

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

AES Warrior Run, Inc.

Docket No. EL03-55-001

v.

Potomac Edison Company
d/b/a Allegheny Power

ORDER DENYING REHEARING

(Issued December 23, 2003)

1. AES Warrior Run, Inc. (AES) and Northeast Utilities Service Company (NU) separately filed timely requests for rehearing of the Commission's July 10, 2003 Order in this proceeding.¹ NU also filed a motion to intervene out-of-time. In this order, the Commission denies AES' request for rehearing and reaffirms its analysis of delivery services and rates for station power, and denies NU's intervention and dismisses its rehearing.

I. Background

2. In its July 10 Order, the Commission explained that deliveries of station power "may involve transmission facilities subject to the Commission's jurisdiction, or local distribution facilities subject to state jurisdiction, or some combination thereof." Therefore, whether or not the Commission has jurisdiction over such delivery depends on the factual circumstances surrounding the delivery.²

3. We also noted that "a self-supplying generator cannot be required to purchase station power under a retail tariff simply because it is a merchant generator," so that, if a merchant generator happened to be in the service territory of a Load Serving Entity

¹ AES Warrior Run, Inc. v. Potomac Edison Co. d/b/a Allegheny Power, 104 FERC ¶ 61,051 (2003) (July 10 Order).

² Id. at P 4.

(LSE), that LSE could not compel the generator to purchase station power from it, rather than self-supplying.³

4. According to the pleadings filed by the parties, only Commission-jurisdictional transmission facilities were used to deliver station power to AES' Warrior Run facility. No local distribution facilities were involved.⁴ Therefore, the Commission held that any local distribution service surcharge levied by Allegheny Power for the transmission of the station power over Allegheny Power's transmission facilities appeared to be an impermissible double charge for Commission-jurisdictional transmission service.⁵ The Commission concluded that AES may seek further relief before the Maryland Public Service Commission (Maryland Commission), without ruling on refunds under the state tariff at issue.⁶

II. AES's Request for Rehearing

5. AES requests that the Commission grant rehearing of its July 10 Order and expressly direct Allegheny Power to (1) stop charging AES a local distribution rate for delivery of station power, and (2) require Allegheny Power to refund to AES all local distribution surcharges from April 1, 2001 until present.

6. AES argues that, since the Commission found Allegheny Powers' local distribution surcharge to be an impermissible double charge for transmission service, the Commission has sole jurisdiction over this matter and should order refunds. AES states that the ongoing proceedings in Maryland court and before the Maryland Commission, referred to in the July 10, Order,⁷ relate to the same set of facts, but present different issues. Therefore, AES argues, there are no overlapping jurisdictional issues, and the Commission should require refunds. AES adds that, in fact, the Maryland Commission has no jurisdiction to require Allegheny Power to refund the local distribution surcharge.⁸

³ Id. at P 5.

⁴ Id. at P 7, 9, 16 & n.20.

⁵ Id. at P 16.

⁶ Id. at P 9 & n.14, 18.

⁷ Id.

⁸ See AES' Request for Rehearing at 4.

III. NU's Request for Rehearing

7. NU filed a request for rehearing, along with a motion to intervene out-of-time. NU takes issue with the Commission's clarification of Northeast Utilities Service Co., 101 FERC ¶ 61,327 (2002) (NU Decision), in the July 10 Order and seeks rehearing.

8. Specifically, NU takes issue with the portion of the July 10 Order in which the Commission stated:

Dictum in [the NU Decision] upon which Allegheny Power relies for the proposition that it may impose charges based on the allocated cost of Allegheny Power's distribution facilities for local distribution service in this instance, even though no local distribution facilities are involved, is incorrect and is reversed. That dictum erroneously implied that a charge for local distribution service could be assessed for delivery of station power, even when no local distribution facilities were actually used in delivering the station power.⁹

NU requests that the Commission reverse this determination and affirm its original statement in the NU Decision that a utility "may impose state-approved charges on such retail deliveries [*i.e.*, delivery of station power to a merchant generator] regardless of . . . whether the delivery uses no identifiable distribution facilities."¹⁰

9. NU fears that the Commission's July 10 Order will be "badly misconstrued," and that while:

AES Warrior Run merely indicates support for the proposition that state-regulated distribution **wires** charges should reflect distribution **wires** usage and thus should not be imposed on **transmission-level** retail customers, it is highly probable that some generators will claim that AES Warrior Run contains a far broader holding.¹¹

NU requests that the Commission avoid this outcome by clarifying that the local distribution rate at issue in the July 10 Order is merely a local distribution wire charge and does not effect state-imposed non-wire local distribution charges.

