

141 FERC ¶ 61,116
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Chehalis Power Generating, L.P.

Docket No. ER05-1056-006

ORDER DENYING REHEARING

(Issued November 15, 2012)

1. On March 18, 2011, Chehalis filed a request for rehearing of the Commission's February 17, 2011 order in this proceeding.¹ As discussed below, the Commission will deny Chehalis's request for rehearing of the February 17 Order.

I. Background

2. This case has a long history that began in 2005. In that year, Chehalis filed a rate schedule that Chehalis proposed for supplying reactive power to the Bonneville Power Administration (Bonneville). The Commission found that such rate schedule was a changed, rather than an initial, rate.²

3. The Commission based this decision on its finding that an initial rate requires a new customer and a new service. Chehalis had been providing reactive power to Bonneville pursuant to an interconnection agreement; the Commission therefore reasoned that Bonneville was neither a new Chehalis customer, nor was Chehalis's provision of

¹ *Chehalis Power Generating, L.P.*, 134 FERC ¶ 61,112 (2011) (February 17 Order). Consistent with the February 17 Order and other earlier orders, as well as the parties' pleadings, the Commission will refer to the substituted petitioner, TNA Merchant Projects, Inc., as "Chehalis."

² *Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144, at P 23 (2005).

reactive power a new service. The Commission thus held that the proposed rates were changed, not initial, rates.³ On rehearing, the Commission reaffirmed the finding.⁴

4. Chehalis petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the Commission's orders. The court remanded the case to the Commission on a single issue: whether or not the rate for reactive power should have been filed with the Commission.⁵

5. On remand, in the February 17 Order, the Commission found that a rate schedule for the reactive power that Chehalis previously provided to Bonneville should have been filed, thus making Chehalis's filing a changed rate, subject to the suspension and refund provisions of section 205(e) of the FPA.⁶

6. On March 18, 2011, Chehalis filed a request for rehearing of the February 17 Order. On April 4, 2011, Bonneville filed a request for leave to file an answer and answer. On April 11, 2011, Chehalis filed a request for leave to file an answer and answer.

II. Discussion

A. Procedural Matters

7. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2012), prohibits answers to requests for rehearing. Therefore, we reject Bonneville's answer, and correspondingly Chehalis's answer as well.

B. Request for Rehearing

8. Chehalis requests rehearing of the February 17 Order. Chehalis challenges the Commission's finding that Chehalis should have filed a rate schedule because: (1) the Commission fails to explain how section 205 applies to what Chehalis characterizes as an "uncompensated obligation in an interconnection agreement for a generator to follow a voltage schedule"; (2) the Commission's finding that Chehalis should have filed an earlier rate schedule is not supported "by a single citation to any regulation or judicial or

³ *Id.*

⁴ *Chehalis Power Generating, L.P.*, 113 FERC ¶ 61,259, at PP 10-15 (2005).

⁵ *TNA Merchant Projects, Inc. v. FERC*, 616 F.3d 588, 593 (D.C. Cir. 2010).

⁶ February 17 Order, 134 FERC ¶ 61,112 at PP 19-21.

Commission precedent”; (3) the Commission’s “statement” that Chehalis should have filed an earlier rate schedule is contrary to Commission precedent cancelling and rejecting generators’ rate schedules relating to reactive power “when there is no longer any compensation associated with the obligation to follow a voltage schedule”; (4) the Commission’s “statement” finding that Chehalis should have filed a rate schedule earlier is contrary to Order No. 2003 and other precedent that the provision of reactive power by a generator within a specified deadband is not a service, but a duty of a generator; and (5) the Commission’s “statement” that Chehalis should have filed an earlier rate schedule is contrary to Order No. 2003 because Order No. 2003 only requires generators to file rate schedules for reactive power if they seek compensation for it.⁷

9. Chehalis further asserts that the Commission did not respond to Chehalis’s argument that “transmission utilities, not generators such as Chehalis, are required to have standard interconnection agreements in their tariffs, and that the Commission has never required generators to file interconnection agreements.”⁸

10. Chehalis alleges that the Commission erred in attempting to adopt a new policy without providing a reasonable explanation of why the new policy is appropriate. Chehalis asserts that such new Commission policy is that an “uncompensated obligation in an interconnection agreement for a generator to follow a voltage schedule must be filed as a rate schedule pursuant to FPA section 205.”⁹

11. Chehalis adds that the Commission erred by misstating the issue remanded for Commission decision, i.e., whether a rate schedule for reactive power should have been filed, because there was no rate before Chehalis filed the rate now at issue; Chehalis never stated or conceded that it had “a previous rate” for reactive power; and there was no evidence in the record showing that Chehalis had provided reactive power before it filed its rate schedule.¹⁰

⁷ Chehalis Request for Rehearing at 5-6.

