171 FERC ¶ 61,188
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Chehalis Power Generating, L.P. Docket No. ER05-1056-010

ORDER ON REMAND

(Issued June 1, 2020)

1. On May 19, 2017, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), remanded this case to the Commission to determine how to balance the equities when ordering the recoupment by Chehalis Power Generating, L.P. (Chehalis)[1] of refunds originally paid by Chehalis to the Bonneville Power Administration (Bonneville).[2] Upon balancing the equities based on the D.C. Circuit's guidance, we find that it is equitable for Chehalis to recoup refunds from Bonneville as if the Commission had treated its filing as an initial rate subject to an FPA section 206[3] investigation, plus interest, as discussed below. We direct Bonneville to issue payment to Chehalis consistent with this order, and to file a report within 120 days of the date of this order detailing the payment it has made to Chehalis.

[1] Consistent with the Commission's prior orders as well as the parties' pleadings, the Commission will to refer to the substituted petitioner, TNA Merchant Projects, Inc., as "Chehalis."

[2] *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354 (D.C. Cir. 2017) (Remand Order).

[3] 16 U.S.C. § 824e (2018).

I. Background

2. This case has a long history, dating back to 2005, which is recounted at length in the Commission's earlier orders.[4] As relevant here, Chehalis operated an electric generating plant connected to Bonneville's electric transmission system. Prior to 2005, Chehalis supplied reactive power to Bonneville pursuant to an Interconnection Agreement that did not provide compensation to Chehalis for providing this service. In May 2005, Chehalis filed a rate schedule, which set forth Chehalis's proposed rates for the provision of Reactive Power Service where it would charge Bonneville for these services for the first time. In its transmittal letter accompanying the filing, Chehalis described these rates as "initial rates" because Chehalis had never before sought to charge for this service.[5]

3. In July 2005, the Commission found that Chehalis's proposed rate schedule was a changed rate, rather than an initial rate, and, therefore, suspended it and made it effective subject to refund.[6] The Commission reasoned, consistent with longstanding precedent, that "[a]n initial rate schedule must involve a new customer and a new service," and Chehalis was not offering either; Chehalis simply continued the "provision of reactive power to [Bonneville]."[7] Consequently, the Commission exercised its authority under FPA section 205(e) to suspend the rates "for a nominal period, to become effective

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[4] *Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144 (2005) (Initial Order), *order on reh'g*, 113 FERC ¶ 61,259 (2005), *vacated sub nom. TNA Merchant Projects, Inc. v. FERC*, 616 F.3d 588 (D.C. Cir. 2010), *order on remand sub nom. Chehalis Power Generating, L.P.*, 134 FERC ¶ 61,112 (2011), *order on reh'g*, 141 FERC ¶ 61,116 (2012), *order on voluntary remand*, 145 FERC ¶ 61,052 (2013), *reh'g denied*, 152 FERC ¶ 61,050 (2015) (Recoupment Order), *reh'g denied*, 153 FERC ¶ 61,194 (2015) (Order on Rehearing), *rev'd in part*, Remand Order, 857 F.3d 354.

In a separate but related hearing, a presiding judge found, and the Commission agreed, that Chehalis's proposed rate was not just and reasonable, and that Chehalis must make refunds to Bonneville of the amounts Chehalis had received in excess of the just and reasonable rate. *See Chehalis Power Generating, L.P.*, 123 FERC ¶ 61,038, at ordering para. (C) (2008) (Order on Initial Decision); *cf. Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144, at PP 21-23 (2005) (Hearing Order); *Chehalis Power Generating, L.P.*, 118 FERC ¶ 63,009 (2007) (Initial Decision).

[5] Chehalis, Transmittal Letter, Docket No. ER05-1056-000 (filed May 31, 2005).

[6] Initial Order, 112 FERC ¶ 61,144 at P 1.

[7] *Id.* P 23.

August 1, 2005 ... subject to refund."[8] The Commission then denied Chehalis's request for rehearing.[9] On April 17, 2008, the Commission concluded that Chehalis's proposed rates were excessive and ordered Chehalis to refund Bonneville a portion of the revenues Chehalis had collected for supplying reactive power service from August 1, 2005 through September 30, 2006, an amount totaling approximately $2 million.[10]

4. Chehalis appealed the Commission's determinations reflected in its denial of rehearing of the Initial Order, arguing that its May 2005 proposed rate schedule was an "initial rate" and not a "changed rate" subject to suspension and refund. The D.C. Circuit vacated and remanded the Commission's orders because it found that the Commission had failed to explain why Chehalis was required to file an initial rate schedule when it was providing Bonneville with power *gratis*, a claim which was essential to the Commission's argument that Chehalis's May 2005 proposed rate schedule constituted a changed rate.[11] On remand, the Commission issued an order again holding that Chehalis's May 2005 proposed rate schedule constituted a changed rate. After the Commission denied its request for rehearing, Chehalis once more appealed the Commission's determination to the D.C. Circuit.[12]

5. Before the D.C. Circuit issued a ruling, however, the Commission undertook a voluntary remand. The Commission then issued a new order on October 17, 2013, in which it reaffirmed its finding that "Chehalis should have earlier filed a rate schedule for its provision of reactive power service, making its later filing ... a changed rate." The Commission noted, however, that its precedent on this point had not been entirely clear, and, thus, stated that its determination that entities should file "rates, terms and conditions for the provision of reactive power service ... for which there is no compensation" was a prospective policy, inapplicable to Chehalis. Therefore, the Commission reasoned, "it would be appropriate for Chehalis to recover the amounts previously refunded to [Bonneville], with interest."[13]

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[8] *See id*. P 1.

[9] *Chehalis Power Generating, L.P.*, 113 FERC ¶ 61,259.

[10] Order on Initial Decision, 123 FERC ¶ 61,038 at ordering para. (C), n.111.

[11] *TNA Merchant Projects, Inc. v. FERC*, 616 F.3d at 593.

[12] Remand Order, 857 F.3d at 357-358.

