

141 FERC ¶ 61,150
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PacifiCorp

Docket No. ER12-36-000

ORDER ACCEPTING AGREEMENTS AND DIRECTING REFUNDS

(Issued November 20, 2012)

1. On October 4, 2011, as amended on January 19, 2012 and February 16, 2012, PacifiCorp submitted a filing containing proposed refund calculations in connection with two service agreements it entered into with Bonneville Power Administration (BPA) that were not filed in accordance with the Commission's filing requirements in effect at the time service commenced. In this order, the Commission accepts the service agreements and directs PacifiCorp to make refunds to BPA and to submit a refund report to the Commission.

I. Background

2. On May 28, 1999 and July 20, 2000, PacifiCorp entered into two "storage" agreements with BPA regarding energy generated by the Foote Creek II and Foote Creek IV facilities (collectively, the BPA Storage Agreements). PacifiCorp's October 4, 2011 filing includes the BPA Storage Agreements and time-value refunds that PacifiCorp proposes to pay to BPA in connection with the BPA Storage Agreements.

3. PacifiCorp explains that, in general, storage agreements provide for the supply of power by one party to another at one time and the return of such power at a later date. PacifiCorp further explains that storage agreements can provide for the conversion of a variable or intermittent energy resource to a predictable resource. With respect to the BPA Storage Agreements, PacifiCorp states that it accepts the variable wind energy generated by the Foote Creek II and Foote Creek IV facilities and provides BPA a non-variable energy product delivered to the BPA transmission system.

4. The BPA Storage Agreements include an energy charge of \$6.00/MWh (escalated to reflect inflation over the term of the agreements) for this service. In addition to providing the improved energy, PacifiCorp also arranged for the delivery of such power over the (non-integrated) Foote Creek Line Extension, a 29-mile, 230 kilovolt (kV) line, which runs from a 34.5 kV/230 kV substation to the integrated PacifiCorp Transmission System. PacifiCorp states that any necessary delivery service had to be purchased from

PacifiCorp's Transmission Function by PacifiCorp's Merchant Function. The BPA Storage Agreements thus include a direct assigned facility (DAF) charge (\$1.79/kW-month), and a transmission charge (\$3.75/MWh), which, PacifiCorp states, essentially reimburses the PacifiCorp Merchant Function for any delivery charges.

5. PacifiCorp states that insofar as the BPA Storage Agreements were entered into under the authority of PacifiCorp's market-based rate tariff, effective with Order No. 2001,¹ the BPA Storage Agreements no longer were subject to the Commission's filing requirements, as they instead were required to be reported in PacifiCorp's Electric Quarterly Reports (EQRs), effective the third quarter 2002. PacifiCorp states that it began reporting the Foote Creek II BPA Storage Agreement in its EQR in the fourth quarter of 2002 and began reporting the Foote Creek IV BPA Storage Agreement in its EQR in the third quarter of 2009. PacifiCorp's proposed effective dates are October 1, 2002 for the Foote Creek II BPA Storage Agreement and July 1, 2009 for the Foote Creek IV BPA Storage Agreement.

6. In its October 4, 2011 filing, PacifiCorp states that, with respect to the time-value refund remedy, it has taken its costs into account. PacifiCorp considers the DAF component of the rate (\$1.79/kW-month) to reflect reimbursement of the DAF costs that the PacifiCorp Merchant Function incurred. Likewise, PacifiCorp states that the transmission component of the charges to BPA (\$3.75/MWh) reflects the transmission charges, but not the ancillary service charges, under the PacifiCorp open access transmission tariff (OATT) that were incurred by the PacifiCorp Merchant Function. PacifiCorp's calculations also include a \$1/MWh adder to account for costs associated with the storage service.

7. On December 6, 2011, the Director of the Division of Electric Power Regulation – West requested additional information from PacifiCorp.² On January 19, 2012 and

¹ *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008).

² *PacifiCorp*, Docket No. ER12-36-000 (Dec. 6, 2011) (delegated letter order).

February 16, 2012, PacifiCorp responded to the December 6, 2011 request for additional information.³

II. Notice of Filings and Responsive Pleadings

8. Notice of PacifiCorp's October 4, 2011 filing was published in the *Federal Register*,⁴ with interventions and comments due on or before October 25, 2011. On October 25, 2011, BPA filed a motion to intervene and protest.

9. In its protest, BPA requests that the Commission order PacifiCorp to recalculate the refunds owed to BPA. Specifically, BPA protests the inclusion of the \$1/MWh adder as a variable cost in the time-value refund calculations and argues that it is not appropriate for PacifiCorp to include the adder as an additional variable cost to reduce the time-value refund. BPA states that PacifiCorp has not quantified or justified the \$1/MWh adder as part of its variable costs. BPA also states that the adder is not a cost that was identified during the negotiation of the BPA Storage Agreements.

