

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

Investigation of Wholesale Rates of Public
Utility Sellers of Energy and Ancillary Services
in the Western Systems Coordinating Council

Docket No. EL01-68-013

ORDER DENYING REHEARING

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1. In this order, we deny rehearing of an order issued May 15, 2002 (May 15 Order)¹ in which the Commission denied rehearing of an order issued on December 19, 2001 (December 19 Order).² This order benefits customers because it clarifies procedural matters in the May 15 Order.

Background

2. In the December 19 Order, the Commission considered numerous possible modifications to the West-wide price mitigation methodology and the must-offer requirement.³ The Commission chose to implement temporary measures until May 1, 2002, rather than implement significant changes. In the May 15 Order, we found no merit to the arguments that the December 19 Order demonstrated that the Commission acted in an arbitrary or capricious manner or that the December 19 Order reflected a lack of due consideration.

¹Investigation of Wholesale Rates of Public Utility Sellers of Energy and Ancillary Services in the Western Systems Coordinating Council, 99 FERC ¶ 61,161 (2002).

²Investigation of Wholesale Rates of Public Utility Sellers of Energy and Ancillary Services in the Western Systems Coordinating Council, 97 FERC ¶ 61,294 (2001).

³See December 19 Order at 62,373.

Comments

3. Midway Sunset Cogeneration Company (Midway) and the Public Utility District No. 1 of Clark County Washington, (Clark) filed requests for rehearing of the May 15 Order. In the May 15 Order, the Commission found that Clark had not met its burden of justifying late intervention. Clark requests that the Commission permit it to participate as a party in this proceeding. Alternatively, Clark seeks a clarification stating that "the Commission intended that any transaction that exceeded the just and reasonable rates adopted in this proceeding [EL01-68] would be subject to a refund order without regard to whether the purchaser was a party in Docket No. EL01-68."

4. Midway requests that the Commission vacate that part of the May 15 Order in which we dismissed Midway's January 22, 2002 request for rehearing and consider this request for clarification on its merits. Midway states that its January 22, 2002 filing sought clarification concerning "how a generator's must-offer obligation would be affected by a derating of the generator's capacity due to ambient conditions." In the May 15 Order, the Commission dismissed this untimely January 22, 2002 rehearing request, which Midway described as a "petition for clarification." The Commission found that because Midway was not a party to this proceeding, Midway lacked standing to seek clarification of the Commission's December 19 Order.⁴

Discussion

5. Clark states that the Commission should not have denied Clark's motion to intervene because the Commission failed to provide an announced intervention period for Docket No. EL01-68. On April 27, 2001, the Commission issued a notice⁵ in which it stated that it had initiated a proceeding in Docket No. EL01-68-000⁶ under section 206 of

⁴Midway's January 22, 2002 rehearing request also included a petition for declaratory order. However, since Midway did not submit the fee required in order to file a petition for declaratory order, the Commission found this portion of its filing to be procedurally deficient. Midway does not seek rehearing of the Commission's finding concerning its petition for declaratory order.

⁵See 66 Fed. Reg. 22,223 (2001).

⁶In an April 26, 2001 order that initiated the EL01-68 proceeding, the Commission ordered that parties should submit "comments" within ten days of the issuance date of that order. See San Diego Gas & Electric Company v. Sellers of Energy and Ancillary

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the Federal Power Act (FPA).⁷ While section 206 of the FPA requires the Commission to issue a public notice of its action, it does not require the Commission to establish a date for interventions to be filed and the Commission does not typically include such a date in this type of notice. We find no merit to Clark's argument that because the Commission did not announce an intervention period for this docket, Clark should be allowed to intervene nearly nine months after the initiation of the proceeding. As we stated in the May 15 Order, 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.

6. Midway now clarifies that it is a member of the Cogeneration Association of California, an ad hoc association of qualifying facilities in California whose members are parties in the EL00-95-000 and EL01-68-000 proceedings. Midway states that its January 22, 2002 "petition for clarification," in essence a request for rehearing, concerns the Commission's April 26 Order. However, we must reject this untimely request for rehearing. As the courts have repeatedly recognized, the time period within which a party may file an application for rehearing of a Commission order is statutorily established at 30 days by section 313(a) of the FPA, and the Commission has no discretion to extend that deadline.⁸ Similarly, the Commission has long held that it lacks the authority to consider requests for rehearing filed more than 30 days after issuance of a Commission order.⁹ However, we encourage Midway to utilize the California Independent System

⁶(...continued)

Service into Markets Operated by the California Independent System Operator and the California Power Exchange, 95 FERC ¶ 61,115 at 61,366 (2001) (April 26 Order).

⁷See 18 C.F.R. § 385.206.

⁸See City of Campbell v. FERC, 770 F.2d 1180, 1183 (D.C. Cir. 1985) ("The 30-day time requirement of [the FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing."); Boston Gas Co. v. FERC, 575 F.2d 975, 977-78, 979 (1st Cir. 1978) (same; describing identical rehearing provision of Natural Gas Act as "a tightly structured and formal provision. Neither the Commission nor the courts are given any form of jurisdictional discretion."). See also Sierra Association for Environment v. FERC, 791 F.2d 1403, 1406 (9th Cir. 1986).

⁹See, e.g., New England Power Pool, 89 FERC ¶ 61,022 at 61,076 (2000); Arkansas Power & Light Co., 19 FERC ¶ 61,115 at 61,217-18 (1982), reh'g denied, 20 FERC ¶ 61,013 at 61,034 (1982). See also Public Service Company of New

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Operator Corporation's alternative dispute resolution procedures to resolve the issues surrounding the alleged "deratings" in capacity it experienced as a result of ambient temperatures.

The Commission orders:

The requests for rehearing filed in this proceeding are hereby denied, as discussed in the body of this order.

By the Commission.

Secretary

⁹(...continued)

Hampshire, 56 FERC ¶ 61,105 at 61,403 (1991); CMS Midland, Inc., 56 FERC ¶ 61,177 at 61,623 (1991).