

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

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

PSEG Energy Resources & Trade, LLC
PSEG Fossil LLC

Docket No. ER05-644-000

ORDER ACCEPTING AND SUSPENDING TARIFF FILING, SUBJECT TO
MODIFICATIONS AND ESTABLISHING HEARING

(Issued April 25, 2005)

1. On February 24, 2005, PSEG Energy Resources & Trade, LLC (PSEG ER&T) and PSEG Fossil LLC (PSEG Fossil) (collectively PSEG) filed a tariff for Cost of Service Recovery Rates for five of PSEG Fossil's generating units. These are the Sewaren Station, Units No. 1, 2, 3 and 4, and the Hudson Station, Unit No. 1, all within PJM Interconnection, LLC (PJM) and located in northern New Jersey. PSEG requests waiver of the 60 day notice period and an effective date of February 25, 2005. The Commission accepts and suspends the proposed rates for a nominal period, subject to refund, and the modifications required by this order, to be effective on February 25, 2005, and establishes a hearing to determine whether the proposed rates are just and reasonable. This order benefits customers by ensuring that the generating units that PJM has determined are needed for short term reliability will continue to operate at rates that are not unjust and unreasonable or unduly discriminatory.

I. Background

2. On January 25, 2005, the Commission issued an order addressing, among other things, PJM proposed tariff provisions governing the deactivation of generating units in the PJM operating territory.¹ PJM filed Part V of the PJM Tariff in response to a prior Commission order directing PJM to clarify its deactivation procedures. Part V

¹ *PJM Interconnection, LLC*, 110 FERC ¶ 61,053 (2005), *reh'g pending* (January 25 Order).

of the tariff governs both retirement and mothballing.² Section 113 of the approved tariff provides the following procedural schedule for a unit that seeks deactivation. A generation owner must give 90 days notice that it wishes to deactivate a unit and must also provide an estimate of any investment that would be needed to keep the unit operating. Thirty days from the date of the notice, PJM will inform the generation owner whether deactivation of the unit would adversely affect reliability and provide an estimate of how long the unit will be required to continue operating for reliability. Within 90 days of the generation owner's notice, PJM will post on its internet site the transmission upgrades that would be needed to permit the generating unit to deactivate.

3. The January 25 Order concluded that PJM could not prevent a unit from retiring after a reasonable notice period, in this case the procedure contained in the tariff. However, if a unit elects to continue operations for reliability reasons, it can be compensated in one of two ways. The generation owner may file a Cost of Service Recovery Rate with the Commission, pursuant to section 119, to recover the entire cost of operating the unit beyond its proposed Deactivation Date³ or it may elect to receive a Deactivation Avoidable Cost Credit (DACC) pursuant to the formula contained in section 114 of the PJM Tariff.⁴ A generation owner that files a specific rate to recover its costs is ineligible for the DACC. In the instant case PSEG has elected to file a Cost of Service Recovery Rate with the Commission. As discussed below, the filing proposes a full cost of service and includes costs in addition to those included in the DACC, such as depreciation of book plant, including a negative salvage value and return on investment.

² The term mothballing was not defined, but the Commission understood this term to mean removing the unit from operations for the present, but maintaining the unit in a physical state such that it could become operational at a future date.

³ The date a generating unit is either retired or mothballed and ceases to operate. First Revised Sheet No. 224A, PJM OATT, Sixth Revised Volume No. 1.

⁴ See section 114, First Revised Sheet No. 224B, PJM OATT, Sixth Revised Volume No. 1. The formula for calculating the DACC includes a Deactivation Avoidable Cost Rate described in section 115 of the PJM OATT that includes avoidable expenses related directly to the unit for (1) labor for operations and maintenance labor; (2) administrative expenses for employees at the unit; (3) maintenance; (4) variable expenses excluding variable costs recoverable in the energy market; (5) taxes, fees, and insurance; (6) short term carrying charges for maintaining reasonable levels of inventories of fuel and spare parts; (7) corporate level expenses; and (8) project investment required to enable a unit to continue operating beyond its proposed Deactivation Date.

