122 FERC ¶ 61,114
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.

PacifiCorp	Docket Nos.	ER07-1419-000
		ER07-1419-001
PacifiCorp	Docket Nos.	ER07-1423-000
		ER07-1423-001

ORDER REJECTING NOTICE OF CANCELLATION AND UNEXECUTED SERVICE AGREEMENT

(Issued February 8, 2008)

1. On September 28, 2007, PacifiCorp submitted in Docket No. ER07-1419-000, a notice of cancellation under its Open Access Transmission Tariff (OATT) for Service Agreement No. 67, a firm point-to-point transmission service agreement (1997 PTP Agreement) between PacifiCorp and Black Hills Corporation. On September 28, 2007, PacifiCorp also submitted in Docket No. ER07-1423-000, Service Agreement No. 364, an unexecuted firm point-to-point transmission service agreement (Proposed 2007 PTP Agreement) between PacifiCorp and Black Hills Power, Inc. (Black Hills), that is intended to replace the 1997 PTP Agreement. PacifiCorp requests waiver of the Commission's notice requirements to permit the filings to become effective September 28, 2007. In this order, the Commission rejects PacifiCorp's filings.

I. Background

2. On December 16, 1997, PacifiCorp entered into the 1997 PTP Agreement with Black Hills Corporation, to terminate on December 31, 2023, as well as a network integrated transmission service agreement (1997 Network Agreement), to terminate on

December 31, 2006.[1] PacifiCorp also entered into a power purchase agreement with Black Hills (1997 Power Service Agreement) until December 31, 2023.[2] The 1997 Network Agreement expired, and PacifiCorp filed to cancel the 1997 Network Agreement and replace it with Service Agreement No. 347, a new network service agreement (2007 Network Agreement). The Commission accepted PacifiCorp's filing on August 17, 2007.[3]

3. PacifiCorp states that it is submitting the notice of cancellation for the 1997 PTP Agreement and Proposed 2007 PTP Agreement because of a dispute between Black Hills and PacifiCorp regarding whether the Proposed 2007 PTP Agreement needs to contain the list of multiple generating units (MGUs) contained in section 9.0 of the 1997 PTP Agreement. The dispute began after Black Hills requested to change its point of receipt under the 1997 PTP Agreement from the Jim Bridger Plant to the Yellowtail Substation.[4] PacifiCorp states that under section 22.2 of its OATT, it is required to treat such a request as a new request for service.[5] As a result, PacifiCorp states that it provided Black Hills with the Proposed 2007 PTP Agreement.

4. PacifiCorp states that the MGUs become multiple alternative points of receipt when the generating units at the Jim Bridger Plant are not operating. PacifiCorp explains that section 9.0 was included in the 1997 PTP Agreement pursuant to section 3.3 of the 1997 Power Service Agreement, which required PacifiCorp to pay for transmission service from its MGUs. However, PacifiCorp states that this provision of the 1997 Power Service Agreement expired on December 31, 2006, and there is no longer a need to include the list of MGUs in the Proposed 2007 PTP Agreement. PacifiCorp asserts that omitting the list of MGUs will not change Black Hills' transmission service, that the

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[1] *PacifiCorp*, Docket No. ER97-4367-000 (Dec. 16, 1997) (unpublished letter order).

[2] *PacifiCorp*, Docket No. ER98-568-000 (Dec. 16, 1997) (unpublished letter order) (accepting 1997 Power Service Agreement in Rate Schedule FERC No. 441).

[3] *PacifiCorp*, 120 FERC ¶ 61,166 (2007).

[4] Open Access Same-time Information System (OASIS) Ref. 423931 to change the point of receipt from the Jim Bridger Plant to the Yellowtail Substation.

[5] *See* PacifiCorp, FERC Electric Tariff, Seventh Revised Vol. No. 11, Original Sheet No. 101 ("Any request by a Transmission Customer to modify Receipt and Delivery Points on a firm basis shall be treated as a new request for service in accordance with section 17 hereof, except that such Transmission Customer shall not be obligated to pay any additional deposit if the capacity reservation does not exceed the amount reserved in the existing Service Agreement.").

