

113 FERC ¶ 61,259
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Chehalis Power Generating, L.P.

Docket No. ER05-1056-001

ORDER DENYING REQUEST FOR REHEARING

(Issued December 15, 2005)

1. On August 26, 2005, Chehalis Power Generating, L.P. (Chehalis) filed a request for rehearing of the Commission's July 27, 2005 Order¹ which accepted Chehalis's proposed rate schedule for reactive power and voltage control service (reactive power), suspended it for a nominal period, to become effective August 1, 2005, as requested, and established hearing and settlement judge procedures. The Commission denies Chehalis's request for rehearing, as discussed below.

Background

2. Chehalis requests rehearing of one issue addressed in the Commission's July 27 Order. Specifically, Chehalis asserts that the Commission erred in finding that the rate schedule filed by Chehalis was a "changed" rate that is subject to suspension and refund, rather than an "initial" rate. Chehalis states that initial rates are not subject to suspension or refund.

3. Chehalis asserts that the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has established the principle that section 205 of the Federal Power Act (FPA) provides for two categories of rate filings, initial rates and changed rates, and that only changed rates are subject to suspension and refund.² It cites to *Florida Power*, in which the D.C. Circuit stated that it would defer to the Commission's technical expertise to determine changed rates versus initial rates, "unless the Commission's judgment is unreasonable or cannot be rationally reconciled with the terms of the Act."³

¹ *Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144 (2005) (July 27 Order).

² *See Florida Power and Light Co. v. FERC*, 617 F.2d 809 (D.C. Cir. 1980) (*Florida Power*).

³ *Id.* at 814-15. Chehalis also cites to *Middle South Energy, Inc. v. FERC*, 747 F.2d 763, 770-72 (D.C. Cir. 1984) (*Middle South*), to further support this premise.

4. Chehalis states that the Commission's finding that Chehalis's filing is a changed rate arises from the premise that an initial rate must involve a new customer and a new service. Chehalis disputes the July 27 Order's finding that Chehalis's rate schedule does not represent a new service because Chehalis "has been providing reactive power to [Bonneville Power Administration] BPA pursuant to an interconnection agreement, albeit without charge."⁴ Chehalis states that the interconnection agreement is a BPA interconnection agreement and is not a Chehalis rate schedule. According to Chehalis, the interconnection agreement does not set forth rates under which Chehalis will provide reactive power. Instead, BPA simply requires Chehalis to maintain certain voltage schedules as a condition of the interconnection agreement. Chehalis claims there cannot be a change in rates if it never previously filed a rate schedule for the service.

5. Chehalis adds that *Middle South* found that the suspension and refund provisions of FPA section 205(e) relate only to charges in rate schedules described in section 205(d).⁵ Chehalis argues that absent a previous rate or charge there can be no rate change within the meaning of FPA sections 205(d) or (e). Thus, because it did not file a rate schedule pursuant to section 205(c) for the reactive power it previously provided for no charge under the BPA interconnection agreement, it maintains that there can be no rate change under the FPA.

6. Chehalis also uses section 35.1(b) of the Commission's regulations, which defines what schedules must be filed as initial rate schedules, to argue that its rate schedule does not propose to supersede, supplement, cancel, or otherwise change the provisions of any rate schedule required to be on file and, therefore, its filing is an initial rate. Chehalis also relies on sections 35.2(a) and (b) of the Commission's regulations to argue that an entity that is providing reactive power without a rate as a condition of an interconnection agreement is not making a "sale" and, therefore, it is not required to file a rate schedule. Chehalis asserts that if it was not previously required to file a reactive power rate schedule under the Commission's regulations, then the Commission cannot now define Chehalis's filing as a changed rate.

7. Chehalis claims that the precedent cited in the July 27 Order does not support the determination that its filing is a changed rate. It states that *Calpine Oneta Power, L.P.*⁶ merely says the same thing that the Commission stated in the July 27 Order, that the reactive power tariff was a change in rates because reactive power had been provided previously without charge. Chehalis states that *WPS Canada Generation, Inc.* involved a

⁴ July 27 Order at P 23.

⁵ *Middle South*, 747 F.2d 763, 769.