II. Procedural Matters

4. Notice of PSEG's filing was published in the *Federal Register* on March 1, 2005, 70 Fed. Reg. 11229, with comments due by March 17, 2005. Timely motions to intervene with comments or protests were filed by PJM, Gerdau Ameristeel Corporation (Gerdau), the Maryland Office of People's Counsel (MD People's Counsel), and the Public Power Association of New Jersey (PPANJ). Timely motions to intervene were filed by the Mirant units,⁵ Consolidated Edison Energy, Inc., Public Service Electric and Gas Company, the PPL Parties, and Rockland Electric Company.⁶ Exelon Corporation (Exelon), Jersey Central Power and Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company (FirstEnergy Companies) filed motions to intervene out of time. PSEG and PJM filed answers on April 1, 2005. On April 13, 2005, PPANJ filed a motion to reply and comments in response to the answers of PSEG and PJM.

5. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the lack of undue prejudice or delay and the parties' interest, we find good cause to grant, under Rule 214, the unopposed, untimely motions to intervene of Exelon and First Energy Companies in this proceeding. Rule 213(a) (2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.213(a) (2) (2004) prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept PPANJ's answer to the protests in this docket and will, therefore, reject it.

6. PSEG has requested that the Commission waive the 60 day notice requirement and make the proposed tariff effective February 25, 2005, *i.e.*, on one day notice. While there is likely to be a significant rate impact from this proposal, the Commission will grant the waiver for good cause shown for the following reasons. First, PSEG provided 90 days notice to PJM that the units would be retired on December 7, 2004, thus conforming in advance to what later became the notice provisions of the PJM tariff. PJM advised PSEG that the units were needed for

⁵ Consisting of Mirant Americas Energy Marketing, LP; Mirant Chalk Point, LLC; Mirant Mid-Atlantic, LLC; Mirant Peaker, LLC; and Mirant Potomac River, LLC.

⁶ Consisting of PPL EnergyPlus, LLC; PPL Electric Utilities Corporation; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; PPL University Park, LLC; and Lower Mount Bethel Energy, LLC.

reliability purposes at least through the summer of 2006. On January 25, the Commission issued its order ruling on PJM's proposed deactivation procedures, ruling in part that PJM could not require PSEG to continue providing service. PSEG filed to recover costs needed to maintain reliability some 30 days after the PJM tariff became effective.

7. At present, PSEG has continued to hold the units in operational status since December 7, 2004, the date it would have been permitted to retire under the Commission's ruling. Under the tariff as now constituted, PSEG would be entitled to retire the units no later than the end of the 90 day period if PJM did not need the units to meet reliability concerns. The Commission concludes that PSEG should not be required to wait an additional ninety days beyond the Commission's January 25 determinations before beginning to recover its cost of continuing to make the units available in the market. Additionally, PSEG is entitled to begin collecting for the Investment Projects which must be completed in order to maintain the availability of the units before the beginning of the summer season. Therefore Commission will grant the request to waive the 60 day notice period for good cause shown, as it has done in *Mirant*⁷ and other cases in order to address reliability concerns.

III. The Filing

8. PSEG characterizes its filing of the Cost of Service Recovery Rate Tariff (PSEG Tariff) as containing cost-of-service rates for making available units that it proposed to retire but which are to be retained to meet PJM's reliability needs. The tariff has a term through September 1, 2006, the period that PJM stated the units at issue would be needed until certain transmission upgrades are completed to address PJM's reliability needs.⁸ According to PSEG, the capacity factors in 2004 for the Sewaren Units were 3.8 percent for Unit 1, 6.5 percent for Unit 2, 9.5 percent for Unit 3, and 11.1 percent for Unit 4. The capacity factor in 2004 for Hudson Unit 1 was 2.1 percent. PSEG also states that none of these units are recovering its cost of service and that until the PJM market design recognizes the locational value of capacity, direct payments for reliability services for units like these will be necessary.

