

145 FERC ¶ 61,043
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

PPL Montana, LLC

Docket No. EL12-62-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued October 15, 2013)

1. PPL Montana, LLC (PPL Montana) has filed a petition for a declaratory order (Petition) asking the Commission to interpret certain provisions of the project license for the Kerr Hydroelectric Project (License) related to mandated environmental costs that will largely determine the conveyance price PPL Montana may demand from the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes) for the sale of the hydroelectric facility in 2015. The License provides that, if there is a dispute between PPL Montana and the Tribes with respect to the Conveyance Price, the dispute will be resolved through arbitration.¹ However, the Petition asks the Commission to make several specific findings regarding the determination of the Conveyance Price.

2. In this order, the Commission finds that, as specified in the License, the Board of Arbitration (Board) is the appropriate entity to resolve disputes as to the Conveyance Price. This being the case, the Commission will not prejudge the Board's assessment of any questions of fact that may be presented to the Board by PPL Montana or the Tribes. However, as the determination of the Board does not affect the Commission's jurisdiction to resolve wholesale rate and associated accounting issues that may arise, we will provide guidance in this order as to the appropriate accounting for mandated environmental obligations under the License.

¹ The Kerr Hydroelectric Project License, FERC Project No. 5, was initially held by Montana Power Corporation (Montana Power) until 1999 when PPL Montana acquired the Kerr Hydroelectric Project and assumed the rights and obligations provided under the License, including future environmental mitigation payments. The Commission approved the transfer of License for the Kerr Project to PPL Montana in *Montana Power Company*, 88 FERC ¶ 62,010 (1999).

I. Background

3. On April 26, 2012, PPL Montana filed its Petition with the Commission. The Petition asks the Commission to interpret certain provisions of the License relating to the calculation of the Conveyance Price. PPL Montana states that Ordering Paragraph (C) of the License provides for a possible transfer of ownership of the Project to the Tribes, beginning in 2015, and prescribes a formula and a procedure for determination of the Conveyance Price to be paid to PPL Montana for such transfer of ownership. In essence, the calculation of the Conveyance Price is based on the net investment in the Kerr Hydroelectric Project as reflected in the licensee's books of account in accordance with the Commission's Uniform System of Accounts (USofA).² Additionally, as mentioned above, the License further provides that, if there is a dispute between PPL Montana and the Tribes with respect to the Conveyance Price, the dispute will be resolved through arbitration.

4. In its Petition, PPL Montana requests that the Commission determine whether PPL Montana's accounting treatment for environmental mitigation costs mandated under the

² Ordering Paragraph (C)(2) of the License defines the Conveyance Price as the sum of the following:

(a) the actual original cost of the project (including any additions and improvements thereto) less accumulated depreciation, as reflected in [Montana Power's] FERC accounts (as those accounts are maintained in accordance with routine Commission audit and compliance procedures), as of the Conveyance Date; (b) the original cost, less accumulated depreciation as of the Conveyance Date, of any automatic control equipment located at [Montana Power's] dispatch center and not included in (a) that is being used as of the time of conveyance to control the operation of the project and for which [Montana Power] has no other comparable need after the conveyance; (c)(i) the cost to [Montana Power] of replacing any communications facilities that are among the project works conveyed to the Tribes, but that are, in addition, used and useful in the operation of [Montana Power's] integrated system, minus (ii) the original cost, less accumulated depreciation, of such equipment to the extent included in (a) above; and (d) the original cost of any flooding rights or other interests in realty outside the project boundary which interests, at the Conveyance Date, are used and useful in the operation of the Project, remain effective at least until the termination of this joint license, and are assignable to the Tribes.

Montana Power Company, Confederated Salish and Kootenai Tribes of the Flathead Reservation, 32 FERC ¶ 61,070, at 61,181 (1985).

License is correct under the Commission's USofA and argues that questions as to its compliance with the requirements of the USofA are outside the scope of issues to be decided by the Board. PPL Montana emphasizes that it does not seek a Commission ruling with respect to any aspect of a past or future calculation of the Conveyance Price; rather, it requests an interpretation by the Commission of the meaning of Ordering Paragraph (C)(2) of the License.

