

139 FERC ¶ 61,052  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

PacifiCorp

Docket Nos. EL12-13-000  
ER12-336-000  
Consolidated

v.

Utah Associated Municipal Power Systems

ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES  
AND CONSOLIDATING PROCEEDINGS

(Issued April 19, 2012)

1. On December 2, 2011, PacifiCorp filed a complaint against Utah Associated Municipal Power Systems (UAMPS) pursuant to sections 206 and 306 of the Federal Power Act (FPA).<sup>1</sup> In the complaint, PacifiCorp requests the Commission to issue an order finding that the transmission services agreement between PacifiCorp and UAMPS requires UAMPS to provide operating reserves for the Hunter II resource. PacifiCorp also asks the Commission to find that when UAMPS fails to provide such operating reserves, it must pay PacifiCorp for operating reserves, including interest. As discussed below, we will set all of the issues raised in the complaint for hearing and settlement judge procedures, and consolidate this complaint proceeding with the proceedings in Docket No. ER12-336-000.

**I. Background**

2. PacifiCorp states that it is an indirect wholly-owned subsidiary of MidAmerican Energy Holdings Company, and is a vertically-integrated public utility providing retail electric service to approximately 1.7 million customers in six states: Utah, Oregon,

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<sup>1</sup> 16 U.S.C. §§ 824(e) and 825(e) (2006).

Washington, Idaho, California, and Wyoming.<sup>2</sup> UAMPS is an interlocal association and political subdivision of the state of Utah that provides power pooling, scheduling, and other services to its members comprised of 45 municipal and other public power systems and entities in eight states: Utah, Oregon, Idaho, California, Wyoming, Nevada, Arizona, and New Mexico.<sup>3</sup> PacifiCorp provides transmission service to UAMPS under a transmission services operating agreement (TSOA) that was executed by PacifiCorp and UAMPS in 1991, and amended in 1992 and 2001.<sup>4</sup>

3. According to PacifiCorp, the TSOA identifies UAMPS's resources in a manner similar to the designation of network resources for network transmission customers in the Commission's *pro forma* open access transmission tariff.<sup>5</sup> One of UAMPS's designated resources, at the center of this complaint, is Hunter II, a 430 MW coal plant. Hunter II is jointly owned by PacifiCorp, UAMPS, and Deseret Generation & Transmission Cooperative; PacifiCorp operates Hunter II.<sup>6</sup>

## II. PacifiCorp Complaint

4. PacifiCorp contends that section 10.2 of the TSOA obligates UAMPS to provide operating reserves for all of its resources.<sup>7</sup> PacifiCorp asserts that to the extent UAMPS

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<sup>2</sup> PacifiCorp Complaint at 2.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 4. On November 2, 2011, in Docket No. ER12-336-000, PacifiCorp filed an unexecuted amended TSOA with the Commission between itself and UAMPS. In that docket, PacifiCorp seeks to modify the rates, terms, and conditions of network transmission service provided to UAMPS by PacifiCorp under the parties' original TSOA to conform to the network transmission service provisions now found under PacifiCorp's OATT, as it may be modified in PacifiCorp's current transmission rate case, Docket No. ER11-3643-000 and ER11-3643-001. The Commission accepted the filing, suspended it for a five-month period, to be effective June 2, 2012, subject to refund, and set all issues raised therein for hearing and settlement judge procedures. *PacifiCorp*, 137 FERC ¶ 61,247 (2011). The issues raised in Docket No. ER12-336-000 are substantively the same as those at issue in the instant case.

<sup>6</sup> *Id.* UAMPS's share of Hunter II is 14.582 percent, 63 MW of energy and capacity.