[13] *Chehalis Power Generating, L.P.*, 145 FERC ¶ 61,052 at PP 11, 14.

6. On July 16, 2015, the Commission found that, while Chehalis should recoup refunds it paid to Bonneville,[14] the Commission could not order Bonneville to return such refunds.[15] Specifically, the Commission stated that the FPA did not grant the Commission authority to order Bonneville to return these amounts, because, as a governmental entity, Bonneville was an exempt public utility pursuant to section 201(f) of the FPA.[16] The Commission concluded that ordering Bonneville to return the refunds was beyond its authority.[17]

7. Chehalis requested rehearing, which the Commission denied in its November 19, 2015 Order on Rehearing.[18] The Commission affirmed its holding that it lacked the authority to order Bonneville, an exempt public utility, to return the refunds.[19] Further, the Commission reasoned that section 309 of the FPA did not provide the Commission with the "broad remedial authority" that Chehalis claimed.[20] The Commission did not depart from its previously expressed view that it would be appropriate for Chehalis to recover amounts it had previously refunded to Bonneville, with interest.[21]

8. On appeal, however, the D.C. Circuit found that the Commission "erred when it held that it lacked the authority" and remanded the case to the Commission for the narrow purpose of "balanc[ing] the equities of this case to determine the amount of recoupment to which Chehalis is entitled,"[22] including "whether something less than full recoupment might be warranted."[23] The D.C. Circuit offered specific guidance on the scope of the remand. It noted that the Commission must "evaluate the relevant equities" when determining "how much" of the refunds originally paid by Chehalis to Bonneville

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[14] Recoupment Order, 152 FERC ¶ 61,050 at P 29.

[15] *Id*.

[16] 16 U.S.C. § 824(f).

[17] Recoupment Order, 152 FERC ¶ 61,050 at P 29.

[18] Order on Rehearing, 153 FERC ¶ 61,194**.**

[19] *Id.* P 16.

[20] *Id.* P 17.

[21] *See id*.

[22] Remand Order, 857 F.3d at 356, 363.

[23] *Id*. at 356.

Chehalis could recoup.[24] Specifically, the D.C. Circuit noted several equities that the Commission should balance, including: Chehalis's "possible confusion regarding the necessity of filing" the rate schedule and "the fact that [Chehalis] charged [Bonneville] a rate which [the Commission] deemed to be unjust and unreasonable."[25] The D.C. Circuit, in this regard, noted both Bonneville's claim that recoupment of the entire amount at issue, plus interest, would result in Chehalis's unjust enrichment, and Bonneville's claim that, under Chehalis's theory that it was filing a new rate, Bonneville would have been entitled to refunds under section 206 of the FPA, which provides for refunds when the Commission finds a rate unjust and unreasonable.[26]

9. On December 21, 2017, the Commission issued an order, which found that it was appropriate to further develop the record to determine the amount Chehalis should be permitted to recoup. A briefing schedule was established, but the Commission held the briefing in abeyance to allow for settlement judge procedures. The parties chose not to avail themselves of settlement judge procedures and ultimately filed briefs and reply briefs detailing their positions, reflected below.[27]

II. Pleadings

A. Chehalis Initial Brief

10. Chehalis argues that the relevant rates should be treated as "initial rates."[28] Consequently, Chehalis argues that the rate filing would not be subject to the Commission's suspension and refund authority under section 205(e) of the FPA.[29]

[24] *Id.*

[25] *Id.*

[26] Remand Order, 857 F.3d at 363.

[27] *Chehalis Power Generating, L.P.*, 161 FERC ¶ 61,269 (2017).

[28] Chehalis Br. at 6.

[29] *Id*. at 6-7.

11. Chehalis states that a prior settlement, the TransAlta Settlement Agreement,[30] also protected Chehalis from any obligation to refund any portion of the revenues it collected for reactive power service to Bonneville from August 1, 2005 to September 30, 2006, and adds that it is important for the Commission to respect that portion of the TransAlta Settlement Agreement.[31]

12. Chehalis objects to the Commission's decision to treat its filing as a changed rate instead of an initial rate and emphasizes that the Commission has, in fact, accounted for its inequitable treatment of Chehalis by determining that Chehalis should receive a full refund with interest so as "not to be penalized."[32] Chehalis argues that anything less than full recoupment would not accord with the Commission's prior statements[33] and that recoupment of the full refund amount, with interest, is necessary to "put the parties back in the positions in which they would have found themselves if the Commission [had] not erred…."[34] Chehalis also explains that, because Bonneville would not have received any refunds from Chehalis if the Commission had correctly treated the Chehalis filing as an initial rate, only full recoupment is equitable.[35] Chehalis adds that there are no equities to balance on Bonneville's side.[36]

13. In this regard, Chehalis argues that the D.C. Circuit has held that, under section 205(e) of the FPA, the Commission's suspension and refund power applies only to *changed* rates and that Commission may not suspend initial rates.[37] Chehalis continues to maintain that the

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[30] The TransAlta Settlement Agreement was executed by Bonneville and a number of generators, including Chehalis. It set forth a process and methodology for all of the generators party to the settlement to be compensated for reactive power. It was approved by the Commission on April 19, 2005. *Transalta Centralia Generation, L.L.C.*, 111 FERC ¶ 61,087 (2005).

[31] Chehalis Br. at 10.

[32] *Id*. at 11-12 (citing *Chehalis,* 152 FERC ¶ 61,050 at PP 14, 20-22).

[33] *Id.* at 12.

[34] *Id*. (citing *Black Oak Energy LLC*, 146 FERC ¶ 61,099, at P 45 (2014), *order on reh'g*, 155 FERC ¶ 61,013 (2016)).

[35] *Id.*

[36] *Id*.