⁶ *Calpine Oneta Power, L.P.*, 103 FERC ¶ 61,388 at P 11 (2003) (citing *Florida Power and Light Co.*, 65 FERC ¶ 61,411 at 63,128 n. 28 (1993); *Florida Power*, 617 F.2d 763, 813-17).

utility-divested power plant, and the plant's prior service as part of an integrated utility meant the reactive power tariff was a changed rate.⁷ It states that these are not the facts here. Finally, it states that the Commission merely cites a case where an initial rate must involve a new service and a new customer.⁸

8. Chehalis argues that BPA and the other settling parties in this case intended Chehalis's rate to be an initial rate and, therefore, the Commission should honor the intent of the settling parties.⁹

9. Finally, Chehalis argues that the court cases finding that initial rates cannot be suspended or made subject to refund were decided in 1980 and 1984. It asserts that since Congress has taken no action to amend section 205 since that time Congress must be considered to have endorsed the interpretation given section 205 by the D.C. Circuit.

Discussion

10. We disagree with Chehalis that its filing is an initial rate. As noted by Chehalis, the *Florida Power* court agreed to defer to the Commission's technical expertise to determine what rates are changed rates and what rates are initial rates, "unless the Commission's judgment is unreasonable or cannot be rationally reconciled with the terms of the Act."¹⁰ The *Middle South* court further interpreted FPA sections 205(c), 205(d), and 205(e) to mean that the Commission can only suspend changed rates and could not suspend initial rates. However, in contrast to Chehalis's argument, the court did not take its discussion of these sections further and define changed and initial rates. Instead, the *Middle South* court reaffirmed the latitude that the Commission has to interpret what constitutes a changed rate versus what constitutes an initial rate.¹¹ The Commission's

⁷ *WPS Canada Generation, Inc.*, 103 FERC ¶ 61,193 at P 15 (2003).

⁸ *Florida Power & Light Co.*, 65 FERC ¶ 61,411 at 63,128 n. 28 (1993).

⁹ Chehalis references the second paragraph of section B of the Settlement Agreement:

Similarly, Goldendale, Hermiston, and Chehalis may make initial rate filings pursuant to section 205 of the FPA applicable to each of their plants as described in sections C.4 and C.5 of this Settlement Agreement. Bonneville agrees that it will not challenge such filings, except as specifically described in section C.1.c. below.

Settlement Agreement, Docket No. ER04-810-000, section B P 2 (2005).

¹⁰ *Florida Power*, 617 F.2d 809, 814-15.

¹¹ *Middle South*, 747 F.2d 763, 771 (citing *Florida Power*, 617 F.2d 809, 815).

well-settled precedent is that an initial rate is one that provides for a new service to a new customer.¹² The recent precedent cited in the July 27 Order simply builds upon almost 20 years of earlier precedent supporting this determination.¹³

11. In *Southwestern Electric Power Co.*, on remand from a subsequent D.C. Circuit decision in *Southwestern Electric Power Co. v. FERC*,¹⁴ the Commission explained that the FPA does not expressly define change in rate or initial rate and the Commission took the D.C. Circuit up on its statements that it was for the Commission to define the two.¹⁵ The Commission thus defined a change in rate, and defined, in particular, an initial rate as one that provides for a new service to a new customer.¹⁶ The Commission further explained the policy behind its definitions, “We believe that our broadened definition of a change in rate is consistent with and serves to further the policies which underlie the FPA. The primary purpose is the protection of customers from excessive rates and charges.”¹⁷ It emphasized that this broadened definition of a changed rate allowed the Commission to give customers refund protection and, therefore, shielded them from the

¹² See, e.g., *Gulf State Utilities Co.*, 45 FERC ¶ 61,246 at 61,725 (1988) (finding that a rate schedule for transmission service was a changed rate because Gulf States was already providing service to Lafayette and Plaquemine and the present filing merely provides for a different service to existing customers); *Public Service Co. of Colorado*, 74 FERC ¶ 61,354 at 62,087 & n.2 (1996) (finding that a power supply agreement with Glenwood Springs adds a new customer to an existing service and, therefore, constitutes a changed rate); *Northern States Power Co.*, 74 FERC ¶ 61,106 at 61,345 (1996) (finding that Northern States’ filing was a changed rate because it unbundled its requirements rates to provide for separately-stated charges for various types of transmission and related ancillary services rather than providing a new service to a new customer).

¹³ See *Calpine Oneta Power, L.P.*, 103 FERC ¶ 61,388 at P 11 (citing *Florida Power and Light Co.*, 65 FERC ¶ 61,411 at 63,128 n. 28 (1993); *Florida Power*, 617 F.2d 809, 813-17) (finding that Oneta’s filing constituted a changed rate because Oneta was already providing reactive power to Public Services Company of Oklahoma under its interconnection agreement, albeit without charge); *WPS Canada*, 103 FERC ¶ 61,193 at P 15 (finding that a particular facility had been providing reactive power service to Maine Public for years, although under different ownership, and, therefore, the proposed rates were changed rates rather than initial rates).