Commission did not require the identical list of MGUs to be included in the 2007 Network Agreement,[6] and further that it is not clear why Black Hills insists on listing the MGUs designated for network transmission service in a point-to-point transmission service agreement.

5. Black Hills sent a letter to PacifiCorp stating that it declined to execute the Proposed 2007 PTP Agreement because of the new terms and conditions included in that agreement.[7] Black Hills also requested that it be able to retain its rights to service under the 1997 PTP Agreement while changing the point of receipt from the Jim Bridger Plant to the Yellowtail Substation. Black Hills said in the letter that if PacifiCorp declined to modify the 1997 PTP Agreement, it requested PacifiCorp to file its Proposed 2007 PTP Agreement with the Commission in unexecuted form, and Black Hills would protest it.

II. Public Notice, Intervention and Comments

6. Notices of PacifiCorp's filings in Docket Nos. ER07-1419-000 and ER07-1423-000 were issued on October 3, 2007,[8] with protests or interventions due on or before October 19, 2007. On October 19, 2007, Black Hills filed a motion to intervene and protest. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), all timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceedings in which they moved to intervene.

7. On October 26, 2007, PacifiCorp filed an answer to Black Hills' protest. 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 a protest unless otherwise ordered by the decisional authority. We will accept PacifiCorp's answer because it has provided information that assisted us in our decision-making process.

8. On November 27, 2007, the Commission issued a deficiency letter to PacifiCorp. The deficiency letter requested additional information on PacifiCorp's proposed cancellation of the 1997 PTP Agreement and its filing of the Proposed 2007 PTP Agreement. Notices of PacifiCorp's filings in Docket Nos. ER07-1419-001 and ER07-

[6] *PacifiCorp*, 120 FERC ¶ 61,166, at P 9-10 ("Parties are not required to list all details of a network service in their transmission service agreement.").

[7] Letter from Jacqueline A. Sargent, Director of Generating Dispatch and Power Marketing, Black Hills Corp., to Kenneth T. Houston, Director of Transmission Services, PacifiCorp (Aug. 27, 2007) (Black Hills Power Inc., October 19, 2007 Protest, Attachment C).

[8] 72 Fed. Reg. 57,548 (2007).

1423-001 were issued on December 18, 2007,[9] with protests or interventions due on or before January 2, 2008. On January 2, 2008, Black Hills filed a protest.

9. On January 22, 2008, PacifiCorp filed an answer to Black Hills' protest. We will accept PacifiCorp's answer because it has provided information that assisted us in our decision-making process.

10. Black Hills argues that PacifiCorp's filings should be rejected because the Commission's regulations provide that a party seeking to cancel or terminate a rate schedule or part thereof must file a notice of cancellation or termination with the Commission, and that each party shall submit a statement giving the reasons for the proposed cancellation or termination.[10] Black Hills states that PacifiCorp's filing in Docket No. ER07-1419-000 fails to provide any statement giving reasons for the proposed cancellation and should be rejected, and moreover, that attempting to justify the cancellation of the agreement in Docket No. ER07-1423-000 is inadequate.

11. Black Hills claims that PacifiCorp is dissatisfied with the flexibility Black Hills has to receive power purchased from PacifiCorp Merchant under the 1997 Power Service Agreement from the MGUs identified in the 1997 PTP Agreement. Black Hills asserts that PacifiCorp is using the requested change in point of receipt to justify creating a new agreement with different terms and conditions, such as shortening the termination date by three years to January 1, 2021, requiring Black Hills to settle energy losses financially in lieu of returning losses with in-kind energy, and changing the method for calculating ancillary service charges. Of particular concern to Black Hills is the proposed exclusion of the list of MGUs contained in section 9.0 of the 1997 PTP Agreement from the Proposed 2007 PTP Agreement. Black Hills contends that the inclusion of this list is critical because it memorializes PacifiCorp's obligations that date back to 1983.[11] Black Hills proposes to retain the original terms of the 1997 PTP Agreement, except for changing the point of receipt from the Jim Bridger Plant to the Yellowtail Substation.

