

97 FERC ¶ 61, 274  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, Linda Breathitt,  
and Nora Mead Brownell.

Allegheny Power

Docket No. ER02-136-000

ORDER ON PROPOSED REVISED CONTRACT AND ESTABLISHING HEARING  
AND SETTLEMENT JUDGE PROCEDURES

(Issued December 18, 2001)

On October 19, 2001, West Penn Power Company, doing business as Allegheny Power (Allegheny Power), submitted for filing an addendum to the current agreement between Allegheny Power and Allegheny Electric Cooperative, Inc. (AEC). The addendum represents Allegheny Power's proposed revised charges, terms and conditions for a one-year extension<sup>1</sup> of the existing agreement. We will accept the proposed addendum for filing, suspend it for a nominal period, make it effective subject to refund, and establish hearing procedures, but will hold the hearing in abeyance pending settlement judge procedures. This order thus provides the parties a venue in which to explore what would be reasonable rates for the services provided under the addendum.

Background

Service has been provided by Allegheny Power to AEC under the terms of a 1994 Settlement Agreement. The 1994 Settlement Agreement basically covers two types of service. First, as relevant here, Allegheny Power provides bundled Partial Requirements service to AEC for AEC's requirements, less 20 MW of capacity. This service is billed on a coincident peak rate design, which is based on AEC's load at the time of Allegheny Power's peak.

Second, AEC may purchase either from Allegheny Power or from other sources, or generate and provide, the other 20 MW of capacity. This service is referred to as Peak

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<sup>1</sup>December 1, 2001 through November 30, 2002.

Reduction Supply (PRS) service. Since 1994, AEC has purchased PRS service from Allegheny Power solely.

The 1994 Settlement Agreement had an initial term through November 30, 2001, with automatic annual renewals thereafter unless terminated by either party on two years' advance notice. Specifically, Section 2.6 states that "[i]n respect to partial requirements service provided to [AEC] by Allegheny Power under the Tariff, the [Electric Service Agreement] shall automatically renew for one (1) year periods, subject to revised charges, terms and conditions." Concerning the PRS service, Section 2.6 further states that in the event the Electric Service Agreement (ESA) is renewed, Allegheny Power "shall, unless specifically prohibited by law" offer (a) transmission service for the 20 MW, and "solely at [Allegheny Power's] discretion, may offer" (b) a continuation of the arrangements concerning the 20 MW, described above, or (c) an arrangement under which AEC would purchase the 20 MW on a full-time basis from Allegheny Power.

By letter dated November 15, 2000 (November 15 letter), Allegheny Power provided formal written notice of its intent to cancel the agreement. The letter states that all provisions of the 1994 Settlement Agreement will remain in effect through November 30, 2001. For the final year of the contract, however, December 1, 2001 through November 30, 2002, the Partial Requirements service will remain in effect "subject to revised charges, terms and conditions" per Section 2.6 of the 1994 Settlement Agreement. As far as PRS is concerned, the November 15 letter stated that Allegheny Power would provide transmission service for PRS under its open access transmission tariff (OATT). However, Allegheny Power declined to offer PRS under either options (b) or (c) of Section 2.6.

The result of the November 15 letter was that Partial Requirements service would now be offered from December 1, 2001 through November 30, 2002 at revised charges, terms, and conditions. For what had been PRS, only transmission service would be offered for the same period.

By letter dated January 31, 2001, AEC responded that it understood Allegheny Power's intent to terminate the ESA effective November 30, 2002. AEC stated that it understood that Allegheny Power was not exercising its option to continue to provide the power associated with what had been PRS and that AEC would obtain transmission service for the former PRS pursuant to the Allegheny Power OATT.

However, in a letter from AEC to Allegheny Power dated April 5, 2001 (April 5 letter), AEC pointed out that Allegheny Power, in the so-called PJM West filing, had

listed the transmission associated with the 20 MW of what had been PRS as "grandfathered." (In its order addressing that filing, the Commission acknowledged Allegheny Power's clarification that the PRS arrangement with AEC is grandfathered, and that it is listed as a grandfathered arrangement in Allegheny's March 15, 2001 PJM filing.<sup>2</sup>)

Allegheny Power responded in a letter dated April 17, 2001 that AEC would have to purchase transmission from Allegheny Power under the terms of its OATT for the period November 30, 2001 through December 31, 2001 and under the PJM West OATT thereafter.

