

3. On February 22, 2001, Plains End and PS Colorado entered into a Power Purchase Agreement under which Plains End will sell to PS Colorado all of the electric power and energy from its generation facility for ten years.² Plains End wished to connect its generating facility and associated interconnection equipment with PS Colorado's transmission system.

4. On August 22, 2001, PS Colorado filed this executed Interconnection Agreement between itself and Plains End. The Interconnection Agreement establishes the rates, terms and conditions under which PS Colorado will construct, operate, and maintain the facilities interconnecting Plains End's generating facility to PS Colorado's transmission grid. The Interconnection Agreement provides that Plains End will pay PS Colorado a monthly Direct Assignment Facilities Charge based on PS Colorado's estimated costs of constructing, owning and maintaining the necessary "Provider's Interconnection Facilities." Plains End is obligated to construct, operate and maintain the Customer Interconnection Facilities, which the Interconnection Agreement defines as the equipment on the Customer's side of the point of interconnection with PS Colorado.³ PS Colorado requests waiver of the Commission's 60-day prior notice requirement to allow an effective date of August 20, 2001, the date on which the Interconnection Agreement was executed by the parties.

5. The parties submitted several requests to defer action on the filing so that they could discuss a negotiated resolution to certain issues raised by Plains End. On April 16, 2002, PS Colorado filed a letter stating that the parties were unable to reach a settlement, and withdrew its request for indefinite deferral.

6. A delegated letter order was issued on June 14, 2002, advising PS Colorado of deficiencies in its filing. The letter requested: (1) support for PS Colorado's contention that the Provider's Interconnection Facilities are all directly assignable to Plains End; (2) a detailed line drawing of the facilities at issue clearly identifying the point of interconnection; and (3) cost support for the monthly Direct Assignment Facilities Charge. PS Colorado filed its response in Docket No. ER01-2905-001 on July 15, 2002.

²The Power Purchase Agreement was accepted for filing by delegated letter order dated June 11, 2002, in Docket No. ER02-1519-000.

³The interconnection point with PS Colorado is described in Exhibit A of the Interconnection Agreement as being located inside Plains End's 230 kV switchyard, at the dead-end structure adjacent to the generating facility.

Notice, Protests and Interventions

7. Notice of PS Colorado's filing in Docket No. ER01-2905-000 was published in the Federal Register, 66 Fed. Reg. 45,977 (2001), with comments, protests and interventions due on or before September 13, 2001. On September 13, 2001, Plains End filed a timely motion to intervene and protest.⁴ On May 1, 2002, PS Colorado filed an answer to Plains End's protest. On May 16, 2002, Plains End filed an answer to PS Colorado's answer.

8. Notice of PS Colorado's filing in Docket No. ER01-2905-001 was published in the Federal Register, 67 Fed. Reg. 49,685 (2002), with comments, protests and interventions due on or before August 5, 2002. Plains End filed a timely response.

9. Plains End disputes several issues and asks the Commission to direct PS Colorado to amend the Interconnection Agreement to resolve them, or to set the unresolved issues for hearing.⁵ The issues in dispute are: (1) whether certain of the facilities are really transmission system upgrades rather than directly assignable facilities; (2) whether PS Colorado is engaging in prohibited "and" pricing;⁶ (3) whether PS Colorado is unjustly assessing Plains End for operations and maintenance costs associated with network upgrades; and (4) the level of the Direct Assignment Facilities Charge.⁷

Discussion

A. Procedural Matters

⁴Plains End states that it executed the Interconnection Agreement to facilitate financing of the project, but reserved its right to protest rate treatment and transmission crediting issues. See Plains End, LLC's Motion to Intervene, Protest and Request for Evidentiary Hearing (hereinafter Plains End Protest) at 3.

⁵Plains End states that it would not be adverse to the Commission assigning this case to the Commission's Dispute Resolution Service before convening a formal evidentiary hearing. See id. at 1 n.1.

⁶"And" pricing occurs when a transmission provider charges a customer both an incremental rate and an embedded cost rate for network upgrades.

