122 FERC ¶ 61,168
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ExxonMobil Corporation

v. Docket No. EL03-230-003

Entergy Services, Inc.

ORDER DENYING REHEARING

(Issued February 22, 2008)

1. This order denies a request for rehearing by ExxonMobil Corporation (ExxonMobil) of the Commission's July 18, 2007 order rejecting a compliance filing made by Entergy Services, Inc. (Entergy).[1]

## I. Background

2. On September 28, 2001, Entergy filed an interconnection, operation and generator imbalance agreement (Original IA) to accommodate ExxonMobil's 165 MW generator at an oil refinery in Beaumont, Texas. On December 7, 2001, the Commission accepted the Original IA for filing pursuant to delegated authority.[2] The Original IA identified certain facilities in that agreement as interconnection facilities (Original Transmission Facilities) and directly assigned the cost of these facilities to ExxonMobil, without requiring Entergy to provide transmission credits.

3. ExxonMobil then installed two additional generators, adding 324 MW of generation. When Entergy filed an unexecuted, revised IA to accommodate the expanded facilities (New Transmission Facilities), ExxonMobil filed a protest, stating that *all* of the facilities (both Original and New Transmission Facilities) are located at or beyond the

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[1] *ExxonMobil Corp. v. Entergy Services, Inc.*, 120 FERC ¶ 61,051 (2007) (July Compliance Order).

[2] *See Entergy Services, Inc.*, Docket No. ER02-144-000 (December 7, 2001) (unpublished letter order) (December 7 Order).

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point of interconnection on the Entergy network and are, therefore, network upgrades entitled to transmission credits.

4. The Commission granted ExxonMobil's protest with respect to the New Transmission Facilities. With respect to the Original Transmission Facilities, the Commission found that ExxonMobil's request that the Commission direct Entergy to reclassify the Original Transmission Facilities was, in effect, a complaint. The Commission rejected this portion of ExxonMobil's protest, without prejudice to ExxonMobil's filing a separate complaint on that issue.[3]

5. On September 16, 2003, ExxonMobil filed a complaint requesting that the Commission direct Entergy to reclassify the Original Transmission Facilities as network upgrades rather than as direct assignment facilities, and provide ExxonMobil with transmission credits. On January 19, 2007, the Commission granted that complaint and directed Entergy to provide ExxonMobil with transmission credits for the cost of those facilities.[4] It also directed Entergy to file revisions to the Original IA reflecting the Commission's decision and to file a compliance report within 15 days after providing the required credits.[5]

6. In *ExxonMobil I*, the Commission noted that section 206(b) of the Federal Power Act (FPA),[6] as it was in effect at the time that ExxonMobil filed its complaint, requires that the Commission must, when it institutes an investigation on a complaint, establish a refund effective date that is no earlier than 60 days after the date on which the complainant filed the complaint, and not later than five months after the expiration of the 60-day period.[7] Because transmission service had not commenced when ExxonMobil

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[3] *See Entergy Services, Inc.*, 104 FERC ¶ 61,084 at P 13 (2003).

[4] *ExxonMobil Corp. v. Entergy Services, Inc.*, 118 FERC ¶ 61,032 at P 1, 14 (2007) (*ExxonMobil I*).

[5] *Id.* P 14-16.

[6] 16 U.S.C. § 824e(b) (2000).

[7] *ExxonMobil I*, 118 FERC ¶ 61,032 at P 15. The Commission also noted that the Energy Policy Act of 2005, Pub. L. No. 109-58, Sec. 1285, 119 Stat. 594, 980-81 (2005), amended section 206(b) of the FPA to require that, in the case of a proceeding instituted on a complaint, the refund effective date shall not be earlier than the date of the filing of such complaint or later than five months after the filing of such complaint. *Id.* n.10.

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filed its complaint,[8] to afford ExxonMobil maximum protection, the Commission set the refund effective date at the latest possible date, *i.e.*, five months after the date 60 days after ExxonMobil filed its complaint, which was April 15, 2004.[9]

7. The Commission noted that transmission credits accrue over a maximum 20-year period beginning with the commercial operation of the generator.[10] The Commission directed Entergy to provide ExxonMobil with transmission credits as follows: (a) before April 15, 2004 (the start of the refund effective period), Entergy provides no transmission credits; (b) from April 15, 2004 through July 15, 2005 (the refund effective period), Entergy provides transmission credits, with interest calculated in accordance with 18 C.F.R. § 35.19a(a)(2)(iii);[11] (c) from the end of the 15-month refund effective period until the date of the Commission order (January 19, 2007), Entergy may not provide any transmission credits or interest on those credits; and (d) to the extent that ExxonMobil has not previously taken service for which credits either did accrue or would have accrued, Entergy must provide ExxonMobil transmission credits, with interest, on a prospective basis from the date of the Commission's order.[12]

8. On June 8, 2007, the Commission denied rehearing of *ExxonMobil I*.[13] The Commission discussed ExxonMobil's claim that it should be entitled to refunds, but noted that section 206 of the FPA limits our refund authority:

> ExxonMobil is thus allowed to receive transmission credits for the fifteen-month refund effective period that section 206 prescribes, *i.e.*, April 15, 2004 through and including July 15, 2005. It cannot, however, receive transmission credits or interest on those credits from July 16, 2005 to the date of the Commission's order, January 19, 2007, because the

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[8] ExxonMobil filed its complaint on September 16, 2003; however, the generating facilities that are the subject of the complaint did not begin commercial operation until December, 2004.

