

121 FERC ¶ 61,277
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Avista Corporation Docket No. ER08-56-000

NorthWestern Corporation Docket No. ER08-66-000

ORDER ACCEPTING AGREEMENT FOR DYNAMIC CAPACITY AND ENERGY

(Issued December 20, 2007)

1. On October 16, 2007, Avista Corporation (Avista) and NorthWestern Corporation – Montana Transmission Function (NorthWestern) (collectively, Applicants) submitted for filing, pursuant to section 205 of the Federal Power Act (FPA),¹ an executed long-term service agreement for the sale of Dynamic Capacity and Energy Service (Agreement). Under the Agreement Avista will provide Dynamic Capacity and Energy to NorthWestern commencing January 1, 2008, for NorthWestern to fulfill its Open Access Transmission Tariff (OATT) obligation to provide Schedule 3 – Regulation and Frequency Response Service to its OATT customers in Montana. For the reasons discussed below, we will accept the proposed Agreement to become effective on January 1, 2008, as requested and grant a limited waiver² under Avista’s market-based rate tariff.³

¹16 U.S.C. § 824d (2007).

² Avista’s market-based rate tariff states, “The Purchaser may not use Dynamic Capacity and Energy Service to satisfy the Purchaser’s obligation under its open access transmission tariff to offer ancillary services to the Purchaser’s open access transmission tariff transmission customers.” See Avista’s Fifth Revised Volume No. 9, Service Schedule E (Dynamic Capacity and Energy), section E5.

³ See *Avista Corp.*, 87 FERC ¶ 61,223 (1999) and *Avista Corp.*, 89 FERC ¶ 61,136 (1999). Avista’s FERC Electric Tariff, Seventh Revised Volume No. 9 was accepted for filing by unpublished delegated letter order issued November 30, 2007, in Avista Corporation, Docket Nos. ER99-1435-014 and ER99-1435-015.

Description of Filings

2. Under the proposed Agreement, Avista will provide for the sale of dynamic capacity and energy service between January 1, 2008 and December 31, 2008.⁴ Under the agreement, Avista will provide capacity pursuant to its cost-based ancillary services tariff (Cost-Based A/S Tariff).⁵ In addition, the parties will prepare a monthly financial settlement of the balancing account net energy between Avista and NorthWestern pursuant to Avista's market-based rate tariff using the Dow-Jones Mid-Columbia Daily Firm On-Peak and Off-Peak Electricity Index (Mid-C Index). Applicants state that the total rate for Dynamic Capacity and Energy Service under the proposed Agreement will be less than the total "up to" cost-based rate established in Service Schedule A of the Cost-Based A/S Tariff.

3. According to the filing, NorthWestern owns no rate-based generation, therefore it must enter into contracts with third parties to procure the ancillary services that it is required to offer under its OATT. The filing further states that the proposed Agreement results from a competitive bid process in which NorthWestern requested proposals from over 70 potential suppliers in the Western Electricity Coordinating Council region.

Notice of Filing and Responsive Pleadings

4. Notice of Applicants' filing was published in the *Federal Register*⁶ with interventions and protests due on or before November 6, 2007. Bonneville Power Administration (BPA) filed a motion to intervene and protest. The Montana Large

⁴ The term of the proposed agreement is 12 months and consists of three distinct periods: January 1, 2008 through April 30, 2008 (Period 1); May 1, 2008 through July 15, 2008 (Period 2); and July 16, 2008 through December 31, 2008 (Period 3). During Periods 1 and 3, NorthWestern will purchase from Avista an amount of Dynamic Capacity and Energy Service equal to 10 MW for each hour on an absolute value basis so that its load following requirements could be from -5 MW to +5 MW or any variation within those limits within any hour. No service will be provided during Period 2.

⁵ FERC Electric Tariff, Original Volume No. 10 was accepted for filing by unpublished delegated letter order issued December 14, 1998 in *Washington Water Power Co.*, Docket No. ER99-603-000.

