

120 FERC 61,140
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.

PPM Energy, Inc.

Docket No. EL06-82-000

v.

PacifiCorp

ORDER DENYING COMPLAINT IN PART AND
GRANTING COMPLAINT IN PART

(Issued August 7, 2007)

1. On July 14, 2006, PPM Energy, Inc. (PPM) filed a complaint against PacifiCorp under section 206 of the Federal Power Act (FPA),¹ alleging that PacifiCorp violated its Open Access Transmission Tariff (OATT or Tariff) and Commission policy by assessing PPM charges for unauthorized use of hourly non-firm transmission service and associated losses (collectively, unauthorized use) since December 2004. In this order, the Commission denies the complaint in part and grants it in part, as discussed below.

I. PPM's Complaint

2. PPM asserts that PacifiCorp is improperly assessing PPM charges for PPM's alleged unauthorized use of PacifiCorp's transmission system. PPM states that these charges are based on the amount of energy produced by the Stateline Energy Center (Stateline) and Pleasant Valley Wind Energy Center (Pleasant Valley) (collectively, the Wind Projects) that PacifiCorp absorbed as negative generation imbalance energy, *i.e.*, energy absorbed by PacifiCorp when the Wind Projects generated more energy than PPM had scheduled for delivery to its customers. PPM requests that the Commission establish July 14, 2006, the date of the complaint, as the refund effective date for the requested relief.

¹ 16 U.S.C. § 824e (2000).

A. Duplicative charges

3. PPM argues that PacifiCorp's OATT does not permit it to assess unauthorized use charges for energy in excess of what PPM reserved, scheduled, and paid for, because at no time covered by the invoices in dispute did PacifiCorp provide PPM with transmission service in excess of its reservation. PPM states that PacifiCorp delivered to PPM's customers only that amount of energy scheduled to be delivered to PPM's customers, for which PPM had a transmission reservation, and for which PacifiCorp was fully paid.

4. PPM does not dispute PacifiCorp's treatment of this energy as generation imbalance energy and its charges pursuant to Schedule 4 of PacifiCorp's OATT. However, PPM states that Schedule 4 does not provide for assessing unauthorized use charges. PPM contends that, because PacifiCorp treated such excess as energy imbalances under Schedule 4, it was foreclosed from simultaneously treating the same imbalances as unauthorized use of the transmission system.

B. Monthly demand charge

5. PPM argues that, even if PacifiCorp is entitled to assess unauthorized use charges for negative generation imbalances, the Commission still should direct PacifiCorp to refund charges from hourly non-firm transmission reservations because PacifiCorp is prohibited from applying its *monthly* demand charge to an unauthorized *hourly* non-firm service.

6. PPM states that transmission providers with tariffs on file prior to the effective date of Order No. 888² were allowed to maintain their existing charges for unauthorized transmission use.³ However, in those cases where the transmission provider had not obtained pre-Order No. 888 approval, the Commission rejected the inclusion of these

² Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd* in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd* sub nom. New York v. FERC, 535 U.S. 1 (2002).

³ *Allegheny Power System, Inc.*, 80 FERC ¶ 61,143 (1997), *order on reh'g*, 85 FERC ¶ 61,235 (1998) (*Allegheny*).

charges in Order No. 888 compliance tariffs and limited the penalty charge to “a level equal to twice the standard rate for the service at issue.”⁴ PPM states that PacifiCorp’s pre-Order No. 888 tariff included an unauthorized transmission use charge that applied only to firm and certain short-term nonfirm reservations and that these charges were grandfathered under *Allegheny*,⁵ but it did not include charges for the unauthorized use of transmission for nonfirm *hourly* service. PPM concludes that since PacifiCorp failed to amend its OATT to comply with *Allegheny*, any unauthorized use charges should be subject to a cap at no more than twice the standard rate for hourly non-firm transmission service. Therefore, PacifiCorp should be prohibited from applying a monthly demand charge to unauthorized hourly non-firm transmission service.