[9] *ExxonMobil I*, 118 FERC ¶ 61,032 at P 15 (citations omitted).

[10] The Commission noted that Article 11.4.1 of the Large Generator Interconnection Agreement provides for a maximum 20-year refund period. *Id.* P 17.

[11] *ExxonMobil I*, 118 FERC ¶ 61,032 at P 16. We note that in *ExxonMobil I* the Commission inadvertently referenced 18 C.F.R. § 35.19a(2)(ii) (2000).

[12] *Id.*

[13] *ExxonMobil Corp. v. Entergy Services, Inc.*, 119 FERC ¶ 61,261 (2007) (*ExxonMobil II*).

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> Commission would be ordering Entergy to give back to a customer money that it collected after the expiration of the refund effective period and before the date of the Commission's order in violation of the filed rate doctrine. However, to the extent that ExxonMobil has not previously taken service for which transmission credits either did accrue or would have accrued, ExxonMobil is entitled to receive transmission credits, with interest, on a prospective basis from the date of the Commission's order. This is the maximum protection that the Commission can afford ExxonMobil under the FPA.[[14]]

9. On February 20, 2007, before *ExxonMobil II*, Entergy filed a revised Service Agreement purporting to comply with *ExxonMobil I* (compliance filing). The compliance filing consisted of a revised Interconnection and Operating Agreement and a revised Generator Imbalance Agreement (together, the Revised IA) between Entergy and ExxonMobil.[15] The Revised IA reclassified the Original Transmission Facilities as required system upgrades, as directed by the Commission.[16]

10. However, Entergy stated that it would provide ExxonMobil with transmission credits against transmission charges for the *full* amount of the upfront payments that ExxonMobil made for the Original Transmission Facilities once it (Entergy) had fully reimbursed the upfront payment (total cost plus interest) that ExxonMobil paid to Entergy for the New Transmission Facilities.[17] Entergy stated that ExxonMobil would continue to receive transmission credits against transmission charges until Entergy had reimbursed ExxonMobil for the total cost of the construction of both the Original and New Transmission Facilities, with interest.[18]

11. In the July Compliance Order, the Commission found that Entergy had not complied with our instructions in *ExxonMobil I*. We stated that the interconnection cost that ExxonMobil must pay, and the rate Entergy must charge for its transmission service

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[14] *Id.* P 22 (footnotes omitted).

[15] Entergy also submitted what it refers to as "blackline pages," which reflect the revisions made in the Revised IA.

[16] Entergy March 28, 2007 Answer to ExxonMobil Protest, Docket No. EL03-230-002 at 2.

[17] *Id.* P 5.

[18] *Id.* P 5-6.

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for the periods addressed in this proceeding, are set by the Commission pursuant to the requirements of section 206 of the FPA, including the refund limitations required by section 206. We noted that, in *ExxonMobil I*, we had expressly provided that Entergy may not pay ExxonMobil any transmission credits for the Original Transmission Facilities that ExxonMobil would have earned from the end of the 15-month refund effective period until the date of the Commission order, or any interest on those credits.[19]

12. The Commission found that Entergy did not comply with this direction in its compliance filing. Instead, Entergy stated that it intends to pay to ExxonMobil *all* of ExxonMobil's upfront payments for the Original Transmission Facilities *without deducting* the sum of the transmission service payments associated with the transmission service that ExxonMobil took from the end of the 15-month refund effective period (July 15, 2005) until the date of the Commission order (January 19, 2007).[20] Therefore, we directed Entergy to re-file its compliance filing in accordance with the rate we established in *ExxonMobil I*. That is, we required Entergy to deduct from the total of ExxonMobil's upfront payments for the Original Transmission Facilities the sum of the transmission service payments associated with the transmission service that ExxonMobil took from July 16, 2005 through January 19, 2007, to determine the total amount of credits to which ExxonMobil is entitled.[21] We also rejected ExxonMobil's argument that it is entitled to transmission credits for the entire cost of the upfront payments for the Original Transmission Facilities.

