

111 FERC ¶61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Vermont Electric Cooperative, Inc.

Docket Nos. ER05-670-000
EL05-98-000

ORDER ACCEPTING ANNUAL FORMULA RATE UPDATES, INSTITUTING
SECTION 206 INVESTIGATION, ESTABLISHING REFUND EFFECTIVE DATE,
AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued April 28, 2005)

1. On March 2, 2005, Vermont Electric Cooperative, Inc. (VEC) filed its Second Annual Formula Rate Update to revise the local transmission rates under its Open Access Transmission Tariff (OATT) and to revise the transmission rates under two rate schedules (March 2 Filing). In this order, we will accept VEC's proposed rates, effective on the dates requested by VEC. However, we will institute, under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000), an investigation into the continued justness and reasonableness of VEC's rate formula, including the use of VEC's existing 21.5 percent carrying charges, and will establish a refund effective date. We will also establish hearing and settlement judge procedures. This order benefits customers by ensuring that VEC's formula rates remain prospectively just and reasonable for services provided by VEC.

Background and Proposal

2. In 2004, VEC purchased the remaining electric transmission assets of Citizens Communications Company (Citizens), including its lower-voltage transmission facilities. To accomplish this acquisition, in Docket No. ER04-341-000, VEC filed a request under section 205 of the FPA that the Commission transfer to VEC, as Citizens' successor in interest, Citizens' Vermont Electric Division's OATT, as well as certain grandfathered service agreements and their associated rate schedules.¹ While VEC proposed at that time some limited, non-substantial tariff modifications,

¹ The Block Loading Facilities Transfer Agreement ("BLFTA"), formerly Citizens Rate Schedule FERC No. 28 (as amended), is now VEC First Revised Rate Schedule FERC No. 4 (Schedule No. 4). Three other grandfathered agreements,

the OATT and rate schedules it sought to assume contained cost-based formula rates.² Specific tariff language in the OATT and rate schedules required recalculation of the charges on an annual basis, by applying prior calendar year results to produce charges for the following year.³ On February 12, 2004, the Commission conditionally accepted, subject to modification, VEC's request to assume Citizens' OATT and rate schedules to render jurisdictional service.⁴

3. On May 3, 2004, in Docket No. ER04-796-000, VEC made its first annual filing to update its adopted formula rates. With the exception of a 2.74 percent increase in FPC-10 charges, the charges produced by the formula produced rate decreases. No customers intervened in that proceeding and, on July 30, 2004, the Commission accepted the 2004 annual filing in an unpublished letter order.⁵

4. The March 2 Filing constitutes VEC's second annual formula rate update to its OATT and Schedule Nos. 4 and 6. VEC states that it is "not proposing any changes to the underlying formulas."⁶ VEC explains that its OATT contains a formula rate for firm point-to-point, non-firm point-to-point, and network transmission services, which is adjusted annually on May 1. VEC proposes to increase its rates for these services.⁷ VEC also states that there are separate transmission charges for firm and non-firm point-to-point transmission service over the Phase I/Phase II HVDC facilities, which are adjusted on June 1 of each year. VEC proposes to decrease its rates for service over these facilities. VEC further states that its Schedule Nos. 4 and 6 have formula rate provisions that are adjusted on July 1 of each year. VEC proposes to increase its rates under Schedule No. 4, and to decrease its rates under Schedule No. 6. For its OATT and Schedule No. 4 service, VEC developed the proposed rates by applying to

referred to by parties as the "FPC-10" contracts, formerly Citizens Rate Schedule Nos. 29, 31 and 32 (as amended) are now VEC First Revised Rate Schedule FERC No. 6 (Schedule No. 6). VEC Answer at 3 n.2.

² *Vermont Electric Cooperative, Inc.*, 106 FERC ¶ 61,131 at P 3 (2004) (VEC); VEC Answer at 3.

³ VEC Answer at 3.

⁴ VEC, 106 FERC ¶ 61,131 at P 17 and Ordering Paragraph (A).

⁵ *Vermont Electric Cooperative, Inc.*, Docket Nos. ER04-794-000 and -001 (July 30, 2004) (unpublished letter order).

⁶ May 2 Filing at 2.

⁷ VEC states that the OATT charges produced by the formula rates are applicable to the new VEC-specific Local Service Schedule included in the ISO New England Tariff, FERC Electric Tariff No. 3, and to the Local Service Schedule that may be filed with the Commission in the future. *Id.* at 1 and 3.

its plant accounts the 21.5 percent fixed carrying charge that is part of the Commission-approved formula rate.

5. Notice of VEC's filing was published in the *Federal Register*, 70 Fed. Reg. 12,864 (2005), with comments, protests, and interventions due on or before March 23, 2005. Timely motions to intervene, protest and request for suspension and hearing were submitted by Barton Village, Inc., the Village of Enosburg Falls and the Vermont Public Power Supply Authority (Vermont Villages and VPPSA); and by Central Vermont Public Service Corporation (Central Vermont). On March 28, 2005, Vermont Marble Power Division of Omya, Inc. (VMPD) filed a late motion to intervene, protest and request for suspension and hearing. All intervenors request the maximum five-month suspension of VEC's proposed updated formula rates, as well as an investigation and hearing into the justness and reasonableness of those rates. On April 7, 2005, VEC filed an answer to the protests.

