No. 04-1423

# In the Supreme Court of the United States

ALTERNATE POWER SOURCE, INC., PETITIONER

*v.*

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION


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## QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission (FERC) correctly decided that, on the facts of this case, certain charges made to petitioner by a utility to which petitioner sold power did not violate a statute, rule, or tariff filed with FERC.

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## OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is unreported. The challenged orders of the Federal Energy Regulatory Commission are reported at 101 F.E.R.C. ¶ 61,236, and 104 F.E.R.C. ¶ 61,255.

## JURISDICTION

The judgment of the court of appeals was entered on November 23, 2004. A petition for rehearing was denied on January 21, 2005 (Pet. App. 3a). The petition for a writ of certiorari was filed on April 21, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (FERC) jurisdiction over the transmission and wholesale sale of electric energy in interstate commerce, but leaves regulation of retail sales and local distribution of electric power to the States. See 16 U.S.C. 824(b)(1). Under the FPA, utilities may only charge rates and engage in practices that are just, reasonable and not unduly discriminatory. 16 U.S.C. 824d(a) and (b). FERC must replace rates and practices that it finds unjust, unreasonable or unduly discriminatory with just and reasonable rates and practices. 16 U.S.C. 824e(a).

The FPA requires public utilities to file "schedules" showing all "rates and charges" for jurisdictional services, all "practices and regulations affecting such rates and charges," and all "contracts which in any manner affect or relate to such rates, charges * * * and services." 16 U.S.C. 824d(c). The Act prohibits such utilities from making any change in such rates or services prior to giving the Commission and the public sixty days' notice. 16 U.S.C. 824d(d). Those provisions provide the statutory basis for the "filed rate doctrine," which prohibits public utilities from charging rates and engaging in practices not specified in their tariffs. *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 576-578 (1980) (*Arkla*); *Town of Norwood* v. *New England Power Co.*, 202 F.3d 408, 416 (1st Cir.), cert. denied, 531 U.S. 818 (2000).[1]

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[1] *Arkla* interpreted the filed-rate provision of the Natural Gas Act, 15 U.S.C. 717c(d), a provision virtually identical to 16 U.S.C. 824d(d). Accordingly, the two provisions are properly interpreted consistently with one another. 453 U.S. at 577 n.7.

2. This case involves FERC's dismissal of petitioner's complaint, which alleged that certain provisions of a power agreement between petitioner, a supplier of electric power, and Western Massachusetts Power Company (WMECO), a public utility, violated rates on file with FERC.

a. The New England Power Pool (NEPOOL) is a regional power pool, operated by an independent system operator (ISO).[2] NEPOOL uses "pool transmission facilities" to provide regional network transmission service under its own tariff. WMECO is a subsidiary of Northeast Utilities, Inc., a registered public utility holding company. WMECO purchases electric power from suppliers that it sells to retail customers in Massachusetts, and it uses NEPOOL's transmission facilities, in part, to do so. Pet. App. 11a. Under NEPOOL's tariff, certain "transmission congestion charges" and "line loss charges" may be assessed to its customers, such as WMECO. *Id.* at 12a.

b. Petitioner and WMECO entered into a Standard Offer and Default Service Wholesale Sales Agreement (SOS Agreement) for the year 2000. Under the SOS Agreement, petitioner was responsible for selling electricity to WMECO for resale to WMECO's retail sales customers, and WMECO was responsible for assuring delivery of the power. WMECO in turn obtained regional network transmission service under the NEPOOL tariff. Based on its interpretation of the SOS Agreement, WMECO passed through to petitioner NEPOOL's transmission-congestion charges and line loss charges. Pet. App. 11a.

3. Petitioner filed two separate breach-of-contract actions against WMECO in the Norfolk Division of the Mas-

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[2] The NEPOOL facilities are operated by ISO New England, Inc. See *New England Power Pool*, 79 F.E.R.C. ¶ 61,374 (1997), order on reh'g, 85 F.E.R.C. ¶ 61,242 (1998). For simplicity, NEPOOL and ISO New England are both referred to as "NEPOOL."

sachusetts Superior Court, alleging that the pass-through of those costs breached the SOS Agreement. See 101 F.E.R.C. at 62,013 n.4.[3] Those cases are currently pending.

4. On October 2, 2002, petitioner filed a complaint with FERC. The complaint alleged that any provisions of the SOS Agreement that permitted WMECO to pass through to petitioner transmission-congestion and line-loss charges assessed to WMECO as a NEPOOL transmission customer would, *inter alia*, violate the NEPOOL tariffs. Pet. App. 10a-12a.

On November 25, 2002, the Commission dismissed petitioner's complaint, on the ground that WMECO's pass-through of NEPOOL charges to petitioner did not result in any of the violations alleged. Pet. App. 10a-14a. The Commission found that WMECO did not "violate the NEPOOL [tariff], or any other Commission rule or regulation" by allocating "to a power supplier, such as [petitioner], in a bilateral arrangement—freely entered into by [petitioner]—costs and expenses initially assessed to WMECO directly under the NEPOOL [tariff]." *Id.* at 13a. Rather, "[s]haring the risk of cost responsibility under bilateral transactions * * * is a private contractual matter[.]" 101 F.E.R.C. at 62,013 n.7 (quoting *ISO New England, Inc.*, 95 F.E.R.C. ¶ 61,384, at 62,428 (2001), reh'g denied, 100 F.E.R.C. ¶ 61,254 (2002)).

