

152 FERC ¶ 61,050
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Chehalis Power Generating, L.P.

Docket No. ER05-1056-008

ORDER ON REHEARING

(Issued July 16, 2015)

1. On November 18, 2013, Chehalis Power Generating L.P.¹ (Chehalis) and Bonneville Power Administration (Bonneville) filed requests for rehearing of the Commission's October 17, 2013 order in this proceeding.² The October 17 Order reaffirmed the Commission's finding that Chehalis's May 2005 filing was a changed rate subject to the suspension and refund provisions of section 205(e) of the Federal Power Act (FPA).³ In this order, the Commission denies the requests for rehearing filed by Chehalis and Bonneville. The Commission also denies Chehalis's motion for an order requiring recoupment of payment, as discussed below.

I. Background

2. This case has a long history that began in 2005. In that year, Chehalis filed a rate schedule for supplying Reactive Supply and Voltage Control from Generation Sources

¹ Consistent with the Commission's prior 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.*, 145 FERC ¶ 61,052 (2013) (October 17 Order).

³ *Id.* P 1.

Service (reactive power) to Bonneville. The Commission found that such rate schedule was a changed, rather than an initial, rate.⁴

3. The Commission based this decision on its longstanding finding that an initial rate requires both a new customer and a new service. Chehalis had been providing reactive power to Bonneville pursuant to an unfiled interconnection agreement; the Commission therefore reasoned that Bonneville was neither a new Chehalis customer, nor was Chehalis's provision of reactive power a new service. The Commission thus held that the proposed rates were changed, not initial, rates.⁵ On rehearing, the Commission reaffirmed that finding.⁶

4. Chehalis petitioned the U.S. Court of Appeals for the District of Columbia Circuit (D.C. 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.⁷ On remand, the Commission found that a rate schedule for the reactive power that Chehalis previously provided to Bonneville should have been filed, and reaffirmed that Chehalis's filing was a changed rate, subject to the suspension and refund provisions of section 205(e) of the FPA.⁸ On rehearing, the Commission again reaffirmed that finding.⁹

5. Chehalis again petitioned the D.C. Circuit for review of the Commission's orders, arguing that the Commission erred by determining: (1) that the interconnection agreement between Chehalis and Bonneville was required to be filed prior to May 2005, even though it did not contain rates for reactive power service and Chehalis was not proposing to collect charges for such service prior to that date, and (2) that the proposed rate schedule for supply of reactive power service filed by Chehalis in May 2005 was a change in rates that could be suspended and made effective subject to refund under section 205(e) of the FPA. Chehalis specifically argued that, in prior Commission orders, when the generators cancelled their existing reactive power rate schedules, the

⁴ *Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144, at P 23 (2005).

⁵ *Id.*

⁶ *Chehalis Power Generating, L.P.*, 113 FERC ¶ 61,259, at PP 10-15 (2005).

⁷ *TNA Merchant Projects, Inc. v. FERC*, 616 F.3d 588, 593 (D.C. Cir. 2010).

⁸ *Chehalis Power Generating, L.P.*, 134 FERC ¶ 61,112, at PP 19-21 (2011).

⁹ *Chehalis Power Generating, L.P.*, 141 FERC ¶ 61,116 (2012).

Commission accepted those cancellations without suggesting that a replacement rate schedule must be filed for the supply of reactive power without compensation.¹⁰

6. The Commission moved for a voluntary remand to more fully consider Chehalis's arguments, and issued the October 17 Order reaffirming its prior findings that Chehalis's May 2005 filing was a changed rate.¹¹ However, the Commission clarified its policy related to jurisdictional reactive power rate schedules for which there is no compensation, requiring that such rate schedules containing the rates, terms, and conditions for reactive power service be filed with the Commission on a prospective basis.¹² The Commission also found that it would be appropriate for Chehalis to recover the amounts it previously refunded to Bonneville, with interest calculated in accordance with 18 C.F.R. § 35.19a.¹³

7. On November 18, 2013, both Chehalis and Bonneville filed requests for rehearing of the Commission's October 17 Order. On that same day, Chehalis filed a motion requesting that the Commission issue an order requiring Bonneville to pay Chehalis amounts that were previously refunded to Bonneville, together with interest calculated in accordance with 18 C.F.R. § 35.19a. On December 3, 2013, Bonneville filed an answer responding to the motion. On December 17, 2013, Chehalis filed an amendment to its earlier motion. On December 23, 2013, Bonneville filed an answer in response to the amendment. On November 7, 2014, Chehalis filed a request for expedited action on its request for rehearing.