## II. <u>Request for Rehearing</u>

13. On August 17, 2007, ExxonMobil filed a request for rehearing of the July Compliance Filing. ExxonMobil states that the Commission had ordered Entergy to pay credits for both Required System Upgrades and Optional System Upgrades on the Original Transmission Facilities. Further, ExxonMobil notes that the Commission, in *ExxonMobil I*, determined that Entergy owed ExxonMobil credits to the extent that ExxonMobil had not previously taken service for which credits would have or did accrue. According to ExxonMobil, Entergy properly determined that ExxonMobil did not take service relative to the Original Transmission Facilities until Entergy fully compensated ExxonMobil for the costs of the New Transmission Facilities. ExxonMobil maintains that the previously-taken service and the credits previously provided related only to the New Transmission Facilities. Therefore, ExxonMobil contends that Entergy's

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[19] *ExxonMobil I*, 118 FERC ¶ 61,032 at P 17.

[20] Entergy March 28, 2007 Answer to ExxonMobil Protest at 5; Entergy April 24, 2007 Answer to ExxonMobil Answer at 3.

[21] *ExxonMobil II*, 119 FERC ¶ 61,261 n. 39.

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determination that it was required to credit ExxonMobil for the entire cost of the Original Transmission Facilities comports with the plain language of *ExxonMobil I*.

14. In addition, ExxonMobil contends that transmission service must be paid for, not just taken.[22] Because ExxonMobil did not pay for any transmission service for the Original Transmission Facilities after the refund effective period and before the issuance of *ExxonMobil I*, ExxonMobil maintains that there should be a zero deduction in the amount owed relative to that period. ExxonMobil argues that this is consistent with section 206 of the FPA, which allows the Commission to refund "any amounts paid" for the 15-month refund effective period.[23]

15. ExxonMobil also maintains that the Commission should have accepted Entergy's compliance filing because Entergy's obligation is not a rate, but a term of service. According to ExxonMobil, granting a request to reclassify facilities may have rate consequences, but does not establish a rate. Further, it argues that the July Compliance Order does not identify the rate being modified and therefore there is no rate to retroactively alter.[24] ExxonMobil also contends that the Commission usually applies changes in terms and conditions prospectively from the date of the Commission order. Therefore, ExxonMobil argues that, because the Commission's order effectuated a change in terms and conditions, the remedy should apply prospectively from *ExxonMobil I*.

16. Even assuming that *ExxonMobil I* established a rate and the Commission must have the rate begin at the beginning of the refund effective period, ExxonMobil argues that the Original IA requires Entergy to pay all of the transmission credits. According to ExxonMobil, there were no remaining transmission service payments to which credits could apply because the credits for the New Transmission Facilities paid off 100 percent of transmission service for each month from December 2004, the date when service commenced on the Old Transmission Facilities, until May 2007. ExxonMobil maintains that paragraph 8.3.1 of the Revised IA expressly addresses this situation, by requiring Entergy to credit ExxonMobil (emphases added by ExxonMobil):

> an amount equal to the Point-to-Point Transmission service rate, on a dollar-for-dollar basis, with interest…applied to Customer's total monthly bill for services, *until such time as the cost* of the Required System Upgrades and Optional

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[22] *Union Power Partners, L.P v. Entergy Services, Inc.*, 119 FERC ¶ 61,328 (2007) (*Union*).

[23] ExxonMobil August 17 Request for Rehearing at 23, citing 16 U.S.C. § 824e(b).

[24] *Id.* at 24, citing *Niagara v. FERC*, 452 F.3d 822, 830 n.9 (D.C. Cir. 2006).

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> System Upgrades (that have been previously paid by Customer), *has been fully offset*, after which time such offset or credit shall no longer apply.

17. ExxonMobil therefore contends that the Revised IA requires a "dollar-for-dollar" payback, whereas the Commission's order requires a two-dollar credit for every dollar of transmission payment – one dollar for the New Transmission Facilities and one dollar for the Old Transmission Facilities. Therefore, ExxonMobil maintains that the credits for the Old Transmission Facilities should only start after Entergy completes payment for the New Transmission Facilities, which was after issuance of *ExxonMobil I*. According to ExxonMobil, this would mean that no refunds would have accrued between the end of the refund effective period and issuance of *ExxonMobil I*, and therefore no refunds should be disallowed.

18. Further, ExxonMobil maintains that paragraph 8.3.1 of the Revised IA requires Entergy to refund the entire cost of the facilities. Paragraph 8.3.1 requires transmission credits to be paid directly to ExxonMobil if there are no charges due, because the total amount of credits due for the month exceeds charges due to Entergy from ExxonMobil under the Revised IA. ExxonMobil argues that the total amount of credits exceeds the transmission charges due to Entergy. According to ExxonMobil, it raised these concerns in its protest to Entergy's compliance filing, but the Commission did not address them.

