

124 FERC ¶ 61,303  
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.

Public Service Electric and Gas Company

Docket No. ER08-1233-000

ORDER ON FORMULA RATE PROPOSAL

(Issued September 30, 2008)

1. On July 7, 2008, Public Service Electric and Gas Company (PSE&G) filed revised tariff sheets to PJM Interconnection, L.L.C.'s (PJM) Open Access Transmission Tariff (OATT) to substitute a formula rate for its stated rates for Network Integration Transmission Service and Point-to-Point transmission service (July 7 Filing).<sup>1</sup> The formula rate incorporates a base return on equity (ROE) of 11.18 percent plus 50 basis points for continued membership in PJM, for a total ROE of 11.68 percent. The Commission accepts the formula rate proposed by PSE&G, with certain modifications as discussed herein, effective October 1, 2008.

**I. Background**

2. PSE&G is a wholly-owned subsidiary of Public Service Enterprise Group Inc. PSE&G, located in New Jersey, is a transmission-owner member of the PJM regional transmission organization (RTO), providing network integration transmission service and point-to-point transmission services over PSE&G's transmission facilities, in accordance with PJM's OATT. PSE&G's currently-effective rates are "stated rates," which have been in effect since 1996.<sup>2</sup>

3. On December 21, 2007, PSE&G, jointly with PPL Electric Utilities Corporation, filed a petition for declaratory order pursuant to section 219 of the Federal Power Act

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<sup>1</sup> See Appendix for list of tariff sheets.

<sup>2</sup> *Public Service Electric & Gas Co.*, 81 FERC ¶ 61,289 (1997).

(FPA)<sup>3</sup> and Order No. 679<sup>4</sup> seeking rate incentives for the proposed 130-mile 500 kV Susquehanna-Roseland Line, a baseline project under PJM's Regional Transmission Expansion Plan. PSE&G requested: (1) a 50-basis point ROE adder for all of its transmission facilities for continued membership in an RTO; (2) a 150-basis point ROE adder for the risks and challenges faced by the Susquehanna Line; (3) authority to include 100 percent of construction work in progress (CWIP) expenses in rate base; and (4) 100 percent recovery of prudently incurred construction costs if the Susquehanna Line is abandoned as a result of factors beyond its control.

4. On April 22, 2008, the Commission accepted PSE&G's requested incentives for continued membership in PJM, CWIP, and abandonment costs,<sup>5</sup> but found that based on the risks associated with the Susquehanna Line, a 125-basis point adder was more appropriate than the 150 basis points requested by PSE&G. The Commission noted that the 125-basis point adder would be bound by the upper end of the zone of reasonableness, which would be determined in a future section 205 filing.<sup>6</sup>

## II. Proposal

5. On July 7, 2008, PSE&G filed revised tariff sheets to PJM's OATT which would substitute a forward-looking formula rate for its currently-effective stated rates for transmission service within the PSE&G zone of PJM. PSE&G states that a forward-looking formula rate will provide up-to-date cost recovery and minimize the burdens on the company and its customer associated with a filing under section 205 of the Federal Power Act<sup>7</sup> for each new transmission investment. PSE&G states that the Commission has recognized the consumer benefits of forward-looking formula rates, and has

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<sup>3</sup> 16 U.S.C. § 824s (2006). The Energy Policy Act of 2005, 119 Stat. 594 § 1241 (2005), amended the FPA by adding section 219.

<sup>4</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006) (Order No. 679); *order on reh 'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006) (Order No. 679-A); *order denying reh 'g*, 119 FERC ¶ 61,062 (2007).

<sup>5</sup> *PPL Electric Utilities Corp. and Public Service Electric & Gas Co.*, 123 FERC ¶ 61,2065 (2008) (*PPL/PSE&G*).

<sup>6</sup> *Id.* P 39.