⁶ 72 Fed. Reg. 60,338 (October 24, 2007).

Customer Group (LCG) filed a motion to intervene.⁷ Central Montana Electric Power Cooperative, Inc. (Central Montana) also filed a motion to intervene in Docket No. ER08-66-000. Central Montana subsequently filed an out-of-time intervention in Avista's Docket No. ER08-56-000 on November 9, 2007. NorthWestern and Avista filed answers to BPA's protest on November 20, 2007.

BPA's Protest

5. In its protest, BPA argues that NorthWestern fails to justify what it claims is a 400 percent increase in Schedule 3 Regulation and Frequency Response Service rates. BPA claims that NorthWestern's current rate for Schedule 3 Regulation and Frequency Response Service is \$0.14 kW/month under an expiring contract with Idaho Power Company. BPA argues the pass-through rate that will result from the proposed Agreement (together with an agreement between Powerex and NorthWestern⁸ in another proceeding) is \$0.54 kW/month or an increase of almost 400 percent.⁹

6. BPA argues that NorthWestern has provided no documentation to show that it has entered into this Agreement prudently, that the Agreement represents the lowest-cost service available to meet NorthWestern's requirements for capacity and energy services, and that NorthWestern did not provide documentation demonstrating what its balancing area requirements are for the level of the Regulation and Frequency Response Service it seeks to procure.

7. BPA acknowledges that the total rate for Dynamic Capacity and Energy Service under the proposed Agreement will be less than the total "up to" cost-based rate established in Avista's Service Schedule A, but suggests that there should be a mechanism for NorthWestern to pass through any discount provided by Avista to NorthWestern's OATT customers. Thus, BPA alleges that the rates resulting from the pass-through of the proposed Agreement may be unduly discriminatory.

⁷ LCG is an informal coalition of industrial energy customers comprised of: Ash Grove Cement West, ConocoPhillips, Holcim (US) Inc., Montana Refining Company, REC Advanced Silicon Materials LLC, Smurfit-Stone Container Corporation and Stillwater Mining Company.

⁸ See Docket Nos. ER08-71-000 and ER08-72-000 for the agreement between NorthWestern and Powerex.

⁹ NorthWestern's proposal to amend Schedule 3 providing regulation and frequency response under its OATT to allow for a pass-through of the costs incurred by NorthWestern is currently pending in NorthWestern's Docket No. ER07-46-000 rate proceeding. NorthWestern proposes this revision to reflect the current cost of the service that NorthWestern purchases from providers outside its control area.

8. Finally, BPA requests that the Commission set the dockets for hearing with a nominal suspension period to be effective January 1, 2008, subject to refund.

NorthWestern and Avista Answers to BPA's Protest

9. On November 20, 2007, Avista and NorthWestern submitted separate answers addressing BPA's protest. In response to BPA's request for the Commission to suspend the Agreement for a nominal time and set this matter for hearing, NorthWestern asserts in its answer that if granted, this request could result in the termination of the Agreement which would in turn severely threaten reliability. NorthWestern states that the Agreement conditions the obligation to provide service upon the Commission's acceptance of it for filing or approval without change, and allows either party to terminate obligations under it if the Commission imposes unacceptable conditions.¹⁰ NorthWestern asserts that unless the Commission accepts the Agreement without condition or suspension, NorthWestern may not be able to secure Schedule 3 service to replace that which is set to expire on December 31, 2007.

10. NorthWestern states that the cost for service under the Agreement will be \$7.26 per kW/month for the regulating capacity and \$1.40 per kW/month for the associated firm transmission service across the Avista transmission system. The sale is pursuant to Avista's Cost-Based A/S Tariff and the transmission is under Avista's cost-based Commission approved OATT. NorthWestern also notes that while Avista is authorized to charge "up to" a cost-based rate of \$9.49 per kW/month for regulating capacity, NorthWestern is obtaining it for \$7.26 per kW/month. NorthWestern asserts that this represents a cost savings to NorthWestern and its customers of \$2.26 per kW/month from the cost-based rate that could be charged.

