

104 FERC ¶ 61,060
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
009
Operator, Inc.

Docket No. RM00-7-

ORDER DENYING REHEARING

(Issued July 10, 2003)

Summary

1. This order denies requests for a rehearing of the Commission's order denying a petition for rulemaking concerning the way in which the Commission collects its electric annual charges.¹ 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 1986,² the Commission's regulations provide for the payment of annual charges by public utilities.³ 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

¹Midwest Independent Transmission System Operator, Inc., *et al.*, 103 FERC ¶ 61,048 (2003) (April 11 Order).

²42 U.S.C § 7178 (2000)(Budget Act).

³18 C.F.R. Part 382 (2002).

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 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 charge's bill.⁴

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.⁵ The Commission uses that data to allocate the Commission's collectible regulatory electric program 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 them.⁶

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.⁷

⁴18 C.F.R. § 382.201 (2003). See, e.g., Revision of Annual Charges to Public Utilities, Order No. 641, 65 Fed. Reg. 65,757 (November 2, 2000), FERC Stats. & Regs. 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).

⁵18 C.F.R. § 382.201(b)(4) (2003).

⁶See, e.g., Texas Utilities Electric Company, 45 FERC ¶ 61,007 at 61,026 (1988) (Texas Utilities).

⁷See Order No. 641, FERC Stats. & Regs. Regulations Preambles July 1996-

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.)⁸

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) petitioned the Commission to commence a rulemaking to change its electric annual charges methodology.⁹ They argued that they, as Regional Transmission Organizations (RTO)s, not only should be assessed a lower and, from their perspective, more appropriate share of the electric regulatory program costs,¹⁰ but perhaps even a lower share than non-RTOs.¹¹ In addition, they asked the Commission to return to the approach followed in the years before Order No. 641, assessing its electric

⁷(...continued)

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).

⁸Order No. 641, FERC Stats. & Regs. 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.

⁹All three petitioners filed comments in the rulemaking proceeding that led to Order No. 641. See Order No. 641, FERC Stats. & Regs. 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.

¹⁰Petition at 6-10, 14-15.

¹¹Id. at 10-11.

regulatory program costs to power sales as well as to transmission.¹² Indeed, concerned that the Commission may not be able to change its regulations before the next (i.e., second) electric annual charges bills issued pursuant to Order No. 641 go out, they asked that the Commission immediately revert to the methodology used before Order No. 641.¹³

The April 11 Order

8. In its April 11 Order, the Commission denied the petition for rulemaking. The Commission found that the petition amounted to a belated attempt to seek rehearing of Order No. 641, and so did not properly lie.¹⁴ The Commission noted that, in any event, it had already responded to Petitioners' arguments - - in Order Nos. 641 and 641-A¹⁵ and in the Commission's order on rehearing of the first electric annual charges bills.¹⁶

9. The Commission rejected the assertion that the Commission was wrong to find that its work is now primarily directed toward transmission, and that the Commission should assess annual charges to power sales. The Commission found that it had already considered and rejected this argument.¹⁷ It pointed out that, compared to a decade or more ago, 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 is now focusing increasingly on transmission, through, for

¹²Id. at 11-14, 18.

¹³Id. at 17-18. They also asked for guidance on certain matters, such as what transmission must be reported or the treatment of bundled retail transmission, see id. at 16-17. The Commission found that it had already addressed these requests in Order Nos. 641 and 641-A. See, e.g., Order No. 641, FERC Stats, & Regs. Regulations Preambles, July 1996-December 2000 at 31,849-50, 31,855; Order No. 641-A, 94 FERC at 62,037-38.

¹⁴See 18 C.F.R. § 385.713(b) (2003); cf. supra note 9.

¹⁵See supra note 4.

¹⁶April 11 Order, 103 FERC ¶ 61,048 at P 9. See also 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).

¹⁷See California, 101 FERC ¶ 61,043 at P 14.

example, open access transmission-related filings and complaints, interconnection policy, and the formation and operation of Independent System Operators and RTOs.¹⁸

10. The Commission also noted that a primary focus of its efforts in reforming the western markets and a primary focus of the SMD NOPR¹⁹ is transmission. As an example, the Commission noted that: (a) 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; and (b) 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.²⁰ The Commission also found that it has directed much of its efforts involving western markets to determining whether public utilities have used transmission schedules and constraints to manipulate prices or exercise market power.²¹

11. The Commission also considered and rejected arguments that its annual charge assessments do not reflect the differing levels of transmission service provided in various regions and unduly disadvantage RTOs. Finally, the Commission explained that annual charges are a legitimate cost of providing transmission service and that Part 35 of the Commission's regulations provide RTOs with the ability and the flexibility to recover their costs, including their annual charges payments.²²

Requests for Rehearing

12. On May 12, 2003, the Midwest Independent Transmission System Operator, Inc. (MISO) and the Midwest ISO Transmission Owners (Transmission Owners) (together, Petitioners) filed requests for rehearing of the April 11 Order. They largely reiterate

¹⁸April 11 Order, 103 FERC ¶ 61,048 at P 11.

