

123 FERC ¶ 61,240  
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.

Westar Energy, Inc.  
Kansas Gas and Electric Company

Docket Nos. ER03-9-011  
ER06-1313-003  
ER98-2157-012  
EL05-64-003

ORDER DENYING REQUEST FOR STAY

(Issued June 3, 2008)

1. On May 7, 2008, Westar Energy, Inc. and its wholly-owned subsidiary, Kansas Gas and Electric Company (collectively, Westar) filed a request for expedited clarification<sup>1</sup> and stay, or, in the alternative, a request to establish an interest-bearing refund escrow account pending judicial review of a Commission order issued on May 5, 2008.<sup>2</sup> In that order, among other things the Commission conditionally accepted for filing tariff revisions, denied the requests for rehearing of a Commission order issued September 6, 2006,<sup>3</sup> and required that Westar pay refunds “to the extent Westar made any sales under its market-bases rate tariff since the refund effective date in the proceeding in the Westar, Midwest Energy (Midwest), and Aquila Networks-West Plains Kansas

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<sup>1</sup> The request for clarification is moot in light of the Errata notice issued in this docket on May 15, 2008.

<sup>2</sup> *Westar Energy, Inc.*, 123 FERC ¶ 61,123 (2008) (May 5 Order).

<sup>3</sup> *Westar Energy, Inc.*, 116 FERC ¶ 61,219 (2006) (September 6 Order). The September 6 Order addressed Westar’s proposal to mitigate the presumption of market power for sales of electric power at wholesale for transactions in its home (Westar) balancing authority area, and two of its first-tier markets, Midwest Energy (Midwest) balancing authority area and Aquila Networks-West Plains Kansas (WPEK) balancing authority area.

(WPEK) balancing authority areas that were above the WSSP Agreement<sup>4</sup> in effect at the time of the refund effective date...”<sup>5</sup> As discussed below, we deny Westar’s requests for stay and for establishment of an escrow account.

## **I. Background**

2. In the September 6 Order, the Commission accepted a proposed mitigation proposal filed by Westar for sales made in the Westar balancing authority area subject to certain modifications and subject to the outcome of Order No. 697.<sup>6</sup> The Commission found that Westar’s proposed tariff language would improperly limit mitigation to certain customers in the Westar balancing authority area, namely, only to sales to those buyers that serve end-use customers in the Westar balancing authority area. The Commission established a refund effective date of May 16, 2005.<sup>7</sup>

3. In the May 5 Order, the Commission denied a request for rehearing of the September 6 Order, affirming its earlier finding that Westar’s proposed tariff language would not properly mitigate Westar’s potential to exercise market power in the Westar balancing authority area. The Commission noted that, since the issuance of the September 6 Order, the Commission had issued Order No. 697, in which it found that adequately protecting customers from the potential exercise of market power required that it continue to apply mitigation to all sales in the balancing authority area in which a seller is found, or presumed to have, market power. The Commission denied Westar’s request that the Commission waive refunds, finding that ordering refunds was consistent with Commission policy that “applicants that have a presumption of market power ... will have their rates prospectively made subject to refund.”<sup>8</sup>

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<sup>4</sup> The proposed amended tariff provided that Mitigated Sales for periods of one year or less shall be made under Schedules A or C of the Western Systems Power Pool Rate Schedule, FERC No. 6 (WSPP Agreement).

<sup>5</sup> May 5 Order, 123 FERC ¶ 61,123 at P 42.

<sup>6</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008).

<sup>7</sup> The procedural history is discussed at greater length in the May 5 Order at P 2-11.

<sup>8</sup> May 5 Order, 123 FERC ¶ 61,123 at P 19 (citing *AEP Power Marketing, Inc.*, 114 FERC ¶ 61,025 (2006)).