⁷See Plains End Protest at 1, 22-23.

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 384.214 (2002), Plains End's timely, unopposed motion to intervene serves to make it a party to this proceeding. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. ¶ 384.213 (2002) generally prohibits the filing of an answer to a protest. We will accept PS Colorado's May 1, 2002 answer to Plains End's protest because it has assisted us in our decision of this matter. We are not persuaded to accept Plains End's May 16, 2002 answer, and accordingly we will reject it.

11. We generally grant waiver of the 60-day prior notice period for new services if there is good cause and the applicant submits the filing before the commencement of service.⁸ PS Colorado requests an effective date of August 20, 2001, two days before filing. We will nominally suspend the filing, grant waiver for good cause and allow an effective date of August 23, 2001, one day after filing.

B. Interconnection Cost Responsibility

12. The Interconnection Agreement provides for PS Colorado to construct the Provider's Interconnection Facilities, consisting of: (1) a new 230 kV switchyard, including a three-point ring bus configuration (the PS Colorado Switchyard); (2) a 1.2-mile, double-circuit, 230 kV conductor line from the PS Colorado Switchyard to an existing north-to-south PS Colorado 230 kV line; and (3) a 455-foot, single-circuit, 230 kV line that would connect the PS Colorado Switchyard to the Plains End facility. PS Colorado estimates the costs of these facilities to be approximately \$3.9 million, and proposes to directly assign all of these costs to Plains End.

13. The Interconnection Agreement does not require Plains End to make an up-front payment to fund the Provider's Interconnection Facilities. Instead, PS Colorado proposes to collect the \$3.9 million from Plains End via a monthly Direct Assignment Facilities Charge using a levelized fixed charge rate methodology over a 35-year term. Under the separate Power Purchase Agreement between the parties, PS Colorado will reimburse Plains End, during the ten-year term of the Power Purchase Agreement, the amount of the monthly Direct Assignment Facilities Charge that Plains End pays PS Colorado under the Interconnection Agreement. Under this arrangement, PS Colorado effectively will pay for whatever monthly interconnection charges are assessed under the Interconnection

⁸See Delmarva Power & Light Company, 88 FERC ¶ 61,247 at 61,786 (1999); Central Hudson Gas & Electric Corporation, 60 FERC ¶ 61,106 at 61,339, reh'g denied, 61 FERC ¶ 61,089 (1992).

Agreement for the first ten years, and Plains End will be responsible for the monthly charges for the rest of the 35 years. However, the parties dispute whether the interconnection charges should be assessed using a straight-line declining cost methodology or a levelized cost methodology.

1. Plains End's Arguments

14. Plains End argues that the Interconnection Agreement makes no distinction between directly assignable costs and transmission network upgrades associated with connecting Plains End's facility to PS Colorado's transmission system. Plains End states that instead, PS Colorado proposes to charge \$3.9 million of interconnection costs to Plains End without providing transmission credits for network upgrade costs. Plains End believes that this would violate Commission policy⁹ and would allow PS Colorado to benefit from prohibited "and" pricing.

15. Plains End contends that approximately \$3.7 million of the cost of the interconnection facilities is related to network upgrades, including the PS Colorado Switchyard and its three-point ring bus, and the 1.2-mile conductor line. Plains End argues that the three-point ring bus would allow for additional third-party interconnections and is similar, if not identical, to the ring bus arrangement that the Commission found to be a network facility in Duke Energy Corporation (Duke).¹⁰

16. Plains End argues that, consistent with Commission precedent in Consumers and Duke, PS Colorado should directly assign to Plains End only the cost of the 455-foot, single-circuit, 230 kV line that connects the Plains End facility to the PS Colorado Switchyard, and that any other payments made to cover the costs of network upgrades must be returned in the form of transmission credits.¹¹ Plains End also contends that the

⁹See Plains End, LLC's Motion to Intervene, Protest, and Request for Evidentiary Hearing at 4-8 (citing Consumers Energy Company, 95 FERC ¶ 61,233 (2001), reh'g denied, 96 FERC ¶ 61,132 (2001) (Consumers)).

