

153 FERC ¶ 61,037
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Seminole Electric Cooperative, Inc.

v.

Docket No. EL12-53-001

Florida Power & Light Company

ORDER ON REHEARING

(Issued October 15, 2015)

1. On July 27, 2012, pursuant to Rule 713 of the Commission's Rules of Practice and Procedure,¹ Seminole Electric Cooperative, Inc. (Seminole) filed a request for rehearing of the Commission's June 28, 2012 Order on Complaint and Proposed Tariff Revisions.² In this order, we deny rehearing, as discussed below.

I. Background

A. Commission Rulemakings on Charges for Imbalance Service

2. The Commission concluded in Order No. 888 that an open access transmission tariff (OATT or Tariff) must include six ancillary services, one of which is energy imbalance service under Schedule 4 of the *pro forma* OATT.³ In Order No. 890, the

¹ 18 C.F.R. § 385.713 (2015).

² *Seminole Elec. Coop., Inc. v. Florida Power & Light Co.*, 139 FERC ¶ 61,254 (2012) (Order on Complaint).

³ See generally *Promoting Wholesale Competition Through Open Access Non-Discriminatory Trans. Serv. by Pub. Utilities; Recovery of Stranded Costs by Pub. Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,708 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Trans. Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

Commission “expressed concern about the variety of different methodologies used for determining imbalance charges and whether the level of the charges provides the proper incentive to keep schedules accurate without being excessive.”⁴ Accordingly, the Commission sought to standardize imbalance service by amending the *pro forma* OATT Schedule 4 treatment of energy imbalance service and adding a separate *pro forma* OATT Schedule 9 for generator imbalance service.⁵ These changes employed three principles:

(1) charges for imbalance service must be based on incremental cost or some multiple thereof; (2) the charges must provide an incentive for accurate scheduling, such as by increasing the percentage of the adder above (and below) incremental cost as the deviations become larger; and (3) the tariff provisions must account for the special circumstances presented by intermittent generators and their limited ability to precisely forecast or control generation levels, such as waiving the more punitive adders associated with higher deviations.⁶

3. More specifically, the Commission stated:

[I]mbalances of less than or equal to 1.5 percent of the scheduled energy (or two megawatts, whichever is larger) will be netted on a monthly basis and settled financially at 100 percent of incremental or decremental cost at the end of each month. Imbalances between 1.5 and 7.5 percent of the scheduled amounts (or two to ten megawatts, whichever is larger) will be settled financially at 90 percent of the transmission provider’s system decremental cost for overscheduling imbalances that require the transmission provider to decrease generation or 110 percent of the incremental cost for underscheduling imbalances that require increased generation in the control area. Imbalances greater than 7.5 percent of the scheduled amounts (or 10 megawatts, whichever

⁴ *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, FERC Stats. & Regs. ¶ 31, 241 at P 634, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,288 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

⁵ *Id.* PP 634, 667.

⁶ *Id.* P 635.

is larger) will be settled at 75 percent of the system decremental cost for overscheduling imbalances or 125 percent of the incremental cost for underscheduling imbalances.⁷

4. In adopting this tiered approach in Order No. 890, the Commission stated that “[i]n order to increase consistency among transmission providers in the application of imbalance charges, and to ensure that the level of the charges provides appropriate incentives to keep schedules accurate without being excessive, the Commission adopts in the *pro forma* OATT imbalance provisions similar to those implemented by [Bonneville Power Administration (Bonneville)].”⁸ The Commission also emphasized that standardizing imbalance provisions in the *pro forma* OATT from the wide variety that existed at the time “should lessen the potential for undue discrimination, increase transparency and reduce confusion in the industry that results from the current plethora of different approaches.”⁹

B. Seminole Complaint

5. On March 30, 2012, Seminole filed a complaint alleging that Florida Power & Light Company (FPL) was misapplying Schedule 4 of its OATT.¹⁰ Seminole argued that Schedule 4 requires that: (1) the amount within each tier is determined by the “greater of” either the percentage or MW amount of deviation from the hourly schedule (the “threshold” issue); and (2) FPL charge for deviations within each tier in each hour for the amount specified for imbalances within that tier (the “apportionment” issue). Seminole argued that FPL’s misapplication of Schedule 4 resulted in excess penalty charges in the amount of \$4,432,098 for the locked-in period from August 2007 to January 2012.

6. In its response, FPL stated that it did not contest Seminole’s description of FPL’s Schedule 4 billing practice, but FPL maintained that its billing practice was consistent with its OATT. FPL asserted that Schedule 4, “strictly read,” requires: (1) for the threshold issue, determining a Tier 2 or Tier 3 imbalance by reference to either the

⁷ *Id.* P 664.