## II. Request for Stay

4. On May 7, 2008, Westar filed a request for stay, or, in the alternative, a request to place refunds into an escrow account pending judicial review of the May 5 Order. Westar argues that the Commission may stay its action when “justice so requires.” 5 U.S.C. § 705 (2000). In deciding whether justice requires a stay, the Commission generally requires several factors including: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.<sup>9</sup> Westar concedes that the Commission’s general policy is to refrain from granting stays of its orders, in order to assure definiteness and finality in Commission proceedings.<sup>10</sup>

5. Westar argues that it will suffer irreparable harm if required to pay refunds prior to a judicial review of the May 5 Order. It argues that its anticipated refund liability – approximately \$800,000, not counting interest – is substantial and it would not be in the best interest of Westar and its customers

6. Westar further argues that the Commission has stated previously that it will issue a stay “when justice so requires.”<sup>11</sup> Westar argues that justice requires a stay because Westar will pay refunds to non-captive and/or non-FERC jurisdictional customers, which means that it has no effective means to surcharge those customers to recoup those refunds if the Commission is ultimately reversed by the court of appeals. Conversely, Westar argues that granting a stay will not substantially harm other parties because it has identified and reserved the refunds in this proceeding. Therefore, Westar asserts, if it is ultimately required to pay refunds, the monies will be readily available for distribution to the customers.<sup>12</sup>

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<sup>9</sup> Westar Motion at 5 (citing *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,131 (1991), *aff’d sub nom.*, *Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993), *cert denied*, 510 U.S. 990 (1993); *NE Hub Partners, L.P.*, 85 FERC ¶ 61,105 (1998); *Boston Edison Company*, 81 FERC ¶ 61,102 (1997)).

<sup>10</sup> Westar Motion at 5 (citing *Sea Robin Pipeline Company*, 92 FERC ¶ 61,217 (2000)).

<sup>11</sup> Westar Motion at 5-6 (citing, e.g., *The Montana Power Co.*, 80 FERC 61,175, at 61,735 n.7 (1997)); *City of Tacoma, Washington*, 89 FERC ¶ 61,273, at p. 61,795, n.10 (1999).

<sup>12</sup> Westar Motion at 6.

7. Westar argues that a party showing a strong likelihood of success on the merits need only show the possibility of irreparable injury.<sup>13</sup> Westar argues that it is likely to succeed on appeal because the Commission acknowledged in the May 5 Order that it reached different results in other cases, but attempted to justify its action based on its holding in Order No. 697. Westar argues that that rationale is inapposite here because Order No. 697 adopted prospective rule changes that did not apply to the transactions at issue here. Westar argues that the Commission failed to reconcile its treatment of Westar with rulings in other cases where the Commission concedes it reached inconsistent results, making it likely that the court of appeals will find the Commission's decision here to be arbitrary and capricious.

8. Westar also argues that, to the extent that the Commission denies Westar's request for stay of the order to pay refunds, the Commission should authorize Westar to place the refunds into an interest-bearing escrow account pending judicial review.<sup>14</sup> Westar states that it will place into the escrow the refunds accumulated as of the date it establishes the escrow, including interest, and will continue to pay refunds into the escrow account while judicial review is pending. Westar argues that the escrow account is warranted because it contends that it has a strong likelihood of success on appeal should it pursue judicial review.

### **III. Commission Determination**

9. We will deny Westar's request to retain, pending judicial review, the refunds that the Commission has found are owed to its customers. The law requires the ordering of refunds at the earliest possible moment,<sup>15</sup> and the Supreme Court has stated that "[i]t is the duty of the Commission . . . , where refunds are due, to direct their payment at the earliest possible moment consistent with due process."<sup>16</sup> The rationale for prompt ordering of refunds is clear: "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."<sup>17</sup> Further, as Westar concedes,

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<sup>13</sup> Westar Motion at 6 (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, F.2d 921, 925 (D.C. Cir. 1958)).

<sup>14</sup> Westar Motion at 7 (citing *Panhandle Eastern Pipe Line Co.*, 107 FERC ¶ 61,239, *reh'g*, 109 FERC ¶ 61,054 (2004); *Plains Petroleum Co.*, 84 FERC ¶ 61,140 (1998)).

