61 FERC P 61182 (F.E.R.C.), 1992 WL 510299

FEDERAL ENERGY REGULATORY COMMISSION
**1 Commission Opinions, Orders and Notices

Re Western Massachusetts Electric Company

Docket No. ER92-67-001
November 03, 1992

*61659 Before Allday, chairman, and Trabandt, Moler, Langdon, and Terzic, commissioners.
BY THE COMMISSION:

ORDER DENYING REHEARING AND INTERPRETING QUALIFYING FACILITY REGULATIONS

Background

On May 26, 1992, Western Massachusetts Electric Company (WMECO) filed a request for rehearing of the Commission's order issued in this proceeding on April 24, 1992 (April 24 Order).[1]

The April 24 Order accepted for filing, suspended, and set for hearing two transmission service agreements (TSAs) under which WMECO has agreed to transmit capacity and energy produced by Altresco Pittsfield Limited Partnership (Altresco), a qualifying facility (QF), to New England Power Company (NEPCO). One TSA is for firm transmission service (firm TSA) and the other TSA is for nonfirm service (nonfirm TSA).

Among other things, the April 24 Order summarily disposed of WMECO's proposal regarding certain of the terms upon which it may recover so-called "out-of-rate" costs.[2] WMECO's proposed terms included an obligation on WMECO's part to notify its customers (so as to permit the customer an opportunity to interrupt service in lieu of incurring the cost) only when "practicable and possible." The Commission granted summary disposition rejecting this term, finding that "WMECO's recovery of its out-of-rate costs under the nonfirm TSA shall be limited only to occasions when WMECO provides notice to NEPCO."[3]

In addition, the Commission found in the April 24 Order that the TSAs referenced certain agreements between WMECO and Altresco which could be jurisdictional (Altresco agreements). The Commission ordered WMECO to file these agreements.

WMECO's Request for Rehearing

WMECO objects to two aspects of the April 24 Order. First, WMECO objects to the Commission's finding that WMECO can only recover out-of-rate charges under its nonfirm TSA when WMECO gives prior notice. As discussed more fully below, WMECO argues that frequently it cannot give such prior notice.

Second, WMECO objects to the requirement that WMECO formally file the Altresco agreements. WMECO contends the agreements are not jurisdictional because they do not relate to jurisdictional service.[4] The first agreement, an "Agreement for Engineering and Licensing of Transmission System Reinforcements Needed to Accept the Output of the Altresco Project" (Reinforcement Engineering Agreement), requires WMECO to obtain licenses and perform engineering work to reinforce existing 115 kV lines and substations owned by WMECO. The Reinforcement Engineering Agreement also requires Altresco to reimburse WMECO for its actual costs. The second agreement, an "Agreement for Construction of the Transmission System Reinforcements Needed to Accept the Output of the Altresco Project" (Reinforcement Construction Agreement), requires WMECO to undertake the reinforcements and for Altresco to pay the actual costs. The third agreement, a "Revision to Agreement for Construction of Electric Interconnection Facilities" (Interconnection Construction Agreement), requires WMECO to interconnect with Altresco and for Altresco to pay the actual costs. Finally, the Interconnection, Operation and Maintenance Agreement (O&M Agreement) requires Altresco to reimburse WMECO *61660 for all costs it incurs to ensure the safety and reliability of the interconnection.

**2 As described more fully below, as to the first three agreements, WMECO argues that the Commission does not have jurisdiction over interconnection agreements with QFs; rather, it argues, the states have jurisdiction over these agreements. In addition, WMECO argues that these three agreements involve services to be undertaken and completed before the interconnection facilities are placed in operation, and they also do not provide for the sale or transmission of electricity.

As also described more fully below, as to the fourth agreement, WMECO argues that it does not provide for the sale or transmission of electricity. WMECO argues that this agreement was executed to ensure the safety and reliability of the interconnection, and merely enumerates standards to achieve that end.

Discussion

(A) *Out-of-Rate Costs under WMECO's Nonfirm TSA*

WMECO argues that the Commission erred by summarily limiting its recovery of out-of-rate costs in its nonfirm TSA to instances where it gives prior notice to NEPCO. WMECO contends that this limitation effectively denies it recovery of most, if not all, of its out-of-rate charges in its nonfirm TSA.

WMECO argues that, as a member of NEPOOL, its power production is centrally dispatched by NEPEX. WMECO states that NEPEX seeks to dispatch power from the lowest cost generation resource available unless dispatch from a higher cost generation resource is necessary to prevent the power flow from exceeding a transmission line's transfer capability. Under such circumstances, NEPEX dispatches power from higher cost units, and the higher cost units are described as operating "out-of-rate."[5] Although the nonfirm TSA provides that WMECO is to give NEPCO prior notice of the out-of-rate operation of WMECO's units whenever practicable and possible (so that NEPCO may opt to have its service interrupted rather than pay the out-of-rate costs), WMECO argues that out-of-rate operations cannot be anticipated or controlled and that it should be permitted full recovery of such costs even when no prior notice is given.

