

147 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Delmarva Power and Light Company

Docket Nos. ER05-515-000
ER09-1158-000

ORDER ON FORMAL CHALLENGE AND MOTION FOR CONSOLIDATION

(Issued April 8, 2014)

1. On May 15, 2013, pursuant to the terms of a 2006 settlement (Settlement)¹ and the governing provisions of the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (OATT), Delmarva Power & Light Company (Delmarva) made an informational filing with the Commission detailing Delmarva's computation of its 2013 formula transmission rate (2013 Annual Update). On December 12, 2013, Delaware Municipal Electric Corporation, Inc. (Delaware Municipal) filed a Formal Challenge (2013 Formal Challenge), pursuant to the Formula Rate Implementation Protocols (Protocols), disputing certain aspects of Delmarva's filing. Along with the 2013 Formal Challenge, Delaware Municipal filed a motion to consolidate Delmarva's 2013 Annual Update with the ongoing proceeding on the 2011 and 2012 Annual Updates (Motion to Consolidate). As discussed below, we set the issues raised in the 2013 Formal Challenge and Motion to Consolidate for hearing and settlement judge procedures.

I. Background

A. The Formula Rate

2. On January 31, 2005, in Docket No. ER05-515-000, Delmarva² filed proposed formula rates for recovery of its transmission service revenue requirements.³ On

¹ See *Balt. Gas and Elec. Co.*, 115 FERC ¶ 61,066 (2006).

² Delmarva and Atlantic City Electric Company are subsidiaries of Connectiv, LLC, which is a wholly-owned subsidiary of Pepco Holdings, Inc. (PHI).

³ *Allegheny Power Sys. Operating Cos.*, 111 FERC ¶ 61,308 (2005).

April 19, 2006, the Commission approved Delmarva's Formula Rate as part of an uncontested Settlement.⁴

3. The Settlement delineates the process for determining transmission rates and cost recovery within the Delmarva transmission zone. Pursuant to the Settlement, Delmarva utilizes a Formula Rate set forth in Attachment H-3 of the PJM OATT to calculate its Annual Transmission Revenue Requirement (ATRR). The Formula Rate consists of a template that is populated using Delmarva's FERC Form No. 1 data for the most recent calendar year and other per book costs and revenues "consistent with FERC accounting policy," as explained more fully below.⁵

B. The Protocols

4. Delmarva's Protocols establish the legal framework for the development and review of the Formula Rates. Delmarva's Protocols were approved as part of a Settlement Agreement in *Baltimore Gas and Electric Co.*⁶ Pursuant to the Protocols, Delmarva annually submits its initial calculations for informal review by interested parties, and then files the results with the Commission as an informational filing (Annual Update). Section 1 of the Protocols requires Delmarva to recalculate its ATRR and produce an Annual Update on or before May 15 of each year to be effective on and after June 1 of a given calendar year through May 31 of the subsequent year (Rate Year). Any interested party has a Review Period of up to 150 days after the filing to notify Delmarva of any specific challenges to Delmarva's application of the Formula Rate (Preliminary Challenge).⁷ If any Preliminary Challenge has not been resolved within 21 days after the Review Period, any interested party has an additional 21 days to make a Formal Challenge with the Commission.⁸ The Protocols state that the Annual Update shall be subject to challenge and review only in accordance with the procedures set forth in Attachment H-3E and only as to the appropriateness of the application of the Formula

⁴ *Balt. Gas and Elec. Co.*, 115 FERC ¶ 61,066 at P 2.

⁵ See PJM OATT, Attachment H-3E, Protocols, § 1(f)(i).

⁶ 115 FERC ¶ 61,066. Delaware Municipal is one of the original settling parties to this Settlement where the Protocols were negotiated and approved. See Settlement Agreement and Offer of Settlement, Docket No. ER05-515-000, Ex. A, at 2 (filed Mar. 20, 2006).

⁷ PJM OATT, Attachment H-3E, Protocols § 2(a).

⁸ PJM OATT, Attachment H-3E, Protocols § 3(a).

