

120 FERC ¶ 61,268
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.

Wisconsin Electric Power Company

Docket No. ER07-1192-000

ORDER ON PROPOSED DISTRIBUTION OF DECOMMISSIONING TRUST FUNDS
AND GAIN ON SALE OF PLANT

(Issued September 21, 2007)

1. On July 23, 2007, pursuant to section 205 of the Federal Power Act (FPA)¹ and section 35.32(a)(6) of the Commission's regulations,² Wisconsin Electric Power Company (WEPCO) filed a proposal to reduce its rates for wholesale requirements service to reflect: (1) decommissioning funds that are in excess of requirements established by the Nuclear Regulatory Commission (NRC); and (2) the net gain from the disposition of the Point Beach Nuclear Power Plant (Point Beach). In this order, the Commission accepts WEPCO's proposal, suspends it for a nominal period, to become effective subject to refund, and establishes a paper hearing.

Background

2. As the owner of Point Beach, WEPCO is required to provide assurance that it is funding the decommissioning of the plant at certain minimum levels specified by the NRC. WEPCO has historically provided these assurances with two types of external sinking decommissioning trust funds; one that qualifies for special tax treatment under section 468A of the Internal Revenue Code of 1986 and another that does not (respectively, the Qualified Fund and the Non-Qualified Fund; collectively, the Funds). WEPCO's retail customers in Wisconsin and Michigan and WEPCO's wholesale requirements customers contribute to these Funds through their rates.

¹ 16 U.S.C. § 824d (2000).

² 18 C.F.R. § 35.32(a)(6) (2007).

3. Earlier this year, WEPCO and FPL Energy Point Beach, LLC (FPL Point Beach) jointly requested Commission authorization under section 203 of the FPA³ to dispose of jurisdictional facilities in connection with WEPCO's plan to sell the Point Beach plant to FPL Point Beach. On May 25, 2007, pursuant to delegated authority, the Director, Division of Tariffs and Market Development-West, issued an order authorizing the transaction.⁴ Other requests for approval of the sale of the plant are currently pending before the Public Service Commission of Wisconsin (Wisconsin Commission) and the Michigan Public Service Commission (Michigan Commission). Upon closing of the sale, which is dependent upon approvals from the Wisconsin and Michigan Commissions, FPL Point Beach will become the NRC licensee for Point Beach and will assume responsibility for its decommissioning.⁵

4. In its section 203 application, WEPCO explained that any retained excess decommissioning funds that result from the transaction, and the net gain from the transaction, would not be retained by WEPCO for the benefit of its shareholders. Rather, the excess decommissioning funds and any net gain would be passed through to WEPCO's customers.⁶

5. In its application in this proceeding, WEPCO requests authorization to distribute a portion of its Non-Qualified Fund, and possibly a portion of its Qualified Fund, that are in excess of NRC required amounts, to wholesale customers upon the close of the pending sale of Point Beach to FPL Point Beach.⁷ WEPCO states that the proposed

³ 16 U.S.C § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-93 (2005).

⁴ *Wisconsin Elec. Power Co.*, 119 FERC ¶ 62,160 (2007).

⁵As part of the transaction, FPL Point Beach and WEPCO have entered into a Power Purchase Agreement (PPA) in connection with the asset sale. Under the PPA, WEPCO will purchase from FPL Point Beach the entire output of the Point Beach plant, and thereby continue to use the Point Beach plant to serve its retail and wholesale requirements customers.

⁶ See WEPCO's March 9, 2007 answer to comments of Wisconsin Public Power, Inc. in Docket No. EC07-57-000 at 4.

⁷ Pursuant to section 35.32 of the Commission's regulations, a public utility may provide for decommissioning of a nuclear power plant owned by it through contributions from its wholesale rates to a decommissioning trust fund, provided the public utility and the funds meet certain requirements. Section 35.32(a)(6) provides that, absent the express authorization of the Commission, no part of the assets of a decommissioning trust

(continued)

distribution is in lieu of expending such funds on the future decommissioning of Point Beach.⁸

6. WEPCO submits that it does not need Commission approval for the methodology by which it would allocate and distribute the net gain to customers. WEPCO also asserts that, if the Commission disagrees and determines that such approval is required, WEPCO requests that the Commission grant such approval when acting on its filing.

