

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Black Hills Power, Inc.
Basin Electric Power Cooperative, and
Powder River Energy Corporation

Docket Nos. ER03-1354-000,
ER03-1354-001, and
ER03-1354-002

ORDER ACCEPTING AND SUSPENDING PROPOSED JOINT OPEN ACCESS
TRANSMISSION TARIFF, AS MODIFIED, AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued February 12, 2004)

1. On September 16, 2003, as amended on September 23, 2003, and December 19, 2003, Black Hills Power, Inc. (Black Hills), Basin Electric Power Cooperative (Basin Electric), and Powder River Energy Corporation (PRECorp) (collectively, Transmission Providers) tendered for filing a proposed joint open access transmission tariff (Joint Tariff), pursuant to Section 205 of the Federal Power Act, 16 U.S.C. § 824d (2000), and Part 35 of the Commission's regulations, 18 C.F.R. Part 35 (2003). As we discuss below, we will accept the proposed Joint Tariff for filing, as modified, suspend it for a nominal period, to become effective October 15, 2003, subject to refund. We will also set the rates for hearing, but hold the hearing in abeyance so that the parties may engage in settlement negotiations. This order benefits customers because it allows separate transmission systems to operate as a single, more efficient transmission system.

Background

2. Transmission Providers state that they intend to combine their respective transmission systems located in the Western Interconnection into a single system (Common Use System) and provide open access transmission service over the Common Use System under the proposed Joint Tariff. They state that this decision was made in the course of developing arrangements to provide service on a new AC/DC/AC tie facility at Rapid City, South Dakota (Rapid City Converter Tie), which is being constructed by Black Hills and Basin Electric to provide an additional interconnection between the Western and Eastern Interconnections. Transmission Providers state that

Black Hills and Basin Electric intend to provide service over that new facility under the proposed Joint Tariff.

3. Under the new Common Use System, Transmission Providers intend to include all of their 230 kV facilities and certain of their 69 kV facilities that perform a transmission function. Transmission Providers will exclude from the Common Use System their 69 kV facilities that do not now, or will not in the future, perform transmission functions.
4. Transmission Providers assert that combining their transmission systems into the Common Use System under the proposed Joint Tariff will provide significant benefits, including permitting all eligible customers to take open access transmission service on the Common Use System under standardized rates, terms, and conditions. They state that the proposed Joint Tariff will enhance the integration of Black Hills', Basin Electric's, and PRECorp's transmission facilities, furthering the Commission's objective of encouraging utilities to provide reciprocal open access transmission service. Moreover, Transmission Providers state that the proposed Joint Tariff will provide for bulk transmission service under a non-pancaked, system-average postage stamp rate.
5. Transmission Providers request that they each be permitted to earn the same rate of return on transmission rate base, using Black Hills' 11.5 percent proposed return on common equity (ROE) as the appropriate return on equity. In addition, they request that they each be permitted an upward adjustment of 50 basis points to their ROE, for a total ROE of 12 percent.
6. Transmission Providers request that the Joint Tariff be made effective October 15, 2003, the date the Rapid City Converter Tie will commence commercial operation.

Notice of Filing, Interventions and Comments

7. Notice of Transmission Providers' filing was published in the Federal Register, 69 Fed. Reg. 2,134 (2004), with comments, protests, and interventions due on or before January 1, 2004. The South Dakota Public Utilities Commission (South Dakota Commission) filed a notice of intervention. The City of Gillette, Wyoming and the Municipal Energy Agency of Nebraska filed timely motions to intervene with comments in support of the proposed Joint Tariff.

8. South Dakota Commission states that it is concerned that the Transmission Providers have included positive cash working capital requirements based on a formulaic approach instead of an analysis of actual cash flows. South Dakota Commission is also concerned that the Transmission Providers are ascribed identical costs of equity capital even though they have widely variant equity ratios. South Dakota Commission states that a 12 percent overall equity return appears quite high for Black Hills alone, and exceptionally high considering the combined risk profile of the Transmission Providers.

Discussion**A. Procedural Matters**

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Analysis

10. We find Transmission Providers' proposed rates present issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing ordered below.

11. Our preliminary analysis indicates that the proposed rates, as revised as ordered below, 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 the proposed Joint Tariff for filing, suspend it for a nominal period, make it effective October 15, 2003,¹ subject to refund, and set the proposed rates for hearing.

12. In order to provide the parties an opportunity to resolve this matter among themselves, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.³ 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.

¹ See 18 C.F.R. §35.3 (2002). See also Central Hudson Gas & Electric Corp., et al., 60 FERC ¶ 61,106 at 61,338-39, reh'g denied, 61 FERC ¶ 61,089 (1992).

² 18 C.F.R. § 385.603 (2003).

³ 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. FERC's website contains a listing of the Commission's judges and a summary of their background and experience (www.ferc.gov -- click on Office of Administrative Law Judges).

13. In addition, we will require Transmission Providers to revise the Joint Tariff to delete the proposed 50 basis point upward adjustment to its requested ROE. Transmission Providers base their argument for the upward adjustment on Midwest Independent Transmission System Operator, Inc., 100 FERC ¶ 61,292 (2002), reh'g denied, 102 FERC ¶ 61,143 (2003) (Midwest ISO), where the Commission granted Midwest ISO transmission owners a 50 basis point upward adjustment to their allowed returns as a premium for turning control over their systems to Midwest ISO, *i.e.*, a regional transmission organization (RTO). Unlike the situation in Midwest ISO, the Transmission Providers are neither forming an RTO nor turning control over their systems to an RTO. Therefore, we will direct Transmission Providers to file a revised Joint Tariff deleting the 50 basis point upward adjustment within 30 days of the date of this order.

The Commission orders:

(A) Transmission Providers' proposed Joint Tariff, as modified as ordered below, is hereby accepted for filing, suspended for a nominal period, to become effective October 15, 2003, 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 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 1), a public hearing shall be held in Docket No. ER03-1354-000, et al., concerning the justness and reasonableness of the proposed rates, as discussed in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2003), 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 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 with 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 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(E) If settlement judge procedures fail, and a trial-type evidentiary hearing is to be held, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a conference in this proceeding, to be held within approximately fifteen (15) days of the date on which the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E. Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding administrative law 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.

(F) Within 30 days of the date of this order, Transmission Providers are hereby directed to submit a revised Joint Tariff reflecting the change discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.