

154 FERC ¶ 61,113
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

GenOn Energy Management, LLC

Docket Nos. ER15-2571-001
ER15-2572-001
ER15-2573-001

ORDER DENYING REHEARING AND CLARIFICATION

(Issued February 18, 2016)

I. Background

1. In an October 30, 2015 order, the Commission accepted and suspended GenOn Energy Management, LLC's (GenOn) proposed Reactive Power Tariffs, which set forth its revenue requirements for the provision of Reactive Supply and Voltage Control from Generation or Other Sources Service (Reactive Service) by the Chalk Point, Dickerson, and Morgantown generation facilities.¹ The Commission suspended the Tariffs for five months, made them effective on March 31, 2016, subject to refund, and subject to the outcome of settlement judge and hearing procedures and a separate proceeding regarding return on equity for certain interconnected utilities with transmission that will impact GenOn's proposed revenue requirements. The Commission also referred the filing to its Office of Enforcement for further examination and inquiry.

2. On November 30, 2015, GenOn sought rehearing, or in the alternative, clarification, of that order. On rehearing, GenOn argues that the Commission acted arbitrarily and capriciously in suspending the effectiveness of the Reactive Power Tariffs for five months. GenOn claims that the record does not support a suspension of that length and Commission precedent suggests that only a nominal suspension would be appropriate. GenOn further contends that the Commission erred by failing to identify an alleged violation of law warranting a referral to the Office of Enforcement, as purportedly required by the Commission's regulations. GenOn asserts that the referral has the effect

¹ *GenOn Energy Mgmt., LLC*, 153 FERC ¶ 61,117 (2015).

of “indirectly” forcing GenOn to make a reactive power rate filing under section 205 of the Federal Power Act (FPA).² In the alternative, GenOn requests that the Commission clarify the basis for, and evidence supporting, the five-month suspension and why GenOn was referred to the Office of Enforcement.³ As discussed below, we deny GenOn’s request for rehearing and clarification.

II. Commission Determination

3. We reject GenOn’s contention that the Commission acted arbitrarily and capriciously in suspending the effectiveness of the proposed rates for five months. Section 205(e) of the FPA expressly authorizes the Commission to suspend proposed rates for a maximum of five months.⁴ The Commission has broad discretion in determining the particular length of the suspension period in each case.⁵ And, contrary to GenOn’s claim, the Commission is not obligated to provide a detailed explanation of its suspension determination. As the Commission has explained, “the very purpose of the [subsequent] hearing is to allow the Commission the opportunity to determine whether the proposed rate change is reasonable, and it is unreasonable to expect the Commission to provide at such an early stage of a proceeding a detailed explanation of its reasons for suspending a proposed rate change or of the various factors that lead to the choice of a particular suspension.”⁶

4. In recognition of the constraints on the Commission’s initial review of filings, courts “will not review [the Commission’s] suspension decision under the guise of examining the adequacy of its reasons.”⁷ The Commission must “state reasons for a suspension and for the length of the suspension” that are in some way “related to [the Commission’s] interim or ultimate inquiries.”⁸ But courts will not “take the next step and

² Request for Rehearing Or, in the Alternative, Clarification of GenOn Energy Management, LLC, filed November 30, 2015 at 7-8.

³ *Id.* at 17.

⁴ 16 U.S.C. § 824d(e) (2012).

⁵ *NV Energy, Inc.*, 145 FERC ¶ 61,080, at P 9 (2013).

⁶ *Xcel Energy Servs., Inc.*, 111 FERC ¶ 61,084, at P 18 (2005).

⁷ *Cities of Anaheim v. FERC*, 723 F.2d 656, 662 (9th Cir. 1984).

