

121 FERC ¶ 61,189
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Calpine Oneta Power, L.P.

Docket No. ER03-765-005

ORDER DENYING REHEARING

(Issued November 19, 2007)

1. This order addresses East Texas Cooperatives'¹ request for rehearing of our May 21, 2007 order² (Request for Rehearing). As discussed below, we will deny East Texas Cooperatives' Request for Rehearing.

I. Background

2. The background of this case is described in detail in the May 21 Order. Briefly, the Commission upheld an Initial Decision³ on Calpine Oneta Power, L.P.'s (Oneta) proposed rate schedule for the provision of Reactive Supply from Generation Sources Services (reactive power) to Southwest Power Pool, Inc. (SPP), finding that: (1) applying a needs test solely to Oneta is contrary to Commission precedent and is unduly discriminatory; (2) the revenue requirement was calculated according to the methodology accepted in Opinion No. 440;⁴ and (3) Oneta's reactive power capability is comparable to the reactive power capability provided by American Electric Power Service Corp. (AEP).⁵

¹ East Texas Cooperatives are East Texas Cooperative, Inc., Northeast Texas Electric Cooperative, Inc. (NTEC) and Tex-La Electric Cooperative of Texas, Inc.

² *Calpine Oneta Power, L.P.*, 119 FERC ¶ 61,177 (2007) (May 21 Order).

³ *See Calpine Oneta Power, L.P.*, 113 FERC ¶ 63,015 (2005) (Initial Decision).

⁴ *American Electric Power Service Corp.*, 88 FERC ¶ 61,141 (1999).

⁵ *See Calpine Oneta Power, L.P.*, 116 FERC ¶ 61,282 (2006) (Order on Initial Decision).

3. In the Order on Initial Decision, the Commission found that Oneta should receive compensation under its proposed rate schedule for providing reactive power on a basis comparable to that of suppliers of reactive power affiliated with control area operators. Additionally, the Commission directed Oneta to submit a compliance filing, the sole purpose of which was to revise its rate schedule listing AEP instead of SPP as the customer.

4. On October 25, 2006, as amended on October 27, 2006, Oneta submitted this compliance filing, revising its Rate Schedule FERC No. 2. In addition, AEP and SPP filed requests for rehearing of the Order on Initial Decision. On November 16, 2006, East Texas Cooperatives filed an untimely motion to intervene in this proceeding and to respond to the AEP Request for Rehearing.⁶ East Texas Cooperatives also filed, with respect to the compliance filing, an untimely motion to intervene and protest.

5. In the May 21 Order, the Commission denied AEP's and SPP's rehearing requests.⁷ The Commission also denied East Texas Cooperatives' motion to intervene and to respond to rehearing requests, finding that they had not shown good cause to warrant intervention after the dispositive order was issued. The Commission also found that, even if it were to grant the motion to intervene out-of-time, the Commission's Rules of Practice and Procedure do not permit an answer to a request for rehearing.⁸ The Commission, however, granted the motion to intervene with respect to the compliance aspect of the filing. Nevertheless, the Commission rejected East Texas Cooperatives'

⁶ AEP October 26, 2006 Request for Rehearing (AEP Request for Rehearing).

⁷ As we explained in the May 21 Order, SPP provides reactive power service by arranging with control area operators that perform the service pursuant to their Schedule 2. The control area operators, in turn, use their own generation and control unaffiliated generation to maintain proper voltage. Because the Oneta Facility, which is in the AEP control area, assists in maintaining the proper voltage levels within that area, and because the existing SPP Schedule 2 requires SPP to make arrangements with only control area operators, it is reasonable to conclude that AEP is the appropriate customer under the Oneta rate schedule and should pay the Oneta revenue requirement. AEP stated that it self-supplies its reactive power requirements and that no Schedule 2 charges are assessed by SPP in connection with network service provided to AEP loads in its control area. AEP Request for Rehearing at 35. The Commission held that AEP's choice to self-supply could not be used as a basis to deny Oneta its reactive revenue requirement for comparable reactive power capability. May 21 Order, 119 FERC ¶ 61,177, at P 68.

⁸ *Citing* 18 C.F.R. § 385.213(a)(2) (2007).

protest as beyond the scope of the proceeding,⁹ and accepted Oneta's compliance filing to become effective June 21, 2003.