¹⁰95 FERC ¶ 61,279 (2001).

¹¹Plains End points out in its August 5, 2002 response that, given the location of the point of interconnection just inside Plains End's switchyard at its generating facility, the 455-foot line would also be a network facility, since it is at or beyond the point of interconnection. However, Plains End states that it will honor its commitment made

credits should accrue interest in order to assure that Plains End receives the full value of the costs it will pay, and that customers should be able to sell or assign their transmission credits to any PS Colorado transmission customer.

17. Finally, Plains End objects to PS Colorado's proposal to also assess Plains End for operations and maintenance (O&M) costs associated with the network upgrades. It argues that this proposal violates Commission policy as well.

2. PS Colorado's Arguments

18. PS Colorado argues that Plains End is attempting to take advantage of changes in Commission policy regarding interconnection cost responsibility that took place after the parties had reached agreement on their interconnection and power sale arrangements. It argues that the Commission should not permit Plains End to take advantage of the changed regulatory environment to reap an economic windfall at the expense of PS Colorado and its customers.

19. PS Colorado contends that it and Plains End reached agreement on the appropriate design for the interconnection facilities in early 2001.¹² PS Colorado agreed to build the Provider's Interconnection Facilities, including the three-point ring bus and the lengthy double-circuit transmission line from Plains End's generating facility to PS Colorado's grid, and Plains End agreed to pay for them, and for the O&M costs, through the facilities charge in the Interconnection Agreement. PS Colorado states that it negotiated the Interconnection Agreement based on its anticipation that all of the Provider's Interconnection Facilities would be directly assignable.

20. However, PS Colorado states that in May 2001, well after the parties reached agreement on the interconnection arrangements, the Commission issued orders which changed its policy regarding payment for interconnection-related costs. The orders

¹¹(...continued)

during negotiations with PS Colorado to pay for that line even though it is on PS Colorado's side of the point of interconnection.

¹²PS Colorado references the preliminary diagram of the interconnection facilities shown in Exhibit B of the Interconnection Agreement. The Exhibit is dated March 2001, which PS Colorado claims reflects the parties' agreement to the interconnection configuration early in 2001.

provided, among other things, that transmission credits should be awarded for ring bus facilities.¹³

21. PS Colorado acknowledges that under Removing Obstacles,¹⁴ Consumers and Duke, Plains End would be entitled to receive transmission credits for the Provider's Interconnection Facilities it will fund under the Interconnection Agreement. PS Colorado also recognizes that the Commission issued these orders before PS Colorado's execution of the Interconnection Agreement. However, since the parties struck their economic bargain before the Commission issued those orders, it would be inequitable to apply the policy changes retroactively. PS Colorado cites to orders on rehearing in Removing Obstacles and Consumers where the Commission allegedly stated that the "new" policy would not be applied retroactively, and would only apply to agreements entered into on or after May 16, 2001.

22. With respect to O&M costs, PS Colorado states that if the Commission determines that the interconnection-related facilities are network upgrades, PS Colorado will remove the costs of such upgrades from its calculation of O&M charges.

23. PS Colorado states that, to encourage new generation in its request for proposals process, it committed to an arrangement (set forth in the Power Purchase Agreement) in which Plains End is entitled to recover all its interconnection-related facilities charge costs over the ten-year term of the Power Purchase Agreement. PS Colorado contends that granting Plains End transmission credits on top of the amounts it will recover under the Power Purchase Agreement would give Plains End a double recovery.

24. PS Colorado also contends that Plains End's proposal that it be permitted to sell or assign its transmission credits to any PS Colorado transmission customer is contrary to Commission policy, which requires that credits remain always tied to the specific generator to which they relate.¹⁵

¹³See Duke Energy Corporation, 95 FERC ¶ 61,279 (2001) (Duke).

¹⁴Further Order on Removing Obstacles to Increased Energy Supply and Reduced Demand in the Western United States and Dismissing Petition for Rehearing, 95 FERC ¶ 61,225 (2001), order on reh'g, 96 FERC ¶ 61,225 (2001), order on reh'g, 97 FERC ¶ 61,024 (2001) (Removing Obstacles).

