

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. EL03-55-004 and EL03-55-005

v.

Potomac Edison Company d/b/a
Allegheny Power

ORDER ON REHEARING AND REJECTING REFUND REPORT

(Issued July 5, 2005)

1. Potomac Edison Company d/b/a Allegheny Power (Allegheny Power) requests rehearing of the Commission's September 28, 2004 order,¹ directing Allegheny Power to refund monies improperly collected by Allegheny Power allegedly pursuant to a Maryland state tariff. We deny rehearing in part, and grant rehearing in part, as discussed below. We also reject Allegheny Power's refund report detailing its refunds of improperly collected monies to AES Warrior Run, Inc, and direct further refunds and a further refund report. This order benefits customers by ensuring compliance with the Commission's station power policies.

¹ *AES Warrior Run, Inc. v. Potomac Edison Co.*, 108 FERC ¶ 61,316 (2004) (Remand Order).

I. Background

2. 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 rates² for delivery of station power³ to be unjust and unreasonable where no state-jurisdictional local distribution facilities were involved in the delivery of the station power.

3. The Commission agreed with AES' characterization "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."⁴ Allegheny Power likewise accepted AES' factual description of the lines being used.⁵ 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."⁶ However, the Commission did not direct Allegheny Power to refund the improperly collected amounts.⁷

² 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 Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 at P 7-8, 17 n.23 (2003) (AES Order), *reh'g denied*, 105 FERC ¶ 61,357 at P 14 (2003) (Rehearing Order).

³ 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." *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*).

⁴ AES Order at P 7, 16 ("Here, however, it appears that there no local distribution facilities involved in the delivery of station power. . . .")

⁵ *Id.* at P 20 (finding that Allegheny Power "accepts" AES' version of the facts.) *See also* Allegheny Power's March 24, 2004 Answer at p. 3.

⁶ *Id.* at P 16.

⁷ *Id.* at P 18.

4. 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. (The Rehearing Order also rejected Allegheny Power's answer to AES' request for rehearing.⁹)

5. On August 11, 2004, the D.C. Circuit granted the Commission's request for remand on the issue of ordering refunds.¹⁰ In the Remand Order, the Commission reconsidered its decision not to order refunds and instead directed Allegheny Power to refund any local distribution charges it had improperly collected for the delivery of station power where no state-jurisdictional local distribution facilities were involved in its delivery of station power from April 1, 2001 to the present.¹¹ The Commission concluded that "the Commission . . . erred when it originally declined to order Allegheny Power to refund to AES the improperly collected monies"¹² and that "given that what is at issue is a Commission-jurisdictional service, the Maryland [Public Service] Commission (and Maryland courts) would not have authority to order refunds. So, if we do not, no one would be able to do so."¹³

II. Allegheny Power's Rehearing Request

6. On October 28, 2004, Allegheny Power requested rehearing of the Remand Order. In its rehearing request, Allegheny Power reiterates that the Commission lacks authority to order refunds. Allegheny Power also argues that the factual record is insufficient to justify the Commission's conclusion that AES is being impermissibly double charged for station power delivery service. Instead, Allegheny Power argues that AES was incorrect when it stated that the station power never flowed over local distribution lines. Therefore, Allegheny Power argues, only the Maryland Commission may properly exert jurisdiction over the station power deliveries at issue here. Allegheny Power argues that the Commission recognized this fact in the AES Order where it qualified its factual findings by stating that Allegheny Power "appeared" to be impermissibly double charging AES for station power service.¹⁴

⁸ Rehearing Order at P 13-15.

⁹ Rehearing Order at P 11 & n.12 (citing Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2003)).

¹⁰ *See supra* note 2.

¹¹ Remand Order at P 9, 15.

¹² *Id.* at P 13 (citing *Public Utilities Commission of California v. FERC*, 143 F.3d 610 (D.C. Cir. 1998)).

¹³ *Id.* at P 14.

¹⁴ *See* AES Order at P 16.

7. In this same regard, Allegheny Power argues that AES, as the complainant, bears the burden of proving that the amounts being collected by Allegheny Power violate the Federal Power Act and that AES' initial complaint failed to do so. Because of this, Allegheny Power asserts that the cases relied upon by the Commission in its Remand Order¹⁵ are not on point and that the Commission should not have ordered refunds.

