

119 FERC ¶ 61,328
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Union Power Partners, L.P.

v.

Docket No. EL05-1-001

Entergy Services, Inc.
Entergy Operating Companies

ORDER DENYING REHEARING

(Issued June 28, 2007)

1. On February 20, 2007, the Commission issued an order in *Union Power Partners, L.P. v. Entergy Services, Inc.*¹ In that order, the Commission granted the complaint of Union Power Partners L.P. (Union) and directed Entergy Operating Companies and Entergy Services, Inc. (collectively, Entergy) to reclassify certain facilities as network facilities and to provide transmission credits with interest for all network upgrades. On March 22, 2007, Union filed a request for rehearing of the Commission's order in *Union*. For the reasons discussed below, we will deny Union's request for rehearing.

I. Background

2. On March 1, 2001, Entergy filed an Amended and Restated Interconnection Agreement (IA) with Union to connect its generating facility in Union County, Arkansas with Entergy's El Dorado Substation. Under the IA, Union was required to pay for the upgrades of facilities classified as direct assignment facilities. On April 26, 2001, the Commission accepted the IA for filing pursuant to delegated authority.²

¹ 118 FERC ¶ 61,134 (2007) (*Union*).

² See *Entergy Services, Inc.*, Docket No. ER01-1367-000 (unpublished letter order dated April 26, 2001).

3. On October 4, 2004, Union filed a complaint, alleging that Entergy was violating the Commission's transmission policy prohibiting "and" pricing by failing to provide transmission credits with interest to Union for the construction of facilities that, in fact, are properly classified as network upgrades. Union further argued that Entergy should provide transmission credits of \$26.3 million, plus interest, to Union and make conforming revisions to Union's IA.

4. In its answer, Entergy argued that the Commission exceeded the scope of section 206 of the Federal Power Act (FPA),³ contending that refunding previously Commission-accepted and already-collected charges would constitute retroactive relief.

5. In *Union*, the Commission granted Union's complaint and set the refund effective date at the earliest date possible, *i.e.*, 60 days after the filing of Union's complaint, or December 3, 2004.

6. The Commission directed Entergy to provide Union with any transmission credits that would have accrued during the 15-month refund effective period, December 3, 2004, through and including March 3, 2006, with interest calculated in accordance with 18 C.F.R. § 35.19a(a)(2)(iii) (2006).⁴ Further, the Commission required that Entergy revise the IA to provide that, to the extent that Union had not previously taken service for which credits either did accrue or would have accrued, Entergy must provide Union credits with interest on a prospective basis from the date of the order.⁵ Entergy was also required to file a compliance report, within 15 days after making the required credits.⁶

II. Request for Rehearing

7. On rehearing, Union argues that the Commission erred in holding that the transmission credits and interest that Entergy must provide to Union are refunds subject to the limitations of section 206(b) of the FPA (as in effect when the complaint was filed). According to Union, transmission credits and interest are in the nature of repayment of a loan to the utility. Union states that the Commission has consistently

³ 16 U.S.C. § 824e (2000).

⁴ *Id.* P 14 (*citing* 16 U.S.C. § 824e(b) (2000)). We note that, in *Union*, the Commission made a typographical error and inadvertently referenced 18 C.F.R. § 35.19(a)(2)(ii) (2006).

⁵ *Id.* P 15.

⁶ *Id.*

recognized that a generator's upfront payment is a financing mechanism and, essentially, a loan.⁷ Union contends that what was lacking in the IA was a mechanism for repayment of the loan, and that Union's right to recovery of a loan should not depend upon the selection of a mechanism for repayment. Union asserts that the Commission has stressed that repayment may be made through credits or other means.⁸

8. Union argues that the Commission's section 206(b) holding conflates credits with refunds and subjects it to precisely the "and" pricing that transmission credits are intended to prevent. Union states that the Commission's order cannot be squared with its recognition that payments for Network Upgrades are "essentially a loan from the Interconnection Customer to the Transmission Provider"⁹ and that "the Interconnection Customer is entitled to full reimbursement for its upfront payment."¹⁰ Union argues that, under Commission policy, Union's payments to Entergy for Network Upgrades were always loans and never monies Entergy was entitled to retain over and above embedded cost rates for transmission from Union's project. It asserts that subordinating the right to repayment of the loan to the mechanics of how that loan is repaid is unjustifiable. Union argues that, if the Commission is concerned about its ability to order retroactive revisions to the IA, the Commission should order the recovery of credits in an amount equal to the loan for the Network Upgrades, with interest, prospectively from the date of its order.

9. Moreover, Union argues that neither the prohibition against retroactive ratemaking nor the provisions of section 206(b), which are designed to limit the exception to that prohibition, are implicated in this case because the Commission is not engaged in retroactive ratemaking. Union explains that the Commission has held that an upfront payment for Network Upgrades "is *not a rate for service*, and is not the means for a transmission provider to recover its costs."¹¹ It asserts that, while the Commission's prior holdings find that upfront payments for Network Upgrades are not rates, it is not clear that the rationale offered in *Duke Energy Hinds LLC*,¹² and incorporated by reference into

⁷ Union Rehearing Request at 6–7.

