

120 FERC ¶ 61,146
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.

North Star Steel Company, LLC

Docket No. EL06-68-001

v.

Arizona Public Service Company
California Independent System Operator Corp.
Enron Power Marketing, Inc.
Nevada Power Company
PacifiCorp
Powerex Corp.
Public Service Company of New Mexico
Tucson Electric Power Company

ORDER DENYING REHEARING

(Issued August 10, 2007)

1. In this order, we deny rehearing of the Commission's order issued on July 7, 2006 dismissing North Star Steel Company, LLC's (North Star) complaint against Arizona Public Service Company; California Independent System Operator Corporation (California ISO); Enron Power Marketing, Inc.; Nevada Power Company; PacifiCorp;¹ Powerex Corp.; Public Service Company of New Mexico; and Tucson Electric Power

¹ We note that, on May 15, 2007, North Star and PacifiCorp filed a settlement in this proceeding, which they assert resolves all claims by North Star against PacifiCorp in this proceeding. On August 1, 2007, the Commission approved the uncontested settlement. *North Star Steel Co. v. Arizona Public Serv. Co.*, 120 FERC ¶ 61,125 (2007). As a result, PacifiCorp is no longer a Respondent in this proceeding.

Company (collectively, Respondents), seeking refunds for electric energy prices in excess of the market clearing price during the California energy crisis of 2000 and 2001.²

Background

2. On May 2, 2006, North Star filed a complaint with the Commission alleging that Respondents had (1) exercised market power in violation of Commission orders; (2) exceeded their market-based rate authority; and (3) "charged, demanded, and received a rate that was not a part of a tariff filed with and approved by the Commission." North Star stated that, as an end-user of electricity, it purchased electricity from the Arizona Electric Power Cooperative (AEPSCO) from January 1, 2000 through June 20, 2001. North Star argued that this electricity was purchased by AEPSCO from Respondents at rates that exceeded the market clearing price and that these rates were unjust and unreasonable. North Star also asserted that, based on "information and belief," the sales transactions from Respondents to AEPSCO were not timely reported to the Commission as required, and, accordingly, such transactions were void or voidable and subject to refund and other remedies. North Star requested that the Commission direct each Respondent to refund to North Star certain specified amounts.

3. In the July 7 Order, the Commission dismissed North Star's request for refunds because the Commission found that the relief North Star sought consisted of refunds to a retail customer.³ The Commission explained that section 201 of the Federal Power Act (FPA), which sets the Commission's jurisdictional limitations,⁴ dictates that the Commission's rate and refund authority for sales of power under sections 205 and 206 of the FPA shall be limited to wholesale transactions.⁵ Since North Star requested that the Commission order retail refunds, the Commission found that the relief North Star requested was beyond the scope of sections 205 and 206 of the FPA.⁶

4. The Commission also found that there was no privity of contract between North Star and Respondents because, although North Star had a retail service agreement with AEPSCO, North Star had not identified any transaction or contract for the wholesale sale

² *North Star Steel Co. v. Arizona Public Service Co.*, 116 FERC ¶ 61,022 (2006) (July 7 Order).

³ *Id.* P 13.

⁴ *Id.* (citing *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911, 914-15 (9th Cir. 2005)).

⁵ *Id.* (citing 16 U.S.C. §824(b)(1) (2000)).

⁶ *Id.*

of electricity between Respondents and North Star.⁷ Additionally, the Commission found that North Star could not step into the shoes of AEPCO because section 20 of the Western System Power Pool Agreement (WSPPA), to which AEPCO was a party, states that the WSPPA shall not be construed to create any third-party beneficiary rights.⁸

Discussion

Retail Refunds

Rehearing Request

5. North Star requests rehearing of the Commission's determination that it does not have subject matter jurisdiction over the wholesale transaction at issue because North Star is a retail customer. North Star argues that neither the FPA nor the Commission's regulations preclude a retail customer from filing a complaint with the Commission regarding wholesale rates. North Star further argues that the Commission's conclusion that it does not have jurisdiction over retail rate refunds is inconsistent with the FPA's overall purpose of protecting consumers.⁹

Commission Determination

6. North Star's rehearing request mistakenly characterizes the Commission's determination in the July 7 Order as denying the complaint because a retail customer brought the complaint. Instead, the Commission denied North Star's complaint because the Commission determined that the retail refunds that North Star requested are beyond the scope of the Commission's jurisdiction. While North Star is correct that the FPA and the Commission's regulations permit North Star to bring a complaint under section 206 of the FPA challenging the justness and reasonableness of the Respondents' rates, that does not also mean that it is within the Commission's jurisdiction to order the remedy sought by North Star. The Commission's jurisdiction under sections 205 and 206 of the FPA is limited by section 201 of the FPA, which grants the Commission jurisdiction over "the sale of electric energy at wholesale in interstate commerce" and explicitly excludes "any other sale of electric energy."¹⁰ North Star admits it is a retail customer

⁷ *Id.* P 11.

⁸ *See id.* P 12.

⁹ North Star Rehearing Request at 7 (*citing Public Utilities Comm'n of the State of California v. FERC*, 456 F.3d 1025, 1058 (9th Cir. 2006), *amended by*, 462 F.3d 1027 (9th Cir. 2006) ("FPA cannot be construed to immunize those who overcharge and manipulate markets in violation of the FPA.")).

