

143 FERC ¶ 61,167
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

PacifiCorp

Docket No. ER12-36-001

ORDER ON REHEARING AND CLARIFICATION

(Issued May 23, 2013)

1. On December 20, 2012, PacifiCorp filed a request for clarification and rehearing of the Commission's November 20, 2012 order concerning PacifiCorp's late-filed agreements and proposed refund calculations.¹ As discussed below, PacifiCorp's request for clarification and rehearing is granted in part and denied in part.

I. Background

2. On October 4, 2011, as amended on January 19, 2012 and February 16, 2012, PacifiCorp submitted a filing containing proposed refund calculations in connection with two service agreements it entered into with Bonneville Power Administration (BPA) that were not filed in accordance with the Commission's filing requirements in effect at the time service commenced. PacifiCorp's filing included the two agreements, which it entered into with BPA on May 28, 1999 and July 20, 2000 (collectively, the BPA Storage Agreements). The BPA Storage Agreements require PacifiCorp to accept delivery of BPA-produced wind energy generated by the Foote Creek II and Foote Creek IV windfarms and then deliver energy to BPA's transmission system at a later date in block schedules.

3. Prior to Order No. 2001,² the Commission required service agreements entered into under market-based rate tariffs to be filed with the Commission. However, as a

¹ *PacifiCorp*, 141 FERC ¶ 61,150 (2012) (November 20 Order).

² *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101

(continued...)

result of Order No. 2001 these agreements are no longer required to be filed and instead sales under such agreements must be reported in a utility's electric quarterly reports (EQRs).³ The BPA Storage Agreements were not properly filed with the Commission as required prior to the issuance of Order No. 2001. PacifiCorp began reporting the Foote Creek II BPA Storage Agreement in its EQR in the fourth quarter of 2002 and began reporting the Foote Creek IV BPA Storage Agreement in its EQR in the third quarter of 2009.

4. In the November 20 Order, the Commission explained that in circumstances such as this one, where the company already has market-based rate authority, the company is required to refund the time-value of money collected.⁴ The Commission also noted that the company is permitted to recover its variable costs (e.g., fuel and variable operation and maintenance expenses).⁵ The Commission accepted the BPA Storage Agreements and directed PacifiCorp to make refunds to BPA for the time-value of gross revenues collected. The Commission allowed PacifiCorp to limit the refund to an amount that allows PacifiCorp to recover the direct assignment facilities (DAF) and transmission costs set out in PacifiCorp's October 4, 2011 filing. The Commission did not allow PacifiCorp to include a \$1/MWh adder as a variable cost, which PacifiCorp proposed to account for costs associated with the storage service it was providing to BPA.

FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008).

³ Order No. 2001, which implemented section 35.1(g) of the Commission's regulations, obviates the need to file with the Commission service agreements under market-based power sales tariffs. *See* 18 C.F.R. § 35.1(g) (2012) (“[A]ny market-based rate agreement pursuant to a tariff shall not be filed with the Commission.”).

⁴ November 20 Order, 141 FERC ¶ 61,150 at P 19 (citing *Idaho Power Co.*, 95 FERC ¶ 61,482, *order on reh'g*, 96 FERC ¶ 61,305 (2001)).

⁵ November 20 Order, 141 FERC ¶ 61,150 at P 19 (citing *Carolina Power & Light Co.*, 84 FERC ¶ 61,103 (1998), *order on reh'g*, 87 FERC ¶ 61,083 (1999) (*Carolina Power*); *El Paso Electric Co.*, 101 FERC ¶ 61,276 (2002), *order on reh'g*, 105 FERC ¶ 61,131, at PP 21-23 (2003)).

II. Rehearing Request

5. On December 20, 2012, PacifiCorp filed a request for clarification and rehearing of the November Order with respect to the Commission's determinations regarding the variable costs to be considered in the refund calculations, the use of net monthly revenues rather than gross revenues in calculating refunds, and the date PacifiCorp came into compliance with the Commission's filing requirements with respect to its late-filed agreements.