WMECO argues that the discussion of lost opportunity costs in *Northeast Utilities Service Company (Northeast Utilities), supra*,[6] which the Commission cited in its April 24 Order,[7] should not be considered precedent for the treatment of its out-of-rate costs.[8] WMECO argues that, unlike opportunity costs, a utility is normally unable to anticipate or avoid the incurrence of out-of-rate costs. Thus, WMECO argues, it should not be required to provide advance notice to its customers as a precondition to its recovery of out-of-rate costs. Further, WMECO argues that it often only learns of the incurrence of out-of-rate costs after the fact, and that it is unable to provide prior notice. WMECO adds that assessing the out-of-rate costs to its nonfirm TSA customers places the utility and the customer in the same economic position they would have been in if WMECO had exercised its right to interrupt. WMECO further adds that the Commission should, at a minimum, allow it to argue for recovery of its out-of-rate costs at hearing.[9]

****3** We find WMECO's arguments unpersuasive. First, WMECO is a member of NEPOOL. Consequently, we reject WMECO's contention that it has no responsibility for NEPEX procedures or actions. More to the point, however, the manner and timing of when (and even if) NEPEX notifies WMECO that units may be operated out-of-rate is not determinative of what rate is just and reasonable for service by WMECO to NEPCO.

Second, in *Northeast Utilities*, our approval of the recovery of opportunity costs by NU expressly relied on the fact that customers would be afforded an opportunity *not* to incur the charge. We stated: "[w]hen [NU]'s transmission system becomes constrained, the third-party non-firm wheeling customer must elect either to accept an interruption in its transmission service or to pay [NU]'s foregone opportunity ***61661** costs."[10] We determined that the option allowing a customer to elect interruption was important to insure that prices for nonfirm service would not be excessive. This concern is equally applicable to recovery of out-of-rate costs from the instant nonfirm TSA customer, NEPCO. Absent such notice, NEPCO could be compelled to pay out-of-rate costs without any opportunity to avoid the costs. Absent such notice, we believe the rate would not be just and reasonable.

Third, we reject WMECO's contention that its proposed recovery of out-of-rate costs without prior notice merely keeps the utility and the customer in the same economic position they would have been in if NEPEX had notified WMECO of impending out-of-rate charges and WMECO had, in turn, interrupted service to NEPCO. In these circumstances, the economic position of WMECO's nonfirm TSA customer, NEPCO, would differ significantly because it would be paying higher costs.

Accordingly, we affirm our finding that WMECO's recovery of its out-of-rate costs under the nonfirm TSA shall be limited to occassions when WMECO provides prior notice to NEPCO. WMECO must revise its nonfirm TSA to reflect our finding that out-of-rate costs may only be recovered when prior notice is provided to NEPCO. To the extent WMECO is unable to provide such notice, it may instead choose to offer NEPCO firm service at rates reflecting firm service.[11]

(B) *Commission Jurisdiction as to Altresco Agreements*

1. *Authority to Determine Jurisdiction*

WMECO argues that the Commission erred by directing it to file the Altresco agreements in question prior to making a final

determination as to the Commission's jurisdiction over the agreements. This contention lacks merit. The Commission has the authority to examine contracts relating to transactions which may be subject to its jurisdiction, prior to making its determination as to jurisdiction.[12] In other words, the Commission has jurisdiction, in the first instance, to determine its jurisdiction, subject to judicial review thereafter.

Moreover, WMECO's analysis would lead to an unreasonable result. If the Commission lacked the authority to examine such agreements, many jurisdictional transactions could easily evade Commission review. Parties could simply assert — as WMECO has done here — that the Commission lacks jurisdiction and the Commission would be constrained from taking any further action.

2. *Determination as to Commission Jurisdiction*

****4** After review of the four Altresco agreements, we conclude that the agreements are jurisdictional under section 205 of the FPA,[13] and, as described more fully below, we conclude that WMECO's arguments to the contrary lack merit. Accordingly, we will reinstate the requirement in our April 24 Order that the agreements be formally filed and that WMECO tender the appropriate filing fee.

As a general matter, WMECO asserts that under the Public Utility Regulatory Policies Act of 1978 (PURPA) and the Commission's regulations,[14] state regulatory authorities have jurisdiction over interconnection agreements between electric utilities and QFs.[15] Thus, WMECO argues that the Commission lacks jurisdiction over the four agreements.

We disagree with WMECO's arguments. In addressing these arguments, it is necessary to distinguish between matters subject to state regulation and matters subject to the Commission's exclusive jurisdiction.

Section 292.303 of our QF regulations prescribes the obligations of an electric utility to a QF.[16] Section 292.303(c) requires electric ***61662** utilities to interconnect with QFs. However, the requirement to interconnect under section 292.303(c) is limited to those interconnections "as may be necessary to accomplish purchases or sales" directly between the electric utility obligated to purchase from or sell to a QF and that QF. The requirement does not extend to utilities located between the buyer and the seller that provide transmission service.[17]

Additionally, while section 292.306(a)[18] provides that QFs are obligated to pay the interconnection costs assessed by state regulatory authorities, the scope of section 292.306(a) is limited by section 292.303(c)'s limitation to interconnections to accomplish purchases or sales. Thus, section 292.306(a) is not applicable to transactions involving utilities transmitting QF power in interstate commerce, but is limited to purchases or sales of power between the electric utility obligated to purchase from or sell to a QF and that QF.