9. The proposed tariff provides for a "monthly availability charge" to recover the estimated annualized costs of operating the units for the period covered by the tariff. Built into that rate are estimated cash operating expenses for the units, such as the

⁷ *Mirant Kendall, LLC and Mirant Americas Energy Marketing, L.P.*, 109 FERC ¶ 61,227 (2004).

⁸ In its answer of April 1, 2005, PSEG states that PJM has extended the reliability need for these units at least through the summer of 2008 (April 1 answer at 12).

inventory cost of fuel, maintenance, labor, taxes, and overhead costs, together with a monthly project investment tracker designed to recover the project expenditures required to restore the units to a reliable condition. The monthly availability charge also includes elements for depreciation of existing plant, return on investment in the units, and for negative salvage value. The monthly rate will be reduced by the actual net revenues (those in addition the variable costs incurred) for any month in which the units actually operate and receive revenues for participating in PJM's various markets.

10. The project investment tracker permits the recovery of large maintenance expenditures, including expenditures that would normally be capitalized, during the term of the tariff. Thus, the tariff provides for the recovery of capital costs incurred between February 25, 2005 and December 31, 2005 by spreading the estimated costs over that period. The tariff contains a list of planned project costs for the period ended December 31, 2005 and totals these for each of the two plants involved. These are \$13,403,179 for the four Sewaren units and \$2,232,054 for the Hudson unit. If additional investments are required for the year 2006, these will be filed with the Commission no later than November 1, 2005. The investment tracker includes an annual true-up mechanism to adjust the costs if these project costs should be greater or less than those included in the tariff. The project costs incurred in 2005 would be recovered in that year (*i.e.* over ten months) even if the utility of the project costs were to continue forward to the end of the tariff on September 1, 2006.

11. The tariff further provides that PJM can request additional project investment expenditures in order to eliminate a forced outage or potential shut down of a unit. In addition, the tariff provides that PSEG will not delist the units as capacity resources and that each unit will bid into the day-ahead and the real time PJM Energy Exchange Markets at rates equal to their cost-based bids as determined by PJM. PSEG will operate the units in accordance with the PJM's Performance Standards.

IV. Discussion

A. The Applicability of the PJM Tariff

1. Protests and Comments

12. As was previously discussed, PSEG made this filing in accordance with the retirement provisions of the PJM Tariff. The commenting and protesting parties have several objections and reservations to the application of those provisions. For example, Gerdau and PPANJ protest the February 25, 2005 effective date because the customers' exposure to the monthly availability surcharge cannot be determined at this time. PPANJ states that no analysis was performed by PJM to establish how it could justify the acceleration of the transmission upgrades given the potential rate

impact of the RMR Tariff. They further assert that PJM has not demonstrated the necessity of keeping the units in service to maintain reliability and therefore the filing should be suspended for a full five months while PJM conducts such an analysis.

13. PJM asks the Commission to confirm that PSEG is not entitled to receive monthly capacity payments beyond the date that PJM determines the units are no longer needed for reliability. PJM states that the proposed PSEG Tariff only provides a mechanism for extending the deactivation date beyond September 1, 2006, but not for shortening it. PJM states that the Commission should require PSEG to revise its tariff to permit PJM to terminate the tariff upon providing PSEG 120 days notice that the units are no longer needed for reliability. PJM, MD People's Counsel and PPANJ state that in the event that the generating units remain in service beyond the date when they are no longer needed for reliability pursuant to the PSEG Tariff, PSEG should be required to refund a *pro rata* share of any Project Investment costs for which it received reimbursement. PJM states that this will ensure that market participants do not subsidize PSEG for investments that keep the units in service beyond the period when they are needed for reliability. MD People's Counsel states that without this refund provision, PSEG could continue to run the generators and retain the profits because of the capital expenditures paid for by customers. It concludes therefore, that the refund provisions described in sections 117 and 118 of the PJM Tariff that are applicable to the DACC option should also apply to the PSEG Tariff.