6. PacifiCorp contends that the Commission erred to the extent it found that PacifiCorp must limit recovery of its DAF and transmission costs to those set out in PacifiCorp's October 4, 2011 filing. PacifiCorp argues that the October 4, 2011 filing was a comprehensive package and that the DAF and transmission costs were based on contractual proxies. PacifiCorp states that the amount reflected in the February 16, 2012 amendment best reflects the DAF and transmission costs that PacifiCorp incurred and it should be entitled to that amount.

7. PacifiCorp also contends that the Commission erred to the extent it found that PacifiCorp may not recover its variable costs associated with its provision of storage service under the storage agreements. PacifiCorp states that Commission policy on the variable-cost floor articulated in *Carolina Power* is that a filing party owing refunds is entitled to recover an amount that permits a public utility to recover its variable costs, and that normally these costs will include fuel and variable operation and maintenance expenses. PacifiCorp represents that in the October 4, 2011 filing it used a \$1/MWh proxy because it lacked actual cost data for storage service. PacifiCorp notes that the Commission explained why it would not allow the proxy but argues that the Commission did not state why it was inappropriate for PacifiCorp to attribute any variable costs to the storage services. PacifiCorp argues that disallowing storage costs is a departure from existing precedent because "variable costs of all sorts are typically permitted, depending on the type of service provided."⁶ PacifiCorp also states that Commission erred to the extent it found that variable costs may not be recovered under the *Carolina Power* floor policy unless they were identified during the negotiations of a contract.

8. PacifiCorp notes that it could find no precedent on how to calculate variable storage costs for contracts such as the BPA Storage Agreements, but considers its February 16, 2012 amendment with estimated storage costs of \$1,353,144.42 to be logical and reasonable. PacifiCorp states that it subtracted the value of the intermittent wind energy received from BPA from the cost of the block energy PacifiCorp

⁶ PacifiCorp's Rehearing Request at 13-14.

subsequently returned to BPA to calculate the storage costs. Specifically, PacifiCorp explains as follows:

The first part of the calculation required PacifiCorp to value the intermittent, non-firm energy produced by the Foote Creek wind generators in Wyoming, which PacifiCorp did by using the non-firm energy rate for certain types of qualifying facilities that were approved by the Wyoming Public Service Commission. The second part of the calculation required PacifiCorp to determine the hourly cost of the energy that PacifiCorp returned to BPA. Because PacifiCorp had not calculated a “system lambda,” it used “Hourly Pricing Proxy” data which has long been used for determining imbalance service charges under Schedule 4 of its [OATT.]⁷

9. PacifiCorp also claims that the Commission erred to the extent it failed to permit PacifiCorp to calculate refunds based on the time-value of net monthly revenues. PacifiCorp argues that the Commission did not explain why at least one utility has been permitted to use a time-value of net monthly revenues approach to calculating refunds, but PacifiCorp was not permitted to do so. PacifiCorp states that in *NewCorp*,⁸ a delegated letter order, a time-value refund based on the *net* monthly revenues was accepted. PacifiCorp states that applying the time-value penalty to the gross amount that PacifiCorp collected each month from BPA overstates the level of funds on which PacifiCorp was able to earn interest.

10. Finally, PacifiCorp requests that the Commission clarify that October 1, 2002 and July 1, 2009 are the “on file” dates of the storage agreements. PacifiCorp states that it has no objection to a December 4, 2011 effective date, as long as such date is not treated as the date on which the storage agreements were deemed to be filed. PacifiCorp maintains that the “on file” date is the date it began reporting in EQRs and it is that “on file” date, not the December 4, 2011 effective date, which should drive the revenue component (as opposed to the interest component) of the refund.

⁷ *Id.* at 17.

⁸ *Id.* at 18 (citing *NewCorp Resources Electric Cooperative, Inc.*, Docket No. ER10-890-000 (May 10, 2010) (delegated letter order) (accepting refund report filed on March 15, 2010)).

III. Discussion

11. PacifiCorp's request for clarification and rehearing is granted in part and denied in part, as discussed below.

12. We will grant rehearing to the extent that we will allow PacifiCorp to use the calculations provided in its February 16, 2012 amendment for DAF and transmission costs. The amendment contains data detailing PacifiCorp's monthly variable costs. Upon further consideration, we find that PacifiCorp has supported its argument that the amounts reflected in the February 16, 2012 amendment best reflect the DAF and transmission costs that PacifiCorp incurred.

