests that had not been addressed in *PG&E II*, *i.e.*, issues that did not relate to customers’ entitlements to transmission credits. None of those issues is relevant here.

¹⁴ With respect to the Cottonwood IA, the Commission partially granted rehearing in Docket No. ER02-1472-001, and instituted a proceeding, pursuant to section 206 of the FPA, in Docket No. EL03-3-000.

¹⁵ *PG&E II*, 102 FERC ¶ 61,070 at P 10.

¹⁶ Entergy Compliance Filing transmittal letter at 9 and Attachment 6, Cottonwood IA.

6. In response to the Entergy Compliance Filing, Cottonwood filed a protest on March 21, 2003, asserting that the Cottonwood IA: (1) failed to state clearly that Entergy will provide interest on both Required System Upgrades and Optional System Upgrades, contrary to the Commission's policies; and (2) should be revised, consistent with the May 31, 2002 Order in this proceeding, to state that costs incurred for certain facilities classified as a Required System Upgrades should accrue interest as of the date that Cottonwood commenced paying Entergy for those upgrades.¹⁷

7. On November 17, 2006, the Commission issued *Duke Hinds III*, denying in part and granting in part rehearing of *Duke Hinds II*. *Duke Hinds III* also addressed Entergy's compliance filing made in response to *Duke Hinds II*, as well as the mechanics of the crediting mechanism for the IAs at issue and the applicable refund period.¹⁸

8. On December 18, 2006, the Commission issued *PG&E III*, a basket order that made findings on the requests for rehearing and clarification of the Commission's orders in *PG&E I*, *PG&E II*, and *Wrightsville*, as well as the compliance filings submitted in response to those orders. *PG&E III* addressed several IAs, including the Cottonwood IA, and upheld the Commission's findings in *Duke Hinds III*.

9. As relevant here, in *PG&E III*, the Commission found that Entergy generally complied with *PG&E II* and accepted the Entergy Compliance Filing, but directed modifications necessary for consistency with our findings and clarifications in *Duke Hinds III*.¹⁹ The Commission agreed with Cottonwood that Entergy should revise the IA to provide Cottonwood with interest on credits for Required System Upgrades and Optional System Upgrades starting on the refund effective date, consistent with *Duke Hinds III*.²⁰ Further, we directed Entergy to provide refunds for the period starting with the appropriate refund effective date, as directed in *PG&E II*, "for the locked-in period, up until Entergy begins to provide transmission credits, with interest calculated in accordance with [18 C.F.R. § 35.19a(a)(2)(iii)], as a lump sum refund."²¹

¹⁷ Cottonwood Protest, March 21, 2003, Docket No. ER02-1472-004, *et al.*, at 6-8.

¹⁸ *Duke Energy III*, 117 FERC ¶ 61,210 at P 56.

¹⁹ *PG&E III*, 117 FERC ¶ 61,294 at P 56.

²⁰ *Id.* at P 57 (*citing Duke Hinds III*, 117 FERC ¶ 61,210 at P 37 and 53).

²¹ *Id.*

10. On January 17, 2007, Cottonwood and Southern Company Services, Inc. (Southern) filed timely requests for rehearing of *PG&E III*. On February 1, 2007, Southern filed a notice of withdrawal of its request for rehearing. Also on that day, Entergy, on behalf of Entergy Gulf States, Inc., filed an answer to Cottonwood's request for rehearing.

II. Discussion

A. Procedural Matters

11. The Commission's Rules of Practice and Procedure prohibit answers to requests for rehearing,²² and, accordingly, we will reject Entergy's answer.

B. Cottonwood's Rehearing Request

12. On rehearing, Cottonwood asserts that the Commission erred in limiting the accrual of interest on transmission credits for Network Upgrades starting "only on the 'refund effective date' -- April 8, 2003."²³ Cottonwood requests that the Commission clarify that interest should accrue from the date that Cottonwood started making payments to Entergy under the Cottonwood IA, which is as early as October 2001 for certain Required System Upgrades. It states that, if the Commission does not grant this clarification, then Cottonwood seeks rehearing.

13. Cottonwood asserts that the Commission's regulations require that interest be calculated from the date payments commence. It points out that section 35.19a(a)(2) of the Commission's regulations provides that "[i]nterest shall be computed from the date of collection until the date refunds are made."²⁴ Cottonwood argues that the Commission, in *PG&E III*, neither provided explanation for its departure from this regulation, nor addressed Cottonwood's protest, in deciding that interest should accrue as of the refund effective date, as opposed to the date that Cottonwood commenced paying Entergy.

14. Further, Cottonwood argues that, in the May 31, 2002 Order, the Commission made the revised Cottonwood IA effective on April 3, 2002 and ordered Entergy to

²² 18 C.F.R. § 385.713(d)(1) (2006).