II. Requests for Rehearing

8. In its rehearing request, Chehalis argues that the Commission erred by finding Chehalis should have filed a rate schedule for reactive power service prior to May 2005. Chehalis asserts that this finding is contrary to the clear and unambiguous language of section 205(c) of the FPA. Specifically, Chehalis maintains that section 205(c) of the FPA requires only that regulated utilities file "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission" and that even if reactive power service is deemed to be a Commission-jurisdictional service, a document cannot reasonably be considered to be a schedule showing rates and charges if it does not

¹⁰ Brief of Petitioner, *TNA Merchant Projects, Inc. v. FERC*, No. 13-1008, at 28-29 (D.C. Cir. Apr. 15, 2013).

¹¹ October 17 Order, 145 FERC ¶ 61,052 at P 1.

¹² *Id.*

¹³ *Id.* P 14.

prescribe any rates and charges for that service.¹⁴ Chehalis also states that, while utilities are required to file “schedules showing . . . the classification, practices and regulations affecting such rates or charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services,” there cannot be any classifications, practices, regulations or contracts that affect rates and charges for a Commission-jurisdictional service when there are no charges or rates for that service.¹⁵

9. Chehalis also argues that the Commission’s finding that a rate schedule should have been filed prior to May 2005 is inconsistent with prior precedent.¹⁶ Chehalis notes that, in *Hot Spring Power Company, L.P.*, the Commission ordered the generator to cancel an existing rate schedule for reactive power service after the utility owning the transmission facilities to which it was interconnected ceased paying its own generators for reactive power “inside the dead band.”¹⁷ Chehalis argues that there was no mention of an obligation for the generator to retain a rate schedule for uncompensated reactive power service on file with the Commission. Chehalis asserts that, although the Commission properly determined in the October 17 Order that its policy to require the filing of rates, terms, and conditions for the provision of reactive power service for which there is no compensation would apply on a prospective basis, the Commission did not provide a rational explanation for its change in policy.¹⁸ Moreover, Chehalis asserts that the December 17 Order expands the types of documents that could be filed as rate schedules to include some undefined set of documents that do not affect or relate to jurisdictional services and has therefore created substantial uncertainty over the scope of documents which must be filed.¹⁹

10. Chehalis also asserts that there is no rational basis for the Commission to find that utilities are required by section 205(c) of the FPA to file rate schedules for services for which they are not compensated. Chehalis notes that the Commission found that its policy is intended to “ensure that ratepayers are protected from, *inter alia*, excessive

¹⁴ Chehalis Rehearing Request at 7-8.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 11-15.

¹⁷ *Id.* at 13 (citing *Hot Spring Power Company, L.P.*, 113 FERC ¶ 61,088, at P 14 (2005), *order on reh’g*, 115 FERC ¶ 61,027 (2006) (*Hot Spring*)).

¹⁸ Chehalis Rehearing Request at 14.

¹⁹ *Id.* at 15.

rates.”²⁰ However, Chehalis asserts that a document cannot rationally be deemed to contain excessive rates for which a Commission-prescribed remedy may be warranted when such document does not contain any rates and charges.²¹ Chehalis also asserts that, under *Middle South Energy*, the D.C. Circuit concluded that Congress withheld from the Commission the authority to suspend the effectiveness of an initial rate schedule and order refunds. Thus, the Commission may not ignore the clear limitations on its authority that Congress adopted in the FPA out of its desire to protect consumers.²² Chehalis also argues that the Commission has ample authority under section 206 of the FPA to protect consumers by investigating the lawfulness of existing filed rates for FERC-jurisdictional services.²³

11. Bonneville argues in its rehearing request that the Commission erred by determining it would be appropriate for Chehalis to recoup amounts it previously refunded to Bonneville in this proceeding. Bonneville states that the Commission failed to adequately explain why it was reversing the approach it had taken in multiple prior orders when the legal bases for the prior orders remain unchanged.²⁴ Bonneville states that the case cited by the Commission, *Black Oak Energy, LLC v. FERC*,²⁵ in support of its authority to order recoupment of funds previously paid, does not support recoupment in this case.²⁶ Bonneville argues that, in *Black Oak Energy*, the court accepted the Commission’s reasoning that it made a mistake in ordering refunds and that recoupment

²⁰ *Id.* at 15-16 (citing October 17 Order, 145 FERC ¶ 61,052 at PP 1, 3).

