

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Southwest Power Pool, Inc.

Docket No. ER06-448-000

ORDER ACCEPTING AND SUSPENDING AGREEMENTS, AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 3, 2006)

1. On January 3, 2006, SPP filed a proposed unexecuted Network Integration Transmission Service Agreement (NITSA) between SPP and Oklahoma Municipal Power Authority (OMPA), an executed Network Operating Agreement (NOA) between SPP, OMPA and American Electric Power Company (AEP), and an unexecuted NOA between SPP, OMPA and Western Farmers Electric Cooperative (WFEC). As discussed below, the Commission accepts the agreements, suspends them for a nominal period, to become effective December 1, 2005, subject to refund, and establishes hearing and settlement judge procedures.

Background

2. OMPA is a member of SPP; OMPA serves as a wholesale power supplier to 35 municipalities in Oklahoma and is a supplier of contract capacity and supplemental energy to three cities in Kansas. The total coincident peak demand of all OMPA's participating members in 2005 was in excess of 600 MW, of which approximately 35 MW is located in the WFEC control area. OMPA meets its power supply obligations in part with approximately 346 MW of OMPA generation (including undivided ownership interests), and the remainder of its power needs through purchases from utilities and through contractual entitlements to the output of approximately 75 MW of generating capacity operated by five OMPA members. OMPA acts as a scheduling agent for the delivery of its participants' 77.6 MW of peaking power and supplemental purchases from Southwestern Power Administration.

3. WFEC is a rural electric cooperative with financing from the Rural Utilities Service (RUS) and thus is not a Commission-jurisdictional “public utility”.¹

4. SPP filed the NITSA and NOAs as a result of an Interim Settlement Agreement among the parties on November 14, 2005. The Interim Settlement Agreement was filed by SPP, OG&E, OMPA and Public Service Company of Oklahoma, an operating utility subsidiary of AEP, and was approved by the Commission on January 19, 2006.²

5. SPP is willing to provide OMPA with transmission service; however, as described below, at issue are the charges and the cost support. SPP, OMPA and WFEC have attempted to resolve these issues, but have not been able to do so. Therefore, as requested by OMPA and WFEC, SPP has filed with the Commission. SPP has requested an effective date of December 1, 2005 since this is the date when the unexecuted agreement submitted in this filing were to become effective, thus rendering the prior agreements with OMPA obsolete, while still assuring service for OMPA’s load.

Notice of Filing, Interventions, and Protests

6. Notice of SPP’s filing was published in the *Federal Register*, 71 Fed. Reg. 3081 (2006), with interventions and protests due on or before January 24, 2006. Oklahoma Gas & Electric Company (OG&E), National Rural Electric Cooperative Association (NRECA)³ and WFEC filed timely motions to intervene and comments. OMPA filed a timely motion to intervene and limited protest. On February 8, 2006, OMPA filed a response to WFEC’s comments. On February 9, 2006, WFEC filed an answer to OMPA’s protest.

7. OMPA objects to the WFEC-related charges to be assessed by SPP under its tariff, which OMPA claims are unjust and unreasonable charges: (1) a proposed provision governing imbalances service in the WFEC control area; and (2) proposed WFEC

¹ See Pub. L. No. 109-58, § 1291(c), 119 Stat. 594, 985 (2005) (codifying exemption from FPA jurisdiction for electric cooperatives with RUS financing); see also *Dairyland Power Cooperative.*, 37 F.P.C. 12 (1967); *Salt River Project Agric. Improvement & Power Dist. v. F.P.C.*, 391 F.2d 470 (D.C. Cir. 1967).

² See *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,045 (2006).