10. BPA also protests PacifiCorp's filing with respect to the profit associated with the transmission component in PacifiCorp's refund calculation. BPA states that while it agrees that from the PacifiCorp merchant's perspective the cost of transmission associated with the storage agreements is a legitimate variable cost that should be deducted from the refund calculation, this transmission component is for service across PacifiCorp's own transmission system; therefore, the Commission should recognize that there is a profit (return) component associated with PacifiCorp's transmission service. BPA argues that the Commission should require PacifiCorp to account for the profit associated with the transmission component in the refund calculation.

11. On November 9, 2011, PacifiCorp filed an answer to BPA's October 25, 2011 protest. PacifiCorp argues that the adder represents a highly conservative proxy for its actual additional variable costs and that consideration of transmission costs in the refund calculation is appropriate. PacifiCorp also argues that its Merchant Function must be treated like any other customer in connection with open access transmission service it obtains for its wholesale deliveries, even when PacifiCorp's Merchant Function obtains service from the PacifiCorp Transmission Function.

³ In its January 19, 2012 filing, PacifiCorp responded to the majority of the questions asked in the data request and requested additional time to submit the remainder of its response. The request for an extension of time was granted to and including February 16, 2012, as requested. Notice of Extension of Time, Docket No. ER12-36-000 (Jan. 24, 2012).

⁴ 76 Fed. Reg. 64,339 (2011).

12. Notice of PacifiCorp's responses to the December 6, 2011 data request was published in the *Federal Register*,⁵ with interventions and comments due on or before March 8, 2012. On March 8, 2012, BPA filed comments in response to the filings PacifiCorp submitted in response to the December 6, 2011 data request.

13. In its comments, BPA argues that the Commission should order PacifiCorp to refund to BPA the time-value of gross revenues collected as calculated by PacifiCorp in response to question four in the data request. BPA states that PacifiCorp has calculated two different sets of costs in this docket and contends that PacifiCorp's two disparate calculations of estimated costs demonstrate that some of PacifiCorp's variable costs are unknown, and therefore PacifiCorp cannot show that the time-value remedy will prevent PacifiCorp from recovering its costs.

14. On March 23, 2012, PacifiCorp filed an answer to BPA's March 8, 2012 comments. PacifiCorp maintains that there are multiple ways to calculate variable costs in this case and requests that the Commission affirm that the appropriate remedy in this proceeding is the time-value remedy, but that such remedy must take into account PacifiCorp's variable costs.

III. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), BPA's timely, unopposed motion to intervene serve to make it a party to this proceeding.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed by PacifiCorp because the answers have provided information that assisted us in our decision-making process.

B. Commission Determination

17. Prior to Order No. 2001, the Commission required service agreements entered into under market-based rate tariffs to be filed with the Commission. As a result of Order No. 2001, these agreements are no longer required to be filed and instead sales under such

⁵ 77 Fed. Reg. 11,526 (2012).

agreements must be reported in a utility's EQR.⁶ Given that PacifiCorp's agreements were not filed with the Commission in accordance with the Commission's filing requirements in effect at the time service commenced, we agree with PacifiCorp and BPA that BPA is entitled to refunds in connection with the BPA Storage Agreements.

18. The Commission has noted that if a utility files a market-based rate tariff less than 60 days prior to the proposed effective date of new service, and waiver is denied, the Commission will require the utility to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission's regulations,⁷ for the entire period that the rate was collected without Commission authorization.⁸ In addition to returning the time value of revenues collected for the period the rate was charged without Commission authorization, when dealing with market-based rates that are not timely filed, the Commission has stated that:

[T]he utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and a cost-justified rate. . . . In other words, the late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized late filing of cost-based rates, until the date of Commission authorization.⁹

19. In cases such as this one, where the company already has market-based rate authority, the Commission has consistently required only that the company refund the time value of money collected, and not also the difference between a market-based rate and a cost-based rate.¹⁰ The Commission has also held in *Carolina Power & Light*, that a utility is permitted to recover its variable costs (e.g., fuel and variable operation and

⁶ Order No. 2001, which implemented section 35.1(g) of the Commission's regulations, obviates the need to file with the Commission service agreements under market-based power sales tariffs. See 18 C.F.R. § 35.1(g) (2012) ("[A]ny market-based rate agreement pursuant to a tariff shall not be filed with the Commission.").

⁷ 18 C.F.R. § 35.19a (2012).

⁸ *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,980, *reh'g denied*, 65 FERC ¶ 61,081 (1993).