II. Request for Rehearing

6. East Texas Cooperatives now file a Request for Rehearing of the May 21 Order citing three errors by the Commission. First, they argue that the Commission should have granted their motion to intervene and to respond to rehearing requests. Specifically, they contend that they were not put on notice that the Order on Initial Decision might be interpreted to provide Oneta a guarantee that it would recover its full reactive power revenue requirement. They argue that, given the lack of notice, they did not waive their right to intervene.¹⁰ They also note that, in an Order on Rehearing in *Midwest ISO*,¹¹ the Commission granted a late-filed motion to intervene after the issuance of an order disposing of substantive issues when the intervention raised concerns about ambiguity in the dispositive order. They state that their situation is similar and that the Commission should allow their late intervention in this case.

7. Next, East Texas Cooperatives argue that the Commission should have addressed the comparability arguments that they raised in response to Oneta's compliance filing. East Texas Cooperatives argue that Oneta did not comply with the directives of the Order on Initial Decision because Oneta attempted to recover a fixed monthly amount for reactive power in an effort to guarantee that it will recover its entire annual reactive power revenue requirement. East Texas Cooperatives argue that recovery of Oneta's entire revenue requirement violates comparability because others in SPP do not recover their entire revenue requirement, and because it renders self-supply arrangements meaningless with respect to the Oneta-related charges. They state that they did not know that Oneta would misinterpret the Order on Initial Decision to allow full recovery of reactive power revenue requirements until Oneta made its compliance filing. Accordingly, they argue that their protest of the compliance filing was appropriate.

⁹ Specifically, the Commission found that East Texas Cooperatives should have raised these arguments in a request for rehearing of the Order on Initial Decision instead of in a protest to Oneta's compliance filing.

¹⁰ Citing *Tractebel Calypso Pipeline, L.L.C.*, 106 FERC ¶ 61,273, at P 21, n. 17 (2004) (granting motion to intervene out-of-time after the issuance of a dispositive order because the intervening party was not on notice of a project and the impact of the project on the party's land) (*Tractebel*); *East Texas Cooperative, Inc. v. FERC*, 218 F.3d 750 (D.C. Cir. 2000) (*East Texas Cooperatives v. FERC*).

¹¹ *Midwest Indep. Transmission System Operator, Inc.*, 107 FERC ¶ 61,167, at P 3 (2004) (*Midwest ISO*).

8. Finally, East Texas Cooperatives claim that Oneta's proposed reactive power rate schedule should be rejected because it guarantees recovery of Oneta's entire revenue requirement and neither AEP nor any other control area operator is entitled to flow through its entire reactive power revenue requirement. East Texas Cooperatives state that, under their self-supply arrangements, they do not have to purchase reactive power service from SPP up to the level of their full network load because they self-supply a portion of their reactive power requirement. They argue, however, that under the May 21 Order, East Texas Cooperatives' reactive power self-supply arrangement would apply only to reactive power provided by AEP. For reactive power supplied by Oneta, East Texas Cooperatives assert that they would be required to pay charges for reactive power based on their *full* network load, i.e., the non-self-supplying portion as well as the self-supplying portion of the network load. They contend that the Schedule 2 (reactive power) charge in SPP's OATT is not intended to work this way.

III. Discussion

9. We will deny East Texas Cooperatives' Request for Rehearing for the reasons stated below.

A. East Texas Cooperatives' Untimely Motion to Intervene

10. We reject East Texas Cooperatives' argument that we should have granted their untimely motion to intervene and to respond to rehearing requests because they lacked notice. This case has been pending before the Commission for over four years. Indeed, notice that Oneta submitted a rate schedule for reactive power in regions affecting the East Texas Cooperatives was first published in the *Federal Register* on May 1, 2003.¹² From the beginning, an issue in the case has been whether Oneta would recover its costs of providing reactive power. Thus, East Texas Cooperatives have long been on notice that they could be adversely affected by a Commission decision in this proceeding.

11. Yet East Texas Cooperatives have failed to intervene until this very late date. Indeed, even after issuance of an Initial Decision in the proceeding, East Texas Cooperatives still chose not to participate. It was not until after the Commission issued its Order on Initial Decision (and after the 30-day statutory period for rehearing requests had expired) that East Texas Cooperatives finally expressed an interest in this proceeding. Only then, more than 4 years after the case was first filed, noticed and set for hearing¹³ did East Texas Cooperatives seek to intervene. We have repeatedly explained that, when late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late

¹² 68 Fed. Reg. 23,297 (2003).

¹³ *Calpine Oneta Power, L.P.*, 103 FERC ¶ 61,338 (2003).

intervention may be substantial.¹⁴ Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. East Texas Cooperatives' attempted justification does not meet this higher burden for late intervention.¹⁵ Moreover, as we have previously explained, an entity, in not seeking intervention in a timely manner, assumes the risk that the proceeding will be resolved in a manner that is adverse to its interests.¹⁶ Thus, East Texas Cooperatives assumed the risk here by choosing not to participate in this proceeding until the very end stages of the regulatory process.