⁸ *Id.* at 6. In this proceeding, we do not require that Chehalis itself now file a generator interconnection agreement, nor do we find that Chehalis should have earlier filed a generator interconnection agreement; such agreements are far broader in scope and cover many more topics than just reactive power. Rather, as relevant here, what we find in this proceeding is that Chehalis’s filing for recovery of the costs associated with the reactive power it provides is a changed rate.

⁹ *Id.*

¹⁰ *Id.* at 6-7.

12. Chehalis argues that the Commission was wrong to state that “it elevates ‘form over substance’ to require that a rate schedule must be on file under section 205(c) before a rate change under section 205(d) can occur, because courts have repeatedly said that the FERC must follow the letter of the statute.”¹¹

13. Chehalis challenges the Commission’s finding that there would be an incentive not to file rate schedules if the Commission were to rule otherwise, because the Commission “ignores the fact that the Commission has penalty tools available for those who do not file rate schedules when they are supposed to.”¹²

14. Chehalis argues that the Commission’s finding that an initial rate is a new service to a new customer is irrelevant to the issue remanded in this case.¹³

15. Chehalis also states that the February 17 Order fails to consider the “[p]ractical consequences of its holding that all generators must file any interconnection agreement that includes an uncompensated obligation to follow a voltage schedule. One consequence is that virtually all generators are currently out of compliance with the law, and they must immediately file rate schedules for such uncompensated obligation.”¹⁴

16. Finally, Chehalis alleges that the D.C. Circuit’s order vacating the Commission’s earlier orders means that Chehalis’s rates must now be considered to have gone into effect without suspension and without being subject to refund.¹⁵

¹¹ *Id.* at 7.

¹² *Id.*

¹³ *Id.* Because whether the Commission may suspend Chehalis’s proposed rates and make their collection subject to refund depends on whether the filing is an initial rate or a changed rate, the matter of what constitutes an initial rate versus a changed rate is not as irrelevant to this proceeding as Chehalis suggests.

¹⁴ *Id.* at 8.

¹⁵ *Id.* We do not read the D.C. Circuit’s order as directing that Chehalis’s rates be made effective without suspension and without being made subject to refund. Surely if the court had intended such an unusual remedy it would have done so explicitly rather than implicitly, and, indeed, its doing so arguably would have mooted the need to address the issue the court did explicitly remand. Rather, as discussed below, the court remanded only a single comparatively narrow issue.

C. Commission Determination

17. The single issue remanded to the Commission by the D.C. Circuit in this case is whether or not a rate schedule for reactive power should previously have been filed with the Commission.¹⁶ As we explained in the February 17 Order, we find that it should have been filed. Section 205 requires that rates, terms, and conditions of jurisdictional services must be filed with the Commission; the statute does not make such a filing optional, or otherwise grant discretion to utilities to decide whether or when they must file.¹⁷ If the provision of reactive power is a jurisdictional service, and no one in this proceeding denies that it is, then the utility providing this service has an obligation to file a rate schedule governing the provision of this service. In sum, Chehalis should have filed a rate schedule, and thus it is fair to treat Chehalis's proposed rate schedule at issue here as a changed rate.¹⁸

18. Turning to the specifics of Chehalis's arguments, we note that, at the outset, in the very first paragraph of the court's decision, the court states that it was remanding the case to the Commission "[b]ecause the Commission failed to respond to Chehalis's argument that its rate cannot be classified as 'changed' since it was not previously filed."¹⁹ Moreover, the court explained that it did not need to determine who had the better of four arguments that the Commission had responded to because the Commission had failed to respond to a fifth argument—that Chehalis had not filed a rate schedule for reactive power previously—and the court thus remanded the case "[a]ccordingly" for the Commission "to provide an explanation" responsive to this fifth argument. Therefore, any suggestion to the contrary notwithstanding, the February 17 Order was properly confined to that issue and any assignments of error that Chehalis asserts that do not relate to that single issue are not properly before the Commission.

19. Chehalis begins by characterizing what it provides to Bonneville as an "uncompensated obligation . . . to follow a voltage schedule."²⁰ If Chehalis means by this characterization to suggest that providing reactive power is an extra-jurisdictional service, then Chehalis equally had no business making its filing in Docket No. ER05-

¹⁶ *TNA Merchant Projects*, 616 F.3d at 592.

¹⁷ 16 U.S.C. § 824d(c) (2006).

¹⁸ See February 17 Order, 134 FERC ¶ 61,112 at PP 4 and 19.

¹⁹ *TNA Merchant Projects*, 616 F.3d at 589.

²⁰ Chehalis Request for Rehearing at 11.