⁸ *Id.* P 663. Bonneville utilized an energy imbalance pricing approach based on a three-tiered deviation band, which the Commission noted in Order No. 890. *See id.* P 636; *United States Dep’t of Energy – Bonneville Power Admin.*, 112 FERC ¶ 62,258 (2005).

⁹ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 667.

¹⁰ At the time the complaint was filed, the relevant language of FPL’s Schedule 4 was identical to Schedule 4 of the *pro forma* OATT – the issue in the complaint was whether FPL was properly applying that provision.

percentage or the MW (nominal) amount; and (2) for the apportionment issue, applying the highest applicable tier rate to the entire amount of an imbalance (a single tier, rather than multiple tiers, approach). Further, FPL stated that section 12.0 of the Network Integration Transmission Service (NITS) Agreement between the parties precluded Seminole from challenging invoices from August 2007 to September 2009 due to a 24-month time limitation for challenging bills. Notwithstanding its opposition to Seminole's complaint, FPL stated that it did not oppose treating imbalances in the manner that Seminole advocated on a prospective basis and, in a separate proceeding (Docket No. ER12-1576-000), it submitted a section 205 filing to revise Schedules 4 and 9 (Generator Imbalance Service) of its Tariff to use the apportionment method of calculating imbalances. These rate changes, made effective by the Commission on July 1, 2012,¹¹ do not impact the locked-in period of the complaint.

C. Commission Order on Complaint

7. On June 28, 2012, the Commission granted in part and denied in part the complaint. On the threshold issue, the Commission granted the complaint, agreeing with Seminole that Order No. 890 requires that the appropriate tier threshold should be the greater of the percentage or MW amount.

8. However, as to whether a single imbalance should be considered as contained in a single tier or apportioned across multiple tiers, the Commission concluded that Schedule 4 does not specify a single method, nor did the Commission address that issue in Order No. 890. Therefore, the Commission denied the complaint with respect to the apportionment issue. Specifically, the Commission stated that Schedule 4 does not include the apportionment (or "portion") language used in the Bonneville Tariff, which provides that "Deviation Band 2 applies to *the portion of the deviation* greater than or equal to +/- 1.5 percent or +/- 2 MW, whichever is larger in value" and "Deviation 3 applies to *the portion of the deviation* i) greater than +/- 7.5% of the scheduled amount of energy, or ii) greater than +/- 10 MW of the scheduled amount of energy, whichever is the larger in absolute value."¹² As a result, the Commission concluded that "FPL's reading of Schedule 4 is not unreasonable,"¹³ and thus that FPL did not violate Schedule 4 of its OATT by its use of the non-apportionment method.

9. Having granted in part the complaint, the Commission then determined the appropriate refund period. The Commission found that section 12.0 of the NITS Agreement applied to the situation. The Commission held that this section required that

¹¹ Order on Complaint, 139 FERC ¶ 61,254 at P 51.

¹² See Complaint at Att. 2, Bonneville Tariff 2006, Schedule II.D.1.b. and c.

¹³ Order on Complaint, 139 FERC ¶ 61,254 at P 34.

all challenges to bills be made within 24 months after the bill was made available and that this constituted a knowing waiver of the right to refunds outside that period. Therefore, the Commission limited refunds to the period beginning October 20, 2009.

10. On July 30, 2012, National Rural Electric Cooperative Association (NRECA) filed a motion to intervene out-of-time and request for rehearing or, in the alternative, public comments. On August 10, 2012, FPL filed an answer to NRECA's motion to intervene out-of-time. FPL argued that NRECA failed to meet the criteria for late intervention and that there was no precedent for accepting its arguments as public comments. On August 11, 2012, Seminole filed a timely request for rehearing on the apportionment issue and the refund period issue, as discussed below.

II. Discussion

A. Procedural Matters

11. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention, and generally it is Commission policy to deny late intervention at the rehearing stage, even when the petitioner claims that the decision establishes a broad policy of general application.¹⁴ NRECA has not met its burden to justify granting its out-of-time intervention.¹⁵ Accordingly, we deny NRECA's motion to intervene out-of-time. As NRECA is not a party to this proceeding, it may not seek rehearing of the Order on Complaint, and we dismiss its request for rehearing on that basis.¹⁶ Correspondingly, we dismiss FPL's answer to NRECA's pleading.

¹⁴ See, e.g., *PáTu Wind Farm LLC v. Portland General Elec. Co.*, 151 FERC ¶ 61,223, at P 39 & n.5 (2015) (citing *Columbia Gas Transmission Co.*, 113 FERC ¶ 61,066, at P 61,243 (2005)).

