

125 FERC ¶ 61,245
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Puget Sound Energy, Inc.	Docket No. ER08-1599-000
Avista Corporation	Docket No. ER08-1602-000
PacifiCorp	Docket No. ER08-1607-000
Portland General Electric Company	Docket No. ER08-1608-000
	(Not Consolidated)

ORDER CONDITIONALLY ACCEPTING AGREEMENTS

(Issued November 26, 2008)

1. On September 30, 2008, Puget Sound Energy, Inc. (Puget), Avista Corporation (Avista), PacifiCorp, and Portland General Electric Company (Portland) (collectively, the Utilities) separately tendered for filing Residential Purchase and Sale Agreements (Residential Agreements) each had entered into with the U.S. Department of Energy – Bonneville Power Administration (Bonneville).¹ In this order, the Commission conditionally accepts the Residential Agreements, effective October 1, 2008, subject to the outcome of pending Commission proceedings. The Commission declines to address the alternative requests that the Commission disclaim jurisdiction over the Residential Agreements.

¹ The Residential Agreements are designated as Puget Sound Energy, Inc., Rate Schedule FERC No. 448; Avista Corporation, Rate Schedule FERC No. 501; PacifiCorp, Rate Schedule FERC No. 558; and Portland General Electric Company, Rate Schedule FERC No. 18.

I. Background

2. The Northwest Power Act,² among other things, authorizes Bonneville to provide the benefits of its low-cost federal hydroelectric system to the residential and small farm customers of regional investor-owned utilities. Section 5(c) of the Northwest Power Act provides investor-owned utilities the option to obtain the benefits for their residential and small farm customers under this Residential Exchange Program by entering into a residential exchange contract with Bonneville.

A. The Filings

3. The Residential Agreements provide the contractual terms under which residential and small farm customers will receive the Residential Exchange Program benefits. Under the terms of each of the Residential Agreements, the Utilities agree to sell power to Bonneville equal to the amount of their respective residential and small farm customer loads at their respective average system costs. In return, Bonneville agrees to sell each of the Utilities an equal amount of power at Bonneville's priority firm exchange rate. The Utilities state that historically no actual power sales or exchanges have taken place under the Residential Agreements; instead, the benefits are passed through to residential and small farm customers. The Residential Exchange Program benefits paid by Bonneville to each residential and small farm customer, subject to certain adjustments, equal the product of the amount by which the priority firm exchange rate exceeds the seller's average system cost and the eligible customer's load.

4. Under certain circumstances, Bonneville may elect to purchase "in lieu" power from a source other than the Utilities, if the expected cost of such power is less than that particular Utility's average system cost. In such an instance, power may flow from Bonneville to the Utilities. However, the Utilities assert that in no event will power flow from the Utilities to Bonneville. If Bonneville does not elect to purchase "in lieu" power, the Residential Agreement transactions become purely financial transactions.

5. Accordingly, the Utilities argue that their respective Residential Agreements are not subject to the Commission's jurisdiction and, therefore, request that the Commission disclaim jurisdiction over the Residential Agreements, or in the alternative, accept the

² Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) 16 U.S.C. § 839c(c) (2006).

filings under section 205 of the Federal Power Act (FPA) with an effective date of October 1, 2008.³

B. Notice of Filings

6. Notice of the Docket Nos. ER08-1599-000, ER08-1602-000, ER08-1607-000 and ER08-1608-000 filings made on September 30, 2008 was published in the *Federal Register*, with interventions and protests due on or before October 21, 2008.⁴ None was filed in Docket Nos. ER08-1599-000 and ER08-1608-000. The Idaho Public Utilities Commission (Idaho Commission) filed notices of intervention and comments in Docket Nos. ER08-1602-000 and ER08-1607-000. On October 23, 2008, Idaho Power Company (Idaho Power) filed motions to intervene out-of-time in Docket Nos. ER08-1602-000 and ER08-1607-000.

II. Discussion

A. Interventions

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), Idaho Commission's notices of intervention serves to make it a party to the proceedings in which it filed. We will grant Idaho Power's unopposed late-filed motions to intervene, given the early stage of the proceedings, and lack of prejudice to other parties.

B. Comments

1. Idaho Commission

8. Idaho Commission states that it does not take a position on whether the Commission has jurisdiction over the Residential Agreements; however, if the Commission does exert jurisdiction over these agreements, Idaho Commission finds two contract terms in each agreement objectionable.

³ PacifiCorp states that although it does not believe that its Residential Agreement is subject to the Commission's jurisdiction, it is submitting the section 205 filing out of an abundance of caution.

⁴ 73 Fed. Reg. 59,618 (2008).