1056 to establish a charge for providing the same extra-jurisdictional service. Chehalis cannot have it both ways. If it is now entitled to file with us for compensation, then the service was equally jurisdictional before.²¹ And that means that the new filed rate is a changed rate rather than an initial rate, as pursuant to longstanding precedent the latter, i.e., an initial rate, requires *both* a new customer and a new service, which is not the case here (Chehalis had provided this same service to Bonneville before; Bonneville was not a new customer, and this service was not a new service).²² Phrased differently, Chehalis's argument appears to be that section 205 requires the filing of rates and that the arrangement with Bonneville is not a rate but, rather, is merely an uncompensated obligation to follow a voltage schedule and Chehalis is not required to file it. The weakness in this argument is that Chehalis's choice of words for describing its arrangement with Bonneville does not control what is and what is not a rate. As we observed in the February 17 Order, assuming for the sake of argument that the provision of reactive power were not a jurisdictional service, (and, in fact, it is a jurisdictional service), "then Chehalis should not have filed its proposed rate schedule and proposed reactive power rate [that are at issue here] in the first place, and the Commission should not have accepted [the rate] and should not have authorized Chehalis to charge the rate."²³

²¹ February 17 Order, 134 FERC ¶ 61,112 at P 19 (provision of reactive power is a jurisdictional service); *see* 16 U.S.C. § 824d (2006). We note, by the way, that reactive power rate schedules can provide for a zero rate. *E.g.*, *Bonneville Power Administration v. Puget Sound Energy, Inc.*, 125 FERC ¶ 61,273 at P 22, n.32 (2008); *Midwest ISO Transmission Owners*, 129 FERC ¶ 61,041, at PP 2-3, 83 (2009) (describing MISO Tariff Schedule 2-A as providing for no compensation for reactive power within a deadband in certain circumstances); *accord Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122, 1124, 1126, 1128-29 (D.C. Cir. 2011) (finding that MISO Tariff Schedule 2-A was properly filed).

²² *E.g.*, *Calpine Oneta Power, L.P.*, 103 FERC ¶ 61,338, at P 11 (2003) (citing *Florida Power & Light Co.*, 65 FERC ¶ 61,411, at 63,128 n.28 (1993), and *Florida Power & Light Co. v. FERC*, 617 F.2d 809, 813-17 (1980)); *see also WPS Canada Generation, Inc.*, 103 FERC ¶ 61,193, at P 15 (2003); *Public Service Co. of Colorado*, 74 FERC ¶ 61,354, at 62,087 n.2 (1996); *Southwestern Electric Power Co.*, 39 FERC ¶ 61,099, at 61,292-61,294 (1987).

²³ February 17 Order, 134 FERC ¶ 61,112 at P 19, n.27. We disagree with Chehalis's contention that requiring it to file a rate schedule amounts to a requirement that generators file interconnection agreements. *See supra* note 8.

20. Chehalis also points to Commission precedent “cancelling and rejecting generators’ rate schedules relating to reactive power when there is no longer any compensation associated with the obligation to follow a voltage schedule.” Chehalis cites *Hot Spring Power Co., L.P.*, in particular, as support for its argument, but that case is very different from this one. The Commission held that Hot Spring Power should not be permitted to charge Entergy for within-the-deadband reactive power provided to Entergy when the Hot Spring generator at issue in that case was not yet operating. Moreover, Entergy had earlier stopped paying its affiliate generators for such “inside the deadband” reactive power, and the Commission found that Entergy “need not on a prospective basis compensate a non-affiliate generator for maintaining reactive power within its deadband under Order No. 2003”²⁴ when it was not paying its own generator; that is, there was no undue discrimination. The Commission held that, in such circumstances, Entergy was not obligated to pay for reactive power.²⁵ Finally, as relevant here, in *Hot Spring Power Co., L.P.* and the other cases that Chehalis cites, the generators all had filed rates.²⁶ Those cases do not support Chehalis’s argument that it was not earlier required to file a rate schedule covering its provision of reactive power. If it was an obligation for which Chehalis did not have to file a rate schedule before, it is no more an obligation today—and Chehalis is no more entitled to compensation today. Assuming *arguendo* that Chehalis is right in its reading of Commission precedent, the appropriate response by the Commission was not to have accepted the rate schedule, suspended it, and made it effective subject to refund, but rather the appropriate response by the Commission was to have rejected the rate schedule out-of-hand as seeking compensation for Chehalis’s merely meeting its obligations.

