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July 15, 2003

Honorable Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. EL03-204-000 - AES Somerset, LLC

Dear Secretary Salas:

For filing, please find the Notice of Intervention and Protest of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-7136.

Very truly yours,

Leonard Van Ryn
Assistant Counsel

Attachment

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

AES Somerset, LLC

) Docket No. EL03-204-000

NOTICE OF INTERVENTION AND PROTEST

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the Public Service Commission of the State of New York (NYPSC) hereby submits its Notice of Intervention and Protest in the captioned proceeding.

Copies of all documents and correspondence should be sent to:

Dawn Jablonski Ryman
General Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Ronald Liberty, Director
Federal Energy Intervention
Office of Electricity
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New York State Department
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Three Empire State Plaza
Albany, New York 12223-1350

In a complaint filed June 25, 2003, AES Somerset, LLC (AES), the owner of a 675 MW coal-fired electric generating facility located in Somerset, New York (the Somerset facility), asks that the Commission preclude Niagara Mohawk Power Corporation (Niagara Mohawk) from charging for the retail standby electric services it supplies to the Somerset facility. AES argues that the charges conflict with the New York

Independent System Operators' Station Power Netting Tariff,¹ and are otherwise discriminatory. Those arguments lack merit, because the Commission has recognized that States have the authority to charge for retail delivery services provided to customers like AES; retail energy services are subject to State jurisdiction in any event; and, there is no discrimination. To the extent Niagara Mohawk's charges might duplicate charges within the scope of the NYISO netting tariff, AES should be directed to petition NYPSC for relief. Accordingly, NYPSC asks that the Commission reject the complaint.

BACKGROUND

AES purchased the Somerset facility from New York State Electric & Gas Corporation (NYSEG) in February 1998. The facility, AES reports, is connected to a NYSEG substation, which is tied to a 345 kV transmission line owned and operated by the New York Power Authority (NYPA). While conceding that it is located within Niagara Mohawk's service territory, AES claims the utility may not charge for the standby electric retail services it provides to the generating facility.²

¹ New York Independent System Operator, Inc., 101 FERC ¶61,230 (2002)(NYISO Netting Order).

² Standby service is the electric delivery and energy supplied to a customer that owns generation when its generator is out of service or otherwise does not meet all or a portion of the customer's load.

AES premises its claim on the NYISO netting tariff that took effect on April 1, 2003. According to AES, taking station power service under that tariff precludes State utility charges because the tariff encompasses all electric delivery service needs, through the Somerset facility's transmission level interconnection, and all energy service needs, through netting of the facility's usage against production over a 30 day period.³ Moreover, AES claims charging it for State retail services would be discriminatory because Niagara Mohawk did not charge NYSEG for those services when that utility owned the Somerset facility.

The Commission should deny the complaint. As the Commission has found, State retail charges can co-exist with Commission-jurisdictional transmission services charges.⁴ To find otherwise would arbitrarily deviate from policies expressed in prior Orders,⁵ where the Commission decided there is an element of local distribution service in any unbundled retail transaction, and that State jurisdiction over delivery service

³ Station power is the electric energy used for the heating, lighting, air-conditioning and office equipment needs of the buildings on a generating facility site, and for operating the electric equipment that is on the generating facility site.

⁴ PJM Interconnection, LLC, 94 FERC ¶61,251 (2001)(PJM II).

⁵ San Francisco Bay Area Rapid Transit District, 87 FERC ¶61,255 (1999)(BART Order) and 90 FERC ¶61,291 (2000)(BART Rehearing Order).

includes the authority to impose non-bypassable distribution or retail stranded cost charges.

Moreover, the energy a generator consumes when it is not operating is purchased at retail subject to State jurisdiction, and the netting of the cost of energy delivered to a generator at retail against the price for energy produced by that generator at wholesale is permissible only with the acquiescence of the State jurisdiction. In tolerating, to date, the NYISO netting arrangement, NYPSC in no way forgoes its jurisdiction to impose other retail energy charges, or to modify, in the future, netting arrangements affecting retail energy sales.