7. According to WEPCO, its use of amounts held in its Qualified Fund for purposes other than decommissioning would have adverse tax consequences. As a result, the Asset Sale Agreement (ASA) between WEPCO and FPL Point Beach provides WEPCO with two options: (1) the transfer of all the amounts held in its Qualified Fund to a new decommissioning trust fund established by FPL Point Beach; or (2) the transfer from its Qualified Fund to FPL Point Beach of only that amount needed by FPL Point Beach to meet the NRC's minimum requirements, contingent upon a favorable private letter ruling from the Internal Revenue Service mitigating the potential adverse tax consequences. WEPCO's choice depends, in part, on whether the Wisconsin Commission decides that the decommissioning trust should remain over-funded as a hedge against unknown future contingencies not accounted for in the NRC minimum required amount. The amounts to be distributed from the Funds depends on which option is selected by WEPCO, and is further dependant on other variables affecting the final amounts held in the Funds. Therefore, the actual excess decommissioning funds available to be distributed to customers is not known at this time.

8. WEPCO proposes to allocate the excess decommissioning funds to retail and wholesale requirements customers based on their relative energy consumption, using a 2008 projected test year. The net gain on the transaction would be allocated to such customers based on their respective projected monthly coincident peak demand using that

fund may be used for any purpose other than to fund the costs of decommissioning the nuclear power plant to which the fund relates and to pay costs of administering the fund. Section 35.32(a)(7) provides that, if the fund balance exceeds the actual amount expended for decommissioning after decommissioning has been completed, the utility shall return the excess jurisdictional amount to ratepayers in a manner the Commission determines.

⁸ According to WEPCO, the amounts held in the Funds at this time significantly exceed NRC minimum requirements. This over-funding is due, in part, to recent 20-year extensions to the NRC licenses for Point Beach, which allow greater time for fund earnings to be generated and compounded prior to the start of decommissioning.

test year. Assuming excess decommissioning funds and a net gain of \$825 million,⁹ WEPCO proposes an initial allocation of \$755 million, of which approximately \$42.7 million would be distributed to wholesale requirements customers (reflecting approximately \$19.3 million in excess decommissioning funds and \$23.4 million in net gain). The initial allocation excludes a \$30 million reserve for potential later claims that may arise under the ASA, and a \$40 million reserve to settle unanticipated claims by third parties brought against the excess decommissioning funds and net gain. If these excluded funds are not ultimately required to fund claims, they would be distributed in a subsequent allocation in the same manner as the initial allocation.

9. WEPCO would make its initial disbursement on the later of: (1) 15 days after the purchase price is established under that ASA; or (2) 5 days after the Commission approves its filing. The subsequent allocation of funds would be disbursed on the later of: (1) the same date as the payment of the initial allocation; or (2) 180 days after the closing the transaction under the ASA, except the distribution of excluded funds that remain after payments required to fund claims against WEPCO have been made would be made within 15 days after the expiration or resolution of the contingencies and/or indemnification for which the funds were held in reserve. The disbursements paid to wholesale requirement customers in each instance will bear interest at WEPCO's actual cost of short-term borrowings from the date WEPCO receives the purchase price from FPL Point Beach until disbursement.

10. WEPCO states that it has filed similar requests with the Wisconsin and Michigan Commissions related to its planned disbursements, using the same methodology. WEPCO states that this would provide consistent and equitable treatment among retail and wholesale customers, and help ensure against over- or under-recovery by WEPCO.

Notice of Filing and Responsive Pleadings

11. Notice of WEPCO's filing was published in the *Federal Register*, 72 Fed. Reg. 43,266 (2007), with interventions and protests due on or before August 13, 2007. A timely motion to intervene and comments in support of WEPCO's application was filed by Wisconsin Public Power, Inc. (WPPI). Badger Power Marketing Authority and Great Lakes Utilities (Badger and Great Lakes) filed a timely motion to intervene and protest. On August 27, 2007, WEPCO filed a motion for leave to answer and an answer to the protest of Badger and Great Lakes. On August 28, 2007, WPPI also filed an answer to that protest. On August 31, 2007, Badger and Great Lakes filed an answer to the answers filed by WEPCO and WPPI.

⁹ Based on an assumption that WEPCO elects Option 1.

12. Badger and Great Lakes state that they and their predecessors were full requirements customers of WEPCO from the time that Point Beach was placed into service until they ended their contracts with WEPCO between the years 2000 and 2003. They assert that WEPCO's proposed allocation is unjust, unreasonable and unduly discriminatory because former WEPCO customers who contributed to the Funds and the costs of Point Beach would not receive a share of any of the excess Funds or net gain. Badger and Great Lakes argue that an allocation based on historical use would better return excess decommissioning funds and the net gain in accordance with their contributions to the Funds and to the cost of Point Beach and is, therefore, the only equitable methodology.

