

166 FERC ¶ 61,193
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

NorthWestern Corporation

Docket No. EL18-104-001

ORDER DISMISSING REHEARING

(Issued March 21, 2019)

1. On November 15, 2018, the Commission issued an order¹ in this proceeding: (1) acknowledging NorthWestern Corporation's (NorthWestern) submission of a response to the Commission's March 2018 order to show cause;² and (2) holding the Federal Power Act (FPA) section 206³ proceeding instituted in Docket No. EL18-104-000 with respect to NorthWestern's stated transmission rates in abeyance pending the outcome of NorthWestern's expected upcoming filing of updated transmission rates.

2. In its December 11, 2018 request for rehearing, NorthWestern alleges that the Commission erred in holding the FPA section 206 proceeding in abeyance instead of terminating it. For the reasons discussed below, we dismiss NorthWestern's request for rehearing.

Commission Determination

A. Procedural Matters

3. On December 21, 2018, Montana Large Customer Group submitted a motion to answer and answer to NorthWestern's request for rehearing. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2018), prohibits

¹ *NorthWestern Corp.*, 165 FERC ¶ 61,102 (2018) (November 15 Order).

² *Alcoa Power Generating Inc. – Long Sault Div.*, 162 FERC ¶ 61,224 (2018) (Order to Show Cause) (instituting show cause proceeding in multiple dockets for public utilities, including NorthWestern, that use stated transmission rates under an open access transmission tariff or transmission owner tariff).

³ 16 U.S.C. § 824e (2012).

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an answer to a request for rehearing. Accordingly, we reject Montana Large Customer Group's answer.

B. Substantive Matters

4. NorthWestern asserts that the Commission erred in the November 15 Order by holding its FPA section 206 proceeding in abeyance despite NorthWestern submitting similar information in response to the Order to Show Cause as other utilities whose FPA section 206 proceedings were terminated in concurrent orders.⁴ We find NorthWestern's request for rehearing to be premature, and thus dismiss it.

5. In the Order to Show Cause, the Commission directed electric utilities with stated transmission rates to either propose revisions to their stated rates to reflect the reduction in the federal corporate income tax rate from 35 percent to 21 percent under the Tax Cuts and Jobs Act of 2017⁵ or show cause as to why their stated transmission rates should not be revised to reflect the new federal corporate income tax rate. NorthWestern contends that it made this showing in its response to the Order to Show Cause by submitting an abbreviated revenue requirement analysis using data from its 2017 FERC Form No. 1 that, it maintains, demonstrates that updating its stated transmission rate would result in a higher rate, even accounting for the reduction in federal corporate income taxes from the Tax Cuts and Jobs Act.⁶

6. Rule 713(b) of the Commission's Rules of Practice and Procedure permits requests for rehearing "of any final decision or other final order in a proceeding."⁷ A final order is one that imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process.⁸ In the November 15

⁴ Rehearing Request at 1, 4-7.

⁵ An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (Tax Cuts and Jobs Act).

⁶ Rehearing Request at 2-3 (citing NorthWestern May 14, 2018 Response to Order to Show Cause at 10; *id.*, Affidavit of Patrick J. DiFronzo at App. A, line 48).

⁷ 18 C.F.R. § 385.713(b) (2018); *see also* 16 U.S.C. § 825l (a) (2012) (parties "aggrieved by an order issued by the Commission in a proceeding...may apply for a rehearing within thirty days after the issuance of such order").

⁸ *Reliable Automatic Sprinkler Co. Inc. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003) ("Final agency action 'mark[s] the consummation of the agency's decision making process' and is 'one by which rights or obligations have been (*continued* ...)").

Order, the Commission made no final determinations.⁹ Instead, given NorthWestern's commitment to file a future transmission rate case,¹⁰ the Commission held the FPA section 206 proceeding in abeyance pending the outcome of that future proceeding.¹¹ Indeed, the Commission was not statutorily obligated to issue an order on November 15, 2018 formally holding the proceeding in abeyance. Had the Commission taken no action, the FPA section 206 proceeding still would remain open and NorthWestern would remain

determined, or from which legal consequences will flow.””) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)); see also *Entergy Servs., Inc.*, 156 FERC ¶ 61,112, at P 4 (2016).