19. ExxonMobil also contends that the Commission should have recognized that all of the transmission service taken was subject to pre-existing credits and that the suggestion in the July Compliance Order that Entergy should not consider credits for the Original Transmission Facilities separate from the credits for the New Transmission Facilities is contrary to the Commission's order on rehearing of *ExxonMobil I*.[25] According to ExxonMobil, the Commission's determination to reject Entergy's compliance filing would require simultaneous reimbursement of credits for the Original and New Transmission Facilities. Therefore, ExxonMobil maintains that there is no rational basis for the Commission's conclusion that "there is no longer any question of Entergy's applying the payment of transmission credits associated with the New Transmission Facilities as an offset against the transmission credits associated with the Original Transmission Facilities."[26] Finally, ExxonMobil asserts that the Commission's order is discriminatory in not taking into account the credits for the New Transmission Facilities when determining credits for the Original Transmission Facilities because, in *Union*, the Commission took into account that Entergy previously had provided credits to Union for

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[25] ExxonMobil August 17 Request for Rehearing at 28, citing *ExxonMobil II*, 119 FERC ¶ 61,261 at P 26 ("Entergy must separately reimburse ExxonMobil for each group of network upgrades as we have directed in our orders").

[26] *Id.* at 29, citing *July Compliance Order* at P 22.

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Optional Upgrades and Entergy did not begin deducting amounts paid for transmission service until after pre-existing credits were completed for Optional Upgrades in August 2003.[27]

20. ExxonMobil further maintains that the decision in the July Compliance Order renders meaningless the inclusion of a final refund period where Entergy must provide ExxonMobil credits with interest on a prospective basis.[28] According to ExxonMobil, the Commission did not clearly state that, in requiring Entergy to deduct the sum of the "transmission service payments" associated with the transmission service that ExxonMobil took from July 16, 2005 through January 19, 2007, the Commission meant that Entergy must deduct the *value* of the transmission service, rather than the amount *actually paid* for the transmission service. ExxonMobil argues that this does not comport with the plain language of *ExxonMobil I*. It maintains that it is undisputed that no transmission service payments were made by ExxonMobil to Entergy during that time period because credits from the New Transmission Facilities eliminated the need for such payments, therefore the sum of such payments is zero.

21. Further, ExxonMobil argues that *ExxonMobil I* is clear that refunds are only due when credits "have been accrued" and that credits accrue over 20 years starting when the facilities go into commercial operation.[29] However, according to ExxonMobil, *ExxonMobil I* imposes a refund effective date beginning on April 15, 2004, which is long before the mid-December 2004 commercial operation date. Therefore, ExxonMobil maintains that credits could not have accrued before December 2004.

22. Further, ExxonMobil contends that the compliance filing is consistent with the relief sought in the original complaint – a "prospective" reclassification of facilities – and that interest should be provided from the date of the order providing reclassification.[30] According to ExxonMobil, allowing Entergy to credit ExxonMobil for the entire cost of the facilities is not unduly discriminatory to other generators because there is no showing that there are other generators that are similarly situated, such that all of the transmission service is subject to credits under a prior Commission order.

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[27] *Id.* at 29-30, citing *Union*, 119 FERC ¶ 61,328 at P 7; *see also Quachita Power, LLC v. Entergy Louisiana*, 118 FERC ¶ 61,155 (2007).

[28] *Id.* at 31, citing *ExxonMobil I*, 118 FERC ¶ 61,032 at P 17.

[29] *ExxonMobil I*, 118 FERC ¶ 61,032 at P 16.

[30] Moreover, ExxonMobil maintains that the July Compliance Order's ruling as to interest was not based on substantial evidence because the Commission does not know the end result of its ruling, *i.e.*, how much interest will actually be paid.

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23. ExxonMobil also argues that the relief should have been prospective because the Regulatory Fairness Act (RFA)[31] (which promulgated the 15 month period) only limited retroactive refund authority, not prospective relief. According to ExxonMobil, retroactive refunds are not mandatory and the RFA "was intended to correct the problem of public utilities engaging in dilatory behavior in section 206 proceedings in order to delay the effectiveness of proposed, presumably lower, rates."[32] ExxonMobil argues that the July Compliance Order turns this on its head by shielding the public utility. Further, ExxonMobil states that, even where section 206 of the FPA is applied, the Commission acknowledges exceptions.[33]

24. ExxonMobil also argues that Order No. 2003 provided that an interconnection customer making upfront payments for Network Upgrades is entitled to complete recovery of the cost of the facilities.[34] Therefore, according to ExxonMobil, the determination in the July Compliance Order is a change in policy that can only be applied prospectively.

25. ExxonMobil asserts that rejecting the compliance filing contravenes the policy against "and" pricing, violates cost causation principles and provides an unjust and unreasonable windfall to Entergy. According to ExxonMobil, the entire cost of the upgrades at issue here was incurred for the benefit of all Entergy customers, but the July Compliance Order requires ExxonMobil to bear all of the costs of the upgrades.

26. ExxonMobil argues that the July Compliance Order results in the taking of ExxonMobil's property without due process of law, contrary to the Fifth Amendment of the U.S. Constitution, because the $5.1 million in upgrades paid for by ExxonMobil is

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[31] 102 Stat. 2299 (1988).

[32] ExxonMobil August 17 Request for Rehearing at 18, *citing San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange*, 93 FERC ¶ 61,121 at 61,379 (2000).