Rate according to its terms and procedures in Attachment H-3E (including terms and procedures related to challenges concerning Material Accounting Changes).”⁹

5. Additionally, interested parties may submit information requests to Delmarva “limited to what is necessary to determine whether [Delmarva] has properly applied the Formula Rate and the procedures in this Attachment H-3E, and shall not otherwise be directed to ascertaining whether the Formula Rate is just and reasonable.”¹⁰ The Protocols also provide that “such information requests shall not solicit information concerning costs or allocations where the cost or allocation method may have been determined by the Settlement or in the context of other Annual Updates, except that such information requests shall be permitted if they seek to determine if there has been a material change in circumstances.”¹¹

6. The Protocols also establish the burden of proof in a Formal Challenge filed with the Commission, stating:

Except as provided in Section 2.e, . . . [Delmarva] shall bear the burden of proving that it has reasonably applied the terms of the Formula Rate, and the applicable procedures in these Formula Rate Implementation Protocols, in that year’s Annual Update.¹²

7. The Protocols also establish the finality of each Annual Update:

Subject to judicial review of FERC orders, each Annual Update shall become final and no longer subject to challenge pursuant to these Annual Review Protocols 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) day period (or extended period, if applicable) for making a Formal Challenge if no such challenge has been made and the FERC has not initiated a proceeding to consider the Annual Update, or (ii) a final FERC order issued in response to a Formal Challenge or a proceeding initiated by the FERC to consider the Annual Update.¹³

⁹ *Id.* § 1(f)(iv).

¹⁰ *Id.* § 2(b).

¹¹ *Id.*

¹² *Id.* § 3(c).

¹³ *Id.* § 3(d).

C. Procedural History

8. On May 13, 2011, pursuant to the terms of the 2006 Settlement and the governing provisions of the PJM OATT, Delmarva made an informational filing with the Commission detailing Delmarva's computation of its 2011 Formula Transmission Rate (2011 Annual Update). On December 2, 2011, the Delaware Municipal filed a Formal Challenge (2011 Formal Challenge) pursuant to the Protocols, disputing certain aspects of Delmarva's filing. On May 14, 2012, Delmarva made an informational filing with the Commission detailing Delmarva's computation of its 2012 Formula Transmission Rate (2012 Annual Update). On December 17, 2012, Delaware Municipal filed a Formal Challenge (2012 Formal Challenge) to Delmarva's 2012 Annual Update.

9. The Commission addressed the above filings in this docket in *Delmarva Power and Light Co.*¹⁴ The October 2013 Order granted in part and rejected in part the 2011 and 2012 Formal Challenges and set for hearing and settlement judge procedures the 2011 and 2012 Annual Updates.

D. 2013 Formal Challenge and Answers

10. On May 15, 2013, Delmarva submitted its 2013 Annual Update with the Commission. On December 12, 2013, Delaware Municipal filed a Formal Challenge (the 2013 Formal Challenge) .

11. In the 2013 Formal Challenge, Delaware Municipal raises twelve issues that we briefly summarize below:

Issue No. 1. – Prepaid Taxes. Delaware Municipal challenges rate base inclusion of \$10 million that Delmarva paid to the Internal Revenue Service related to a 2003 potential tax liability that Delmarva is disputing;

Issue No. 2. – Net Operating Losses. Delaware Municipal challenges rate base inclusion of \$86.4 million of deferred income taxes related to asserted Delmarva tax net operating losses;

Issue No. 3. – Loss on Reacquired Debt. Delaware Municipal asserts that Delmarva has not reduced the amount of the loss on reacquired debt used in determining Delmarva's weighted cost of capital by related deferred income taxes;

Issue No. 4. – Prepaid Pensions. Delaware Municipal challenges the amount included in rate base for Delmarva's contributions to its prepaid pensions;

¹⁴ 145 FERC ¶ 61,055 (2013) (October 2013 Order).

