

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Exelon Corporation

Docket Nos. EL05-49-000 and  
EL05-49-001

v.

PPL Electric Utilities Corporation and  
PJM Interconnection, L.L.C.

ORDER ACCEPTING OFFER OF SETTLEMENT SUBJECT TO CONDITIONS

(Issued November 9, 2006)

1. In this order, we approve, subject to certain conditions discussed below, a contested revised settlement between Exelon Corporation (Exelon), on behalf of itself and its wholly-owned subsidiary PECO Energy Company (PECO), and PPL Electric Utilities Corporation (PPL) (together the Settling Parties). The settlement resolves all outstanding issues regarding energy delivered to PPL but erroneously billed to PECO resulting from an error in PJM Interconnection, LLC's (PJM) State Estimator.

**I. Background**

2. On December 23, 2004, Exelon, on behalf of its wholly owned subsidiary, PECO, filed a complaint for reimbursement of over \$39 million plus interest for energy taken by PPL but erroneously charged to PECO through PJM's State Estimator. The erroneous charges consist of Transmission Congestion Charges incurred at the Elroy substation during periods of congestion from April 1, 1998 through May 31, 2003.

3. On April 18, 2005, the Commission issued an order stating that PECO is entitled to reimbursement for the Transmission Congestion Charges erroneously billed to it resulting from the PJM State Estimator mistakenly identifying the PPL Elroy substation

as belonging to PECO.<sup>1</sup> In the April 18 Order, the Commission determined that who should reimburse PECO and for what amount was a material issue of fact in dispute and established hearing and settlement judge proceedings to resolve those issues.

4. Following the April 18 Order, settlement conferences commenced and on September 14, 2005, Exelon, on behalf of itself and PECO, and PPL filed a proposed settlement agreement to resolve all outstanding issues in this proceeding. The proposed settlement involved a \$40 million payment to Exelon/PECO by PJM to be funded in two separate charges. The first charge would consist of a \$33 million, plus interest, payment from PPL, and the second charge would consist of a \$7.5 million, plus interest, payment assessed to PJM market participants. Several PJM market participants objected to the proposed settlement claiming it was unjust and unreasonable to assess charges to entities that were not parties to this dispute.

5. On March 21, 2006, the Commission issued an Order rejecting the proposed settlement agreement and dismissing PPL's request for rehearing.<sup>2</sup> The Commission found that the settlement involved material issues of fact that could not be decided without further information and directed the Chief Judge to set the matter for hearing proceedings. Regarding PPL's claim that the Commission erred in finding a violation of the filed rate in April 18 Order, the Commission found, among other things, that PJM can claim no rate as the legal rate other than the filed rate and that charging a customer for congestion costs it did not incur was a violation of PJM's OATT.

6. On March 30, 2006, Exelon, on behalf of PECO, and PPL filed a second offer of settlement (Revised Settlement) to resolve all outstanding issues in this proceeding and requested suspension of the procedural schedule.

## **II. Terms of the Settlement**

7. The Revised Settlement includes a \$40.5 million payment to PECO, which will constitute full settlement of the Exelon complaint. PECO will receive this payment in the form of credits applied to PJM's monthly invoice to PECO for charges under the PJM Tariff and PJM Operating Agreement. The first monthly credit to PECO's bill will be made no later than the date of the first PJM monthly invoice to PECO following the date

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<sup>1</sup> *Exelon Corporation v. PPL Electric Utilities Corporation and PJM Interconnection, LLC*, 111 FERC ¶ 61,065 (2005) (April 18 Order)

<sup>2</sup> *Exelon Corporation v. PPL Electric Utilities Corporation and PJM Interconnection, LLC*, 114 FERC ¶ 61,298 (2006) (March 21 Order).

this Order is published. Payments will continue until PECO receives the entire \$40.5 million, plus interest.<sup>3</sup>

8. PJM's payments to PECO will be funded by the charges set forth in Attachment H-8B of the PJM Tariff, as proposed in the Revised Settlement. Attachment H-8B states that a new \$0.1162/kV-month charge for network transmission service will be assessed to all customers receiving network service in the PPL Zone. Interest will accrue from September 14, 2005, according to the Commission's regulations<sup>4</sup> and published rates on the principal amounts to be collected, under Attachment H-8B of the PJM Tariff. This charge is designed to collect the \$40.5 million plus interest over a period of approximately sixty months.

