

121 FERC ¶ 61,262  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Allegheny Generating Company

Docket Nos. ER07-1402-000  
ER07-1402-001

ORDER ACCEPTING AND SUSPENDING AMENDED AGREEMENT AND  
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued December 20, 2007)

1. In this order, we accept for filing Allegheny Generating Company's (Allegheny) Amended Power Sales Agreement (Amended PSA) for sales of power generated at the Bath County Pumped-Storage Hydroelectric Generation Station (Bath County Station), suspend it for a nominal period, and make it effective November 26, 2007, subject to refund. We also establish hearing and settlement judge procedures.

**I. Background**

2. On September 26, 2007, Allegheny submitted, under section 205 of the Federal Power Act (FPA),<sup>1</sup> the Amended PSA. Allegheny sells to its shareholder companies its share of the power generated at the Bath County Station. The Amended PSA proposes to change the allocation of generation capacity at the Bath County Station between its shareholders, Allegheny Energy Supply Company, LLC (AE Supply) and Monongahela Power Company (Monongahela).<sup>2</sup>

3. Allegheny and the shareholder companies are subsidiaries of Allegheny Energy, Inc. (Allegheny Energy). Its sole asset is a 40 percent undivided interest in the Bath County Station and the interconnection facilities that connect it to the grid. Allegheny states that before the capacity upgrades described below, it was entitled to 1035 megawatts (MW) of the generation capacity from the Bath County Station.

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<sup>1</sup> 16 U.S.C. § 824(d) (2000).

<sup>2</sup> Allegheny also requests the Commission's authorization under section 204 of the FPA to issue additional common stock to AE Supply and Monongahela. That request was addressed separately in Docket No. ES07-66-000. *See Allegheny Energy Inc.*, 121 FERC ¶ 62,109 (2007).

4. The capacity from Allegheny's share of the Bath County Station is available to each of the shareholders of Allegheny in proportion to its equity ownership of Allegheny.<sup>3</sup> Allegheny's revenues are determined under a cost-of-service formula wholesale rate schedule (Revenue Requirement). Allegheny states that it recovers various expenses from its shareholders, AE Supply and Monongahela, on a proportional basis that tracks their respective equity ownership of Allegheny. Allegheny does not directly recover its capital expenditures. The construction work in progress (CWIP) resulting from capital expenditures is part of the investment component in Allegheny's rate base and is recovered through the equity and debt returns under the Revenue Requirement.

5. The Commission has approved an internal restructuring of generation asset ownership within the Allegheny Energy holding company system.<sup>4</sup> The restructuring included a swap of generation between AE Supply and Monongahela (Asset Swap). The Restructuring Order explained that when the restructuring is completed, AE Supply will have transferred generation ownership interests of 1,249 MW to Monongahela and Monongahela will have transferred generation ownership interests of 656 MW to AE Supply.<sup>5</sup>

## II. Description of the Filing

6. Allegheny states that the need for its Amended PSA results from the transaction approved by the Commission in the Restructuring Order. The Asset Swap took place on January 1, 2007. Part of the Asset Swap involved the transfer of AE Supply's rights to 189 MW of capacity from the Bath County Station. To effectuate this transfer, AE Supply transferred ownership of shares in Allegheny to Monongahela. Allegheny states that this entitled AE Supply to 608.2 MW and Monongahela to 426.8 MW of Allegheny's total pre-upgrade 1,035 MW share of the capacity at the Bath County Station, thus giving Monongahela a greater share than it had before.

7. Allegheny states that a complication arises from capital improvements being made at the Bath County Station (Capital Project), which made 25 MW of additional capacity

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<sup>3</sup> AE Supply and Monongahela's ownership interests are approximately 59 percent and 41 percent, respectively (Asset Swap percentages). AE Supply and Monongahela's pre-Asset Swap ownership interests were approximately 77 percent and 23 percent, respectively.

<sup>4</sup> *Allegheny Energy, Inc.*, 113 FERC ¶ 61,077 (2005) (Restructuring Order), *order on clarification*, 114 FERC ¶ 61,247 (2006).

<sup>5</sup> Restructuring Order, 113 FERC ¶ 61,077 at P 4.

available to Allegheny on March 29, 2007. The Capital Project will make more capacity available in 2008 and 2009, approximately 25 MW in each year.

