

141 FERC ¶ 61,114
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 Nos. ER11-4214-001
ER11-4214-000

ORDER ON REHEARING AND ACCEPTING REFUND REPORT

(Issued November 15, 2012)

1. On October 31, 2011, Sierra Pacific Power Company d/b/a NV Energy (NV Energy) requested rehearing of the Commission's September 30, 2011 order in this proceeding.¹ On November 2, 2011, PacifiCorp filed a refund report, as it was directed to do in the September 30 Order. For the reasons set forth below, we will deny the request for rehearing and accept the refund report.

I. Background

2. On August 3, 2011, PacifiCorp filed an Amended and Restated Interconnection Agreement (Conformed Agreement) between PacifiCorp and NV Energy.² PacifiCorp stated that the Conformed Agreement was intended to reinstate the terms and conditions of a 1971 agreement (1971 Agreement) between the parties³ for transmission and interconnection services, and asserted that PacifiCorp inadvertently cancelled the entire

¹ *PacifiCorp*, 136 FERC ¶ 61,233 (2011) (September 30 Order).

² *PacifiCorp Rate Schedule* FERC No. 674.

³ The 1971 Agreement was between Utah Power & Light Company (PacifiCorp's predecessor) and Sierra Pacific Power Company (NV Energy's predecessor).

1971 Agreement effective April 30, 2000, when PacifiCorp intended only to cancel certain power purchase and sale provisions of the agreement.⁴

3. In the 1971 Agreement, PacifiCorp agreed to provide NV Energy with interconnection services and the use of certain PacifiCorp transmission facilities. The 1971 Agreement was amended four times: in 1977, 1985, 1991, and 1992. The amended agreements were filed with the Commission and designated as supplements to PacifiCorp Rate Schedule FERC No. 267.⁵ By letter dated April 29, 1997, NV Energy informed PacifiCorp's merchant function of its intent to cancel the power purchase and sale provisions of the 1971 Agreement. On July 1, 2003, PacifiCorp filed with the Commission a Notice of Cancellation of PacifiCorp's entire Rate Schedule FERC No. 267, instead of just the power purchase and sale provisions set forth in NV Energy's termination notice to PacifiCorp.⁶

4. In the transmittal letter accompanying the filing of the Conformed Agreement, PacifiCorp stated that beginning in 2008 it undertook a comprehensive review of the types of agreements that must be filed with the Commission. With respect to the cancellation of Rate Schedule FERC No. 267, PacifiCorp stated that upon reviewing such cancellation, it assumed that the entire agreement had been properly cancelled, because the company's comprehensive review at the time did not reconcile filed service agreements and rate schedules with transmission service revenue streams.⁷ PacifiCorp stated that it did not discover the inadvertent error of cancelling the transmission and interconnection services until it prepared its 2011 transmission rate case filing.⁸

5. In the September 30 Order, the Commission found that PacifiCorp brought the earlier arrangement for transmission and interconnection services into conformance with the requirements of both Order Nos. 614 and 714, and that the rates, terms, and

⁴ On August 13, 2003, the Commission accepted a Notice of Cancellation of PacifiCorp Rate Schedule FERC No. 267, which became effective April 30, 2000. *See PacifiCorp*, Docket No. ER03-1020-000 (2003) (delegated letter order).

⁵ September 30 Order, 136 FERC ¶ 61,233 at P 2.

⁶ *Id.* n.6. Specifically, NV Energy's notice, dated April 29, 1997, provided as follows: "Termination of Power Purchase from PacifiCorp under the Interconnection Agreement of May 19, 1971."

⁷ September 30 Order, 136 FERC ¶ 61,233 at P 3.

⁸ *Id.*

conditions of transmission and interconnection services in the Conformed Agreement that were previously filed with and approved by the Commission in 1971, as amended in 1977, 1985, 1991, and 1992, were unchanged.⁹ The Commission also found that, consistent with the provisions of section 6.1(c) of the Conformed Agreement, PacifiCorp had continued to bill NV Energy and NV Energy had continued to pay PacifiCorp annual fixed payments for transmission and interconnection services after the Commission accepted the notice of cancellation. In essence, the parties operated as if the 1971 Agreement had not been cancelled.¹⁰ The Commission found that, under the Conformed Agreement, these payments are scheduled to continue for the remainder of the 45-year term of the Conformed Agreement, in order to allow PacifiCorp to recover its full investment in the transmission facilities. Because the interconnection arrangement between the parties was previously accepted and on file with the Commission (before the administrative error by PacifiCorp inadvertently terminated it), PacifiCorp argued that the terms and conditions of the substantively unchanged Conformed Agreement remained just and reasonable.¹¹