Finally, AES premises its discrimination claim on the character of service provided at a time it owned the facility, before the NYISO commenced operation and before competition was introduced into New York's electric market. These prior circumstances are irrelevant to the competitive market that exists today in New York, and are not evidence of discrimination.

ARGUMENT

I. The Commission Should Reject AES' Complaint, and Reaffirm Its Prior Policies Permitting States to Impose Retail Charges.

In its Order No. 888, the Commission found that "there is an element of local distribution service in any unbundled

retail transaction,"⁶ and State jurisdiction over delivery service includes the "authority to impose non-bypassable distribution or retail stranded cost charges."⁷ Elaborating upon that principle, the Commission found in the BART Orders that, even where there are no identifiable local distribution facilities, states retain authority over retail delivery to end-users and so may assess separate charges for distribution service in addition to the Commission's jurisdictional charges for transmission service. This State authority over distribution service permits the use of suitably-developed retail rates for standby service, which may include non-bypassable customer or stranded cost charges, for customers taking delivery at either transmission or distribution levels.

To the extent AES relies upon the NYISO Netting Order as establishing that states may not tariff standby charges for transmission level customers, that reliance is misplaced.⁸ The Order does not address application of the principles established in Order No. 888 and the BART Orders to retail standby services

⁶ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services By Public Utilities, Order No. 888, FERC Stats. & Regs. ¶31,036 (1996), at 31,783.

⁷ Order No. 888 at 31,781-82.

⁸ NYPSC has petitioned for rehearing of the NYISO Netting Order, seeking clarification that it is not intended to reverse Order No. 888 or the BART Orders.

furnished to customers at the transmission level, and so does not overrule those Orders.

In claiming that the State may not impose any charges for the standby services provided to it, AES ignores Order No. 888, and the BART Orders. Since those Orders provide that states may impose delivery charges on AES, it asks, in effect, that the Commission reverse its prior precedents without explanation. Since it has not justified such a reversal, its complaint is fatally flawed and should not be granted.

II. Netting Results In a Retail Sale Subject to State Jurisdiction.

When a generator is operating, and draws its electricity directly from its generating equipment, it self-supplies station power and there is no sale of energy. When a generator does not operate, however, its netting of the cost of the energy delivered to it against the price paid for its prior production is a sale, notwithstanding the NYISO netting tariff pricing arrangement. While the Commission has jurisdiction to decide what is a wholesale sale, it concedes that none is present in station use;⁹ once that determination is made, the Commission lacks the jurisdiction to rule that the energy consumed is not a retail sale.

⁹ PJM II, at 61,894.

Generators netting their energy costs most certainly do consume retail energy supply from the NYISO markets when their equipment is incapable of generating. Otherwise, they would not be able to operate their non-generation equipment or restart their generators. While netting may be a useful approach to accounting for that station use energy, it does not change the fact that the energy consumed is being purchased and used at retail. For the Commission to expand its jurisdiction into the area of these retail energy sales would be ultra vires.

Indeed, the Commission recently found that there is a retail sale when a generator purchases its station use energy from an independent third party.¹⁰ A purchase from the NYISO market through netting is a third-party retail purchase and sale just the same, even though the cost is accounted for through netting. Consequently,

Order No. 888 applies; there is a delivery of energy that is consumed by an end-user (in this case, a generator receiving station power), the transaction retains an element of state jurisdiction, and [a utility] may impose state-approved charges on such retail deliveries regardless of who provides the energy, or whether a sale of energy occurs, or whether the delivery uses no identifiable distribution facilities.¹¹

¹⁰ Northeast Utility Services Company, 101 FERC ¶61,327 (December 18, 2002).

¹¹ 101 FERC at 62,363.

Therefore, NYPSC does not lose jurisdiction over energy sales at retail. It may attach to those sales at retail appropriate charges for the services provided. AES premises its complaint upon the theory that no such charges may be imposed. Since that theory is without merit, the complaint must be rejected.

III. Assessing State Retail Charges
Against AES For Services Provided
To It is Not Discriminatory.

As another justification for its complaint, AES maintains that it is discriminatory to charge it for standby service when NYSEG was not assessed those charges when it owned the Somerset facility. This argument is not credible.