In this case, WMECO will purchase none of the QF's output. The agreements here at issue concern stand-alone transmission service by WMECO to NEPCO, both public utilities, of power produced by Altresco, a QF. Under these circumstances, the authority of state regulatory authorities under section 292.306 to determine interconnection costs does not come into play. When a utility transmits QF power in interstate commerce, as WMECO will do here, a Commission-jurisdictional transaction takes place; jurisdiction over the transmission of electric energy in interstate commerce and over agreements affecting or relating to such service (and the rates for such service) are subject to the Commission's exclusive jurisdiction[19] and any attempt by a state authority to exercise jurisdiction over such service and agreements (and rates) would be *ultra vires*.

Our exclusive jurisdiction over the charges assessed in conjunction with the provision of interstate transmission service necessitates our exercise of jurisdiction over the related interconnection costs. The fact that the facilities used to support the jurisdictional service might also be used to provide various nonjurisdictional services, such as back-up and maintenance power for a QF, does not vest state regulatory authorities with authority to regulate matters subject to the Commission's exclusive jurisdiction.[20] Thus, we find no merit to WMECO's argument that under PURPA and the related regulations the four agreements are appropriately within the Massachusetts Commission's jurisdiction. To the contrary, we find that the four agreements are subject to our exclusive jurisdiction under the FPA and are not subject to the Massachusetts Commission's jurisdiction.[21]

****5** In *American Municipal Power-Ohio, Inc., et al. (AMP-Ohio)*,[22] the Commission found that contribution in aid of construction (CIAC) payments made by a customer to a public utility in conjunction with a jurisdictional service are jurisdictional under the FPA.[23] In *AMP-Ohio*, Ohio Edison Company and AMP-Ohio executed a temporary service agreement which provided for a CIAC in exchange for Ohio Edison building a permanent 138 kV substation and transmission ***61663** facility to interconnect Ohio Edison to an AMP-Ohio member.

The Commission found that it had the authority under section 205(c) of the FPA[24] to direct utilities to file, for Commission review, rates and charges for jurisdictional service as well as classifications, practices, and regulations "affecting" such rates

and charges, and contracts which in any manner "affect" or relate to such rates and charges. The Commission found that the contract providing for the CIAC charge was in this category of jurisdictional agreements. The Commission stated:

> The [agreement] clearly affects transmission service and the rate for such service because it involves facilities necessary in order to provide jurisdictional service; indeed, the new interconnection was intended to improve jurisdictional service that Ohio Edison provides to AMP-Ohio and [the AMP-Ohio member]. In this instance, instead of attempting to recover such costs over time as is typically the case (*i.e.*, through depreciation), Ohio Edison has opted to recover the costs of the interconnection in the form of lump sum payments. That Ohio Edison has opted to do so, however does not make a jurisdictional rate into a nonjurisdictional charge. [25]

Three of the four Altresco agreements are jurisdictional for the reasons stated in *AMP-Ohio*.[26] These three agreements are: (1) the Reinforcement Engineering Agreement; (2) the Reinforcement Construction Agreement; and (3) the Interconnection Construction Agreement. These three agreements together provide for services which are necessary for WMECO to provide transmission service for Altresco, *i.e.*, the engineering and construction of upgraded facilities necessary to deliver Altresco's output to WMECO, and then to NEPCO.[27] The three agreements, among other things, concern: (1) the construction of transmission system reinforcements by WMECO (in exchange for a fee from Altresco);[28] and (2) the physical and engineering work to WMECO's system which is necessary for WMECO to transmit Altresco's electricity (also in exchange for a fee from Altresco).[29]

WMECO also argues that the Commission has no jurisdiction over the three agreements because they involve facilities, not services, and because the payments are made prior to energizing the facilities used to effect the transmission of electric energy in interstate commerce. WMECO's argument lacks merit.

As in *AMP-Ohio*, the three agreements affect the transmission service to be provided (here by WMECO for Altresco), as well as the rate for such service, because the agreements involve facilities necessary in order to provide jurisdictional service.[30] Indeed, the reinforcements ***61664** are expressly intended to facilitate WMECO's jurisdictional transmission of Altresco's output from Altresco to NEPCO. Moreover, as in *AMP-Ohio*, in this instance, instead of attempting to recover such costs over time as is typically the case (*i.e.*, through depreciation), WMECO has opted to recover the costs of the system reinforcements (and other system changes needed to facilitate service for Altresco) in the form of lump sum payments. However, as we found in *AMP-Ohio*, all charges assessed to recoup the cost of facilities used to provide transmission service are jurisdictional whether those charges are assessed as a lump sum charge or as a series of payments over the life of the service.[31] The timing of the payments is immaterial to our jurisdictional determination.[32] WMECO cannot avoid regulatory scrutiny of its charges merely by structuring the agreements to require prepayment of those charges prior to the commencement of service. In sum, the reasoning we applied in *AMP-Ohio* is equally applicable here. Accordingly, the three agreements in question are jurisdictional under section 205 of the FPA.