7. PPM also claims that PacifiCorp applied its monthly transmission demand charge to the highest hourly negative difference between the transmission reservation and the actual generation measured *in each month*. Under that approach, according to PPM, PacifiCorp misapplied the monthly demand charge to the maximum imbalance amount in each month, because PacifiCorp’s OATT provides that, if a customer exceeds its reserved capacity at any Point of Receipt or Point of Delivery, the customer shall be charged 150 percent of the demand charge for monthly delivery for the sum of the maximum amount that the customer exceeds its reserved capacity at each Point of Receipt or Point of Delivery “during the billing period.”⁶ For Invoice Nos. 6311 and 6653, PPM states that the billing periods are ten and two month periods, respectively, and the demand charge should be applied to the maximum imbalance during each of those total billing periods, instead of applied to the maximum imbalance in each month within each of the billing periods.⁷ PPM argues that PacifiCorp’s application of the monthly demand charge to individual months within these two respective billing periods (the ten and two month billing periods) is not supported by its OATT.

8. PPM states that it was assessed approximately 3.29 million in unauthorized use charges. PPM claims that it has escrowed \$1,068,120.17 allegedly owed to PacifiCorp under the invoices, and that PacifiCorp does not dispute this amount. PPM states that the amount in escrow is less than the total unauthorized use charges because each of the invoices contains various credits to PPM for negative generation imbalance payments

⁴ Complaint at 24 (*citing Allegheny*, 80 FERC at 61,545 & n.131).

⁵ *Id.*

⁶ *Id.* at 15-16, 24-25; *see* FERC Electric Tariff, 5th Rev. Vol. No. 11, Sub. Original Sheet Nos. 254 (Schedule 7, Item 6) & 260 (Schedule 8, Item 6).

⁷ Complaint at 27-29.

that were netted against the unauthorized use charges. Thus, the \$3.29 million total is reduced to a net \$1,068,120.17 after crediting the negative generation imbalance payments to the unauthorized use charges. PPM requests the Commission to order PacifiCorp to refund credits with interest back to the time when they first should have been paid to PPM, *i.e.*, no later than one month after service was provided. PPM states that the Commission should also allow PPM to release to itself the \$1,068,120.17 in escrow, with interest.

C. Timely issuance of invoices

9. PPM states that PacifiCorp's OATT requires it to issue invoices within a reasonable time after the first day of each month for all services furnished under the OATT during the preceding month. PPM argues that PacifiCorp failed to provide it with timely invoices for the alleged charges during the ten-month period from December 2004 to September 2005 (Invoice No. 6311) and the two-month period from October to November 2005 (Invoice No. 6653) in violation of its OATT.

10. PPM claims that it received Invoice No. 6311 from PacifiCorp on December 2005, about a full year after service was first rendered, and that it received Invoice No. 6653 on January 2006, at least two months after service was rendered. PPM notes that it received various invoices during these time periods from PacifiCorp for basic transmission service and that it paid those amounts without dispute.

11. Because it was unaware of the unauthorized use charges, PPM states that it was denied the opportunity to modify its reservation and scheduling practices in order to avoid being assessed with multiple charges, nor could it challenge PacifiCorp's billing practices. PPM also asserts that it is now being forced to reserve transmission in amounts greatly in excess of what it ordinarily would have reserved for the delivery of its power sales. In many cases, PPM claims that it reserved 100 percent of the nameplate capacity of certain of the Wind Projects, even in hours when it had no expectation of producing at such levels, and this unnecessarily drives up the Wind Projects' costs and renders potential transactions uneconomic.

D. Double assessment in OATT

12. If the Commission permits the assessment of unauthorized use charges with respect to negative generation imbalances, PPM requests the Commission to direct PacifiCorp to modify its OATT prospectively so that unauthorized use charges should apply only when the transmission provider actually transmits and delivers power above the amount of the reservation, and not when the transmission provider transmits and delivers no more than the reserved capacity.