[37] *Id*. at 15 (citing *Middle S. Energy, Inc. v. FERC*, 747 F.2d 763, 769 (D.C. Cir. 1984)).

rate schedule for reactive power service was an initial rate and, therefore, not subject to the Commission's suspension and refund authority under section 205(e) of the FPA. Chehalis also notes that the Commission repeatedly found that it would be appropriate for Chehalis to recoup all amounts previously refunded to Bonneville, with interest.[38]

14. Chehalis further argues that it would be inequitable to, as an alternative, apply the refund protections applicable under section 206 of the FPA. It notes that, when the Commission undertakes a section 206(b) investigation, the Commission has the burden of proof to show that the rate is unjust, unreasonable, unduly discriminatory or preferential, and that the procedures under section 206 are different and more strict than those under section 205.[39] Chehalis states that the D.C. Circuit, in *Emera Maine*, found that refunds are available under section 206 of the FPA only when the Commission explicitly finds that the existing rates are unjust and unreasonable, though its citation acknowledges that the just and reasonable standard under section 206 of the FPA is the same as under section 205.[40] Chehalis observes that the Hearing Order did not find that the Reactive Power Schedule was unjust, unreasonable, or otherwise unlawful as required under section 206.[41] Because there is a zone of reasonableness for just and reasonable rates, Chehalis argues that the fact that the rate Chehalis filed initially was higher than its revised rate does not necessarily mean that the initial rate was unjust and unreasonable.[42] Chehalis asserts that under section 206, existing rates must be found to be entirely outside of the zone of reasonableness before the Commission can require revised rates.[43]

15. Chehalis also claims that the D.C. Circuit, in ordering the Commission to "more carefully balance the equities of this case," overlooked the fact that the Commission previously had weighed the equities in favor of Chehalis's full recoupment.[44]

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[38] *Id*. at 16-17 (citing *Chehalis*, 145 FERC ¶ 61,052 at PP 12, 14; *Chehalis*, 152 FERC ¶ 61,050 at P 22).

[39] *Id.* at 17-18 (citing *Emera Maine v. FERC*, 854 F.3d 662 (D.C. Cir. 2017)).

[40] *Id*. (citing *Emera Maine*, 854 F.3d at 602).

[41] *Id.* at 19.

[42] *Id*. (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)).

[43] *Id*. at 20 (citing *City of Winnfield, LA v. FERC*, 744 F.2d 871 (1984)).

[44] *Id.* at 22-23.

16. Chehalis suggests that, in the event that it does not receive full recoupment, it may re-raise the issue of whether its filing was an "initial rate" or a "changed rate" on appeal, which would not serve the interest of administrative efficiency or judicial economy.[45]

B. Bonneville Initial Brief

17. Bonneville states that the primary aim of the FPA is "the protection of consumers from excessive rates and charges."[46] As the customer here, Bonneville contends that the Commission is obligated to protect Bonneville from Chehalis charging a rate found by the Commission to be 250% over the just and reasonable rate.[47] Bonneville explains that, as a self-funding agency that must recover its costs through rates charged to power and transmission customers, any recoupment would be born exclusively from its ratepayers.[48] Bonneville adds that Chehalis's alleged confusion was the only justification for recoupment, but that any lack of clarity in Commission precedent should not favor the party charging the unjust and unreasonable rate.[49]

18. Bonneville contends that allowing Chehalis to fully recoup a rate found to be over 250% of the just and reasonable rate would lead to Chehalis's unjust enrichment.[50] Bonneville also contends that, whatever recoupment amount the Commission decides, interest on the recoupment should not be required, because the plain language of the Commission's regulations requires interest only from a "public utility" whose rates were suspended.[51]

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[45] *Id*. at 24-25.

[46] Bonneville Initial Br. at 10 (citing *Mun. Light Bds.*, 450 F.2d 1341, 1348 (1971), *cert. denied*, 405 U.S. 989 (1972)).

[47] *Id.*

[48] *Id*.

[49] *Id*. at 11.

[50] *Id*.

[51] *Id.* at 12 (citing 18 C.F.R. § 35.19a(1) (2019)). 18 C.F.R. § 35.19a(1) states:

> The public utility whose proposed increase rates or charges were suspended shall refund at such time in such amounts and in such manner as required by final order of the Commission the portion of any increased rates or charges

19. Bonneville argues that interest is not required because it is not a "public utility," and it was, in fact, Chehalis's rate that was suspended.[52] Moreover, the Commission's interest regulation only applies where an amount is subject to "refund," but, as the D.C. Circuit noted in the instant case, "recoupment… is an entirely distinct remedy from a refund."[53] Finally, Bonneville argues there is no justification for it to pay interest, because it lawfully possessed the funds at issue per the Commission's 2008 instructions to Chehalis to issue refunds; consequently, Bonneville argues that, if interest must be paid, it should be calculated from the point at which the Commission has fully balanced the equities and issued an order of recoupment.[54]

20. Instead, Bonneville argues that the Commission should weigh the equities as if it had instead set Chehalis's rate for hearing under section 206, and apply the undisputed finding that the rate was unjust and unreasonable.[55] Bonneville argues that Chehalis could not have reasonably expected its rate schedule to be shielded from all Commission scrutiny.[56] Bonneville states that Chehalis has conceded as much in its pleadings.[57]

21. Bonneville explains that Chehalis's rate was evaluated under the *AEP* methodology, which was based on objective criteria: whether or not Chehalis included proper costs.[58] Bonneville, therefore, argues that it is reasonable to assume that the Commission would have investigated such an obviously egregious rate under section 206(b).[59]

22. Bonneville contends that, although section 206, unlike section 205, imposes the burden of proof on the Commission, the objective test required under the *AEP* methodology suggests there would have been little difficulty in the Commission meeting

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found by the Commission in that suspension proceeding not to be justified, together with interest….

[52] Bonneville Initial Br. at 12.

[53] *Id*. (citing Remand Order, 857 F.3d at 359).

[54] *Id*. at 13.

[55] *Id.* at 14.

[56] *Id*. at 13.

[57] *Id.* at 14.

[58] *Id*. at 15.

