

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 05-1193

**WESTAR ENERGY, INC., ET AL.,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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WASHINGTON, D.C. 20426**

MAY 2, 2006

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties are as stated in Petitioner's brief.

B. Rulings Under Review:

The rulings under review are as follows:

1. Letter Order to Westar Energy, Inc. and Kansas Gas and Electric Co. Re Corrected Form No. 582, dated April 8, 2004 (unpublished); and
2. Revision of Annual Charges to Public Utilities (Westar Energy, Inc. and Kansas Gas and Electric Company), 111 FERC ¶ 61,086 (April 19, 2005).

C. Related Cases:

This case has not previously been before this Court. Counsel is not aware of any related case pending in this Court or any other court.

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March 23, 2006

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GLOSSARY

FERC

Federal Energy Regulatory Commission

Westar

Westar Energy, Inc. and Kansas City Gas and Electric Company

**IN THE UNITED STATES COURT OF APPEALS
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No. 05-1193

**WESTAR ENERGY, INC. *ET AL.*,
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v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY
COMMISSION**

STATEMENT OF THE ISSUES

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) abused its discretion in rejecting, as untimely, a filing that failed to comply with the filing deadline plainly set forth in the Commission’s regulations.

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the addendum to this brief.

STATEMENT OF FACTS

I. Nature of the Case, Course of Proceedings, and Disposition Below

In this case, Petitioners Westar Energy, Inc. and Kansas Gas and Electric Company (collectively, “Westar”) requested waiver of Commission regulations so that they could file certain data late. The Commission denied the request. *See* Letter Order (unpublished), issued April 12, 2004 (“Letter Order”), *reh’g denied*, *Revision of Annual Charges to Public Utilities (Westar Energy, Inc. and Kansas Gas and Electric Company)*, 111 FERC ¶ 61,086 (April 19, 2005) (“Rehearing Order”) (JA 5 and 6, respectively). This appeal followed.

II. Statutory and Regulatory Background

The Omnibus Budget Reconciliation Act of 1986 requires the Commission to recoup its electric regulatory program costs from the industries it regulates.¹ *See generally Michigan Public Power Agency v. FERC*, 405 F.3d 8, 9-10 (D.C. Cir. 2005); *Midwest Independent Transmission System Operator, Inc. v. FERC*, 388 F.3d 903, 906-07 (D.C. Cir. 2004). The costs are assessed annually to each public utility based upon the utility’s share of the interstate megawatt-hours of electric energy transmitted by all public utilities during the immediately preceding reporting year. 18 C.F.R. § 382.201(b). Each utility is required to submit under

¹ *See* Section 3401 of the Omnibus Budget Reconciliation Act of 1986, 42 U.S.C. § 7178.

oath to the Commission by April 30 of each year a statement (“Form No. 582”) of the megawatt-hours of electric energy it transmitted in interstate commerce in the preceding year. 18 C.F.R. § 382.201(c)(1).

Corrections to the data must be submitted under oath to the Commission on or before the end of the calendar year in which the information was originally reported. 18 C.F.R. § 382.201(c)(2). The Commission adjusts the annual charges in the following fiscal year, using the corrected information, to eliminate any over or under recovery both of the Commission’s actual costs and the charges to each utility.²

III. This Case

On December 18, 2003, Westar submitted a corrected Form No. 582 for 2002 and 2003. On April 12, 2004, the Director of the Commission’s Division of Financial Services, Office of the Executive Director, acting under delegated authority, issued the Letter Order accepting Westar’s corrections for fiscal year

² See generally *Revision of Annual Charges to Public Utilities*, Order No. 641, 65 Fed. Reg. 65,757 (Nov. 2, 2000), FERC Stats. & Regs., Regulations Preambles ¶ 31,109 at 31,857 (2000), *reh'g denied*, Order No. 641-A, 66 Fed. Reg. 15,793 (March 21, 2001), 94 FERC ¶ 61,290 (2001); *Revision of Annual Charges to Public Utilities (California Independent System Operator, Inc.)*, 101 FERC ¶ 61,043 at 61,163, *reh'g dismissed*, 101 FERC ¶ 61,326 at P 9 (2002); *Annual Charges under the Omnibus Budget Reconciliation Act of 1986 (CNG Power Services, et al.)*, 87 FERC ¶ 61,074 at 61,303 (1999).

2003 based on calendar year 2002 data. The Letter Order nevertheless rejected as untimely the corrections for fiscal year 2002 based on calendar year 2001 data.

Westar requested rehearing of the rejection of the untimely fiscal year 2002 corrections. The Commission denied the request, finding that Westar had not demonstrated good cause for waiver of express filing requirements. *See* Rehearing Order at P 10-12 (JA 8-10).

SUMMARY OF ARGUMENT

A court may overturn an agency's denial of a waiver request only if the agency has abused its discretion. Here, the Commission explained that waiver would undermine the finality of the charges other public utilities must pay and that its treatment of Westar was in accord with precedent and not discriminatory. Consequently, the denial of Westar's waiver request was appropriate.