By letter dated October 12, 2001, Allegheny Power informed AEC that beginning December 1, 2001 PRS service would be terminated, Partial Requirements service would be offered to AEC at a market based rate of \$38.50/MWh, and all transmission service would be provided under the OATT of either Allegheny Power or PJM West.

On October 19, 2001, Allegheny Power filed a unilateral addendum to the 1994 Settlement Agreement which states in part that (1) the term of the addendum is from December 1, 2001 through November 30, 2002, (2) all transmission must be under the appropriate OATT, (3) AEC will be assessed sub-transmission charges for service over facilities not covered by the OATTs, (4) AEC must provide power for the 20 MW (the PRS service which was being discontinued) and the rate for power for Partial Requirements service was \$38.50/MWh plus Gross Receipts tax, and (5) all AEC loads which exceed the Partial Requirements service (the 20 MW of power which had been the PRS) will be billed at the energy imbalance charges under the Allegheny Power OATT or the PJM West OATT, as applicable.

#### Notice of filing and responses

Notice of Allegheny Power's filing was published in the Federal Register, 66 Fed. Reg. 54,989 (2001), with comments, protests, and interventions due on or before November 9, 2001. On November 9, 2001, AEC filed a motion to intervene, protest, motion to reject, and motion for summary disposition. On November 15, 2001, Allegheny Power filed a response. On November 26, 2001, AEC filed a reply to Allegheny Power's response.

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<sup>2</sup>See Allegheny Power Service Corporation, et al., 95 FERC ¶ 61,045 at 61,113 (2001).

## Discussion

### A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2001), the timely, unopposed motion to intervene serves to make AEC a party to this proceeding. While answers to protests are generally not permitted under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2001), we find good cause to accept Allegheny Power's response and AEC's reply to Allegheny Power's response because they have assisted us in understanding the issues.

### B. Motion to Reject Based on Mobile-Sierra

AEC argues that Allegheny Power's unilateral filing is prohibited by the Mobile-Sierra doctrine.<sup>3</sup> AEC asserts that the filing is contractually prohibited and is allowed only in certain circumstances, *i.e.* if the Commission determines that the filing is in the public interest. As explained below, we disagree with AEC's reading of the 1994 Settlement Agreement.

AEC states that the relevant language governing Allegheny Power's ability to change terms and conditions of the contract is laid out in Sections 2.6 and 2.7 of the 1994 Settlement Agreement. AEC alleges that Section 2.7, in particular, sets out a "rate moratorium," prohibiting Allegheny Power from seeking a change in rates or a change in the calculation methodology of energy credits. AEC further states that those terms and conditions that are not covered by the rate moratorium in Section 2.7 are addressed in Section 2.6. AEC states that Section 2.6 must affirmatively state that Allegheny Power has the right to unilaterally change terms and conditions for Allegheny Power to make the filing at issue here, and because Section 2.6 does not do so, Allegheny Power is not permitted to make a unilateral filing.

While Allegheny Power acknowledges that it does not have an express contractual right to unilaterally file, it notes that Section 2.6 specifically states that service provided during any renewal term is "subject to revised charges, terms and conditions." Allegheny Power also points out that it no longer owns generating assets and the cost-based economics underlying the original rate no longer exist.

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<sup>3</sup>See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

AEC replies that because Allegheny Power has conceded that it did not have an express contractual right to file, the Commission should dismiss the filing. AEC also states that if Allegheny Power wanted to terminate the 1994 Settlement Agreement, it could have properly done so by giving the requisite two-year notice; however, Allegheny Power did not do so. AEC adds that Allegheny Power's filing is simply a belated attempt to correct its failure to provide notice. Further, AEC states that it has never taken the position that terms and conditions may not be revised. Rather, AEC states that the parties may change the terms of the contract by mutual agreement of the parties or the Commission may change the contract under the public interest standard. However, AEC states that it has not agreed to a change and that Allegheny Power fails to provide any basis for Commission modification under the public interest standard.