6. In the September 30 Order, the Commission stated that:

Under section 205 of the FPA, all jurisdictional rates must be filed with the Commission in a timely manner. In many cases, the Commission has stated that the statutory notice and filing requirement is not to be taken lightly, as a mere “procedural requirement” and that “administrative error” is not an excuse for failure to do so.¹²

7. The Commission added that it had accepted the July 1, 2003 PacifiCorp Notice of Cancellation, and the effect of such Commission acceptance was that there was no agreement on file covering the matters in the 1971 Agreement.¹³ The Commission also

⁹ *Id.* P 4.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* P 19 (citing *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, *passim*, *reh’g denied*, 61 FERC ¶ 61,089 (1992); *New England Power Co.*, 76 FERC ¶ 61,209, at 62,060 (1996); *Northeast Utilities Service Co.*, 76 FERC ¶ 61,237, at 62,151 (1996); and *Illinois Power Co.*, 75 FERC ¶ 61,269, at 61,878 (1996)).

¹³ *Id.* P 19 (citing PacifiCorp, Docket No. ER03-1020-000 (2003) (delegated letter order), *supra* n.4).

found that the parties behaved as if certain provisions of the 1971 Agreement (other than the power purchase and sale provisions) remained in effect despite the fact that it was not on file, and operated for approximately 11 years under the 1971 Agreement. Specifically, PacifiCorp's transmission function continued to bill NV Energy pursuant to the terms of the agreement and NV Energy continued to pay those bills.

8. The Commission further found that PacifiCorp was required by statute and Commission precedent to have an agreement on file covering the terms of the parties' transmission and interconnection relationship from the time that the parties terminated the 1971 Agreement until the effective date of the Conformed Agreement.¹⁴ Moreover, the Commission found that PacifiCorp had identified no extraordinary circumstances justifying the waiver of the Commission's prior notice requirement. The Commission therefore ordered PacifiCorp to refund the time value of payments it collected related to this transaction from April 1, 2000¹⁵ to October 2, 2011, which the Commission held was the effective date of the Conformed Agreement.¹⁶ The September 30 Order limited the refunds to time value of payments it collected to ensure that PacifiCorp would return to NV Energy only the time value of money that it was never authorized to receive, with a floor to protect PacifiCorp from operating at a loss. The Commission directed PacifiCorp to make this refund to NV Energy within 30 days of the date of the issuance of the order, and to file a refund report within 60 days of the date of the issuance of the order, stating the amounts that it refunded to NV Energy.¹⁷ PacifiCorp filed the refund report on November 2, 2011.

¹⁴ *Id.* P 19 (citing *PacifiCorp*, 60 FERC ¶ 61,292, at 62,036 (1992) (“We cannot allow utilities such as PacifiCorp to evade their statutory filing responsibilities by operating under unfiled . . . rather than filed agreements.”)).

¹⁵ PacifiCorp points out in its November 2, 2011 refund report that the refund period actually begins on May 1, 2000, because the effective date for the cancellation of the 1971 Agreement was April 30, 2000. PacifiCorp Refund Report at 1.

¹⁶ September 30 Order, 136 FERC ¶ 61,233 at P 20 (citing *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992)).

¹⁷ *Id.* P 19 (citing *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1999); *Florida Power & Light Co.*, 98 FERC ¶ 61,276, at 62,151 (2002)).

II. Request for Rehearing

9. NV Energy alleges that the September 30 Order is arbitrary and capricious because the Commission did not find that the Conformed Agreement was just and reasonable.¹⁸ NV Energy states that it “stopped receiving any service under the 1971 Agreement when it lawfully terminated its power purchase obligation therein”¹⁹ NV Energy alleges that the September 30 Order does not explain whether or how the Conformed Agreement constitutes a just and reasonable rate.²⁰

10. NV Energy next argues that to the extent that the Commission found that the Conformed Agreement was just and reasonable, that finding is not supported by substantial evidence.²¹ NV Energy asserts that the record contains no evidence demonstrating that PacifiCorp recouped less than its full transmission investment under the 1971 Agreement by May 1, 2000. NV Energy then quotes paragraph 6.1(a) of the 1971 Agreement, which states that even if NV Energy did not continue to purchase power and energy, it was obligated to continue the fixed payments for the remainder of the 45-year contract or, in the alternative, make a single payment for the unrecovered costs of PacifiCorp’s transmission investment.²² NV Energy alleges that PacifiCorp provided no evidence of how much it had received from NV Energy under the 1971 Agreement so that NV Energy could calculate what fixed charges under the agreement remained.²³ NV Energy states that the September 30 Order fails to explain whether or why the Commission waived the filing requirements of Part 35 of the Commission’s regulations, which set forth the procedures for filing rate schedules and tariffs. NV Energy also asserts that the Commission, in the September 30 Order, should have made a finding that determined whether PacifiCorp’s filing of the Conformed Agreement was an initial or a revised filing.