Issue No. 5. – Rate Base Reductions. Delaware Municipal asserts that Delmarva should have reduced rate base by the balances in two accrued liability accounts (Accrued Liability Vacation and Accrued Liability Vendors);

Issue No. 6. – Mid-Atlantic Power Pathway (or MAPP) Costs. Delaware Municipal challenges Delmarva’s inclusion of MAPP construction work in progress costs in rate base;

Issue No. 7. – PHI Service Company (Service Company) ¹⁵ Regulatory Expenses. Delaware Municipal challenges Delmarva’s inclusion of Service Company regulatory affairs expenses in Delmarva’s transmission ATTR;

Issue No. 8. – Service Company A&G Costs. Delaware Municipal challenges Delmarva’s recovery of increased amounts of certain Service Company administrative & general expenses;

Issue No. 9. – Service Company Allocation Factors. Delaware Municipal challenges the allocation factors used to allocate Service Company human resources and payroll accounting services to Delmarva;

Issue No. 10. – Retail Service Expenses. Delaware Municipal challenges Delmarva’s inclusion of asserted retail service related expense in Delmarva’s ATTR;

Issue No. 11. – Equity Capital. Delaware Municipal challenges Delmarva’s inclusion of \$60 million contribution by PHI and \$8 million of goodwill as equity capital;

Issue No. 12. – Other Rate Base Items: Delaware Municipal challenges Delmarva’s addition to rate base of amounts related to Delmarva’s under – recovery of its formula rates and PJM member defaults. Delaware Municipal also challenges Delmarva’s failure to reduce rate base for collections of property insurance and employee pensions and benefits.

12. Delaware Municipal asserts that all issues are in common with those that have been set for hearing and settlement procedures by the October 2013 Order, except for Issues 3, 9, and 11, which they state are new in the 2013 Formal Challenge.¹⁶

¹⁵ PHI Service Company, a subsidiary service company of PHI, provides a variety of support services, including legal, accounting, treasury, tax, purchasing and information technology services, to PHI and its operating subsidiaries.

¹⁶ Delaware Municipal 2013 Formal Challenge at 35.

13. On January 13, 2014, Delmarva filed an answer to the 2013 Formal Challenge (Delmarva Answer). Delmarva requests that the Commission summarily dispose of the issues the 2013 Formal Challenge raises, or, in the alternative, set the issues for hearing and settlement procedures.¹⁷ Delmarva asserts that Delaware Municipal's renewal of its prior challenges is without merit and summary disposition in favor of Delaware Municipal is unwarranted. Delmarva argues that several of the issues that Delaware Municipal claims renew prior challenges are, in reality, new challenges, are without merit, and should be rejected. Delmarva notes that the Commission's October 2013 Order summarily rejected several of the issues that Delaware Municipal raised in its 2011 and 2012 Formal Challenges and should do so in the 2013 Formal Challenge with respect to the new issues raised. However, to the extent that the issues presented are similar to the 2011 and 2012 Formal Challenges, Delmarva states it has no objection to consolidating those issues of the 2013 Formal Challenge with the existing proceedings.¹⁸

14. On January 28, 2014, Delaware Municipal filed a motion for leave to respond and a response to the Delmarva Answer. Delaware Municipal states that Issue No. 3 above was resolved by the Delmarva Answer.¹⁹ Delaware Municipal contends however that Delmarva's positions on the other issues are misguided and consolidation would promote administrative efficiency to the extent the issues are not summarily resolved in Delaware Municipal's favor.²⁰

II. Commission Determination

15. We find that the 2013 Formal Challenge raises issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in a trial-type, evidentiary hearing and settlement judge procedures. While the 2013 Formal Challenge presents many similar facts and arguments at issue in the existing proceedings covering the 2011 and 2012 Annual Updates and Formal Challenges, we do not have enough information regarding the current hearing process to determine if the proceedings would be more efficient if consolidated. Therefore, we set the issues of the 2013 Formal Challenge and Motion to Consolidate for hearing and settlement judge procedures, as ordered below. The Administrative Law Judge reviewing the 2011 and 2012 challenges, along with the Chief Administrative Law Judge, can determine whether to consolidate the proceedings.

¹⁷ Delmarva January 13, 2014 Answer at 58.

¹⁸ *Id.* at 2-3.

¹⁹ Delaware Municipal January 28, 2014 Answer at 3-4.

²⁰ *Id.* at 3.

16. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes 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.²¹ 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.²² The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order 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.

The Commission orders:

(A) 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 Delmarva's 2013 Annual Update and motion to consolidate Delmarva's 2013 Annual Update with the ongoing proceeding on the 2011 and 2012 Annual Updates. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 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 5 days of the date of this order.

(C) Within thirty (30) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement

²¹ 18 C.F.R. § 385.603 (2013).

²² 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).

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 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) 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 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, NE, 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.