[59] *Id*. at 14-15.

that burden.[60] Because the finding that Chehalis violated the TransAlta Settlement Agreement by not complying with the *AEP* methodology was never challenged, Bonneville stresses that the current record is sufficient to reasonably believe that the Commission could have reached the same conclusion under section 206.[61] Bonneville argues that allowing a complete recoupment would completely ignore the harm that it suffered by being charged an unjust and unreasonable rate.[62]

23. Bonneville explains that, in order to calculate recoupment using a section 206-style methodology, it is necessary to establish a refund effective date, the date from which refunds would be collected. Bonneville proffers the following timeline:

- 5/31/05: Chehalis filed its rate schedule;
- 7/27/05: The Commission issued an order accepting Chehalis's filing as a changed rate. However, for recoupment purposes, Bonneville suggests using this as the date on which the Commission would have accepted Chehalis's filing as an initial rate and instituted an investigation into the initial rate under section 206(b) of the FPA. The reason for the delay is because, prior to the Energy Policy Act of 2005 (EPAct 2005),[63] the Commission would have set a refund effective date 60 days after publication of its notice of intent to institute an investigation;
- 10/5/05: refund period would begin;
- 9/30/06: Chehalis's subsequent filing for reactive power service becomes effective, superseding the rate at issue here and ending the refund period.[64]

24. Under this scenario, Bonneville states that the potential refund period under FPA section 206(b) refunds is from October 5, 2005 through September 30, 2006, 65 days

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[60] *Id.* at 15.

[61] *Id*. at 16-17.

[62] *Id*. at 18-19.

[63] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 691-692 (2005). EPAct 2005 amended section 206(b) to allow the Commission to set the refund date as of the date of publication of notice of its intent to initiate a proceeding, eliminating the 60-day window that was in effect when Chehalis made its filing.

[64] Bonneville Initial Br. at 19-20.

longer than the period actually ordered by the Commission.[65] This would result in a recoupment amount of $270,289, exclusive of interest, according to Bonneville.[66]

25. Bonneville argues that Chehalis was not confused about its filing being treated as a changed rate, quoting Chehalis's statements in its initial rate filing that "[e]ven if the submitted rates were not initial rates…." and "waiver of... Section 35.15 of the Commission's regulations in the event the Commission were to find that this rate is not an initial rate."[67] Bonneville concludes that, because Chehalis grasped the possibility that its rate would be treated as a changed rate, the Commission should not give any weight to Chehalis's arguments that it was confused.[68]

26. Finally, Bonneville points to five additional factors that the Commission should weigh. First, Bonneville contends that Chehalis's contention that it is entitled to full recoupment is unsupportable because it assumes the Commission would have accepted the rate as an initial rate with no further examination.[69] Second, Bonneville points out that four other generators were party to the TransAlta Settlement Agreement, and only Chehalis violated it.[70] Third, Bonneville reasons that EPAct 2005 amended section 206(b) to allow the Commission to eliminate the 60-day refund limitation that would have applied here, suggesting there is no further equity in over-recovering.[71] Fourth, Bonneville asserts that allowing full recoupment would result in manifest injustice to Bonneville by allowing Chehalis to charge an unjust and unreasonable rate for so long.[72] Fifth, Bonneville urges that the Commission should exercise restraint in drafting the order, limiting it strictly to the unique circumstances of this case "where a non-jurisdictional

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[65] *Id*. at 20.

[66] *Id.* at 21.

[67] *Id*. (citing Chehalis, Transmittal Letter, Docket No. ER05-1056-000, at 6, 7 (filed May 31, 2005)).

[68] *Id*. at 22.

[69] *Id*.

[70] *Id*.

[71] *Id*. at 23.

[72] *Id*.

entity improperly received a refund" due to the Commission's "own mistaken or unlawful acts."[73]

C. Chehalis Reply Brief

27. Chehalis argues that, despite the Commission previously ruling that Chehalis should "recover the amounts previously refunded to [Bonneville], with interest," Bonneville simply reiterates arguments it had made prior to the Commission making that finding, and, consequently, that Bonneville has presented no arguments to justify the Commission reaching a different conclusion now.[74]

28. Chehalis argues that, notwithstanding the ratepayer protection objective of the FPA, the Commission must regulate rates within its jurisdiction in accordance with the statutory limits on its authority under the FPA.[75] Chehalis reiterates that, because the Commission had no authority to order Chehalis to issue refunds to Bonneville in the first place, allowing Bonneville to retain any portion of the recoupment amount would be contrary to the limits on the Commission's authority.[76]

29. Chehalis takes issue with Bonneville's conjecture that the Commission would have decided to launch a section 206 proceeding if it had not acted under section 205. Chehalis explains that the Commission did not find the rate unjust and unreasonable until after it had completed an evidentiary hearing nearly three years later.[77] Chehalis also argues that it is appropriate to calculate interest on the amounts under section 35.19a of the Commission's regulations, because Chehalis has not had the use of the money during the time period and because it would put Chehalis in the place it would have been had the Commission not erred in the first place.[78]

30. Chehalis opposes a section 206-style remedy, because it notes that the Commission never availed itself of section 206 of the FPA. First, Chehalis argues that the case was

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[73] *Id*. at 25 (citing Remand Order, 857 F.3d 359-60).

[74] Chehalis Reply Br. at 2-4 (citing *Chehalis*, 145 FERC ¶ 61,052 at P 14).

[75] *Id.* at 4 (citing *S. Cal. Edison Co. v. FERC*, 195 F.3d 17, 18-19 (D.C. Cir. 1999); *City of Anaheim v. FERC*, 558 F.3d 521, 522 (D.C. Cir. 2009); *Fl. Power & Light Co. v. FERC*, 617 F.2d 809, 814-15 (D.C. Cir. 1980)).

[76] *Id*.

[77] *Id*. at 6-7.