9. Exelon and PPL developed proposed pro forma revisions to the PJM Tariff and PJM Operating Agreement to limit the time period for raising billing errors and the liability of PJM and PJM members in connection with such errors. Exelon and PPL agree to present the proposed revisions to the PJM Tariff and PJM Operating Agreement upon the acceptance of the instant settlement agreement. Exelon and PPL are not asking the Commission to take action on this matter at this time.<sup>5</sup>

10. The Revised Settlement requests that the terms and conditions set forth in the Revised Settlement, and the conforming changes in the PJM Tariff required by the Revised Settlement shall be subject to change solely by written amendment executed by PPL and Exelon. In addition, the Revised Settlement requests that the Commission's right to change any charges established in the Revised Settlement will be limited to the maximum extent permissible according to the *Mobile-Sierra* public interest applicable to fixed-rate agreements.

### **III. Comments**

#### **A. Comments In Support**

11. American Municipal Power-Ohio, Inc. (AMP-Ohio), Exelon, Commission Trial Staff, PJM, and PPL support the Revised Settlement. Exelon, PJM and PPL claim that

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<sup>3</sup> According to terms in the Revised Settlement, entire payment is expected to be completed over a sixty month period.

<sup>4</sup> 18 C.F.R. § 35.19a (2005).

<sup>5</sup> PJM has made the filing to limit the time period within which parties may seek billing adjustments under its Operating Agreement or Tariff in Docket Number ER06-1497-000 (Sept. 19, 2006).

the Revised Settlement is well crafted and its acceptance will avoid substantial litigation costs.

### **B. Cost Classification and Retail Rates**

12. The PP&L Industrial Customer Alliance and PJM Industrial Customer Coalition (together the Industrial Customers) oppose language in the Revised Settlement that classifies the charges erroneously billed to PECO and all charges associated with PECO's reimbursement as transmission related. The Industrial Customers state that the disputed charges are in fact energy related as the underlying proceeding involves energy received from the Elroy substation and the billing of that energy. In addition, the Industrial Customers further claim that due to provisions in PPL's Tariff,<sup>6</sup> allowing the disputed charges to be classified as transmission related will ultimately force PPL retail ratepayers to pay PPL's share of the reimbursement costs set forth in the Revised Settlement. The Industrial Customers argue that if the Commission accepts the Revised Settlement, the Commission should confirm that the relevant costs are energy costs as opposed to transmission costs. The Industrial Customers further argue that if the Commission does not reject outright the characterization of the settlement payment as a "network transmission service" charge, the Commission should specifically preserve this issue for the Pennsylvania Public Utilities Commission (PUC) determination if and when PPL seeks recovery for its retail ratepayers.

13. Exelon and PPL claim that it is appropriate to classify the charges erroneously billed to PECO and all charges associated with PECO's reimbursement as specified in the Revised Settlement as transmission related. PPL states that the erroneous charges billed to PECO resulted from PJM's misclassification of transmission facilities and PECO's complaint as being overcharged for Transmission Congestion Charges.

### **C. Retail Rate Cap**

14. The Industrial Customers claim that if the Commission approves the Revised Settlement and the result is that the ultimate burden of the reimbursement costs fall on the retail ratepayer, the Commission will have intruded into matters under the jurisdiction of the PUC. The Industrial Customers further state that during the period PECO incurred erroneous charges (April 1, 1998 through May 31, 2003), all components of PPL's retail rates were capped pursuant to Pennsylvania state law,<sup>7</sup> therefore, it is unlawful that PPL

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<sup>6</sup> PPL's Tariff defines "Transmission Charges" as "all applicable charges incurred by the Company to acquire transmission service (including all ancillary service charges) on behalf of the Basic Utility Supply Service (BUSS) customers under the PJM OATT.

<sup>7</sup> See Competition Act § 2804(4); see also Joint Petition for Full Settlement of PP&L, Inc.'s Restructuring Plan and Related Court Proceedings, Docket No. R-00973954 (Aug. 12, 1998).

seek recovery from retail ratepayers, because the rates were incurred when state-mandated rate caps were effective.

15. PPL asserts that the costs of paying the settlement charges proposed in the Revised Settlement as Attachment H-8B of the PJM Tariff are in fact lawfully recoverable from its retail customers. PPL explains that a state cannot exercise its jurisdiction over retail rates to prevent the utility from recovering the costs associated with paying its FERC approved rate.<sup>8</sup> In addition, PPL states that the state mandated rate cap expired on December 31, 2004, having no implications should the Revised Settlement be accepted.