⁹ *Id.*

¹⁰ See *Idaho Power Co.*, 95 FERC ¶ 61,482, *order on reh'g*, 96 FERC ¶ 61,305 (2001).

maintenance expenses).¹¹ Thus, a time-value refund is not open-ended, and is limited in that a utility may recover its variable costs.¹²

20. We will accept the BPA Storage Agreements and require PacifiCorp to refund only the time value of the money collected without a rate on file, within 30 days of the date of this order.¹³ We note that PacifiCorp proposes effective dates of October 1, 2002, and July 1, 2009 for the BPA Storage Agreements. PacifiCorp has not demonstrated good cause for waiver of the prior notice requirement.¹⁴ Therefore, we will accept the agreements effective 61 days from the date of PacifiCorp's October 4, 2011 filing (i.e., December 4, 2011). With regard to the Foote Creek II BPA Storage Agreement, we will require PacifiCorp to refund the time value of payments for the period beginning May 28, 1999 through December 3, 2011. For the Foote Creek IV BPA Storage Agreement, we will require PacifiCorp to refund the time value of payments for the period beginning July 20, 2000 through December 3, 2011. The aforementioned refund periods reflect the dates on which PacifiCorp entered into the BPA Storage Agreements, respectively.

21. Such refunds should be based on the money collected without a rate on file, i.e., the gross revenues, and limited to an amount that permits PacifiCorp to recover the transmission and DAF charges PacifiCorp provided as variable costs in its October 4, 2011 filing. PacifiCorp is directed to exclude the \$1/MWh adder as a variable cost in this refund proceeding. We find that PacifiCorp has not demonstrated that the \$1/MWh adder is a variable cost that was identified during the negotiation of the BPA Storage Agreements or shown that such an adder here would be consistent with Commission precedent.

22. With respect to transmission charges, we note that BPA agrees that the transmission component is a legitimate part of PacifiCorp's variable costs under the BPA Storage Agreements. However, we disagree with BPA's contention that PacifiCorp should account for the profit associated with the transmission costs when calculating its refunds. Rather, we agree with PacifiCorp that PacifiCorp's Merchant Function must be

¹¹ *Carolina Power & Light Co.*, 84 FERC ¶ 61,103 (1998), *order on reh'g*, 87 FERC ¶ 61,083 (1999) (*Carolina Power & Light*); *accord El Paso Electric Co.*, 101 FERC ¶ 61,276 (2002), *order on reh'g*, 105 FERC ¶ 61,131 at PP 21-23 (2003).

¹² *Carolina Power & Light*, 87 FERC ¶ 61,083 at 61,357.

¹³ PacifiCorp is reminded that it must submit required filings on a timely basis, or face possible sanctions by the Commission.

¹⁴ *See* 18 C.F.R. § 35.11 (2012).

treated like any other customer in connection with open access service it obtains for its wholesale deliveries, even when PacifiCorp's Merchant Function obtains service from PacifiCorp's Transmission Function. Recognizing that PacifiCorp's Merchant Function and Transmission Function operate under separate tariffs, we will not require PacifiCorp to adjust its refund calculations to account for the profit associated with the cost of transmission.

23. We are not persuaded by BPA's argument that PacifiCorp's two disparate calculations of estimated costs demonstrate that some of PacifiCorp's variable costs are unknown, and therefore PacifiCorp cannot show that the time-value remedy will prevent PacifiCorp from recovering its costs. We note that the only reason PacifiCorp provided additional calculations was in response to the December 6, 2011 data request seeking additional information.

24. We disagree with BPA's argument that the Commission should order PacifiCorp to refund to BPA the time-value of gross revenues collected as calculated by PacifiCorp in response to question four in the data request. Our review of PacifiCorp's response to question four of the data request indicates that PacifiCorp provided calculations based on gross revenues through December 3, 2011 as directed in the data request; however, PacifiCorp's calculations do not limit the refund to an amount that allows PacifiCorp to recover its variable costs.¹⁵ Given that *Carolina Power & Light* provides that a utility may recover its variable costs, we direct PacifiCorp to recalculate the refund such that the time value remedy is calculated based on the money collected without a rate on file, i.e., the gross revenues recalculated through December 3, 2011, and to limit such refund to an amount that allows PacifiCorp to recover the transmission and DAF charges PacifiCorp claims as variable costs in its October 4, 2011 filing.

The Commission orders:

(A) The BPA Storage Agreements are hereby accepted for filing, as discussed in the body of this order.

(B) PacifiCorp is hereby ordered to refund the time value of the money collected without a rate on file, within 30 days of the date of this order, as discussed in the body of this order. Such refunds shall include the period that market-based rates were collected without a rate on file, as discussed in the body of this order. PacifiCorp is hereby

¹⁵ *Carolina Power & Light*, 87 FERC ¶ 61,083 at 61,357.

directed to submit a refund report within 15 days thereafter, regarding the basis for and calculations of the refunds paid.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.