

103 FERC ¶ 61, 048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc.
New York Independent System Operator, Inc. Docket No. RM00-7-008
PJM Interconnection, L.L.C.

ORDER DENYING PETITION FOR RULEMAKING

(Issued April 11, 2003)

Summary

1. This order denies a petition for rulemaking concerning the way in which the Commission collects its electric annual charges. This order benefits customers by upholding the policy found in the Commission's regulations and ensuring that the Commission recovers its electric regulatory program costs from those who are primarily responsible for the Commission's current and future electric workload.

Omnibus Budget Reconciliation Act of 1986

2. As required by Section 3401 of the Omnibus Budget Reconciliation Act of 1986,¹ the Commission's regulations provide for the payment of annual charges by public utilities.² The Commission intends that its electric annual charges in any fiscal year will recover the Commission's estimated electric regulatory program costs (other than the costs of regulating Federal Power Marketing Agencies (PMAs) and electric regulatory program costs recovered through electric filing fees) for that fiscal year. In the next fiscal year the Commission adjusts the annual charges up or down, as appropriate, both to eliminate any over- or under-recovery of the Commission's actual costs and to eliminate any over- or under-charge of any particular person. The Commission

¹42 U.S.C § 7178 (2000).

²18 C.F.R. Part 382 (2002).

accomplishes this by recalculating the annual charges and carrying over any over or under charge from the prior year as a credit or debit on the next fiscal year's annual charges bill.³

3. In calculating annual charges, the Commission determines the total regulatory program costs and subtracts all PMA-related costs and electric filing fee collections to determine its collectible electric regulatory program costs. It then charges that amount to public utilities that provide transmission service.

4. Public utilities that provide transmission service and thus are subject to annual charges must submit FERC Reporting Requirement No. 582 (FERC 582) to the Office of the Secretary by April 30 of each year, providing data for the previous calendar year.⁴ The Commission uses that data to allocate the Commission's costs among the public utilities that provide transmission service. The Commission issues bills for annual charges, and public utilities must pay them within 45 days of the date on which the Commission issues the bills.⁵

The Calculation of Annual Charges Before Order No. 641

5. Before Order No. 641, the Commission allocated its collectible electric regulatory program costs among public utilities that sold power as well as those that transmitted that power.⁶

³18 C.F.R. § 382.201 (2002). See, e.g., Revision of Annual Charges to Public Utilities, Order No. 641, 65 Fed. Reg. 65,757 (November 2, 2000), FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,109 at 31,841-42 (2000), reh'g denied, Order No. 641-A, 66 Fed. Reg. 15793 (March 21, 2001), 94 FERC ¶ 61,290 (2001); Annual Charges under the Omnibus Budget Reconciliation Act of 1986 (CNG Power Services, et al.), 87 FERC ¶ 61,074 at 61,302 (1999).

⁴18 C.F.R. § 382.201(b)(4) (2002).

⁵See, e.g., Texas Utilities Electric Company, 45 FERC ¶ 61,007 at 61,026 (1988) (Texas Utilities).

⁶See Order No. 641, FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 at 31,841-42. See also Annual Charges Under the Omnibus Budget Reconciliation Act of 1986 (Phibro, Inc.), 81 FERC ¶ 61,308 at 62,424-25 (1997) (Phibro).

Order No. 641

6. In Order No. 641, the Commission recognized that the industry had and was changing and that the nature of the work of the Commission had and was also changing. To reflect the changes in the industry and in the Commission's work, the Commission modified the way in which it collects electric annual charges. As relevant here, the Commission no longer assesses electric annual charges on wholesale power sales. Rather, the Commission decided to assess electric annual charges only to public utilities that provide transmission service (based on the volumes of electric energy that they transmit.)⁷

Petition for Rulemaking

7. On December 3, 2002, following the first electric annual charges bills issued pursuant to Order No. 641, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO), New York Independent System Operator, Inc. (NYISO), and PJM Interconnection, L.L.C. (PJM) (collectively, Petitioners) petitioned the Commission to commence a rulemaking to change its electric annual charges methodology.⁸ They argue that they, as RTOs, not only should be assessed a lower and, from their perspective, more appropriate share of the electric regulatory program costs,⁹ but perhaps even a lower share than non-RTOs.¹⁰ In addition, they ask the Commission to return to the approach followed in the years before Order No. 641, assessing its electric regulatory program costs to power sales as well as to transmission.¹¹ Indeed, concerned that the Commission may not be able to change its regulations before the next (*i.e.*, second) electric annual

⁷Order No. 641, FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 at 31,842; accord id. at 31,843-56. See Order No. 641-A, 94 FERC at 62,036-39.

⁸All three petitioners filed comments in the rulemaking proceeding that led to Order No. 641. See Order No. 641, FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 at 31,860-61. None of them sought rehearing of Order No. 641. Order No. 641-A, 94 FERC at 62,036.

⁹Petition at 6-10, 14-15.

¹⁰Id. at 10-11.

¹¹Id. at 11-14, 18.

charges bills issued pursuant to Order No. 641 go out, they ask that the Commission immediately revert to the methodology used before Order No. 641.¹²

8. On February 14, 2003, the Midwest ISO Transmission Owners filed comments in support of the proposed rulemaking.

Discussion

9. Petitioners ask the Commission to return to the methodology used before Order No. 641. Petitioners' filing amounts to a belated attempt to seek rehearing of Order No. 641, and so does not properly lie.¹³ In any event, Petitioners' arguments have already been responded to - - in Order Nos. 641 and 641-A¹⁴ and in the Commission's order on rehearing of the first electric annual charges bills.¹⁵

10. In requesting that the Commission revise the way in which it collects its annual charges, Petitioners argue, for example, that, in Order No. 641, the Commission was wrong to find that its work is now primarily directed toward transmission. They argue that the Commission should still assess annual charges to power sales.