[33] *Allegheny Electric Coop., Inc. v. Pennsylvania Electric Co.*, 92 FERC ¶ 61,206 (2000) (*Allegheny*).

[34] *Id.* at 33-35, *citing Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003-A, FERC Stats. & Regs., ¶ 31,160 at P 617 (2004), *order on reh'g*, Order No. 2003-B, FERC Statutes and Regulations ¶ 31,171 at P 41 (2004), *order on reh'g*, FERC Statutes and Regulations ¶ 31,190 (2005) (Order No. 2003-C), *see also Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004), *appeal docketed sub nom. National Association of Regulatory Commissioners v. FERC*, Nos. 04-1148, *et al*. (D.C. Cir. argued Oct. 13, 2006).

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taken from it by the Commission's actions and given to Entergy. At a minimum, ExxonMobil argues that the Commission must provide ExxonMobil a full evidentiary hearing before taking its property.

27. Finally, ExxonMobil argues that Entergy failed to comply with the December 7 Order accepting the Original IA because that order was conditioned on the outcome of Docket No. ER01-2021-000, *et al.*, which in turn conditioned approval of interconnection agreements between Entergy and Washington Parish Energy Center, L.L.C. (Washington Parish) and GenPower Keo, L.L.C. (GenPower) on Entergy filing to revise the credit provision and the *pro forma* IA to provide for credits for all network upgrades.[35] Therefore, ExxonMobil argues, the Commission has jurisdiction under section 205 to enforce its conditional acceptance of the Original IA, and Entergy should be directed to fully refund the $5.1 million, with interest, as of December 7, 2001 (the date of order accepting the Original IA, subject to conditions).[36] Further, ExxonMobil argues that the filed rate is the Original IA as accepted with the express condition of Entergy providing credits in accord with the order in ER01-2021. In the alternative, ExxonMobil states that the Commission should exercise its authority under section 309 of the FPA[37] to require Entergy to comply with its tariff, which is not limited by the refund effective period.[38] Further, ExxonMobil states that the complaint was not resolved within the 15 month period because of dilatory behavior by the public utility (Entergy) in failing to comply with the Commission orders and Entergy's Open Access Transmission Tariff. Therefore ExxonMobil states that Entergy should be required to "refund" the entire cost of the upgrade.

28. In the alternative, ExxonMobil argues that, by not allowing Entergy to voluntarily employ just and reasonable rates and practices, the Commission negates the consumer protection intent of the FPA.[39] Further, according to ExxonMobil, accepting Entergy's compliance filing would not run afoul of the filed rate doctrine or the rule against retroactive ratemaking. ExxonMobil argues that it and Entergy have essentially agreed to make a rate effective retroactively, or alternatively, that the Commission may view the compliance filing as an agreement to make the rate prospective from the date of *ExxonMobil I*. Further, ExxonMobil argues that allowing it and Entergy to agree on the

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[35] *Entergy Services, Inc.*, 95 FERC ¶ 61,437 (2001) (*Washington Parish*).

[36] *See Entergy Gulf States Inc.*, 119 FERC ¶ 61,051 (2007) (*Entergy Gulf States*).

[37] 16 U.S.C.§ 825h (2000).

[38] *Pub. Util. Comm'n State of Calif. v. FERC*, 462 F.3d 1-27, 1048 (9th Cir. 2006).

[39] ExxonMobil August 17 Request for Rehearing at 38, citing *Public Util. Dist. No. 1 v. FERC*, 471 F3d. 1053, 1058 (9th Cir. 2006).

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crediting issue is consistent with the fact that rate changes are governed by contractual relations between the parties.

## III. Discussion

29. The Commission will deny ExxonMobil's request for rehearing. ExxonMobil is incorrect that it will not take transmission service relative to the Original Transmission Facilities until crediting for the New Transmission Facilities is completed. Regardless of whether it actually received credits for transmission service taken over the New Transmission Facilities, the Commission clearly stated that "any credits that *would have been earned* [for transmission service taken over the Original Transmission Facilities for the period from commercial operation until April 15, 2004] are not recoverable."[40] Contrary to ExxonMobil's assertion, this does not mean that transmission service must have been paid for, not just taken. Rather, we meant exactly what we said: that Entergy needed to deduct the value of the transmission service, not the amount actually paid for transmission service. Nor was the order ambiguous that the Commission required Entergy to deduct the value of the transmission service that would have been earned during this period. If the order did not require Entergy to deduct the value of transmission service taken, then the Commission determination that such credits are not recoverable would have no meaning.

30. To hold otherwise would mean that the amount of credits to which ExxonMobil is entitled is dependent solely on Entergy's *classification* of those credits to either Original or New Transmission Facilities. Basing the appropriate amount of credits due on the accounting method for such credits is patently unfair. Moreover, had the crediting classification been reversed, and Entergy decided to classify credits as first accruing to the Original Transmission Facilities, and only after they were completed assign credits to the New Transmission Facilities, under ExxonMobil's approach, ExxonMobil would have been entitled to *fewer* credits (because ExxonMobil is not entitled to credits that accrued for the Original Transmission Facilities during the period from the end of the refund effective period until the issuance of *ExxonMobil I* (July 16, 2005 through January 19, 2007)).

