

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Basin Electric Power Cooperative

Docket No. ER05-1243-000

ORDER ACCEPTING AND SUSPENDING FILING AND ESTABLISHING  
HEARING AND SETTLEMENT JUDGE PROCEEDINGS

(Issued October 21, 2005)

1. In this order, the Commission accepts, suspends and makes effective subject to refund, and sets for hearing and settlement judge proceedings a tariff filing by Basin Electric Power Cooperative (Basin).

**Background**

2. Basin, which is an electric cooperative that is not a public utility, owns transmission facilities that are integrated with those of Black Hills Power, Inc. (Black Hills), a public utility, and Powder River Energy Corporation (Powder River), an electric cooperative also not a public utility (the Common Use Utilities). The Common Use Utilities operate an integrated transmission system under a Commission-approved Joint Open Access Transmission Tariff (Joint OATT).<sup>1</sup>

3. On July 25, 2005, Basin filed revised, increased rates under the Joint OATT to reflect the inclusion in Basin's revenue requirement of the cost of the construction and operation of a new 74-mile 230 kV transmission line from Teckla, Wyoming, to Carr

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<sup>1</sup> The Commission accepted the Joint OATT in *Black Hills Power, Inc.*, 106 FERC ¶ 61,119 (2004).

Draw, Wyoming (Teckla/Carr Draw Line).<sup>2</sup> Basin states that the Teckla/Carr Draw Line is expected to go into service on October 31, 2005.<sup>3</sup>

4. Basin explains that the Joint OATT rates currently on file reflect the stated revenue requirements of the three Common Use Utilities; the Joint OATT includes an annual revenue requirement for the Common Use Utilities, which is equivalent to the sum of the revenue requirements of each of the three utilities. Each utility's revenue requirement used to derive the current Joint OATT rates is based on calendar-year 2002 cost-of-service data and a 10.85 percent return on common equity, pursuant to a settlement agreement entered into by the Common Use Utilities on May 7, 2004.<sup>4</sup> The rates for network integration transmission service are derived by multiplying one twelfth the annual revenue requirement, less revenue credits for point-to-point transmission service in the month, by the network customer's load ratio share for the month. The rates for point-to-point transmission service are updated each March 1 to reflect the annual revenue requirement, less revenue credits for short-term and non-firm point-to-point transmission service, divided by the sum of the monthly network loads and point-to-point reservations at the time of the monthly system peaks for the previous calendar year.

5. Basin further states that the Joint OATT allows each of the three Common Use Utilities to modify its revenue requirement unilaterally through a filing with the Commission. Basin states that it has developed a new, updated cost-of-service study, but using the same methodology and return on equity that it used to develop the currently-effective revenue requirement and rates, pursuant to which Basin's revenue requirement will increase from \$1,613,213 to \$5,742,195, with the addition of the Teckla/Carr Draw Line. Basin states that, if it were to follow its current practice and utilize historical cost data to develop its revenue requirement for service under the Joint OATT, it would not be able to fully reflect the cost of the Teckla/Carr Draw Line in its revenue requirement until

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<sup>2</sup> Basin also proposes modification of Attachment K to the Joint OATT to include the Teckla/Carr Draw Line in the list of facilities over which service is provided under the Joint OATT.

<sup>3</sup> Basin originally asked the Commission to accept its new rates and suspend them until the first day of the calendar month after the date on which the Teckla/Carr Draw Line goes into service, November 1, 2005. On August 15, 2005, Basin filed a letter requesting that the Commission defer action on this filing until no later than October 21, 2005, but continued to ask that the Commission allow the new rates to become effective on the proposed effective date.

<sup>4</sup> *Black Hills Power, Inc.*, 108 FERC ¶ 61,165 (2004).