13. Badger and Great Lakes argue that WEPCO's only justification for the proposed allocation methodology, that it is designed to provide for consistent and equitable treatment among jurisdictions and customers, and to ensure against over- or under-recovery by WEPCO, is flawed in several respects. They argue that, while the Wisconsin Commission may approve the use of the same forward-looking methodology, it is possible that it will not and that, even if the Wisconsin Commission does approve the methodology, the Commission would not be bound by such a determination. Badger and Great Lakes also state that the methodology proposed by WEPCO is inconsistent with the Commission's rules pertaining to the disposition of nuclear plant decommissioning trust funds and, is inconsistent with the principles and precedents with regard to the allocation of refunds.

14. They state that a forward-looking allocator is inconsistent with Order No. 580, where the Commission makes it clear that the funds collected for decommissioning belong to the ratepayers who contributed the monies, not shareholders, and that utilities become fiduciaries to their ratepayers on the use of the funds.¹⁰ They argue that, because the monies collected for decommissioning belong to the ratepayers who contributed to the fund through their rates, it follows that any excess decommissioning funds must be returned to those same ratepayers. They claim that the only way to do this is to return the funds using a historical allocator because not doing so would give the monies contributed by former wholesale customers to other ratepayers, something the Commission has not allowed in the past.¹¹

¹⁰ See *Nuclear Plant Decommissioning Trust Fund Guidelines*, Order No. 580, FERC Stats. & Regs. ¶ 31,023 at 31,353 (1995), *order on reh'g*, Order No. 580-A, FERC Stats. & Regs. ¶ 31,055, at 30,630 (1997).

¹¹ Badger and Great Lakes Protest at 7, citing *Consumers Energy Co.*, 120 FERC ¶ 61,091 (2007) (*Consumers Energy*).

15. They further argue that a historical allocator is also consistent with the Commission's practice with respect to refunds provided in other contexts. They note that in *Plains Electric*, involving a refund disbursement plan for monies received in settlement of certain antitrust claims against a company's natural gas suppliers, the Commission rejected the company's proposed forward-looking allocator, stating that its precedent "favors refunds based, at least in part, on historical patterns of usage."¹² They state that a historical allocator has also been approved in numerous cases involving distribution of fuel-related over-charges.¹³

16. Badger and Great Lakes also argue that WEPCO's application is materially deficient, lacking details and support required under part 35 of the Commission's regulations. They state that WEPCO has the burden to prove that any refund plan is consistent with section 34.32(a)(7) and that the plan is just, reasonable, and not unduly discriminatory. They state that the lack of detail and support filed with WEPCO's application makes it impossible for the Commission to determine whether the amount of the excess decommissioning funds that WEPCO proposes to return meets the requirements of sections 35.32(a)(6) and (7), and difficult to conclude that WEPCO has met its burden of proof.

17. In its answer, WEPCO asserts that no particular methodology for allocating decommissioning distributions has been established by the Commission, as each case must be examined in the context of its specific facts and circumstances, and the standard used by the Commission in assessing a proposed distribution is whether it lies within a zone of reasonableness. WEPCO asserts that the historical methodology does not reasonably balance the risk and reward that is assumed by current customers relative to former customers. That is, former customers bear no liability for the risks faced by WEPCO in its ownership and operation of Point Beach, so they should not benefit from events that have occurred after they ceased being customers. In particular, WEPCO claims that a twenty-year extension of the NRC license, granted after Badger and Great Lakes ended their service with WEPCO, was essential to the revised estimate of surplus decommissioning funds.

18. In its answer, WPPI argues that Badger's and Great Lakes' request is one-sided; because the rule against retroactive ratemaking protects former customers from any liability for a shortfall in funding for decommissioning, Badger and Great Lakes seek to

¹² *Plains Elec. Gen. and Trans. Coop., Inc. v. Pub. Serv. Co. of New Mexico*, 29 FERC ¶ 61,374 at 61,785 (1984).

¹³ Badger and Great Lakes Protest at 8, citing as an example, *Wisconsin Pub. Serv. Corp.*, 67 FERC ¶ 61,287 (1994) (*Wisconsin Public Service*).

obtain the benefits of ongoing customers while continuing to avoid the burdens. WPPI thus asserts that since the *Consumers Energy* decision hinged on the need to recover shortfalls from continuing customers, not former customers, then *Consumers Energy* supports the view that only continuing wholesale customers are entitled to a distribution from excess decommissioning funds.