⁸ *Exxon Pipeline Co. v. United States*, 725 F.2d 1467, 1473 (D.C. Cir. 1984).

review the merits of a given case.”⁹ As the United States Court of Appeals for the D.C. Circuit explained, “[f]or us to intrude at the suspension stage would disrupt the Commission’s regulatory function, by forcing a consideration of the reasonableness of a proposed rate prior to a final [Commission] ruling on that very question.”¹⁰

5. In order to determine the appropriate suspension period, the Commission conducts a preliminary analysis that is a rough, first-cut review performed within a statutorily-mandated, limited time (typically within 60 days) on the basis of then-available information.¹¹ Here, GenOn’s proposed rates constituted a 57% increase to its prior rates, from \$4,733,477.04 to \$7,429,800.81. The Commission’s analysis of the proposed rates found that they may be “substantially excessive.”¹² The Commission does not, as a general rule, open its preliminary analysis of the proposed rates to review and challenge, and we see no reason to depart from that precedent here.¹³

6. We also reject GenOn’s contention that the Commission must identify an associated violation of law when it refers a matter to the Office of Enforcement. As a general matter, the decision to commence an enforcement action is committed to the Commission’s discretion.¹⁴ , GenOn’s argument thus fails in light of the Commission’s broad discretion to initiate enforcement matters.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See S. Cal. Edison Co.*, 116 FERC ¶ 61,099, at PP 9, 11 (2006).

¹² *GenOn*, 153 FERC ¶ 61,117 at PP 6-7, 12.

¹³ *See S.F. Bay Area Rapid Transit Dist.*, 154 FERC ¶ 61,025, at P 14 (2016).

¹⁴ *See* 16 U.S.C. § 825(m)(c) (2012) (authorizing the Commission to employ attorneys to conduct investigations); 18 C.F.R. § 1b.3 (2015) (“The Commission may conduct investigations related to any matter subject to its jurisdiction.”); *Balt. Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) (“[A]n agency’s decision not to exercise its enforcement authority, or to use it in a particular way, is committed to its absolute discretion.”). *See also Tenneco, Inc. v FERC*, 688 F.2d 1018, 1021-23 (5th Cir. 1982) (Commission order suspending adjudicatory proceeding before administrative law judge and instituting non-public Part 1b investigation was not reviewable because it was a non-final Commission order that was not definitive in its impact on the rights of the parties to the adjudicatory proceeding and did not threaten the petitioner with irreparable harm).

7. GenOn's argument is premised on Commission regulations pertaining to formal investigations, or investigations instituted at the request of entities other than the Commission.¹⁵ Here, by contrast, the Commission has referred the matter to its Office of Enforcement for examination and inquiry as appropriate. Moreover, the Commission did identify the issue to be examined by the Office of Enforcement: "GenOn may have continued to receive payments for Reactive Service for units that were no longer capable of providing that service."¹⁶

8. In referring the matter to the Office of Enforcement, the Commission did not effectively impose a requirement that GenOn make a filing pursuant to section 205 of the FPA in connection with the retirement of the Potomac River facility. Rather, based on information submitted by GenOn, the Commission asked its Office of Enforcement to conduct an examination and inquiry as appropriate whether, under GenOn's previous reactive power rate schedule, GenOn received payments for units that were no longer capable of providing Reactive Service.

9. Finally, GenOn's arguments as to the propriety of charging rates for deactivated units are premature as the Commission has not yet completed its inquiry to determine whether a violation of law has occurred. A referral for examination and inquiry is not a final order on the merits of an investigation as it "imposes no obligation, denies no right nor fixes a legal relationship,"¹⁷ and "does not affect or determine rights" because it "merely develops facts which can be brought to bear on rights only in subsequent adjudication."¹⁸

10. As to the request for clarification, we see no need to further clarify our underlying order beyond what we have stated herein.

¹⁵ Rehearing Request at 8-9 (citing 18 C.F.R. §§ 1b.5, 1b.8(b)).

¹⁶ *GenOn*, 153 FERC ¶ 61,117 at P 14.

¹⁷ See *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,343, at P 19 (2003), *order on reh'g*, 106 FERC ¶ 61,024 (2004).

¹⁸ *Amoco Production Co.*, 21 FERC ¶ 61,256, at 61,256-57 (1982).

The Commission orders:

GenOn's request for rehearing, or in the alternative, clarification, is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.