According to AES, discrimination exists because of the arrangements that were made for supplying station use energy to the Somerset facility at the time before AES purchased it, before the NYISO entered operation, and before competition was introduced in New York via the NYISO. These prior circumstances are irrelevant. Niagara Mohawk has divested all of its generation, and other New York utilities have divested most of their generation as well. Consequently, there is no meaningful discrimination between utility ownership and non-utility ownership of generation facilities in New York.

AES argues that a discrimination finding may be premised on findings made in PJM II. Those circumstances,

however, are not analogous to New York's. Unlike New York, in PJM, utilities continue to own generation in competition with independent generators. Since the type of discrimination allegedly present in PJM cannot exist in New York, AES' discrimination argument allegedly present in PJM is factually unsustainable.

Moreover, when New York's utilities were integrated, they recovered the cost of their station use energy and its delivery in their bundled retail charges to their customers. They did not suggest that their generators failed to consume energy for station use when out-of-service. In its attempt to evade Niagara Mohawk's standby service charges, AES would disregard its consumption of energy when its generator is out-of-service. Utilities were also able, when integrated, to supply energy to an out-of-service generator with deliveries from other facilities that were producing energy at remote locations. AES has not made any claim that it can similarly self-supply from remote locations. Consequently, its discrimination argument is further flawed.

AES' discrimination arguments do not justify the relief it seeks. Its complaint cannot be granted on the grounds that discrimination has occurred.

IV. AES Has Failed To Justify Its Claim that Niagara Mohawk Imposes Unreasonable Charges Through Its Standby Tariff.

AES argues that it is a transmission-level customer, and that the charges Niagara Mohawk would impose on it are unreasonable given the services it takes from NYISO through its interconnection with NYISO-controlled transmission facilities. The Commission is not the proper forum for addressing this complaint.

NYPSC adopted standby tariffs for Niagara Mohawk after extensive proceedings.¹² AES never presented in those proceedings any argument that any of Niagara Mohawk's charges were unreasonable, and never brought such a claim to the NYPSC in any other fashion. To the extent that Niagara Mohawk's standby charges arguably might duplicate NYISO charges, the Commission should direct AES to first present its arguments to NYPSC.

If a complaint were presented to NYPSC, it could winnow out of Niagara Mohawk's tariffs charges for services that are duplicative of the services furnished under the NYISO netting tariff. This approach would afford AES the opportunity to avoid any overpayments that might occur from taking service

¹² Case 01-E-1847, Niagara Mohawk Power Corporation - Standby Service Rates, Order Approving Joint Proposal (issued June 21, 2002) and Order Denying Rehearing (issued October 4, 2002).

under both a Commission-jurisdictional and an NYPSC-jurisdictional tariff.

Instead of seeking to identify duplicative State charges, however, AES claims that all State charges are improper. For the reasons discussed above, this claim has no merit and requires rejection of AES' entire complaint, without prejudice to seeking, from NYPSC, adjustment of Niagara Mohawk's tariffs to prevent overcharges.

CONCLUSION

The Commission should deny the complaint filed by AES Somerset, LLC, because the relief it requests conflicts with Commission policies and is beyond Commission jurisdiction, and it has failed to establish that discrimination exists. To the extent that it complains that it is overcharged because it takes service under both Commission-jurisdictional and NYPSC-

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jurisdictional tariffs, it should be directed to present its complaints to NYPSC.

Respectfully submitted,

Dawn Jablonski Ryman
General Counsel

Leonard Van Ryn
Assistant Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Dated: July 15, 2003
Albany, New York

CERTIFICATE OF SERVICE

I, Janet Burg, do hereby certify that I will serve on July 15, 2003 the foregoing Notice of Intervention and Comments of the Public Service Commission of the State of New York by depositing a copy thereof, first class postage prepaid, in the United States mail, properly addressed to each of the parties of record, indicated on the official service list compiled by the Secretary in this proceeding.

Date: July 15, 2003
Albany, New York

Janet Burg