¹⁵See Response of Xcel Energy Services, Inc. at 20 (citing Duke Energy

C. Direct Assignment Facilities Charge

25. The monthly Direct Assignment Facilities Charge set forth in Exhibit E of the Interconnection Agreement includes a Monthly Facilities Charge component of \$75,770 and a Monthly Operations and Maintenance Charge component of \$18,940, for a total of \$94,710 per month. PS Colorado bases the charges on its estimated initial investment of \$3,925,424 and a term of 35 years.

1. Plains End's Arguments

26. Plains End objects to the level of the charges as unjust and unreasonable. It notes that there is no cost support included in the filing and that its evaluation of the rates is based on a spreadsheet detailing costs that PS Colorado provided to Plains End upon Plains End's request. Plains End argues that the Monthly Facilities Charge component is excessive because it uses a levelized depreciation scheme that discriminates against Plains End and is based on inflated figures for property tax, O&M expenses, and administrative and general (A&G) costs.

27. Plains End explains that due to the reimbursement for the Direct Assignment Facilities under the Power Purchase Agreement, PS Colorado effectively will pay for whatever monthly interconnection charges are assessed under the Interconnection Agreement for the first ten years, and Plains End will be responsible for the monthly charges for the rest of the 35 years. Plains End argues that PS Colorado has selectively used a levelized depreciation methodology in order to unfairly shift more of the interconnection costs to later years, and thus to Plains End. It proposes a dual-levelized approach consisting of a first, ten-year levelized period in which PS Colorado would be responsible for the same amount of depreciation costs as it would be under a straight-line declining methodology; and a second, twenty-five-year levelized period in which Plains End would be responsible for the same amount of depreciation costs as it would be under a straight-line declining methodology. Plains End argues that under this approach, each party will be responsible for its share of depreciation costs without subsidizing the other.

28. Plains End also contends that PS Colorado inflates the Monthly Facilities Charge by improperly calculating a number of the cost of service components. As examples,

¹⁵(...continued)

Corporation, 94 FERC ¶ 61,187 at 61,659 (2001)).

Plains End argues that PS Colorado's composite O&M/A&G factor of 10.31 percent of gross plant investment is grossly over-inflated, claiming that its calculations based on PS Colorado's Form No. 1 data produce a figure of 2.53 percent. Plains End argues that PS Colorado's 1.59 percent property tax factor is also inflated, claiming that Plains End's calculations (using functionalized total property taxes paid using net plant ratios using 1999 data) yield a property tax factor of 1.312 percent – nearly twenty percent less than PS Colorado's figure. Plains End also contends that the Monthly O&M Charge, which is almost twenty percent of the total monthly Direct Assignment Facilities Charge, is excessive. First, Plains End argues that charging a separate Monthly O&M charge, when O&M costs are already included in the Monthly Facilities Charge component, results in double-collection of O&M costs by PS Colorado. Plains End also argues that O&M charges associated with a small generating plant such as Plains End's are typically de minimis, and that PS Colorado has provided no support for such a high O&M charge.

29. Plains End requests that the Commission direct PS Colorado to use a dual-levelization approach and to eliminate the Monthly O&M Charge, and collect O&M costs associated with directly assigned facilities through the Monthly Facilities Charge, using the corrected cost-of-service variables. Plains End requests that in the alternative, that the Commission set the rate issues for hearing.

2. PS Colorado's Arguments

30. PS Colorado argues that Plains End has failed to demonstrate that the levelized Direct Assignment Facilities Charge is unjust or unreasonable in light of the Commission's common acceptance of levelized rates. It argues that levelizing the total cost of the facilities over the 35-year term of the Interconnection Agreement is appropriate because the charges will be applied to Plains End over the entire levelization period, with no shifting of costs. Plains End's dual-levelized proposal is an attempt to front-load depreciation expenses onto PS Colorado and its customers during the period when PS Colorado will bear the costs of the facility charges.