5. PPL Montana argues that Ordering Paragraph (C)(2) of the License contemplates the inclusion in the calculation of the Conveyance Price of the net unamortized capitalized value of a stream of environmental mitigation payments required under the License, to the extent that such net value (i) has been properly accounted for pursuant to the USofA, and (ii) has not been recovered from the customers of Montana Power. These License Articles governing environmental mitigation payments³ were created by the 1985 settlement agreement between the Tribes, the Secretary of the Interior, and Montana Power.⁴

6. PPL Montana explains that Montana Power recorded the environmental costs as intangible assets at the net present value of the stream of payments, and because they benefited the project over the entire life of the License, they were and continue to be amortized to expense ratably over the remaining term of the License. PPL Montana states that its estimate of the Conveyance Price reflects the remaining unamortized net present value of the environmental obligations as of the 30th anniversary of the License.

II. Notice of Filing and Responsive Pleadings

7. Notice of PPL Montana's April 26, 2012 filing was published in the *Federal Register*, 77 Fed. Reg. 27,450-51 (2012), with interventions or protests due on or before May 28, 2012. In a public notice issued on May 23, 2012, the Commission extended the date for such filings until June 22, 2012. In response to the Petition, the United States Department of the Interior, through the Bureau of Indian Affairs (Bureau), filed a notice of intervention, and the Tribes filed a timely motion to intervene. In addition, the Tribes filed a timely answer opposing the Petition and the Bureau filed timely comments supporting the Tribes' position. On July 23, 2012, PPL Montana filed an answer to the Tribes' answer, which the Tribes answered on August 7, 2012.

³ The relevant provisions are License Articles 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, and 76. These License Articles require payments to be made for the protection, mitigation, and enhancement of fish and wildlife.

⁴ An initial 50-year license to construct and operate the Kerr Hydroelectric Project, a three-unit hydroelectric project, was issued by the Commission to the Rocky Mountain Power Company (a subsidiary of Montana Power).

8. On October 18, 2012, the Tribes filed a notice of the parties' dispute before the Board with the Commission. The notice related that the Tribes had taken the dispute over the conveyance price to the Board for arbitration. PPL Montana filed an answer to the notice on October 23, 2012. PPL Montana's answer objected that the Tribes should have continued negotiations rather than bringing the dispute to the Board. On November 2, 2012, the Tribes filed an update to its notice of dispute, which was answered by the Bureau on November 8, 2012, and by PPL Montana on November 27, 2012 and January 22, 2013.

9. On July 22, 2013, PPL Montana filed a motion to lodge the Opinion and Order issued on July 17, 2013 by the American Arbitration Association panel presiding over proceedings in AAA No. 77-198-000416-12 (July 2013 AAA Opinion), as well as pleadings underlying the Opinion. On August 6, 2013, the Tribes and the Bureau filed answers to the Motion to Lodge.

A. Responses to the Petition

10. In their June 22, 2012 response to the Petition, the Tribes dispute PPL Montana's claim that costs associated with implementing environmental mitigation costs required under License Articles may be included within the Conveyance Price of the project as provided in the License. The Tribes assert that the Fish and Wildlife License Articles, which originate from the Department of Interior, attempt to mitigate the enormous irreparable harm to the Tribes' Reservation caused by PPL Montana's and Montana Power's operation over the last 85 years of the project.⁵ The Tribes maintain that the proposition that the Tribes must reimburse PPL Montana for Montana Power's and PPL Montana's costs associated with this mitigation is both contrary to the plain language of the License and unconscionable.⁶

11. The Tribes characterize PPL Montana's declaratory request as an attempt to shield Montana Power's and PPL Montana's accounting practices and costs included within the Estimated Conveyance Price from any meaningful review in the upcoming arbitration by the Board to establish the Conveyance Price of the Project.⁷ The Tribes state that the plain language of the License expressly allows the Board to establish the Estimated Conveyance Price. The Tribes state that the License clearly allows the Board to review whether certain Montana Power and PPL Montana costs are within the definition of the "actual original cost of the project (including any additions and improvements thereto),"

⁵ The Tribes' June 22, 2012 Answer at 4.

