

155 FERC ¶ 61,316
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Southwest Power Pool, Inc.

Docket Nos. ER14-2850-008
ER14-2851-008

ORDER ON UNCONTESTED PARTIAL SETTLEMENT AND REQUEST FOR
SHORTENED PROCEDURES, AND ESTABLISHING PAPER HEARING
PROCEDURES

(Issued June 27, 2016)

1. On March 24, 2016, pursuant to Rules 602 and 801 of the Commission's Rules of Practice and Procedure,¹ Southwest Power Pool, Inc. (SPP) filed an uncontested Joint Offer of Partial Settlement and Request for Shortened Procedures (Partial Settlement) on behalf of SPP, Missouri River Energy Services (Missouri River), Basin Electric Power Cooperative (Basin Electric), Western Area Power Administration – Upper Great Plains (Western-UGP), Heartland Consumers Power District (Heartland), and Nebraska Public Power District (NPPD) (collectively, Settling Parties), which establishes a process to resolve all issues raised by Missouri River, Basin Electric, and Heartland in this proceeding regarding the integration of Basin Electric, Heartland, and Western-UGP (the Integrated System Parties) into SPP as transmission owners. We approve the Partial Settlement, as discussed below. Moreover, consistent with the terms of the Partial Settlement, we establish paper hearing procedures, as discussed below.

2. On September 11, 2014, SPP filed revisions to its Open Access Transmission Tariff (SPP Tariff), Bylaws, and Membership Agreement (Governing Documents) to facilitate integrating the Integrated System Parties into SPP. On November 10, 2014, the Commission issued an order conditionally accepting in part, rejecting in part, accepting and suspending filings in part for a nominal period, to become effective as requested, subject to refund, SPP's proposed revisions to the SPP Tariff and Governing Documents,

¹ 18 C.F.R. §§ 385.602, 385.801 (2015).

and establishing hearing and settlement judge procedures.² Among the issues set for hearing and settlement judge procedures were Missouri River's claims that it was entitled to "carve-out" treatment under the SPP Tariff for certain transmission rights under a pre-open access transmission tariff service agreement.³ Specifically, Missouri River maintains that Attachment AE in the SPP Tariff expressly excuses it from paying congestion and marginal loss charges for Missouri Basin Power Project-related service it receives under a 1977 transmission service contract between NPPD and Basin Electric (1977 Contract). Heartland and Basin Electric also raised these issues during settlement discussions⁴ because they are also Missouri Basin Power Project participants with transmission rights under the 1977 Contract.⁵ SPP contends that the SPP Tariff does not entitle Basin Electric, Heartland, and Missouri River to the "carve-out" treatment that they seek. In the course of hearing and settlement proceedings Missouri River and SPP agreed, with the concurrence of Heartland and Basin Electric, that this issue did not lend itself to negotiated resolution and agreed to the Partial Settlement, which proposes the expedited procedures described below.

3. On March 29, 2016, Commission Trial Staff filed initial comments in support of the Partial Settlement. On March 31, 2016, Judge H. Peter Young certified the Partial Settlement to the Commission as uncontested.⁶ Thereafter, the Acting Chief Administrative Law Judge, Carmen A. Cintron, terminated settlement judge procedures because the composite effect of the Partial Settlement and four other partial offers of settlement would be a comprehensive consensual resolution to all issues set for hearing.⁷

² *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,113 (2014), *order on reh'g and clarification*, 153 FERC ¶ 61,051 (2015).

³ *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,113 at PP 86, 112.

⁴ Explanatory Statement in Support of Joint Offer of Partial Settlement at 3.

⁵ Offer of Partial Settlement at 1-2.

⁶ *Sw. Power Pool, Inc.*, 154 FERC ¶ 63,026 (2016).