13. PPM maintains that it cannot “predict with 100% certainty the actual output of a wind project.”⁸ According to PPM, PacifiCorp’s application of unauthorized use charges to every instance in which a negative generation imbalance in excess of the transmission reservation occurs necessarily will drive a wind resource to avoid such punitive penalties by reserving transmission greatly in excess of what it otherwise would have reserved. PPM states that such penalties are inconsistent with the Commission’s goal of reducing penalties on generators that routinely have difficulty managing imbalances.⁹

E. Penalty in OATT for unauthorized use

14. PPM further requests that the Commission revise PacifiCorp’s OATT to reduce penalties that apply in instances where actual unauthorized use of transmission occurs. PPM states that the Commission should require reduction of PacifiCorp’s current 150 percent demand charge penalty for unauthorized use of the transmission system so that it is based on the service at issue.¹⁰ PPM proffers an example of the result of PacifiCorp’s unauthorized use charge of a 150 percent demand charge as it is applied for monthly delivery—versus hourly delivery—for the excess use without regard to the service period at issue.¹¹

II. Notice of Filing and Responsive Pleadings

15. Notice of PPM’s complaint was published in the *Federal Register*, 71 Fed. Reg. 42,374 (2006), with the answer to the complaint, interventions, and protests due on or before August 14, 2006. PacifiCorp filed an answer on August 14, 2006. PPM filed a reply on August 29, 2006. PacifiCorp and PPM filed responses on September 13, 2006, and October 13, 2006, respectively.

⁸ *Id.* at 32.

⁹ *Id.* at 33.

¹⁰ *Id.* (providing examples, e.g., a charge of 150 percent of the *weekly* rate is applied to excess use of *weekly* service).

¹¹ *Id.* at 34-35 (referring to Schedules 7 & 8). PPM posits that a transmission customer that exceeds an hourly reservation by 1 MW (at \$5.84/MWh) can expect to pay a \$3,038.00 charge under PacifiCorp’s calculation (\$2,025.00/MW/month x 1 MW x 150%), rather than the \$11.68 charge (\$5.84/MWh x 1 MW x *no more than* 200%) that PPM alleges more appropriately reflects Commission policy.

16. PacifiCorp denies all of the allegations in PPM's complaint, and argues that the complaint should be denied and that the relief sought by PPM should be rejected in its entirety.

17. With respect to whether the charges are duplicative, PacifiCorp denies PPM's contention that the unauthorized use charges and the imbalance payments were "relative to the same generation imbalances" or that any excess energy is subject solely to generation imbalance charges. PacifiCorp asserts that it does not see the relevance of the unauthorized use charges under Schedule 7 (short-term, firm transmission service agreements) and Schedule 8 (non-firm transmission service agreements) of its Tariff to the imbalance charges or credits under Schedule 4 of its Tariff. PacifiCorp argues that PPM's complaint fails to recognize that generator imbalances and unauthorized transmission use are two separate and distinct services and, as such, customers may be subject to both tariff provisions in circumstances where, as in the case of PPM, customers deliver excess power without any transmission reservation.¹²

18. PacifiCorp states that the unauthorized use charges in Schedules 7 and 8 of its Tariff are intended to encourage the reservation of transmission capacity for generation, and are distinct from the generation imbalance provisions in Schedule 4, which are intended to either compensate the transmission provider for energy it sold or to compensate a generator for energy it compelled the transmission provider to purchase by its actions. PacifiCorp alleges that these prices for compensation are set in a manner that encourages proper and accurate scheduling practices, which are linked to system reliability and planning.¹³

19. PacifiCorp asserts that PPM's complaint is actually asking the Commission to distinguish between two situations. The first situation is when a transmission customer deliberately over-schedules energy to its purchaser and the transmission provider wheels that excess energy, in which case the transmission provider may rightfully assess charges for the unauthorized wheeling. The second situation is when the transmission customer simply generates energy in excess of its reservation (or with no reservation) and the energy is not delivered to a specific purchaser, in which case the transmission provider

¹² Answer at 20 (*citing Detroit Edison Co.*, 84 FERC ¶ 63,006, at 65,046 (1998), *affirmed*, 88 FERC ¶ 61,070 (1999) (*Detroit Edison*)).

