

127 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeem G. Kelly, Marc Spitzer,
and Philip D. Moeller.

PacifiCorp

Docket No. EL09-21-000

ORDER ON PETITION REQUESTING DISCLAIMER OF JURISDICTION

(Issued May 21, 2009)

1. In this order, the Commission finds, under its “rule of reason,” that PacifiCorp need not file ten of seventeen agreements it included in a petition for a Commission disclaimer of jurisdiction, but it will require PacifiCorp to file the other seven agreements.¹

I. Background

2. In an order issued on October 14, 2008 in Docket No. ER08-1410-000, the Commission conditionally accepted for filing a number of agreements and declined to address requests to disclaim jurisdiction for certain agreements submitted by PacifiCorp.² The agreements submitted for filing included seventeen agreements (*see* PacifiCorp Exhibit Nos.1 through 17), primarily with the Bonneville Power Administration (Bonneville), that PacifiCorp stated address operation and maintenance responsibilities and/or delineate the ownership of particular transmission facilities.³ PacifiCorp maintained that the agreements were either not jurisdictional or not of practical significance. PacifiCorp submitted these agreements for informational purposes with a request that the Commission

¹ PacifiCorp has attached the seventeen agreements that are the subject of its request for disclaimer as Exhibits Nos. 1-17 to its petition. In the discussion below, we will refer to these various agreements by these same numbers.

² *PacifiCorp*, 125 FERC ¶ 61,034 (2008) (October 2008 Order).

³ *Id.* P 28.

disclaim jurisdiction over them. Given that PacifiCorp did not formally submit the agreements for filing and merely provided the agreements for informational purposes, the Commission acknowledged receipt of the agreements but did not accept the agreements for filing. The Commission declined to rule on PacifiCorp's request for a disclaimer of jurisdiction, finding that the proper forum in which to present such a request would be in a petition for a declaratory order.⁴

3. On December 16, 2008, PacifiCorp filed the subject petition for declaratory order. PacifiCorp argues that the Commission should disclaim jurisdiction over the seventeen agreements that PacifiCorp identified as being non-jurisdictional in Docket No. ER08-1410-000, because none of the agreements includes rates and charges for any transmission service or power sale subject to the Commission's jurisdiction.

4. Notice of PacifiCorp's December 16, 2008 filing was published in the *Federal Register*, with interventions or protests due on or before January 14, 2009.⁵ None was filed.

II. Discussion

A. Fifteen Bonneville Agreements

5. PacifiCorp states that fifteen of the agreements (Exhibit Nos. 1 through 15) are contracts between PacifiCorp and Bonneville (Fifteen Bonneville Agreements). It describes the Fifteen Bonneville Agreements as primarily addressing the design, construction, and operation and maintenance responsibilities between the parties with respect to particular transmission facilities. PacifiCorp explains that none of the Fifteen Bonneville Agreements is a joint transmission ownership agreement that allocates transmission capacity or provides for shared usage of facilities. Rather, according to PacifiCorp, each of the Fifteen Bonneville Agreements describes a facilities construction project and specifies each party's duties and expenses with regard to the project. PacifiCorp states that the agreements also delineate who owns which facilities at a particular location. Additionally, PacifiCorp states that usage of the facilities is not addressed and therefore they are not the types of joint ownership agreements that

⁴ *Id.* P 29.

⁵ 73 Fed. Reg. 79,876 (2008).

require filing. PacifiCorp argues that, under the Commission's *Prior Notice Order*⁶ and other relevant precedent,⁷ PacifiCorp does not believe that any of the Fifteen Bonneville Agreements need to be filed.

6. Furthermore, PacifiCorp stresses that, under the terms of all but a few of the contracts, Bonneville does not pay PacifiCorp for operation and maintenance services relating to the transmission facilities under the agreements. PacifiCorp states that, for these contracts, the operation and maintenance services contemplated are either provided by Bonneville at PacifiCorp's expense or provided by PacifiCorp at its own expense. PacifiCorp argues that, under the *Prior Notice Order*,⁸ this shows that the operation and maintenance provisions do not render the agreements jurisdictional.