<sup>7</sup> 16 U.S.C. § 824d (2000) (FPA).

encouraged utilities to consider filing formula rates.<sup>8</sup> PSE&G states that its proposed formula rate is consistent with the formula rate accepted for the Virginia Electric and Power Company (VEPCO).<sup>9</sup>

6. PSE&G's initial rate for 2008 will be pro-rated for October 1 through December 31, 2008. PSE&G will calculate this initial rate by dividing the 12 months of forecasted data for calendar year 2008 by four months, the number of months that the rate will be in effect. For the 2009 calendar year, PSE&G will post on PJM's website its forecasted revenue requirement for 2009 by October 15, 2008, including workpapers supporting the projected cost of plant, its construction schedule, and anticipated in-service dates.

7. PSE&G requests an effective date of October 1, 2008, for its proposed revisions to the PJM OATT. PSE&G further requests that the Commission issue an order by September 30, 2008, to give it adequate time to hold customer meetings to review the 2009 rate restatement under PSE&G's proposed formula, on or before October 15, 2008.

### **III. Notice, Interventions, and Protests**

8. Notice of PSE&G's July 7 Filing was published in the *Federal Register*, 73 Fed. Reg. 41,058 (2008), with interventions and protests due on or before July 28, 2008. Timely motions to intervene were filed by Gerdau Ameristeel Corporation, PJM, Hess Corporation, PPL Electric Utilities Corporation, Rockland Electric Company, Allegheny Power and Trans-Allegheny Interstate Line Company, the New Jersey Division of Rate Counsel and Exelon Corporation. Dominion Resources Services, Inc. filed a motion to intervene out-of-time. A notice of intervention was filed by the New Jersey Board of Public Utilities. No comments or protests were filed.

### **IV. Discussion**

#### **A. Procedural Matters**

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We grant

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<sup>8</sup> PSE&G July 7 Filing, Transmittal Letter at 5-6; *see also Midwest Independent System Operator Corp.*, 117 FERC ¶ 61, 323, at P 12 (2006); *Northeast Utilities Service Co.*, 105 FERC ¶ 61,089, at P 23 (2003).

<sup>9</sup> *Virginia Electric and Power Co.*, 123 FERC ¶ 61,098 (2008) (VEPCO).

the motion to intervene out-of-time filed by Dominion Resources Services, Inc. as this late intervention will not prejudice or burden any of the parties to the proceeding.

**B. Formula Rate Proposal**

10. We accept PSE&G's proposal to implement a formula rate with modifications to the Annual Update Process, to become effective October 1, 2008, as discussed herein. PSE&G's proposed formula rate is contained in Attachment H-10 A and B to PJM's OATT, which consists of a spreadsheet and supporting documents. PSE&G's ATRR will be calculated by entering data into the spreadsheet and its initial ATRR will be \$200,671,504.

11. The Commission has found that the use of formula rates encourages the construction and timely placement into service of needed transmission infrastructure.<sup>10</sup> The Commission has accepted the use of formula rates by a number of utilities in the PJM region, both those utilizing prior-year FERC Form No. 1 data to calculate rates for the upcoming year,<sup>11</sup> as well as those utilizing projected costs, as PSE&G proposes to do.<sup>12</sup> In each case, the fundamental process remains the same: rates are estimated for the following year and data regarding such rates is provided to customers with sufficient time to review and challenge the rates before the Commission, if necessary, before they are implemented. Once the actual costs are known from that year's FERC Form No. 1, those costs are trued-up to the rates charged over the past year and any over-collections are returned to customers with interest. These mechanisms allow the utility to recover its costs in a more timely manner while protecting customers from inflated rates through the true-up process. PSE&G's proposal is consistent with this structure, and is, therefore, accepted.

**C. Annual Update Process**

**1. PSE&G's Proposal**

12. PSE&G's protocols provide for challenges to the True-Up Adjustment. Under PSE&G's proposed Preliminary Challenge provision, "Interested Parties" have 150 days in which to review data published by PSE&G and to submit information requests to the

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<sup>10</sup> See *Northeast Utilities Service Co.*, 105 FERC ¶ 61,089, at P 23 (2003).