³ NRECA is a not-for-profit national service organization representing 930 not-for-profit, customer-owned rural electric cooperatives located in 47 states and serving more than 37 million end users. Of those 930 cooperatives, 64 are generation and transmission cooperatives that are owned by and sell power at wholesale to their member distribution cooperatives. Among them are WFEC and WFEC’s member distribution cooperatives.

wholesale distribution service charges. OMPA requests WFEC rate-related provisions, in particular WFEC's Schedule 4 imbalance provisions and Wholesale Distribution Service Charges reflected in Section 8.8 and Appendix 5, be summarily rejected or suspended for a five month period and set for hearing and settlement judge proceedings. However, OMPA accepts the notice of cancellations of Service Agreement Nos. 1068 and 1125, but only, if the OG&E NOA that is part of Service Agreement No. 1125, is retained on file with the Commission. OMPA requests that the Commission accept SPP's filing which governs service to OMPA's loads in the AEP and OG&E control areas, and the non-rate provisions governing service to OMPA's loads in the WFEC control area.

8. In its comments, OG&E states that it has provided transmission service to OMPA since 1985 through a Transmission Service Agreement (TSA), as amended, and has provided dispatch and load regulation services to OMPA through a dispatch and load regulation Agreement, as amended for wholesale customers of OMPA within the OG&E control area. OG&E states that the NITSA originally filed in Docket No. ER05-799-000 was intended to replace the TSA so OMPA could take transmission service through SPP. OG&E states that the agreement filed with the Commission in the current proceeding does not incorporate the provisions of the Interim Settlement Agreement in Appendix 1 and it does not accurately reflect OMPA's Network Resources (NR) as specified in the Interim Settlement Agreement. Therefore, OG&E states that SPP's filing is deficient in that it fails to include the network operating agreement between OMPA and OG&E as part of SPP's proposed Service Agreement No. 1166. However, OG&E believes that the deficiencies can be resolved through the Commission's settlement judge procedures, and, therefore, requests that this proceeding be referred to a settlement judge.

9. In its comments, NRECA states that it is vitally important for the Commission to conclude that it does not have jurisdiction under section 205 of the Federal Power Act with regard to the rates, terms and conditions of services being provided by WFEC in this proceeding. Concerning WFEC's services to OMPA, SPP would be limited to providing a billing function for the parties, merely passing through the charges and revenues and performing no substantive or physical function for the services provided by WFEC. NRECA claims that, under section 205, the Commission has reviewed the revenue requirements of non-jurisdictional entities only where they have voluntarily sought Commission review,⁴ where the charges for the services were integrated with other jurisdictional charges⁵ or a Commission-jurisdictional tariff has required review.⁶

⁴ *City of Vernon*, 111 FERC ¶ 61,092 (2005).

⁵ *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,366 at P 12 (2005).

⁶ *Buckeye Power, Inc.*, 110 FERC ¶ 61,166 (2005); *Indiana Municipal Power Agency*, 112 FERC ¶ 61,274 (2005).

NRECA argues that none of these circumstances are present in this case; therefore, there is no basis for Commission authority under section 205 over the rates, terms and conditions of services being provided by WFEC to OMPA.

10. In its comments, WFEC states the Commission lacks jurisdiction under section 205 to determine the rates, terms and conditions of those services to be provided by WFEC to OMPA. WFEC also states the wholesale distribution service charges and energy imbalance service charges to OMPA are reasonable, cost-based and comparable.

11. Separately, WFEC protests SPP's inclusion of Laverne, Fairview and Mangum internal city generation as grandfathered network resources because an interconnection agreement does not exist for these resources. WFEC states that these are city-owned generators which are located behind the meter and are operated by OMPA, and not eligible to be designated as NR under SPP's tariff because an agreement governing the interconnection and operation of such generation has not been executed. In addition, WFEC argues that the Fairview and Mangum generators have been used only to service city load behind the meter and not previously used as a network resource by OMPA (*i.e.*, available to serve any of OMPA's load).

12. WFEC states that SPP claims that "agreements are already in place for WFEC to test the metering equipment" that will be used to meter OMPA's load in connection with the services being provided. In fact, WFEC argues there are no such agreements in place yet. The expired Coordination Agreement had included a provision on meter testing, but no agreement has been executed by OMPA that would provide this meter testing. WFEC believes that a provision on testing in the *pro forma* NOA should be retained, but modified to reflect that OMPA would need to make arrangements for the testing of meters that it does not own and operate. WFEC also states that OMPA should be required to elect to self-provide or acquire from third parties operating reserves.