March 1, 2007, because the line will not be included in Basin's monthly plant balances for an entire calendar year until 2006, and rates based on 2006 data would not take effect until March 1, 2007. Basin states that this would create a substantial mismatch between the facilities that are used to develop the cost of service upon which the transmission rates are based and the facilities that are used to provide service to transmission customers. Thus, Basin explains, it has elected to use a forward looking calendar-year 2006 test year to develop its proposed revenue requirement, which will permit it immediately to include the full cost of the Teckla/Carr Draw Line in its revenue requirement beginning on November 1. Basin also proposes to calculate the rates for point-to-point transmission service based on projected load for 2006, which it states will synchronize the rate design with Basin's forward-looking calendar-year 2006 test year.

6. Additionally, Basin further proposes to make a compliance filing in this docket by the later of March 31, 2007, or two weeks after it has completed all of its Rural Utilities Service (RUS) cost forms for 2006, to true up the charges under the new rates through March 31, 2007 to reflect its actual costs for this period. If the estimated costs are higher than the actual costs, refunds will be made to customers for this period; if, on the other hand, the actual costs turn out to be higher, then customers will be assessed a surcharge.

7. Basin then proposes that, after April 1, 2007: (1) its revenue requirement will be based on its actual cost of service for calendar-year 2006; (2) network rates will continue to be derived based on monthly load ratio shares; and (3) derivation of the rates for point-to-point transmission service will revert to the formula currently on file in the Joint OATT, but updated April 1, rather than March 1, of each year to reflect revenue credits and loads from the previous calendar year.<sup>5</sup>

### **Notice of Filing and Responsive Pleadings**

8. Notice of Basin's filing was published in the *Federal Register*,<sup>6</sup> with interventions and protests due on or before August 5, 2005. Timely motions to intervene were filed by Black Hills and Powder River. The Municipal Agency of Nebraska and the City of Gillette, Wyoming, (collectively, Municipals) filed a joint motion to intervene and a joint protest.

9. In their protest, Municipals object to Basin's proposal to fix its revenue requirement based on a projected 2006 test year. They contend that Basin's costs have

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<sup>5</sup> Basin proposes to change the date on which the point-to-point rates are updated each year from March 1 to April 1 because it has found that it cannot complete its analysis of costs for the prior calendar year until after March 1.

<sup>6</sup> 70 Fed. Reg. 45,382 (2005).

declined since the 2002 test year on which its existing revenue requirement is based, resulting in Basin's collecting more than actual costs. Now, however, Municipals argue, because Basin anticipates a large new investment, it wants to modify its prior ratemaking approach to use a forward-looking test year, so as to eliminate some of the lag that is built into the backward-looking test year approach. Municipals characterize this as an attempt to "have cake, eat it, and then go back to having it."<sup>7</sup> Municipals further state that Basin's proposal involves not only such inappropriate inconsistency in ratemaking approaches over time, but also across the three Common Use Utilities, because Black Hills' and Powder River's revenue requirements will remain based on a 2002 test year. Thus, according to Municipals, Basin's proposal does not "harmonize" the recovery of its new facilities' costs with the recovery of existing Black Hills and Powder River facility costs, which continue to factor into the Joint OATT's postage-stamp rate. Municipals state that although the Commission generally allows the use of forward-looking test year costs and loads to set rates, applying such ratemaking temporarily, and only to a fraction of the costs and loads of the Common Use Utilities, as proposed by Basin, would result in revenues, over time, exceeding costs. Municipals also object to Basin's proposal to adopt the 10.85 percent return on common equity resulting from the settlement of the previous rate case, without demonstrating that this reflects its current cost of capital.

10. Municipals urge the Commission to reject Basin's filing because it lacks the transparent and complete cost-of-service data required to evaluate the end result of the proposed changes to the Joint OATT rates. In the alternative, Municipals request that the Commission suspend the filing for five months and order a hearing and settlement judge procedures.