14. In its answer PSEG states that it is willing to amend its proposed PSEG Tariff to allow for early termination upon 120 days notice by PJM. PSEG also states that it will amend the PSEG Tariff to provide for a refund of Project Investment costs should the generating units continue to operate beyond the date that PJM has requested the units for reliability services, *i.e.* September 1, 2006.

15. PPANJ protests that the revenue requirement proposed by PSEG is overstated. PPANJ takes issue with the inclusion or treatment of specific cost of service items in the Cost of Service Recovery Rate including negative salvage value, fuel inventory, retirement expenses, and book value. PPANJ also asserts that the proposed Cost of Service Recovery Rate amounts to a double recovery because customers will still have to pay for transmission upgrades in addition to a similar amount to PSEG for these units, both to essentially serve the same purpose. Therefore, they state that the proposed expenses to PSEG, which are in addition to the transmission upgrades, are imprudent and should not be imposed on customers. In this regard, PPANJ states that both PJM and PSEG should have recognized and planned for the impending retirement of these units. PPANJ states that the deferral by PSEG of needed maintenance on these generating units indicates their intention to retire the facilities.

16. PJM responds to the PPANJ that it has followed the deactivation provision in its tariff and that it can only plan transmission upgrades once market participants notify PJM of their intention to retire. PJM further states that the retirement compensation provisions in Part V of the PJM Tariff support units that delay exiting the market and does not require PJM to develop alternatives. PSEG likewise answers that it followed the requirements of the PJM Tariff and that it complied with the requirements for deactivation. PSEG therefore argues that the protests of PPANJ regarding shortcomings and defects of the planning procedures embedded in the tariff are issues that are not appropriate to this proceeding.

17. PSEG also states that the recovery of negative salvage value is consistent with Commission precedent. PSEG further states that maintaining fuel inventory is necessary and is an appropriate cost of service item, as is retirement expenses. PSEG also states that the book value used in the filing is the book value when the plants were transferred from PSE&G and takes into account transition costs that were charged to customers and that the method used appropriately calculates Accumulated Deferred Income Tax.

2. Commission Determination

18. The Commission concludes that PSEG's proposed rates were properly filed under the PJM tariff. As has been discussed, Part V of PJM's Open Access Transmission Tariff, which addresses generators seeking deactivation, was approved in the January 25 Order.⁹ Under Part V of the tariff, a generator has a choice of two compensation mechanisms if they elect not to retire upon notice from PJM that a facility is needed for reliability. As noted in the January 25 Order, the generator can either "file a cost of service rate with the Commission to recover the entire cost of operating the unit beyond its Deactivation Date or it may elect to receive a Deactivation Avoidable Cost Credit proposed in section 114 of the tariff."¹⁰ Here, PSEG chose to file for cost-of-service rates for the Sewaren and Hudson units pursuant to section 119 of the PJM Tariff.

19. PSEG filed its proposed tariff after providing PJM with the requisite 90 days notice that PSEG desired to retire the units at issue. The Commission has approved the relevant tariff provisions, which vest in PJM the responsibility of determining whether the units are necessary for reliability in the PJM region. As PJM notes, it is not reasonable to require that it anticipate which units may elect to retire, and for this reason the PJM Tariff provides an interim method of assuring reliability until new

⁹ January 25 Order at P 123.

¹⁰ *Id* at P 124.

transmission can be constructed to meet reliability needs. The time frames of the filing here substantially exceeded what the Commission ultimately required in its January 25 Order.

20. The Commission therefore rejects the arguments that because the PJM planning process may have been inadequate, the interim payments to a generator are necessarily imprudent, and that no interim cost recovery should be allowed. As noted, PJM and PSEG followed the generation deactivation procedures accepted in the January 25 Order and we do not believe it is appropriate to further discuss merits of these procedures in this docket. On this basis, we deny the motion to consolidate this proceeding with EL03-236-005. The Commission also concludes that PJM should have the right to cancel the tariff if the service is no longer needed subject to assuring that any Project Investments not recovered to date are recovered within the original time frame of the tariff. We also conclude that a *pro rata* share of the Project Investments should be returned to customers if the units continue to operate beyond the date when they are no longer needed for reliability. PSEG has agreed to modify the tariff accordingly and is directed to do so.¹¹ The Commission is also making this filing subject to refund so that any unnecessary or excessive expenditures can be recovered and reduce the transmission charges that would be charged to customers in the affected zones.