⁶ *Id.*

⁷ *Id.* at 2.

which in turn will require the Board to interpret and apply the USofA.⁸ The Tribes argue that PPL Montana's Petition represents an impermissible collateral attack on the 1985 License order by attempting to redefine the role of the Board.⁹ Further, they argue that the doctrine of primary jurisdiction has no bearing upon whether the Board can apply the USofA when determining whether PPL Montana's and Montana Power's costs are properly included within the Conveyance Price.¹⁰ The Tribes also ask the Commission to deny the request in the Petition to declare certain costs associated with the License are properly included in the Conveyance Price, because PPL Montana failed to provide adequate documentation substantiating these costs.¹¹

12. The Bureau states that, if the Commission decides to address the merits, it should issue an order finding that none of the costs actually incurred and associated with implementation of the Fish and Wildlife License Articles may be included within the Conveyance Price. It asserts that, although the costs associated with implementation of these Articles are well-documented, none of these costs should be included in the Conveyance Price. It argues that these costs should not be included in the Conveyance Price because (1) they are operating expenses and, as such, there is no basis under the USofA standards to capitalize them, (2) documents from the Montana Public Service Commission show that Montana Power already completely recovered its Fish and Wildlife License Article costs through a Montana restructuring transition plan, and from ratepayers, and (3) the costs have been fully depreciated by PPL Montana.¹² The Bureau further argues that the mitigation costs were designed to mitigate the enormous irreparable damage caused by Montana Power and PPL Montana operating the project over the past 85 years. To make the Tribes pay to reimburse this is both contrary to the license language and unconscionable.¹³ The Bureau also requests that the Commission order PPL Montana to produce evidentiary proof for its claims and, absent such proof, its claims should be denied.¹⁴

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² Bureau's June 22, 2012 Response to Petition at 4.

¹³ *Id.*

¹⁴ *Id.*

B. Answers

13. PPL Montana reiterates its contention that the parties' primary disagreement is over the accounting treatment under the USofA for environmental mitigation costs required by the License and their inclusion in the Conveyance Price. PPL Montana argues that its estimate is consistent with the License and the USofA with respect to costs of environmental remediation mandated by the License. PPL Montana contends that Montana Power properly accounted for these costs on an accrual basis. Also, PPL Montana asserts that the recognition of the liability and asset on a present value basis is appropriate under the USofA because the items being measured involve payments to be made over future periods.

14. PPL Montana argues that General Instruction (GI) No. 11, *Accounting to be on Accrual Basis*, of the USofA requires the use of the accrual basis of accounting and "[i]ts effect is pervasive, governing the accounting for all transactions, events and circumstances including those related to utility plant."¹⁵ PPL Montana argues that it is generally recognized by the accounting profession that present value based measurements should be used for recognition of assets and liabilities involving future payment streams, and that there is nothing in the Commission's USofA that prohibits the use of present value based measurements.

15. In response, the Tribes maintain that PPL Montana erroneously estimated the Conveyance Price, and that while accrual accounting may generally be appropriate, it is not correctly applied here because the recording of this liability does not create an asset that is eligible for inclusion as a component of the actual original cost of the Project.

C. Motion to Lodge and Responses

16. In its July 22, 2013 motion, PPL Montana moves to lodge the July 2013 AAA Opinion, as well as pleadings underlying the Opinion.¹⁶ PPL Montana's Motion to Lodge notifies the Commission that the Board plans to issue an order by March 5, 2014 making a determination of the conveyance price. PPL Montana requests that the Commission act on the Petition by October 15, 2013 and grant both its Motion to Lodge and the relief requested in its Petition or, alternatively, toll the arbitration deadlines so that arbitrator can defer acting on the dispute until after the Commission acts on the Petition.