¹³ *Id.* at 18 ("The requirement that transmission customers reserve transmission capacity is directly linked to system reliability.") (*citing Rockgen Energy, LLC*, 100 FERC ¶ 61,261, at P 14 (2002) (*Rockgen*)), 23 (purpose of reservations is for system planning).

simply absorbs the energy and pays the transmission customer for the energy under the imbalance provisions even though the transmission provider did not provide any wheeling service because energy is not delivered to a specific customer. PacifiCorp concludes that PPM's argument is inconsistent with Commission precedent and prudent and reliable transmission practices, because it leaves transmission providers uninformed as to power being delivered onto the grid, and encourages transmission customers to intentionally deliver power without making transmission reservations.

20. With respect to the unauthorized use charges themselves, PacifiCorp claims that its Tariff properly applies the monthly delivery charge. PacifiCorp argues that when a transmission customer delivers energy onto the system without an underlying reservation, PacifiCorp cannot know the length of service a transmission customer might be taking to determine which unauthorized use charge would apply. Therefore, PacifiCorp claims that, based on the service most often reserved by PPM, it was reasonable for PacifiCorp to track the service as a monthly service and to calculate the charges based on monthly service.

21. PacifiCorp argues that its Tariff reflects the language of the *pro forma* OATT in specifying the rate treatment for unauthorized use of the transmission system in Schedules 7 and 8. PacifiCorp asserts that in accordance with Commission precedent, it adopted a 150 percent penalty charge for unauthorized use of its transmission system. Moreover, PacifiCorp points out that this is less than the 200 percent cap established in *Allegheny*.¹⁴

22. Regardless of whether the invoices were late, PacifiCorp states that late billing does not excuse payment of a mandatory charge under its Tariff. PacifiCorp states that its obligation to invoice within a reasonable time after the first day of each month refers to actual transmission service reserved and paid for by the transmission customer, but does not apply to unauthorized use of the transmission system. PacifiCorp argues that unauthorized use, by its nature, is often not immediately identifiable and it was required to go through substantial transmission records and look at a detailed analysis of that information to confirm that unauthorized use in fact occurred before billing its customers for penalty charges. PacifiCorp claims that in order to complete its analysis it had to look at multiple agreements to determine PPM's use of various transmission rights to transmit energy from its Stateline and Pleasant Valley facilities. Further, PacifiCorp contends that "the combination of invoices for administrative efficiency does not alter that underlying service."¹⁵ PacifiCorp further argues that it would be unreasonable to prohibit an

¹⁴ *Allegheny*, 80 FERC at 61,545.

¹⁵ Answer at 28 (citing *Cleco Power LLC*, 105 FERC ¶ 61,222, at P 14 (2003) (*Cleco Power*); *Arizona Pub. Serv. Co.*, 109 FERC ¶ 61,271, at 62,278 (2004); *Commonwealth Edison Co.*, 88 FERC ¶ 61,144, at 61,481 (1999) (*Commonwealth*)).

opportunity to correct behavior detrimental to system reliability simply because the data cannot be immediately verified.

