

127 FERC ¶ 61,010
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Basin Electric Power Cooperative

Docket No. ER08-1600-000

ORDER ACCEPTING AND SUSPENDING PROPOSED
TARIFF SHEETS AND ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES

(Issued April 3, 2009)

1. In this order, we accept for filing Basin Electric Power Cooperative's (Basin Electric) revised tariff sheets, and suspend them for a nominal period, to be effective December 1, 2008, as requested, subject to refund. We also establish hearing and settlement judge procedures.

Filing

2. On September 29, 2008, Basin Electric filed proposed tariff sheets that increase its stated transmission rates to reflect increases to its cost of service because of the addition of new transmission facilities. The revised rates are intended to recover the increased costs of Basin Electric's Transmission Revenue Requirement that result from the construction of transmission facilities on its portion of the Common Use System.¹ Basin Electric requests that its proposed tariff sheets be made effective December 1, 2008.

¹ The Common Use System is the transmission system located in the Western Interconnection whose facilities are owned and operated by Black Hills Power, Basin Electric Power Cooperative, and Powder River Energy Corporation. The Common Use System Transmission Providers provide open access transmission service on the Common Use System under their joint Open Access Transmission Tariff (Joint Tariff).

3. Basin Electric's Transmission Revenue Requirement for facilities included in the Common Use System will increase from \$5,530,000 to \$14,187,297, or an increase of 156 percent, based on a test period ending December 31, 2009.
4. Basin Electric's rates are derived using a 10.95 percent return on common equity (ROE). Basin Electric states that it is adopting this return from Black Hills Power, Inc.'s (Black Hills) rate application as a proxy for its cost of equity.²
5. Basin Electric proposes to file a true-up to its projected cost of service based on actual costs incurred in 2009 and will concurrently revise the charges for network integration transmission service, firm and non-firm point-to-point service for the period to reflect the true-up cost of service.³ According to Basin Electric, a true-up that dictates a reduction in rates will result in refunds including interest to network customers and point-to-point customers for that period. Accordingly, Basin notes that if the true-up results in an increase in rates, then network customers and point-to-point customers will be assessed a surcharge, including interest.⁴

Notice of Filing and Responsive Pleadings

6. Notice of Basin Electric's filing was published in the *Federal Register*, 73 Fed. Reg. 60,683 (2008), with interventions and protests due on or before October 20, 2008. Timely, unopposed motions to intervene were filed by Black Hills and the Municipal Energy Agency of Nebraska (Municipal Energy) and the City of Gillette, Wyoming (Gillette) (collectively, Municipal Energy/Gillette).
7. Municipal Energy/Gillette filed a Protest, Request for Rejection or Summary Disposition, Maximum Suspension and Hearing of the proposed tariff revisions.
8. Basin Electric filed an answer to the protest. Municipal Energy/Gillette filed a limited response to Basin Electric's answer.
9. On November 21, 2008, Basin Electric filed a motion requesting the Commission to defer action pending the filing of a settlement agreement. Basin Electric states that

² On September 29, 2008, Black Hills filed in Docket No. ER08-1584-000, proposed rate revisions to reflect an updated transmission revenue requirement and the implementation of a formula rate methodology as a replacement to its current stated transmission rates, based on the increase in capital-related costs associated with the new transmission investment it is expecting to place into service.

³ Basin Electric states that this filing will be made no later than June 1, 2010.

⁴ Transmittal Letter at 4.

since the filing of the Municipal Energy/Gillette Protest, Basin Electric, Municipal Energy and Gillette (collectively, the Parties) have engaged in settlement discussions intended to resolve the Municipal Energy/Gillette Protest.

10. On February 2, 2009, Basin Electric filed a request for the Commission to take action on Basin Electric's proposed rate modifications as originally filed on September 29, 2008, because the Parties were unsuccessful in their settlement negotiations.

Protest

11. Municipal Energy/Gillette object to the proposed revised tariff sheets in part because: (1) Basin Electric has not posted the new facilities on the Open Access Same-time Information System (OASIS); (2) the cost of Long-Term Debt does not recognize the Low-Cost Debt Financing provided by the Wyoming Infrastructure Authority for its Hughes Transmission Project;⁵ (3) the proposed ROE is excessive and flawed; (4) the cost of service information is inadequate; (5) the proposal does not include adequate formula rate monitoring protocols;⁶ (6) Basin Electric improperly uses what amounts to a net plant ratio to allocate general plant and A&G expenses; and (7) the proposal includes multiple timing mismatches that would yield unreasonable rates for Basin Electric's firm service.

12. Municipal Energy/Gillette assert that the facility additions to the Common Use System are not projected to be placed into effect until April 2009, at the earliest. Thus, they argue that until customers can benefit from the added capability, their rates should not be increased to reflect the costs of these facilities.

13. Municipal Energy/Gillette also argue that Basin Electric has not justified mixing formulaic and stated rate concepts. They point out that Basin Electric proposes a hybrid approach of filing a true-up of its cost of service in 2010 based on costs incurred in 2009. They note that Basin Electric proposes to charge or credit customers the difference between actual and estimated costs, but the usual practice is to set a standard rate using a

⁵ Protest at 9. Basin Electric's proposed rate of return on the Hughes Transmission Project, \$2,882,621, represents one-third of the total projected increase in Basin Electric's Transmission Revenue Requirement.