¹⁵ See 18 C.F.R. § 385.214(d) (2015).

¹⁶ 16 U.S.C. § 825l (2012); 18 C.F.R. § 385.713(b) (2015). As to NRECA's alternative characterization of its pleading as public comments, creative nomenclature does not make it anything other than a request for rehearing. See *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001 at n.3 (1984) ("Nor does the style in which a petitioner frames a document necessarily determine how the Commission must treat it.") (citation omitted).

B. Substantive Matters**1. Apportionment Issue****a. Rehearing Request**

12. Seminole argues on rehearing that the Commission erred in finding, first, that FPL's reading of the then-existing language of Schedule 4 was not unreasonable, and second, that FPL thus did not violate Schedule 4.

13. Seminole argues that the Commission erred in finding that Order No. 890 allowed FPL to interpret Schedule 4 to apply the highest charge to the entire imbalance (the non-apportionment method). Seminole asserts that the Commission was not "silent" in Order No. 890 with respect to apportionment, but rather was clear that it was revising OATT Schedule 4 to authorize specific charges "within" each deviation band. Seminole contends that the language in Order No. 890, including but not limited to its express reference to the Bonneville approach, made clear that the amount of an imbalance was to be apportioned across multiple tiers.

14. Seminole also contends that the Commission's interpretation of the relevant language in *LG&E*¹⁷ as "consistent with" the *pro forma* Tariff precluded the Commission in the complaint proceeding from "reinterpreting" Schedule 4 absent appropriate notice and comment procedures. Seminole argues that the Commission's decision to allow multiple and contradictory interpretations of Schedule 4 – apportionment (consistent with the Bonneville Tariff) and non-apportionment (inconsistent with the Bonneville Tariff) – is irrational on its face and contrary to what Seminole says is the "express goal" of Order No. 890 (explicitly acknowledged in subsequent decisions¹⁸ and in the Order on Complaint at paragraph 34) to prevent undue discrimination by "standardizing the treatment of energy and generator imbalances."¹⁹

15. Further, Seminole contends that the Commission's decision to allow conflicting interpretations of Schedule 4 by different transmission providers also cannot be logically

¹⁷ *Louisville Gas and Electric Co.*, 120 FERC ¶ 61,227 (2007) (accepting proposal to modify LG&E's OATT to make the language identical to the imbalance penalty apportionment language in the Bonneville OATT) (*LG&E*).

¹⁸ Rehearing Request at 18 (citing *Cal. Indep. Sys. Op. Corp.*, 135 FERC ¶ 61,180, at P 2 (2011); *Southwest Power Pool, Inc.*, 126 FERC ¶ 61,244, at P 2 (2009); *Progress Energy, Inc.*, 125 FERC ¶ 61,104, at P 2 (2008); *Florida Power & Light Co.*, 122 FERC ¶ 61,079, at P 2 (2008)).

¹⁹ *Id.* at 10.

squared with the express goal of Order No. 890 to “ensure that the level of the charges provides appropriate incentives to keep schedules accurate without being excessive.”²⁰ Seminole asserts that in finding the “portion of” language filed by LG&E to be “consistent with” the *pro forma* OATT, the Commission effectively determined that this approach provided the appropriate incentives without being excessive.²¹ Seminole contends that in upholding FPL’s different interpretation, the Commission has accepted a method that produces dramatically higher charges for precisely the same levels of imbalance.

16. Finally, Seminole argues that the Commission did not attempt in the Order on Complaint to explain why LG&E and FPL need different levels of charges in order to provide appropriate incentives to their customers. It also argues that FPL did not allege the existence of any such distinctions between the two cases.

b. Commission Determination

17. We deny rehearing. First, we disagree with Seminole’s contention that the language of Order No. 890 clearly supports the Bonneville apportionment method. Rather, we continue to read the express language of Schedules 4 and 9 as supporting the use of either the apportionment or non-apportionment approach. On the one hand, the provisions can be reasonably interpreted as requiring amounts that fall within each tier to be assessed at that tier (apportionment approach); on the other hand, it is also reasonable to conclude that neither provision precludes assessing charges on the full amount at the highest applicable tier.²² Indeed, in drafting Order No. 890, the Commission chose not to retain the “portion of” language of the Bonneville Tariff in the OATT provision. Furthermore, the Commission stated in the preamble to Order No. 890 that it was adopting an approach “similar” to Bonneville’s approach; it did not say it was adopting an approach that was “identical” to Bonneville’s approach. We therefore reaffirm the earlier finding that FPL’s interpretation of its Schedule 4 was not unreasonable.