12. In any event, even if we were to grant East Texas Cooperatives' late intervention, we would reject their motion to respond to AEP's rehearing request. This motion amounts to a request for rehearing that was filed out-of-time. Untimely requests for rehearing are barred under section 313(a) of the Federal Power Act (FPA) (16 U.S.C. § 8251(a) (2000)) and Rule 713(b) of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.713(b) (2007)).¹⁷

¹⁴ See, e.g., *Midwest Indep. Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

¹⁵ The cases cited by East Texas Cooperatives are inapposite. *Tractebel* turned on Commission regulations that required notice to be received by landowners on the proposed route of a pipeline. Late intervention was granted because the regulations had been violated and no actual notice had been received. In *East Texas Cooperatives v. FERC*, the court found that an order accepting a tariff does not give fair notice that the tariff will be eliminated. Finally, in *Midwest ISO*, the Commission granted a late intervention for the purpose of seeking rehearing (which was within the 30-day statutory period for requests for rehearing) because a clarification of jurisdiction was necessary, and there would be no impact on the other parties to the proceeding nor would it place any additional burdens on them. None of these cases provides a justification for granting East Texas Cooperatives' untimely motion to intervene in this proceeding.

¹⁶ See *Tennessee Gas Pipeline Co.*, 32 FERC ¶ 61,347, at 61,792-93 (1985). In this regard, even if we were to grant their untimely motion to intervene, East Texas Cooperatives would have to abide by the record established in this proceeding up to that point – including the earlier orders issued. 18 C.F.R. § 385.214(d)(3)(ii) (2007). Thus, its attempt to raise concerns with respect to issues already addressed would have to be rejected.

¹⁷ See *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) (“The 30-day time requirement of [the FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing”). Further, even if we granted East Texas Cooperatives' untimely motion to intervene, and even if we treated their pleading as an answer, the Commission's Rules of Practice and Procedure do not permit an answer to a request for rehearing. 18 C.F.R. § 385.713(d) (2007).

B. East Texas Cooperatives' Compliance Pleading

13. We reject East Texas Cooperatives' assertion that their previous arguments with respect to Oneta's compliance filing were not beyond the scope of Oneta's compliance filing. According to East Texas Cooperatives, the Commission was mistaken in finding in the May 21 Order that neither AEP nor East Texas Cooperatives had argued that Oneta failed to comply with the directives of the Order on Initial Decision. East Texas Cooperatives argue that, in so finding, the Commission failed to consider East Texas Cooperatives' argument that Oneta had misconstrued the Commission's order and had improperly complied. The Commission disagrees. In fact, contrary to East Texas Cooperatives' arguments, the May 21 Order referred to the explicit Commission directive that Oneta change the name of the customer in its rate schedule from SPP to AEP.¹⁸ Oneta's compliance filing did that – it changed the customer's name from SPP to AEP. Thus, Oneta construed the Commission's order correctly. We note, however, that while Oneta complied with the Commission's explicit directive and changed the customer's name to AEP in its rate schedule, section 1 of the revised rate schedule makes reference to a "monthly charge to SPP." This appears to be an oversight by Oneta in light of its compliance filing that elsewhere changed the customer's name from SPP to AEP. Accordingly, we will direct Oneta to submit a new compliance filing within thirty days to correct the oversight by removing the words "to SPP" from section 1.

14. The limited change of making AEP the customer was the only issue within the scope of the compliance proceeding. East Texas Cooperatives' attempt to introduce arguments concerning comparability was thus outside the scope of the proceeding and properly rejected. As the Commission has repeatedly explained, it will not consider arguments raised in a compliance proceeding that do not respond to the narrow issue of the filing company's compliance with the explicit directives of the Commission in the underlying order.¹⁹

C. Oneta's Revenue Recovery and Comparability

15. Even if we were to find East Texas Cooperatives argument within the scope of the compliance filing, we would not grant rehearing. We disagree with East Texas Cooperatives' argument that allowing Oneta to recover its revenue requirement violates comparability and renders self-supply arrangements meaningless with respect to the Oneta-related charges. In the Order on Initial Decision, the Commission explained the history of reactive power and its long-standing policy of comparability with respect to

¹⁸May 21 Order, 119 FERC ¶ 61,177, at P 80; *see* Order on Initial Decision, 116 FERC ¶ 61,282, at P 69.