31. Had the Original Transmission Facilities been properly classified during this period, there would not have been this dispute; Entergy would have had to pay credits to ExxonMobil for transmission taken. Therefore, to comply with *ExxonMobil I*, Entergy was required to deduct the amount of the transmission service payments associated with the transmission service over the Original Transmission Facilities that would have accrued from July 16, 2005 through January 19, 2007, had the facilities been properly assigned at the time. The July Compliance Order did not require Entergy to refund two dollars for every dollar of transmission payment, it merely required that Entergy account

[40] *ExxonMobil I*, 118 FERC ¶ 61,032 at P 17.

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for the transmission service over the Original Transmission Facilities as it would have had they been correctly designated as Network Facilities in the first place. For the same reasons, we deny ExxonMobil's request for rehearing of the Commission's ruling concerning interest calculations.

32. Similarly, we disagree with ExxonMobil that our determination in the July Compliance Order contravenes the decision to include a final refund period during which Entergy must provide credits on a prospective basis after issuance of *ExxonMobil I*. In the July Compliance Order, the Commission did not eliminate this prospective period, we enforced the period between the end of the refund period and the date *ExxonMobil I* was issued. ExxonMobil will still receive credits "to the extent that ExxonMobil has not previously taken service for which credits either did accrue or would have accrued" during the prospective period.[41]

33. The Commission agrees with ExxonMobil that credits accrue when the facilities go into commercial operation and that, because the Original Transmission Facilities did not go into commercial operation until December 2004,[42] no credits could have accrued before this date. This does not change the Commission's determination that Entergy did not comply with *ExxonMobil I*. It just means that ExxonMobil did not accrue, and therefore does not lose, credits before this date. Practically, it means that no credits are deducted for the period before December 2004, when the Original Transmission Facilities went into commercial operation.

34. ExxonMobil raises various arguments that should have been raised on rehearing of *ExxonMobil I*. The Commission was clear that Entergy must refund any transmission credits that accrued during the 15-month refund effective period, April 15, 2004, through and including July 15, 2005,[43] and any arguments ExxonMobil had about prospective relief should have been raised at that time. The argument that the Commission has granted exceptions to the refund provisions of section 206 of the FPA also should have been raised as a rehearing of the refund requirement.[44] In any case, *Allegheny* is not applicable to the circumstances presented in this case. In *Allegheny*, the parties expressly agreed in writing before Allegheny filed its complaint that refunds would begin on a date certain. Here there is no such prior agreement.

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[41] *See id.* P 17.

[42] *See id.* n.9.

[43] *Id.* at P 15-17.

[44] *Id.*

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35. ExxonMobil's argument that retroactive refunds are not mandatory and the RFA was intended to correct the problem of public utilities engaging in dilatory behavior in section 206 proceedings in order to delay the effectiveness of proposed, presumably lower, rates misses the point completely. As stated in *SDG&E*, in enacting the RFA, Congress intended "the Commission to exercise its refund authority under section 206 in a manner that furthers the long-term objective of achieving the lowest cost for consumers consistent with the maintenance of safe and reliable service."[45] ExxonMobil seems to believe that, if the Commission had made the changes to the Revised IA prospectively only, ExxonMobil would receive credits for the entire cost of the facilities prospectively. ExxonMobil is incorrect. Because credits accrue over a 20-year period commencing from commercial operation of the generator, had the Commission ordered changes to the Revised IA from the date of *ExxonMobil I*, any credits that would have been earned before the refund date, which ExxonMobil asks us to set at the date the Commission issued *ExxonMobil I*, would not have been recoverable, and interest on those credits would not have been paid. Had the Commission made the changes to the Revised IA prospectively only from the date of the Commission's order, ExxonMobil would actually have been entitled to *fewer* credits for the cost of the facilities. Therefore, providing ExxonMobil with credits during the refund period, which increases the amount recovered by ExxonMobil for the amounts it paid for the facilities, does protect ExxonMobil and carries out the intention of the RFA.

36. Similarly, ExxonMobil's arguments that the July Compliance Order represents a change in policy that should only apply prospectively and that our determination to deny recovery of credits is a taking of ExxonMobil's property should also have been raised on rehearing of *ExxonMobil I*. In addition, ExxonMobil's argument that Order No. 2003 provided that interconnection customers are entitled to complete recovery of the cost of the facilities was raised and denied on rehearing of *ExxonMobil I*.[46] As discussed above, in *ExxonMobil I*, the Commission made clear its intention to deny ExxonMobil credits for the period between the end of the refund period and the date of the Commission order. Therefore, if ExxonMobil was concerned that this was a change in policy or that this did not reflect Order No. 2003, it should have raised it on rehearing of *ExxonMobil I*.