²¹ Chehalis Rehearing Request at 16. As we explain below, however, Chehalis’s argument misstates the Commission’s reasoning.

²² *Id.* at 17-18 (citing *Middle South Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (*Middle South Energy*)).

²³ *Id.* at 18.

²⁴ Bonneville Rehearing Request at 6.

²⁵ 725 F.3d 230 (D.C. Cir. 2013) (*Black Oak Energy*).

²⁶ Bonneville Rehearing Request at 7.

was a means to correct the error.²⁷ Bonneville asserts that, in this case, the Commission did not find that recoupment would redress a mistake.²⁸

12. Bonneville also argues that the Commission erred by giving prospective effect to its clarified policy, because the approach ignores the refund protections afforded Bonneville under section 205 of the FPA.²⁹ Bonneville states that the Commission failed to explain why the lack of clarity in Commission policy would favor the party that charged an unjust and unreasonable rate rather than the party that paid that rate.³⁰ Bonneville also argues that the Commission's prospective application of the policy is inconsistent with administrative law. Bonneville states that, in determining whether to uphold an agency's decision not to apply a new rule retroactively, the court will consider whether retroactive application would result in manifest injustice.³¹ Bonneville asserts there are certain factors the courts consider when deciding whether to permit an exception to applying a rule retroactively³² and those factors are not met in this case.³³

²⁷ *Id.* at 8 (citing *Black Oak Energy*, 725 F.3d at 243-44).

²⁸ Bonneville Rehearing Request at 8.

²⁹ *Id.* at 9-13.

³⁰ *Id.* at 9.

³¹ *Id.* at 10 (citing *Clark-Cowlitz Energy, LLC v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 913 (1988) (*Clark-Cowlitz*)).

³² *Id.* at 10 (citing *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1982) (*Retail, Wholesale*)). The factors include: (1) whether the particular case is one of first impression; (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law; (3) the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of the burden which a retroactive order impose on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

³³ Bonneville Rehearing Request at 10-13.

Commission Determination

13. We deny Chehalis's and Bonneville's requests for rehearing. The parties have not presented any argument on rehearing that persuades us that our determinations in the October 17 Order were in error.

14. The fundamental issue in this case remains the distinction between an initial and changed rate. In order for a rate to be considered an initial rate, it must provide for a new service to a new customer.³⁴ Here, the rate Chehalis filed in May 2005 did not fit these criteria because Chehalis was providing reactive power service to Bonneville prior to the filing.³⁵ Thus, the May 2005 filing was properly deemed a changed rate, which could be suspended and made effective subject to refund.

15. In response to Chehalis's claim that a document cannot reasonably be considered to be a schedule showing rates and charges for service if it does not prescribe any rates and charges for that service, we note that the Commission's regulations provide that utilities must submit to the Commission rate schedules governing *not just* rates and charges, but also the provision of "electric service." 18 C.F.R. § 35.1(a) thus provides: "Every public utility shall file with the Commission ... full and complete rate schedules and tariffs ... clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, *the classifications, practices, rules and regulations affecting such* rates, charges, classifications, *services*, rules, regulations or practices."³⁶

16. In turn, 18 C.F.R. § 35.2(b) defines a "rate schedule" as "a statement of electric service" and not just "rates and charges for or in connection with that service," but also "all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service"³⁷ In this regard, moreover, 18 C.F.R. § 35.2(a) defines "electric service" as the transmission of electric energy in interstate commerce and the sale of electric energy for resale in interstate commerce, and is "*without regard to the form of payment or compensation* for the sales or services rendered"³⁸ Thus, we

³⁴ *E.g., Southwestern Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293 (1987).

³⁵ Even Chehalis's latest rehearing request admits as much. Chehalis Rehearing Request at 2, 10.

³⁶ 18 C.F.R. § 35.1(a) (2014).

³⁷ 18 C.F.R. § 35.2(b) (2014).