[78] *Id*. at 7-8.

conducted under section 205 and nothing in section 205 permits the Commission to consider section 206 refund protections.[79] Second, Chehalis notes, in September 2006, it filed a reduction in rates for reactive power service, which the Commission accepted, made effective subject to refund, and subject to the outcome of the instant proceeding.[80]

31. After the Order on Initial Decision was issued, Chehalis issued refunds to Bonneville for both the period at issue here and for the period from October 2006 through September 2007. Because the Commission's authority to order refunds under section 206 of the FPA is limited to revenues collected during a 15-month period after the effective date, Chehalis argues that refunds would only be valid for the 15-month period after it first filed its rate schedule in October 2005 (meaning that no refunds would be available from January 2007 through September 2007).[81] Chehalis continues, noting that, as an initial rate schedule, its filing would not have been subject to the Commission's suspension and refund authority under section 205(e), and, therefore, would have been the "last clean rate."[82] Accordingly, under the last clean rate doctrine, where a utility files a rate decrease to the last clean rate under section 205, the burden remains on the Commission under section 206 to show that a further reduction is warranted.[83] Chehalis avers that the Commission would therefore have been unable to order refunds for the rate decrease in the subsequent filing unless it had also initiated a section 206 filing in that docket.[84] Because no such investigation was initiated, Chehalis argues that it would be inequitable to reduce the amount of refunds it recouped for service from August 1, 2005 through September 30, 2006 while permitting Bonneville to retain all refunds for service from October 1, 2006 through September 30, 2007.[85]

32. Chehalis also argues that Bonneville's scenario is imaginary, because the Commission did not actually investigate Chehalis's filing under section 206 of the FPA. Consequently, the Commission never established a refund effective date, nor did it

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[79] *Id*. at 9.

[80] *Id.*

[81] *Id.* at 9-10.

[82] *Id*. at 10 (citing *Joint California Complainants v. Pac. Gas and Elec. Co*., 161 FERC ¶ 61,179, at P 2, n.3 (2017); *Seminole Elec. Coop., Inc. v. Fl. Power and Light Co.*, 65 FERC ¶ 61,413, at P 14 (1993); *Appalachian Power Co.*, 50 FERC ¶ 61,261 (1990); *Pub. Serv. Com'n of NY v. FERC*, 642 F.2d 1335, at 1345-1345 (D.C. Cir. 1980)).

[83] *Id*. at 9-10.

[84] *Id.* at 10.

[85] *Id*.

conclude that Chehalis's rate was unjust and unreasonable.[86] Chehalis adds that there is no evidence to suggest that the Commission would have instituted a section 206 investigation, and that the Commission may have been unwilling to bear the burden of proof required under section 206.[87] Chehalis further claims that the Commission's Notice of Filing of the Reactive Power Schedule wherein the Commission "characterized" the filing as "its initial Rate Schedule No. 2…"[88] suggests that the Commission chose not to investigate the matter. Chehalis concludes that nothing in the FPA authorizes the Commission to invoke a retroactive refund effective date or determine the rate many years later, and, therefore, the proposal cannot be implemented in an equitable manner.[89]

33. Chehalis also disputes Bonneville's arguments that its rate was unjust and unreasonable. Chehalis states that Bonneville ignores Commission rulings: (1) the Commission's policy to require the filing of rate schedules for the supply of reactive power service for which no compensation was to be paid would not be applied to Chehalis; and, (2) for that reason, Chehalis is entitled to recoup the refunds of charges for reactive power service from August 1, 2005 to September 30, 2006.[90] Chehalis notes that the D.C. Circuit stated that "we do not disturb the Commission's holding that recoupment of funds is appropriate in this case."[91]

34. Chehalis concludes with five further arguments: (1) that nothing in the record shows that the Commission would have found the reactive power rate schedule to be unjust and unreasonable under section 206;[92] (2) that other generators which were parties to the TransAlta Settlement Agreement reduced their rates after negotiations;[93] (3) that changes as a result of EPAct 2005 are irrelevant, because the Commission did not

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[86] *Id.* at 11.

[87] *Id*. at 11-12.

[88] *Id*. at 12.

[89] *Id*. 11.

[90] *Id*. at 13-14.

[91] *Id*. at 14 (citing Remand Order, 857 F.3d at 363).

[92] *Id.* at 20.

[93] *Id.*

institute a section 206 proceeding;[94] (4) the Commission may not deviate from prior practices without justification, and there is no justification for imposing a policy to require generators to file rate schedules of reactive power service when no compensation for such service is received;[95] and (5) recoupment of the full amount is needed to put Chehalis in the position it would have occupied if the Commission had not erred.[96]

D. Bonneville Reply Brief

35. Bonneville disputes Chehalis's argument that its rate was protected from the Commission's suspension and refund authority under the TransAlta Settlement Agreement. Bonneville points to the plain language of the settlement, which states that it "is intended solely to bind the Settling Parties [and] does not bind the Commission to any determination…"[97] Bonneville explains that this language did not bind the Commission to any rate determination or conclusion about whether it was an initial rate.[98] Bonneville adds that the settlement specifically allowed Bonneville to challenge the "inputs" to the *AEP* methodology.[99] Therefore, Bonneville argues that the TransAlta Settlement Agreement did not insulate Chehalis from the possibility of issuing refunds.[100] Moreover, Bonneville notes that the Commission's statutory authority to review rates cannot be avoided through a settlement, which Chehalis should have known.[101]

36. Bonneville also argues that the terms of TransAlta Settlement Agreement, which Chehalis was found to have violated, are no longer the issue; rather, the issue is how to weigh the equities in determining how much Chehalis is permitted to recoup.[102] Bonneville notes that Chehalis has repeatedly stated that the Commission could have instituted a section 206 proceeding, and that it would be absurd for the Commission to

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[94] *Id.*

[95] *Id.* at 20-21.

[96] *Id*. at 21.

[97] Bonneville Reply Br. at 3 (citing TransAlta Settlement Agreement at 2-3).

[98] *Id*. at 3-4.

[99] *Id*. at 4.

[100] *Id*.

[101] *Id*.

