

153 FERC ¶ 61,194  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Chehalis Power Generating, L.P.

Docket No. ER05-1056-009

ORDER ON REHEARING

(Issued November 19, 2015)

1. On November 18, 2013, Chehalis Power Generating L.P.<sup>1</sup> (Chehalis) filed a motion for order requiring recoupment of payment. On July 16, 2015, the Commission denied Chehalis's motion.<sup>2</sup> On August 14, 2015, Chehalis filed a request for rehearing of the Commission's order denying recoupment of payment, which is denied, as discussed below.

**I. Background**

2. This case has a long history that began in 2005. In that year, Chehalis filed a rate schedule for supplying Reactive Supply and Voltage Control from Generation Sources Service (reactive power) to Bonneville Power Administration (Bonneville). The Commission found that such rate schedule was a rate change, rather than an initial rate.<sup>3</sup>

3. The Commission based this decision on its longstanding position that an initial rate requires both a new customer and a new service. Chehalis had been providing reactive power to Bonneville pursuant to an unfiled interconnection agreement; the Commission therefore reasoned that Bonneville was neither a new customer for Chehalis, nor was Chehalis's provision of reactive power a new service. The Commission thus

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

<sup>2</sup> *Chehalis Power Generating, L.P.*, 152 FERC ¶ 61,050 (2015) (July 2015 Order).

<sup>3</sup> *Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144, at P 23 (2005).

held that the proposed rates were changed, not initial, rates.<sup>4</sup> On rehearing, the Commission reaffirmed that finding.<sup>5</sup>

4. Chehalis petitioned the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) for review of the Commission's orders. The court remanded the case to the Commission on a single issue: whether or not the rate for reactive power should have been filed with the Commission.<sup>6</sup> On remand, the Commission found that a rate schedule for the reactive power that Chehalis previously provided to Bonneville should have been filed, and reaffirmed the finding that the filing was a changed rate, subject to the suspension and refund provisions of section 205(e) of the Federal Power Act (FPA).<sup>7</sup> On rehearing, the Commission again reaffirmed that finding.<sup>8</sup>

5. Chehalis again petitioned the D.C. Circuit for review of the Commission's orders, arguing that the Commission erred by determining: (1) that the interconnection agreement between Chehalis and Bonneville was required to be filed prior to May 2005, even though it did not contain rates for reactive power service and Chehalis was not proposing to collect charges for such service prior to that date, and (2) that the proposed rate schedule for supply of reactive power service filed by Chehalis in May 2005 was a change in rates that could be suspended and made effective subject to refund under section 205(e) of the FPA. Chehalis specifically argued that, in prior Commission orders, when the generators cancelled their existing reactive power rate schedules, the Commission accepted those cancellations without suggesting that a replacement rate schedule must be filed for the supply of reactive power without compensation.<sup>9</sup>

6. The Commission moved for a voluntary remand to more fully consider Chehalis's arguments, and issued the October 17 Order reaffirming its prior findings that Chehalis's May 2005 filing was a changed rate.<sup>10</sup> However, the Commission clarified its policy

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<sup>4</sup> *Id.*

<sup>5</sup> *Chehalis Power Generating, L.P.*, 113 FERC ¶ 61,259, at PP 10-15 (2005).

<sup>6</sup> *TNA Merchant Projects, Inc. v. FERC*, 616 F.3d 588, 593 (D.C. Cir. 2010).

<sup>7</sup> *Chehalis Power Generating, L.P.*, 134 FERC ¶ 61,112, at PP 19-21 (2011).

<sup>8</sup> *Chehalis Power Generating, L.P.*, 141 FERC ¶ 61,116 (2012).

<sup>9</sup> Brief of Petitioner, *TNA Merchant Projects, Inc. v. FERC*, No. 13-1008, at 28-29 (D.C. Cir. Apr. 15, 2013).

<sup>10</sup> *Chehalis Power Generating, L.P.*, 145 FERC ¶ 61,052, at P 1 (2013) (October 17 Order).

related to jurisdictional reactive power rate schedules for which there is no compensation, requiring that such rate schedules containing the rates, terms, and conditions for reactive power service be filed with the Commission on a prospective basis.<sup>11</sup> The Commission also found that it would be appropriate for Chehalis to recover the amounts it previously refunded to Bonneville, with interest calculated in accordance with 18 C.F.R. § 35.19a.<sup>12</sup>

7. On November 18, 2013, Chehalis and Bonneville filed requests for rehearing of the Commission's October 17 Order. On that same day, Chehalis filed a motion requesting that the Commission issue an order requiring Bonneville to pay Chehalis amounts that were previously refunded to Bonneville, together with interest calculated in accordance with 18 C.F.R. § 35.19a. On December 3, 2013, Bonneville filed an answer responding to the motion. On December 17, 2013, Chehalis filed an amendment to its earlier motion. On December 23, 2013, Bonneville filed an answer in response to the amended motion.