9. Idaho Commission states that its primary concern is the “deemer” mechanism contained in section 12 (Balancing Account) of the Residential Agreements.⁵ Idaho Commission states that requiring a utility to pay a deemer balance to Bonneville when the utility’s average system cost is lower than Bonneville’s priority firm exchange rate is contrary to section 5(c) of the Northwest Power Act. Moreover, Idaho Commission states that the priority firm exchange rate is pending final approval in Docket No. EF06-2011-002,⁶ and that it also protested the deemer mechanism in the average system cost methodology proceedings in Docket Nos. EF08-2011-000 and RM08-20-000.

10. Secondly, Idaho Commission recommends that the Commission require modifications to section 11 (Termination and Suspension of Agreement) of the Residential Agreements. Idaho Commission argues that currently the termination provision allows an investor-owned utility – after termination of a Residential Agreement – to enter into a new Residential Agreement during the next or subsequent Exchange Period, and thus escape the result of accruing a deemer balance in the Balancing Account when its average system cost falls below Bonneville’s priority firm exchange rate. Also, Idaho Commission states that section 11 should be modified to allow a suspending investor-owned utility to re-enter the current Residential Exchange Program, rather than forfeiting all rights and obligations through the expiration of the Residential Agreements.

2. Idaho Power

11. Idaho Power takes no position on whether the Commission has jurisdiction over the Residential Agreements, but, if the Commission does exert jurisdiction over these agreements, then it concurs with the positions advanced by Idaho Commission.

C. Commission Determination

12. The Utilities request that that the Commission disclaim jurisdiction over the Residential Agreements, or alternatively, accept the filings under section 205 of the FPA with an effective date of October 1, 2008. As a procedural matter, when an applicant seeks a disclaimer of jurisdiction by the Commission, the proper forum in which to present such a request is in a petition for a declaratory order, pursuant to 18 C.F.R. §

⁵ Idaho Commission states that the “deemer” mechanism is a remnant of the 1981 Residential Agreements between Bonneville and three investor-owned utilities, i.e., Avista, Idaho Power, and NorthWestern. If a utility’s average system cost is below the priority firm exchange rate, the parties “deemed” the utility’s average system cost to equal the priority firm exchange rate.

⁶ See *United States Department of Energy – Bonneville Power Administration*, 125 FERC ¶ 61,132 (2008) (approving Bonneville’s wholesale power rates for fiscal year 2009 on an interim basis).

385.207(a)(2) (2008) of the Commission's regulations, and not as part of a section 205 rate filing. Accordingly, we decline to decide the merits of the Utilities' requests for the issuance by the Commission of a disclaimer of jurisdiction. However, our finding here is without prejudice to the Utilities filing petitions for a declaratory order, if they so wish, requesting that the Commission decide this issue at some future date.

13. Our review indicates that the Residential Agreements submitted by the Utilities appear to be just and reasonable, and have not been shown to be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will conditionally accept the Residential Agreements for filing effective October 1, 2008, as requested, subject to the outcome of pending proceedings, as discussed below.

14. The Residential Agreements contains various contractual terms and conditions (including the average system cost methodology) that are currently under review in separate proceedings in Docket Nos. EF06-2011-002 and EF08-2011-000. We decline to rule on the merits of those provisions of the Residential Agreements that are already under review in Docket Nos. EF06-2011-000 and EF08-2011-000. Therefore, we will make our acceptance of the respective Residential Agreements subject to the outcome of those pending proceedings.

15. In addition, the Commission will not address the merits of Idaho Commission's comments on the deemer mechanism issues that are pending in other proceedings. The Commission finds that those proceedings provide the proper forum for resolution of these issues.

16. Finally, the Utilities seek waiver of the Commission's filing requirements under section 35.12(b), with regard to the filing of the Residential Agreements, because they each state that they will file the applicable Residential Agreement pursuant to section 35.30 of the Commission's regulations. Based on our determinations above, we will grant the requested waiver and direct the Utilities to make the filings under section 35.30, subject to the outcome of the other proceedings referenced above.

The Commission orders:

(A) The Commission conditionally accepts for filing the Residential Agreements to be effective October 1, 2008, subject to the outcome of the proceedings referenced in the body of the order, as discussed in the body of this order.

(B) The Commission denies the requests for disclaimer of jurisdiction, without prejudice.

By the Commission. Commissioner Moeller concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

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MOELLER, Commissioner *concurring*:

Transparency in the Commission's process is necessary in light of our significant enforcement authority. By providing clear guidance in our orders, we can reduce the number of filings that are made out of an abundance of caution.

In those instances when the Commission has enough information to act, it should decide whether an agreement is jurisdictional instead of offering an applicant the option of engaging in additional and costly procedures.

Philip D. Moeller
Commissioner