⁹ July 10 Order, 104 FERC ¶ 61,051 at P 17 (footnote omitted).

¹⁰ NU Decision, 101 FERC ¶ 61,327 at P 25.

¹¹ NU's Request for Rehearing at 3 (emphasis in original, footnotes omitted).

IV. Other Pleadings

10. In addition to the requests for rehearing filed by AES and NU, and the motion to intervene out-of-time filed by NU, the Commission also received an answer to AES' rehearing request from Allegheny Power on August 28, 2003. AES then filed an answer to Allegheny Power's answer on September 5, 2003.

V. Discussion

A. Procedural Considerations

11. Consistent with Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2003), which bars answers to requests for rehearing, we will reject Allegheny Power's answer to AES' request for rehearing.¹²

12. NU, along with its rehearing, filed a motion to intervene out-of-time. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.¹³ NU has not met its burden; that the Commission in this case corrected a misstatement in the NU Decision does not justify NU's intervention in this

¹² To the extent that Allegheny Power's answer could itself be construed as a request for rehearing, it is barred by section 313(a) of the Federal Power Act, 16 U.S.C. § 8251(a) (2000), as untimely. That section requires that requests for rehearing must be filed within 30 days of the date of the order, and Allegheny Power's answer was submitted later.

¹³ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003).

case.¹⁴ Consequently we will deny NU's motion to intervene out-of-time. As NU is not a party to this proceeding, we need not address its request for rehearing.¹⁵

B. AES' Request for Rehearing

13. The Commission denies AES' request for rehearing. Since the improper charges paid by AES were being collected by Allegheny Power apparently pursuant to state tariff, it is for the Maryland Commission to order refunds.¹⁶

14. Allegheny Power has a state-jurisdictional bundled retail rate for station power services, its Alternative Generation Schedule (AGS) rate. Included in this AGS rate is a local distribution component based on the allocated cost of Allegheny Power's local distribution facilities. It appears that Allegheny Power was charging AES a rate that tracks that component of the AGS rate.¹⁷

15. This Commission thus is not the proper forum to order refunds. 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.

¹⁴ NU has taken a different position when "the shoe was on the other foot," we note, and we agreed then. See, e.g., Northeast Utilities Service Co., 58 FERC ¶ 61,069 at 61,166-67, 61,176-77 & n.95 (1992); Northeast Utilities Service Co., 53 FERC ¶ 61,135 at 61,455-56 (1990). Moreover, NU's logic, if accepted, would, for example, justify every time the Commission issued an order that changed some policy, every entity that benefited from the prior policy intervening late to seek rehearing of that order and that change in policy. Such an argument cannot succeed. See, e.g., Niagara Mohawk Power Corp. v. Huntley Power LLC, et al., 105 FERC ¶ 61,321 at P 7 & n.7 (2003) (Docket No. EL03-27-001), and cases cited therein.

¹⁵ See 16 U.S.C. § 8251(a) (2000) (only parties may seek rehearing); 18 C.F.R. § 385.713(b) (2003) (same).

¹⁶ In response to AES' request that Allegheny Power stop charging the surcharge prospectively, the Commission has already stated that Allegheny Power's charging AES for distribution service when no local distribution facilities are involved is an impermissible double charge for transmission service, see July 10 Order, 104 FERC ¶ 61,051 at P 16, and Allegheny Power should cease doing so.

¹⁷ Id. at P 7, 17 & n.23.

The Commission orders:

(A) AES' request for rehearing is hereby denied.

(B) NU's motion to intervene out-of-time is hereby denied, and its request for rehearing is hereby dismissed.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.