16. Exelon claims that the Industrial Customers concerns regarding retail rates are matters to be decided by the PUC.

#### **D. Retroactive Ratemaking**

17. The Industrial Customers claim that PPL's recovery of the reimbursement charges through its retail ratepayers violates the filed rate doctrine and prohibition against retroactive ratemaking at the state level. The Industrial Customers claim that PPL is requesting to recover additional charges above the filed rates for services that it provided from April 1, 1998 through May 21, 2003. The Industrial Customers claim that should the Commission approve the reimbursement charges proposed in the Revised Settlement; the effect would be a retroactive rate adjustment.

18. The Industrial Customers pose the question as to whether all or a portion of the charges associated with the proposed reimbursement set forth in the Revised Settlement should be assigned to PPL Energy Plus, PPL's full requirements wholesale supplier for its Basic Utility Supply Service Load. The Industrial Customers request that the Commission examine whether the burden of paying the reimbursement costs in the proposed settlement can be mitigated by requiring PPL Energy Plus to assume all or a portion of the costs.

19. PPL states that recovering the charges under proposed Attachment H-8B in the Revised Settlement does not constitute retroactive ratemaking. PPL explains that a rate increase that may result from the acceptance of the Revised Settlement would be going-forward rates as they will be enacted to settle the litigation dispute in this proceeding.

#### **E. Other Issues**

20. PPL claims that because no bilateral relationship exists between PJM market participants, the only equitable way to determine the exact charges owed to PECO for

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<sup>8</sup> *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F. 3d 1042, 1056 (9<sup>th</sup> Cir. 2001).

compensation of erroneous charges would be to rerun the markets for the five years over which the erroneous charges resulted. PJM and PPL both agree that this process would be unnecessarily costly and inefficient.

21. AMP-Ohio clarifies that Commission approval of the Revised Settlement should not be construed as accepting pro forma revisions to PJM's Tariff regarding time limitations for raising billing errors and the liability of PJM and PJM members in connection with those errors. AMP-Ohio also notes that the standard of review for future modifications of the Revised Settlement not agreed to by all parties shall be under the *Mobile-Sierra* public interest standard. AMP-Ohio states that contracting parties may not bind third parties to a stricter standard of review than is specified in Section 206 of the FPA.

#### **IV. Commission Determination**

22. The Commission finds that it can approve the instant Offer of Settlement only under the condition that the provision establishing a new rate in Attachment H-8B is removed and revised to provide for appropriate invoices to PPL, and to other appropriate parties under the OATT, who would have incurred those charges during the relevant periods. As discussed below, the current rate established in Attachment H-8B constitutes retroactive ratemaking and cannot be found just and reasonable.

23. Under the Commission's regulations, the Commission can approve an uncontested settlement upon a finding that the settlement appears to be fair and reasonable and in the public interest,<sup>9</sup> "without a determination on the merits that the rates approved are 'just and reasonable.'"<sup>10</sup> However, the Supreme Court has held that where a settlement is contested, the Commission must make an "independent finding supported by substantial evidence on the record as a whole, that the proposal will establish just and reasonable rates."<sup>11</sup> This settlement was contested, and accordingly, the Commission must find that the settlement terms are just and reasonable.

24. The Industrial Customers principally argue that the Offer of Settlement is unjust and unreasonable because it constitutes retroactive ratemaking; the funding mechanism proposed increases the rate charged to all customers receiving network service in the PPL

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<sup>9</sup> 18 C.F.R. § 385.602(g)(3) (1999).

<sup>10</sup> *United Municipal Distributors Group v. FERC*, 732 F.2d 202,209 (D.C. Cir. 1984).

<sup>11</sup> *Mobil Oil Corporation v. FERC*, 417 U.S. 283, 314 (1974). See also *Cities of Anaheim, Azusa, Banning, Colton and Riverside, California v. California Independent System Operator Corporation*, 102 FERC ¶ 61,274 at P 38 (2003).

zone to a level higher than the rate on file. At issue in this proceeding is a billing error that occurred from April 1, 1998 through May 31, 2003, as PECO was billed for energy it did not receive and PPL was not billed for energy it did receive.

25. The Commission finds just and reasonable PJM's payment to PECO of the \$40.5 million, plus interest that PECO was erroneously billed. However, as the Industrial Customers correctly contend, the funding mechanism (*i.e.*, the \$0.1162/kW-month charge set forth in Attachment H-8B of PJM's OATT) violates the prohibition on retroactive ratemaking. The retroactive ratemaking and filed rate doctrines provide "in effect, that a utility cannot retroactively increase the rate charged a customer to a level higher than the rate on file."<sup>12</sup> In particular, the retroactive ratemaking doctrine provides that "a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle."<sup>13</sup> Under the retroactive ratemaking doctrine, "the Commission is prohibited from adjusting current rates to make up for previous over- or undercollections of costs in prior periods. The retroactive ratemaking doctrine is thus a logical outgrowth of the filed rate doctrine, prohibiting the Commission from doing indirectly what it cannot do directly."<sup>14</sup> In this case, the settlement provides for PJM to set a current rate of \$0.1162/kW-month to recover from current and future customers, based on their future transactions, past amounts related to prior transactions uncollected by PJM. While PJM is entitled to recover the amounts at issue, the rate established to recover those amounts constitute retroactive ratemaking because PJM is seeking recovery of these past costs from current and future customers, rather than from the customers affected by the past billing error. Such terms may result in a subsidization by current customers of prior customer obligations. Accordingly, the proposed \$0.1162/kW-month charge violates the rule against retroactive ratemaking.<sup>15</sup>