<sup>11</sup> *PHI/BGE*, 115 FERC ¶ 61,066 (2006); *Duquesne Light Co.*, 118 FERC ¶ 61,087 (2007).

<sup>12</sup> *Potomac-Appalachian Transmission Highline, L.L.C.*, 122 ¶ FERC 61,188 (2008) (*PATH*).

company. PSE&G will make a reasonable effort to respond to such information requests within fifteen days. If the parties are unable to resolve a dispute regarding an information request, the protocols provide for use of a Commission Administrative Law Judge as a discovery master. The protocols further provide that Interested Parties have until December 31 to notify PSE&G of any challenge (Preliminary Challenge). If the dispute is not resolved during this Preliminary Challenge Period (i.e., by December 31), parties have an additional twenty-one days in which they may file a complaint with this Commission pursuant to section 206 of the Federal Power Act.

13. PSE&G's proposed protocols provide that failure to make a Preliminary Challenge related to a Material Accounting Change or formula rate input shall act as a bar to further challenge with respect to that Annual Update. The protocols also provide that a formal challenge may not raise issues that were not the subject of that party's Preliminary Challenge during the applicable review period. Further, the protocols provide:

[E]ach True-Up Adjustment or Material Accounting Change shall become final and no longer subject to challenge pursuant to these Annual Review Procedures or by any other means *by the FERC or any other entity* on the later to occur of (i) passage of the twenty-one (21) days following the Preliminary Challenge Period for making a Formal Challenge if no such challenge has been made ...<sup>13</sup>

14. The protocols further specify that in any complaint proceeding or any proceeding initiated *sua sponte* by the Commission, the party (other than PSE&G) challenging the formula rate input or Material Accounting Change bears the burden of showing that the formula rate input or Material Accounting Change is not just and reasonable without the proposed modification, and the proposed modification is just and reasonable.

## **2. Commission Determination**

15. Although we find that the Annual Update process proposed by PSE&G provides sufficient opportunity for customers to review PSE&G's projected costs and discuss those costs with PSE&G, we find, as we did in *VEPCO*, that these protocols unduly restrict parties' rights to challenge the underlying bases of the formula rates and file complaints with the Commission, and the Commission's rights to institute an investigation *sua sponte*.

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<sup>13</sup> PSE&G July 7 Filing, Appendix A at Proposed Tariff Sheet No. 311EE § 4(e) (emphasis added).

16. First, as the Commission found in *VEPCO*, PSE&G must expand the definition of the term “Interested Parties” to include all parties having standing to bring a complaint under section 206 of the Federal Power Act.<sup>14</sup>

17. Second, the Commission rejects PSE&G’s efforts to establish a cut-off date by which parties must file a complaint, or the Commission must initiate a proceeding, under section 206 or lose the right to do so, as discussed in *VEPCO*.<sup>15</sup> As we explained in *VEPCO*, under a formula rate proposal, the Commission accepts the formula, i.e., the algebraic equation used to calculate PSE&G’s rates.<sup>16</sup> It does not accept the inputs into the formula or the charges resulting from the application of the inputs to the algebraic equation. The Commission’s long-standing precedent is that, under formula rates, parties have the right to challenge the inputs to, or the implementation of, the formula at whatever time they discover errors in the inputs or the implementation of the formula.<sup>17</sup>

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<sup>14</sup> *VEPCO* at P 45.

<sup>15</sup> *VEPCO* at P 46, citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 96 FERC ¶ 61,120, at 61,508 n.42 (2001); *Kern River Gas Transmission Co.*, 116 FERC ¶ 61,217 (2006).

<sup>16</sup> *VEPCO* at P 50; see also, *Midwest Independent Transmission System Operator, Inc.*, 113 FERC ¶ 61,194, at P 47 (2005); *Louisiana Public Service Commission v. FERC*, 688 F.2d 357, 361 (5<sup>th</sup> Cir. 1982).