⁷ Order of the Chief Judge Terminating Settlement Judge Procedures, Docket Nos. ER14-2850-000, *et al.* (April 1, 2016). *See also Sw. Power Pool, Inc.*, 155 FERC ¶ 61,168 (2016) (approving partial uncontested settlement in Docket Nos. ER15-2850-006 and ER14-2851-006); *Sw. Power Pool, Inc.*, 155 FERC ¶ 61,043 (2016) (approving partial uncontested settlement in Docket Nos. ER14-2850-004 and ER14-2851-004); *Sw. Power Pool, Inc.*, 154 FERC ¶ 61,061 (2016) (approving partial uncontested settlement in Docket Nos. ER14-2850-003 and ER14-2851-003); *Sw. Power Pool, Inc.*,

(continued...)

4. Under the terms of the Partial Settlement, the Settling Parties agree that the “carve-out” question is sufficiently discrete and straightforward for the Commission to resolve in accordance with Rule 801 of the Commission’s Rules of Practice and Procedure,⁸ without requiring evidentiary hearing procedures. The Settling Parties agree to a set of issues⁹ and stipulated facts.¹⁰ They state that with these agreements, in addition to the filings submitted in this and other proceedings addressing SPP grandfathered agreement “carve-out” treatment,¹¹ there are no remaining issues of material fact in dispute and that the remaining issues are discrete. The Settling Parties propose that any party to this proceeding (and Commission Trial Staff) submit concurrent initial briefs within 60 days of a Commission order approving the Partial Settlement, and reply briefs would be submitted 20 days after the initial briefs.

5. Article 4.5 of the Partial Settlement states:

[T]he standard of review to be applied by the Commission in considering any proposed change sought by a Settling Party shall be the “public interest” standard set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The standard of review for any modification to the Partial Settlement proposed by any non-party to the Partial Settlement or the Commission acting *sua sponte* shall be the most stringent standard permitted by law.

154 FERC ¶ 61,052 (2016) (approving partial uncontested settlement in Docket Nos. ER14-2850-005 and ER14-2851-005).

⁸ 18 C.F.R. § 385.801 (2015).

⁹ Offer of Partial Settlement, Appendix A. Specifically, the Settling Parties agree to two remaining issues: (1) are Missouri River, Basin Electric, Heartland, or all eligible for carve-out treatment under the SPP Tariff and Commission policy by virtue of their rights under the 1977 Contract; and (2) if the answer to issue 1 is yes, then when should the carve-out treatment become effective, and are those parties entitled to refunds back to the effective date.

¹⁰ Offer of Partial Settlement, Appendix B.

¹¹ Offer of Partial Settlement at 2 (identifying Docket Nos. ER12-1179 and ER13-2078 as additional relevant proceedings).

6. The Partial Settlement appears to be fair and reasonable and in the public interest, and is hereby approved. The Partial Settlement resolves all issues of material fact through the Settling Parties' factual stipulation and provides for a paper hearing process that is consistent with those granted through a motion for waiver of initial decision and evidentiary hearing under Rule 710 of the Commission's Rules of Procedure.¹² Initial briefs shall be filed directly with the Commission within 60 days from the date of issuance of this order and reply briefs to the Commission within 20 days thereafter. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

7. Because the Partial Settlement provides that the standard of review for changes to the Partial Settlement proposed by any non-party to the Partial Settlement or the Commission acting *sua sponte* is "the most stringent standard permissible under applicable law," we clarify the framework that would apply if the Commission were required to determine the standard of review in a later challenge to the Settlement.

8. The *Mobile-Sierra* "public interest" presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Association v. FERC*,¹³ however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory "just and reasonable" standard of review on future changes to agreements that fall within the second category described above.

¹² 18 C.F.R. § 385.710 (2015). Generally, the Commission institutes paper hearing proceedings on unresolved non-factual issues by granting a motion requesting waiver of evidentiary hearing and initial decision under Rule 710 at the request of the parties. See *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 FERC ¶ 61,389, at PP 4-5 (2004) (granting waiver of initial decision where the parties stated that there were disagreements on the relevance and import of the record materials but no fact finding was needed).

¹³ 707 F.3d 364, 370-371 (D.C. Cir. 2013).

The Commission orders:

(A) The proposed Partial Settlement is hereby approved, as discussed in the body of this order.

(B) Initial briefs shall be filed directly with the Commission within 60 days from the date of issuance of this order and reply briefs to the Commission within 20 days thereafter.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.