¹⁹*See Delmarva Power & Light Co.*, 63 FERC ¶ 61,321, at 63,160 (1993); *Pacific Gas and Electric Co.*, 109 FERC ¶ 61,336, at P 5 (2004).

reactive power service.²⁰ Specifically, the Commission's policy on reactive power requires that a generator unaffiliated with a transmission owner must be compensated for providing reactive power to the extent that a generator affiliated with the transmission owner is compensated for providing reactive power.²¹ This comparability policy was later affirmed in Order No. 2003-A.²²

16. AEP states that during the historical locked-in period of time,²³ it chose to self-supply reactive power resulting in AEP not recovering its entire revenue requirement under Schedule 2 of the SPP OATT.²⁴ Nonetheless, the Commission required AEP to pay Oneta its reactive revenue requirement because it was the only way to ensure that our policy of comparability would be applied where control area operators self-supply their reactive power requirement.²⁵

17. The end result of this option to self-supply their reactive power requirement would be to allow control area operators, like AEP, to claim a capacity to self-supply as a means for reducing funds available to unaffiliated generators, like Oneta. Unaffiliated

²⁰ Order on Initial Decision, 116 FERC ¶ 61,282, at P 4-7.

²¹ *Michigan Electric Transmission Co.*, 97 FERC ¶ 61,187, at 61,853 (2001).

²² *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,146 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (March 26, 2004), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,160, at P 416 (2004) (Order No. 2003-A), *order on reh'g*, FERC Stats. & Regs. Regulations Preambles 2001-2005 ¶ 31,171 (2004) (Order No. 2003-B), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,190 (2005) (Order No. 2003-C).

²³ We note that this proceeding pertains to an historical, locked-in period from the effective date of the Oneta reactive power rate schedule, June 21, 2003 through February 27, 2007, when SPP's revised reactive power compensation procedure became effective. *Southwest Power Pool, Inc.*, 119 FERC ¶ 61,199 (2007).

²⁴ AEP Request for Rehearing at 35.

²⁵ SPP's reactive power compensation procedure in Schedule 2 stated that reactive power service would be provided by the control area operator within SPP where the load was located. Schedule 2 of SPP's OATT did not allow SPP to compensate non-transmission owners or Independent Power Producers (IPPs) directly for providing reactive power; rather, all payments for Schedule 2 service were distributed to the control area operator.

generation capability would be called only to the extent not provided by a transmission customer from its own resources, which amounts to a “needs test.” Consequently, the Commission’s policy of comparability in reactive power service is impaired when incumbent utilities, like AEP, self-supply their reactive power service, because IPPs are not treated comparably.²⁶

18. To ensure that our comparability policy is applied in the SPP region where self-supply arrangements have otherwise impaired comparability, it is reasonable to require AEP to pay Oneta its reactive power revenue requirement even though AEP states that it chose not to recover all of its own revenue requirement under Schedule 2. As we stated in the May 21 Order, AEP’s under-recovery of its revenue requirement under Schedule 2 of the SPP OATT was the result of its own choice to self-supply reactive power,²⁷ and this choice cannot be used as a basis to deny Oneta its reactive power revenue requirement for comparable reactive power capability.²⁸

19. Allowing Oneta to recover its reactive revenue requirement does not render the East Texas Cooperatives’ self-supply arrangements meaningless as they contend. In fact, the May 21 Order does not require East Texas Cooperatives’ self-supplying load to pay charges for reactive power. Because SPP’s Schedule 2 only allows SPP to make arrangements with control area operators (like AEP), the Commission directed SPP to include the Oneta revenue requirement as part of AEP’s revenue requirement.²⁹ The portion of the combined revenue requirement pertaining to the Oneta Facility would be applied to the transmission customers’ load (including that of East Texas Cooperatives) that does not self-supply its reactive power requirements in a manner identical to the portion of the combined revenue requirement pertaining to AEP’s generation. Therefore, only East Texas Cooperatives’ load that does not self-supply its reactive power requirements will be assessed the revised reactive power charge in SPP’s Schedule 2, which includes Oneta’s revenue requirement for reactive power.

²⁶ Order on Initial Decision, 116 FERC ¶ 61,282, at P 35 (applying a needs test to only Oneta’s reactive power capability would deny Oneta comparable treatment and constitute undue discrimination).

²⁷ To the extent any of AEP’s underrecovery of Schedule 2 revenues is attributable to third-party self-supply arrangements, AEP should have changed, or requested SPP to change, the billing determinants under Schedule 2 to reflect a partial self-supply of reactive power by third-party transmission customers (i.e., NTEC and Oklahoma Municipal Power Authority).

²⁸ May 21 Order, 119 FERC ¶ 61,177, at P 68.

²⁹ Order on Initial Decision, 116 FERC ¶ 61,282, at P 71.

The Commission orders:

(A) East Texas Cooperatives' Request for Rehearing is hereby denied, as discussed in the body of this order.

(B) Oneta is directed to file within thirty days a revised compliance filing as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.