<sup>17</sup> *North Carolina Electric Membership Cooperative v. Carolina Power & Light Co.*, 57 FERC ¶ 61,332, at 62,065 (1991) (rejecting the utility’s efforts to limit the period of review to the prior 12 months by stating “[w]hile prompt identification of disputes is certainly a reasonable goal to strive for, the Commission cannot allow utilities to recover excessive rates through automatic adjustment clauses because the customer did not complain in as prompt a manner as the company believes the customer should have.”). The Commission has held repeatedly that it may order refunds for past periods where a utility has either misapplied a formula rate or otherwise charged rates contrary to the filed rate. See *Appalachian Power Co.*, 23 FERC ¶ 61,032, at 61,088 (1983); *DTE Energy Trading, Inc. v. Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,062, at P 28 (2005); *Quest Energy, L.L.C. v. The Detroit Edison Co.*, 106 FERC ¶ 61,227, at P 21 (2004).

Indeed, customers may not uncover errors in data or imprudent costs or otherwise inappropriate costs until well after the challenge period.<sup>18</sup> As we found in *VEPCO*,<sup>19</sup> any challenge to the projected costs, True-Up Adjustment or Material Accounting Change would not require the complainant to bear the ultimate burden of proof. Rather, PSE&G continues to bear the ultimate burden of proof, i.e., to demonstrate the justness and reasonableness of the charges resulting from application of the formula rate.

18. In addition, PSE&G cannot unilaterally deny a party the statutory right to file a complaint under section 206 of the Federal Power Act or the statutory right of the Commission to institute a section 206 investigation. PSE&G points to no statutory provision that permits it to unilaterally preclude a customer from making a filing under section 206, nor does it provide justification for restricting the Commission's ability to institute an investigation under section 206. The courts have recognized that section 206 permits customers to challenge formula rates.<sup>20</sup>

19. PSE&G seeks to defend its finality provision as providing substantially more time for parties to review materials and determine whether to file a preliminary or formal challenge than did VEPCO. But the differences in the length of challenge time provided by PSE&G and VEPCO does not change the policy and statutory provisions that render PSE&G's provisions unjust and unreasonable, as described above. PSE&G further seeks to distinguish the cases cited by the Commission as inapposite on the grounds that they relate to natural gas fuel tracker formulas, not electric transmission formula rates. According to PSE&G, fuel tracker formulas do not contain customer review and discovery rights and therefore, are not comparable.

20. The Commission's policy applies to all formula rates, regardless of type. Moreover, PSE&G has not explained why a formula covering all of a utility's costs should be treated differently than a more narrowly drawn formula. In any event, the

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<sup>18</sup> See, e.g., *Yankee Atomic Electric Co.*, 60 FERC ¶ 61,316, at 62,096-97 (1992) (allowing review of potentially imprudent costs charged to customers in prior-year formula rates).

<sup>19</sup> *VEPCO*, 123 FERC ¶ 61,098 at P 47.

<sup>20</sup> *Public Utilities Commission of California v. FERC*, 254 F.3d 250, 258 (D.C. Cir. 2001) (“Because relief can be sought pursuant to § 206 in the event a pass through of ... costs results in unjust and unreasonable rates, the Commission's acceptance of the ISO's formula rate without additional § 205 filings does not leave the [state public utilities commission] or ratepayers without any statutory recourse.”)

presence or absence of customer review and discovery does not change the fact that the rates are established through a formula whose inputs have not been accepted by the Commission.

21. PSE&G argues that the Commission has accepted similar language “summarily” in the past in one delegated letter order and several settlement approvals.<sup>21</sup> Letter orders issued under delegated authority are non-precedential.<sup>22</sup> As the courts recognize, “FERC's acceptance of a [utility's] tariff sheets does not turn every provision of the tariff into ‘policy’ or ‘precedent.’”<sup>23</sup> PSE&G also argues that similar language has been

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<sup>21</sup> PSE&G Filing at 9, citing *UGI Utilities, Inc.*, Docket Nos. ER06-1445-000 and ER06-1445-001 (Dec. 13, 2006) (unpublished, delegated letter order); *Duquesne Light Co.*, 123 FERC ¶ 61,139 (2008) (approving settlement); *Baltimore Gas & Elec. Co.*, 115 FERC ¶ 61,066 (2007) (approving settlement), *Commonwealth Edison Co.*, 122 FERC ¶ 61,030 (2007) (approving settlement).