5. Petitioner filed a request for rehearing, which FERC denied. Pet. App. 4a-9a. FERC specifically rejected petitioner's contention that, because the NEPOOL tariff provided that NEPOOL's customers (like WMECO) would pay to NEPOOL the cost of congestion and line-loss charges, WMECO could not in turn contract to pass those same

[3] The appendix to the petition omits the footnotes from FERC's November 25, 2002, order. This brief accordingly cites those footnotes to the published version of FERC's order.

charges through to its own suppliers, such as petitioner. The Commission noted that petitioner had failed to provide "citation or support" for its assumption "that the FPA and the NEPOOL [tariff] prohibit[ed] WMECO, as a network customer, from assigning" NEPOOL charges "to a third party, such as [petitioner]." *Id.* at 8a. The Commission found that the NEPOOL tariff does not "govern (or limit)" the ultimate cost allocations "between WMECO and [petitioner]," because it "do[es] not address and w[as] not intended to restrict a network customer's bilateral arrangements with third parties." *Ibid.*

6. The court of appeals affirmed in an unpublished judgment. Pet. App. 1a-2a. The court stated that "[p]etitioner has identified no reversible error in the orders under review regarding the filed rate doctrine, [a provision] of the NEPOOL [tariff], and [p]etitioner's request for a hearing." *Id.* at 1a. The court also determined that petitioner had failed to preserve other objections in its request for rehearing before FERC. *Ibid.*; see 16 U.S.C. 825*l*(b) (court on review of FERC action may not consider any objection "unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do").

**ARGUMENT**

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's fact-bound claim is unwarranted.

1. The court of appeals disposed of this case in an unpublished, summary order. Further review by this Court of such an order, which disposes of the claims in a particular case, but establishes no new legal principle or rule, is ordinarily unwarranted. That principle applies with full

force here, where the court of appeals' decision established at most that, on the facts of this case, petitioner had failed to make out a claim that WMECO's pass-through of its congestion and line-loss costs violated a term of the NEPOOL tariff. Even if there were some doubt that the court of appeals had correctly disposed of that claim, further review by this Court to examine such a case-specific holding in an unpublished opinion would be unwarranted.

2. In any event, FERC correctly disposed of petitioner's complaint, and the court of appeals correctly denied petitioner's petition for review. Petitioner's primary complaint was that the NEPOOL tariff allocated congestion and line-loss charges to WMECO and that such an allocation precluded WMECO from in turn passing on those charges to its own suppliers, such as petitioner.

As FERC explained, petitioner's claim is "confused." Pet. App. 8a. Petitioner fails to identify any provision in NEPOOL's tariff or any FERC rule that prohibits a transmission customer from passing through transmission charges to a third party under a voluntarily executed bilateral contract. To the contrary, the Commission has specifically ruled that provisions in the NEPOOL tariff governing allocation of costs to NEPOOL's transmission customers do *not* affect bilateral contracts under which those customers contract with third parties to further share the costs. *ISO New England*, 95 F.E.R.C. at 62,428.

In short, the NEPOOL tariff governs the relationship between NEPOOL and WMECO. But "it is the Supply Agreement" between WMECO and petitioner, "not the NEPOOL [tariff] or the Commission's rules that address whether and to what extent [petitioner] is required to pay for the NEPOOL congestion charges" and line-loss charges. Pet. App. 7a-8a. There is nothing in federal law that prohibits WMECO "from assigning to a third party,

such as [petitioner], costs of which WMECO may be initially responsible under the NEPOOL [tariff]. * * * There is neither a statutory mandate nor a rule nor even a reason to prohibit such an assignment." *Id.* at 8a. The NEPOOL tariff and FERC's rules "do not address and were not intended to restrict a network customer's bilateral arrangements with third parties." *Ibid.*

To be sure, petitioner has alleged in its state-court actions that, under the SOS Agreement that does govern the relationship between WMECO and petitioner, WMECO was not permitted to pass on congestion and line-loss charges to petitioner and petitioner was not obligated to pay them. But petitioner insisted before FERC that "it does not rely, here, on its own interpretation of the SOS Agreement." Pet. App. 11a; see *id.* at 7a ("[Petitioner] steadfastly insists that it is not asking the Commission to interpret or enforce [petitioner's] rights and obligations under the Supply Agreement."); *id.* at 13a ("[Petitioner's] contract claims are currently being pursued in two state court proceedings and [petitioner] does not request that we address those issues."). Accordingly, it must be assumed, for purposes of this case, that WMECO's pass-through of the congestion and line-loss charges was consistent with its contract with petitioner. As FERC recognized, nothing in the NEPOOL tariff or FERC's rules precludes giving effect to such terms in a bilateral contract.

3. Petitioner contends (Pet. 6) that the Commission—and the D.C. Circuit—permitted "non-compliance with the longstanding requirements of the filed rate doctrine[.]" That contention, however, is based on petitioner's claim (Pet. 8) that the Commission approved an arrangement under which "WMECO can change the express terms of [the filed rate in the NEPOOL tariff] by a bilateral arrangement which was never filed with or approved by the

Commission." As explained above, however, because the NEPOOL tariffs did not govern WMECO's arrangements with petitioner, WMECO's pass-through of costs did not violate the NEPOOL tariff. Furthermore, information about a wholesale contract such as that between petitioner and WMECO, including its key terms, must be filed with the Commission. See 16 U.S.C. 824d(c). Thus, FERC's decision in this case, and the D.C. Circuit's affirmance, were entirely consistent with the longstanding requirements of the final rate doctrine.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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