²⁰ *Id.* at 22 (quoting Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 663).

²¹ *Id.* Seminole highlights the Commission’s statement in Order No. 890-A that “[t]he imbalance charges adopted in Order No. 890 more closely relate to incremental cost and therefore minimize any incentive on the part of the transmission provider to rely on penalty revenues rather than seeking other methods of encouraging accurate scheduling.” *Id.* at 20 & n.26 (citing Order No. 890-A, FERC Stats. & Regs. ¶ 61,261 at P 332).

²² For example, for an 11 MW imbalance that falls within the third tier, there is nothing in the express language of Schedules 4 or 9 that would require apportionment of those 11 MW to other tiers.

18. Next, as to the significance of the *LG&E* case, we conclude that Seminole attempts to prove too much with this case. While the Commission accepted LG&E's proposed revisions to add the "portion of" language to Schedules 4 and 9 as "consistent" with the *pro forma* OATT, this does not mean that the non-apportionment method is not also consistent with Schedules 4 and 9, since the provisions can reasonably be read to support either approach.

19. We also reject Seminole's argument that the Federal Power Act (FPA) prevents the Commission from adopting a *pro forma* OATT provision that is reasonably interpreted differently with respect to apportionment. Multiple transmission owners in various regions across the country may have different needs when it comes to the incentives needed to encourage accurate scheduling, and Seminole provides no evidence that the Commission expected uniformity on this matter throughout the country. Some regions may need higher charges than others to encourage accurate scheduling, and thus would prefer to adopt the non-apportionment approach. While, as Seminole points out, the Commission's stated aim in adopting Schedules 4 and 9 was to increase consistency, we do not find that stated aim to conflict with our ruling with respect to apportionment. Schedules 4 and 9 in fact do enhance consistency in imbalance charges by standardizing the requirement for a three tiered approach, the thresholds for each tier, and the charges for each tier. That the Commission allowed variations for apportionment does not undermine the goal of enhancing consistency.²³

20. As to Seminole's undue discrimination argument, we find that, as long as a transmission owner consistently applies the same interpretation (either apportionment or non-apportionment) to all of its customers, there will be no potential for undue discrimination under either interpretation.

2. Refund Period Issue

a. Rehearing Request

21. Seminole argues that the Commission erred in finding that Section 12.0 of the NITS Agreement²⁴ limits refunds to a period commencing in October 2009 (24 months

²³ While the Commission has, in the open access era, promulgated *pro forma* tariffs, it also allows public utilities to seek approval for individual variations in their own tariffs to meet their specific needs and those of their region and customers.

²⁴ Section 12.0 of the NITS Agreement between FPL and Seminole provides that:

The Customer may, in good faith, challenge the correctness of any bill rendered under the Tariff no later than twenty-four (24) months after the bill was rendered. Any billing challenge will be in writing and will state the

(continued ...)

before the month in which Seminole sent a letter to FPL challenging the imbalance charges) rather than when Seminole believes that the overcharges commenced (August 2007).²⁵ Seminole states that Section 12.0 makes clear that, consistent with Commission precedent, the 24-month time limit on challenges to the “correctness of any bill rendered under the Tariff” applies only to those situations where the bill is “rendered under and in accordance with this Tariff.”²⁶ That is, Seminole argues that such time bar applies only to challenges to “the arithmetical accuracy of the bill and the use of the correct rate and billing determinants for the service provided.”²⁷

22. Seminole maintains that the flip side of this limitation is that where bills are not rendered “in accordance with this Tariff,” i.e., where they are based upon a misapplication of the Tariff, there is no limitation either as to time for refunds or type of challenge. Seminole contends that the Commission in its orders has been clear in distinguishing between contract clauses that limit challenges to the mere numerical accuracy of bills versus those that limit challenges to charges rendered in violation of the filed rate, and that, here, Section 12.0 falls into the former category and thus does not impose a time limit.²⁸

specific basis for the challenge. A bill rendered under the Tariff will be binding on the Customer twenty-four months after the bill is rendered or adjusted, except to the extent of any specific challenge to the bill made by the customer prior to such time. Customer’s challenge of any bill rendered under and in accordance with this Tariff is limited to: (i) the arithmetical accuracy of the bill and the use of the correct rate and billing determinants for the service provided; (ii) the determination of redispatch costs allocated to the customer; and (iii) the application of the incremental fuel cost mechanism. FPL will provide the Customer, upon request, such information as is reasonably necessary to confirm the correctness of the bill; provided, however, that neither the Customer’s challenge nor the Customer’s request shall serve as a basis for a general audit or investigation of FPL’s books and records.