37. ExxonMobil's arguments regarding "and" pricing, cost causation and providing a windfall to Entergy should also have been raised on rehearing of *ExxonMobil I*. As the Commission noted in *ExxonMobil I* and *II*, section 206(b) of the FPA, as it was in effect when ExxonMobil filed its complaint, places certain restrictions on the refund protection that the Commission can afford complainants. Under section 206(b), as it was in effect when ExxonMobil filed its complaint, the Commission could only set a refund effective

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[45] *See SDG&E* at 61,379, citing S. Rep. No. 491 at 5-6, reprinted in 1988 U.S.C.C.A.N. 2687-88.

[46] *ExxonMobil II*, 119 FERC ¶ 61,261 at P 11, 16-21.

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date that was no earlier than 60 days after the complainant filed the complaint, but no later than five months after 60 days after the filing of the complaint. We also stated that ExxonMobil cannot receive transmission credits or interest on those credits from July 16, 2005 to the date of the Commission's order, January 19, 2007, because the Commission would be ordering Entergy to give back to a customer money that it collected after the expiration of the refund effective period and before the date of the Commission's order in violation of the filed rate doctrine.[47]

38. The Commission also denies ExxonMobil's arguments that the Revised IA does not effectuate a rate that can be refunded as a collateral attack on *ExxonMobil I* and *II*. On rehearing of *ExxonMobil I*, ExxonMobil argued that the transmission credits and interest do not involve a rate or charge that is subject to refund under FPA section 206(b).[48] The Commission denied ExxonMobil's request for rehearing, stating:

> Although it is not a rate for service in the traditional sense that the customer receives a service for its payment, it is a term or condition for interconnection service that charges the customer and provides an opportunity for refund. As a charge with an opportunity for refund, the payment serves as a mechanism to encourage the customer to make efficient siting decisions.[[49]]

39. The Commission disagrees with ExxonMobil that the Commission was discriminatory in not taking into account the credits for the New Transmission Facilities in determining credits for the Original Transmission Facilities, because of our actions in *Union* and *Quachita*. Those cases presented different circumstances than that presented in the instant proceeding. In both *Union* and *Quachita*, all of the credits were due for a single set of facilities. Therefore it was appropriate to take into consideration credits due under the same interconnection agreement in calculating the credits arising from the Commission's determination to reclassify facilities. In contrast, as stated by ExxonMobil in its March 13, 2007 protest of Entergy's compliance filing, this proceeding presents unique factual circumstances in which there are two separate sets of facilities at the same interconnection point. Therefore, we do not believe our actions in *Union* and *Quachita* are relevant here.

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[47] *Id.* P 22.

[48] ExxonMobil February 20 Request for Rehearing, Docket No. EL03-230-001 at 9-12.

[49] *ExxonMobil II*, 119 FERC ¶ 61,261 at P 17.

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40. Additionally, we reject ExxonMobil's arguments that it should recover the entire cost of the Original Transmission facilities because Entergy failed to comply with the December 7 Order accepting the Original IA. The December 7 Order accepted the Original IA subject to the outcome of *Washington Parish*. *Washington Parish* only required Entergy to revise the *pro forma* IA, the Washington Parish IA and the GenPower IA. It did not require Entergy to revise all other IAs entered into prior to that order. In any event, if ExxonMobil believed that Entergy did not comply with a Commission order, it should have filed a complaint, which would have been subject to the same restrictions on refund protection as was the complaint at issue in this order. In *Entergy Gulf States*, the Commission stated that, immediate with acceptance of a Cottonwood IA, "subject to certain specified revisions," the revised Cottonwood IA became the filed rate.[50] Whereas the Cottonwood IA was subject to *specified* revisions, the Original IA was accepted without revision, subject to the outcome of *Washington Parish*, which also did not require revisions to the Original IA. Therefore, any changes to the Original IA must be made under section 206 of the FPA and subject to the refund limitations found therein.

41. Finally, we reject ExxonMobil's arguments that we should allow Entergy to agree to refund the full amount of the cost of the Original Transmission Facilities. First, the only issue in a compliance filing is whether the company complied with the Commission's order. By not deducting the credits that would have accrued from the end of the 15-month refund effective period (July 15, 2005) until the date of the Commission order (January 19, 2007), Entergy did not comply with *ExxonMobil I*. Further, what ExxonMobil calls Entergy's "agreement" to deduct for that period was apparently based on Entergy's misunderstanding of the Commission's order.[51] Entergy seemed to believe that *ExxonMobil I* required it to refund transmission charges during the refund period "*if* ExxonMobil had owed transmission charges and had paid Entergy for transmission service during the refund effective period."[52] Thus, it appears that it is Entergy's misreading of our statement in *ExxonMobil I*, that the refund periods applied to "any credits that would have been accrued," as meaning that the associated transmission service must have actually been paid for, that led Entergy to "voluntarily" propose to refund the entire cost of the Original Transmission Facilities. ExxonMobil has provided no evidence that Entergy was otherwise motivated to provide additional credits than directed to by the Commission.