¹⁰ 16 U.S.C. §824(b)(1) (2000).

participating in a retail transaction.¹¹ Therefore, any refund given directly to North Star would be a retail refund that is beyond the scope of the Commission's jurisdiction.

7. As the Commission has previously stated, the issue of whether a wholesale buyer must pass through refunds "to retail customers is a matter for determination by the appropriate state authorities."¹² Thus, the refunds that North Star requests are an issue for the appropriate state authority, rather than the Commission.

Privity and Third-Party Beneficiary Rights

Rehearing Request

8. North Star claims that the Commission also erred in determining that North Star must be in privity with the Respondents in order to file this complaint. North Star argues that privity is not required for the Commission to exercise jurisdiction because North Star is not seeking to enforce a contractual obligation. Instead, North Star states that it is seeking to enforce an independent statutory duty imposed by the FPA. North Star argues that there is no precedent requiring that a consumer be in privity with the entity whose sales of electric energy are subject to the jurisdiction of the Commission.

9. Similarly, North Star states that the Commission erred in its determination that section 20 of the WSPPA bars a third-party beneficiary of a wholesale transaction from filing a complaint. First, North Star restates that it is not seeking to enforce a contractual obligation created by WSPPA. North Star contends that, instead, it is asserting rights and remedies created by the FPA. Second, North Star argues that, if the WSPPA does limit the right of consumers to bring complaints under the FPA, then the provision contravenes public policy and is unenforceable.

Commission Determination

10. North Star is correct that the absence of privity and section 20 of the WSPPA do not restrict North Star's ability to bring a complaint. However, in the July 7 Order, the Commission determined that the refunds North Star requested are beyond the Commission's jurisdiction under the FPA. Therefore, the contractual issues related to

¹¹ North Star Rehearing Request at 5 ("North Star received non-firm electric retail service for its Kingman mill from [the Mohave Electric Cooperative, Inc. (MEC)]. MEC, in turn obtained scheduling and non-firm electric transmission service for North Star's electric load at Kingman from AEPSCO.") See also North Star Complaint, Docket No. EL06-68-000, Exh. 1.

¹² *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 111 FERC ¶ 61,186, at P 30 (2005).

privity and third-party beneficiary rights are irrelevant because it is the FPA that requires the Commission to deny North Star's request.

Equal Protection Concerns

Rehearing Request

11. Finally, North Star claims that the Commission's July 7 Order violates North Star's Fifth Amendment Right to equal protection of the law because the Commission has denied its complaint but approved an uncontested settlement that allowed a retail customer, Blue Heron Paper Company (Blue Heron), to receive a portion of settlement proceeds.¹³ North Star contends that there is no material distinction between itself and Blue Heron. Therefore, North Star argues that there is no rational basis for the Commission to deny North Star's complaint and the denial of its complaint is a deprivation of its equal protection rights.

Commission Determination

12. The Commission has not treated North Star differently from Blue Heron. Blue Heron was a party to a settlement reached between the parties. In its approval of the uncontested settlement, the Commission was not asserting jurisdiction to order refunds for a retail sale of power. The Commission explicitly stated that Commission approval of the settlement did not constitute binding precedent for any issue or principle and does not settle any issue.¹⁴ The Commission's role in approving an uncontested settlement is limited to ensuring that the settlement is fair, reasonable and in the public interest. Therefore, the Commission's approval of the uncontested settlement involving Blue Heron, where the parties themselves came to a resolution, does not constitute different treatment under the law.¹⁵

¹³ North Star Rehearing Request at 10 (*citing Portland General Elec. Co.*, 105 FERC ¶ 61,302 (2003)).

¹⁴ *Portland General Elec. Co.*, 105 FERC ¶ 61,302 at P 2.

¹⁵ In passing, North Star notes in footnote 16 of its request for rehearing that the Commission could exercise its remedial discretion to fashion a remedy that would provide North Star with the relief it requests. Specifically, North Star states that

[a]s the Commission has frequently noted, its discretion is at its 'zenith' when it is fashioning remedies to arrive at the maximum effectuation of Congressional objectives. *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967). Although North Star's Complaint requested that refunds be paid to it, there is nothing to preclude FERC from arriving at the

(continued...)

The Commission order:

The request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

maximum effectuation of Congressional objectives by directing, instead, that the refunds be paid to AEPCO, which could then be expected to honor the terms of its contract with North Star.

North Star Rehearing Request at 6 n.16.

Initially, we note that North Star recognizes that the Commission's fashioning of remedies is discretionary and that here North Star has failed to persuade us to exercise our discretion to fashion a remedy in this proceeding. In fact, the California refund proceeding is the appropriate forum to determine refunds for transactions in the California ISO and California Power Exchange markets from October 2, 2000 through June 20, 2001. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 92 FERC ¶ 61,172 (2000); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 93 FERC ¶ 61,121 (2000). In fact, both AEPCO and North Star are parties to that proceeding. *See* North Star Nov. 22, 2000 Motion to Intervene, Docket No. EL00-95-000, at 2. We recognize that North Star has requested refunds commencing in January 1, 2000 rather than October 2, 2000, which is the beginning of the refund period in the California refund proceeding. The issues related to the temporal scope of the California refund proceeding have been remanded to us and await further process. *See PUC v. FERC*, 462 F.3d 1027 (9th Cir. 2006); *see also Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007). We have found earlier in this order that the request for refunds to North Star is beyond our jurisdiction, and we find that North Star's request that we exercise our discretion and order refunds to AEPCO is, as just noted, being, and should be, litigated in other proceedings.