²⁵ The refund period issue in this proceeding is not affected by our denial of rehearing on the apportionment issue. Seminole seeks refunds for an approximately five-year period beginning in August 2007 and FPL issued approximately \$1.38 million in refunds to Seminole related to Commission findings that are not challenged on rehearing.

²⁶ Rehearing Request at 25.

²⁷ *Id.*

²⁸ *Id.* at 5, 26-28 (citing *Carnegie Natural Gas Co.*, 63 FERC ¶ 61,103, at 61,643-44 (1993)).

23. Seminole also argues that nothing in the language of Section 12.0 of the NITS Agreement can be construed as a “knowing waiver” of Seminole’s right to refunds based on violations of the filed rate. Seminole also contends that the Commission abused its discretion in limiting refunds resulting from FPL’s violation of the filed rate and that the Commission “has a ‘general policy of granting full refunds’ for overcharges” due to wrongful filed rate violations.²⁹

b. Commission Determination

24. Section 12.0 states, in pertinent part: “A bill rendered under the Tariff will be binding on the Customer twenty-four months after the bill is rendered or adjusted, except to the extent of any specific challenge to the bill made by the customer prior to such time.” We read this to mean that a bill is binding unless it is challenged within a 24 month period after the bill was made available or adjusted. Here, because Seminole sent its challenge letter in October 2011, we reaffirm that Seminole is time-barred from challenging any bill it received more than 24 months before the month in which it sent its letter challenging the bills. Thus, the refund period cannot commence earlier than 24 months before the date of Seminole’s challenge.

25. In addition, Section 12.0 states that challenges include *both* “the arithmetical accuracy” *as well as* “the use of the correct rate.” We reiterate that the phrase “the use of the correct rate” includes allegations that FPL did not charge the rate on file with the Commission, which is the gravamen of the complaint here.³⁰ Seminole’s assertion that the phrase “under and in accordance with” the FPL Tariff contemplates situations such as where FPL renders an invoice in accordance with the Tariff but inadvertently uses the wrong input³¹ fails to provide any meaningful distinction between the terms “arithmetical accuracy” and “use of the correct rate.” Furthermore, if the phrase “in accordance with the Tariff” were to mean in accordance with the proper filed rate, this would eviscerate the rest of the sentence, as there would be no reason to challenge the bill or to limit challenges to any bill as provided in Section 12.0.

26. We disagree with Seminole’s contentions that the Commission has taken isolated phrases out of context and that the 24-month limitation does not apply to the fourth sentence of Section 12.0. The first sentence of Section 12.0 provides a 24-month time

²⁹ *Id.* at 34 (citing *Consolidated Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003) (quoting *Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992))).

³⁰ Order on Complaint, 139 FERC ¶ 61,254 at P 42.

³¹ Rehearing Request at 32.

limit on challenges to “any bill.”³² The third sentence of Section 12.0 clarifies that “[a] bill will be binding on the Commission twenty-four months after the bill is rendered or adjusted.” Likewise, the fourth sentence of Section 12.0 provides a limit to the types of challenges that can be brought concerning “any bill.” Construing these provisions together in context, Section 12.0 limits the timing and type of any billing challenge involving the Tariff. Moreover, the cases that Seminole cites in its rehearing request do not call into question the core elements of the Commission’s reasoning in denying refunds in the Order on Complaint. Each case turns on the specific language in the particular clause limiting refund liability.

27. Furthermore, while the Commission permits “full” refunds for tariff violations, i.e., refunds for periods longer than the 15-month period specified in the FPA, the Commission also allows parties to contractually limit (or waive) their right to refunds for violations of the filed rate.³³ We reiterate that the Commission has found time limitations on the correction of bills involving violations of the filed rate doctrine to be consistent with the filed rate doctrine.³⁴ Section 12.0 of the NITS Agreement is part of FPL’s filed rate. Seminole, as FPL’s customer, is bound by FPL’s filed rate.

28. Therefore, we deny rehearing on the request to extend the refund period beyond the 24-month period as described in Section 12.0 of the NITS Agreement.³⁵

³² We note that the second sentence of Section 12.0 simply provides how challenges are to be made, i.e., in writing, and specifying the basis for the challenge.

³³ See Order on Complaint, 139 FERC ¶ 61,254 at P 43.

³⁴ *Id.*

³⁵ See, e.g., *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000) (noting Commission’s broad discretion in fashioning remedies); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (same).

The Commission orders:

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.