100 FERC ¶ 61,244

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Barton Village, Inc.,
Village of Enosburg Falls Water & Light Department,
Village of Orleans, and
Village of Swanton Village, Vermont

Docket No. EL92-33-008

v.

Citizens Utilities Company

ORDER DENYING REHEARING

(Issued September 3, 2002)

1. In an order issued on April 26, 2002,[1] the Commission dismissed a complaint filed by a group of municipal electric companies in Vermont (Villages)[2] against Citizens Utilities Company (Citizens), accepted Citizens' rates for previously unfiled pre-1983 agreements, and granted waiver of the prior notice requirement. The Villages and the Vermont Department of Public Service (Vermont Department) jointly request rehearing of the April 26 Order, on various grounds.[3] As discussed below, we deny rehearing, and bring this proceeding to its overdue conclusion.

---

[1]Barton Village, Inc., et al. v. Citizens Utilities Company, 99 FERC ¶ 61,111 (2002) (April 26 Order).

[2]Barton Village, Inc., the Village of Enosburg Falls Water and Light Department (Enosburg), the Village of Orleans, and the Village of Swanton Village, Vermont (Swanton).

[3]For convenience, we refer to the rehearing request as that of the Villages.

Background

2. The instant case is the final chapter of a complaint proceeding originally brought by the Villages in 1992, based on Citizens' failure to file with the Commission a number of agreements with the Villages for jurisdictional service provided during the past four decades.[4] The Commission originally granted the complaint in part, finding the agreements in question were jurisdictional, but denied refunds to the Villages as inappropriate.[5] On appeal, the court affirmed these orders as to all agreements between the parties from 1983 onwards.[6] However, the court determined that the Commission had failed to address the Villages' contentions concerning the pre-1983 agreements, and remanded that portion of the case for our consideration. We subsequently issued an order requiring Citizens to file any heretofore unfiled pre-1983 agreements, so that the Villages would have the opportunity to argue that the rates, terms and conditions for services provided under the agreements were not just and reasonable.[7]

3. In the April 26 Order, the Commission accepted for filing Citizens' rates for the period prior to 1983. We determined that the cost data and materials filed by Citizens indicated that it "did not collect excess revenues and that the rates appear to be cost-justified."[8] We thus concluded that acceptance of Citizens' rates and waiver of the prior notice requirement were appropriate, and that refunds were not. Additionally, we rejected certain allegations by the Villages concerning the interchange rates already on

---

[4]The Commission's policy concerning the treatment of such unfiled agreements was established in 1993. 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) (Prior Notice). The refund obligation for unfiled agreements was originally established in Central Maine Power Company, 56 FERC ¶ 61,200, reh'g denied, 57 FERC ¶ 61,083 (1991) (Central Maine).

[5]Barton Village, Inc., et al. v. Citizens Utilities Company, 63 FERC ¶ 61,329 (1993), reh'g denied, 68 FERC ¶ 61,005 (1994), reh'g denied, 73 FERC ¶ 61,303 (1995).

[6]Barton Village, Inc. v. FERC, 106 F.3d 442 (D.C. Cir. 1996) (unpublished opinion).

[7]Barton Village, Inc., et al. v. Citizens Utilities Company, 87 FERC ¶ 61,031 (1999) (Order on Remand).

[8]99 FERC at 61,488.

file as "beyond the scope of its complaint."[9] The Commission also denied the Villages' claim that we should take into account findings by the Vermont Public Service Board (Vermont Board), as "[o]ur evaluation of Citizens' submissions is independent of and unaffected by any such findings[.]"[10]

4. In their request for rehearing, the Villages advance a number of theories. First, they argue that the April 26 Order erred in holding that refunds for interchange sales were beyond the scope of their 1992 complaint. Rather, they assert, their complaint clearly alleged that interchange rates for several of the Villages were on file as of 1963, but that Citizens had collected rates above those on file in subsequent years. The Villages maintain that the Commission should order refunds for such sales based on the "last clean rate," i.e., that on file in 1963.[11]

5. Second, the Villages believe that the Commission improperly denied refunds in light of "Citizens' failure to make timely rate filings."[12] The Villages state that the Prior Notice order requires refunds by Citizens because it missed the "final, general amnesty period,"[13] and failed to demonstrate "extraordinary circumstances" that would allow a waiver.[14] By denying such refunds, the Villages contend, the Commission failed to follow its own precedent.[15]

6. The Villages further maintain that it was wrong for the Commission to take Citizens' cost support at face value, while ignoring findings of the Vermont Board that Citizens' records were inadequate. By taking this course, the Villages allege, the April 26 Order runs afoul of federal court precedent that federal and state agencies should avoid "needless duplication of administrative effort and the possibility of needless

---

[9] Id.

[10] Id. at 61,487 n.20.

[11] Request for Rehearing at 17, quoting Prior Notice, 64 FERC at 61,980 n.13.

[12] Id. at 19.

[13] Id., quoting Prior Notice, 64 FERC at 61,977 (emphasis in original).

[14] Id. at 20.