<sup>7</sup> *Id.* at 9.

does not maintain operating reserves, the TSOA provides a backstop arrangement in which PacifiCorp will supply the reserves at the applicable rate under its Tariff. PacifiCorp contends that UAMPS has failed, since April 2009, to self-supply operating reserves for Hunter II.<sup>8</sup> PacifiCorp adds that UAMPS's failure to pay for the operating reserves is a violation of the filed rate doctrine because UAMPS has not complied with its contractual obligation under the TSOA to either maintain operating reserves or pay PacifiCorp for providing them.<sup>9</sup>

5. PacifiCorp explains that it did not bill UAMPS for operating reserves for many years because it believed that UAMPS was supplying reserves for Hunter II. In July 2008, the Western Electricity Coordinating Council began requiring Responsible Entities, including UAMPS, to submit weekly supply and reserves schedules to their balancing authorities, which for UAMPS is PacifiCorp.<sup>10</sup> PacifiCorp claims that, once it began to receive UAMPS's schedules, it became aware that UAMPS was not self-supplying operating reserves, but rather relying on PacifiCorp to provide the service.<sup>11</sup> PacifiCorp states that it began billing UAMPS for such reserves approximately fourteen months later, in October 2009, and that UAMPS refuses to pay such bills, which now exceed \$800,000, excluding interest.<sup>12</sup>

6. PacifiCorp claims that UAMPS's position is that it does not have to maintain any operating reserves for Hunter II and therefore does not have to pay PacifiCorp for providing them. PacifiCorp disagrees, arguing that the TSOA requires UAMPS to provide operating reserves for all of its resources, or to pay PacifiCorp for providing them.<sup>13</sup>

7. PacifiCorp states that section 10.2 of the TSOA provides that UAMPS is "responsible for arranging for and maintaining the operating reserves for all of its resources" and argues that UAMPS "refuses to fulfill this obligation with respect to"

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 12.

<sup>10</sup> *Id.* at 10. Responsible Entities include generator owners and operators, such as UAMPS, and are defined by the North American Electric Reliability Corporation.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 10-11.

<sup>13</sup> *Id.* at 12.

Hunter II.<sup>14</sup> PacifiCorp argues that operating reserves are reliability-based services, and emergency service is a periodic energy sale made on an as-needed basis.<sup>15</sup> PacifiCorp states that “UAMPS’ interpretation of section 10.3 is undercut by [UAMPS’] longstanding concession that it must provide operating reserves for its resources *other than* Hunter II, despite the parallel language of section 10.4 respecting emergency energy in the event of an outage affecting one of those resources.” PacifiCorp argues that it is not consistent for UAMPS to contend that the contract requires it to provide operating reserves for the other resources named in the contract, except for Hunter II, when

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<sup>14</sup> *Id.* Sections 10.2 and 10.3 of the TSOA provide as follows:

10.2 UAMPS shall be responsible for arranging for and maintaining the operating reserves for all of its resources.

10.3 Loss of Hunter Resource

(a) At the onset of the loss of all or a portion of UAMPS' Hunter Resource (emergency condition), PacifiCorp shall use its own resources, or resources to which it has access, to replace the amount of UAMPS' Hunter Resource scheduled by UAMPS before the emergency condition, plus UAMPS' share of UAMPS' Hunter II station service, for a period not to exceed two (2) hours following notification to UAMPS of the loss of UAMPS' Hunter Resource. PacifiCorp will normally accomplish recovery of its system from the loss of UAMPS' Hunter Resource. However, under extreme circumstances when other resources are not available to PacifiCorp, or when PacifiCorp is unable to accomplish system recovery, PacifiCorp shall notify UAMPS of the need to replace UAMPS' Hunter Resource.

(b) Immediately after system recovery from the loss of UAMPS' Hunter Resource has been completed, or sooner if possible, PacifiCorp shall notify UAMPS of the loss of UAMPS' Hunter Resource so that UAMPS can make arrangements for the on-going station service, from PacifiCorp or other sources.

