

qualified decommissioning trust to DEK for decommissioning,³ and refunding to the customers of WPSC and WP&L the value of the non-qualified decommissioning trust.⁴ Since the section 203 application did not specify the details of the refund plan, the Commission directed the applicants to submit appropriate section 205 filings to implement their refund plan.

3. During an inspection by the NRC, a new set of assumptions was defined to evaluate Kewaunee Plant's auxiliary feedwater pump system. Based on these new assumptions it was determined that the pump system would be inoperable if other systems failed. Consequently, the plant was shut-down February 20, 2005, to complete modifications to the pump system. The unplanned outage had to be resolved to close the sale, and required commitments to the NRC that will cause DEK to incur material costs after the closing of the sale, likely resulting in a loss on the sale of the Kewaunee Plant by WPSC.⁵ Further, as a result of the outage, WPSC experienced significant additional costs.

II. WPSC's Filings

A. Deferred accounting filing

4. On May 5, 2005, WPSC submitted an accounting letter, in Docket No. AC05-54-000, providing notice to the Commission of its intention to use deferred accounting for certain incremental costs incurred in connection with the unplanned outage at the Kewaunee Plant. WPSC stated that it intends to use Account 182.3 (Other Regulatory Assets) to record the outage costs incurred between February 20, 2005, and the date it completes modifications to the plant.⁶ WPSC states that these costs include, but are not limited to, incremental costs related to: operation and maintenance expenses; replacement power; fossil fuel; additional training and oversight of plant operators; review of other Kewaunee Plant systems for vulnerabilities; compliance with certain

³ WPSC states that the Nuclear Regulatory Commission (NRC), in an order dated June 10, 2004, found that the funds in the qualified decommissioning trust were sufficient for NRC requirements.

⁴ Payments to a qualified decommissioning trust are tax deductible in the year collected. 26 U.S.C. § 468A. Remaining monies collected during the year, which are not eligible for tax deduction, are deposited into a non-qualified decommissioning trust.

⁵ WPSC states that at this time it does not have the actual data to calculate the net gain or loss from the Kewaunee Plant as determined under the Asset Sale Agreement.

⁶ WPSC has received authorization to defer the incremental operation and maintenance costs and the fuel component of the outage costs from the Wisconsin Commission. See letter orders issued by the Wisconsin Commission on March 15, 2005, and April 8, 2005, in Docket No. 05-GF-149.

commitments made to the NRC; and key operator actions. WPSC estimates that it will incur approximately \$35-45 million of outage costs, which largely consist of replacement power costs. WPSC also indicates that it intends to apply carrying charges to the outage costs at the pre-tax weighted cost of capital. WPSC states that it will make the appropriate section 205 filings to obtain cost recovery through its rates subject to the Commission's jurisdiction. It further states that at that time the Commission would determine whether the costs were actually and prudently incurred, the appropriate method of recovery, and whether the recovery is just and reasonable.

B. Section 205 filing

5. On June 7, 2005, WPSC filed a refund plan pursuant to FPA section 205 concerning the impact of its sale of the Kewaunee Plant on its cost-based wholesale rates. WPSC explains that it proposes to create a net regulatory liability consisting of the refunds to customers from the value of the non-qualified decommissioning trust,⁷ offset by (1) the likely net loss on the sale of the Kewaunee Plant and (2) the Kewaunee Plant-related outage costs (June 7 Filing).⁸ WPSC plans to amortize the regulatory liability over five years from the effective date as a credit to wholesale customer bills.⁹

6. WPSC requests a joint cooperative proceeding between the Commission and the Wisconsin Commission to ensure that all remaining affected customer classes receive a fair share of the net regulatory liability related to the sale of the Kewaunee Plant.¹⁰ WPSC also requests authorization to create the net regulatory liability related to the value of the non-qualified decommissioning trust, less both the likely loss on the sale of the

⁷ In the June 7 Filing, WPSC states the expected value of the non-qualified decommissioning trust is approximately \$127 million.

⁸ In the June 7 Filing, WPSC states that it cannot provide an exact computation until the ongoing outage of the Kewaunee Plant is resolved and the sale of the plant to DEK has been consummated. June 7 Filing, Transmittal Letter at 2; *see also* June 7 Filing at 8 (“[T]he actual data, when available through the Supplemental Filing, will not affect the details of the Wind-Up Plan.”).