²³ Cottonwood Rehearing Request at 7. We note that Cottonwood states that the Commission ordered an April 8, 2003 refund effective date in *PG&E II*. However, as noted above, in *PG&E II*, the Commission set the effective date at March 30, 2003.

²⁴ 18 C.F.R. § 35.19a(a)(2) (2006).

classify the new 500 kV Breaker as a Required System Upgrade, entitling Cottonwood to transmission credits and interest in accordance with section 35.19a(a)(2).²⁵ It states that Entergy also filed pleadings in these proceedings agreeing that interest associated with this additional breaker accrues from the date that Cottonwood commenced making payments, consistent with the Commission's May 31, 2002 Order.²⁶ However, Cottonwood asserts, in *PG&E III*, the Commission ordered interest starting only on the refund effective date. Cottonwood states that it does not believe that the Commission intended to change the date from which interest should accrue, but if it did intend to alter the date, then Cottonwood seeks rehearing because the Commission failed to explain why it changed the date, particularly when Entergy did not challenge it.

15. Cottonwood also explains that the Cottonwood IA, the agreement to construct Optional System Upgrades, and Cottonwood's protest as to the reasonableness of the terms related to those upgrades originally came before the Commission under section 205 of the FPA,²⁷ in Docket No. ER02-1472-000. It asserts that the relief Cottonwood sought in its protest was under FPA section 205 and that the Commission's orders on the Cottonwood IA were all made under FPA section 205.²⁸ Thus, Cottonwood argues, because a refund effective date is not applicable in a FPA section 205 proceeding, but rather only to decisions that the Commission makes under FPA section 206, the refund effective date does not apply here.

16. Cottonwood requests that, because the changes that the Commission ordered to the Cottonwood IA in *PG&E II* and *PG&E III*, including interest on transmission credits for

²⁵ May 31, 2002 Order, 99 FERC ¶ 61,234 at P 29.

²⁶ Cottonwood Rehearing Request at 10 (*citing* Entergy Response to Cottonwood's Protest to the Entergy Compliance Filing, April 7, 2003, Docket Nos. ER02-1472-004, *et al.*, at 6).

²⁷ 16 U.S.C. § 824d (2000).

²⁸ Cottonwood argues that the procedural posture of interest on the Optional System Upgrades is essentially the same as the procedural posture of the Commission's requirement that Entergy classify the additional breaker as a Required System Upgrade, entitling Cottonwood to transmission credits and interest accrued from the date that it made payments for the additional breaker. The only difference, it states, is that the Commission's ultimate decision on the issue came later in the process; in response to Cottonwood's protest on the Entergy Compliance Filing. Cottonwood Rehearing Request at 11-12.

upgrades reclassified as Required System Upgrades, were made under FPA section 205, the Commission should clarify that interest accrues for all Required System Upgrades and Optional System Upgrades from the date Cottonwood started paying Entergy. At minimum, Cottonwood argues, relief should be provided back from the date that the revised IA became effective (April 3, 2002) under FPA section 205 for Optional System Upgrades and reclassified Required System Upgrades. If the Commission does not so clarify, then Cottonwood seeks rehearing.

C. Commission Determination

17. The Commission's statutory authority to order refunds is specified in sections 205 and 206 of the FPA. Section 205 addresses rate changes proposed by the public utility providing the service in question; section 206 addresses rate changes initiated by a complainant or the Commission.²⁹

18. Section 206 provides that if, upon complaint or upon its own motion, the Commission finds that existing rates, charges or classifications are unjust, unreasonable, or unduly discriminatory or preferential, it must determine, and order implementation of, a just and reasonable rate. In 1988, in the Regulatory Fairness Act (RFA),³⁰ Congress substantially revised section 206 to permit limited authority to order retroactive refunds of rates found to be unjust and unreasonable. Under section 206 (as it was in effect at the time that the Commission issued *PG&E II*), as amended by the RFA, upon instituting a proceeding under section 206, the Commission must establish a refund effective date. In the case of a proceeding instituted upon the Commission's own motion, the refund effective date cannot be earlier than the date 60 days after publication by the Commission of notice of its intention to initiate such proceeding, nor later than 5 months after the expiration of such 60-day period.³¹ At the end of any such proceeding, the Commission

²⁹ *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,121, at 61,377 (2000), *order on reh'g*, 97 FERC ¶ 61,275, *order on appeal*, *California ex rel. Lockyer*, 383 F.3d 1006 (9th Cir. 2001), *reh'g denied*, 99 FERC ¶ 61,160 (2002).

³⁰ 102 Stat. 2299 (1988).

³¹ Section 206(b) of the FPA was amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005), to require that in the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date.

may, in its discretion, order refunds if it finds that the existing rate is unjust, unreasonable, or unduly discriminatory or preferential. Possible refunds are limited to the period from the refund effective date through a date 15 months after such refund effective date and are also limited to the difference between the rate charged and the rate determined to be just and reasonable.