31. PS Colorado also contends that Plains End has failed to demonstrate that PS Colorado used improper inputs in the Direct Assignment Facilities Charge, such as the property tax rate and the O&M/A&G factor. PS Colorado states that Plains End quotes actual property tax rates for PS Colorado in 1999 and 2000, but that PS Colorado received one-time favorable property tax treatments in those years that resulted in low overall property tax rates. The proposed charge reflects a composite tax rate that is more appropriate for use in a levelized rate methodology over the entire 35-year term of the Interconnection Agreement. The O&M/A&G factor does not include any physical

operation and maintenance of the facilities; therefore, there is no double collection of O&M costs. PS Colorado also argues that the Monthly O&M Charge falls within the range of O&M charges that have been accepted for filing in other cases.

32. The deficiency letter asked PS Colorado to provide cost support for the monthly Direct Assignment Facilities Charge, including an explanation of the rate design and the cost of service components. In its response, PS Colorado merely states that the Monthly Operations and Maintenance Charge component is 25% of the Direct Assignment Facilities Charge, explaining that its experience with transmission facility maintenance is that O&M costs range from 15% to 30% of facilities costs. PS Colorado also includes a spreadsheet showing the calculation of the charges over the 35 year life of the facilities, but does not offer justifications of the cost of service components used.

D. Commission Decision

33. This case presents an ongoing dispute of factual issues concerning the Interconnection Agreement between Plains End and PS Colorado. The Interconnection Agreement, and therefore our determination of its justness and reasonableness, is further complicated by provisions in the Power Purchase Agreement that deal with arrangements for the reimbursement of interconnection costs at issue in the Interconnection Agreement. We find that the proposed Interconnection Agreement 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 the proposed Interconnection Agreement for filing as modified, suspend it for a nominal period, to become effective August 23, 2001, subject to refund, and set it for hearing on the matter discussed above.¹⁶ We will, however, also hold the hearing in abeyance to permit the parties to engage in settlement discussions under the auspices of a settlement judge.

34. The Commission has consistently encouraged parties to resolve disputes of this nature through settlement. We believe that formal settlement procedures may lead to a partial or a complete resolution of this case. To aid the parties in their settlement efforts, a settlement judge shall be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁷ If the parties desire, they may, by mutual agreement, request a

¹⁶Given the nature of the issue being set for hearing, we would expect the presiding judge to be able to issue an initial decision within approximately five months of the commencement of the formal hearing process.

¹⁷ 18 C.F.R. § 385.603 (2002).

specific judge; otherwise, the Chief Judge will select a judge for this purpose.¹⁸

The Commission orders:

(A) The Interconnection Agreement is hereby accepted for filing and suspended for a nominal period, and made effective subject to refund. Waiver of the Commission's 60-day prior notice requirement is hereby granted to permit the Interconnection Agreement to become effective, subject to refund, on August 23, 2001.

(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 by 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 I), a public hearing shall be held in Docket Nos. ER01-2905-000 and ER01-2905-001 concerning the justness and reasonableness of PS Colorado's proposed Interconnection Agreement with Plains End, as discussed in the body of this order. The hearing shall be held in abeyance while the parties attempt to settle, as discussed in paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603, the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 15 days of the date of this order. The designated settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable.

(D) Within 60 days of the date of this order, the settlement judge shall issue a report to 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 efforts or, if appropriate, provide for a formal hearing by assigning the case to a presiding judge. If settlement judge procedures are continued, the settlement judge shall issue a report at least every 30 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

¹⁸ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of the Commission's judges and a summary of their background and experience at www.ferc.gov/legal/oalj/bio/judges.htm.

Docket No. ER02-2905-000 and ER01-2905-001

- 12 -

(E) If settlement discussions fail and a formal hearing is to be held, a presiding administrative law judge, to be selected by the Chief Judge, shall convene a prehearing conference in this proceeding, to be held within approximately 15 days of the due date of the settlement judge's report to the Commission and the Chief Judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. The presiding judge is authorized to rule establish procedural dates and to rule on all motions (except motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.