23. PacifiCorp also states that the invoices were not the first notice provided to PPM regarding the potential for unauthorized use charges. PacifiCorp points out that in a February 4, 2005 email addressed to PPM, a PacifiCorp employee informed PPM that PPM could be subject to both generation imbalance charges and unauthorized use charges.¹⁶

24. With respect to modification of PacifiCorp's OATT, if the Commission finds that it permits the assessment of both charges, PacifiCorp states that PPM has provided no basis for its requested limitation. PacifiCorp maintains that PPM misreads *Allegheny* by averring that PacifiCorp was limited to assessing the unauthorized use charges set forth in a pre-Order No. 888 transmission tariff. PacifiCorp responds that "*Allegheny*, however, discussed the amount charged for unauthorized use; it did not foreclose adding an unauthorized use provision that complied with the 200 percent standard."¹⁷

25. With respect to modification of PacifiCorp's OATT to reduce the penalties for unauthorized use, PacifiCorp states that PPM's proposed changes would result in significant degradation of system reliability. PacifiCorp contends that PPM's deliberate actions—not the intermittent nature of PPM's facilities—caused the unauthorized transmission.¹⁸

26. PacifiCorp claims that in many instances PPM knew a day ahead that it had no market for the energy at issue but (1) generated excess energy and simply delivered it onto the grid, (2) reserved transmission over one contract path and then scheduled the energy over another path without a reservation, or (3) sought to avail itself of the Tariff's redirect provisions and scheduled energy over the original path as well as the redirected path. PacifiCorp asserts that these actions have nothing to do with the nature of the generator, but rather reflect the very deliberate conduct the Tariff provisions were designed to address. PacifiCorp states that for PPM, the greater the over-generation, the greater the reward, and that the Commission could not reasonably have intended this result. PacifiCorp contends that the penalties in its Tariff are appropriate and consistent

¹⁶ *Id.* at 15.

¹⁷ *Id.* at 25 (*citing Allegheny*, 80 FERC at 61,545).

¹⁸ *Id.* at 30.

with Commission policy.¹⁹ In sum, PacifiCorp asserts that if the Commission eliminated the unauthorized use charge, wind generators might never reserve transmission capacity. PacifiCorp warns that the Commission should not adopt a policy that exempts a particular type of generation from actively managing its resource to maintain system reliability.²⁰

27. Finally, PacifiCorp alleges that PPM's challenge to its Tariff provisions in this proceeding amounts to an impermissible collateral attack on the Commission's *pro forma* OATT.

III. Discussion

A. Procedural Matters

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept PPM's reply or the responses of PPM and PacifiCorp and will, therefore, reject them.

B. Substantive Matters

29. Resolution of this dispute entails first answering whether a transmission customer delivering energy to the grid in excess of its reservation can be assessed a negative generator imbalance payment and unauthorized use charges for the same energy. We find that both of these charges can apply, as discussed below.

30. With respect to the unauthorized use charges, we agree with PacifiCorp that its Tariff provides for two separate charges, one for generation imbalances under Schedule 4, and another for unauthorized use of the transmission system under Schedule 7 or Schedule 8. In this case, the energy that exceeded PPM's reservation and which was delivered to PacifiCorp's transmission system implicates both generation imbalance and unauthorized use charges. In particular, the imbalances at issue are subject to unauthorized use charges because under the Tariff a transmission customer may be subject to unauthorized use charges for energy that exceeds a reservation at a point of

¹⁹ *Id.* at 17 (citing *Allegheny*, 80 FERC at 61,545-57; *Cleco Power*, 105 FERC ¶ 61,222 (2003); *Rockgen*, 100 FERC ¶ 61,261 (2002); *Commonwealth*, 88 FERC ¶ 61,144 (1999); *FirstEnergy Operating Cos.*, 88 FERC ¶ 61,010 (1999)).