7. PacifiCorp argues that, in the few cases where the agreements provide for Bonneville to pay PacifiCorp, the payment does not constitute "a charge connected to jurisdictional service," and thus does not render the agreements jurisdictional.⁹ PacifiCorp maintains that, in one instance, the payments are for work that will ensure that Bonneville can reliably operate its system and provide non-jurisdictional transmission service to its customers. PacifiCorp states that, in the other two cases where PacifiCorp provides services to Bonneville for a fee, the fee involves the installation of communications equipment. PacifiCorp argues that the Commission has previously found that provisions relating to communications services do not need to be filed with the Commission, because they relate to detailed day-to-day operating procedures.¹⁰

⁶ *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (*Prior Notice Order*), *order on clarification*, 65 FERC ¶ 61,081 (1993).

⁷ The other cases cited by PacifiCorp include the cases referenced in notes 10 and 12, *infra*.

⁸ *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,993.

⁹ *Id.*

¹⁰ *Public Service Co. of New Mexico*, 74 FERC ¶ 61,300, at 61,966 n.5 (1996) (*PSC New Mexico*); *Public Service Co. of Colorado*, 67 FERC ¶ 61,371, at 62,267 (1994) (*PSC Colorado*).

8. PacifiCorp concludes that, under Commission precedent and the "rule of reason," the Fifteen Bonneville Agreements simply do not "affect or relate to" jurisdictional service significantly enough to warrant their filing, and they are not the types of agreements that were identified as requiring filing in the *Prior Notice Order*.

B. Commission Determination

9. Section 205(c) of the Federal Power Act requires public utilities to file:

schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, *together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.*^[11]

However:

[T]here is an infinitude of practices affecting rates and service. The statutory directive [of section 205(c)] must reasonably be read to require the recitation of only those practices that affect rates and services significantly, that are realistically susceptible of specification, and that are not so generally understood as to render recitation superfluous.^[12]

Therefore, as we have stated on several occasions, "the determination of what agreements 'affect or relate to' electric service . . . must be judged by the rule of reason."¹³ And, as we noted in *PSC Colorado*, the rule of reason allows the Commission to exercise its discretion to allow utilities to forego filing particular contracts or practices.¹⁴

¹¹ 16 U.S.C. § 824d(c) (2006) (*emphasis added*); see *PSC Colorado*, 67 FERC at 62,267.

¹² See *PSC Colorado*, 67 FERC ¶ 61,371 at 62,267, quoting *Town of Easton, Maryland v. Delmarva Power and Light Co.*, 24 FERC ¶ 61,251 (1983) (*Town of Easton*), and *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985).

¹³ See *Town of Easton*, 24 FERC ¶ 61,251 at 61,531, quoting *Pacific Gas and Elec. Co.*, 7 FERC ¶ 61,267, at 61,565 (1979).

¹⁴ *PSC Colorado*, 67 FERC ¶ 61,371 at 62,267.

10. PacifiCorp argues that the Fifteen Bonneville Agreements do not significantly affect jurisdictional rates and services. A review of the Fifteen Bonneville Agreements shows that, while they do not themselves provide for transmission service, all of the contracts involve the construction or replacement of facilities or equipment on PacifiCorp's transmission system in order for PacifiCorp to provide jurisdictional transmission service, and we also cannot ignore that a portion of the costs of these projects are paid for by PacifiCorp's customers. This being the case, such agreements affect or relate to jurisdictional transmission service and rates.

11. Under the rule of reason, the Commission does not require such contracts to be filed unless they significantly affect rates and services. In deciding what must be filed, the Commission balances the need for full disclosure of pertinent contracts, which provide real benefits to existing and potential customers, against the burden that would be imposed by requiring public utilities to file contracts that do not significantly affect rates and services. The Commission does not believe it is appropriate to deprive utilities of the flexibility to manage their operations by introducing delay and layered decision-making as would arise from filing obligations for agreements that have an insignificant impact on rates, where such filing and posting would serve no practical purpose.¹⁵

12. To determine which of the contracts would have a significant effect on rates and services that would warrant our directing that they be separately filed here, we consider two possible scenarios. In instances where PacifiCorp bills and Bonneville pays for work performed by PacifiCorp on PacifiCorp's facilities, we find that such agreements should be on file with the Commission because Bonneville's payment significantly affects or relates to PacifiCorp's rates and services.¹⁶ By contrast, however, in instances where PacifiCorp does not bill Bonneville but performs work at its own expense on its own facilities, we find that such agreements do not need to be filed with the Commission. PacifiCorp would need to file a rate case seeking a change in its rates to recover such expenses from its customers and so there would be no need to have PacifiCorp file such agreements separately here and now.