11. We have already considered and rejected this argument.¹⁶ In California we noted that compared to the 1980's and early 1990's, when the Commission adopted its prior electric annual charges regulations, and assessed annual charges to both those who sold electric energy and those who transmitted it, the Commission was now focusing increasingly on transmission, through, for example, open access transmission-related

¹²Id. at 17-18. While Petitioners also ask for guidance on certain matters, such as what transmission must be reported or the treatment of bundled retail transmission, see id. at 16-17, these requests are already addressed in Order Nos. 641 and 641-A. See, e.g., Order No. 641, FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 at 31,849-50, 31,855; Order No. 641-A, 94 FERC at 62,037-38.

¹³See 18 C.F.R. § 385.713(b) (2002); cf. supra note 8.

¹⁴See supra note 3.

¹⁵See Revision of Annual Charges to Public Utilities (California Independent System Operator, et al.), 101 FERC ¶ 61,043 (2002), order dismissing reh'g, 101 FERC ¶ 61,326 (2002) (California).

¹⁶See California, 101 FERC at 61,164.

filings and complaints, interconnection policy, and the formation and operation of Independent System Operators and Regional Transmission Organizations. We further pointed out in California that Order No. 641 is the first update in the Commission's electric annual charges regulations since the Commission issued its Order Nos. 888 and 889.¹⁷

12. While Petitioners point to several actions that the Commission has taken involving western markets, as well as to its SMD NOPR,¹⁸ to support their position that the Commission's work is not now primarily focused on transmission, a primary focus of the Commission's efforts in reforming the western markets and a primary focus of the SMD NOPR is transmission. For example, the SMD NOPR proposes a revised open access transmission tariff that is intended to remedy remaining undue discrimination in the use of the Nation's interstate transmission grid. The SMD NOPR also proposes to establish a transmission congestion management system to ensure that public utilities manage the Nation's interstate transmission grid efficiently.¹⁹ Also, much of the Commission's efforts involving western markets go to whether public utilities have used transmission schedules and constraints to manipulate prices or exercise market power.²⁰

13. We have also considered and rejected the argument that the Commission's annual charge assessments do not reflect the level of transmission service in various regions or unduly disadvantage RTOs. In California we noted that, as provided in the Commission's regulations,²¹ the Commission bases its annual charges bills on the data that utilities (including RTOs) submit on FERC 582. Utilities file this data under oath, and the Commission accepts these statements as accurate, until a subsequent audit may reveal errors or a subsequent filing provides corrected data. Should an audit reveal errors, either in the number of reporting entities or in the figures reported, or both, or

¹⁷See Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 681-83 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

¹⁸Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, 67 Fed. Reg. 55,152 (2002), FERC Statutes and Regulations ¶ 32,563 (2002) (SMD NOPR).

¹⁹See California, 101 FERC at 61,164.

²⁰Cf., e.g., Final Report on Price Manipulation in Western Markets (Docket No. PA02-2-000, March 26, 2003).

²¹See 18 C.F.R. § 382.201 (2002).

should public utilities provide corrected data, the Commission adjusts the annual charges in the next fiscal year up or down, as appropriate.²² In short, the Commission already has a process in place for ensuring that its annual charges accurately reflect the transmission service provided in various regions of the country.

14. Also regarding the assessment of annual charges to RTOs and to RTO members, our annual charges regulations provide that we bill our annual charges solely to transmission providers. We take as a given that these transmission providers, including RTOs, accurately reflect in their FERC 582s the transmission that flows over their transmission grids (since they bill for this transmission under their tariffs and rate schedules, this information is available to them); if there prove to be errors, as noted above a process exists to make corrections.

15. With respect to the recovery of annual charges in rates, we have explained that annual charges are costs of the RTOs that pay them and that these costs can be recovered in an RTO's rates; they are "a legitimate cost of providing transmission service."²³ In this regard, they are no different than any other cost incurred by an RTO and may be recovered in the RTO's rates like any other costs incurred by the RTO. Indeed, in this regard, Part 35 of our regulations already provides great flexibility in how public utilities, including RTOs, may develop their electric rates, including their electric transmission rates.²⁴ Thus, RTOs have the ability and the flexibility to recover their costs, including the annual charges assessed to them, in their rates.²⁵

²²See California, 101 FERC at 61,163.

²³Order No. 641, FERC Statutes and Regulations, Regulations Preambles, July 1996-December 2000 at 31,857; accord Order No. 641-A, 94 FERC at 62,040; see also California, 101 FERC at 61,164-65.

²⁴See California, 101 FERC at 61,164-65.

²⁵Petitioners also are concerned that we are assessing annual charges to non-jurisdictional utilities. See Petition at 9. That is not the case, and, indeed, this claim reflects a fundamental misunderstanding of our annual charges regulations. Our regulations assess annual charges to public utilities, which are jurisdictional. Compare 18 C.F.R. § 382.201 (2002) with 16 U.S.C. § 824 (2000). How the cost is recovered is a matter of the public utility's ratemaking. Just as a public utility recovers its other transmission-related costs in its rates, so a public utility's annual charges may be recovered in its rates. See supra notes 23-24. That the entity paying these rates may not

(continued...)

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16. Accordingly, in light of the discussion above, we will deny the petition for rulemaking.

The Commission orders:

The petition for rulemaking is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁵(...continued)

itself be jurisdictional does not mean it should not have to pay these rates.