****6** WMECO further argues that the three agreements concern services to be completed before the facilities in question are energized and placed into service. WMECO explains that the Commission has declined to assert jurisdiction when agreements are executed before facilities are placed into operation. WMECO cites *Coso Energy Developers*, 48 FERC P 61,044 at 61,213 (1989) (*Coso*) and *Gamma Mariah, Inc.*, 44 FERC P 61,442 at 62,399 (1988) (*Gamma Mariah*) in support of this proposition. *Coso* and *Gamma Mariah* do not support WMECO's argument. *Coso* and *Gamma Mariah* involved the inclusion of transmission facilities as part of the QFs in question, not the assessment of charges for facilities that were owned and operated by a public utility,[33] as is the case in the instant docket. Therefore, WMECO's reliance on *Coso* and *Gamma Mariah* lacks merit.

With respect to the fourth agreement — the O&M Agreement — WMECO argues that the contract merely prescribes reliability standards for the interconnection and that the Commission lacks jurisdiction over this agreement because it does not include terms for the sale or transmission of electricity. We find, however, that the O&M Agreement is jurisdictional under the FPA.

The Commission has previously asserted jurisdiction over O&M agreements in instances, such as this case, in which a public utility agreed to operate and maintain the transmission facilities of a QF.[34] Under the O&M Agreement with Altresco, WMECO, a public utility, has agreed to "operate and maintain the interconnection between the [Altresco] Project and WMECO's System."[35] Under the O&M Agreement, WMECO also will have full discretionary authority to conduct any necessary O&M work, and will be compensated for such work by Altresco.[36] Accordingly, under our precedent, the O&M Agreement at issue here is jurisdictional under the FPA.

Thus, for the reasons cited above, we shall direct WMECO to file the Altresco agreements under section 205 of the FPA, together with appropriate cost support and appropriate filing fee.

(C) *Additional 30-Day Amnesty Period*

We note that the agreements were entered into as of the following dates: Reinforcement Engineering Agreement (March 27, 1989), the Reinforcement Construction Agreement (June 4, 1990), the Interconnection Construction Agreement (June 4, 1990), and the O&M Agreement (July 1990). Thus, service has been provided under the agreements without the rates having been filed. As such, we note that the agreements, at this point, appear to be subject to our policy regarding late-filed agreements. ***61665** [37] However, as discussed below, we have granted an amnesty period for jurisdictional contracts providing for CIAC payments.[38]

In this regard, we note that we have found similarly late-filed contracts providing for CIAC payments to be subject to this policy.[39] While the requirement of prior filing is not a new requirement, as we stated in *Florida Power Corporation*, 61 FERC P _ (1992), we believe the need to file agreements involving contributions in aid of construction[40] may not have been clear at the time the *Central Maine* policy was issued. It was made clear in the *Amp-Ohio* case, *supra*, which was issued after *Central Maine*. Accordingly, WMECO can avail itself of the additional thirty-day amnesty period we provided in *Florida Power* calculated from the date of publication of the *Florida Power* order in the Federal Register, to file with the Commission any now-unfiled service agreements which include contributions in aid of construction.

THE COMMISSION ORDERS:

****7** (A) WMECO's request for rehearing is hereby denied.

(B) Within 30 days of the date of this order WMECO is hereby directed to file a revised nonfirm TSA reflecting revised treatment of out-of-rate costs as discussed in the April 24 Order and in the body of this order.

(C) Within the amnesty period provided in *Florida Power, supra*, WMECO is hereby directed to file the Altresco agreements together with the appropriate cost support and Class II filing fee.

(D) WMECO is hereby informed that the rate schedule designations are those shown on the Attachment to the April 24 Order.

(E) The Secretary shall promptly publish a copy of this order in the Federal Register.

Commissioner Trabandt dissented with a separate statement attached.

Commissioner Moler dissented in part with a separate statement attached.

FOOTNOTES

WMECO had requested that the Commission defer the requirement that it formally file the four agreements until the Commission ruled on WMECO's request for rehearing. On June 16, 1992, in an unpublished order, the Commission granted WMECO a deferral of the formal filing requirement pending the Commission's decision on whether the four Altresco agreements are jurisdictional.

Nonfirm service may not be offered at what are effectively firm service rates. *See* New England Power Company, Opinion No. 335, 49 FERC P 61,129 at 61,354 (1989), *reh'g denied*, Opinion No. 335-A, 50 FERC P 61,151 (1990), *aff'd*, No. 90-1179 (D.C. Cir. Feb. 11, 1991) (unpublished order), where we held that a "nonfirm transmission rate, based on firm service pricing principles, is not just and reasonable for the priority of service provided."

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

WMECO admits that the Commission has asserted jurisdiction over O&M agreements. WMECO Rehearing at 12-13. WMECO notes that the Commission asserted jurisdiction over an O&M agreement in Southwestern Public Service Company (*Southwestern*), 41 FERC P 61,370 (1987), but argues that the scope of the service providers' activities in that case was far greater than WMECO's services in this case. *Id.* To the contrary, as described *infra*, WMECO has full discretionary authority to conduct the necessary O&M work. Therefore, our assertion of jurisdiction over the O&M Agreement at issue here is consistent with our assertion of jurisdiction over the contract in question in *Southwestern*.