Section 2.7 provides that, for Partial Requirements service, the moratorium bars any increase in rates or change in the methodology "until a proposed effective date earlier than November 30, 2001." Here, Allegheny Power proposes rate changes to be effective December 1, 2001 and thereafter. Section 2.6 provides for automatic renewals "subject to revised charges, terms and conditions." While Allegheny Power and AEC may disagree over the reasonableness of the proposed revisions, the relevant contract language does not bar the filing of such revisions. Therefore, we will not reject this filing as barred by the Mobile-Sierra doctrine.

### C. Unbundling

AEC opposes Allegheny Power's unbundling of the Partial Requirements service. Unbundling would require AEC to take service under Allegheny Power's OATT for both Partial Requirements service and PRS service for one month, and under the PJM West OATT for the remainder of the contract term. AEC also takes issue with Allegheny Power's rationale behind unbundling, that is, to treat similarly situated customers alike. AEC states that there is no basis to conclude that not unbundling AEC's service would cause discrimination between Allegheny Power's customers. AEC states that the unbundling of service is not required under Order No. 888<sup>4</sup> because the unbundling

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<sup>4</sup>Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 at 30, 285 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82

(continued...)

mandate applies only to new contracts that are executed after July 9, 1996. The 1994 Settlement Agreement between Allegheny Power and AEC, however, was executed on June 17, 1994. AEC contends that an automatic extension of the contract for a one-year renewal period does not trigger the unbundling requirements of Order No. 888.

AEC also states that unbundling and forcing AEC onto Allegheny Power's and then PJM's OATT violates Allegheny Power's explicit commitment to grandfather the arrangements for the PRS service.<sup>5</sup>

Allegheny Power states that Partial Requirements service should be unbundled. Allegheny Power states that it is unbundling service to its other wholesale customers as well. Allegheny Power adds that the language in Section 2.6 of the 1994 Settlement Agreement, "subject to revised charges, terms, and conditions," allows Allegheny Power to unbundle service.

In its reply, AEC states that Allegheny's proposal to unbundle service cannot be justified on any need to avoid undue discrimination, is not required under Order No. 888, and would violate Allegheny Power's prior explicit commitment to grandfather the arrangements for PRS service.

It is Commission policy to require unbundling at the earliest contractual opportunity.<sup>6</sup> Extensions warrant unbundling, for if they did not, customers could renew indefinitely to prevent unbundling. Thus the Partial Requirements service should be unbundled. On the other hand, the grandfathered status of PRS service dictates that it not be unbundled at this time; AEC correctly points out that the Commission's order of

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<sup>4</sup>(...continued)

FERC ¶ 61,046 (1998), aff'd in part sub nom, Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), cert. granted sub nom, State of New York, et al. v. FERC, 121 S.Ct. 1185 (2001).

<sup>5</sup>That proceeding involved an earlier joint filing by Allegheny Power and PJM Interconnection, LLC of an Interim Coordination Agreement.

<sup>6</sup>See Order No. 888 at 31,665.

April 12, 2001<sup>7</sup> accepted AEC's clarification of its existing PRS service arrangement (i.e. that PRS service would continue pursuant to the existing terms and conditions).<sup>8</sup>

D. Partial Requirements and Subtransmission Rate

AEC challenges the reasonableness of the proposed Partial Requirements service rate, as well as the proposed subtransmission rate.<sup>9</sup> These matters are best addressed in a hearing, or resolved through settlement.<sup>10</sup>

Our preliminary analysis indicates that Allegheny Power's filing has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will conditionally accept the proposed rates, terms and conditions for filing, subject to the condition identified below, suspend for a nominal period, to become effective, subject to refund, on December 19, 2001, and set it for hearing.

We note that the parties have already had discussions on the matters at issue here. We encourage the parties to renew their efforts. In order to provide the parties an opportunity to resolve this proceeding between themselves, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the

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<sup>7</sup>95 FERC at 61,113.