12. Black Hills acknowledges that the Commission accepted the 2007 Network Agreement, which excluded the same list of MGUs. However, Black Hills argues that

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[9] 73 Fed. Reg. 2,468 (2008).

[10] 18 C.F.R. § 35.15 (2007).

[11] Black Hills states that in December 1983, it purchased wholesale power and transmission service from PacifiCorp under a bundled agreement that was on file with the Commission. Black Hills states that the 1997 PTP Agreement, 1997 Network Agreement and 1997 Power Service Agreement were signed in order to insure that Black Hills retained the same level and quality of service it had obtained in the bundled 1983 agreement.

the situation here is different because the 1997 PTP Agreement has not expired, and will not expire until 2023, whereas, the 1997 Network Agreement expired prior to PacifiCorp's filing of the 2007 Network Agreement. Black Hills argues that PacifiCorp may not abrogate the 1997 PTP Agreement in its entirety and substitute it with a new agreement because it has not expired.

13. Black Hills requests that the Commission summarily reject both the notice of cancellation and the Proposed 2007 PTP Agreement. In the alternative, Black Hills requests that the Commission set the notice of cancellation and Proposed 2007 PTP Agreement for hearing. Black Hills states that PacifiCorp has failed to show that the Proposed 2007 PTP Agreement is just and reasonable.

14. PacifiCorp explains that its proposal to terminate the existing agreement and replace it with the Proposed 2007 PTP Agreement complies with its OATT and is in direct response to Black Hills' request to change the point of receipt from Jim Bridger Plant to Yellowtail Substation. Contrary to Black Hills' assertion, PacifiCorp states that it is satisfied with the current terms and conditions of the 1997 PTP Agreement, and that it fully intends to continue providing Black Hills with firm point-to-point service, whether under the 1997 PTP Agreement or the Proposed 2007 PTP Agreement. However, PacifiCorp asserts that Black Hills' request for a modified point of receipt (i.e., a redirect) forced it to issue a new agreement for the new service between the Yellowtail Substation and Wyodak Substation delivery point. PacifiCorp avers that its OATT prohibits it from treating a firm redirect as a modification of the existing agreement. PacifiCorp objects to Black Hills' request for a hearing.

15. PacifiCorp disagrees with Black Hills' objections to the Proposed 2007 PTP Agreement. PacifiCorp states that it is no longer necessary to include the list of MGUs in the Proposed 2007 PTP Agreement because section 3.3 of the 1997 Power Service Agreement, which required the list to be included in the 1997 PTP Agreement, expired on December 31, 2006, pursuant to specific provisions in the 1997 Power Service Agreement. PacifiCorp states that the exclusion of the MGUs conforms the Proposed 2007 PTP Agreement to the *pro forma* firm point-to-point service agreement in PacifiCorp's OATT and does not amount to a radical remaking of the agreement, as it is characterized by Black Hills.

16. PacifiCorp further states that, in the event that the path between the point of receipt and point of delivery is constrained, Black Hills will have the ability to modify its point-to-point service on a non-firm basis under sections 13.7 and 22.1 of PacifiCorp's OATT. PacifiCorp states that, just as the 1997 PTP Agreement made changing the point of receipt subject to the availability of an unconstrained path, this secondary service will be subject to an unconstrained path under the Proposed 2007 PTP Agreement. PacifiCorp argues that the Commission accepted PacifiCorp's exclusion of the MGUs in the 2007 Network Agreement and should do the same in this instance.