13. Using this analysis, we reviewed each of the Fifteen Bonneville Agreements, and we find that PacifiCorp needs to file the following agreements: the agreements in Exhibit Nos. 5, 9 and 11, which involve payments from

¹⁵ *Town of Easton*, 24 FERC ¶ 61,251 at 61,531.

¹⁶ *See Prior Notice Order*, 64 FERC ¶ 61,139 at 61,982, 61,988-91 (discussing the need to file contribution-in-aid-of-construction agreements).

Bonneville to PacifiCorp for work relating to PacifiCorp's facilities as these agreements significantly affect PacifiCorp's rates and services;¹⁷ and the agreements in Exhibit Nos. 6 and 15, which do not lay out sufficient information for the Commission to find that they do not significantly affect PacifiCorp's rates and services.¹⁸ Under the rule of reason, we find that PacifiCorp does not need to file the agreements in Exhibit Nos. 1, 2, 3, 4, 7, 8, 10, 12, 13, and 14, as we find that they do not significantly affect rates and services.

14. PacifiCorp also raises two other arguments why it believes that the Commission should disclaim jurisdiction over the Fifteen Bonneville Agreements. We find neither of these arguments persuasive. Specifically, PacifiCorp relies on the fact that none of the Fifteen Bonneville Agreements is a joint transmission ownership agreement that allocates transmission capacity or provides for shared usage of facilities. While it is true that such joint transmission ownership agreements are to be filed under the *Prior Notice Order*,¹⁹ the Commission has never stated that its jurisdiction is limited to just these specific kinds of contracts.

15. Next, PacifiCorp argues that, in two instances, the agreements involve the installation of communications equipment and that the Commission has previously found that provisions relating to communications services do not need to be filed with the Commission, because they relate to detailed day-to-day operating procedures. In *PSC Colorado*, the Commission was careful to note, however, that its "determinations herein should *not* be construed as definitive jurisdictional analyses."²⁰ Moreover, as explained in *PSC Colorado*, "the fact that agreements concern day-to-day operations does not, in itself, establish the absence of

¹⁷ The Exhibit No. 5 agreement involves a contract to build facilities so that a transmission line could be moved into a Bonneville control area from a PacifiCorp control area. The Exhibit No. 9 agreement involves a contract to construct and install replacement equipment on a transmission line connecting a PacifiCorp substation and a Bonneville substation. The Exhibit No. 11 agreement involves the installation of new relays for the transmission line connecting a PacifiCorp substation and a Bonneville substation.

¹⁸ Neither the Exhibit No. 6 agreement, nor the Exhibit No. 15 agreement, discloses whether the facilities involved are PacifiCorp facilities.

¹⁹ *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,993.

²⁰ *PSC Colorado*, 67 FERC ¶ 61,371 at 62,266-67 (*emphasis in original*).

Commission jurisdiction.”²¹ In the second instance, we held in *PSC New Mexico* that the applicant did not need to file agreements that were duplicative of existing rate schedules already on file.²² PacifiCorp has identified no such duplication here.

16. Moreover, PacifiCorp’s arguments ignore that, in the *Prior Notice Order*, and in the orders cited therein, we found that contracts providing for contributions in aid of construction should be filed with the Commission.²³ The PacifiCorp agreements we have determined here should be filed with the Commission are in the nature of contracts providing contributions in aid of construction – essentially, they provide a pre-payment of expenses that would otherwise be recoverable in rates over time – and must be filed.

C. Other Agreements

17. PacifiCorp also questions the need to file the Letter Agreement in Exhibit No. 16 (Letter Agreement), which PacifiCorp entered into with AES Pacific, Inc. (AES Pacific) on August 9, 2001. The Letter Agreement is for interconnection-related activities associated with AES Pacific’s proposed 220 MW of generation to be connected to PacifiCorp’s transmission system at Wallula Substation. PacifiCorp argues that AES Pacific abandoned its interconnection effort, rendering the Letter Agreement null and void.