(c) PacifiCorp shall provide this emergency condition service during the unforeseen loss of all or a significant part of or unforeseen restriction to UAMPS' Hunter Resource. Scheduled outages or scheduled restrictions shall be covered by adjusting preschedules. The charge to UAMPS for PacifiCorp providing this emergency condition service shall be the marginal energy cost PacifiCorp incurs in providing this emergency service plus 1 mill per kilowatt-hour (1m/kWh).

<sup>15</sup> *Id.* at 14-15.

section 10.4 of the TSOA requires UAMPS to supply emergency energy in the event of an outage for all of its resources.<sup>16</sup>

8. PacifiCorp cites Appendix G of the TSOA as support for its position that UAMPS is obligated to supply operating reserves for Hunter II, and if it does not do so, it must pay PacifiCorp for providing operating reserves.<sup>17</sup> PacifiCorp adds that Commission precedent supports its claim for interest on sums UAMPS has refused to pay for such services.<sup>18</sup>

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

9. Notice of PacifiCorp's filing was published in the *Federal Register*, 76 Fed. Reg. 77,223 (2011), with answers, interventions, and comments due on or before January 11, 2012. On December 7, 2011, Deseret Generation & Transmission Co-operative, Inc. filed a motion to intervene. On December 22, 2011, UAMPS filed an answer. On January 6, 2012, PacifiCorp filed a motion for leave to reply and reply, and on January 23, 2012, UAMPS filed a motion for leave to respond and response.

#### **A. UAMPS Answer**

10. UAMPS contends that PacifiCorp incorrectly interprets section 10.2 of the TSOA. UAMPS claims that to understand the obligations imposed by section 10.2, one must also read the other provisions of section 10, which outline the respective obligations of the parties under "emergency conditions." In particular, UAMPS points to section 10.3, which provides for "emergency conditions" service in the event of the loss of Hunter II. This section requires PacifiCorp to use its own resources or resources to which it has access to replace the decrease in the amount of energy from Hunter II that UAMPS has scheduled for up to two hours after PacifiCorp notifies UAMPS of the loss of Hunter II. PacifiCorp's obligations under section 10.3 apply in all but "extreme circumstances." UAMPS thus claims that section 10.3 is the contractual means by which UAMPS has "arranged for and maintained" operating reserves for Hunter II, in other words, section 10.3 shows that UAMPS arranged for operating reserves for Hunter II by having PacifiCorp provide them.<sup>19</sup>

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<sup>16</sup> *Id.* at 17-18. Emphasis supplied.

<sup>17</sup> *Id.* at 18-19.

<sup>18</sup> *Id.* at 19-20.

<sup>19</sup> *Id.*

11. UAMPS alleges that PacifiCorp did not previously bill UAMPS for operating reserves for Hunter II because PacifiCorp itself agreed with UAMPS's interpretation that section 10.3 of the TSOA satisfies UAMPS's responsibility to arrange for and maintain operating reserves for Hunter II.<sup>20</sup> UAMPS adds that PacifiCorp's own witness's testimony demonstrates that at least until December 2008, PacifiCorp understood that UAMPS had arranged for and maintained reserves for Hunter II through section 10.3 of the TSOA. UAMPS quotes from Kenneth Houston's affidavit, which itself quotes from Mr. Houston's email message to UAMPS dated December 19, 2008, as follows:

We understand the existing contract treats Hunter uniquely. Under current terms, PacifiCorp carries reserves for Hunter at no charge to UAMPS and there is a return account for any imbalance energy, conversely UAMPS self supplying all other reserves.

...