11. NorthWestern states in its answer that it would have been imprudent for NorthWestern not to have secured service from Avista since it was one of two providers willing to provide the required service commencing January 1, 2008. NorthWestern states that a request for proposal was sent to more than 70 different entities and neither BPA nor any on-system generator responded. NorthWestern responds that BPA recognizes that the Agreement is necessary for NorthWestern to continue to provide Schedule 3 service to its OATT customers, as evidenced by BPA's request that the Commission not reject the Agreement, but instead accept it to become effective on January 1, 2008.

12. In response to BPA's concern regarding the amount of contracted capacity, NorthWestern explains that it has historically required 60 MW of Regulating Reserve Capacity to follow the moment-to-moment difference between loads and resources within its balancing authority area and to provide service under Schedule 3 of its OATT.

¹⁰ See section 3 of the proposed Agreement.

NorthWestern states that in late 2005 or early 2006, NorthWestern added a large wind project to its retail supply portfolio, and NorthWestern's retail supply unit ultimately purchased 25 MW of additional Regulating Reserve Capacity from a third party to "self supply" the Regulating Reserves needed to successfully integrate the wind generation. NorthWestern states that the request for proposal requested bids for up to 90 MW of Regulating Reserve Capacity – the total of the traditional needs by the transmission provider (60 MW) and the estimated additional amount for wind integration to be paid for by the retail supply unit. Thus, NorthWestern asserts that the amount of Regulating Reserves it requested is easily measured and supported.¹¹

13. Finally, NorthWestern also notes that until recently, it has been statutorily barred from owning any rate-based electric generation facilities, but that as of October 1, 2007, Montana rolled back its electric restructuring laws and eliminated the bar to NorthWestern's constructing its own electric generation facilities. As a result, NorthWestern is exploring whether to construct or obtain electric generation capacity that could be used to provide ancillary services, and that such possibility indicates that approval of the Agreement could be part of an interim solution until such facilities could come on-line.¹²

14. Avista states that BPA incorrectly assumes that because the cost of the services provided under the Agreement is less than the total "up to" cost authorized in its Cost-Based A/S Tariff, a discount may be available to pass through to NorthWestern's customers. Avista explains that the proposed rate of \$7.26 per kW/month is a negotiated rate and not a discount.

Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹³ the timely, unopposed motions to intervene submitted by the entities noted above serve to make them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, the Commission will grant Central Montana's late-filed motion to intervene in Docket No. ER08-56-000 given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2007), prohibits an answer to a protest unless otherwise ordered by the

¹¹ NorthWestern's answer at 8-9.

¹² *Id.* at 4-5.

¹³ 18 C.F.R. § 385.214 (2007).

decisional authority. We will accept Avista's and NorthWestern's answers because they have provided information that assisted us in our decision-making process.

Discussion

17. For the reasons discussed below, we accept the proposed Agreement for filing to become effective January 1, 2008, as requested, and grant a limited waiver of section E5 of Service Schedule E of Avista's market-based rate tariff to allow Avista to supply Dynamic Capacity and Energy service to NorthWestern during the period January 1, 2008 through December 31, 2008 in accordance with the Agreement.

18. We disagree with BPA's claim that the higher prices NorthWestern will pay for the proposed Schedule 3 ancillary services are not just and reasonable. The Commission has previously found that the rates that Avista proposes to charge under Service Schedule A of its Cost-Based A/S Tariff are just and reasonable. BPA has provided no credible evidence to show that the Avista's cost-based rates are no longer just and reasonable. Indeed, as noted in the answers of both Avista and NorthWestern, although Avista is authorized to sell these ancillary services at a just and reasonable cost-based rate of \$9.49 per kW/month, Avista is only proposing here to charge NorthWestern a rate of \$7.26 per kW/month (\$8.66 per kW/month when adding the \$1.40 per kW/month for the associated firm transmission on Avista's system).¹⁴ The cost-based portion of the rate Avista is proposing to charge here under its Cost-Based A/S Tariff for Dynamic Capacity thus is below the level that the Commission has previously found to be just and reasonable as cost-justified.