8. According to Allegheny, before the Asset Swap, the Capital Project was funded by AE Supply and Monongahela in accordance with their *pre-Asset Swap* equity interests. However, because of the transfer of Allegheny stock from AE Supply to Monongahela, the new capacity made available by the Capital Project will be allocated between AE Supply and Monongahela in accordance with their *post-Asset Swap* ownership percentages of Allegheny rather than the old ownership percentages. Allegheny argues that this allocation would not match the contributions made by AE Supply and Monongahela to fund the Capital Project. Allegheny asserts that such an allocation would result in a transfer of approximately 15 MW of additional capacity from AE Supply above the 189 MW of capacity from the Bath County Station the parties transferred as part of the Asset Swap.

9. Allegheny contends that the Amended PSA will restore AE Supply and Monongahela to a position that is consistent with the Asset Swap. It states that AE Supply and Monongahela should each be entitled to the pre-capital project improvements contemplated as part of the Asset Swap proposal. The Amended PSA provides that AE Supply and Monongahela will fund Allegheny's capital expenditures for the Capital Project and receive additional generation in amounts equal to their equity ownership proportions of Allegheny that existed before the Asset Swap. Allegheny states that there will not be an increase in the total revenues received by Allegheny above what would have been recovered under the previous power agreement. Rather, the proposed amendments simply reallocate cost responsibility between AE Supply and Monongahela prior to the Asset Swap.

10. Allegheny requests waiver of the Commission's prior notice requirement to allow an effective date of January 1, 2007. It states that this would ensure that AE Supply and Monongahela are required to fund the capacity upgrades in accordance with the percentages described in its filing.

### **III. Notice of Filing and Responsive Pleadings**

11. Notice of Allegheny's September 26, 2007 filing (September Filing) was published in the *Federal Register*, 72 Fed. Reg. 57,317 (2007), with interventions and protests due on or before October 17, 2007. The West Virginia Energy Users Group (Energy Users) filed a timely motion to intervene. The Consumer Advocate Division of the Public Service Commission of West Virginia (Consumer Advocate) filed a timely motion to intervene and protest. On October 30, 2007, Allegheny filed an answer to the Consumer Advocate's protest.

12. On October 26, 2007, Allegheny filed supplemental information (October Filing). Notice of Allegheny's October Filing was published in the *Federal Register*, 72 Fed.

Reg. 62,843 (2007) in Docket No. ES07-66-001, with interventions and protests due on or before November 7, 2007. Notice of Allegheny's October Filing was published in the *Federal Register*, 72 Fed. Reg. 68,576 (2007) in this docket, Docket No. ER07-1402-000, *et al.*, with interventions and protests due on or before November 29, 2007.<sup>6</sup> None were filed.

13. In its protest, the Consumer Advocate notes that AE Supply owns generation assets and sells electric power at wholesale at market-based rates within the PJM Interconnection, Inc. LLC (PJM) region. Monongahela, however, sells electric power at state regulated retail rates to approximately 500,000 West Virginia retail customers. Costs incurred by Monongahela under Allegheny's rate schedule are passed on to West Virginia retail ratepayers as purchased power costs. Thus, any change in the percentage of ownership of the capacity of the Bath County Station will affect the retail rates paid by Monongahela's West Virginia retail customers.<sup>7</sup>

14. The Consumer Advocate protests changing the respective ownership percentages of AE Supply and Monongahela as they relate to capacity upgrades at the Bath County Station. It argues that Allegheny seeks to improperly change the existing allocation of capacity and the future allocation of additional capacity to increase the allocation to its affiliate AE Supply, which sells electric power at wholesale at market-based rates, and reduce the allocation to Monongahela, which sells electric power at state regulated retail rates.

15. The Consumer Advocate notes that Allegheny seeks to apply the pre-Asset Swap ownership percentages to the allocation of the post-Asset Swap added capacity. It argues that based on the 25 MW capacity upgrade in 2007, this would result in AE Supply receiving 4.6 MW more (19.3 MW versus 14.7 MW) and Monongahela receiving 4.6 MW less (5.7 versus 10.3 MW) than was actually received by each party on March 29, 2007. Further, the Consumer Advocate protests Allegheny's proposal to apply the pre-Asset Swap ownership percentages to capacity upgrades expected in 2008 and 2009.