8. Allegheny Power also asserts that April 30, 2001 is the proper date from which refunds should be ordered (as opposed to the April 1, 2001 date specified in the Remand Order¹⁶). Allegheny Power claims that it provided AES' station power until April 29, 2001 when AES began acquiring its station power service from another company, and not April 1, 2001 as AES claimed in its initial complaint. Allegheny Power submits copies of invoices sent to AES in support of its claim.

9. Finally, Allegheny Power requests clarification that it is not required to refund amounts collected pursuant to the Maryland Public Service Commission's (Maryland Commission) universal service, stranded investment, and other retail service charges.

III. Allegheny Power's Refund Report

10. On October 28, 2005, Allegheny Power submitted a refund report (Refund Report), as directed by the Commission in the Remand Order. In its Refund Report, Allegheny Power states that it refunded the portion of the local distribution charges related to the costs of the local distribution facilities, but that it did not refund: (1) a surcharge used to fund Maryland's Universal Service Program,¹⁷ and (2) a surcharge levied by Maryland under the Public Utility Regulatory Policies Act of 1978 (PURPA).¹⁸ Allegheny Power also states that it has not refunded its local distribution charges related to 1 MW of station power delivered over Allegheny Power's local distribution facilities.

¹⁵ Namely *Entergy Services Inc.*, 104 FERC ¶ 61,061 (2003) (*Entergy*), and *Public Utilities Commission of California v. FERC*, 143 F.3d 610 (D.C. Cir. 1998).

¹⁶ Remand Order at P 15.

¹⁷ AES describes this surcharge as allowing for the provision of power to low income individuals.

¹⁸ PURPA, among other things, mandates that utilities purchase power from certain generators, so-called qualifying facilities or QFs, at the utility's avoided cost rate. See 16 U.S.C. § 824a-3 (2000). AES states that the Maryland Commission previously approved several contracts between Allegheny Power and AES for the purchase of power generated at AES' Warrior Run facility, which is a QF.

11. Notice of Allegheny Power's Refund Report was published in the *Federal Register*, 69 Fed. Reg. 65,419 (2004), with protests and interventions due on or before November 18, 2004. On November 22, 2004, AES filed a protest (Protest). On December 3, 2004, Allegheny Power filed an answer (Answer) to AES' Protest.

12. In its Protest, AES takes issue with Allegheny Power's Refund Report, asserting that Allegheny Power should have refunded the PURPA surcharge, in addition to the local distribution charges that Allegheny Power did refund. AES does not dispute its obligation to pay for the 1 MW of station power service taken over Allegheny Power's local distribution facilities, however, nor its obligation to pay the Universal Service Program Surcharge.

13. According to AES, the PURPA Surcharge is the difference in the price Allegheny pays AES for power generated at AES' Warrior Run facility minus the amount that Allegheny Power then sells that power for in the wholesale energy markets. Any such loss is then spread among all Maryland retail power customers through the PURPA Surcharge. AES argues that it makes no sense for Allegheny Power to charge AES a surcharge designed to compensate Allegheny Power for purchasing power from AES. As AES states:

Since Warrior Run would need standby service from Allegheny Power . . . only when Warrior Run was not operating, certainly Allegheny Power did sign the power purchase agreement with Warrior Run to enable Allegheny Power to provide station power to Warrior Run. . . . As a matter of unassailable logic, the stranded costs incurred by Allegheny Power in connection with the Warrior Run power purchase were not incurred to enable Allegheny Power to serve Warrior Run, whatever the transmission arrangement.^[19]

14. Allegheny Power's Answer responds that the proper forum for addressing AES' concerns over the PURPA Surcharge is the Maryland Commission, since this Commission has no jurisdiction over such state-imposed charges designed to collect stranded costs. Allegheny Power states that the PURPA Surcharge was approved by the Maryland Commission and that it is a "non-bypassable surcharge [] applicable to all Allegheny Power sales for end use in the State of Maryland to recover the uneconomic portion of the electric generation purchase from AES Warrior Run. . . ." ²⁰

¹⁹ AES' Protest at pp. 3-4.