13. Finally, OMPA and WFEC have responded to each other's protest and comments, although not to each other's answers. In its response to WFEC's comments, OMPA further argues that, by its own actions, WFEC made SPP OMPA's transmission provider and thereby subjected the rates, terms and conditions of such service to Commission review under section 205 of the Federal Power Act. OMPA argues that the Commission has the authority and the obligation to ensure that SPP's charges to OMPA, including even those originating from WFEC, are just, reasonable and not unduly discriminatory. Additionally, SPP is not a mere "billing agent", as WFEC contends,⁷ but is the entity

⁷ WFEC Comments at 12.

actually providing energy imbalance service to OMPA at necessarily Commission-jurisdictional rates. SPP has received Commission approval as an Order No. 2000-compliant regional transmission organization. As such, SPP serves as provider of last resort for ancillary services, subject to a customer's option (which OMPA has not elected in the case of energy imbalance service) to self-supply.

14. WFEC also responds to OMPA's protest. First, while OMPA has argued that the proposed charges for imbalance services are higher than the charges under a prior expired agreement, WFEC argues that the prior charges were negotiated in 1986 and based on OG&E's costs, whereas the current charges are based on WFEC's costs. Second, OMPA has argued that the proposed WFEC charges are not as favorable to OMPA in comparison to charges by other utilities that the Commission has accepted. However, WFEC notes that other utilities' energy imbalance charges are not relevant to WFEC's costs of providing service to OMPA. WFEC believes that allowing OMPA reduced charges, rather than the cost-based charges WFEC offers, would result in WFEC subsidizing OMPA.

Discussion

Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005) prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept WFEC and OMPA's answers because they have provided additional information that assisted us in our decision-making process.

Hearing and Settlement Procedures

17. The Commission notes that the service at issue is provided by SPP, *i.e.*, a jurisdictional public utility, pursuant to its filed OATT, *i.e.*, a jurisdictional rate schedule, and at rates provided in the OATT, *i.e.*, at jurisdictional rates. WFEC, moreover, is a transmission-owning member of SPP, and its facilities are under the control of SPP.⁸ So, while WFEC (because it is a Rural Utilities Service-financed rural electric cooperative) may not be a public utility subject to Commission regulation under the Federal Power

⁸ See, e.g., *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110 at P 5 & n.4, 23, 69-70 (2004), *order on reh'g*, 109 FERC ¶ 61,010 (2004), *order on reh'g*, 110 FERC ¶ 61,137 (2005).

Act,⁹ that fact is not relevant as it is SPP and not WFEC that is providing the service at issue and it is SPP's rates and not WFEC's rates that are at issue. While SPP may use WFEC's facilities to provide the service and while SPP's rates incorporate WFEC's costs, that does not make the service or the rates at issue here WFEC service or rates.

18. However, the NITSA and NOAs submitted by SPP nevertheless raise issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

19. Our preliminary analysis of SPP's filing indicates that it has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Therefore, we will accept SPP's NITSA and NOAs for filing, suspend them for nominal period, to become effective on December 1, 2005,¹⁰ as requested, subject to refund, and set them for hearing and settlement judge procedures as ordered below.

20. 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 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.¹¹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹² The settlement judge shall report to the Chief Judge and the Commission within 30 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.

⁹ 16 U.S.C. § 824 (2000); Pub. L. No. 109-58, § 1291, 119 Stat. 594, 984-85 (2005).

¹⁰ *Prior Notice Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,983-84, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (permitting the Commission to grant waiver if service agreements under an umbrella tariff are filed within 30 days after service commences).

¹¹ 18 C.F.R. § 385.603 (2005).

¹² 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 – click on Office of Administrative Law Judges).

The Commission orders:

(A) SPP's proposed NITSA and NOAs are hereby accepted for filing and suspended for a nominal period, to become effective December 1, 2005, as requested, 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 SPP's, NITSA and NOAs. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, 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 (2005), 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 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 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.

(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 this proceeding in a hearing room of the Commission, 888 First Street, N.E., 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 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)

Magalie R. Salas,
Secretary.