PacifiCorp is willing to begin selling reserves to UAMPS, but our position is that to do so, we require a change to current treatment of Hunter leading to consistent treatment for all reserves and load imbalance. We understand this is a substantial change . . . .<sup>21</sup>

UAMPS contends that the email excerpts show that PacifiCorp knew that UAMPS was not self-supplying operating reserves for Hunter II.<sup>22</sup> UAMPS adds that it specifically negotiated with PacifiCorp to have PacifiCorp provide operating reserves for Hunter II.<sup>23</sup>

12. UAMPS argues that the language of section 10.2 of the TSOA is plain and unambiguous and shows that UAMPS is not responsible for self-supplying or providing operating reserves for Hunter II. Rather, according to UAMPS, section 10.2 states that UAMPS is responsible for "arranging for and maintaining operating reserves for all of its resources."<sup>24</sup> UAMPS repeats that the language does not require that UAMPS provide or self-supply such operating reserves. UAMPS states that the TSOA's provision requiring PacifiCorp to notify UAMPS about the loss of Hunter II "after system recovery" or

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<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 13.

<sup>24</sup> *Id.* at 15.

“sooner if possible” demonstrates that PacifiCorp alone is responsible for responding to a Hunter II outage.

13. UAMPS continues that PacifiCorp’s interpretation of sections 10.2 and 10.3 of the TSOA is further undermined by applicable reliability standards. As the Balancing Area Authority, PacifiCorp cannot wait to deploy operating reserves for up to two hours after PacifiCorp notifies UAMPS of an outage. The only logical conclusion, according to UAMPS, is that through section 10.3, PacifiCorp has agreed to be responsible for operating reserves for Hunter II.

14. UAMPS dismisses PacifiCorp’s argument that the section 10.3 requirement that PacifiCorp shall provide energy only in “extreme circumstances” means that such energy is non-firm. UAMPS states that the Commission’s own precedent shows that energy is still considered firm when subject to curtailment in emergencies.<sup>25</sup> In the same vein, UAMPS rejects PacifiCorp’s argument that because section 10.3 only obligates PacifiCorp to provide operating reserves for up to two hours, this means that PacifiCorp cannot provide for operating reserves, because operating reserves must be available at all times. UAMPS argues that operating reserves are commonly time-limited, including in the NorthWest Power Pool reserve sharing program, in which PacifiCorp participates.<sup>26</sup>

15. UAMPS asserts that assuming *arguendo* that the Commission does not agree that the language of section 10.2 is unambiguous, extrinsic evidence shows that PacifiCorp consistently understood that it was responsible for providing operating reserves for Hunter II.<sup>27</sup> Further, UAMPS points out that the TSOA provides for the application of Utah law, unless preempted by federal law. According to UAMPS, Utah law allows the examination of extrinsic evidence of intent and course of performance even when a contract seems clear.<sup>28</sup>

16. UAMPS relies on the affidavit of Douglas Hunter, who represented UAMPS in negotiating the TSOA in 1991, to demonstrate that section 10 was a prominent issue in the negotiation of the TSOA. In his affidavit, Mr. Hunter states that “[s]ection 10.3 was

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<sup>25</sup> *Id.* at 18 (citing *California Independent System Operator Corp.*, 120 FERC ¶ 61,271, at P 35 (2007)).

<sup>26</sup> UAMPS points out that in the Northwest Power Pool reserve sharing program, reserve sharing support is automatically terminated after one hour. *Id.* at 19.

<sup>27</sup> *Id.* at 14-15.

<sup>28</sup> *Id.* at 22.

pointedly and consciously drafted with the intent that PacifiCorp would supply operating reserves” for Hunter II and that this meaning was “perfectly clear to the parties at the time.”<sup>29</sup>

17. UAMPS also cites to the affidavit of David Cory, whom it states was responsible for administering the TSOA for PacifiCorp from its effective date until his retirement 17 years later. According to Mr. Cory, it was his understanding that “under the TSOA, PacifiCorp was providing reserves for UAMPS’ Hunter Resource pursuant to [s]ection 10.3 . . . and that there was no provision in the TSOA for PacifiCorp to charge for reserves for the Hunter Resource other than as provided in [s]ection 10.3.”<sup>30</sup> UAMPS explains that as witnesses familiar with the TSOA from its inception, Mr. Hunter and Mr. Cory are more credible than PacifiCorp’s witness, Mr. Houston, who was not administering the TSOA throughout its life.<sup>31</sup>