<sup>15</sup> *Interstate Natural Gas Assoc. v. FERC*, 756 F.2d 166, 171 (D.C. Cir. 1985).

<sup>16</sup> *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 155 (1962).

<sup>17</sup> *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378,388 (1959).

the Commission generally denies requests for stays of refunds, which *inter alia* assures definiteness and finality in Commission proceedings.<sup>18</sup> We see no reason to find differently here.

10. Under section 705 of the Administrative Power Act, the standard for granting a stay by an administrative agency is whether “justice so requires.”<sup>19</sup> The Commission must balance the interests of the party seeking the stay with the overall public interest, and determine whether the requesting party will sustain irreparable harm in the absence of a stay.<sup>20</sup> As we explained in our earlier orders, Westar charged market-based rates that were not properly mitigated, i.e., Westar overcharged, and we find that it would not be in the public interest to allow Westar to retain these overcharges any longer than necessary but rather these overcharges should be refunded to the customers that were overcharged as quickly as possible. In addition, a showing of irreparable injury must be more than unfavorable economic circumstances or loss of profits,<sup>21</sup> and Westar has made no such showing here.<sup>22</sup>

11. Further, the Commission does not find merit in Westar’s contention respecting the likely outcome of judicial review of the subject orders. The Commission has fully considered the merits of Westar’s argument that the Commission has failed to reconcile its treatment of Westar with rulings in other cases. In denying rehearing, we considered all relevant factors, including developments in Commission case law and the Commission’s findings in Order No. 697. We took into account the earlier cases that had accepted mitigation proposals similar to Westar’s, i.e., those that limited mitigation to sales that sink in the balancing authority area, and explained why, upon further review,

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<sup>18</sup> See *Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217, at 61,710 (2000).

<sup>19</sup> See 5 U.S.C. § 705 (1984).

<sup>20</sup> *Olympic Pipe Line Co.*, 102 FERC ¶ 61,055, at P 17 (2003) (citations omitted).

<sup>21</sup> *Id.*

<sup>22</sup> The Commission has previously explained that, should a court overturn Commission orders, either the Commission or the court may provide a remedy to recover previously-refunded amounts. *Panhandle Eastern Pipe Line Co.*, 103 FERC ¶ 61,099, at P 5 (2003).

such proposals were insufficient to mitigate the seller's potential to exercise market power.<sup>23</sup> In addition, the Commission also stated that prohibiting only market-based rate sales in the balancing authority area is inconsistent with Commission precedent.<sup>24</sup>

12. In addition, for similar reasons, we will deny the request to place the refunds into escrow. As stated above, we disagree with Westar's assertion that Westar is likely to succeed on appeal. Further, we find no apparent benefits to customers that would be realized through the placement of refunds into an escrow account; to the contrary, if we were to grant Westar's motion customers that were inappropriately overcharged in the first place would continue to be denied the just and reasonable rates that they were entitled to by virtue of the deferral of the relief that the Commission found was appropriate – refunds of the overcharges. Westar must, at a minimum, show the public benefits that would accrue from its proposal to justify our deviating from our usual policy of requiring refunds to be paid as quickly as possible following issuance of a final order. In addition, the *Panhandle* case relied on by Westar is distinguishable. That case involved an atypical situation, the hotly contested *ad valorem taxes*. Here, in the different context of overcharges, Westar has stated no sufficient rationale which would compel the use of an escrow account in place of the traditional direct refund of those overcharges (with interest at the Commission-prescribed rate).<sup>25</sup>

13. Accordingly, we will deny the request for stay or for the establishment of an escrow account.

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<sup>23</sup> May 5 Order, 123 FERC ¶ 61,123 at P 24.

<sup>24</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

<sup>25</sup> The rehearing of the *Panhandle* case also noted that "Commission-ordered refunds are to be paid promptly." *Panhandle Eastern Pipe Line Co.*, 109 FERC ¶ 61,054, at P 25 (2004).

The Commission orders:

The request for stay or, in the alternative, for refunds to be placed into an interest-bearing escrow account, is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.