¹⁴ *Southwestern Electric Power Co. v. FERC*, 810 F.2d 289 (D.C. Cir. 1987).

¹⁵ *Southwestern Electric Power Co.*, 39 FERC ¶ 61,099 at 61,292-293 (1987) (*Southwestern*). See also *Florida Power*, 617 F.2d 809, 815; *Middle South*, 747 F.2d 763, 771 (citing *Florida Power*, 617 F.2d 809, 815).

¹⁶ *Southwestern*, 39 FERC ¶ 61,099 at 61,292.

¹⁷ *Id.* at 61,293 (citing *Town of Alexandria v. FPC*, 555 F.2d 1020, 1028 (D.C. Cir. 1977); *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971); *Atlantic*

ability of utilities to exploit any sort of regulatory lag by filing unjust and unreasonable rates.¹⁸ Stressing this policy of protecting customers, the Commission stated: “Taking a broad view as to what constitutes a change in rate clearly serves, by making filings subject to the Commission’s suspension and refund authority under section 205(e) of the FPA, to protect customers of electricity from excessive or exploitative rates.”¹⁹ Contrary to Chehalis’s arguments, the Commission has consistently followed this definition and policy.

12. Prior to its filing in this proceeding, Chehalis had been providing reactive power to BPA pursuant to its interconnection agreement with BPA. As a result, it is not now providing a new service nor is it now providing service to a new customer. Thus, Chehalis’s filing is not an initial rate.

13. Chehalis argues that sections 35.1(b) and 35.2(a) and (b) of the Commission’s regulations support its assertion that its filing is an initial rate. However, the same Commission regulations were in effect when the D.C. Circuit gave the Commission discretion to define an initial rate.²⁰ In order to fulfill its public policy goal of protecting customers, the Commission exercised the discretion given to it by the court in *Florida Power*.²¹ *Southwestern* defined an initial rate as a new service to a new customer.²² The Commission’s regulations exist to complement rather than supplant the Commission’s policy, under the FPA, of protecting customers from inequitable treatment by utilities. By defining an initial rate as it did in *Southwestern*, the Commission has eliminated “an incentive for electric utilities to secure the benefits of an initial rate by how they draft their filings. The FPA cannot be read to countenance such a result.”²³

Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388 (1959); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944)).

¹⁸ The Commission recognizes that section 206 of the FPA has been modified since the issuance of *Southwestern*. While the new section 206 has eliminated some of the differences underlying the finding in *Southwestern*, a fundamental difference still exists between the refund protection provided under section 205 of the FPA (suspension and refund protection for the period the filed rate is collected prior to issuance of a final Commission order) and section 206 (refund protection limited to a 15-month period). Thus, the Commission reaffirms its definition of a change in rates in order to protect customers from excessive rates and charges.

¹⁹ *Southwestern*, 39 FERC ¶ 61,099 at 61,293.

²⁰ *See Florida Power*, 617 F.2d 809, 814-15.

²¹ *Id.*

²² *Southwestern*, 39 FERC ¶ 61,099 at 61,293.

²³ *Id.*

14. Chehalis claims that the parties intended the rate to be an initial rate and, therefore, the Commission should honor the intent of the parties.²⁴ The Commission disagrees. Whatever the intent of the parties may have been, that intent does not constitute a finding by the Commission under the FPA that the rate is an initial rate; nor does it make the rate an initial rate under Commission policy or precedent.

15. Chehalis states that the court cases ruling that initial rates cannot be suspended or made subject to refund were decided in 1980 and 1984.²⁵ It claims that the fact that Congress did not amend section 205 subsequently should be viewed as a tacit endorsement of the D.C. Circuit's interpretation. As noted above, the Commission agrees that it cannot suspend an initial rate. However, over the last two decades, in keeping with the court's recognition that it is for the Commission to define what constitutes an initial rate, the Commission has consistently found that an initial rate is one that provides for a new service to a new customer. Indeed, as noted by Chehalis, if Congress believed that the Commission had wrongly interpreted what an initial rate is under the FPA, then Congress could and would have acted to clarify the Commission's incorrect interpretation of FPA section 205, but Congress has done no such thing.

The Commission orders:

Chehalis's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁴ See *Settlement Agreement*, Docket No. ER04-810-000, section B P 2 (2005).

²⁵ See *Florida Power*, 617 F.2d 809; *Middle South*, 747 F.2d 763.