18. UAMPS adds that Mr. Houston’s affidavit shows that until April 2009, when UAMPS first began submitting schedules for operating reserves consistent with new Western Electricity Coordinating Council requirements, he did not know that UAMPS was not supplying operating reserves for Hunter II.<sup>32</sup> By contrast, UAMPS observes that Mr. Cory’s affidavit shows 17 years of an uninterrupted course of dealing demonstrating that PacifiCorp knew and expected that it would supply such operating reserves.<sup>33</sup>

19. UAMPS adds that as the complainant, PacifiCorp bears the burden of proving its allegations in accordance with “reliable, probative, and substantial evidence” under the Administrative Procedure Act, and that it has failed to meet this burden.<sup>34</sup> UAMPS notes further that PacifiCorp’s claim that UAMPS has violated the filed rate doctrine does not take into account that the application of the filed rate doctrine requires the Commission to first determine what the disputed language actually means.<sup>35</sup> According to UAMPS, the

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<sup>29</sup> *Id.* at 24.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 26.

<sup>33</sup> *Id.* at 28.

<sup>34</sup> *Id.*, quoting 5 U.S.C. § 556(d) (2006).

<sup>35</sup> *Id.*, n.6.

Commission must decide what the rate is before deciding whether the filed rate doctrine has been violated.

20. Finally, UAMPS argues that Appendix G to the TSOA does not allow PacifiCorp to change the terms of the TSOA unilaterally by deciding after nearly 20 years that section 10.3 does not require PacifiCorp to provide operating reserves for Hunter II. Therefore, PacifiCorp is not entitled to payment for the provision of operating reserves, and any attempt to bill UAMPS for operating reserves constitutes a violation of the filed rate doctrine.<sup>36</sup>

### **B. PacifiCorp Reply**

21. PacifiCorp replies that section 10.3 of the TSOA contemplates “traditional emergency energy sales and generator imbalance or ‘replacement energy’ arrangements.” PacifiCorp argues that in contrast, “operating reserve is a reliability-based service that requires dedication of generating capacity on a year-round, 24/7 basis.”<sup>37</sup> PacifiCorp states that the service described in section 10.3 is limited and does not conform to the prevailing understanding of operating reserves. PacifiCorp claims that UAMPS does not offer any explanation of why the parties chose different terms in the TSOA; operating reserves in section 10.2, and emergency condition service in section 10.3.

22. PacifiCorp contends that extrinsic evidence of the parties’ intent is inadmissible, because the TSOA is subject to the Commission’s jurisdiction under the Federal Power Act and “must be reviewed in accordance with the Commission’s precedents,” rather than state law.<sup>38</sup> Moreover, resort to extrinsic evidence is not merited in this case because, according to PacifiCorp, the TSOA’s language is unambiguous.<sup>39</sup> In any event, PacifiCorp adds that extrinsic evidence is only allowed to show the mutual intent of the parties to a contract. Here, PacifiCorp contends that Mr. Cory’s affidavit demonstrates that he did not negotiate the TSOA, and that Mr. Hunter’s affidavit demonstrates that, although he was involved in such negotiations, the affidavit was prepared for litigation and provides no evidence of the mutual intentions of the parties.<sup>40</sup> Finally, PacifiCorp

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<sup>36</sup> *Id.* at 29. Moreover, in its response, UAMPS states that Appendix G was added to the TSOA in 2008, and accordingly, could not have influenced PacifiCorp’s understanding from 1991 to mid-2008. UAMPS Response at 13, n.12.

<sup>37</sup> PacifiCorp Reply at 4.

<sup>38</sup> *Id.* at 11.