⁹ WPSC requests that the Commission grant waiver of notice to permit the same effective date as established in the Wisconsin Commission's order in Docket No. 6690-UR-117, expected to be January 1, 2006. WPSC states that the Wisconsin Commission order deals with WPSC's retail rates for test year 2006 which will be affected by the refund plan.

¹⁰ WPSC notes that the Michigan Public Service Commission has already determined the allocation to Michigan retail customers to be approximately 1.97 percent of the non-qualified decommissioning trust. Under WPSC's proposal, the Michigan retail customers are exempt from the deferred outage costs.

Kewaunee Plant and the deferred outage costs.¹¹ Further, WPSC requests approval of its proposed refund of the net regulatory liabilities associated with each customer class over a five-year period.¹² WPSC also proposes commingling the net regulatory liability and associated deferred income taxes for each customer class with WPSC's operating funds and reducing its rate base by the amount of the unamortized balance for each net regulatory liability.

III. Notice and Responsive Pleadings

7. Notice of the accounting filing was published in the *Federal Register*, 70 Fed. Reg. 32,318 (2005), with motions to intervene and protests due on or before June 8, 2005. A timely motion to intervene and comments was filed by Wisconsin Public Power, Inc. (WPPI). A timely motion to intervene and protest was filed by the Algoma Group. On June 17, 2005, WPSC filed an answer to the Algoma Group's protest.

8. Notice of the section 205 filing was published in the *Federal Register*, 70 Fed. Reg. 35,419 (2005), with interventions or protests due on or before June 28, 2005. Citizens Utility Board of Wisconsin filed a timely motion to intervene. WPPI and Algoma Group¹³ filed timely motions to intervene and protests. American Transmission Company LLC filed a motion to intervene out-of-time. The City of Wisconsin Rapids, Wisconsin (Wisconsin Rapids) filed a motion to intervene out-of-time and protest.

9. On July 13, 2005, WPSC filed in both proceedings an answer to the protests. On July 25, 2005, the Algoma Group filed a motion to strike WPSC's answer and motion to accept reply and conditional reply.

A. Unbundling of refunds and offsets

¹¹ WPSC states that the billing for the net regulatory liability will need to be based on estimates subject to a true-up pending completion of all regulatory proceedings and the development of actual data relative to the various regulatory liability components. WPSC states that it will file a supplemental filing with actual data related to the net regulatory liability. *See supra* note 8.

¹² WPSC proposes to allocate approximately 95.6 percent of the refund and likely loss on the sale of the plant to the Wisconsin retail customers and certain other customers taking market-based rate requirements service, approximately 1.97 percent to Michigan retail customers, and the remaining 2.39 percent to FERC tariff customers. With respect to the deferred outage costs, WPSC proposes to use similar percentage allocations with an adjustment to recognize that Michigan retail customers are not liable for deferred outage costs.

¹³ The Algoma Group includes the cities of Manitowoc, Marshfield, and Stratford, Wisconsin, the Badger Power Marketing Authority, the Alger Delta Cooperative Electric Association, and the Washington Island Electric Cooperative.

10. The Algoma Group argues that the refund of the non-qualified decommissioning trust should be unbundled from the offsets, including the deferred outage costs and the likely net loss on the sale, and should be treated as separate items so that the practical effects of WPSC's proposal can be seen. WPPI states that, with WPSC's bundling of the refunds and offsets, WPPI may have to pay for the replacement power costs incurred in 2005 when it receives its refunds. WPPI argues that the deferred outage costs, which consist chiefly of replacement power costs and incremental operation and maintenance costs, are not contractually or fairly chargeable to WPPI. WPPI states that it is not a WPSC customer in 2005, and does not anticipate being one before May 2006; therefore, the replacement power costs are not being incurred to serve WPPI. WPPI also states that it is not clear that the remaining outage costs are properly allocable to the cost of providing service to WPPI, because they are being incurred so that DEK can operate the plant once it is transferred.

B. Deferral of outage costs

11. In Docket No. AC05-54-000, WPPI states that it does not oppose WPSC's deferred accounting treatment as an accounting matter, provided such treatment does not control or prejudice ratemaking. WPPI recommends that the Commission expressly state that such approval is "for accounting purposes only," assuming the Commission approves or accepts the accounting filing.