21. Thus, the issue here is whether the proposed expenditures are appropriate under the PJM Tariff, and if appropriate, whether the particular expenditures are required and represent amounts reasonably needed to maintain reliability until the transmission facilities are upgraded. Section 119 of the PJM Tariff states that the Cost of Service Recovery Rate allows the unit owner to recover the “entire cost of operating the generating unit until such time as the generating unit is deactivated.”¹² PSEG proposes to include in its Cost of Service Recovery Rate the expenditures for reliability projects (Project Investments) required to provide reliable service, but which due to their useful lives would normally be capitalized. PSEG’s proposed cost-of-service formula also includes a return on existing investment and depreciation of the unit’s current book value including the proposed recovery of negative salvage value.

22. Because PSEG’s cost of service includes costs, such as remaining depreciation of existing plant and negative salvage value, that are not necessary for operating the unit, this filing presents an issue of whether the phrase “cost of service” in the PJM Tariff should be construed in a conventional manner, or in one that is more oriented to

¹¹ PSEG Answer of April 1, 2005 at 4.

¹² See PJM Tariff section 119, First Revised Sheet No. 224H.

the avoidable cost approach that is embedded in other sections of Part V of the PJM Tariff. In this regard, PSEG references the New England RMR cases it claims support its filing.¹³ However, as noted in *Milford*, the situation represented here and the situation in New England that gives rise to numerous RMR agreements in that market are entirely different. As stated in *Milford*, "Specifically, the Commission found no evidence that the PJM markets fail to appropriately compensate generators during scarcity conditions. Also, in order to receive an RMR agreement a generator in ISO New England is not required to apply for deactivation, while in PJM a generator must apply to deactivate its unit in order to receive reliability compensation. Finally, reliability compensation in PJM's market is not tied to modifications in PJM's market structure in the way that RMR agreements in ISO New England are linked to changes to the New England market structure."¹⁴ Therefore the appropriateness of PSEG's proposed return and its depreciation of book plant are issues that should be addressed at hearing and not summarily resolved here.

23. However, while it may be appropriate to allow PSEG a return of investments made in the generating units since the facilities were transferred to PSEG Fossil, we further conclude that it is not appropriate to include in the rate a return for prior investment that has already been recovered from customers. Additionally, it is not clear from the proposed cost of service whether PSEG is proposing to write down such existing assets at a faster rate, *i.e.* over the period when these units are needed for reliability, than would otherwise have occurred if the units would continue to operate for the remainder of a reasonable amortization period. PSEG was indeed prepared to deactivate and therefore to not recover any more of its prior investment. It is not clear how the Cost of Service Recovery Rate accounts for these issues and whether the proposed depreciation rates are just and reasonable. Therefore, we find that this issue should be investigated at hearing.

24. For these reasons the Commission's preliminary analysis indicates that the proposed rate in the PSEG Tariff has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, as noted elsewhere in this order, the Commission will accept and suspend the proposed rates for a minimal period, to be effective on February 25, 2005, subject to refund, modifies certain of the cost elements proposed to be included in the rates, and establishes a hearing to determine whether the proposed rate is just and reasonable.

¹³ *Devon Power Company et al.*, 104 FERC ¶ 61,123 (2003).

¹⁴ *Milford Power Company, LLC*, 110 FERC ¶ 61,299 at P 71 (2005).

B. Other Cost Issues raised by the Filing

1. Cost Allocation to Wholesale Customers

25. Gerdau states that costs paid to PSEG under the proposed tariff will be recovered from customers based on contribution to system peak load, but that the filing does not specify the method used to allocate the monthly capacity charge. Gerdau also states that section 120 of the PJM Tariff, which addresses cost allocation, lacks specificity and is unclear as to whether: (1) the costs will be collected in the same manner as zonal transmission revenue requirement; and (2) whether transmission upgrade costs will be allocated on a zonal basis as well. PPANJ also protests the PJM filing in docket EL03-236-005 that the PJM Tariff is not clear on this matter and this application exposes flaws in the proposed Tariff. They request that the two proceedings be consolidated.

