

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

101 FERC ¶ 236

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Alternate Power Source, Inc.

v.

Docket No. EL03-9-000

Western Massachusetts Electric Company
and Northeast Utilities System

ORDER ON COMPLAINT

(Issued November 25, 2002)

1. On October 2, 2002, Alternate Power Source, Inc. (APS) filed a complaint pursuant to section 206 of the Federal Power Act,¹ naming as respondents Northeast Utilities System (NU) and its subsidiary, Western Massachusetts Electric Company (WMECO). APS alleges that WMECO's pass through of congestion charges and its calculation of line losses under the parties' bilateral supply agreement (now expired) violated the spirit and intent of the New England Power Pool (NEPOOL) open access transmission tariff (OATT), violated the unbundling requirements of Order No. 888, resulted in discriminatory transmission pricing, and constituted a discriminatory preference in favor of respondents' affiliate. For the reasons discussed below, we will deny APS' complaint.

Background

2. APS states that, pursuant to WMECO's retail unbundling, APS entered into a Standard Offer and Default Service Wholesale Sales Agreement (SOS Agreement) with

¹16 U.S.C. § 824e (2000).

WMECO, for a one year term ending December 31, 2000.² WMECO states that under the SOS Agreement, APS was responsible for providing SOS Requirements Service and for paying (as a pass-through obligation from WMECO) certain charges assessed by ISO New England Inc. (ISO-NE) and NEPOOL and other expenses associated with the provision of this service.³ WMECO further states that in turn, it was responsible for providing Delivery Services, including Regional Network Service (RNS) over NEPOOL's pool transmission facilities (PTF), Local Network Service under WMECO's non-PTF facilities, and firm distribution services under WMECO's distribution services tariff.

3. APS states that relying on this division of responsibility, WMECO passed through to APS transmission congestion charges, for which APS should not be held liable. APS further asserts that while line losses may be passed through to APS, WMECO should have used data from a 1999 loss study rather than the current ISO-NE data on which it relied. APS asserts that in relying on the data it did, WMECO favored its affiliate, Select Energy, Inc. (Select Energy), whose line losses were assessed at a lower rate. APS further asserts that WMECO has applied line losses on a discriminatory basis because WMECO billed its standard offer generation suppliers, including APS, for line losses of 9.05 percent (5.16 percent WMECO's line loss + 3.89 percent NEPOOL's line loss) while billing competitive generation suppliers only WEMCO's line loss of 5.16 percent.

4. In support of its claims, APS states that it does not rely, here, on its own interpretation of the SOS Agreement, although it has advanced claims relating to these matters in two state court actions (now pending).⁴ Rather than rely on these arguments,

²Under the Massachusetts Electricity Restructuring Act, WMECO was required to procure generation for the purpose of providing SOS service to those end-use consumers in its traditional retail service territory that did not otherwise receive service from a competitive supplier.

³See SOS Agreement at Section 1.4.

⁴On December 23, 2000, APS filed a breach of contract action against WMECO in the Norfolk Division of the Massachusetts Superior Court, civil action no. 00-1967, regarding WMECO's pass through of congestion charges under the SOS contract. APS asserted in its complaint, among other things, that the "[t]he defendant [WMECO] has incorrectly construed the parties' agreement, and has in doing so has [sic] wrongfully asserted a set-off of payment due the plaintiff [APS] under the [SOS] agreement." On December 27, 2000, the court denied APS' request for a preliminary injunction. On

(continued...)

APS claims, in effect, that the SOS Agreement, even if interpreted in the manner relied upon by WMECO, cannot be enforced as written, because to do so would violate the terms of the NEPOOL OATT and would otherwise be discriminatory. Specifically, APS asserts that congestion charges under the NEPOOL OATT must be assessed to, and paid for by, the transmission customer (WMECO) and may not thereafter be passed through under a bilateral arrangement to a power supplier (APS). In addition, line losses must be calculated in a manner that is equal as between SOS suppliers and other suppliers, including WMECO's affiliate.

Notice of Filing and Responsive Pleadings

5. Notice of APS' complaint was published in the Federal Register,⁵ with interventions and protests due on or before October 28, 2002. NU and WMECO filed a joint answer.

6. In their answer, respondents assert that the issues raised by APS are contract interpretation issues that are currently pending in the state court proceedings instituted by APS. Respondents state that, in fact, APS makes many of the same arguments that it has made in its breach of contract actions – many of them verbatim. Respondents further assert that WMECO's assignment of congestion charges to APS, under the parties' agreement, was appropriate and in violation of no Commission rule or policy. In addition, Respondents assert that WMECO's calculation of line losses did not favor its affiliate, Select Energy, because APS' firm service, under the SOS Agreement, was fundamentally different than the interruptible service provided to Select Energy. Respondents also assert that the PTF losses applied by WMECO in determining APS Contract Load Quantities, as APS itself concedes, were the actual PTF losses incurred by WMECO.

Discussion

⁴(...continued)

December 28, 2001, APS filed a second contract action against WMECO in the Norfolk Division of the Massachusetts Superior Court, civil action no. 01-02018, regarding WMECO's calculation of its line losses. APS asserted in its complaint, among other things, that WMECO's September 2000 adjustment for PTF losses relied on current ISO-NE data that was not authorized under the SOS Agreement.

⁵67 Fed.Reg. 64,108 (2002).

7. We will deny APS' complaint. APS's contract claims are currently being pursued in two state court proceedings and APS does not request that we address these issues. In this circumstance, we are not required to consider whether we have primary jurisdiction over these matters here.⁶ Nor do we find any tariff violations under the facts alleged in APS's complaint. Specifically, WMECO does not violate the NEPOOL OATT, or any other Commission rule or regulation, when it allocates to a power supplier such as APS, in a bilateral arrangement – freely entered into by APS – costs and expenses initially assessed to WMECO directly under the NEPOOL OATT.⁷ We find no undue preference in WMECO's line loss calculations, which were based on WMECO's actual line losses and calculated in the same manner that WMECO calculated line losses for other SOS suppliers.

8. Finally, we find no discrimination in WEMCO's billing of line losses. SOS suppliers sell directly to WEMCO and are billed by WEMCO under the pass through provisions of the SOS Agreement for a 9.05 percent line loss which consists of WEMCO (5.16 percent) and NEPOOL (3.89 percent). Competitive suppliers sell directly to WEMCO's retail customers and receive separate transmission services from WEMCO and NEPOOL. Therefore, competitive suppliers would be billed by WEMCO for a line loss of 5.16 percent and billed by NEPOOL for a line loss of 3.89 percent for a total line loss of 9.05 percent.

The Commission orders:

APS' complaint is hereby denied as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁶See Arkansas Louisiana Gas Company v. Hall, 7 FERC ¶ 61,175 at 61,322, reh'g denied, 8 FERC ¶ 61,031 (1979).

⁷See ISO New England, Inc., 95 FERC ¶ 61,384 at 62,428 (2001) ("Sharing the risk of incurring cost responsibility under bilateral transactions . . . is a private contractual matter.").