³⁸ 18 C.F.R. § 35.2(a) (2014) (emphasis added).

disagree with Chehalis's claim that there can be no classifications, practices, regulations or contracts that affect rates and charges for a Commission-jurisdictional service when there are no monetary charges or rates for the service. Chehalis's argument assumes, incorrectly, that, if there are no monetary charges for the reactive power service, the applicable rate schedule need not be filed with the Commission. In contrast to this argument, section 205 of the FPA requires that rates, terms, and conditions for 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 their rates, terms, and conditions.³⁹ And it is not just monetary charges which trigger the Commission's filing requirement; not only rates are required to be on file with the Commission, but non-rate terms and conditions must also be filed.⁴⁰

17. While Chehalis suggests our requiring rate schedules for reactive power services is inconsistent with our prior precedent (including *Hot Spring*), and thus Chehalis argues that our requiring rate schedules was unjustified, Chehalis ignores that we have since taken a closer look at this issue and concluded that it was, in fact, our prior precedent that was not justified. As we have explained elsewhere in this order and in our prior orders in this proceeding, insofar as Chehalis was providing reactive power service to Bonneville, a rate schedule for such service should have been filed.

18. Further, as explained by the Commission in the October 17 Order, the clarified policy is intended to "ensure that ratepayers are protected from, *inter alia*, excessive rates."⁴¹ Chehalis misses the point in arguing that a document cannot rationally be deemed to contain excessive rates for which a Commission-prescribed remedy may be

³⁹ 16 U.S.C. § 824d(c) (2012).

⁴⁰ See *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *order on reh'g*, 65 FERC ¶ 61,081 (1993). For example, the Commission requires that non-rate terms and conditions of a transmission provider's open access transmission tariff be filed with the Commission. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,768 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁴¹ October 17 Order, 145 FERC ¶ 61,052 at P 1.

warranted when such document does not contain any monetary rates. The purpose of the policy is to ensure that, when the generator later files for a change in the rate for reactive power service, e.g., increasing the rate (including increasing it from zero, as in this case), the Commission has the authority to suspend that changed rate and make it effective subject to refund in order to ensure that ratepayers are protected from changed rates that may be unjust and unreasonable. In contrast to Chehalis's claims, this authority is, in fact, fully consistent with the D.C. Circuit's holding in *Middle South Energy*, which found section 205 of the FPA does not give the Commission power to suspend initial rates but does give it authority to suspend changed rates. Here, the Commission is not proposing to suspend initial rates, because, in fact, the rates at issue are not initial rates given that Chehalis was providing reactive power service, and providing that service to Bonneville, prior to its filing of the rate schedule at issue.⁴² Instead the Commission suspended a changed rate in line with the D.C. Circuit's ruling confirming the Commission's authority to suspend changed rates.

19. In response to Chehalis's and Bonneville's argument that there was no rational explanation for the Commission's change in policy, we note that the policy was clarified to reconcile this case with the handful of prior cases in which the Commission had accepted notices of cancellation for reactive power rate schedules where no compensation was involved.⁴³ Because Chehalis raised new arguments which appear not to have been considered earlier, the October 17 Order sought to remedy the inconsistency between the earlier precedent and the facts presented in this case. The purpose of the clarification was to ensure that all generators would now be on notice that a rate schedule must be on file for reactive power services provided without compensation. The clarification set forth in the October 17 Order was also necessary to ensure that the Commission has the ability to suspend and refund changed rates to protect customers from excessive rates. Without such clarification, utilities may have the ability to game the system by first providing service at no charge and then filing "initial" rates which would be beyond suspension and refund under section 205 of the FPA, which would inappropriately maximize their revenues, rather than filing when service is first provided.⁴⁴ Chehalis's arguments

⁴² See *supra* nn.34-35 and accompanying text.

⁴³ *Id.* P 12.

⁴⁴ *Chehalis*, 134 FERC ¶ 61,112 at P 20; *Chehalis*, 141 FERC ¶ 61,116 at P 24; *accord* October 17 Order, 145 FERC ¶ 61,052 at P 13. While Chehalis also argues that section 206 of the FPA makes the Commission's decision in this proceeding unnecessary, we disagree. As noted in the October 17 Order, the refund protection available under section 206 is more limited than the refund protection available under section 205. October 17 Order, 145 FERC ¶ 61,052 at P 13 n.30.

provided the opportunity to consider these circumstances and provided an impetus for the Commission to issue the clarification in orders to reconcile our order with the prior precedent.

20. Moreover, we note that the clarified policy was instituted prospectively so that generators who may not have understood this policy prior to October 17, 2013 would not be harmed by the Commission's clarification. As discussed *infra*, we disagree with Bonneville that prospective application of the clarified policy is inconsistent with administrative law. Bonneville cites *Clark-Cowlitz Energy*⁴⁵ and *Retail, Wholesale*⁴⁶ to support its assertion that, in determining whether to uphold an agency decision not to retroactively apply a new rule, a court will consider whether retroactive application would result in manifest injustice.