Protests

6. The intervenors challenge the 21.5 percent fixed carrying charge component of VEC's formula rates for OATT and Schedule No. 4 service as excessive. They explain that this 21.5 percent carrying charge is a continuation of the one previously used by Citizens in its formula rates. In the intervenors' view, there is no basis to assume that a transmission carrying charge appropriate for Citizens would produce a just a reasonable return for VEC. They point out that VEC is a consumer-owned electric distribution cooperative, with different capital, debt, and tax structures than Citizens, which is an investor-owned utility.

7. Vermont Villages and VPPSA also argue that VEC's filing is deficient because it fails to present cost support, including a reconciliation of its proposed rates to FERC Form No. 1 data or to the relevant draft pages of FERC Form No. 1, nor does it request a waiver from these cost support requirements. Further, Vermont Villages and VPPSA argue that when the Commission first accepted the OATT and rate schedules that are the foundation of this proceeding, the Commission expressly conditioned its acceptance on certain commitments VEC agreed to abide by, which included the following:

. . . VEC commits that it is not presently seeking waivers that would allow VEC to implement 'formula' transmission rate adjustments

without making the filings called for by 18 C.F.R. § 35.13 (2003).⁸

Vermont Villages and VPPSA state that VEC made this commitment in direct response to a concern they raised in that proceeding to protect their interest as prospective transmission customers of VEC. Vermont Villages and VPPSA state that they withdrew their conditional protest in that proceeding in reliance on VEC's express commitment not to make any formula transmission rate adjustments without submission of supporting cost information.

Discussion

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(c) (2004), the timely, unopposed motions to intervene serve to make the parties that filed them, Vermont Villages and VPPSA, and Central Vermont, parties to this proceeding. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), VMPD's motion to intervene out-of-time is granted, given its interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept VEC's answer and will, therefore, reject it.

9. We will accept, without refund or suspension, VEC's 2005 annual update showing the charges that are produced by application of VEC's formula rates in its OATT and certain rate schedules to updated cost data. The only issue in this proceeding is whether or not VEC's calculation of its cost-based charges produced by those formulas is consistent with its filed rates, *i.e.*, the accuracy of VEC's calculations, and the accuracy of the updated data inputs. None of the intervenors have alleged any error in VEC's annual rate redetermination, and we find that VEC's filing comports with the annual rate update provisions of its formula rates. When the Commission approved the transfer of Citizen's OATT and rate schedules to VEC, the Commission conditioned such transfer in part on VEC's promise that it was not at that time seeking waivers to implement formula transmission rate adjustments without making the filings called for under the Commission's regulations.⁹ Because VEC's annual update filing does not change its rate formulas, but rather merely updates the

⁸ VEC, 106 FERC ¶ 61,131 at P 13.

⁹ *See Id.*

inputs to the formula, there is no violation of VEC's prior commitment, or departure from our prior order that allowed VEC to step into the shoes of Citizen's OATT and certain rate schedules.¹⁰

10. Nevertheless, intervenors raise significant concerns regarding VEC's continued use of a fixed 21.5 percent carrying charge for formula rates under VEC's OATT and Rate Schedule No. 4. In light of the history of VEC's rate formulas, we are concerned that VEC's rate formulas, including the 21.5 percent carrying charge component of certain formulas, may no longer be just and reasonable. Consequently, we will institute an investigation, under section 206 of the FPA, in Docket No. EL05-98-000, into the continued justness and reasonableness of VEC's rate formulas, including VEC's continued use of a 21.5 percent fixed carrying charge in calculating formula rates under its OATT and Rate Schedule No. 4, and we will establish a refund effective date.

11. Although we are instituting an investigation and establishing hearing procedures, we believe that it would be in the best interest of the parties to resolve this dispute expeditiously and consensually rather than through litigation. Accordingly, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004). If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹¹ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

12. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the Commission's investigation in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum

¹⁰ We note that this is VEC's second annual update filing. When VEC made its first annual filing last year, which resulted in an overall rate decrease, no intervenors challenged that VEC was renegeing on its prior commitment.

¹¹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a listing of the Commission's judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

protection to customers, and consistent with our precedent,¹² we will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of our investigation in Docket No. EL05-98-000, is published in the *Federal Register*.

13. Section 206 of the FPA also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. To implement that requirement, we will direct the presiding judge to provide a report to the Commission no later than 15 days in advance of the refund effective date in the event the presiding judge has not by that date: (1) certified to the Commission a settlement which, if accepted, would dispose of the proceeding; or (2) issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of certification of a settlement or issuance of initial decision.

The Commission orders:

(A) VEC's second annual update filing is hereby accepted, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred by the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), an investigation is hereby instituted, in Docket No. EL05-98-000, concerning the continued justness and reasonableness of the rate formulas contained in VEC's OATT and Rate Schedule Nos. 4 and 6.

(C) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding ordered in Ordering Paragraph (B) above, under section 206 of the Federal Power Act, in Docket No. EL05-98-000.

(D) The refund effective date in Docket No. EL05-98-000, established pursuant to section 206(b) of the Federal Power Act, shall be 60 days following publication in the *Federal Register* of the notice in Ordering Paragraph (C) above.

¹² See, e.g., *PJM Interconnection, L.L.C.*, 90 FERC ¶ 61,137 (2000); *Cambridge Electric Light Co.* 75 FERC ¶ 61,177, *clarified*, 76 FERC ¶61,020 (2005); *Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶61,275 (1989).

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in the proceeding ordered in Ordering Paragraph (B) above within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge.

(F) Within 60 days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussion, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(G) If the settlement judge procedures fail, and a formal hearing is to be held, a presiding judge to be designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately 15 days of the date the Chief Judge designates the presiding judge, at a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.