TRABANDT, Commissioner, dissenting:

**8 I dissent from this order because the majority has decided, with a thinly veiled rationalization, to continue on the path of transmission pricing at embedded cost first, last and always. In this case, the majority goes so far as in effect to retract a holding the Commission made in the opportunity cost companion case to the Northeast Utilities merger case, Northeast Utilities Service Company, 58 FERC P 61,069 (1992). What the Commission seemingly gave in principle — opportunity costs, including out-of-rate charges, in the non-firm service context — it now takes away in practice by requiring prior notice before a utility may collect out-of-rate charges in NEPOOL. While the majority technically adheres to our precedent, which states that in non-firm service a utility may collect opportunity costs because the customer can freely choose other options, this order adopts an overly literal and unduly narrow interpretation of the concept of free choice. Even though the customer, NEPCO, a major NEPOOL utility that can take care of its own needs, agreed to the contract that included out-of-rate charges without notice, the majority still finds that approving this deal deprives NEPCO of choice.

Aside from the out-of-rate issue, the Commission here decides to take jurisdiction over several contracts between WMECO and Altresco, a qualifying facility. I think that the Commonwealth of Massachusetts, not the Federal Commission, should exercise jurisdiction over the interconnection between the QF and WMECO. The majority holds that our regulations giving the states jurisdiction over QF interconnections do not apply here because the regulations deal with direct sales from the QF to the utility, whereas here, Altresco, the QF, is selling to NEPCO and the interconnection involves WMECO, the intermediary transmitting utility. I think the majority is putting too fine a point on our regulations. Nothing in law, policy, or engineering dictates that we differentiate between interconnections from a QF to its customer and those from a QF to a transmitting utility. I dissent on that issue as well.

I. Transmission Pricing 101: Knocking Out-of-rate Charges Out of Transmission Rates

To understand the impact of this decision on transmission rates, I must provide some background, both on NEPOOL and our previous opportunity cost for non-firm NU precedent. As the name indicates, out-of-rate charges occur when NEPEX, the dispatcher for NEPOOL, must for some reason or other, run more expensive generation than the cheapest then available. The reasons for operating out-of-rate can range from the least expensive plant not being available to some blockage along the NEPOOL grid. Except for scheduled maintenance, **61666 which, by definition, NEPEX knows about in advance, NEPOOL has no idea when a plant will run out-of-rate, since dispatching electricity involves instantaneous decisions, for which the dispatcher has no time to ask permission from the utilities or notify them in advance. The need for power to flow over the grid cannot wait for the dispatcher to lift the receiver and for the utility to give its blessing.

**9 NEPCO, a major member of NEPOOL, understands this arrangement. The utility realizes that NEPOOL utilities incur out-of-rate charges without advance notice. Moreover, in NEPCO's case, out-of-rate charges flow both ways. On some occasions it is the utility hit with the out-of-rate charge, when its actions cause NEPEX to rearrange the standard operations of the network. But at other times and in different situations, NEPCO is the beneficiary of out-of-rate charges, when some other utility's actions bring about the change in economic dispatch. NEPCO is fully capable and almost certainly engaged in the exercise of weighing these factors before deciding to enter into the subject contract with WMECO. And, NEPCO also does not depend on this interruptible service for its requirements power needs. Therefore, NEPCO's agreement to enter into the contract with WMECO, after weighing all the facts, should suffice for us to accept the rate. In effect, NEPCO decided that even with the out-of-rate charge, the non-firm service from WMECO is still less costly and more economical than any alternative. NEPCO also decided that it would rather pay a non-firm rate with out-of-rate charges included than a firm rate. The Commission should allow NEPCO to exercise its choice.

Contrary to the majority, slip op. at 4, allowing the rates to become effective does not run contrary to Commission cases. In fact, the opposite is true. Such a result is fully compatible with the holding in the *NU* non-firm opportunity cost case and the ruling here in effect takes back what the Commission ostensibly permitted there. The majority says, slip op. at 4-5:

Second, in *Northeast Utilities*, our approval of the recovery of opportunity costs by NU expressly relied on the fact that customers would be afforded an opportunity *not* to incur the charge. We stated: "[W]hen [NU]'s transmission system becomes constrained, the third-party non-firm wheeling customer must elect either to accept an interruption in its transmission service or to pay [NU]'s for[]gone opportunity costs." We determined that the option of allowing a customer to elect interruption was important to insure that prices for non-firm service would not be excessive. This concern is equally applicable to recovery of out-of-rate costs from the instant . . . customer, NEPCO. Absent such notice, NEPCO could be compelled to pay out-of-rate costs without any opportunity to avoid the costs. Absent such notice, we believe the rate would not be just and reasonable.

(underline in original; italics added; citation omitted).

The majority now interprets the *NU* language to mean that literally at the moment the system becomes constrained, the

customer must have a choice to interrupt and that if, as with NEPCO, the customer agrees in advance to incur the out-of-rate cost, that is not good enough. This approach raises hair splitting to a fine art. Historically and logically, we allow parties that want to offer or to obtain lower grade service greater flexibility in pricing, as for example, the Commission allows parties in economy transactions to split the savings, even though that methodology is frowned on in requirements service. The Commission correctly assumes that since the customer can depend on other sources for its electricity, and economy transactions are an added means to obtain service from the customer's point of view, while from the seller's it can sell electricity otherwise going to waste, we can benefit everyone by not adhering to strict cost of service ratemaking. By analogy, regarding transmission, since by definition, the seller can interrupt, so the buyer must have other arrangements as a back up, parties to non-firm transactions should have more room to maneuver. That is, since the non-firm customer has a choice to use other sources, the seller cannot exercise monopoly power over the customer, so that opportunity costs are legitimate. That is true whether the customer, here NEPCO, decides in advance that it would rather pay the out-of-rate than take alternate service, or the customer makes the decision at the instant the system becomes constrained. As I stated at the outset, this is another instance in which the majority insists on transmission at embedded cost, and never more.