III. Deficiency Letter, PacifiCorp's Responsive Filing, and Black Hills' Protest

17. The Commission's November 27, 2007, deficiency letter to PacifiCorp requested additional information regarding PacifiCorp's argument that section 22.2 and 17 of its OATT require PacifiCorp to treat Black Hills' request for a modified point of receipt as a "new request for service." On December 12, 2007, PacifiCorp responded, stating that a plain reading of section 22.2 of PacifiCorp's OATT, Order No. 890,[12] and Order No. 676[13] indicate that a modification of a point of receipt requires PacifiCorp to generate and execute a new service agreement with Black Hills. PacifiCorp reiterated many of its prior contentions, arguing that the OATT states unambiguously that a request for a firm redirect is a "new" request for service, not an "amended" request for service. PacifiCorp states that although the Commission could have stated that a request to modify an existing agreement on a firm basis was a modification, it instead stated that a modification on a firm basis will be treated as a "new request for service."

18. In contrast, PacifiCorp states that section 22.1 of its OATT, which deals with modifications to existing service agreements on a non-firm basis, allows a transmission customer taking firm point-to-point transmission service to request a change in the receipt or delivery point other than those specified in the service agreement without executing a new agreement. PacifiCorp argues that the Commission differentiated between non-firm and firm changes in the point of receipt or delivery, and that because such a distinction exists, a new agreement for Black Hills' firm redirect is necessary. PacifiCorp states that if the Commission intended for the existing agreement to be modified it could have repeated the language in section 22.1 in section 22.2; however, the Commission did not repeat the language in section 22.2, but instead specifically stated that a firm redirect is a "new request for service."

19. Furthermore, PacifiCorp contends that section 17 of the OATT, which is referenced in section 22.2, specifically addresses a "new request for service," and not modifications to an existing agreement. PacifiCorp states that section 22.2 expressly excludes the deposit requirements from a firm redirect request but does not exclude compliance with any other aspects of section 17.

20. PacifiCorp states that the Commission concluded in Order No. 890 that "it would be inappropriate, and contrary to the *pro forma* OATT, to grant redirects special queue

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[12] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007).

[13] *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676, 71 Fed. Reg. ¶ 26,199, FERC Stats. & Regs. ¶ 31,216, *order on reh'g*, Order No. 676-A, 116 FERC ¶ 61,255 (2006).

treatment."[14] PacifiCorp argues that the transfer of outdated service provisions to a new service agreement has the effect of providing the transmission customer with special queue treatment because other new requests for service do not have the same ability to retain outdated provisions. Further, PacifiCorp states that Order No. 676 reinforced the policy that a firm redirect is a new request for service, allowing for only the continuity of the term of the service in the new agreement to allow for rollover.

21. The Commission also requested additional information from PacifiCorp regarding its exclusion of section 9.0 from the original service agreement, the list of MGUs, from the new service agreement. PacifiCorp responded by stating that it generated the new agreement in accordance with its "Form of Service Agreement for Firm Point-to-Point Transmission Service" contained in its OATT as attachment A. PacifiCorp states that the form of service agreement in Attachment A does not contain a section 9.0 that lists MGUs.

22. With respect to the Commission's inquiry about the term of the Proposed 2007 PTP Agreement, PacifiCorp states that the term for the new agreement was shortened from December 31, 2023 to January 1, 2021 because Black Hills' requested the shortened term in its application for a firm redirect. PacifiCorp also replied to the Commission's inquiry regarding the settlement of energy losses and the method for calculating ancillary services charges, stating that these provisions come from its current OATT and, because the firm redirect request initiated a new agreement, PacifiCorp was obligated to use the terms of its current OATT.

23. Black Hills reiterates that the existing 1997 PTP Agreement is a valid agreement, on file with the Commission with a term through December 31, 2023, and that PacifiCorp's filings purport to abrogate the agreement by replacing it with an agreement with materially changed and inferior terms. Specifically, Black Hills challenges PacifiCorp's responses to the questions posed to PacifiCorp in the Commission's deficiency letter.