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<sup>12</sup> *Cities of Anaheim v. California Independent System Operator Corporation*, 102 FERC ¶ 61,274 at P 40-41 (2003).

<sup>13</sup> *Southern California Edison Co. v. FERC*, 805 F.2d 1068, 1070 n.2 (D.C. Cir. 1986) (quoting *Nader v. FCC*, 520 F.2d 182, 202 (D.C. Cir. 1975)). See *BP W. Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1301 (D.C. Cir. 2004); *Pacific Gas & Electric Company v. FERC*, 373 F.3d 1315 at 1320 (D.C. Cir. 2004); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990).

<sup>14</sup> *Associated Gas Distributors v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990) (Williams, J. concurring).

<sup>15</sup> While a party may agree to a retroactive rate increase in a settlement in order to receive other concessions, the Commission cannot impose such a retroactive rate increase on a party that objects to that increase." *Equitrans, L.P.*, 85 FERC ¶ 61,395 at 62,527 (1998), *reh'g dismissed*, 87 FERC ¶ 61,116 (1999).

26. Accordingly, we cannot accept the settlement as filed, but will accept it under the condition that the \$0.1162/kW-month charge be removed and replaced with appropriate invoices to PPL, and to any other appropriate parties under the OATT who would have incurred those charges during the past periods.<sup>16</sup>

27. The Industrial Customers argue that the proposed settlement will affect the retail rate cap that was in effect during the period when the rates were incurred. As discussed above, the Commission here has not accepted the \$0.1162/kW-month charge for the erroneously charged rates and furthermore issues involving potential recovery of costs from retail customers are within the province of the state.

28. The Industrial Customers oppose language in the Revised Settlement that classifies the charges erroneously billed to PECO and all charges associated with PECO's reimbursement as transmission related. In approving of the settlement, as conditioned, the Commission approves the terms of the settlement, not the background description of the issue. The characterization of these payments does not affect the substantive obligations of the parties under the settlement. Since there is no litigated record in this proceeding to determine the appropriate characterization, there is no basis to amend the descriptions in the settlement. However, we emphasize that in approving the settlement, the Commission is not specifically endorsing these characterizations.

29. As to AMP-Ohio's concern regarding PJM's prospective OATT and Operating Agreement amendments that would limit the time period for raising billing claims and address liability issues, the Commission's approval of this settlement does not represent acceptance or rejection, in principle, of future provisions. PJM's prospective OATT and Operating Agreement revisions regarding billing claims and liability have been filed in Docket No. ER06-1497-000, and these provisions will be considered in that proceeding.

30. AMP-Ohio objects to the Settlement's incorporation of the *Mobile-Sierra* public interest standard of review for any future modifications to the settlement. The rejection of the proposed \$0.1162/kW-month surcharge would appear to render the *Mobile-Sierra* provision moot since there will no longer be a surcharge to be challenged.

31. With the above mentioned conditions, the Commission finds that this settlement will resolve the issues regarding reimbursement for congestion charges incurred by PPL but erroneously billed to PECO by PJM. Therefore, we will direct PPL to submit a lump sum payment to PJM who will, in turn, credit the payment to PECO through a monthly billing invoice. Consequently, the Commission approves the instant Offer of Settlement subject to the conditions stated herein.

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<sup>16</sup> See *IDACORP Energy L.P. v. FERC*, 433 F.3d 879 (D.C. Cir. 2006) (invoices can be amended to charge the rate on file during a past period).

The Commission orders:

(A) PPL's offer of settlement is accepted, subject to the conditions discussed in the body of this order.

(B) Within 30 days of the date of this order, PPL must file to revise the settlement as discussed in the order or to specify that it will not be proceeding with the settlement under those conditions.

(C) Should PPL determine not to proceed with the settlement, the Chief Administrative Law Judge is directed to commence hearing proceedings in this case and assign a presiding judge to oversee those hearing proceedings.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.