[102] *Id.* at 5.

overlook its determination that Chehalis's rate was unjust and unreasonable.[103] Bonneville asserts that the reason the Commission did not use its section 206 authority was because the Commission acted under section 205, not because the Commission thought the rate was just and reasonable.[104] Bonneville states that, the Commission could have reviewed the rate and have reached the same conclusion under either FPA section 205 or 206.[105] Bonneville adds that, if the Commission's only requirement here was to award full recoupment, then the D.C. Circuit would have upheld the Commission's previous findings and ordered full recoupment itself.[106]

37. Bonneville disputes the applicability of *Emera Maine* to the instant case, but argues that even if it does apply, it supports Bonneville's position. Bonneville notes that the D.C. Circuit explicitly directed the Commission to "address [Bonneville's section 206 argument] … when it weighs the equities of recoupment on remand."[107] Bonneville explains that its section 206 argument is inherently an after-the-fact look at what the Commission could have done to assess how much recoupment would be equitable.[108] Bonneville argues that *Emera Maine* does not prevent this type of analysis, but even if it did, the *Emera Maine* standard that a rate has to be entirely outside the zone of reasonableness does not only apply, because the court explicitly noted that the zone of reasonableness finding was dicta.[109] Consequently, the Commission's finding that Chehalis's rate was unjust and unreasonable is sufficient to conclude that the Commission would have ordered Chehalis to make refunds under section 206(b).[110] Bonneville further asserts that, even if the Commission were not engaged in a purely equitable exercise and instead had to make new findings, the record contains ample evidence that the Commission could have met its burden to show that Chehalis's rate was unjust and unreasonable.[111] Finally, Bonneville

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[103] *Id*. at 6.

[104] *Id*.

[105] *Id*. at 6-7.

[106] *Id*. at 7.

[107] *Id.* at 7-8 (citing Remand Order, 857 F.3d at 363).

[108] *Id*. at 8.

[109] *Id*. (citing *Emera Maine*, 854 F.3d 9, 22-23).

[110] *Id*.

[111] *Id*. at 9. Bonneville points to multiple Commission findings to demonstrate that Chehalis improperly implemented its rate under the TransAlta Settlement Agreement.

notes that the Presiding Judge specifically found – in findings adopted by the Commission – that components of Chehalis's rate were "unjust and unreasonable" and even in some cases "unconscionable."[112] Consequently, Bonneville argues that there are numerous instances of findings to demonstrate that the Commission could have met its burden under *Emera Maine's* application of the section 206(b) standard.[113]

38. Bonneville argues that the FPA requires that Bonneville receive a refund, because the Commission's fundamental statutory responsibility is to ensure that all rates are just and reasonable.[114] Where, as here, a rate is found to be unjust and unreasonable, Bonneville asserts that the Commission must determine the just and reasonable rate and impose it.[115] Bonneville believes that it is entitled to a full refund, reduced only to the extent that Chehalis was confused.[116] To do otherwise, Bonneville states, would balance the equities completely in Chehalis's favor, and, moreover, it would allow Chehalis to charge an unjust and unreasonable rate.[117] Bonneville adds that an ostensible lack of notice regarding filing requirements cannot shield Chehalis from rate scrutiny, especially given that the D.C. Circuit noted that the existence of an unjust and unreasonable rate was a factor to balance in Bonneville's favor.[118]

39. Bonneville suggests that the D.C. Circuit concluded that the Commission has "broad authority and considerable latitude" under section 309 of the FPA to "undo harms caused by its own mistaken or unlawful acts."[119] Assuming the Commission would have

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[112] *Id*. at 9-11 (citing Initial Decision, 118 FERC ¶ 63,009 at PP 60, 128, 149, 170; Order on Initial Decision, 123 FERC ¶ 61,038 at PP 12, 100-104, 128-34).

[113] *Id*. at 11.

[114] *Id*. at 14 (citing *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016) (*EPSA*)).

[115] *Id*. (citing *EPSA*, 136 S. Ct. at 767).

[116] *Id*.

[117] *Id.* at 15.

[118] *Id*. at 15-16.

[119] *Id.* at 16 (citing Remand Order, 857 F.3d at 359-369).

instead acted under section 206 would correct the mistake of the lack of notice while ensuring that the rates were just and reasonable.[120]

III. Discussion

40. We note that the Commission is not faced here with a new filing and how it should be handled, but, rather, with the atypical and more narrow question of how much of the refunds that were previously ordered and paid Chehalis should now be permitted to recoup. The D.C. Circuit expressly upheld the Commission's "determination that . . . recoupment of funds by Chehalis is appropriate" and that the Commission has the authority to order Bonneville "to repay the funds that it should not have received."[121] However, the court "remand[ed] the case to allow the Commission to determine whether it should apportion its recoupment order" and explained that the Commission could "consider whether something less than full recoupment might be warranted."[122] And, of particular relevance to the task before us, the court concluded that it was "remand[ing] the case so that [the Commission] can more carefully balance the equities of this case to determine the amount of recoupment to which Chehalis is entitled."[123]

41. Recognizing that the Commission must consider all the relevant factors, the court stated that the Commission "should evaluate the relevant equities, including Chehalis's possible confusion regarding the necessity of filing. . . and the fact that it charged [Bonneville] a rate which [the Commission] deemed to be unjust and unreasonable, when determining how much of the refund Chehalis will be permitted to recoup."[124] Balanced against these arguments, the court also left it to the Commission to address Bonneville's contentions in weighing the equities. In particular, the court noted that Bonneville had argued both that allowing Chehalis to recoup the full amount that it had earlier paid in refunds to Bonneville, with interest, would "unjust[ly] enrich" Chehalis, and also that, if Chehalis's argument that the rate was properly considered an initial rate had been correct, Bonneville instead "would have been entitled to a refund under FPA [section] 206."[125]

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[120] *Id*.

[121] Remand Order, 857 F.3d at 356.

[122] *Id.*

[123] *Id.*

[124] *Id*.

[125] *Id*.