24. Black Hills argues that PacifiCorp fails to cite any authority for its assertion that Black Hills' request to modify a point of receipt under the 1997 PTP Agreement constitutes a new request for service that requires a new service agreement. Black Hills does not take a position on whether its request for a new point of receipt constitutes a "new request for service" under PacifiCorp's OATT. Black Hills states that this issue is not relevant to the present inquiry because, even if Black Hills' request constitutes a "new request for service," such circumstance does not give PacifiCorp leave to cancel the 1997 PTP Agreement, abrogate its terms and conditions, and replace it with an "inferior" Proposed 2007 PTP Agreement.

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[14] Order No. 890 at P 1285.

25. Black Hills also objects to PacifiCorp's argument that equitable considerations justify the cancellation and replacement of the 1997 PTP Agreement with the Proposed 2007 PTP Agreement. Black Hills disagrees with PacifiCorp's insinuation that Black Hills seeks special queue treatment through the change in point of receipt. Black Hills asserts that it merely sought to change the point of receipt under the 1997 PTP Agreement, as is its right under the PacifiCorp OATT, while leaving the remaining terms and conditions of service unchanged. Black Hills further states that PacifiCorp is using the modification request as a pretext for abrogating the 1997 PTP Agreement and replacing it with the Proposed 2007 Agreement with terms and conditions of PacifiCorp's choosing.

26. Black Hills also takes issue with PacifiCorp's reasoning for omitting section 9.0 of the original 1997 PTP Agreement in the new agreement. Black Hills argues against PacifiCorp's justification that section 9.0 is not in its *pro forma* service agreement and therefore properly omitted from the new agreement. Black Hills asserts that the Commission's rules do not mandate blind adherence to the *pro forma* service agreement. Furthermore, Black Hills does not agree with PacifiCorp's characterization of the section as no longer necessary, stating that PacifiCorp's assertion that Black Hills' right to take power from the MGUs expired on December 31, 2006 is wrong. Black Hills asserts that its right to take power from the MGUs remains in place through December 31, 2023, the expiration of the existing 1997 PTP Agreement.

27. With respect to the change in termination date from December 31, 2023, to January 1, 2021, Black Hills states that PacifiCorp misunderstood Black Hills' written request for a change in point of receipt. Black Hills states that it requested the change in point of receipt from Jim Bridger to Yellowtail through January 1, 2021; it did not request that the term of the agreement be shortened.

28. Finally, Black Hills objects to PacifiCorp's responses as to why it changed the manner in which energy losses are settled and why it changed the manner in which ancillary services charges are calculated, i.e., that it changed them to conform to its *pro forma* service agreement. Black Hills reiterates here that the parties are in no way bound to the *pro forma* service agreement and that PacifiCorp should not be allowed to unilaterally impose these changes on Black Hills.

29. In its Answer, PacifiCorp again asserts that a plain reading of section 22.2, as well as provisions of Order 890-A,[15] requires that PacifiCorp treat a firm redirect as a new request for service, as opposed to a modification. PacifiCorp also objects to Black Hills' assertion that PacifiCorp's actions were unilateral, noting that Black Hills requested that PacifiCorp file the new agreement in unexecuted form with the Commission. Finally,

[15] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, at P 704, 708 (2007).

PacifiCorp argues that section 22.2 does not provide for a temporary redirect until 2021, stating that nothing in its OATT requires it to hold the original path available to see if Black Hills might re-request it.

IV. Discussion

30. PacifiCorp's filings to cancel the existing 1997 PTP Agreement and replace it with the Proposed 2007 PTP Agreement raise the issue of whether the reference to section 17 in section 22.2 of the OATT requires that a new service agreement be used when a customer requests a redirect. As explained below, we hold that it does not.