⁸ *Id.* (citing *Entergy Miss., Inc.*, 117 FERC ¶ 61,200 at P 21 (2006); *Southern Cal. Edison Co.*, 117 FERC ¶ 61,103 at P 39 (2006)).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 12 (citing *InterGen Servs., Inc.*, 107 FERC ¶ 61,143 at P 16 (2004)) (emphasis added).

¹² 117 FERC ¶ 61,210 (2006) (*Duke Hinds III*).

Union, is consistent with such precedent. Union explains that, in *Duke Hinds III*, while stating that it “cannot order a utility to give back to a customer money the utility has already collected,” the Commission reasoned that there had been no violation of the rule against retroactive ratemaking because it was granting relief for subsequent rates for “transmission service under [the] OATT,” and not ordering refunds for excessive transmission rates paid before the refund effective date.”¹³ Union asserts that, if the upfront payment for the Network Upgrades was, as the Commission’s application of section 206(b) assumes, a rate, the prohibition against retroactive ratemaking would apply equally to downward adjustments to future rates for transmission service designed to compensate for prior overpayments as to refunds. Such an assumption, it argues, runs counter to established precedent recognizing that these upfront payments are not rates.

10. Finally, Union argues that the Commission’s order in *Union* results in prohibited “and” pricing, rewards inefficient siting, and penalizes efficient siting. It argues that the Commission’s decision here has the effect of rewarding inefficient siting decisions, contrary to goals of Order No. 2003,¹⁴ because Union will be denied repayment of funds it advanced for a Network Upgrade due to its producing energy during the non-refund periods, whereas generators that sat unused will receive full repayment.¹⁵ Thus, Union argues, *Union* is patently arbitrary because it hinges more on the timing of the complaint, which was driven by Union’s efforts to reach a mutually acceptable resolution with Entergy, and the timing of the Commission’s order, which was obviously outside Union’s control, than on application of the Commission’s interconnection pricing policy.

¹³ Union Rehearing Request at 11 (*citing Duke Hinds III*, 117 FERC ¶ 61,210 at P 32).

¹⁴ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 *Fed. Reg.* 49,845 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,146 (2003) (Order No. 2003); *order on reh’g*, Order No. 2003-A, 69 *Fed. Reg.* 15,932 (Mar. 26, 2004), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,160 (2004) (Order No. 2003-A); *order on reh’g and directing compliance*, Order No. 2003-B, 70 *Fed. Reg.* 265 (December 20, 2004), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,171 (2005) (Order No. 2003-B), *order on reh’g*, Order No. 2003-C, 70 *Fed. Reg.* 37,662 (June 30, 2005), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,190 (2005) (Order No. 2003-C); *see also Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004), *aff’d*, *National Association of Regulatory Commissioners v. FERC*, 475 F.3d 1277 (2007) (Order No. 2003).

¹⁵ Union Rehearing Request at 13-14.

III. Commission Determination

11. We will deny rehearing. On June 6, 2007, the Commission issued *ExxonMobil Corporation v. Entergy Services, Inc.*,¹⁶ which addresses many of the issues Union raises here. To the extent that *ExxonMobil* disposes of these arguments, we find it to be controlling and will not discuss these issues further.

12. As we discussed in *ExxonMobil*, the upfront interconnection payment is not a loan.¹⁷ In *ExxonMobil*, we also discussed the arguments Union raises on section 206.¹⁸ In *Union*, we provided Union with the maximum refund protection permitted under section 206.¹⁹

13. Union is allowed to receive transmission credits for the fifteen-month refund effective period that section 206 prescribes, *i.e.*, December 3, 2004 through and including March 3, 2006. It cannot, however, receive transmission credits or interest before December 3, 2004 or from March 4, 2006 to the date of the Commission's order, February 20, 2007.²⁰ Thus, to the extent that Union has taken and paid for transmission service outside the refund effective period and did not receive credits for those transmission service payments, the amount of its upfront payment for the Original Transmission Facilities that is eligible for reimbursement on a prospective basis must be reduced by the total amount of those payments.²¹ This is the maximum protection that the Commission can afford Union under the FPA.²²

¹⁶ 119 FERC ¶ 61,261 (2007) (*ExxonMobil*).

¹⁷ *Id.* at P 15-19.

¹⁸ *Id.* at P 20-22.

¹⁹ *Union*, 118 FERC ¶ 61,134 at P 16.

²⁰ *Duke Hinds III*, 117 FERC ¶ 61,210 at P 32.

²¹ *Union*, 118 FERC ¶ 61,134 at P 16.

²² To this same effect, see *Mirant Las Vegas, LLC v. Nevada Power Company*, 118 FERC ¶ 61,034 at PP 18-20 (2007) (four distinct periods for recovery of transmission credits); *Tenaska Alabama II Partners, LP v. Alabama Power Company and Southern Company Services, Inc.*, 118 FERC ¶ 61,037 at P 23-25 (same).

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The Commission orders:

The request for rehearing is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.