

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

AES Warrior Run, Inc.

Docket No. EL03-55-003

v.

Potomac Edison Company d/b/a
Allegheny Power

ORDER ON REMAND

(Issued September 28, 2004)

1. This case is on voluntary remand from the United States Court of Appeals for the District of Columbia Circuit on the issue of whether the Commission should order the Potomac Edison Company d/b/a Allegheny Power (Allegheny Power) to refund monies improperly collected by Allegheny Power allegedly pursuant to a Maryland state tariff.¹

2. Previously, the Commission declined a request by AES Warrior Run, Inc. (AES) to order refunds. Instead, we held that, since the monies were collected by Allegheny Power allegedly pursuant to a Maryland state tariff, AES's proper course of action was to petition Maryland's Public Service Commission (Maryland Commission) for a refund order.²

¹ AES Warrior Run, Inc. v. FERC, No. 04-1051 (D.C. Cir. Aug. 11, 2004) (order granting the Commission's request for voluntary remand for further proceedings).

² See AES Warrior Run, Inc. v. Potomac Edison Co., 104 FERC ¶ 61,051 at P 16 (AES Order) ("a charge . . . levied by Allegheny Power for the transmission of the station power over Allegheny [Power]'s transmission facilities would appear to be an impermissible double charge for transmission service"), *reh'g denied*, 105 FERC ¶ 61,357 at P 15 (2003) (Rehearing Order) ("Since the improper charges were being collected under that state-jurisdictional tariff, the proper forum for AES to seek a refund is the Maryland Commission.").

3. However, upon further consideration, the Commission will order the requested refunds.

Background

4. On March 4, 2003, AES filed a complaint against Allegheny Power and requested that the Commission find Allegheny Power's practice of charging local distribution rates³ for delivery of station power⁴ to be unjust and unreasonable where no state-jurisdictional local distribution facilities were involved in the delivery of the station power.

5. The Commission agreed with AES "that the station power was delivered directly to the interconnection point between its facility and Allegheny Power's transmission lines without ever traveling across Allegheny Power's local distribution lines."⁵ Therefore, the Commission held, Allegheny Power's allegedly state-authorized local distribution rates should not have been applied to these power deliveries since the power never traveled over any state-jurisdictional local distribution facilities.⁶ Without the use of state-jurisdictional local distribution facilities, Allegheny Power's collection of the allegedly state-authorized local distribution rates constituted an "impermissible double charge for transmission service."⁷ However, the Commission did not direct refunds.

6. The Commission upheld its decision not to order refunds on rehearing,⁸ and AES appealed the Commission's decision not to order refunds to the D.C. Circuit.

³ In fact, what Allegheny Power charges AES is an amount that is the same as the "distribution charge" component of a bundled, state-jurisdictional rate. *See* AES Order at P 7-8, 17 n.23; Rehearing Order at P 14.

⁴ The Commission has defined "station power" as "the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment that is on the generating facility's site." PJM Interconnection, LLC, *et al.*, 94 FERC ¶ 61,251 (*PJM II*), *clarified and reh'g denied*, 95 FERC ¶ 61,333 (2001) (*PJM III*); PJM Interconnection LLC, 95 FERC ¶ 61,470 (2001) (*PJM IV*).

⁵ AES Order at P 7; *see id.* at P 16.

⁶ *Id.* at P 16.

⁷ *Id.*

⁸ Rehearing Order at P 13-15.

Discussion

7. The Commission has long asserted jurisdiction over some deliveries of station power, depending on whether the station power was delivered over Commission-jurisdictional transmission facilities, state-jurisdictional local distribution facilities, or some combination of both.⁹

8. In the AES Order, the Commission found that no local distribution facilities were being used to deliver station power to AES's Warrior Run facility.¹⁰ On this basis, it held Allegheny Power's collection of a local distribution rate to be unjust and unreasonable.