[15] See id. at 4 & n.7, 20, citing Carolina Power & Light Co., 87 FERC ¶ 61,083 (1999) (Carolina Power).

friction."[16] Additionally, in this regard, the Villages make several specific arguments concerning the quality of Citizens' cost support. For example, the Villages now claim that the figures in the Perry affidavit are not only unsupported, but at odds with evidence from a prior stage of the case.

7. Finally, the Villages argue that Commission "erred in failing to address and thus give adequate consideration" to their "settlement efforts."[17]

8. On June 21, 2002, Citizens filed a motion for leave to respond to the Villages' rehearing request, as well as a response to various points in the rehearing petition.

Discussion

9. While Rules 213(a)(2) and 713(d) of the Commission's Rules of Practice and Procedure do not permit answers to requests for rehearing,[18] we do occasionally accept such requests if they provide information that aids in our understanding of the case.[19] We grant Citizens' motion to file its response on this basis.

10. The Commission denies rehearing. Assuming arguendo that the interchange rates were properly at issue, we nonetheless reject the Villages' claim that they were not just and reasonable. While the records concerning these rates are sufficiently spare so as to make serious scrutiny difficult, Citizens did present evidence that the interchange rate was indeed a formula rate, accounting for a rise in the incremental cost basis over time.[20] This fact, combined with the special circumstances presented by the ancient vintage of the agreements at issue here, are more than sufficient for us to invoke our discretion and deny the Villages the refunds they seek.

---

[16] Id. at 27, quoting West Helena S&L Ass'n v. Federal Home Loan Bank Board, 553 F.2d 1175, 1180 (8th Cir. 1977) (West Helena).

[17] Id. at 30.

[18] 18 C.F.R. §§ 385.213(a)(2), 385.713(d) (2002).

[19] E.g., Sierra Pacific Power Co., et al., 88 FERC ¶ 61,058 at 61,148 & n.13 (1999).

[20] See Citizens' Response at 10-11 & n.22, citing Fourth Affidavit of Kevin W. Perry at ¶¶ 9,11.

11. The special circumstances of this case are also relevant to the Villages' contention that we improperly denied (or failed to consider) refunds for Citizens' failure to file rates. Some perspective is necessary. In the Prior Notice order, the Commission concluded that it would not be in the public interest to require filing of agreements under which jurisdictional service terminated prior to August 2, 1991, except for those agreements concerning which a complaint had been filed.[21] There was exactly one such action pending which included such allegations: the Villages' complaint against Citizens. Previously in this case, we determined that for the 1983-1991 agreements, "good cause exists to grant Citizens a waiver of the 60-day prior notice requirement" and denied the Villages' request for refunds.[22] This decision was upheld by the court. However, as the court indicated, our prior orders failed to address the pre-1983 agreements, much less require Citizens to file them. In these extraordinary -- indeed, unique -- circumstances, the Commission determined in the April 26 Order that there was good cause for waiver of the prior notice requirement for the pre-1983 agreements. Indeed, as good cause existed for waiver of notice for the 1983-1991 agreements, it is true a fortiori for the older agreements. If we did not make this as clear as we could have in the April 26 Order, we do so now.[23]

12. The Commission also rejects the Villages' assertion that it was error for us not to consider findings by the Vermont Board. The Villages' reliance on West Helena for this argument is not helpful, as that case involved a regulatory structure where Congress intended that state and federal jurisdiction should overlap. Under the Federal Power Act, on the other hand, the Commission has exclusive jurisdiction over Citizens' wholesale power sales rates.[24] Thus, we have no legal obligation to review, much less rely upon, the findings by the Vermont Board.[25] Even were this not the case, the generalized

---

[21]64 FERC at 61,981.

[22]63 FERC at 61,589.

[23]The Villages' reliance on Carolina Power, a garden-variety late-filing case presenting no such circumstances, is sorely misplaced.

[24]16 U.S.C. § 824, et seq. (2000); TECO Power Services Corp., et al., 53 FERC ¶ 61,202 at 61,811 & n.15. (1990).

[25]See, e.g., Cities of Bethany v. FERC, 727 F.2d 1131, 1137 (D.C. Cir.), cert. denied, 469 U.S. 917 (1984); Portland General Electric Company, 98 FERC ¶ 61,050 at

(continued...)

20020904-3020 Received by FERC OSEC 09/03/2002 in Docket#: EL92-33-008

findings by the Vermont Board do not undercut our findings in this proceeding. Additionally, the specific arguments newly raised by the Villages concerning the adequacy of Citizens' cost support (whether based on the Vermont Board's findings or otherwise), should have been raised in its protest, not on rehearing.[26]

13. Finally, the Commission is aware of no precedent that it is required to evaluate the terms of an unaccepted settlement offer, and the Villages cite none. On the contrary, our regulations provide that settlement negotiations are not admissible in evidence. 18 C.F.R. § 385.602(e) (2002).

The Commission orders**:**

The request for rehearing by the Villages is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

---

[25](...continued)
61,333 n.6 (2002).

[26]E.g., Niagara Mohawk Power Corp., 96 FERC ¶ 61,011 at 61,044 (2001).

20020904-3020 Received by FERC OSEC 09/03/2002 in Docket#: EL92-33-008