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<sup>6</sup> Allegheny filed a motion for expedited consideration on November 21, 2007. It argues that its October Filing was not an amendment to its September Filing in Docket No. ER07-1402-000, and that the Commission must rule on its September Filing within 60 days of when it was made. However, it is up to applicants to put the correct docket numbers on their filings. Because Allegheny submitted its October Filing in *both* Docket Nos. ER07-1402-000 and ES07-66-000, the Commission noticed Allegheny's October Filing in both docket numbers. The Commission must act on Allegheny's September Filing within 60 days of when Allegheny's October Filing was made.

<sup>7</sup> Consumer Advocate, October 16, 2007 Protest at P 7.

16. The Consumer Advocate contends that Allegheny's proposal will harm consumers in West Virginia in that Monongahela will receive substantially less capacity than it is currently entitled to under the PSA. It argues that Monongahela has been paying its share of capacity costs under the PSA, including a return on capacity upgrades under construction, and return, taxes and depreciation on capacity upgrades placed into service, including not only the additional capacity made available on March 29, 2007, but also ongoing CWIP related to 2008 and 2009 capacity upgrades.<sup>8</sup> It argues that since January 1, 2007, Monongahela has been paying 41.2 percent of all such costs and that Monongahela is entitled to receive 41.2 percent of all capacity changes after that date, regardless of whether capacity is added through an upgrade or lost through a derating.

17. With regard to Allegheny's suggestion that it will refund to Monongahela all additional expenses paid since January 1, 2007 if the Amended PSA is approved, the Consumer Advocate argues that even if such payments were made, they would not compensate Monongahela's ratepayers for the irreparable harm that would result from losing their entitlement to the additional capacity at the Bath County Station. The Consumer Advocate contends that the capacity is valuable peaking capacity that will be available either to serve native load of Monongahela or to sell off-system during the periods of highest and most expensive demand. It also states that Monongahela probably will not be able to replace this peaking capacity, and even if it is physically replaced, it would be at a higher cost to Monongahela's retail ratepayers.<sup>9</sup>

18. According to the Consumer Advocate, the Amended PSA was never contemplated by the parties to the Asset Swap.<sup>10</sup> The Consumer Advocate also asserts that "the fact that the proposed amendment to the power supply agreement was agreed to by Allegheny, AE Supply and Monongahela should be given no weight," since these three entities "are all wholly-owned subsidiaries of Allegheny Energy, Inc., and in this matter should be considered as acting as one party."<sup>11</sup>

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<sup>8</sup> *Id.* P 18, 19.

<sup>9</sup> *Id.* P 19. The Consumer Advocate also argues that reduction in off-system sales revenues will result in higher rates for Monongahela's West Virginia retail ratepayers. *Id.* n.10.

<sup>10</sup> *Id.* P 18.

<sup>11</sup> *Id.* n.9.

#### **IV. Discussion**

##### **A. Procedural Matters**

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Allegheny's answer and will, therefore, reject it.

##### **B. Hearing and Settlement Judge Procedures**

20. Allegheny's Amended PSA raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

21. Our preliminary analysis indicates that Allegheny's Amended PSA has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. While Allegheny argues that its application for approval of the Asset Swap shows that the parties intended to transfer only 189 MW of Bath County generation capacity from AE Supply to Monongahela, the Restructuring Order did not address the allocation of generation capacity resulting from the Capital Project. Because Allegheny has not shown good cause for granting waiver of the Commission's prior notice requirement,<sup>12</sup> we will deny Allegheny's request for waiver of this requirement. Therefore, we will accept Allegheny's Amended PSA for filing, suspend it for a nominal period, make it effective November 26, 2007, subject to refund, and set it for hearing and settlement judge procedures.

22. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>13</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding;

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<sup>12</sup> 18 C.F.R. § 35.11 (2007). In fact, Allegheny's only argument in support of waiver is that its filing is just and reasonable. Even if the filing is just and reasonable, that alone is not reason to waive prior notice.

<sup>13</sup> 18 C.F.R. § 385.603 (2007).

otherwise, the Chief Judge will select a judge for this purpose.<sup>14</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, 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.

The Commission orders:

(A) Allegheny's Amended PSA is hereby accepted for filing and suspended for a nominal period, to become effective November 26, 2007, subject to refund, as discussed in the body of this order.

(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 concerning Allegheny's Amended PSA. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering 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 (2007), the Chief Administrative Law Judge is hereby directed 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 within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, 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

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<sup>14</sup> 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 Commission judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

(60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If 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, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a 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 )

Kimberly D. Bose,  
Secretary.