9. However, having made this finding, the Commission stopped short of ordering Allegheny Power to refund the monies it had improperly collected. Instead, the Commission suggested that AES's remedy was to apply to the Maryland Commission or Maryland state courts for an order requiring Allegheny Power to refund the improperly collected monies.¹¹

10. The Commission was faced with a similar situation in *Public Utilities Commission of California v. FERC*, 143 F.3d 610 (1998) (*CPUC v. FERC*). There, we held that Southern California Gas Company (SoCal) improperly collected interconnection charges from interstate gas shippers pursuant to a state-approved tariff. We found that the service being provided by SoCal was, in fact, subject to federal, and not state, regulation.¹² Similar to the instant case, the Commission declined to order refunds, instead referring the parties to the appropriate state regulatory commission.¹³

11. While upholding the Commission's finding that SoCal's collection of the state-approved gas tariff was improper, the court held that the Commission's refusal to order SoCal to refund the improperly collected monies was arbitrary and capricious.¹⁴ The court rejected arguments that the Commission lacked jurisdiction to order refunds of monies improperly collected pursuant to a state tariff.¹⁵ It also rejected arguments that

⁹ See AES Order at P 4.

¹⁰ *Id.* at P 16 ("Here, however, it appears that there are no local distribution facilities involved in the delivery of station power . . . to the AES facility. [O]nly transmission facilities apparently are used. . . ."); *accord id.* at P 16 n.20.

¹¹ See *id.* at P 18; see also Rehearing Order at P 15.

¹² See *CPUC v. FERC*, 143 F.3d at 612.

¹³ *Id.*

¹⁴ *Id.* at 617-18.

¹⁵ *Id.* at 617.

comity considerations justified the Commission's deference to the state commission on the issue of refunds.¹⁶ Finally, the court specifically stated that a party was not required to exhaust its remedies at the state level before applying to the Commission for a refund order.¹⁷

12. The Commission was confronted with an analogous issue in *Entergy Services Inc.*, 104 FERC ¶ 61,061 at P 17 (2003) (*Entergy*), when Entergy argued that the Commission had no power to order refunds of monies improperly collected by Entergy pursuant to state law. The Commission rejected Entergy's argument, stating that:

[t]he Commission has, and must have, the power to correct this wrong. Entergy cannot successfully argue that because it improperly charged customers retail rates for wholesale services, it does not have to refund the monies collected. Rather, the Commission has the authority under [s]ection 205 of the [Federal Power Act] to direct refunds of amounts improperly charged for Commission-jurisdictional services.^{18]}

13. Applying the court's holding in *CPUC v. FERC* to this case, the Commission concludes that it erred when it originally declined to order Allegheny Power to refund to AES the improperly collected monies. As we pointed out in *Entergy*, the Commission must have the power to order refunds of improperly collected monies if its statutory mandate to protect ratepayers is to be given effect.¹⁹

14. In addition, given that what is at issue is a Commission-jurisdictional service, the Maryland Commission (and Maryland courts) would not have authority to order refunds. So, if we do not, no one would be able to do so.

15. Therefore, upon further consideration, the Commission will require Allegheny Power to refund to AES, with interest, the local distribution rates it collected for station power deliveries between April 1, 2001 and the present.

¹⁶ *Id.* at 617-18.

¹⁷ *Id.*

¹⁸ *Entergy Services Inc.*, 104 FERC at P 19.

¹⁹ *See also* *California v. FERC*, No. 02-73093 at 13141 (9th Cir. Sept. 9, 2004) ("The FPA cannot be construed to immunize those who overcharge . . . in violation of the FPA.")

The Commission orders:

(A) Allegheny Power is hereby directed to make refunds, with interest calculated pursuant to 18 C.F.R. § 35.19a (2004), to AES, within 30 days of the date of this order, as described in the body of this order.

(B) Allegheny Power is hereby directed to file a refund report, to be submitted within 30 days of the date of this order, showing the calculation of refunds and interest paid.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.