²⁰ Allegheny Power's Answer at p. 3.

IV. Discussion

A. Procedural Matters

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Allegheny Power's Answer because it has provided information that assisted us in our decision-making process.

B. Allegheny Power's Request for Rehearing

16. At the outset, while Allegheny Power claims the Commission lacks authority to order refunds, we disagree. The Commission explained in the Order on Remand that it has authority to order just such refunds,²¹ and Allegheny Power's rehearing request does not persuade us to the contrary.

17. We also reject Allegheny Power's assertion that the factual record in this case is insufficient to support the ordering of refunds. In its July 10, 2003 order, the Commission expressly noted that:

Nowhere in its Answer does Allegheny Power claim that local distribution facilities *are* being used to provide the service at issue. . . in fact, Allegheny Power argues that the facts are not material to the resolution of this proceeding and "accepts" AES's description of the facts for purposes its Answer.^[22]

18. AES did not challenge this determination on rehearing and Allegheny Power did not seek rehearing.²³ Therefore, in the Commission's view, this issue is settled.

²¹ See Order on Remand at P 12-13 (citing, among other cases, *Entergy Services, Inc.*, 104 FERC ¶ 61,061 (2003) (*Entergy*)). Indeed, *Entergy* has since been affirmed on appeal. *Entergy Services, Inc. v. FERC*, 400 F.3d 5, 8 (D.C. Cir. 2005). The court held:

Entergy surely cannot avoid refunds because it was . . . using the wrong methodology under bundled state-jurisdictional retail rates. The rates at issue related to what Entergy should have considered as wholesale service provided by Entergy to QFs, which is clearly within the Commission's regulatory jurisdiction. . . . [w]e agree with FERC that the ordering of refunds in this case had nothing to do with the regulation of retail rates.

²² AES Order at P 16 n.20.

²³ Rehearing Order at P 1, 5, 7, 8, n.12.

19. This case has gone through rehearing and was appealed. The Commission then requested voluntary remand to modify its *legal* conclusion on its authority to order refunds. It is too late for Allegheny Power to now contest facts it conceded at the outset. Since the only evidence on the record, which at the time Allegheny Power "accepted", supports AES, we reject Allegheny Power's assertion that the record does not support the Commission's factual conclusions.

20. However, we agree with Allegheny Power that April 30, 2001 is the proper date from which refunds should be ordered (as opposed to the April 1, 2001 date ordered in the Remand Order²⁴) and correct that date. As the invoices submitted by Allegheny Power show, Allegheny Power was providing both transmission and generation services to AES until April 30, 2001.²⁵

C. Allegheny Power's Refund Report

21. Allegheny Power asserts that all sales of energy to end-users in the state of Maryland are subject to a PURPA Surcharge and that that surcharge need not be refunded. AES, Allegheny Power argues, is still a Maryland retail consumer of electricity²⁶ and subject to the surcharge as is every other Maryland retail consumer of electricity.

22. We agree with AES, but for different reasons. The PURPA Surcharge charged by Allegheny Power to AES is a surcharge on retail sales of electricity. Here, however, Allegheny Power does not make retail sales of station power to AES, and has not since April 30, 2001, when AES began to take (and is still taking) station power from NewEnergy.²⁷ Just as with the local distribution charges discussed in our earlier orders and above, as Allegheny Power is not making retail sales of station power to AES, Allegheny Power is not entitled to collect the PURPA Surcharge from AES. Accordingly, we reject Allegheny Power's refund report and direct Allegheny Power to refund the PURPA Surcharge and file a further refund report.

The Commission orders:

(A) Allegheny Power's request for rehearing of the Commission's Remand Order is hereby denied in part, and granted in part, as discussed above.

²⁴ *Id.* at P 15.

²⁵ *See* Allegheny Power's Request for Rehearing at 16, Attachments A-6 and A-7.

²⁶ *See id.* at p. 1.

²⁷ *Compare supra* P 8, 20 *with* AES Order at P 8.

(B) Allegheny Power's refund report is hereby rejected and 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 and to file a refund report showing the calculation of refunds and interest within 60 days of the date of this order, as discussed above.

By the Commission.

(S E A L)

Magalie R. Salas
Secretary