²⁰ *Id.* at 29, 31.

receipt.²¹ Contrary to PPM's contention, given our interpretation of PacifiCorp's Tariff the physical delivery of a transmission customer's excess energy by the transmission provider is not a necessary precondition for incurring unauthorized use charges, since such charges may be applied to excess energy at either a point of receipt or a point of delivery.²²

31. Furthermore, precedent supports the conclusion that a transmission customer may be subject to both generation imbalance and unauthorized use charges. PacifiCorp's citation to *Detroit Edison* is not squarely on point with the circumstances presented in PPM's complaint—since in *Detroit Edison* the imbalance at issue was on the end-use customer side (*i.e.*, an energy imbalance for putting an *excess demand* on the system, rather than a generator imbalance, as here, for putting *excess energy* onto the system). Nevertheless, we agree that that case is analogous and that it supports imposing both a generation imbalance charge and an unauthorized use charge. In *Detroit Edison*, the Commission noted that “[t]he judge also found that a customer may be subjected both to energy imbalance service charges for placing excess demand on a company's generators, *and* penalties for unauthorized use of the company's transmission system.”²³ PacifiCorp thus properly assessed under its Tariff two separate charges (*i.e.*, a negative generation

²¹ We note that neither party contests the assessment of the Schedule 4 generation imbalance charges associated with the deliveries of energy at issue.

²² Section 13.7(c) of PacifiCorp's Tariff states that charges may be assessed when a transmission customer exceeds its reservation at either the point of delivery or the point of receipt specified in a service agreement: “The Transmission Customer may not exceed its firm capacity reserved at each Point of Receipt and each Point of Delivery except as otherwise specified in Section 22. The Transmission Provider shall specify the rate treatment and all related terms and conditions applicable in the event that a Transmission Customer (including Third-Party Sales by the Transmission Provider) exceeds its firm reserved capacity at any Point of Receipt or Point of Delivery.” FERC Electric Tariff, 5th Rev. Vol. No. 11, Sub. Original Sheet No. 70.

The Point of Receipt is defined in section 1.104 of PacifiCorp's Tariff as the “point(s) of interconnection on the Transmission Provider's Transmission System where capacity and energy will be made available to the Transmission Provider by the Delivering Party under Part II of the Tariff.” FERC Electric Tariff, 5th Rev. Vol. No. 11, Sub. Original Sheet No. 38.

²³ *Detroit Edison*, 88 FERC at 61,164 n.8 (emphasis added).

imbalance charge and an unauthorized use charge) for PPM's over-deliveries of the energy at issue.²⁴

32. Applying both a generation imbalance charge (which here is a 90 percent, rather than a 100 percent, credit for the excess energy) and an unauthorized use charge to such over-deliveries also discourages a generator from delivering energy onto the transmission system in excess of its reservation and instead encourages the generator to more accurately reserve transmission service, thereby promoting better reliability and more accurate planning of the transmission grid. Unauthorized use charges thus provide an incentive for customers to reserve and pay for the appropriate level of transmission services.²⁵ This ensures that transmission service is allocated in an orderly fashion and supports system reliability.²⁶

33. Since it was appropriate for PacifiCorp to assess both generation imbalance and unauthorized use charges under its Tariff, we next turn to whether PacifiCorp properly calculated the charges related to both of these provisions. The Tariff, *i.e.*, the filed rate, currently provides:

In the event that a Transmission Customer (including Third Party Sales by the Transmission Provider) exceeds its non-firm Reserved Capacity at any Point of Receipt or any Point of Delivery, the Transmission Customer shall be charged 150% of the highest Schedule 8 demand charge for monthly delivery for the sum of the maximum amount that the Transmission Customer exceeds its firm Reserved Capacity at each Point of Receipt or each Point of Delivery during the billing period.²⁷

Accordingly, PacifiCorp was entitled to assess PPM unauthorized use charges using a monthly demand charge.

²⁴ We note that we reached a similar conclusion in *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 837 (2007).

²⁵ *Cf. id.* at P 837 (adopting a similar analysis in Order No. 890).

²⁶ *Cf. id.* at P 835, 838 (adopting a similar analysis in Order No. 890).

²⁷ FERC Electric Tariff, Substitute 6th Rev. Vol. No. 11, Sub. Original Sheet No. 285 (Schedule 8, Item 6).