17. The Tribes' response to the motion states that they do not object to the motion to lodge the Board's order, but they strongly oppose PPL Montana's other requests. The

¹⁵ PPL Montana's July 23, 2012 Answer at 14.

¹⁶ Motion to Lodge at 1 & n.2.

Tribes state that there is no reason or justification at this time for the Commission to substantially re-involve itself in the determination of the price to be paid for the Kerr Project by the Tribes, especially in light of the substantial expertise of the three members of the Arbitration Panel now sitting, nor, they argue, is there a need for the Commission to modify the License's schedule for completion of the Conveyance Price Arbitration.

18. In addition, the Bureau's answer to the motion urges the Commission to allow the arbitration process to continue consistent with the Joint (Proposed) Scheduling Order attached to the July 2013 AAA Opinion. It argues that this schedule will allow for the Conveyance Price to be established and the Project to be transferred to the Tribes consistent with the amended license and settlement agreements.

III. Discussion

A. Procedural Issues

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and timely, unopposed motion to intervene serve to make the entities that filed them parties to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the parties' answers because they have provided information that assisted us in our decision-making process.

B. Substantive Issues

21. As conceded by PPL Montana, the project license specifically states that, if there is a dispute between PPL Montana and the Tribes with respect to the Conveyance Price, that dispute will be resolved through arbitration before the Board. This being the case, the Commission will not impede the ability of the Board to make such a determination by prejudging questions of fact presented to the Board by the opposing parties. However, the Commission finds it would be appropriate to provide guidance on the Commission's accounting requirements under the USofA for mandated environmental obligations under the License.

22. GI No. 11 requires utilities and licensees to keep their accounts on the accrual basis, which provides for the recognition of all known transactions of appreciable amount. Where the items being measured involve mandatory payments to be made over future periods it may be appropriate to recognize a liability on a present value basis. PPL Montana explains that it recognizes a liability and a corresponding asset for the present value of environmental mitigation payments required to be made by the licensee over the 50 year license term ending in 2035. However, we note that PPL Montana's obligation for environmental mitigation payments will cease to exist upon the conveyance of the

Kerr Hydroelectric Project to the Tribes in 2015. Accordingly, there is no underlying basis for PPL Montana to recognize a liability for future environmental obligations it will not be obligated to pay.

23. GI No. 11 also requires adjustments to a previously recorded liability when additional information is received.¹⁷ Since it is known that the Tribes will acquire the Kerr Hydroelectric Project in 2015, releasing PPL Montana from subsequent environmental mitigation obligations, it is inappropriate under the USofA for PPL Montana to continue to recognize a liability for obligations from which it will be released. This being the case, the environmental liability and corresponding asset should be eliminated from PPL Montana's books upon the conveyance of the Kerr Hydroelectric Project.

24. Finally, we will grant PPL Montana's unopposed Motion to Lodge and will include the July 2013 AAA Opinion, as well as the pleadings underlying that order, as part of the record of this proceeding. However, for the reasons explained above, we decline to direct the tolling of the arbitration deadlines in Ordering Paragraph (C) of the License. Our determinations here make no revisions to the License or to the 1985 Settlement.

25. While, by this order, we are granting PPL Montana's request that we act on its Petition and on its Motion to Lodge by October 15, 2013, we leave the determination of the Conveyance Price to the Board and make no findings of fact which are the Board's to assess in determining the proper Conveyance Price. To the extent our guidance on the Commission's accounting requirements is inconsistent with that sought in the Petition, the Petition is denied in that respect.

¹⁷ "If bills covering . . . transactions have not been received or rendered, the accrued amounts shall be estimated and appropriate adjustments made when the bills are received." 18 C.F.R. Part 101, GI No. 11 (2013). The implementation of the accounting requirements under the License here presents a like circumstance where the accrual approach, without adjustment, would work an unjust and unreasonable result.

The Commission orders:

PPL Montana's Petition and Motion to Lodge are granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.