12. In response to the section 205 filing, the Algoma Group states that there is no legitimate reason to defer the outage costs for wholesale customers, even though WPSC received authority for deferred accounting treatment with respect to its Wisconsin retail rates.¹⁴ The Algoma Group states that, since wholesale and retail customers are treated differently with respect to their rates,¹⁵ there is no basis for employing an accounting mechanism to treat those customers consistently with respect to outage costs. Moreover, the Algoma Group avers that WPSC is already passing through the outage costs via WPSC's wholesale formula rates. The Algoma Group states that deferring such costs will create accounting and billing problems because the amounts previously included in the WPSC's wholesale formula rates and the Algoma Group's retail rates will have to be refunded before they can be deferred and charged later.

13. Even if the Commission permits the outage costs to be deferred, the Algoma Group contends that the Commission should reject the inclusion of these deferred costs in

¹⁴ The Algoma Group raised similar concerns in the accounting filing in Docket No. AC05-54-000.

¹⁵ The Algoma Group states that wholesale customers are subject to formula rates, while Wisconsin retail customers have stated rates.

rate base because the costs should be passed through the wholesale formula rates to customers. The Algoma Group states that accounting tools may not dictate ratemaking. Deferring such outage costs with rate base treatment of the unamortized amount will increase the costs to wholesale customers over what the costs would have been if the costs were passed through the formula as incurred by WPSC, according to the Algoma Group. The Algoma Group maintains that inclusion of the unamortized outage costs in rate base potentially would allow WPSC to evade the rate cap protection previously agreed upon by the parties.

C. Loss on the sale

14. WPPI and the Algoma Group argue that the loss on the sale should be borne by the shareholders instead of the ratepayers as an offset to the non-qualified decommissioning trust. The Algoma Group argues that the utility's cost of capital includes a risk premium, and now that one of the risks is being realized, the customers should not have to pay again when the shareholders have accepted the risk in exchange for a higher rate of return. The Algoma Group states that WPSC has not supported its proposed allocation of the loss. The Algoma Group further states that whether the losses should be shifted to ratepayers at all, and, if so, to what extent, are factual questions that need to be developed in a hearing.¹⁶

D. Disbursement of refund

15. WPPI and the Algoma Group contest WPSC's use of a five-year amortization period for refunding the non-qualified decommissioning trust to wholesale customers. WPPI states that it understands a lump-sum disbursement might not be feasible for retail customers given the large number of retail customers and the intergenerational equity issues. However, WPPI states that a lump-sum disbursement may be possible for wholesale customers since there are many fewer wholesale customers who purchased substantial power from the Kewaunee Plant under cost-based arrangements that included decommissioning fund contributions.¹⁷ The Algoma Group argues that the five-year amortization is unfair to long-term customers whose power arrangements with WPSC will end prior to the end of the amortization period, and because new customers who have not paid any decommissioning funds will receive a refund. The Algoma Group also argues that WPSC, which will have access to the funds when the sale closes, should not

¹⁶ WPPI contends that a complete answer to this question requires reference to the Asset Sale Agreement, and thus requires the discovery rights that attend a hearing and which are commonly afforded by settlement judges.

¹⁷ The Algoma Group notes that WPSC has already liquidated its non-qualified decommissioning trust and would have the funds available to make lump-sum refunds.

benefit by holding those funds from its customers over an amortization period that will undermine an equitable apportionment of the refunds.¹⁸

E. Joint proceeding

16. WPPI does not oppose the joint proceeding as long as the litigation is conducted on the record with WPPI's full participation. But WPPI states that the wholesale-level issues should be settled under the auspices of a Commission settlement judge.

IV. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant the unopposed motions to intervene out-of-time filed by American Transmission Company LLC and Wisconsin Rapids given their interest in this proceeding, the early stage of this proceeding, and the absence of any undue prejudice or delay.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept WPSC's answers or the Algoma Group's reply, and will, therefore, reject them.

B. Commission Determination

1. Joint Proceeding Request

19. We will deny WPSC's request for a joint proceeding with the Wisconsin Commission. The issues in this proceeding do not rise to the level necessitating a federal-state joint proceeding. Proceedings concerning rates are regularly complex, commonly affect federal and state interest, and rarely require the Commission to institute a federal-state joint proceeding, because the state's interests can be pursued in other manners. For example, if the Wisconsin Commission was concerned about WPSC's filing, it could have filed a notice of intervention to participate in this proceeding as state commissions regularly do. Moreover, we note that the Wisconsin Commission has not requested a joint proceeding.