19. Additionally, we find that for several reasons Avista's proposed market-based charge for energy under the Agreement is just and reasonable based on our finding below that Avista does not have market power in the provision of ancillary services in the Northwestern market.¹⁵ First, we note that Avista's only generation presence in the NorthWestern balancing authority area is its 222 MW share of the Colstrip generating plant in Montana. However, as discussed in NorthWestern's answer, all of that capacity

¹⁴ Transmission across Avista's system is provided pursuant to its OATT, Third Revised Volume No. 8.

¹⁵ Although Avista was granted authority to sell ancillary services at flexible rates in an order issued May 27, 1999, the order retained a prohibition regarding the sale of ancillary services by third-party ancillary service suppliers. Specifically, third party ancillary service providers are prohibited from selling to a public utility that is purchasing ancillary services to satisfy its own OATT requirements to offer ancillary services to its own customers. The Commission, however, was open to considering requests for market-based rates in such circumstances on a case-by-case basis. *See Avista Corp.*, 87 FERC ¶ 61,223 (1999) and *Avista Corp.*, 89 FERC ¶ 61,136 (1999).

is sold under a long-term contract thus there is no capacity to use for regulation. In addition, Avista does not operate the plant. Since ancillary services are typically provided from generators within the control area where these services are needed, and since Avista has no excess capacity to use for regulation within NorthWestern's balancing authority area, its offer to sell this service to NorthWestern from units in its first tier balancing authority area can only be viewed as pro-competitive.

20. Second, since there is no evidence of binding transmission constraints for flows going into the NorthWestern system, it is reasonable to assume that for the provision of such a small load (10 MW) there are a variety of sellers in addition to Avista that could have provided this service. Indeed, the Commission recently determined in another proceeding that there is approximately 2,000 MW of available economic capacity in the NorthWestern balancing authority area during most periods of the year.¹⁶

21. Finally, we note that there is not any evidence on the record to suggest that Avista attempted to withhold these services from the market since it is not the transmission provider in the NorthWestern balancing authority area, and there is no evidence of barriers to entry. Rather, Avista has entered into an arms-length commitment to provide these ancillary services to NorthWestern. Thus, based on these facts we find no basis to conclude that Avista can exert market power over prices charged in this market for the short duration of this Agreement.

22. We also find that NorthWestern and Avista have adequately addressed BPA's arguments. Specifically, we find that NorthWestern has supported the level of services contained in the Agreement, the cost basis of the capacity rate as discussed above, and has provided evidence that its circumstances are temporary because it now may build or otherwise acquire generation that may alleviate its need to purchase ancillary services from third parties.¹⁷ Therefore, we accept the Agreement for filing and grant waiver of Service Schedule E, section E5 of Avista's market-based rate tariff to permit Avista to financially settle the energy in its balancing account for the period January 1, 2008 through December 31, 2008.

¹⁶ See, e.g., *PPL Montana, LLC*, 120 FERC ¶ 61,096 (2007) at n.36.

¹⁷ See also *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 at P 888 and P 893 (2007) (noting that it may be technically feasible for transmission providers to provide, and customers to self supply, Regulating Reserve Services through demand side resources).

The Commission orders:

(A) The proposed Agreement is hereby accepted for filing, to become effective January 1, 2008, and designated as Avista's FERC Electric Rate Schedule No. 485, and NorthWestern's FERC Electric Rate Schedule No. 249, as discussed in the body of this order.

(B) We hereby grant limited waiver of Avista's market-based rate tariff, Service Schedule E, section E5 for the reasons discussed above for the period January 1, 2008 through December 31, 2008.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.