21. Chehalis also takes issue with the Commission’s finding that Chehalis should earlier have filed a rate schedule, arguing that this finding is contrary to Order No. 2003 and other precedent that the provision of reactive power by a generator within a specified deadband is not a service, but a duty of a generator, and further arguing that the Commission’s “statement” that Chehalis should earlier have filed a rate schedule is also contrary to Order No. 2003 because Order No. 2003 only requires generators to file rate

²⁴ *Hot Spring Power*, 113 FERC ¶ 61,088, at P 14 (2005).

²⁵ *Id.*

²⁶ *See, e.g., Calpine Construction Finance Company, L.P.*, 130 FERC ¶ 61,080 (2010) (Calpine cancelled its rate schedule for reactive power when it was no longer paying its affiliate for within-the-deadband reactive power); *Transalta Centralia Generation L.L.C.*, 121 FERC ¶ 61,103 (2007) (rejecting revised tariff sheets for within-the-deadband reactive power service because the transmission provider had stopped paying its affiliate for the same service).

schedules for reactive power if the generator is asking for compensation.²⁷ Again, Chehalis cannot have it both ways. Chehalis may be entitled to file for compensation for providing reactive power now,²⁸ but the fact remains that it was equally providing that same service to that same customer before and thus the filing here is a changed rate.

22. Chehalis alleges that the Commission erred in attempting to adopt a new policy without providing a reasonable explanation of why the new policy is appropriate. Specifically, Chehalis characterizes the Commission's determination that an "uncompensated obligation in an interconnection agreement for a generator to follow a voltage schedule must be filed as a rate schedule pursuant to FPA section 205" as a "new policy."²⁹ Again, Chehalis's choice of words to describe the service it provides to Bonneville does not control the Commission's analysis and conclusion about what that service really is. And, as noted above, if Chehalis is entitled to file a rate schedule for reactive power now, it was no less required to similarly file a rate schedule for reactive power earlier; Chehalis is, after all, providing the same service that it was providing before and thus its filing here is a changed rate.

23. Chehalis adds that the Commission erred by misstating the issue remanded for Commission decision, i.e., that there was no rate before Chehalis filed it, that Chehalis never stated or conceded that it had a previous rate for reactive power, and that there was no evidence in the record showing that Chehalis had provided reactive power before it filed its rate schedule.³⁰ The issue on remand, as explained by the D.C. Circuit, was whether or not a rate for reactive power should have been filed. Chehalis was providing this service before, and so should have filed a rate schedule before.

²⁷ Chehalis Request for Rehearing at 5-6, 15, 18-19. Chehalis's proffered support, we note, consists largely of general principles of administrative law concerning an agency's departing from established precedent. As explained elsewhere in this order, we do not believe we have done that.

²⁸ We do not decide here whether compensation is indeed appropriate, or what that compensation should be. These are questions to be explored at the hearing we have ordered.

²⁹ *Id.*

³⁰ *Id.* at 6-7.

24. Chehalis claims that the Commission was wrong to state that “it elevates ‘form over substance’ to require that a rate schedule must be on file under section 205(c) before a rate change under section 205(d) can occur, because courts have repeatedly said the FERC must follow the letter of the statute.”³¹ Chehalis’s argument here is difficult to discern; the Commission does not disagree that it must follow the Federal Power Act. It appears, rather, that Chehalis is simply making the same argument described above, albeit phrased differently, that the fact that Chehalis had not, in fact, previously filed a rate schedule means that the filing at issue here cannot be a changed rate, but must be an initial rate. As we have explained above, we disagree. Moreover, to make the definition of what is or is not a changed rate depend on whether a utility has, in fact, filed a previous rate schedule—even if it was required to file by the Federal Power Act, but did not file—leaves the application of the statute largely in the hands of the utility. A utility could then engage in the kind of conduct that, as discussed in our earlier order, would insulate it from the regulatory oversight and ratepayer protections provided by section 205. Our decision in this proceeding also does not address whether other generators are somehow now in violation of the statute. Rather, what we ultimately find here is simply that, on these facts, Chehalis’s filing is not an initial rate but is a changed rate—which means that it can be suspended and made effective subject to refund.

25. Finally, Chehalis asserts that the Commission’s finding that accepting Chehalis’s argument could encourage applicants not to file rate schedules is not reasoned decision-making because “it is based on an illogical hypothetical and ignores the fact that the Commission has penalty tools available for those who do not file rate schedules when they are supposed to.”³² Again, we disagree. We think that the possibility of strategically withholding a filing until the most opportune moment is not an unreasonable possibility. Likewise, the fact that we have penalty authority does not mean that such penalties are our only statutory tool or should be our preferred tool. We can, and should, make use of all of the statutory authority available to us to ensure compliance with the statute including those less onerous than a penalty of \$1 million per day per violation.

³¹ *Id.* at 7.

³² *Id.*

The Commission orders:

Chehalis's request for rehearing of the February 17 Order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.