8. On July 16, 2015, the Commission issued an order affirming its finding that Chehalis's rate was a changed rate, but that the Commission would only be applying its finding prospectively, and that, consequently and as particularly relevant here, while Chehalis should recoup the refunded amount from Bonneville, the Commission could not order Bonneville to do so because it lacked authority to order Bonneville to make refunds.<sup>13</sup> The Commission explained that the FPA does not grant the Commission authority to order Bonneville to make refunds, because, as a governmental entity and thus an exempt public utility pursuant to section 201(f) of the FPA,<sup>14</sup> Bonneville is exempt from the Commission's refund authority.<sup>15</sup> The Commission further noted, though, that

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* P 14. While the litigation described above was ongoing, in a separate 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 received in excess of the just and reasonable rate. *See Chehalis Power Generating, L.P.*, 123 FERC ¶ 61,038, at ordering para. (C) (2008); *Chehalis Power Generating, L.P.*, 117 FERC ¶ 61,235, at PP 10-11 (2006).

<sup>13</sup> July 2015 Order, 152 FERC ¶ 61,050.

<sup>14</sup> *See* 16 U.S.C. § 824(f) (2012).

<sup>15</sup> July 2015 Order, 152 FERC ¶ 61,050 at P 29 (citing 16 U.S.C. § 824(f) (2012); *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663 (D.C. Cir. 2007) (*TANC*)).

Chehalis may have the ability to seek relief from other administrative or judicial fora with authority to compel Bonneville to make repayment.<sup>16</sup>

9. On August 14, 2015, Chehalis requested rehearing of the Commission's denial of refunds. On August 28, 2015, Bonneville filed an answer arguing that the Commission lacked jurisdiction to order Bonneville to make refunds, and asserting that refunds were inappropriate. On September 3, 2015, Chehalis filed an answer to Bonneville's answer.

## II. Request for Rehearing

10. In its request for rehearing, Chehalis argues that the Commission erred in finding that it lacked authority to order Bonneville to repay these amounts.<sup>17</sup> In support of this proposition, Chehalis notes that the plain language of section 309 of the FPA grants the Commission the "power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act."<sup>18</sup> Chehalis asserts that this language grants the Commission broad power to order Bonneville to refund the amounts at issue.<sup>19</sup>

11. Chehalis states that the Commission erroneously concluded that section 201(f) of the Federal Power Act<sup>20</sup> and *TANC*<sup>21</sup> denied it authority over Bonneville, as *TANC* explained that certain provisions of subchapter II of the FPA, which includes sections 205 and 206, exempt governmental entities "unless a provision expressly provides the Commission with such authority."<sup>22</sup> Chehalis also cites to a U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) decision. Chehalis asserts that this Ninth Circuit decision stands for the proposition that the Commission's lack of refund authority only applies to wholesale electric energy sales made *by* Bonneville.<sup>23</sup> Chehalis distinguishes

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<sup>16</sup> *Id.*

<sup>17</sup> Chehalis avers that Bonneville has refused to make refunds.

<sup>18</sup> 16 U.S.C. § 825h (2012).

<sup>19</sup> Chehalis August Rehearing Request at 4-5.

<sup>20</sup> 16 U.S.C. § 824(f) (2012).

<sup>21</sup> *TANC*, 495 F.3d 663.

<sup>22</sup> Chehalis August Rehearing Request at 6-7 (citing *TANC*, 495 F.3d 663).

<sup>23</sup> *Bonneville Power Admin. v. FERC*, 422 F. 3d 908 (9<sup>th</sup> Cir. 2005) (*BPA*).

the instant case by arguing that Chehalis is not requesting the Commission to regulate Bonneville's wholesale electricity sales, but is instead requesting that the Commission order recovery of revenue previously refunded *to* Bonneville.<sup>24</sup> Chehalis argues that the limitations the court imposed on the Commission's authority over Bonneville under section 201(f) of the FPA do not apply under section 309 of the FPA, because while section 201(f) is codified in subchapter II of the FPA, section 309 is codified in subchapter III of the FPA.<sup>25</sup>