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[50] *Entergy Gulf States*, 119 FERC ¶ 61,051 at P 19.

[51] *See* Entergy March 28, 2007 Answer to ExxonMobil Protest at 3.

[52] *Id.* (emphasis in original).

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The Commission orders:

ExxonMobil's request for rehearing is hereby denied.

By the Commission. Commissioner Kelly dissenting with a separate statement attached.

( S E A L )

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ExxonMobil Corporation v. Entergy Services, Inc. Docket No. EL03-230-003

(Issued February 22, 2008)

KELLY, Commissioner, *dissenting:*

Here we have a case where ExxonMobil Corporation (ExxonMobil) seeks rehearing of a Commission order[53] rejecting a compliance filing made by Entergy Services, Inc. (Entergy). In its compliance filing, Entergy voluntarily offered to refund to ExxonMobil the cost of certain network transmission facilities that ExxonMobil paid for up front despite the fact that the Commission could not order Entergy to do so under Federal Power Act (FPA) section 206.[54] The July Compliance Order rejected Entergy's filing as non-compliant. I dissented in part from that order because I believe that the Commission should not have prohibited Entergy from voluntarily paying off the full amount of its valid debt to a customer.

The facts in this case are complex. ExxonMobil has two sets of creditable facilities that were, for various reasons, divided into two distinct groups for crediting reasons. Crediting issues for the first group were resolved prior to those of the second group. Therefore, Entergy gave ExxonMobil credits for the first group prior to those for the second group. It appears that, based on these circumstances, Entergy accounted for the credits for these two groups sequentially and that this accounting method resulted in Entergy's delaying the start of crediting for the second group until after the Commission issued an order on ExxonMobil's complaint surrounding transmission credits for the second group.[55] Due to statutory restrictions on the Commission's ability to order refunds under FPA section 206, the Commission could only order credits for a 15-month period. However, in a truly unusual turn of events, Entergy expressed its willingness to give credits including time before the Complaint Order, but after the end of the 15-month refund window, when the Commission could not have ordered such refunds. Unfortunately, the Commission rejected this offer in the July Compliance Order.

To begin with, I note that Entergy did not offer to pay more than the Commission would have ordered if we had not been prevented from doing so by FPA section 206.

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[53] *ExxonMobil Corp. v. Entergy Servs., Inc.*, 120 FERC ¶ 61,051 (2007) (July Compliance Order).

[54] 16 U.S.C. § 824e (2000 & Supp. V 2005).

[55] *ExxonMobil Corp. v. Entergy Servs., Inc.*, 118 FERC ¶ 61,032 (Complaint Order), *reh'g denied*, 119 FERC ¶ 61,261 (2007) (Complaint Rehearing Order).

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Further, no party objected to Entergy's proposal. I agree that the Commission can only order Entergy to give credits for the 15-month refund window. However, I do not correspondingly agree that the Commission should step in and prevent Entergy from voluntarily paying off the full amount of its valid debt to a customer. This approach seems to be lacking in common sense. The Commission should be encouraging right behavior by companies rather than sending the signal that we are more concerned with form than substance.

Some may argue that the filed rate doctrine is violated if Entergy voluntarily grants credits for a period when the Commission was prohibited from directing credits. However, in its request for rehearing, ExxonMobil asserts that the Complaint Order did not set a rate, but merely granted a request to reclassify the subject facilities from direct assignment to Network Facilities.[56] ExxonMobil states that the July Compliance Order failed to identify the alleged "rate" that is being modified retroactively and cites *Niagara Mohawk Power Co. v. FERC* for the proposition that "without there having been a preexisting relevant filed rate, there can be no retroactive alternation of it."[57] The order here dismisses ExxonMobil's assertions as a collateral attack on the Complaint Order and the Complaint Rehearing Order.[58] If Entergy's proposal to fully pay off its valid debt to a customer indeed violates the filed rate doctrine, I believe that the so-called "violation" merely results in the same just and reasonable rate that we have approved for other periods being applied during a period when we were prohibited from directing its application.

Accordingly, for the reasons stated above, I dissent.

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Suedeen G. Kelly

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[56] ExxonMobil Aug. 17, 2007 Request for Rehearing, Docket No. EL02-230, at 24.

[57] *Id.* (quoting *Niagara Mohawk Power Co. v. FERC*, 452 F.3d 822, 830 n.9 (D.C. Circuit 2006)).

[58] *ExxonMobil Corp. v. Entergy Servs., Inc.*, 122 FERC ¶ 61,168, at P 38 (2008) (quoting Complaint Rehearing Order, 119 FERC ¶ 61,261 at 17 ("'Although it is not a rate for service in the traditional sense that the customer receives a service for its payment, it is a term or condition for interconnection service that charges the customer and provides an opportunity for refund. As a charge with an opportunity for refund, the payment serves as a mechanism to encourage the customer to make efficient siting decisions'")).

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