****10** I can hear the reader remark, but the majority is not *forcing* WMECO to offer non-firm service at rates that do not include out-of-rate charges. That is true as far as it goes. On the other hand, the majority forces WMECO into an equally untenable position in the guise of giving WMECO the option to offer firm service in the place of the non-firm, if WMECO believes — which both it and NEPCO do — that it cannot recover its costs without the out-of-rate charge. The order states, slip op. at 5 (footnote omitted):

To the extent WMECO is unable to provide such (prior) notice [of the change in dispatch giving rise to out-of-rate charges], [the utility] ***61667** may instead choose to offer NEPCO firm service at rates reflecting firm service.

That implies that WMECO could recover its out-of-rate costs in firm service. But if, in fact, WMECO took up the offer it seemingly could not refuse, and NEPCO, ironically, now having no choice, agreed to such an arrangement, WMECO would be met by a cry of "gotcha" when it came to the Commission to obtain approval for its rates. Last month, in a 3 to 2 vote, the Commission held that in a firm transaction, the selling utility, for all practical purposes, could not collect out-of-rate charges, since the standard for collecting out-of-rate charges is that the *cumulative total* of out-of-rate charges *for the duration of the transaction* (in that instance 18 to 30 years) must be higher than the *cumulative total* of embedded costs over that period. *New England Power Company*, 61 FERC P 61,009 (1992). That cannot happen in the real world. Here, the duration of the firm service must be at least 20 years. While the *NEPCO* case is subject to rehearing, I see no indication, in fact I see quite the opposite, that the majority will change its mind and allow two parties to choose freely to include out-of-rate charges in transmission rates.

Rather than ignore the import of the majority's rulings in the NEPCO and WMECO contracts, I think we must face the fact that as I said in my *NEPCO* dissent in part, slip op. at 1, "it is obvious that the Commission's real transmission pricing policy was embedded cost under any and all circumstances, notwithstanding the rhetoric in [*NU*] about holding the native load harmless." First, when the Commission held that utilities can only collect the higher of opportunity or embedded cost, next when the majority in *NEPCO* made it impossible to collect out-of rate charges (a form of opportunity cost) in firm transmission and now that the majority has done so in non-firm contracts as to NEPOOL, the Commission is well along the path to its goal. The Commission is about to close the pincer, even in the face of clear Congressional intent that transmission pricing make the transmission customer compensate the utilities for the costs of those transactions.

II. *Transmission 102: Extending Jurisdiction To Otherwise Non-Jurisdictional Agreements, Here, Interconnection Agreements With QF's*

****11** The Commission could not as thoroughly enact embedded cost for transmission if parties could circumvent the Commission by exercising their private prerogatives to negotiate agreements that fall outside the Federal Power Act. In one respect, if the activity is an obvious thinly disguised attempt to evade our jurisdiction, I could understand trying to prevent it. On the other hand, if the transaction is legitimately something over which our jurisdiction does not extend, trying to capture more authority is itself unwarranted. This case falls squarely within the second category. Our own regulations governing QF's remove interconnection agreements from our jurisdiction and place them within the authority of the states. I quote from section 292.306 of our regulations:

Interconnection Costs

(a) *Obligation to pay*. Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) . . . may assess against the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics.

(b) *Reimbursement of interconnection costs.* Each state regulatory authority (with respect to any electric utility over which it has ratemaking authority) . . . shall determine the manner for payments of interconnection costs, which may include reimbursement over a reasonable period of time.

In my judgment, there is no way around the fact that since the beginning of our QF program, the Commission has left to the states, here, the Commonwealth of Massachusetts, the authority to regulate interconnections between QF's and utilities and to review the justness and reasonableness of the agreements. The Commonwealth has regulations governing interconnection agreements and we are compelled to let Massachusetts decide. I heard it argued that the Commission's QF regulations deal with direct sales to utilities, indeed, the first subsection of section 292 states that it applies to sales and purchases between QF's and utilities, whereas the interconnection here is between the QF and a transmitting utility. That is, Altresco connects with WMECO but sells it power to NEPCO. That, to me, is a distinction without a difference. I could see it if this involved construction of a QF-owned line, so that we do not forgo jurisdiction over a line that ties the QF to the grid, and thereby circumvent, for example, Federal Power Act requirements and retail wheeling prohibitions. Here, however, the interconnection is the same whether it is to NEPCO or WMECO. The only reason to exercise jurisdiction over the interconnection with WMECO is to prevent parties from agreeing to rates that are above embedded. The reason we would not exercise jurisdiction over a direct interconnection with NEPCO is because the 1980 regulations have placed that responsibility in the hands of state regulatory ***61668** authorities. However, that distinction does not justify the majority's action today.