42. The D.C. Circuit, therefore, gave the Commission a narrow task: balance the competing equities to determine how much Chehalis should be entitled to recoup as a remedy. In doing so, the court did not mandate any particular result but, instead, provided the Commission with discretion to decide what remedy to adopt, to balance the equities as it determined most appropriate. And the Commission likewise, has considerable latitude to prescribe remedies generally, especially for harms caused by its own legal errors. This authority, the court explained, stems from both FPA section 309 and the Commission's implicit remedial authority to rectify its mistakes.[126]

43. Although the D.C. Circuit did not explicitly find that the Commission committed legal error in this proceeding, it implied as much. The court found that, because the Commission's regulations regarding when a rate filing would be treated as a "changed rate" were unclear, treating Chehalis's rate as a changed rate would run afoul of a "fundamental principle" of justice requiring parties to have fair notice.[127] When the Commission commits legal error, there is a strong presumption that the proper remedy is to return the parties to the positions they would have been in but for the Commission's error.[128] In balancing the equities, the Commission can make "limited departures from traditional rate making principles."[129] When balancing the equities, relevant considerations can include, for example, the potential for a party to make windfall profits.[130]

44. As explained below, the Commission adopts Bonneville's proposal and, for the purposes of calculating a recoupment remedy, will treat Chehalis's filing as an initial rate that would have been accepted for filing but also set for hearing under section 206. This remedy will put Chehalis in the position it would have been in, but for the Commission's decision, based on its mistaken belief at the time that it could do so, to suspend Chehalis's filing and make it effective subject to refund under section 205. Our determination here means that Chehalis is entitled to recoup refunds for the rate charged during the 60-day notice period formerly allowed under section 206. In practice, this means that recoupment applies to the rates charged from the original effective date of

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[126] *See id.* at 360 (citing *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 955-956 (D.C. Cir. 2016) (*Xcel*)).

[127] *Id.*

[128] *See Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) (citing *Pub. Utils. Comm'n of the State of California v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993)).

[129] *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,057, at P 21 (2016) (citing *Transcon. Gas Pipeline Corp.*, 54 F.3d 893, at 897-898 (1995)).

[130] *Transcon. Gas Pipeline Corp.*, 95 FERC ¶ 61,299, at 62,019 (2001); *see* Remand Order, 857 F.3d at 363.

August 1, 2005 through September 30, 2005. The Commission will also allow Chehalis to receive interest on the recoupment directed herein. As explained below, interest should be calculated per the Commission's regulations.

45. Bonneville can retain the refunds that it received for the period from October 1, 2005 through the 15-month refund period allowed in a case set for hearing under section 206.[131] We believe that this remedy is supported by the record, appropriately balances the equities, and is equitable to both parties.

46. While relatively uncommon, this is not the first time that the Commission has "balanced the equities" when authorizing recoupment.[132] The Commission has "broad authority to remedy its errors and correct unjust situations."[133] This broad authority ensures that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order."[134] In *Niagara Mohawk*, the D.C. Circuit explained that, when the Commission acts pursuant to section 309, it may "use means of regulation not spelled out in detail [in the FPA], provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act."[135] While the Commission cannot use section 309 to "supersede [the] specific statutory strictures" of the FPA,[136] courts have made clear that, when the Commission acts to correct a legal error, it can use remedies that are not otherwise available under sections 205 and 206.[137] Instead,

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[131] Bonneville is also entitled to retain the amounts it received for the subsequent period, i.e. through September 2007.

[132] *E.g.*, *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,057; *Black Oak Energy LLC*, 146 FERC ¶ 61,099.

[133] Remand Order, 857 F.3d at 359 (internal quotations omitted).

[134] *United Gas Improvement Co. v. Callery Properties, Inc.,* 382 U.S. 223, 229 (1965).

[135] *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967).

[136] Remand Order, 857 F.3d at 359.

[137] *See Xcel*, 815 F.3d at 955-956 (finding that the Commission can retroactively suspend a tariff to correct for its legal error).

section 309, like its parallel provision in the Natural Gas Act, "gives the Commission broad authority… to do equity consistent with the public interest."[138]

47. In the instant case, the D.C. Circuit expressly opted not to direct recoupment of the entire amount that Chehalis had refunded to Bonneville, but instead instructed the Commission to "evaluate the relevant equities… when determining how much of the refund Chehalis will be permitted to recoup."[139] While the court left the Commission with leeway to frame the universe of equities, it specifically enumerated several equities for the Commission to weigh, including Chehalis's "possible confusion regarding the necessity of filing" the rate schedule and "the fact that [Chehalis] charged [Bonneville] a rate which [the Commission] deemed to be unjust and unreasonable," as well as Bonneville's proposed quasi-section 206 recoupment remedy.[140] Moreover, we interpret the D.C. Circuit's direction that we "more carefully" balance the equities as an indication that our prior award of full recoupment to Chehalis needed to be reconsidered.[141]

48. As a threshold matter, Chehalis's argument that the earlier TransAlta Settlement Agreement would bar Commission scrutiny of Chehalis's rate inputs under FPA section 206 is without merit, because the TransAlta Settlement Agreement explicitly permitted Commission review.[142] The remedy we adopt here is equitable because it would be consistent with Chehalis's reasonable expectations at the time of the filing (i.e., that its rate could, in fact, be subject to scrutiny under section 206), while ensuring that Chehalis may not receive a windfall through the retention of revenues that were the product of rates ultimately determined to be unjust and reasonable by the Commission.

49. Chehalis's argument that there is no indication that the Commission would have instituted a section 206 proceeding is likewise without merit. While the Commission's precedent regarding the need to file rates may have been unclear, the Initial Order found that the rate charged by Chehalis "may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful" – the same determination that is typically made in a case set for

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[138] *N. Natural Gas Co. v. FERC,* 785 F.2d 338, 341 (D.C. Cir. 1986) (quoting *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984)).

[139] Remand Order, 857 F.3d at 363.

[140] *Id.*

[141] *Id.* at 356.

