

125 FERC ¶ 61,001
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.

Southwest Power Pool, Inc.

Docket Nos. ER08-1357-000
ER08-1358-000
ER08-1359-000

ER08-313-000
ER08-923-000
ER08-1307-000
ER08-1308-000
ER08-1308-001
(consolidated)

ORDER CONSOLIDATING DOCKETS, ACCEPTING AND SUSPENDING
SERVICE AGREEMENTS, AND ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued October 1, 2008)

1. On August 5, 2008, Southwest Power Pool, Inc. (SPP) submitted a partially executed Network Integration Transmission Service Agreement (NITSA) between SPP as Transmission Provider and Golden Spread Electric Cooperative, Inc. (Golden Spread) as Network Customer and a partially executed Network Operating Agreement (NOA) among SPP as Transmission Provider, Golden Spread as Network Customer and Southwestern Public Service Company (SPS) as Host Transmission Owner in Docket No. ER08-1357-000. In Docket Nos. ER08-1358-000 and ER08-1359-000, SPP filed executed NITSAs and partially executed NOAs between SPP as Transmission Provider and SPS as both Network Customer and Host Transmission Owner (collectively, Agreements).

2. In this order, we will accept the proposed Agreements for filing, suspend them for a nominal period, make them effective July 6, 2008, as requested, subject to refund, and set all issues for hearing and settlement judge procedures. We will also consolidate the subject Docket Nos. ER08-1357-000, ER08-1358-000, and ER08-1359-000 with the ongoing proceedings in Docket Nos. ER08-313-000, ER08-923-000, ER08-1307-000, ER08-1308-000, and ER08-1308-001 which involve similar issues and are currently in settlement procedures.

I. Background

3. In Docket No. ER08-313-000, Xcel Energy Services, Inc. (Xcel) filed revised tariff sheets on behalf of SPS to implement a transmission cost of service formula rate for transmission services over the transmission facilities of SPS. The proposed formula rate is intended to replace the stated transmission service rates previously established by settlement in 2006¹ and are set forth in a new Attachment O – SPS to the Xcel Open Access Transmission Tariff (OATT).

4. Within the formula rate, SPS proposed, *inter alia*, a meter charge. While SPS has historically included the costs of the delivery point meters in the production rate, SPS is proposing to move these costs from the production rate to the transmission rate. The meter charge would be cost-based and charged to each customer based on the number of delivery points the customer has on the SPS system.²

5. SPS stated that in developing formula rates, it adhered to the current definition of “Transmission Facilities” in Attachment AI of SPP’s Regional OATT, which excludes certain radial lines.³ SPS states that to conform with this definition, it removed the costs of certain radial lines from the formula rate. SPS instead proposed to assign the costs of these radial lines directly to the applicable customers through the use of an annual carrying charge.⁴

6. By order issued February 5, 2008, the Commission accepted and suspended SPS’ proposed formula rates and established hearing and settlement judge procedures.⁵ The Commission set all issues for hearing including the proposed meter charge and the proposed reclassification of transmission facilities to exclude radial lines.⁶

¹ *Xcel Energy Services, Inc.*, 115 FERC ¶ 61,011 (2006).

² Xcel’s Dec. 7, 2007 Transmittal Letter, Docket No. ER08-313-000, at 11-12.

³ Prior to the change in the definition of Transmission Facilities, radial lines were classified and accounted for as transmission plants, and the costs of these lines were recovered from both wholesale and retail transmission customers. However, with the proposed reclassification of radial lines, SPS intends to recover the costs of radial lines from the jurisdictional customers (i.e., retail or wholesale) served by those lines.

⁴ Xcel’s Dec. 7, 2007 Transmittal Letter, Docket No. ER08-313-000 at 11.

⁵ *Xcel Energy Services, Inc.*, 122 FERC ¶ 61,098 (2008).

⁶ *Id.* P 74.