13. However, we continue to find that PacifiCorp has not supported its request to recover storage service costs as a variable cost and we will deny rehearing in this regard. We note that PacifiCorp states that the Commission erred to the extent it found that variable costs may not be recovered under the *Carolina Power* floor policy unless they were identified during the negotiations of a contract. We clarify here that the Commission did not make such a finding. Rather, the Commission's statement on this matter was intended as an example of one of the pieces of information an entity could have included in attempting to justify a finding that certain costs should be included as variable costs.⁹ In this case, in addition to the \$1/MWh proxy originally submitted, PacifiCorp provided an alternative "calculation" of its variable storage costs, which calculates variable storage costs by subtracting the proxy value of the energy received from BPA from the estimated cost of the energy PacifiCorp subsequently returned to BPA. We find that PacifiCorp has not shown that the \$1/MWh proxy or the alternative calculation is a credible representation of a variable cost of providing the exchange.

14. We also deny rehearing with respect to PacifiCorp's argument that it should be permitted to calculate refunds based on the time-value of net monthly revenues. We disagree with PacifiCorp's argument that precedent supports the use of net revenues. PacifiCorp points to no Commission order where a time-value of net monthly revenues approach was accepted. The only case PacifiCorp provides to support its argument is a

⁹ In the November 20 Order, 141 FERC ¶ 61,150 at P 21, the Commission stated that "PacifiCorp has not demonstrated that the \$1/MWh adder is a variable cost that was identified during the negotiation of the BPA Storage Agreements or shown that such an adder here would be consistent with Commission precedent."

delegated letter order, where this specific issue was not discussed.¹⁰ Moreover, we note that *Carolina Power* does not stand for the proposition that revenues must be calculated on a net, rather than gross, basis. In fact, in *Carolina Power*, the Commission found that customers did not receive a windfall from the time-value refund, explaining “[u]nder the time value remedy, the customers received only interest on *the amount they paid to* [Carolina Power], thereby reimbursing them for the time value of the money that [Carolina Power] was not authorized to collect from them.”¹¹ In *Carolina Power*, the Commission held that a time-value refund is not open-ended, and is limited in that a utility may recover its variable costs. In applying the Commission’s refund policy, the Commission has consistently required entities to “refund to customers the time value of revenues collected,” not on net revenues.¹²

15. We find that PacifiCorp was in compliance with the Commission’s requirements once it began reporting the service agreements in its EQRs. Although PacifiCorp was originally obligated to file the storage agreements with the Commission, that obligation was superseded by Order No. 2001, which required the filing of EQRs in lieu of filing the contracts themselves. In Order No. 2001, the Commission stated that it hoped that the EQR’s more accessible format would better fulfill a public utility’s responsibility under FPA section 205(c) to have rates on file in a convenient form and place.¹³ Thus, once PacifiCorp included these agreements in its EQRs, it was compliant with its obligation to have a rate on file with the Commission. Therefore, we clarify that PacifiCorp should only have to account for revenues received prior to the dates it started filing EQRs for the two agreements, respectively, but must calculate interest on those revenues up to the December 4, 2011 effective date.

¹⁰ A delegated letter order does not constitute legal precedent that is binding on the Commission. *Wolverine Power Supply Cooperative, Inc.*, 135 FERC ¶ 61,165, at P 15 & n.22 (2011).

¹¹ *Carolina Power*, 87 FERC ¶ 61,083 at 61,357 (emphasis added). The amount the customer paid to Carolina Power was a gross revenue figure, not a net revenue.

¹² See *OREG 1, Inc.*, 135 FERC ¶ 61,150 (2011), *order on reh’g*, 138 FERC ¶ 61,110, at P 18 (2012); see also *El Paso Electric Co.*, 101 FERC ¶ 61,276 (2002), *order on reh’g*, 105 FERC ¶ 61,131 (2003).

¹³ Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 31.

The Commission orders:

PacifiCorp's request for clarification and rehearing is granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.