34. We find, however, that continued assessment of a monthly demand charge for unauthorized use of the PacifiCorp transmission system under circumstances such as those presented in the Complaint is unjust and unreasonable and violates Commission policy. We agree with PPM that prospectively, from the date of the complaint forward, PacifiCorp may not apply a monthly demand charge to an unauthorized hourly non-firm transmission service. The Commission's policy for assessment of such charges is that the penalty should be based on the underlying transaction, *i.e.*, if a service is an hourly service, the appropriate charge is an hourly charge.²⁸ Thus, with an hourly service at issue, the rate should likewise be an hourly rate.²⁹

35. It appears that when PacifiCorp amended its tariff to provide for hourly non-firm transmission service, it failed to amend the penalty provision to exclude the monthly demand charge and instead apply the Commission-approved penalty set forth in *Allegheny*. In *Allegheny*, the Commission stated that “[t]o the degree that a compliance tariff adopts the penalty provisions of the utility’s pre-Order No. 888 tariff, we will accept these penalty provisions,” but penalty provisions not included in the utility’s pre-Order No. 888 tariff would only be accepted “as long as they are capped at a level equal to twice the standard rate for the service at issue.”³⁰ PacifiCorp’s pre-Order No. 888 tariff did not include a stated rate for hourly non-firm transmission service, and, although Schedule 8 of PacifiCorp’s Order No. 888 compliance tariff did contain a stated rate for hourly non-firm transmission service,³¹ the unauthorized use charge was not properly capped at two times or 200 percent (or as relevant here, 1.5 times or 150 percent) of the hourly rate. Thus, PacifiCorp’s existing penalty provision for unauthorized use of hourly non-firm transmission service is unjust and unreasonable and must be revised.³²

²⁸ *Commonwealth*, 88 FERC at 61,481.

²⁹ *Commonwealth*, 88 FERC at 61,486.

³⁰ *Allegheny*, 80 FERC at 61,545.

³¹ FERC Electric Tariff, 5th Rev. Vol. No. 11, Sub. Original Sheet No. 260 (Schedule 8, § 6).

³² In contrast, PacifiCorp’s pre-Order No. 888 tariff did include penalty provisions for monthly, weekly and daily delivery services based on monthly delivery charges. Therefore, these penalties have been grandfathered into PacifiCorp’s Schedule 8 for non-firm transmission service, and PacifiCorp may continue to recover the penalty for unauthorized use based on the monthly delivery charges in these instances. Since the hourly delivery charge was added to Schedule 8 after Order No. 888 was issued, however, its penalty provisions must be capped at a level equal to twice the standard rate for the service at issue. Therefore, the monthly charge penalty should not apply to hourly service.

PacifiCorp's assessments for unauthorized use of hourly non-firm transmission service should not exceed two times or 200 percent (or as PacifiCorp proposes, 1.5 times or 150 percent) of the hourly rate.

36. In cases where, as here, the Commission—in response to a complaint under section 206 of the FPA—determines that the rate on file is unjust and unreasonable, section 206(b) requires that the Commission establish a refund effective date that, as relevant here, is no earlier than the date the complaint was filed. Consistent with our general policy of providing maximum protection to customers,³³ and given the circumstances of this case, we will set the refund effective date as the date of the filing of this complaint, *i.e.*, July 14, 2006.

37. With respect to the timeliness of PacifiCorp's issuance of invoices relating to the unauthorized use charges,³⁴ PacifiCorp's OATT does not include provisions expressly concerning the timing of such invoices. Section 7.1 (Billing Procedure) under PacifiCorp's OATT provides: "Within a *reasonable time* after the first day of each month, the Transmission Provider shall submit an invoice to the Transmission Customer for the charges for all services furnished under the Tariff during the preceding month."³⁵ We recognize that discovering and confirming unauthorized use and calculating the related charges is a complicated process that takes additional time. Furthermore, PacifiCorp provided notice to PPM within three months of the initial violation that unauthorized use charges might be assessed.³⁶ Therefore, we conclude that, in this instance, PacifiCorp's actions were not unreasonable.