21. Here, the equities favor prospective application.⁴⁷ Where the Commission departs from a prior practice, prospective-only application can be appropriate, and it is appropriate here given our previous acceptance of the cancellations of reactive power rate schedules which did not provide for compensation,⁴⁸ in order to protect settled expectations.⁴⁹

22. In response to Bonneville's claims that the Commission's citation to the court's decision in *Black Oak Energy* does not support recoupment in this case, we disagree. This case was cited to demonstrate that the Commission has authority to order recoupment of funds previously paid if an adequate explanation is provided.⁵⁰ We found, and continue to find, recoupment of funds appropriate here after balancing the equities of the case. Chehalis should not be penalized given the need for clarification of the policy governing the filing of rates, terms and conditions for the provision of reactive power service (even within-the-deadband reactive power service) for which there is no

⁴⁵ *Clark-Cowlitz*, 826 F.2d at 1081-82.

⁴⁶ *Retail, Wholesale*, 466 F.2d at 390.

⁴⁷ See *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1553-54 (D.C. Cir. 1993); see also *Power Company of America, L.P. v. FERC*, 245 F.3d 839, 847 (D.C. Cir. 2001).

⁴⁸ October 17 Order, 145 FERC ¶ 61,052 at P 12.

⁴⁹ *Connecticut Valley Electric Co., Inc. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000); accord *Williams*, 3 F.3d at 1554; *Clark-Cowlitz*, 826 F.2d at 1081-86.

⁵⁰ October 17 Order, 145 FERC ¶ 61,052 at P 14.

compensation, and given the application of the policy on a prospective basis, because the Commission's policy may not have been entirely clear prior to the October 17 Order. As the D.C. Circuit has recognized, the breadth of the Commission's discretion is at its zenith when fashioning remedies.⁵¹ Thus, we find it reasonable to put Chehalis back into the position it was in prior to the October 17 Order.

23. Finally, we disagree with Chehalis's claims which assert that the Commission has expanded the types of documents that should be submitted for filing to include an undefined set of documents. To the contrary, the clarification set forth in the October 17 Order states that, on a prospective basis, for any jurisdictional reactive power service (including within-the-deadband reactive power service) provided by both existing and new generators, the rates, terms, and conditions for such service must be pursuant to a rate schedule on file with the Commission, even though the rate schedule would provide no compensation for such service.⁵² The requirement applies only to the rates, terms, and conditions for reactive power service for which there is no compensation.⁵³

III. Motion for Order Requiring Recoupment

24. On November 18, 2013, Chehalis filed a motion requesting the Commission issue an order requiring Bonneville to pay Chehalis the amounts that were previously refunded

⁵¹ *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

⁵² *Id.*

⁵³ We note that the Commission retains discretion on what needs to be filed and follows a "rule of reason" to determine whether provisions or practices must be filed under section 205. *See Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 656 (2007) ("Our policy is that all practices that significantly affect rates, terms and conditions fall within the purview of section 205(c) of the FPA, and, therefore, must be included in a tariff filed with the Commission. Further, we have found that our 'rule of reason' test requires a case-by-case analysis....") (citation omitted); *see generally Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,986 (explaining Commission jurisdiction with respect to all rates and charges that are "for or connected with," and all agreements that "affect or relate to," jurisdictional activities).

Subsequent to our earlier orders in this matter, we established a proceeding to consider how to best implement the requirement to file zero-rate reactive power rate schedules in Docket No. AD14-1-000. The Commission held a technical conference on December 11, 2013. That proceeding is still pending.

to Bonneville, with interest calculated in accordance with 18 C.F.R. § 35.19a (2013).⁵⁴ Chehalis explains that, on April 17, 2008, the Commission issued an order addressing contested rate level issues in this proceeding;⁵⁵ the Commission required Chehalis to refund to Bonneville a portion of the revenues it had collected for supplying reactive power service to Bonneville from August 1, 2005 through September 30, 2006.⁵⁶ Chehalis states that, on May 30, 2008, Chehalis filed a refund report with the Commission stating that as required by Commission, it had refunded a total amount of \$3,401,619.94 to Bonneville on May 15, 2008. Chehalis notes that of this amount, \$2,042,457.10 was for the August 1, 2005 through September 30, 2006 period, which is the amount relevant to its motion.⁵⁷