11. NV Energy argues that the Commission’s finding that both NV Energy and PacifiCorp continued to operate under the 1971 Agreement is not supported by

¹⁸ Request for Rehearing at 6.

¹⁹ *Id.* at 7.

²⁰ *Id.*

²¹ *Id.* at 10.

²² *Id.* at 11.

²³ *Id.* at 12.

substantial evidence.²⁴ NV Energy states that “PacifiCorp provided no record evidence demonstrating that the invoices it has issued to NV Energy were in accordance with the 1971 Agreement.”²⁵ NV Energy goes on to state that “[h]ad PacifiCorp’s Notice of Cancellation truly been inadvertent, and PacifiCorp had not recovered its full transmission costs, then PacifiCorp would have switched the rate it has been charging NV Energy from the Section 6.1(b) methodology to the Section 6.1(c) methodology.”²⁶

²⁴ *Id.* at 16.

²⁵ *Id.* at 17.

²⁶ *Id.* at 18. Sections 6.1(a), (b), and (c), updated to reflect the current successors in interest, read, in relevant part:

6.1(a) Beginning at the time that [PacifiCorp’s] 230 kv line is ready for commercial operation and extending to such time as [NV Energy] begins purchase of firm power pursuant to Service Schedule C-1, [NV Energy] will pay [PacifiCorp] monthly one-twelfth (1/12) of the annual fixed charge rate computed from Exhibit “A” applied to [PacifiCorp’s] investment in extending its 230 kv line to the Point of Interconnection less \$300,000. . . .

6.1(b) When [NV Energy] extends its 230 kv line from the Diamond Valley area to the Yerrington area, and begins purchase of firm power and energy pursuant to Service Schedule C-1, then the initial fixed charge payments under Paragraph 6.1(a) will be adjusted as set forth in Service Schedule C-1 hereto

6.1(c) If [NV Energy] decides not to extend its 230 kv line to the Yerrington area and complete the interconnection or not to begin or continue the purchase of firm power and energy pursuant to Paragraph 6.1(b), then it shall continue or resume the annual fixed charge payments of Paragraph 6.1(a) for the remainder of the forty-five (45) year term of the agreement or alternatively, at its option, a single payment equivalent to [PacifiCorp’s] unrecovered costs of its transmission investment. The aforesaid unrecovered costs shall be the actual cost of the transmission plant investment less accumulated depreciation (straight-line) plus the accumulated present worth of the annual differences between fixed charges applicable to a net investment payment base and levelized fixed charges applicable to a gross investment payment base for each year of this Interconnection Agreement prior to [NV Energy’s] failure to exercise its option to purchase firm power and energy pursuant to Service Schedule C-1

(continued...)

12. Finally, NV Energy argues that the Commission should have ordered more than time-value refunds because it omitted making an express finding that the 1971 Agreement was just and reasonable.²⁷ NV Energy states that time-value refunds are only appropriate when a late-filed rate is found to be just and reasonable.

III. Refund Report

13. PacifiCorp filed its refund report on November 2, 2011. The refund report explains that PacifiCorp tendered a refund to NV Energy in the amount of \$298,294.09 on October 14, 2011, calculating the refund on a quarterly basis for transactions from May 1, 2000, through September 30, 2011. PacifiCorp states that it applied an interest rate to the refund in a manner consistent with 18 C.F.R. §35.19a(a)(2) (2011). PacifiCorp pointed out that the refund period begins on May 1, 2000, because the effective date for the cancellation of the 1971 Agreement was April 30, 2000.²⁸

14. Nevada Energy protested the refund report, for the same reasons that it requests rehearing, stating that the refund report inaccurately reflects the amount it is owed because the refund report is based on the Commission's "erroneous September 30 Order."²⁹

IV. Commission Determinations

15. When the Commission found, in the September 30 Order, that the Conformed Agreement was effective October 2, 2011, the Commission necessarily found that the agreement was just and reasonable. Only by qualifying under that standard could the Conformed Agreement have been accepted. We therefore disagree with NV Energy's assertion that there was any doubt that the Commission found that the Conformed Agreement contained just and reasonable rates. The Conformed Agreement was merely the 1971 Agreement minus the power purchase and sale provisions that NV Energy cancelled in 1997 (effective April 30, 2000). The Commission accepted both the 1971

or termination of firm power and energy purchases thereunder. In addition to the unrecovered costs, [PacifiCorp] shall be reimbursed for any Federal and State income taxes incurred due to the exercise of said option by [NV Energy].