III. *Conclusion*

****12** Here, once again, a majority finds a way to deny parties to transmission agreements the ability to agree on anything besides embedded cost pricing. After all the fanfare of *NU* and the recent Congressional activity, I would have thought, naively as it turns out, that the Transmission Task Force faction would have thrown in the towel. In light of the increased importance transmission pricing will have in the future, I decline to throw in the towel, either, and forcefully call to the attention of interested parties that what some thought provided great promise will, in the execution, most likely turn to dust.

I dissent.

Charles A. Trabandt Commissioner

MOLER, Commissioner, *dissenting in part*:

I dissent from the Commission's insistence that WMECO must provide NEPCO prior notice of out-of-rate costs under the nonfirm TSA. As a practical matter, WMECO cannot always provide that prior notice. Thus, the effect of this decision will be to put WMECO in the position of refusing to provide an important service or risking the recovery of the legitimate and verifiable costs of providing the service. This is an untenable result that I simply cannot support.[1]

WMECO and NEPCO are major players who have willingly entered into an agreement. They belong to the same power pool. Thus, unlike the situation involving recovery of lost opportunity costs we confronted in the *Northeast Utilities* case,[2] the buyer and seller here are in similar positions to recognize ahead of time the risks of incurring out-of-rate charges and of deciding accordingly. Further, we cannot seriously claim — as the majority apparently does — that the out-of-rate costs may, if charged, result in "excessive" rates.[3] These cost are, quite properly, recognized as appropriate costs of the pool membership. Thus, these costs can be recognized in the tariff for nonfirm service and recovered if incurred.

In short, finding no good reason to deny WMECO's request for rehearing on this issue, I would grant rehearing to allow the recovery of the out-of-rate costs on the terms agreed to between the parties.

Elizabeth Anne Moler Commissioner

FOOTNOTES

Footnotes	
1	Western Massachusetts Electric Company, 59 FERC P 61,091 (1992).
2	Out-of-rate costs have been described as "redispatch charges that may be incurred because a particular wheeling transaction may necessitate that the New England Power Pool (NEPOOL) through the New England Power Exchange (NEPEX) operate certain generating units out of economic dispatch . . .." Northeast Utilities Service Company, 58 FERC P 61,069 at 61,167 (1992), *reh'g pending*.
3	59 FERC at 61,342.

4	Although WMECO has objected to formally filing the Altresco agreements, WMECO has submitted the four agreements for Commission review as part of its request for rehearing.
5	The out-of-rate costs, WMECO explains, generally represent the difference in costs of operating the more expensive unit rather than the more economic unit. This difference in costs is typically assessed, WMECO adds, to the utility that owns the unit that is operating out-of-rate.
6	58 FERC at 61,179.
7	59 FERC at 61,342 n.24.
8	In *Northeast Utilities*, we deferred final action on Northeast Utilities' (NU's) proposed out-of-rate charges — which, were associated with firm transmission service — pending receipt of NU's compliance filing in its merger proceeding. *See* 58 FERC at 61,182.
9	As to this last point, WMECO does no more than request a hearing. WMECO Request for Rehearing at 7. WMECO does not explain why such a hearing is necessary. Moreover, the Commission is certainly permitted to act without a trial-type, evidentiary hearing, and we see nothing in WMECO's various arguments that would require such a hearing. *See, e.g.*, Southern Company Services, Inc., 57 FERC P 61,093 at 61,337 & n.23 (1991), *appeal pending*, No. 91-1595 (D.C. Cir.).
10	58 FERC at 61,180; accord, *id.* at 61,179-80.
11	As we noted in our April 24 Order, the recovery of out-of-rate costs in the firm TSA is being decided in the compliance phase of the merger proceeding and the paper hearing proceeding. 59 FERC at 61,342.
12	*See, e.g.*, Ex Parte McCardle, 74 U.S. 506, 515 (1869) (in which the Court exercised its authority to review the issues presented by the parties before reaching its determination that it lacked jurisdiction); *see also* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 544 (1978), which upheld the discretion of agencies to develop needed evidence.
13	16 U.S.C. § 824d (1988).
14	16 U.S.C. § 2601 *et seq.* (1988); 18 C.F.R. Part 292 (1992).
15	WMECO states that the Massachusetts Department of Public Utilities (Massachusetts Commission) has sole jurisdiction over the four agreements and has generally approved WMECO's standard interconnection procedures and requirements, although the Massachusetts Commission has not specifically approved the four Altresco agreements. WMECO argues that such specific approval is not necessary.
16	18 C.F.R. § 292.303 (1992).
17	*See* American Paper Institute v. American Electric Power Service Corporation, 461, U.S. 402, 418 (1983) (discussing PURPA's encompassing "the power to promulgate rules requiring utilities to make physical connections with [QFs] in order to consummate purchases and sales"); *accord, id.* at 419-21. *Compare* 18 C.F.R. § 292.303(c) (1992) *with* 18 C.F.R. § 292.303(d) (1992). The interconnection requirement under section 292.303(c) is limited to "such interconnections . . . as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306." Section 292.303(d), in contrast, speaks separately of an electric utility's voluntary transmission of QF energy or capacity to another electric utility: "[i]f a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility." *Compare* Small Power Production and Cogeneration Facilities, Order No. 69, FERC Stats. & Regs. Regulations Preambles 1977-1981 P 30,128 at 30,870, *order on reh'g*, FERC Stats. & Regs. Regulations Preambles 1977-81 P 30,160 (1980) *with id.* at 30,871-72. *Accord*, 18 C.F.R. § § 292.303(b), 292.305 (1992); FERC Stats. & Regs. Regulations Preambles 1977-81 at 30,872-73.
18	18 C.F.R. § 292.306(a) (1992).
19	16 U.S.C. § § 824, 824d (1988).