25. Chehalis argues that the Commission should order Bonneville to repay the amounts previously refunded to Bonneville.⁵⁸ Chehalis cites the court's decision in *Black Oak Energy* for the proposition that the Commission has discretion while a case is pending and subject to appellate review to modify any remedy that it has previously required in that case.⁵⁹ Chehalis also asserts that when the Commission commits legal error, the proper remedy is one that puts the parties in the position they would have been had the error not been made.⁶⁰ Chehalis requests the Commission require Bonneville to repay in a lump sum the amount of the refunds it previously ordered Chehalis to refund to Bonneville, plus interest.⁶¹

⁵⁴ Chehalis November 18, 2013 Motion for Order Requiring Recoupment of Payments at 1 (Chehalis Motion).

⁵⁵ *Id.* at 3 (citing *Chehalis Power Generating, L.P.*, 123 FERC ¶ 61,038 (2008)).

⁵⁶ *Chehalis Power Generating, L.P.*, 123 FERC ¶ 61,038 at P 13.

⁵⁷ Chehalis Motion at 3.

⁵⁸ *Id.* at 5.

⁵⁹ *Id.* (citing *Black Oak Energy*, 725 F.3d 230).

⁶⁰ Chehalis Motion at 5 (citing *Exxon Company, U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) and *Tennessee Valley Mun. Gas v. FPC*, 470 F.2d 446, 452 (D.C. Cir. 1972)).

⁶¹ *Id.* at 7.

26. In response, Bonneville asserts that neither the FPA nor Commission precedent support recoupment.⁶² Bonneville argues that *Black Oak Energy* is distinguishable because, in that case, the Commission and the court agreed that the Commission should not have ordered refunds in the first place.⁶³ Bonneville states that the other cases cited by Chehalis are also distinguishable because, in those cases, the court found legal error and issued a decision in favor of remedying an excessive rate.⁶⁴ Chehalis asserts that here, the Commission has consistently held that Chehalis's filed reactive power rate was unjust and unreasonable and thus, there is no legal error.⁶⁵ Bonneville also argues that even if the Commission had made legal error, ordering recoupment would be the improper remedy. Bonneville states that the Commission has refund authority only over public utilities.⁶⁶ Finally, Bonneville requests that the Commission defer action on Chehalis's motion until such time as it acts on the pending requests for rehearing.⁶⁷

27. In Chehalis's amendment filing, Chehalis attaches documentation to show that on November 15, 2013, in reliance on the October 17 Order, Chehalis forwarded an invoice to Bonneville for the amounts it was owed. Chehalis states that in an e-mail dated December 13, 2013, Bonneville forwarded copies of its rehearing request of the October 17 Order and its response to Chehalis's motion and stated it would not be paying the invoice because it does "not agree that Bonneville owes [Chehalis] the amounts requested."⁶⁸ Chehalis argues that Bonneville should not be permitted to disregard the October 17 Order with impunity.⁶⁹

⁶² Bonneville December 3, 2013 Answer at 3 (citing *Black Oak Energy*, 725 F.3d at 243-44 and Bonneville Rehearing Request at 7).

⁶³ *Id.* at 4.

⁶⁴ *Id.* at 5.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 6.

⁶⁸ Chehalis December 17, 2013 Amendment to Motion for Order Requiring Recoupment of Payments at 2.

⁶⁹ *Id.*

28. In Bonneville's response to the amendment filing, Chehalis states that it has not failed to comply with any order issued by the Commission. Bonneville notes that Chehalis's motion and both Chehalis's and Bonneville's requests for rehearing of the Commission's October 17 Order are still pending before the Commission.⁷⁰

Commission Determination

29. While we affirm our prior determination that recoupment of funds by Chehalis would be appropriate, the Federal Power Act does not grant us authority to order Bonneville to repay the funds at issue, given its status as an exempt public utility because it is a governmental entity.⁷¹ Thus, we cannot grant the motion filed by Chehalis. We express no opinion on whether, or to what extent, other administrative or judicial fora may have authority to compel Bonneville to make such repayments.

The Commission orders:

(A) The requests for rehearing filed by Bonneville and Chehalis are hereby denied, as discussed in the body of this order.

(B) Chehalis's motion that the Commission direct the recoupment of funds is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁷⁰ Bonneville December 23, 2013 Answer at 1.

⁷¹ 16 U.S.C. § 824(f) (2012); *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663 (D.C. Cir. 2007).