19. In response to the answers of WEPCO and WPPI, Badger and Great Lakes answer that WEPCO never quantified the extent that the twenty-year license extension resulted in a surplus, and that alone should warrant establishment of hearing procedures to investigate the reasonableness of WEPCO's proposed distribution methodology. That is, without quantifying the reasons for the excess funds in the trusts, the Commission cannot arrive at a reasonable conclusion as to how the excess funds should be allocated. Badger and Great Lakes also claim that they incurred risk related to Point Beach during the years that they were customers, but current customers will not incur any risk because any distribution of funds will occur after the plant is sold. Thus, it is unfair for current customers to receive a distribution when former customers bore the risks related to the plant. Badger and Great Lakes assert that using a method based on historical usage properly establishes a nexus between the source of the funds and the distribution of the excess funds.

Discussion

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), timely unopposed motions to intervene serve to make the entities that filed them parties to the proceeding.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(1) (2007), prohibits an answer to a protest and to an answer, unless otherwise ordered by the decisional authority. We will accept the answers filed by WEPCO and WPPI, and the answer to these answers filed by Badger and Great Lakes, because they have provided information that has assisted us in our decision-making process.

22. WEPCO requests authorization to distribute a portion of its Non-Qualified Fund, and possibly a portion of its Qualified Fund, that are in excess of NRC required amounts, to wholesale customers upon the close of the pending sale of Point Beach to FPL Point Beach based on the wholesale customers' relative energy consumption, using a 2008 projected test year. Badger and Great Lakes argue that WEPCO's proposed methodology

for allocating the decommissioning funds to be distributed is unjust and unreasonable because it uses a forward looking versus historical allocation methodology.¹⁴

23. The Commission has never before had to address on the merits whether a utility can be required to allocate a portion of excess decommissioning funds to a former customer. WEPCO's proposal raises issues that cannot be resolved based on the record before us, and that are more appropriately addressed in the paper hearing procedures ordered below. Our preliminary analysis indicates that WEPCO's proposed methodology for allocating excess decommissioning funds has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept WEPCO's proposal, suspend it for a nominal period, to become effective subject to refund, and establish a paper hearing.

24. The Commission finds that, at this juncture, a paper hearing will most efficiently and expeditiously address the issues in this case. As we have explained in the past, "[a] trial-type hearing is required only when the written submissions do not afford an adequate basis for resolving disputes about material facts . . . [and that a] policy argument is not sufficient to bring a factual assertion into question."¹⁵ The issues in this case involve matters that, at this juncture, we believe can be best resolved without the need for a trial-type evidentiary hearing. The issues set for hearing include, but are not limited to, the methodology for allocating the excess decommissioning funds and the net gain from the disposition of Point Beach as well as whether the excess decommissioning funds and net gains should be distributed using the same methodology. We note that WEPCO did not file revised tariff sheets reflecting its proposed rate reduction. Accordingly, we will direct WEPCO to file, with its initial comments provided below, revised tariff sheets which reflect its proposed methodology for determining the final amount of the excess decommissioning funds and the net gain that will be distributed to each wholesale customer.¹⁶

¹⁴ Protest of Badger and Great Lakes at 4-8.

¹⁵ *Iroquois Gas Transmission System, L.P.*, Opinion No. 357-A, 54 FERC ¶ 61,103, at 61,346 (1991) (citing *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969)), *reh'g denied*, 58 FERC ¶ 61,280 (1992).

¹⁶ WEPCO argues that it is not required by any Commission rules or orders to distribute the net gain to customers and, therefore, it does not need Commission approval for the methodology by which it would allocate the distribution of the net gain among customers. We disagree; because the proposal impacts rates for jurisdictional service, it must be filed with the Commission under section 205 of the FPA.

25. We will adopt the following expedited procedural schedule for the paper hearing:
- a. Within 20 days of the date of this order, all parties seeking to be heard may file initial comments;
 - b. Within 10 days of the date on which initial comments are filed, reply comments may e filed.

As always, parties have the option of engaging in settlement discussions in this proceeding.

The Commission orders:

(A) WEPCO's proposed methodology to distribute its excess nuclear decommissioning funds and net gain from the transaction with FPL Point Beach, is hereby accepted for filing and suspended for a nominal period, to become effective subject to refund and the paper hearing procedures discussed in the body of this order.

(B) A paper hearing to resolve issues in this proceeding related to WEPCO's proposal, as discussed in the body of this order, is hereby established in accordance with the procedural schedule described in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.