11. On September 26, 2005, Basin filed an answer and on October 12, 2005, Municipals filed an answer to Basin's answer.

### **Procedural Matters**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene of Black Hills, Powder River and Municipals serve to make them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest or to an answer, unless otherwise permitted by the decisional authority. We are not persuaded to accept Basin's and Municipal's answers, and therefore, we will reject them.

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<sup>7</sup> Municipals' protest at 5.

## Discussion

### 1. Jurisdiction

13. As noted above, Basin is not a "public utility" as defined in section 201(e) of the Federal Power Act (FPA).<sup>8</sup> Section 205 of the FPA provides that "[a]ll rates and charges made . . . by *any public utility* for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable."<sup>9</sup> However, the rates at issue here are the rates under the Joint OATT, and are rates charged by all three Common Use Utilities – which include Black Hills, a public utility.

14. The Commission has previously accepted filings by the Common Use Utilities, where Black Hills, a public utility, was one of the filing utilities.<sup>10</sup> Here, however, Basin alone is filing a change to its revenue requirement and thus to the rates contained in the Common Use Utilities' Joint OATT and charged by all three Common Use Utilities. It makes this filing in reliance on the provision in the Joint OATT allowing each of the three Common Use Utilities to make unilateral filings to change the component of the Joint OATT rates that reflects that utility's revenue requirement:

Each of Black Hills, Basin Electric and [Powder River] ("Party") may unilaterally modify its component of the charge for Transmission Service pursuant to a filing with the FERC; provided that it must notify the other two Parties in writing not less than thirty (30) days prior to making such filing.<sup>11</sup>

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<sup>8</sup> See, e.g., *Dairyland Power Cooperative*, 37 FPC 12 (1967) (cooperatives financed by the Rural Electrification Administration (now RUS) are not regulated as public utilities under the FPA).

<sup>9</sup> 16 U.S.C. § 824(d)(a) (2000) (emphasis added).

<sup>10</sup> See *supra* notes 1 and 4.

<sup>11</sup> Attachment H, paragraph 3, Original Sheet no. 135, Common Use System Utilities, FERC Electric Tariff, Original Volume No. 1, submitted in Docket No. ER03-1354-000 on September 16, 2003.

15. The Commission "may analyze and consider the rates of non-jurisdictional utilities to the extent that those rates affect jurisdictional transactions."<sup>12</sup> In its *City of Vernon* orders,<sup>13</sup> the Commission addressed the situation in which a non-jurisdictional utility, the City of Vernon, turned its system over to the California Independent System Operator Corporation (CAISO) to operate, and the CAISO then sought to incorporate Vernon's Transmission Revenue Requirement (TRR) into the rate that the CAISO charges its customers for transmission service. In those circumstances, when the rates of an entity that is not a public utility become a component of the rates for service provided by a public utility, and thus have the ability to affect the justness and reasonableness of a rate that is subject to Commission review pursuant to its responsibility under section 205 of the FPA (*i.e.*, a rate charged by a jurisdictional, public utility), the Commission may review the justness and reasonableness of that component.

16. Similarly, here, Basin's revenue requirement is a component of the rates charged by the three Common Use Utilities for service provided under their Joint OATT, including service provided by Black Hills over its facilities included under the Joint OATT, and affects the justness and reasonableness of those rates. Therefore, the Commission must review the justness and reasonableness of Basin's proposal to increase its revenue requirement.

## 2. Rates

17. Basin's filing raises issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

18. Our preliminary analysis indicates that Basin's proposed increase in its revenue requirement has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept Basin's filing, and suspend it for a nominal period and make it effective as of the first day of the calendar month after the date on which the Teckla/Carr Draw Line

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<sup>12</sup> *Pacific Gas and Electric Co. v. FERC*, 306 F.3d 1112, 1114 (D.C. Cir. 2002) (*PG&E*).