<sup>39</sup> *Id.* at 11-12.

argues that Mr. Houston's email messages, written in 2008 by someone who did not negotiate the TSOA, shed no light on the parties' mutual intent.<sup>41</sup>

### C. UAMPS Response

23. UAMPS responds that section 10.3 of the TSOA requires PacifiCorp to replace Hunter II's schedules and accomplish system recovery from its own resources or resources available to it "only in extreme circumstances, and *then* after notification to UAMPS, to provide continued replacement service for up to two hours" after system recovery.<sup>42</sup> UAMPS questions why section 10.3 states that system recovery is to be accomplished from PacifiCorp's "own resources or resources available to it" if the parties meant that recovery was actually to be provided from UAMPS's resources.<sup>43</sup>

24. UAMPS states that PacifiCorp's position on the applicability of Utah law to the admissibility of extrinsic evidence is not accurate, and that the Commission routinely applies state law in interpreting contracts containing choice of law provisions. According to UAMPS, PacifiCorp has offered no authority to support its assertion that because a contract containing a choice-of-law provision is regulated by the Commission, otherwise applicable state law is preempted. Moreover, there is no federal common law of contracts to apply in this dispute.<sup>44</sup>

25. UAMPS disputes PacifiCorp's characterization of Mr. Cory's affidavit as self-serving, stating that PacifiCorp has not shown that Mr. Cory has any interest that will be affected by the outcome of the instant case.<sup>45</sup> Moreover UAMPS states that Mr. Cory administered the TSOA for 17 years while he worked for PacifiCorp, and therefore his affidavit demonstrates contemporaneous, not *post hoc*, evidence of the course of performance between the parties. While PacifiCorp questions why the parties used different language for operating reserves in sections 10.2 and 10.3 of the TSOA, UAMPS states that Mr. Hunter's testimony shows that varying language for operating reserves

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<sup>40</sup> *Id.* at 13-14.

<sup>41</sup> *Id.* at 14.

<sup>42</sup> UAMPS Response at 3-4, emphasis in original.

<sup>43</sup> *Id.* at 5.

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.* at 12.

was common before the *pro forma* open access transmission tariff standardized such language.

26. UAMPS states that while it may be difficult to understand why a functionally unbundled transmission provider such as PacifiCorp would agree to its transmission arm's absorbing the cost of providing operating reserves, when the TSOA was negotiated "[i]t would not be unreasonable for a bundled system operator on a system the size of PacifiCorp's to determine that it would rather just absorb that requirement than have to interact with its minority co-owner in a system emergency."<sup>46</sup>

#### IV. Discussion

##### A. Procedural Matters

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed 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) (2011), prohibits a reply to an answer unless otherwise ordered by the decisional authority. We will accept PacifiCorp's reply, as well as UAMPS's response, because they have provided information that assisted us in our decision-making process.

##### B. Commission Determination

28. PacifiCorp's complaint raises issues that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. Moreover, such issues are now subject to settlement procedures in Docket No. ER11-336-000, and for administrative efficiency, should be consolidated with the ongoing proceedings in that case.<sup>47</sup>

29. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the

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<sup>46</sup> *Id.* at 18. UAMPS calculates that its share of the operating reserve requirement for Hunter II was 4.4 MW in 1991, when the TSOA was negotiated.

<sup>47</sup> The Commission's policy is to consolidate proceedings where the issues are closely intertwined with each other. *Missouri River Energy Services*, 124 FERC ¶ 61,309, at P 39 (2008).

hearing in abeyance. The settlement judge or presiding judge, as appropriate, designated in Docket No. 12-336-000, shall determine the procedures best suited to accommodate the consolidation ordered herein. The settlement judge shall report to the Chief Judge and the Commission within 30 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.

The Commission orders:

(A) PacifiCorp's complaint is set for hearing and settlement, as discussed in the body of this order and the ordering paragraphs below, and consolidated with the proceedings in Docket No. ER12-336-000.

(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 by the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the complaint. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.