26. PJM responds that section 120 of the PJM Tariff is clear that the costs of the PSEG Tariff will be collected in the same manner as other zonal transmission revenue requirements. PJM also states that section 1.5.6(g) of Schedule 6 of the PJM Operating Agreement specifies that the cost of transmission upgrades will be allocated to the zone(s) based on PJM's assessment of need and benefits.

27. The Commission concludes that the method of allocating the costs in accordance with section 120 of the PJM Tariff is clear and that the provisions contained in section 120 do not need to be incorporated into the PSEG Tariff in order to be enforced. In addition, these tariff provisions were accepted by the Commission in the January 25 Order; and therefore, as discussed previously, it is not appropriate to discuss the merits of procedures in this proceeding that were already accepted by the Commission. PPANJ's protest regarding the PJM filing in Docket No. EL03-236-005 should be directed to that docket and is beyond the scope of this proceeding

2. Project Investments

28. PPANJ states that the Project Investment costs should be treated as capital expenditures and should be depreciated over the expected life of the project rather than over the term of the PSEG Tariff as proposed by PSEG and should not be recovered until the project is placed in service. PSEG answers that the proposed Project Investments follow the PJM Tariff which does not require a specific treatment for rate or accounting purposes. PSEG also states that treating these costs as capital to be recovered and depreciated over their expected lives could result in under-recovery by PSEG should the project life be greater than the term of the PSEG Tariff. PSEG also responds to the PPANJ claim that payments for the Project Investments should

not commence until they are placed in service stating that the rate proposed in the filing contains a true-up mechanism and provides customer protection contained in the PJM Tariff for monthly over- or under-recovery amounts.

29. The Commission concludes that PSEG is entitled to payments for the Project Investments according to a specific formula in section 118 of the PJM Tariff. However, this formula is presented in the context of the Deactivation Avoidable Cost Rate from of section 115 of the PJM Tariff, and does not appear to apply to the Cost of Service Recovery Rate of section 119, which is the rate that PSEG has filed here. In similar cases in which the applicant has requested reimbursement for reliability projects needed to maintain the availability of the units, the recovery typically follows the cash flow expenditures for the projects with a true-up mechanism. In prior instances, the Commission has also recognized that some of these projects may be capital and some may be considered expenses. PSEG has not provided a monthly cash flow for the estimates contained in the filing, nor have they identified capital versus maintenance projects.

30. Alternatively, under the DACC mechanism, section 115 of the PJM Tariff allows Project Investments to be recovered over the term of the Tariff but to not commence until the project is placed in-service. There is a limit to recovery of expenditures totaling \$2 million under this provision (however, under section 117 of the tariff, this limit is increased subject to independent third party verification of the need for additional Project Investment). PSEG has also proposed to recover the project expenditures for 2005 in ten months rather than spreading them over the entire term of the tariff. PSEG has not established that this recovery method is just and reasonable given that the benefits will extend beyond the first 10 months that the tariff is in effect. The Commission therefore sets the recovery of the Project Investments for hearing as part of the determination of the proper Cost of Service Recovery Rate.

The Commission orders:

(A) PSEG's proposed tariff is hereby accepted for filing and suspended for a nominal period, to be effective on February 25, 2005, subject to refund, and to the modifications required by this order. PSEG shall file those modifications within 30 days after this order issues. PSEG's request to waive the 60-day notice period is granted.

(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 regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall

be held concerning the justness and reasonableness of PSEG's proposed tariff revisions. As discussed in the body of this order, the hearing will be held in abeyance to give the parties time to conduct settlement judge negotiations.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby authorized 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 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 Commission and the Chief Judge 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 sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If the settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall convene a conference in this proceeding to be held within approximately fifteen (15) days of the date 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 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.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.