¹⁹Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, 67 Fed. Reg. 55,152 (2002), FERC Stats. & Regs. ¶ 32,563 (2002) (SMD NOPR).

²⁰See California, 101 FERC ¶ 61,043 at P 14.

²¹See April 11 Order, 103 FERC ¶ 61,048 at P 12. Cf., e.g., Final Report on Price Manipulation in Western Markets (Docket No. PA02-2-000 March 26, 2003).

²²See April 11 Order, 103 FERC ¶ 61,048 at P 13-15.

arguments made earlier, contending essentially that the Commission did not consider the arguments originally made in their request for rulemaking.²³

13. MISO argues that the Commission's characterization of the petition for rulemaking as a belated attempt to seek rehearing of Order No. 641²⁴ "foreclosed all further substantive review of Order No. 641."²⁵ Similarly, Transmission Owners argue that by summarily rejecting the petition as an improper procedural attack on an existing Commission rule, the Commission failed to consider new evidence and changed circumstances.²⁶ Transmission Owners also argue that the Commission has not explained the inconsistency between the way in which it collects electric annual charges (based on volume of transmission) and gas annual charges (based on sales and transmission).²⁷

14. Petitioners also renew the argument that the Commission's decision to allocate annual charges based upon transmission volume "has generated a substantial disincentive to RTO participation" and runs counter to the Commission's goal of "encouraging the widespread, voluntary formation of and participation in RTOs."²⁸ Petitioners also fault the April 11 Order for failing to tell RTOs how to assess annual charges among their members.²⁹

²³MISO maintains that the Commission "failed to provide any substantive consideration to the arguments" in the Petition for Rulemaking. MISO Rehearing at 9; Transmission Owners contend that the Commission has failed to "provide a meaningful response to Petitioners' challenges." Transmission Owners Rehearing at 10.

²⁴April 11 Order, 103 FERC ¶ 61,048 at P 9.

²⁵MISO Rehearing at 7. To the same effect, see Transmission Owners Rehearing at 15.

²⁶Transmission Owners Rehearing at 8, 10.

²⁷Id. at 12.

²⁸MISO Rehearing at 11. See also Transmission Owners Rehearing at 10-12.

²⁹MISO Rehearing at 11-12; Transmission Owners Rehearing at 13-14. Petitioners stress that some of their members are not public utilities. See MISO Rehearing at 10-11; Transmission Owners Rehearing at 13-14.

15. Finally, Petitioners repeat that the Commission's focus has changed from the regulation of transmission to the promotion of efficient energy markets, and that its methodology for assessing annual charges is not fair and equitable.³⁰

Discussion

16. In light of the current state of flux in the electric industry, including the formation of RTOs in many areas of the country, the Commission will not initiate a new rulemaking on annual charges at this time and will deny the requests for rehearing in this regard. However, the issues may merit further consideration at a later time and we will reevaluate whether a new rulemaking is warranted at that later time.

17. Although the April 11 Order characterized the petition for rulemaking as a belated attempt to seek rehearing of Order No. 641, which it was, the April 11 Order addressed each and every point that the petition raised.

18. The thrust of the Commission's current work involves the regulation of transmission.³¹ Petitioners nevertheless assert that the Commission should, in its annual charges, place more emphasis on sales of electric energy rather than on the volume of electric energy transmitted.³² The way to make electric energy markets work more efficiently, however, is to remedy undue discrimination in transmission and to establish a transmission congestion management system to ensure that public utilities manage the Nation's interstate transmission grid efficiently.³³ Both the SMD NOPR and the more recent White Paper on a Wholesale Market Platform emphasize the Commission's

³⁰MISO Rehearing at 12-17; Transmission Owners Rehearing at 5-8.

³¹April 11 Order, 103 FERC ¶ 61,048 at P 10-12.

³²MISO Rehearing at 13; Transmission Owners Rehearing at 6-8. Petitioners' contention that the Commission's method of collecting annual charges is not fair and equitable is merely a reprise of this argument.

³³Transmission Owners refer to the Commission Staff's report on potential price manipulation in Western electric energy and natural gas markets as an indication that the Commission is once again focusing on sales of electric energy. See supra note 21. What Transmission Owners overlook is that many of the activities that Staff seeks to change involve improper use of the Nation's transmission network. See also infra note 34, addressing the Commission's regulation of these markets.

commitment to ensuring that public utilities do not use transmission schedules and constraints to manipulate market prices and exercise market power.³⁴

19. Moreover, Petitioners are wrong when they argue that basing annual charges on the amount of electric energy transmitted disadvantages RTO formation. In particular, the Commission has recognized that each RTO is different, and has noted both that annual charges are costs that RTOs may recover in their rates and that the Commission's regulations give RTOs flexibility in how they collect such annual charges from their ratepayers.³⁵

³⁴See April 11 Order, 103 FERC ¶ 61,048 at P 10-12; California, 101 FERC ¶ 61,043 at P 14. See also White Paper (Docket No. RM01-12-000 April 28, 2003). To the extent the Commission still issues orders that directly address electric energy markets themselves, the Commission is proposing to put in place tariff conditions that should make these orders increasingly uncommon. See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 103 FERC ¶ 61,349 (2003) (Docket Nos. EL01-118-000, et al.).