31. Black Hills' request to modify its point of receipt under the 1997 PTP Agreement is governed by section 22.2 of PacifiCorp's OATT, which states: "Any request by a Transmission Customer to modify Receipt and Delivery Points on a firm basis shall be treated as a new request for service in accordance with section 17 [of the OATT]." PacifiCorp contends that, because this section requires it to treat Black Hills' request as a "new request for service," the parties must execute a new service agreement—as opposed to modifying the original service agreement—to reflect the firm redirect. Although PacifiCorp does not expressly argue that section 22.2 permits it to require the execution of a new service agreement for the redirect service, such is the effect of its filings. We disagree with PacifiCorp's interpretation of section 22.2 of its tariff, and we determine that section 22.2 does not require the execution of a new service agreement to accommodate the redirect request made by Black Hills.

32. In particular, PacifiCorp's argument that different language in section 22.1 and section 22.2 indicates that the Commission intended that long-term firm redirects would abrogate existing agreements and generate replacement agreements is incorrect. Indeed, the language is different: section 22.1 states that a transmission customer shall not have to execute a new service agreement for a non-firm redirect, while section 22.2 does not contain similar language. However, there is nothing in section 22.2 nor in section 17 of the OATT that requires the termination of the existing service agreement, nor does it require that a transmission customer execute a new service agreement, in the event of a redirect. Indeed, to interpret sections 22.2 and 17 otherwise would essentially eliminate the Commission's existing policy of providing flexibility to transmission customers to redirect on a firm basis.

33. As the Commission explained in *Commonwealth Edison Company* (*Commonwealth*), "[s]ection 22.2 of the *pro forma* tariff was intended to provide

flexibility to transmission customers to permit them to react in a competitive market."[16] Moreover, in *Commonwealth*, the Commission explicitly found that a transmission customer "retains its long-term firm service agreement and the rights associated with such agreement when it changes delivery points pursuant to section 22.2. . . ."[17]

34. Further, the requirement that a transmission provider must treat the redirect request as a "new request for service" in accordance with section 17 protects customers by requiring that the transmission provider respond to a customer request in a timely manner. At the same time, redirect requests receive the same treatment as a new request for service, with the result being that they do not receive special queue treatment and remain subject to available capacity.[18]

35. In light of our precedent and policy, we determine that when Black Hills requested a firm redirect for a portion of the contract term, PacifiCorp was required to evaluate the request as a "new request for service" by following the procedural protocols in section 17. However, PacifiCorp was not permitted to require the execution of a new service agreement. Instead, once PacifiCorp determined that it had capacity available on the redirected path, it was required to offer that capacity to the customer under the same terms and conditions as the original service. Accordingly, we reject PacifiCorp's notice of cancellation of the existing 1997 PTP Agreement and its proposed unexecuted service agreement. PacifiCorp must provide the redirected transmission service pursuant to the 1997 PTP Agreement modified only to reflect the redirected path.

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[16] *Commonwealth Edison Co.*, 95 FERC ¶ 61027, at 61,083 (2001). Further, in *Dynegy Power Marketing, Inc. v. Southwest Power Pool, Inc.*, 96 FERC ¶ 61,275, at 62,048 (2001), the Commission explained that "transmission customers will more readily commit to long-term transmission service when they can effectively respond to unexpected events and economic situations in a competitive electric power market."

[17] *Id.* We note that in *Aquila Merchant Services, Inc. v. Southwest Power Pool, Inc.*, 113 FERC ¶ 61,056 (2005) (*Aquila*), the Commission did determine that a transmission customer may be required to pay a new rate for service over the redirected path. Unlike in *Aquila*, PacifiCorp is not proposing a rate change related to the requested redirect.

[18] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241, at P 1285 (2007). PacifiCorp argues that allowing Black Hills to modify the receipt point under the terms of the original service agreement amounts to giving it special queue treatment. We disagree. As the Commission explained in Order 890, "a redirect right does not grant the customer access to system capacity or queue position different from other customers submitting new requests for service." *Id.*

The Commission orders:

(A) PacifiCorp's notice of cancellation is hereby rejected.

(B) PacifiCorp's proposed unexecuted service agreement is hereby rejected.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.