¹⁸ The Algoma Group lists additional issues that the Commission may need to address in a hearing, including the reasonableness of the customer classes proposed by WPSC and the percentage allocations of the refund.

2. Docket Nos. ER05-1089-000, AC05-54-000, and EL05-136-000

20. WPSC's proposed refund plan in Docket No. ER05-1089-000 raises issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. These material issues of fact include, but are not limited to: (1) the bundling of the refund and offsets; (2) the deferral of outage costs; (3) the risk of loss on the sale; and (4) the allocation of refunds to wholesale customers.

21. Our preliminary analysis indicates that WPSC's proposal has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we accept WPSC's proposed refund plan for filing, suspend it for a nominal period, make it effective January 1, 2006, or the date set by the relevant Wisconsin Commission order,¹⁹ as requested, subject to refund, and set it for hearing and settlement judge procedures. We direct WPSC to inform this Commission as to the actual effective date upon the issuance of the Wisconsin Commission's order.

22. With respect to WPSC's accounting treatment in Docket No. AC05-54-000, we note that WPSC's deferred accounting for the unplanned outage costs has impacted billings under its wholesale formula rates in earlier periods. In light of the concerns raised by parties and upon our review of WPSC's filing in Docket No. AC05-54-000, we will institute an investigation, under sections 206 and 301 of the FPA into the justness and reasonableness of WPSC's rates that are based on its deferred accounting treatment (as set forth in Docket No. AC05-54-000) and will establish a refund effective date.²⁰ In addition, because the investigation will involve issues of material fact, we will set the matter for a trial-type evidentiary hearing.

23. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the Commission's investigation in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with our precedent,²¹ we will establish a refund effective

¹⁹ We will grant waiver of the Commission's 120-day notice requirements to permit the requested effective date. 18 C.F.R. § 35.3(a) (2005).

²⁰ Just as the Commission can review and adjust prior inputs to a formula rate that ultimately may result in lower charges to customers, the Commission also can review and adjust prior inputs to a formula rate that may result in higher charges.

²¹ See, e.g., *PJM Interconnection, L.L.C.*, 90 FERC ¶ 61,137 (2000); *Cambridge*

date at the earliest date allowed. This date will be 60 days from the date on which notice of our investigation in Docket No. EL05-136-000 is published in the *Federal Register*.

24. Section 206 of the FPA also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. To implement that requirement, we will direct the presiding judge to provide a report to the Commission no later than 15 days in advance of the refund effective date in the event the presiding judge has not by that date: (1) certified to the Commission a settlement which, if accepted, would dispose of the proceeding; or (2) issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of certification of a settlement or issuance of initial decision.

25. 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.²² 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.²³ The settlement judge shall report to the Chief Judge and the Commission within 60 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.

26. Finally, because there are common issues of law and fact, we will consolidate Docket No. EL05-136-000 with Docket Nos. ER05-1089-000 and AC05-54-000 for purposes of settlement, hearing, and decision.

The Commission orders:

Electric Light Co., 75 FERC ¶ 61,177, *clarified*, 76 FERC ¶ 61,020 (2005); *Canal Electric Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

²² 18 C.F.R. § 385.603 (2005).

²³ 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).

(A) WPSC's proposed refund plan is hereby accepted for filing, and suspended for a nominal period, to become effective January 1, 2006, or the date set by the Wisconsin Commission, as requested, subject to refund, as discussed in the body of this order.

(B) 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, 206, and 301 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), an investigation is hereby instituted in Docket No. EL05-136-000 concerning WPSC's rates that are based on its deferred accounting treatment (as set forth in Docket No. AC05-54-000), as discussed in the body of this order. The hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed below in paragraphs (E) and (F).

(C) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding ordered in ordering paragraph (B) above, under section 206 of the Federal Power Act, in Docket No. EL05-136-000.

(D) The refund effective date in Docket No. EL05-136-000, established pursuant to section 206(b) of the Federal Power Act, shall be sixty (60) days following publication in the *Federal Register* of the notice in ordering paragraph (C) above.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge (Chief Judge) is hereby directed to appoint a settlement judge in this proceeding ordered in ordering paragraph (B) above 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 in writing or by telephone within five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission 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.

(E) 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 conference in this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such 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)

Linda Mitry,
Deputy Secretary.