38. We also disagree with PPM's assertion that PacifiCorp's penalty charges should apply the demand rate for the service at issue to the maximum deviation between amounts actually delivered by PacifiCorp and the amount of the customer's reservation over each of the respective ten-month and two-month billing periods. Rather, PacifiCorp

³³ See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

³⁴ No one disputes that PacifiCorp met its obligation to timely bill for scheduled transmission service.

³⁵ FERC Electric Tariff, 5th Rev. Vol. No. 11, Sub. Original Sheet No. 56 (emphasis added).

³⁶ PacifiCorp states that a PacifiCorp employee raised the possibility of unauthorized use charges with PPM personnel in a February 4, 2005 email.

correctly applied the demand rate to the maximum deviation in each month (*i.e.*, in each billing period) as Schedules 7 and 8 provide. Combining in one invoice the penalty charges for several monthly billing periods, does not alter the “billing period,” referred to in Schedules 7 and 8, which determine the applicable penalty charges.³⁷

39. Next, we observe that neither party disputes that PacifiCorp has met its obligation to submit timely bills for scheduled transmission service, including generation imbalance charges. Despite these timely billings, however, we note that PacifiCorp delayed payment of the generation imbalance service credits due to PPM until it billed PPM for unauthorized transmission use. In its complaint, PPM claims that PacifiCorp should remit these credits to PPM,³⁸ with interest back to the time the credits should have been remitted, because PacifiCorp should not have levied the unauthorized use charges. Although we find that PacifiCorp was authorized to levy the unauthorized use charges, and therefore deny PPM’s request for a cash refund of the credits, we find that PPM is due interest on the credits from the time they should have been remitted to PPM (*i.e.*, when Pacificorp tendered a transmission bill for the relevant time period) until the time they were netted against the unauthorized use charges. PacifiCorp has offered no explanation for its delay in paying the credits, and we see no reason why PPM should suffer the loss of the time value of the monies (in the form of credits) it would have received had PacifiCorp promptly remitted the credits. Therefore, we order PacifiCorp to remit to PPM interest, calculated pursuant to section 35.19a of the Commission’s regulations,³⁹ on the credits from the time they should have been credited until the time PacifiCorp applied them to the unauthorized use charges. This will make PPM whole for the time value of money that it otherwise would have had available for its use.⁴⁰

40. Finally, we direct PPM to release the \$1,068,120.17 that it has escrowed to PacifiCorp, with interest, in satisfaction of the charges due under the invoices.

³⁷ See *Cleco Power*, 105 FERC ¶ 61,222 at P 14 (stating that there could be several reasons, including errors, why an invoice could cover more than one month).

³⁸ In fact, PacifiCorp netted the credits against the unauthorized use charges and so PPM did recover the credits. Therefore, all that remains at issue in this regard is the interest.

³⁹ See 18 C.F.R. § 35.19a (2007); *cf.* FERC Electric Tariff, 5th Rev. Vol. No. 11, Sub. Original Sheet No. 56 § 7.2 (interest on unpaid amounts calculated pursuant to section 35); *pro forma* OATT § 7.2.

⁴⁰ See *Washington Urban League v. FERC*, 888 F.2d 1381, 1386 (3d Cir. 1989).

The Commission orders:

(A) PPM's complaint is hereby denied in part, and granted in part, as discussed in the body of this order.

(B) The refund effective date established pursuant to section 206(b) of the Federal Power Act is July 14, 2006.

(C) PacifiCorp is hereby ordered to remit interest due to PPM within 30 days of the date of this order, as discussed in the body of this order.

(D) PPM is hereby directed to release the \$1,068,120.17 that it has escrowed to PacifiCorp, with interest, in satisfaction of the charges due under the invoices, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.