18. Finally, PacifiCorp seeks a disclaimer of jurisdiction concerning its Cooperative Communications Agreement (CCA) with Bonneville, which is included in Exhibit No. 17. PacifiCorp claims that the CCA was originally filed as Supplement No. 11 to Rate Schedule No. 327 in Docket No. ER93-629-000. PacifiCorp further explains that Rate Schedule No. 327 was the July 1986 Intertie

²¹ *Id.* at 62,267; *accord, id.* at 62,266 (noting that one agreement related to “communications among pool members”). That agreement – Operating Agreement 4, IPP Formal Communications System – was intended, by its terms, merely to “provide a method for improved contact between operating personnel.” IPP Operating Agreement 4, page 1 of 7 (Docket No. ER94-505-000, filed Dec. 29, 1993).

²² *PSC New Mexico*, 74 FERC ¶ 61,300 at 61,966 (P 4). There is no indication on the face of the order that installation of communications equipment was at issue, or that, if it was at issue, the Commission considered it relevant to its analysis.

²³ *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,982, 61,988-92.

Agreement between the Bonneville and PacifiCorp. PacifiCorp then asserts that Rate Schedule No. 327 was superseded by Rate Schedule No. 368 (June 1994 AC Intertie Agreement) in Docket No. ER94-1390-000. Additionally, PacifiCorp states that the CCA was amended in Docket No. ER95-547-000 and the amendments were designated as supplements to Rate Schedule No. 355 (not to Rate Schedule No. 327 or Rate Schedule No. 368). According to PacifiCorp, it appears that the CCA was given a new rate schedule number that applied only to the CCA, and that the CCA is now a stand-alone agreement. PacifiCorp requests that the CCA be cancelled as a rate schedule in recognition that it is not jurisdictional as a stand-alone agreement. If cancelled, PacifiCorp states that the CCA will remain in force as a valid (albeit unfiled) contract.

D. Commission Determination

19. As to PacifiCorp's Letter Agreement in Exhibit No. 16, it provides that AES Pacific will make payments to PacifiCorp for work performed at AES Pacific's generation facility and that PacifiCorp will assume ownership of the facilities installed. Therefore, AES Pacific's payments to PacifiCorp constitute "a charge connected to jurisdictional service"²⁴ and would affect PacifiCorp's rates. Thus, we find that PacifiCorp must file the Letter Agreement. However, since the interconnection was abandoned and the project never went forward, we will deem PacifiCorp's disclaimer petition to constitute its notice of cancellation of the Letter Agreement.

20. As to PacifiCorp's CCA in Exhibit No. 17, we find that, notwithstanding PacifiCorp's arguments to the contrary, the CCA constitutes a supplement to a jurisdictional rate schedule and is not a stand-alone agreement.²⁵ The CCA was originally designated as Supplement No. 11 to Rate Schedule No. 327 in Docket No. ER93-629-000. However, we disagree with PacifiCorp's claim that Rate Schedule No. 327 was superseded by Rate Schedule No. 368. Rate Schedule

²⁴ *Id.* at 61,993.

²⁵ Based on the fact that the parties have joint interests in certain electric energy-related projects, the CCA gives Bonneville the right to use certain defined communication channels of PacifiCorp in return for PacifiCorp obtaining the right to use certain defined communication channels of Bonneville. The agreement benefits both parties by reducing duplicative expenditures. The agreement is not a stand-alone agreement because it was entered into as part of a jurisdictional intertie agreement between Bonneville and PacifiCorp and there would be no need for the CCA, absent the intertie between Bonneville and PacifiCorp.

No. 368 superseded Rate Schedule No. 354 as supplemented and not (as PacifiCorp claims) Rate Schedule No. 327,²⁶ and the CCA was re-designated as Supplement No. 1 to Rate Schedule No. 355.²⁷ The CCA was never a stand-alone agreement as PacifiCorp argues. Therefore, PacifiCorp must file the amendment to the CCA with the Commission. PacifiCorp's request for disclaimer of jurisdiction over the CCA is denied.

The Commission orders:

PacifiCorp's petition for declaratory order is hereby granted in part and denied in part, as discussed in the body of this order. PacifiCorp is hereby ordered to make the further filings, as discussed in the body of this order within 30 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁶ *PacifiCorp*, Docket No. ER94-1390-000 (July 21, 1994) (unpublished letter order). Rate Schedule No. 354 is a letter of understanding to resolve several outstanding issues related to the June 1994 Intertie Agreement.

²⁷ *PacifiCorp*, Docket No. ER94-684-000 (Feb. 23, 1994) (unpublished letter order). Rate Schedule No. 355 is an interim interconnection agreement between Portland General Electric Company and PacifiCorp.