[142] TransAlta Settlement Agreement at 2-3.

hearing under section 206.[143] Ultimately, following the trial-type evidentiary hearing ordered by the Commission, the Commission upheld the Administrative Law Judge's findings that the rate Chehalis had charged was unjust and unreasonable, and ordered Chehalis to pay refunds.[144] Furthermore, treating Chehalis's filing as one requiring action under section 206 also would be consistent with Chehalis's expectations at the time, because Chehalis knew that, at a minimum, a "new" rate could still be subject to scrutiny under section 206. We find that it is reasonable to conclude that the Commission would have acted under section 206 at the outset if the Commission had instead treated the filing as an initial rate.

50. While Chehalis notes that the Commission bears the burden of proof under section 206, the fact is that Chehalis's rate was, from the outset, identified as a rate that "may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful" and, therefore, set for trial-type evidentiary hearing. We conclude that there is no reason to believe that the Commission would have been unable to satisfy its burden under the standards of section 206, especially given that the rate was ultimately found to be excessive.[145]

51. In the context of the narrow question of recoupment now before the Commission, and given the Commission's explicit determination as to the justness and reasonableness of the rates at the very outset, we conclude that it is equitable to Chehalis to adopt a remedy that calculates recoupment from Bonneville as if the Commission had reviewed and set Chehalis's filing for hearing under FPA section 206 at the outset.[146]

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[143] *Compare* Initial Order, 112 FERC ¶ 61,144 at P 21 *with Hickory Run Energy, LLC*, 170 FERC ¶ 61,061, at P 11 (2020) *and CPV Fairview, LLC*, 169 FERC ¶ 61,261, at 11 (2019). The Commission also specifically noted that Chehalis's filing raised issues of material fact that required a trial-type evidentiary hearing, including identifying the power factor used in the calculation of the reactive power allocator, Chehalis's inclusion of a heating loss component, and the methodology used by Chehalis to determine the tax and depreciation components of the fixed charge rate. Initial Order, 112 FERC ¶ 61,144 at P 20.

[144] Initial Decision, 118 FERC ¶ 63,009 at P 170; Order on Initial Decision, 123 FERC ¶ 61,038, at ordering para. (C).

[145] Initial Decision, 118 FERC ¶ 63,009 at P 170; Order on Initial Decision, 123 FERC ¶ 61,038 at PP 11-13.

[146] Regardless of whether we term this an "FPA section 206 remedy," however, we stress that we are not acting under FPA section 206. We are only using FPA section 206

52. Although, as explained above, the Commission generally has broad discretion in remedial matters, the D.C. Circuit has also provided more specific guidance in situations where the Commission commits a legal error. In *Exxon*, the court stated that, when the Commission makes a legal error, there is a "strong equitable presumption in favor of…mak[ing] the parties whole."[147] This ordinarily means that "the proper remedy is one that puts the parties in the position they would have been in had the error not been made."[148] This order does precisely that by giving Chehalis the benefit of the doubt regarding its confusion, and treating the filing as if it were an initial rate, albeit still a rate that was identified at the outset as potentially unjust and unreasonable.

53. Similarly, Chehalis's arguments regarding the last clean rate doctrine are inapplicable here,[149] as no rates are being disturbed. As the D.C. Circuit directed, the Commission is instead crafting a recoupment remedy.[150]

54. Another equitable factor the Commission has weighed is whether the Commission is acting in a manner consistent with its own prior actions.[151] While the Commission had previously found that Chehalis should recover all of the refund amounts, the D.C. Circuit, well aware of the Commission's finding, specifically ordered the Commission to more carefully balance the equities and not simply order Bonneville to return the full amount.

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as a reasonable framework for the purposes of calculating an equitable recoupment remedy under FPA section 309.

[147] *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999).

[148] *Id*. (citing *Pub. Utils. Comm'n of the State of California v. FERC*, 988 F.2d at 168); *see also Tennessee Val. Mun. Gas Ass'n v. FPC*, 470 F.2d 446, 452 (D.C. Cir. 1972) ("If the policy of the Natural Gas Act is not arbitrarily to be defeated by uncorrected Commission error, the Association must be put in the same position that it would have occupied had the error not been made.").

[149] The Commission applies the last clean rate doctrine if a "company has filed … for an increase in a previously-accepted rate …. If the rate increase is permitted to take effect and the Commission subsequently approves a rate lower than the underlying rate, the Commission can only order *refunds* equal to the difference between the increased rate and the underlying rate." *Bangor Hydro-Electric Co.*, 120 FERC ¶ 61,093, at 16 (2007) (emphasis added).

[150] *See supra* P 8.

[151] *Transcon. Gas Pipeline Corp.*, 95 FERC ¶ 61,299, at 62,019 (2001).

In light of the court's directive, the Commission believes that it is appropriate to examine the issue anew, and this order reflects that more careful balancing.

55. To the extent that the Commission strives to put the parties in the position that they would have been in but for the Commission's legal error, then it is equitable for Chehalis also to receive interest on the amounts recouped. The Commission previously has allowed the recovery of interest after balancing the equities in a recoupment proceeding.[152] While the Commission's interest regulation[153] explicitly applies to refunds of suspended rates, the Commission has long considered the methodology found in the regulation to be a good measure of the time value of money and, thus, has used it in other contexts.[154] We think it is equally appropriate to use this methodology here, as well, with interest calculated from the date Bonneville first received the refund from Chehalis to the date of recoupment.

The Commission orders:

(A) Bonneville is hereby directed to provide recoupment, with interest calculated pursuant to the methodology contained in 18 C.F.R. § 35.19a (2019), as discussed in the body of this order, within 90 days of the date of this order.

(B) Bonneville is hereby directed to file a report, identifying the calculation of and the amounts paid for recoupment, together with the calculation of interest, within 120 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[152] *Black Oak Energy LLC*, 155 FERC ¶ 61,013, at PP 36-40 (2016).

[153] 18 C.F.R. § 35.19a.

[154] *See, e.g., Kimball Wind LLC*, 170 FERC ¶ 61,151 (2020) (using § 35.19a to calculate interest for a rate that was collected without Commission authorization).