19. Cottonwood appears to misunderstand the distinction between a rate filed under section 205 and a modification to a filed rate under section 206. Cottonwood is correct that the revisions to the Cottonwood IA were first brought to us by Entergy in Docket No. ER02-1472-000, under section 205. However, we accepted that filing, subject to certain specified revisions (including reclassification of the 500 kV Breaker), in the May 31, 2002 Order, effective April 3, 2002. Immediate with that acceptance, the revised Cottonwood IA became the filed rate, and subsequently, any revisions to that filed rate must be made pursuant to section 206.

20. Hence, in *PG&E II*, the Commission specifically found that the Cottonwood IA was “unjust and unreasonable under *section 206* of the [FPA].”³² Therefore, the Commission established a proceeding “pursuant to Section 206 of the FPA,” in Docket No. EL03-3-000, and directed that Entergy modify the Cottonwood IA “in accordance with our ruling in *Duke Hinds II* and Commission policy.”³³ As explained above, in order for the Cottonwood IA to be consistent with the Commission’s pricing policy, the Commission’s authority to direct implementation of a just and reasonable rate required that we institute a proceeding under section 206 of the FPA. Also pursuant to the Commission’s authority under FPA section 206, the Commission found that, “in order to give maximum protection to customers,” we established a refund effective date at the earliest date allowed, *i.e.*, 60 days from the date on which *PG&E II* was published in the Federal Register, or on March 30, 2003.³⁴ The March 30, 2003 refund effective date for the Cottonwood IA was appropriately attached to the relief that the Commission granted pursuant to section 206 of the FPA, not FPA section 205, as Cottonwood argues.

21. We appropriately upheld these findings, in *PG&E III*, and directed Entergy to provide refunds for the period starting with the refund effective date, “for the locked-in period, up until Entergy begins to provide transmission credits, with interest calculated in

³² *PG&E II*, 102 FERC ¶ 61,070 at P 2 (emphasis added).

³³ *Id.* at P 9.

³⁴ *Id.* at P 10.

accordance with [18 C.F.R. § 35.19a(a)(2)(iii)], as a lump sum refund.”³⁵ Therefore, we will deny Cottonwood’s request for rehearing. However, we will clarify that, pursuant to the May 31, 2002 Order, interest should accrue for the 500 kV Breaker from the April 3, 2002 effective date, in accordance with 18 C.F.R. § 35.19a(a)(2)(iii).³⁶

22. Further, in response to Cottonwood’s argument that section 35.19a(a)(2) of the Commission’s regulations requires that interest be calculated from the date payments commence, we note the Commission’s use of that section, in *PG&E III*, was meant merely as guidance for the *computation* of interest. Section 35.19a of the Commission’s regulations is only strictly applicable to refund requirements under suspension orders, which the Cottonwood IA has never been subject to. Further, we note that, in *PG&E III*, the Commission referred to the interest accrual requirement in 18 C.F.R. § 35.19a(a)(2)(iii), to dictate the interest *rate* applicable to refunds, not the date upon which interest must begin to accrue.

23. Finally, we note that *PG&E II* issued on January 29, 2003 and requests for rehearing of that order were due within 30 days after its issuance, or February 28, 2003. Cottonwood did not file a request for rehearing of *PG&E II*.³⁷ Section 313(a) of the FPA³⁸ generally precludes the Commission from considering late-filed requests for rehearing. Further, rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.³⁹ The Commission’s decision with respect to the appropriate effective date for the Cottonwood IA, which is the premise of Cottonwood’s instant

³⁵ *PG&E III*, 117 FERC ¶ 61,294 at P 59. We note that, in *PG&E III*, the Commission made a typographical error when we referenced 18 C.F.R. § 35.19a(2)(ii). The appropriate section is 18 C.F.R. § 35.19a(a)(2)(iii) (2006).

³⁶ May 31, 2002 Order, 99 FERC ¶ 61,234 at P 37.

³⁷ Although Cottonwood filed an answer to Entergy’s timely request for rehearing of *PG&E II* on March 17, 2003, supporting the Commission’s decision in *PG&E II* and rejecting Entergy’s specifications of error, it was rejected in *PG&E III*, 117 FERC ¶ 61,294 at P 36.

³⁸ 16 U.S.C. § 8251(a) (2000).

³⁹ *California Independent System Operator Corporation*, 118 FERC ¶ 61,061, at P 8 (2007). See also *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999).

request for rehearing, was not modified or disturbed in *PG&E III*. Therefore, as a general matter, Cottonwood had the opportunity to raise its arguments regarding the effective date earlier in this proceeding, on rehearing of *PG&E II*, but neglected to do so. Thus, it would be inappropriate to allow it to effectively seek rehearing of *PG&E II* at this late date in this proceeding.

The Commission orders:

(A) Cottonwood's request for clarification of *PG&E III* is hereby granted, as discussed in the body of this order.

(B) Cottonwood's request for rehearing of *PG&E III* is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Philis J. Posey,
Deputy Secretary.