And, likewise, to the extent that the Commission is still involved in California market-related matters, those matters are being resolved. See, e.g., Nevada Power Company and Sierra Pacific Power Company v. Enron Power Marketing, Inc., 103 FERC ¶ 61,353 (2003) (Docket Nos. EL02-28-000, et al.); Public Utilities Commission of the State of California v. Sellers of Long Term Contracts to the California Department of Water Resources, 103 FERC ¶ 61,354 (2003) (Docket Nos. EL02-60-000, et al.); PacifiCorp. v. Reliant Energy Services, Inc., et al., 103 FERC ¶ 61,355 (2003) (Docket Nos. EL02-80-001, et al.); Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,343 (2003) (Docket Nos. EL03-77-000, et al.); accord American Electric Power Service Corp., et al., 103 FERC ¶ 61,345 (2003) (Docket Nos. EL03-137-000, et al.); Enron Power Marketing, et al., 103 FERC ¶ 61,346 (2003) (Docket Nos. EL03-180-000, et al.).

³⁵ See April 11 Order, 103 FERC ¶ 61,048 at P 13-15. While Petitioners are concerned about rate recovery by RTOs from non-public utilities, this concern is inapposite. The Commission is not seeking to collect annual charges from non-public utilities. It will collect them from public utilities only. That RTOs (or, indeed, any public utility) assessed annual charges may, in turn, seek to recover such costs in RTO (or public utility) rates for transmission services the RTO (or public utility) provides is not the same as the Commission collecting annual charges from non-public utilities. Moreover, why these costs would be so different from any other costs RTOs (or public utilities) incur and seek to recover in their rates is not explained; in fact, these costs are
(continued...)

20. And while Petitioners speculate that the collection of annual charges may “discourage RTO participation,”³⁶ they have yet to cite a single instance where it has done so. Indeed, in this regard, progress in the Midwest continues apace, notwithstanding the issuance of Order No. 641.

21. Transmission Owners cite Tesoro Alaska Petroleum Company v. FERC, 234 F.3d 1286, 1290-91 (D.C. Cir 2000) (Tesoro), for the proposition that the Commission must revisit the way in which it collects electric annual charges. First, Tesoro involved a different factual situation. Tesoro involved changes in pipeline rates. This proceeding involves the Commission's regulations governing the collection of its electric annual charges. Second, in citing to Tesoro, Transmission Owners take it as a given that they have established either new evidence or circumstances that have changed since the Commission issued Order No. 641. As we noted above, the Commission's focus has not to date substantially changed since we prescribed our current method of assessing electric

³⁵(...continued)
no different.

And, if Petitioners are right, no system of annual charges - - including the system of annual charges that pre-dated Order No. 641, which the petition for rulemaking sought to reinstate - - would survive challenge, as the entity assessed these annual charges (whether a transmission provider or a power seller) would never be able to recover them from any non-public utility ratepayer. Such a result, i.e., a reading that would essentially invalidate any system of annual charges, is not consonant with the Budget Act. See Order No. 888-A, 94 FERC at 62,039.

³⁶MISO Rehearing at 12. See also Transmission Owners Rehearing at 10-12.

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annual charges in Order No. 641.³⁷ Tesoro is, therefore, inapposite to our consideration of Petitioners' requests for rehearing.³⁸

The Commission orders:

The requests for rehearing are hereby denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

³⁷While the Transmission Owners also point to a difference between the electric annual charges and the natural gas annual charges, see Transmission Owners Rehearing at 12-13, this argument fails. While our natural gas annual charges regulation nominally still assesses annual charges against natural gas pipelines, it does so based on natural gas "subject to the Commission's regulation which was sold and transported." See 18 C.F.R. § 382.202 (2003). That regulation, in other words, assesses natural gas annual charges only against natural gas pipelines and only on their natural gas sales subject to the Commission's regulation, i.e. only on "jurisdictional sales volumes." Annual Charges Under the Omnibus Budget Reconciliation Act of 1986, 42 FERC ¶ 61,013 at 61,033 (1988); accord Annual Charges Under the Omnibus Budget Reconciliation Act of 1986, 52 FERC ¶ 61,377 at 62,320 (1990). And the Transmission Owners concede such volumes are now "largely insignificant." Transmission Owners Rehearing at 12. Thus, for virtually all intents and purposes, the Commission no longer assesses natural gas annual charges against natural gas sales, but instead assesses them now only against transportation. That the Commission has not yet formally revised its natural gas annual charges does not bar the Commission from updating its electric annual charges. In fact, the failure to update its electric annual charges in light of the changed circumstances noted earlier in this order, see supra P 6, would be contrary to the plain intent of the Budget Act. See, e.g., Order No. 641-A, 94 FERC at 62,039.

³⁸See also, e.g., NARUC v. DOE, 851 F.2d 1424, 1430 (D.C. Cir. 1988); Arkansas Power & Light Co. v. ICC, 725 F.2d 716, 723 (D.C. Cir. 1984); accord Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 866 (1984).