<sup>8</sup>We note that on November 30, 2001, in Docket No. ER02-454-000, Allegheny Power has submitted a variety of executed, partially executed and unexecuted agreements for the transmission service associated with both the partial requirements service and the PRS service to AEC. That docket will be the subject of a separate order.

<sup>9</sup>We note that a settlement agreement dated March 29, 1993 specifically prohibits Allegheny Power from assigning any of the costs of the Lobo Substation to AEC. Allegheny Power must eliminate those costs from its subtransmission rate to AEC.

<sup>10</sup>The fact that Allegheny Power has market-based rate authority does not mean that Allegheny Power may charge a market-based rate for the extension of pre-existing Partial Requirements service under the 1994 Settlement Agreement. See AEC Protest at 41 and Attachment 3, paragraph 2 (Allegheny Power's market-based rate authorization applies to sales "not otherwise subject to a specific rate schedule or tariff."); accord Allegheny Power Service Corporation, 82 FERC ¶ 61,245 at 61,928 (1993).

Commission's Rules of Practice and Procedure.<sup>11</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>12</sup> The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

We note that Allegheny Power's filing does not comply with the guidelines set forth in Designation of Electric Rate Schedule Sheets, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000). Specifically, Order No. 614 requires that all rate schedule sheets submitted to the Commission after June 1, 2000, be designated:<sup>13</sup> "if a change is proposed in an existing tariff or rate schedule, the entire tariff or rate schedule must be refiled according to the new system. In this way, as tariff sheets are replaced over time, the old designations will disappear and the new system will be implemented in an orderly and efficient manner."<sup>14</sup> In this case, Allegheny Power incorrectly designated its filing as an addendum to the Settlement Agreement. Allegheny Power's filing of a proposed change in this rate schedule requires Allegheny Power to refile the entire rate schedule. Allegheny Power is directed to file, within 30 days, a compliance filing to designate its revised rate schedule consistent with Order No. 614.

#### E. Waiver

Allegheny Power requests that the Commission grant waiver of the 60-day prior notice requirement in order to allow the proposed rate, terms and conditions to be made

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<sup>11</sup>18 C.F.R. § 385.603 (2001).

<sup>12</sup>If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 219- 2500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience. ([www.ferc.fed.us](http://www.ferc.fed.us) - click on Office of Administrative Law Judges).

<sup>13</sup>See Nevada Power Company and Sierra Pacific Power Company, 94 FERC ¶ 61,011 at 61,019 (2001).

<sup>14</sup>Order No. 614, FERC Stats. & Regs. ¶ 31,096 at 31,502.

effective December 1, 2001. AEC opposes the request for waiver, stating that Allegheny Power has not provided any support for its request.

We agree with AEC. Allegheny Power has not demonstrated good cause sufficient to justify waiver of the 60-day prior notice requirement.<sup>15</sup>

The Commission orders:

(A) Allegheny Power's filing is hereby conditionally accepted for filing and suspended for a nominal period, to become effective December 19, 2001, subject to refund.

(B) Allegheny Power's request for waiver for the 60-day prior notice requirement is hereby denied, as discussed in the body of this order.

(C) 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 the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held concerning the justness and reasonableness of Allegheny Power's filing. As discussed in body of this order, we will hold the hearing in abeyance to give the parties time to conduct settlement judge negotiations.

(D) Pursuant to Rule 603 of the Commission's Rule of Practice and Procedure, 18 C.F.R. § 385.603 (2001), 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 in writing or by telephone within five (5) days of the date of this order.

(E) 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

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<sup>15</sup>See Central Hudson Gas & Electric Corporation et al., 60 FERC ¶ 61,106, reh'g denied 61 FERC ¶ 61,089 (1992).

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.

(F) 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, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, including a date for Allegheny Power's submission of a case-in-chief, and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

(G) Allegheny Power is hereby directed to refile its filing, within 30 days of the date of this order, to comply with Order No. 614 regarding the appropriate designation of supplements to existing agreements on file.

By the Commission.

( S E A L )

Linwood A. Watson, Jr.,  
Acting Secretary.