⁶ Municipal Energy/Gillette argue that in addition to the true-up Basin Electric should provide for either discovery or formula-rate-type monitoring protocols applicable to its June 1, 2010 compliance filing. *Id.* at 28.

projected test year. They assert that the projections should be relied upon “if reasonable when made,” however different the actual results may turn out to be.⁷

14. Municipal Energy/Gillette request that the Commission suspend the proposed revisions for the maximum period allowed and establish hearing procedures to address the issues raised. Finally, they request consolidation of this docket with Docket No. ER08-1584-000, the Black Hills’ proposed rate revisions proceeding.

Answers

15. Basin Electric disagrees with the arguments that its rate filing should be rejected and states that the Commission will reject a filing only if it is so inconsistent with the Commission’s requirements that it is a “patent nullity.” Basin Electric argues that its rate proposal includes cost of service data⁸ and qualified witness testimony sufficient for the Commission and the intervenors to evaluate the reasonableness of the proposed rate increase.⁹

16. Basin Electric responds to Municipal Energy/Gillette’s concerns in the following manner: (1) since the cost of service reflects the costs of the entire year, no over-recovery of costs occurs in that year;¹⁰ (2) the argument that Basin Electric is required to post the new facilities on OASIS before rate recovery is allowed is inapposite;¹¹ (3) the new facilities are Network Upgrades since they pass on all five criteria of the *Mansfield*

⁷ *Id.* at 24-25.

⁸ Basin Electric points out that since it is not a public utility, it does not utilize the Commission’s Uniform System of Accounts and instead utilizes the Rural Services’ Uniform System of Accounts. It also points out that it provided cost of service for 2007 and projections of its costs for 2008 and 2009 and referenced its Rural Utilities Services’ Uniform System of Accounts Form 12. Basin Electric Answer at 5-6.

⁹ Basin Electric Answer at 4-5.

¹⁰ *Id.* at 7-8.

¹¹ Basin Electric Answer at 10, citing Protest at 5, citing *City of Vernon*, Opinion No 479, 111 FERC ¶ 61,092, *order on reh’g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh’g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006).

test¹² to determine whether an interconnection facility is part of the integrated transmission grid or a Transmission Owner Interconnection, and were implemented to address significant increases in regional load;¹³ (4) it is Commission policy to use labor ratios to allocate A&G, payroll taxes, materials and supplies, and Basin Electric has properly followed such precedent and, then, utilized net plant ratios to allocate these costs to separate transmission tariffs; (5) its proposed ROE is not excessive and Basin Electric should be allowed to rely on Black Hills' rate of return because, since it is a cooperative, it does not have the same rating system as an investor-owned utility, nor can an accurate proxy group be developed, and Basin Electric notes that it has relied on Black Hills' rate of return before without Commission rejection;¹⁴ and (6) Basin Electric should be able to update its cost of service based on actual costs, a process that Municipal Energy/Gillette can challenge in the 2010 compliance filing.¹⁵ Municipal Energy/Gillette reiterate their argument that the Commission should impose a maximum five-month suspension period.

Discussion

Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F. R. § 385.214 (2008), Black Hills' and Municipal Energy/Gillette's unopposed motions to intervene serve to make them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Basin Electric's and Municipal Energy/Gillette's answers because they have provided information that assisted us in our decision-making process.

Substantive Matters

Hearing and Settlement Judge Procedures

18. Basin Electric's proposed tariff sheets raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

¹² *Mansfield Municipal Electric Dept.*, Opinion No. 454, 97 FERC ¶ 61,134, at 61,613-14 (2001), *reh'g denied*, Opinion No. 454-A, 98 FERC ¶ 61,115 (2002) (*Mansfield*).

¹³ Basin Electric Answer at 12-14.

¹⁴ *Id.* at 18-19.

¹⁵ *Id.* at 20.

19. Our preliminary analysis indicates that Basin Electric's proposed tariff sheets have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Basin Electric's proposed tariff sheets for filing, suspend them for a nominal period, make them effective December 1, 2008, subject to refund, and set them for hearing and settlement judge procedures.

20. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁷ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

21. We will deny Municipal Energy/Gillette's request to consolidate this proceeding with the proceeding in Docket No. ER08-1584-000, concerning Black Hill's proposed revisions. Black Hills' proposed revisions were accepted by the Commission without suspension.¹⁸ Accordingly, since that proceeding has been resolved, Municipal Energy/Gillette's request for consolidation is moot.

¹⁶ 18 C.F.R. § 385.603 (2008).

¹⁷ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

¹⁸ See *Black Hills Power, Inc.*, 126 FERC ¶ 61,104 (2009).

The Commission orders:

(A) Basin Electric's proposed tariff sheets are hereby accepted for filing and suspended for a nominal period, to be effective December 1, 2008, as requested, subject to refund, as discussed in the body of this order.

(B) Municipal Energy/Gillette's request for consolidation is hereby denied.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning Basin Electric's proposed tariff sheets. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(E) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish

procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.