⁹ See *Cal. Pub. Util. Comm'n v. FERC*, 624 F.App'x 603 (9th Cir. 2015) (memorandum) (a Commission order declining to hold a proceeding in abeyance was “not final in the relevant sense” for purposes of seeking appeal, as it could not deny a right, impose an obligation, or fix a legal relationship as a consummation of the administrative process) (citing *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2013)); *BridgeTex Pipeline Co., LLC*, 164 FERC ¶ 61,111, at PP 10-12 (2018) (dismissing requests for rehearing of an order accepting and suspending tariffs subject to refund pending the outcome of consolidated hearing procedures); *Old Dominion Elec. Coop. v. PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,116, at P 13 (2018) (dismissing as premature requests for rehearing of an order establishing a technical conference to further examine issues raised in complaints); *Shetek Wind Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,250, at PP 153-155 (2012) (confirming that an order conditionally accepting a generator interconnection agreement subject to a further order “merely acted to reserve the issues” pending further consideration in a subsequent proceeding, and was not a final order for the purpose of seeking rehearing).

¹⁰ NorthWestern initially committed to make a full transmission rate case filing by March 31, 2019. See NorthWestern May 14, 2018 Response to Order to Show Cause at 1. On March 19, 2019, NorthWestern informed the Commission that it needs an additional month to prepare and instead will make its filing to revise its transmission rates on or before May 1, 2019. NorthWestern Mar. 19, 2019 Notice of Revised Filing Date of Rate Case at 2.

¹¹ November 15 Order, 165 FERC ¶ 61,102 at P 11; see *Algonquin Gas Transmission, LLC*, 143 FERC ¶ 61,082, at P 23 (2013), *order on reh'g*, 153 FERC ¶ 61,038 (2015) (clarifying that, by giving a pipeline the option to either revise its tariff or explain why it should not be required to do so, the Commission was not making a final merits determination under the analogous section of the Natural Gas Act (NGA section 5), but was “only commencing the NGA section 5 proceeding to decide those issues”).

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in the same legal position, with the same rights and obligations. The fact that the Commission issued orders updating parties whose FPA section 206 proceedings remain open on the status of their proceedings¹² at the same time that it issued orders on the merits of other responses to the Order to Show Cause does not provide a basis for seeking rehearing of an interlocutory order.

7. Where, as here, Commission action is not final and will be succeeded by further Commission action, a request for rehearing may be dismissed.¹³ Accordingly, NorthWestern's request for rehearing is dismissed.

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹² See November 15 Order, 165 FERC ¶ 61,102 at P 11; *San Diego Gas & Elec. Co.*, 165 FERC ¶ 61,095 at P 10 (holding San Diego Gas & Electric Company's FPA section 206 proceeding in abeyance pending the final outcome of its upcoming transmission formula rate filings, in which it committed to reflect the revised federal corporate income tax rate); *Cheyenne Light Fuel & Power Co.*, 165 FERC ¶ 61,099, at P 9 (2018) (holding FPA section 206 proceeding in abeyance where the utility committed to file a transmission rate case in December 2018); *Portland Gen. Elec. Co.*, 165 FERC ¶ 61,129, at PP 6, 10 (2018) (holding proceeding in abeyance where the utility committed to file a transmission rate case in April 2019); *Pac. Gas and Elec. Co.*, 165 FERC ¶ 61,131, at P 18 (2018) (holding proceeding in abeyance in light of pending transmission rate case); *DATC Path 15, LLC*, 165 FERC ¶ 61,100, at P 13 (2018) (same).

¹³ See, e.g., *Pac. Gas and Elec. Co.*, 162 FERC ¶ 61,246, at P 7 (2018); *Talen Energy Mktg.*, 158 FERC ¶ 61,077, at P 4 (2017); *Logan Generating Co., L.P.*, 158 FERC ¶ 61,013, at P 6 (2017).