<sup>13</sup> *City of Vernon*, Opinion No. 479, 111 FERC ¶ 61,092 (2005), *order on reh'g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), (*City of Vernon*), *reh'g pending*.

goes into service, as requested, subject to refund. We will also set the filing for hearing and settlement judge procedures.<sup>14</sup>

19. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>15</sup> If the parties desire they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>16</sup> The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

20. Should the case not settle and go to hearing, we have not established a formal standard of review to be applied to non-jurisdictional rates that become components of jurisdictional rates, but have determined that we will consider the issue on a case-by-case basis. In Opinion No. 479, the Commission stated that, although the City of Vernon was clearly not subject to our section 205 jurisdiction, in *PG&E* “the court gave the Commission discretion concerning the review of Vernon’s TRR, so long as that review ‘ensure[s]. . . that the CAISO’s rates will ultimately be just and reasonable.’”<sup>17</sup> We

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<sup>14</sup> We note that, since only Basin has filed to increase its revenue requirement, the revenue requirements of the other two Common Use Utilities (Black Hills and Powder River) are not at issue in the hearing and settlement judge procedures. If Municipals believe that Black Hills’ and Powder Rivers’ revenue requirements underlying the Joint OATT rates are no longer just and reasonable and wish to seek changes to those rates, they must initiate a proceeding under section 206 of the FPA. 16 U.S.C. § 824e (2000).

<sup>15</sup> 18 C.F.R. § 385.603 (2005).

<sup>16</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) - click on Office of Administrative Law Judges).

<sup>17</sup> Opinion No. 479 at P 35, *citing PG&E*, 306 F.3d at 1116.

further explained that the court did not rule out the possibility of traditional section 205 review but gave also the Commission the discretion to conduct a less thorough review.<sup>18</sup> In Opinion No. 479-A, we further stated that "we read the court's opinion as fully endorsing – though not necessarily requiring – the Commission's performing a section 205 review of Vernon's TRR to ensure that the [CA]ISO's . . . rate, of which it is a component, is just and reasonable."<sup>19</sup>

21. We additionally note that, in Opinion No. 479, the Commission relied on the fact that Vernon submitted its TRR for section 205 review, by making it part of a jurisdictional rate.<sup>20</sup> Similarly here, when the Common Use Utilities first submitted the Joint OATT to the Commission under section 205, they filed an overall rate of which the essential components were the revenue requirements of the three Common Use Utilities.

Additionally, Basin's instant filing is made under section 205, as can be seen from the following commitment made by the Common Use Utilities at the time they filed the Joint OATT:

Basin Electric and [Power River] are not subject to section 205 of the Federal Power Act because they are not public utilities. Nonetheless, they have committed in the Joint [OATT] to make filings with FERC pursuant to section 205 of the Federal Power Act in the event they wish to modify their components of the rates for transmission service under the Joint [OATT].<sup>21</sup>

22. Therefore, in establishing hearing procedures to determine the appropriate revenue requirement for Basin, we will leave the manner in which the determination will be made to the discretion of the presiding judge, subject to the guidelines established by the Opinion No. 479 orders. Whether this will entail a section 205 proceeding like the one in Vernon in order to establish a sufficient record on the justness and reasonableness of Basin's revenue requirement will be up to the presiding judge in the first instance.<sup>22</sup>

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<sup>18</sup> *Id.* at P 36.

<sup>19</sup> Opinion No. 479-A at P 26.

<sup>20</sup> Opinion No. 479 at P 42.

<sup>21</sup> Transmittal Letter of Common Use Utilities, *Black Hills Power, Inc.*, Docket No. ER03-1354-000 at 7 n.2 (September 16, 2003).

<sup>22</sup> *See City of Anaheim*, 112 FERC ¶ 61,208 at P 18 (2004).

The Commission orders:

(A) Basin's proposed revenue requirement is hereby accepted for filing, and suspended for a nominal period, to become effective as of the first day of the calendar month after the date on which the Teckla/Carr Draw Line goes into service, as requested, subject to refund.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Basin's proposed revenue requirement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge by telephone within five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington,

D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.