²⁷ Request for Rehearing at 14.

²⁸ PacifiCorp Refund Report at 1.

²⁹ NV Energy Refund Report Protest at 2.

Agreement and the Conformed Agreement under section 205 of the Federal Power Act; thus the acceptance of the agreements amounted to the Commission's imprimatur that the rates therein were just and reasonable.

16. NV Energy's assertion that it stopped receiving "any" service under the 1971 Agreement when it terminated its power purchase obligation is not supported by the record; the 1971 Agreement provides for the payment of transmission and interconnection costs over 45 years, recognizing that the benefits of interconnection would continue even if NV Energy elected to terminate its power purchases and sales under the 1971 Agreement.³⁰ NV Energy's argument that it should pay PacifiCorp nothing after May 1, 2000 would provide NV Energy with an unjust and unreasonable windfall. Thus, the Commission, in the September 30 Order, provided a remedy closely approximating both parties' intention to cancel the power purchase and sale provisions of the 1971 Agreement while leaving the transmission and interconnection provisions in place, recognizing that PacifiCorp must issue a refund for the time it did not have an agreement on file to collect the payments related to the service. NV Energy asserts that this is not the typical situation where the time-value refund remedy is used.³¹ In the more typical situation a public utility may execute a service agreement and begin providing service before timely filing to obtain approval of the agreement from the Commission. The situation here (an unintended cancellation), can, however, be understood as the obverse of the more typical scenario, and the Commission reasonably ordered the time-value refund remedy to equitably restore the balance of interests of both the parties and the Commission in the circumstances presented.

17. PacifiCorp was not obligated to show whether or not it had "recouped its investment" under the 1971 Agreement because the agreement itself requires a fixed payment amount over the agreement's 45-year term, absent a request from NV Energy to accelerate its payments and pay off its obligation in one lump sum.³² NV Energy itself acknowledges the unconditional nature of the payment obligation.³³

18. With regard to NV Energy's argument that the Commission did not indicate "whether or why" it waived the requirements of Part 35 of our regulations, the Commission did not find that a waiver was necessary, inasmuch as the record showed

³⁰ PacifiCorp Answer at 9.

³¹ Request for Rehearing at 7-8.

³² 1971 Agreement, article VI.

³³ Request for Rehearing at 11.

that the cancellation of the *entire* 1971 Agreement was never intended by the parties, and billings and payments never ceased. NV Energy's allegations that the invoices it received were "not in accordance with" the 1971 Agreement appear to relate to which proviso for payment should be applied: section 6.1(a), section 6.1(b), or section 6.1(c). Sections 6.1(a) and 6.1(b) describe the payments that NV Energy is to make to PacifiCorp, fixed monthly payments. As to section 6.1(c), this section grants NV Energy the option to continue the fixed payments under section 6.1(a) or elect a single payment equivalent to the unrecovered costs of the relevant transmission facilities. NV Energy seems to want to impose some affirmative duty on PacifiCorp to have notified NV Energy that use of section 6.1(c) was applicable. But no such obligation falls on PacifiCorp; fixed charge payments also continued under section 6.1(c) unless NV Energy made a lump sum payment election. As NV Energy itself explains it,³⁴ section 6.1(c) provides that if NV Energy decided not to:

continue the purchase of firm power and energy pursuant to Paragraph 6.1(b), then it shall continue or resume the annual fixed charge payments of Paragraph 6.1(a) [which governed payment once the transmission line at issue was ready for operation but before NV Energy began to purchase the energy] for the remainder of the forty-five (45) year term of the agreement or alternatively, *at its option*, a single payment equivalent to [PacifiCorp's] unrecovered costs of its transmission investment.³⁵

19. NV Energy chose not to exercise this option under section 6.1(c). There was no affirmative obligation on PacifiCorp to remind NV Energy of this lump sum option. Moreover, the record does not support the proposition that NV Energy decided to *entirely* discontinue the purchase of "firm power and energy" from PacifiCorp under the 1971 Agreement, since NV Energy did not request the cancellation of the agreement in its entirety, but only in part. Given the foregoing, the Commission finds no basis to grant rehearing.

20. We accept PacifiCorp's refund report. NV Energy's request for rejection of the refund report is premised on NV Energy's assertions on rehearing that the September 30 Order's findings were incorrect. In light of the Commission's decision to affirm the September 30 Order on rehearing, there is no viable premise underlying NV Energy's protest of the refund report.

³⁴ Request for Rehearing at 2.

³⁵ 1971 Agreement, article VI(c) (emphasis added).

The Commission orders:

(A) NV Energy's request for rehearing is denied, as discussed in the body of this order.

(B) PacifiCorp's refund report is accepted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.