ARGUMENT

I. Standard of Review

The scope of judicial review of an order denying waiver is narrow. An agency's refusal to grant a waiver may not be overturned "unless the agency's reasons are 'so insubstantial as to render that denial an abuse of discretion.'" *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999) (citations omitted); *see also Thomas Radio Co. v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983) (same); *MacLeod v. ICC*, 54 F.3d 888, 891 (D.C. Cir. 1995) (same); *Universal*

City Studios LLLP v. Peters, 402 F.3d 1238, 1242 (D.C. Cir. 2005) (same; case involved late filing at Copyright Office of claims valued in the millions of dollars).

II. The Commission’s Rejection Of Westar’s Late Filing Was Appropriate.

The Commission’s action here was well within the bounds of its discretion. Its regulations expressly provide that corrections to the Form No. 582 information must be made promptly, by the end of the calendar year in which the information was originally filed. 18 C.F.R. § 382.201(c)(2). Moreover, the Commission explained why Westar’s stated reasons for filing late did not constitute good cause for granting a waiver of the regulation:

As explained above, the Commission allocates its program costs among all responsible public utilities. Changing the amount owed by one utility has an effect on the amount owed by all of the others. Therefore, in the normal course of events, waiving the regulatory deadline for one utility in response to its untimely request would require the recalculation and re-billing of annual charges to all public utilities, and would undermine the certainty of both the Commission and public utilities that annual charges would not be indefinitely subject to change. Furthermore, permitting a utility to modify its calculations beyond the specified correction period would also, naturally, prompt other utilities to take the same action, further undermining the finality of the annual charges for a particular fiscal year.

Rehearing Order at P 10 (JA 8-9) (citation omitted). The Commission concluded, on balance, “that the broader interest in rejecting the late correction outweighs Westar’s individual interest, so that the waiver request must be denied.” *Id.*

FERC also rejected Westar's argument that precedent supported its waiver request. Citing *Midwest Independent System Operator, Inc.*, 103 FERC ¶ 61,048 (2003), the Commission explained that it is willing to make corrections for erroneously filed information. Rehearing Order at P 11 (JA 9). The Commission is not, however, willing to "ignore the deadline expressly spelled out in its regulations." *Id.* With regard to Westar's contention that the Commission had permitted a neighboring utility, Kansas City Power and Light ("Kansas City Power") to late-file corrections, FERC concluded that there "the Commission's auditors delayed [Kansas City Power's] filing because of their ongoing investigation," and that "in those very different circumstances, where the Commission itself caused the late filing, it would have been inequitable to penalize the company." *Id.* at P 12 (JA 10). Westar, of course, was not subject to a similar delay. *Id.*

Dismissing the Kansas City Power audit as immaterial, Westar argues on appeal (Br. at 10-11) that the Commission has unreasonably discriminated between "two evidently identical cases." This argument is without merit. The accuracy of Kansas City Power's data was the subject of a Commission audit and, accordingly, Kansas City Power was subject to Commission internal scheduling and deadlines. As Westar itself points out (Br. at 11), once the Commission completed the audit, it

directed Kansas City Power to file a corrected Form No. 582 properly stating its transmission volumes for 2001.

In contrast, Westar, since it was not audited, was responsible itself for ascertaining the accuracy of its data and for meeting the deadline established in the regulations. Moreover, if the audit had found that Kansas City Power had understated its transmission volumes, the Commission would have adjusted its charges upward (instead of downward) in the next billing cycle. It is not so clear that Westar would have volunteered to have its charges similarly increased. In sum, as the Commission found, the Westar and Kansas City Power circumstances were very different. Rehearing Order at P 12 (JA 10).

Westar's other arguments require little comment. Westar contends (Br. at 7) that the Commission "failed to provide a reasoned explanation for rejecting" Westar's waiver request. As demonstrated *supra* at 5-6, that is not correct. The Commission explained, *inter alia*, that waiver would undermine the finality of the annual charges. Westar also characterizes the Rehearing Order as providing "*post hoc*" and "after-the-fact" rationales (Br. at 8, 11), but this argument ignores the fact that the purpose of rehearing is to provide the Commission with another opportunity to address the issues raised. *Ameren Services Co. v. FERC*, 330 F.3d 494, 499 n. 8 (D.C. Cir. 2003) ("The very purpose of rehearing is to give the

Commission the opportunity to review its decision before facing judicial scrutiny.”).³

Finally, Westar’s contention (Br. at 8) that it was the only utility filing for a waiver is presumably intended to challenge the Commission’s position that granting Westar’s waiver request would encourage the filing of similar requests. However, “since the Commission established [the] deadline . . . , it has never indicated that it would allow a public utility to make an untimely filing to correct its transmission data.” Rehearing Order at P 11 n. 14 (JA 9)(citing cases). Given this consistent Commission position, the lack of waiver requests is not surprising.

³ See also, *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (rehearing “enables the Commission to correct its own errors, which might obviate judicial review, or to explain in its expert judgment why the party’s objection is not well taken, which facilitates judicial review.”).

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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March 23, 2006
Final Brief: May 2, 2006

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 1,680 words, not including the tables of contents and authorities, the certificate of counsel, this certificate, and the addendum.

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