<sup>22</sup> *Westar Energy, Inc.*, 124 FERC ¶ 61,057, at P 26 (2008); *Norwalk Power, LLC*, 122 FERC ¶ 61,273, at P 25 (2008). The Commission has explained that: “... actions taken by its staff pursuant to delegated authority ‘do not constitute Commission precedent binding the Commission in future cases’ and the ‘exercise of ... delegated authority cannot serve to supplant the policies [the Commission has] established in [its] decisions and regulations.’” *Mid-Continent Area Power Pool*, 97 FERC ¶ 61,038, at 61,184 n.10 (2001), citing *Phoenix Hydro Corp.*, 26 FERC ¶ 61,389, at 61,870 (1984), *aff'd*, 775 F.2d 1187, 1191 (D.C. Cir. 1985).

Further, delegated letter orders contain the following disclaimer: “This acceptance for filing shall not be construed as constituting approval of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service contained in your filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such action is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.” See, e.g., *UGI Utilities, Inc.*, Docket Nos. ER06-1445-000 and ER06-1445-001 at 3 (Dec. 13, 2006) (unpublished, delegated letter order).

<sup>23</sup> *Gas Transmission Northwest Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007). Also, the Commission has held that it is not bound by issues which were not raised and which the Commission did not specifically address. *Transwestern Pipeline Co.*, 36 FERC ¶ 61,175, at 61,438 (1986), citing *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”)

accepted in the settlement context; however, these also are not binding on the Commission.<sup>24</sup> Further, in the settlement context, the Commission's concerns regarding the unilateral abrogation of customers' section 206 rights, in particular, are alleviated by the customer's agreement to the language limiting its rights.

22. PSE&G's filing is therefore accepted subject to the condition that it make a compliance filing within 30 days of the date of this order, reflecting in the relevant tariff sheets the modifications discussed above.

**D. Request for Waivers**

**1. PSE&G's Proposal**

23. PSE&G requests waiver of any requirement to submit cost-of-service statements other than those included in its filing, including section 35.13 (d)(1)-(2), section 35.13 (d)(5), and section 35.13 (h) of the Commission's regulations. PSE&G contends that good cause exists to grant waiver because detailed cost-of-service statements are not needed when the proposed rates are formulary and will be based on actual costs. PSE&G also requests that the Commission grant any other necessary waivers.

**2. Commission Determination**

24. We will grant PSE&G's request, and waive the requirements of section 35.13(d)(1)-(2), section 35.13 (d)(5), and section 35.13 (h).

The Commission orders:

(A) PSE&G's revised tariff sheets to the PJM OATT are accepted for filing effective October 1, 2008, subject to revision based on a further compliance filing, as discussed in the body of this order.

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<sup>24</sup> Commission orders approving settlements include the following language: "Our acceptance of the Settlement does not constitute approval, or precedent regarding, any principle or issue in this proceeding." *Duquesne Light Co.*, 123 FERC ¶ 61,139 at P 14 (2008).

(B) Within 30 days of the date of this order, PSE&G must make the compliance filing discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

**Appendix**

**Tariff Sheets Accepted for Filing  
Effective October 1, 2008**

PJM Interconnection, L.L.C.  
FERC Electric Tariff  
Sixth Revised Volume No. 1

Fifth Revised Sheet No. 26  
Eighth Revised Sheet No. 26A  
Fourth Revised Sheet No. 270E.10  
Second Revised Sheet No. 270E.11  
Third Revised Sheet No. 270E.14  
Third Revised Sheet No. 270E.15  
First Revised Sheet No. 311  
Original Sheet No. 311A through Original Sheet No. 311Z  
Original Sheet No. 311AA through Original Sheet No. 311EE