12. Chehalis further asserts that the Commission's conclusion that it lacks authority to order Bonneville to repay the amounts at issue is irrational, because these amounts arise from rates charged by a Commission-jurisdictional entity, Chehalis. Chehalis observes that many Commission-jurisdictional entities regularly make wholesale sales to federal power marketing agencies and municipal electric utilities. Chehalis alleges that the Commission's inability to order refunds would undermine its ability to ensure that customers pay rates for Commission-jurisdictional services that comply with the FPA. It adds that it is illogical to suggest that Congress intended for a decision by the Commission to order payment of refunds by a regulated electric utility to a governmental entity to be irrevocable.<sup>26</sup>

13. Chehalis also notes that the Commission stated in the July 2015 Order that it was unaware of whether or to what extent other administrative or judicial fora may have authority to compel Bonneville to make the repayments. Chehalis adds that, when a court finds that the Commission committed legal error, the appropriate Commission remedy is to put the party in the same position it would have been in absent the legal error. If governmental entities are exempt from the Commission's refund authority, that interpretation effectively nullifies the purpose of appellate review.<sup>27</sup>

14. Finally, Chehalis asserts that there is precedent for the Commission to direct a governmental entity to make payments to a public utility for electrical service provided

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<sup>24</sup> Chehalis August Rehearing Request at 6-7.

<sup>25</sup> *Id.* at 7-8.

<sup>26</sup> *Id.* at 8.

<sup>27</sup> *Id.* at 9.

pursuant to a rate schedule on file at the Commission, citing *City of Cleveland, Ohio v. Cleveland Elec. Illuminating Company*.<sup>28</sup>

### **III. Commission Determination**

15. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2015), prohibits an answer to a request for rehearing. We, accordingly, will reject Bonneville's answer, and likewise Chehalis's subsequent answer.

16. Chehalis urges the Commission to use section 309 of the FPA to order Bonneville, an exempt public utility pursuant to section 201(f) of the FPA, to make refunds of the amounts at issue.<sup>29</sup> The Ninth Circuit, in *BPA*, flatly rejected Commission authority to order governmental entities to make refunds.<sup>30</sup> In that case, the court held that the FPA "unambiguously states that the provisions of subchapter II [of the FPA], which is the basis of FERC's refund authority, do not apply to governmental entities "unless such provision makes specific reference thereto.""<sup>31</sup> And, as relevant here, section 205 of the FPA contains no such provision that would allow the Commission to direct Bonneville to make refunds.<sup>32</sup>

17. Section 309 of the FPA, codified in subchapter III, provides the Commission with the ancillary powers necessary to fulfill its statutory obligations, including those obligations found in subchapter II. But section 309 is not an independent grant of authority,<sup>33</sup> it does not grant the Commission the broad remedial authority that Chehalis

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<sup>28</sup> Chehalis August Rehearing Request at 10 (citing *City of Cleveland, Ohio v. Cleveland Elec. Illuminating Co.*, 51 FPC 1250 (1974) (*City of Cleveland*), *reh'g denied*, 51 FPC 1749 (1974)).

<sup>29</sup> Section 309 authorizes the Commission "to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act." See *Niagara Mohawk Power Corp. v. FERC*, 379 F.2d 153, 158 (D.C. Cir. 1967) (*Niagara Mohawk*) (citing *Pub. Serv. Comm'n of N.Y. v. FPC*, 327 F.2d 893, 896-97 (D.C. Cir. 1964)).

<sup>30</sup> *BPA*, 422 F.3d at 918.

<sup>31</sup> *Id.* at 912.

<sup>32</sup> See 16 U.S.C. § 824d (2012).

<sup>33</sup> *Consol. Gas Transmission Corp.*, 771 F.2d 1536, 1551 (D.C. Cir. 1985); *New England Power Co.*, 467 F.2d 425, 430-31 (D.C. Cir. 1972).

wishes, and, specifically, it makes no reference to Commission authority over governmental entities or exempt public utilities.<sup>34</sup> Using the Commission's section 309 authority to order recoupment would be an overreach, because the Commission's refund authority under section 205 does not extend to exempt public utilities such as Bonneville. And the Commission's ancillary authority under section 309 does not grant the Commission any broader authority than that provided by section 205, because section 309 makes no specific reference to authority over governmental entities or exempt public utilities. And because the Commission cannot order Bonneville to make refunds, any suggestion that the Commission has jurisdiction over the refund amounts, separate from the entity possessing those amounts, is unsupported.