20	*See, e.g.*, Consolidated Edison Company, 15 FERC P 61,174 at 61,405 (1981). Consequently, the Massachusetts Commission would have exclusive jurisdiction over an interconnection agreement which would concern solely purchases or sales of power between a QF and its local utility. However, to the extent the agreement covers both the purchase and/or sale of power between a QF and its local utility, *and* the transmission of QF power in interstate commerce, the agreement would be subject to the Commission's exclusive jurisdiction.
21	However, the rates for the sale or purchase of any back-up power, maintenance power, etc., provided to the QF by WMECO would be subject to the Massachusetts Commission's exclusive jurisdiction.
22	57 FERC P 61,358 (1991), *reh'g denied*, 58 FERC P 61,182 (1992).
23	*See also* Florida Power Corporation (*Florida Power*), 58 FERC 61,161, *reh'g denied*, 60 FERC 61,003, *supplemental order issued*, 61 FERC P _ (1992), *appeal filed*, No. _ (D.C. Cir.).
24	16 U.S.C. § 824d(c) (1988). Section 205(c) of the FPA provides:
25	57 FERC at 62,161 (footnote omitted). On rehearing, the Commission reiterated the findings of its prior order, and found that the contract providing for the CIAC could not be "neatly disconnected" from the supply of jurisdictional service. The Commission stated that if utilities were permitted to recover their fixed costs through CIAC, and the Commission were to disassociate such arrangements from jurisdictional service or charges, utilities' jurisdictional rates would — in violation of section 205 of the FPA — evade Commission review. *See* 58 FERC at 61,565.
26	See *infra* text following note 33 for a discussion of the O&M Agreement.
27	*E.g.*, Reinforcement Engineering Agreement at 1 (agreement concerns "terms under which [WMECO] will engineer and license the Transmission System Reinforcements . . . needed to accept the output of the [Altresco] project into [WMECO's] transmission system"); Reinforcement Construction Agreement at 1 (agreement concerns "the terms under which [WMECO] will construct, test and energize the Transmission System Reinforcements . . . needed to accept the output of the ALTRESCO project . . . into [WMECO's] transmission system"); Interconnection Construction Agreement at 2 (agreement concerns "the terms under which [WMECO] will design and modify its facilities . . . to interconnect the [Altresco] Project with [WMECO's] transmission system").
28	*See* Reinforcement Construction Agreement at 1, Paragraph 1 (noting estimated cost of $2,976,000 "including $576,000 in taxes on contributions in aid of construction"); *id.* at Schedule A (listing work to be completed by WMECO including, among other things, "[r]econstructing the existing 4.7 mile 115-kV transmission line between [WMECO's] Woodland Substation and Oswald Junction.")
29	*See* Reinforcement Engineering Agreement at 1, 2 at Paragraph 3 (WMECO shall, among other things "perform engineering and design" of the transmission reinforcements; Altresco shall pay WMECO $480,000); Interconnection Construction Agreement at Schedule C (work to be completed by WMECO includes replacing existing overcurrent relays at substation and engineering and design modifications to substation).
30	The agreements would not, however, be jurisdictional if WMECO itself was purchasing the entire output of the Altresco facility, as opposed to transmitting the output to NEPCO.
31	57 FERC at 62,161; 58 FERC at 61,565-67; *see also* 58 FERC at 61,485.
32	58 FERC at 61,485.
33	*See* 48 FERC at 61,213; 44 FERC at 62,399.
34	*See* Sierra Pacific Power Company, 42 FERC P 61,149 (1988); *accord* Minnesota Power & Light Company, 47 FERC P 62,151 1989); Pacific Gas & Electric Company, 45 FERC P 62,017 (1988). *See also* Bechtel Power Corporation, 60 FERC P 61,156 at 61,573 (1992), in which the Commission explained that O&M agreements that vest a sufficient degree of control or decisionmaking authority in a party can make that party an "operator" for purposes of section 201 of the FPA and thus a public utility, requiring the filing of the O&M agreement under section 205 of the FPA.
35	O&M Agreement at 4 at Section 2.
36	*Id*.

37	*See* Central Maine Power Company, 56 FERC P 61,200, *reh'g denied*, 57 FERC P 61,083 (1991).
38	*See supra* note 23 (citing *Florida Power*).
39	*Id.*
40	This is particularly the case for contracts that involve CIAC payments in conjunction with the voluntary transmission of QF power in interstate commerce.
1	I join those parts of the order finding certain related agreements to be jurisdictional.
2	58 FERC P 61,069 (1992).
3	Slip op. at 5.

61 FERC P 61182 (F.E.R.C.), 1992 WL 510299