18. Chehalis argues that the Commission's decision not to order recoupment is irrational, and that it may create problems between jurisdictional and non-jurisdictional market participants. This policy argument is without merit. Policy arguments cannot overcome the language and limitations of the statute, and the FPA, as interpreted by the courts in *TANC* and *BPA*, bars the Commission from ordering Bonneville to refund the amounts at issue here. *TANC*, despite attempts by Chehalis to argue a contrary position, features a remarkably similar circumstance to the present case. There, the D.C. Circuit held that the Commission lacked jurisdiction to regulate an exempt public utility, including ordering that exempt public utility to issue refunds.<sup>35</sup> The issue, then, is not one of rationality or policy, but one of jurisdictional limits on the Commission's authority. While Chehalis similarly asserts that it would be equitable for the Commission to assert jurisdiction here, the Commission has previously held that equitable relief is an insufficient justification for invoking section 309.<sup>36</sup> In any event, here the equities of

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<sup>34</sup> Chehalis's reliance on section 309 is also a double-edged sword, which in fact cuts against its claims. If section 309 is, as Chehalis claims, so broad in its reach that it allows the Commission to order an exempt public utility such as Bonneville to make refunds to Chehalis notwithstanding the limits imposed by sections 201(f) and 205 of the FPA, then section 309 equally should allow the Commission to order Chehalis to pay refunds to Bonneville of amounts that Chehalis charged in excess of a just and reasonable rate – consistent with the dictate of section 205 that all jurisdictional rates must be just and reasonable and that any rate that is not just and reasonable is, in fact, “unlawful,” *see* 16 U.S.C. § 824d(a) (2012) – notwithstanding Chehalis's claim that its rate was an initial rate.

<sup>35</sup> *TANC*, 495 F.3d at 674.

<sup>36</sup> *See Southwest Power Pool, Inc.*, 149 FERC ¶ 61,050, at PP 12, 27 (2014) (citing *Pub. Util. Comm'n of Calif. v. FERC*, 988 F.2d 154, 168 n.12 (D.C. Cir. 1993)).

ordering refunds by Bonneville to Chehalis do not outweigh clear Congressional intent to secure the statutory independence of governmental entities like Bonneville.<sup>37</sup>

19. Chehalis also believes that the Commission can act with additional authority on remand to correct legal error. While the Commission does have authority to respond to a court's directive,<sup>38</sup> that authority is not unlimited, as the Commission is ultimately a creature of statute and must act within the statute's prescribed bounds.<sup>39</sup> As such, the Commission cannot use section 309 to conjure up jurisdiction over Bonneville *ex nihilo* to order refunds.

20. Finally, in support of its argument that the Commission can order refunds here, Chehalis claims that the Commission's predecessor, the Federal Power Commission (FPC), ordered a governmental entity to pay amounts to a public utility in *City of Cleveland*, in the context of an emergency interconnection order allowing a new utility, Cleveland Electric Illuminating Company, to interconnect to Cleveland to address a "critical energy situation."<sup>40</sup> However, the facts in the two cases differ in a critical way; in that interconnection order, the FPC "conditioned" the interconnection on Cleveland – a governmental entity – accepting enumerated terms, including payment provisions.<sup>41</sup> It was this agreed-to acceptance of FPC authority that made the FPC's order providing for

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<sup>37</sup> See *id.* P 28 ("the structure of the FPA reflects Congress[']s intent to exempt certain utilities, such as governmental utilities, from the Commission's traditional rate regulation and thus likewise from its refund authority.").

<sup>38</sup> See, e.g., *Pub. Util. Comm'n of Cal.*, 988 F.2d at 162.

<sup>39</sup> See *supra* PP 16, 18.

<sup>40</sup> *City of Cleveland*, 51 FPC 1250 at 1250.

<sup>41</sup> *Id.* at 1251. In fact, the Commission noted that Cleveland "agreed in writing to all the terms and conditions" of the Commission's original order providing for the payments. *Id.*; see also *id.* at 1253, ordering paragraphs (C) and (D) (providing that the City must "communicate in writing to the Commission its agreement to abide by the provisions of this order, as well as the terms and conditions of our previous orders," and that a failure by the City to make the required payments would result in automatic vacating of the Commission's orders that provided for the interconnection and jurisdictional service).

payments permissible. In contrast, Chehalis provides no evidence that Bonneville agreed to allow the Commission jurisdiction over these matters.<sup>42</sup>

21. Therefore, Chehalis's request that we order Bonneville to make refunds is a request outside the Commission's authority, and thus we deny rehearing.

The Commission orders:

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

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>42</sup> Nor, under its theory of the case, could Chehalis argue that Bonneville had agreed to a Commission-imposed condition because Chehalis maintains that its reactive power filing was an *initial* rate, and thus beyond the reach of the Commission's authority to suspend the rate or otherwise condition acceptance of the rate.