7. On May 6, 2008, in Docket No. ER08-923-000, Xcel submitted on behalf of SPS unexecuted revised NITSAs between SPS and two SPS network customers, Golden Spread Electric Cooperative, Inc. (Golden Spread) and South Plains Electric Cooperative, Inc. (South Plains), a member of Golden Spread. SPS stated it submitted these revisions to its NITSAs to reflect the transmission service formula rate filing in Docket No. ER08-313-000. SPS proposed the following changes to the SPS NITSAs: (1) the addition of a provision authorizing SPS to directly assign to the network customer the meter charge, as ultimately determined in ER08-313-000; (2) the addition of a provision authorizing SPS to directly assign to the customer the cost of radial lines in accordance with Attachment O – SPS, as ultimately determined in Docket No. ER08-313-000; and (3) an update to the list of delivery points and the list of designated network resources contained in the agreements. SPS requested that the Commission consolidate ER08-923-000 with Docket No. ER08-313-000 and establish the same effective date of July 6, 2008, in the two proceedings.

8. Golden Spread filed a motion to intervene and protest, and a motion to summarily reject the filing or, in the alternative, a request for a five month suspension. Golden Spread claimed that (1) SPS failed to provide cost of service information to support its proposed formula rate for transmission service; (2) SPS needed to file a request with the Commission for a determination as to which of its facilities are “Transmission Facilities” as required by Attachment AI of the SPP OATT⁷; and (3) the filing violated the Commission’s principle of transmission access and rate comparability. In addition, Golden Spread filed a statement in support of consolidating Docket Nos. ER08-923-000 and ER08-313-000.

9. By order issued July 2, 2008, the Commission accepted the proposed revisions in Docket No. ER08-923-000, suspended them for a nominal period, made them effective

⁷ Section IV of Attachment AI states, in part:

Within three (3) years from the date of acceptance by FERC of this Attachment AI to the Tariff, each Transmission Owner shall file a request(s) based on this Attachment with its appropriate regulatory authority or authorities for a determination as to which of its facilities are Transmission Facilities... Each Transmission Owner shall use reasonable efforts to cause the aforementioned determinations to be made and the applicable transmission service rates to be adjusted accordingly as soon as possible after such determinations are finalized.

July 6, 2008, as requested, subject to refund, and set the issues raised for hearing and settlement judge procedures.⁸ The Commission also consolidated Docket Nos. ER08-923-000 and ER08-313-000.

10. In Docket Nos. ER08-1307-000 and ER08-1308-000,⁹ SPP submitted executed NITSAs and NOAs between SPP as Transmission Provider and SPS as both Network Customer and Host Transmission Owner. In both dockets, SPP proposed additional language to Section 8.3 in Attachment 1 of the NITSAs specifying a monthly meter charge and radial facilities charge, both based on the Xcel OATT, Attachment O – SPS. SPS also proposed revisions to Section 2.0 of the NITSAs and to Section 3.3 of the NOAs to update the list of delivery points. In Docket No. ER08-1308-000, SPP proposed additional language to Section 4.0 of the NITSA clarifying that the initial sources of the network service would be generating units currently owned by SPS within the SPS control area.

11. By order issued September 23, 2008, the Commission accepted the proposed revisions in Docket Nos. ER08-1307-000 and ER08-1308-000, suspended them for a nominal period, made them effective July 6, 2008, as requested, subject to refund, and set the issues raised for hearing and settlement judge procedures.¹⁰ The Commission also consolidated these dockets with Docket Nos. ER08-923-000 and ER08-313-000.

12. Currently, the parties to the above consolidated dockets are in the process of settlement procedures.¹¹

II. Description of the Filings

13. In Docket No. ER08-1357-000, SPP filed a partially executed NITSA between SPP as Transmission Provider and Golden Spread as Network Customer and a partially executed NOA among SPP as Transmission Provider, Golden Spread as Network

⁸ *Xcel Energy Services, Inc.*, 124 FERC ¶ 61,011 (2008) (July 2 Order).

⁹ In Docket No. ER08-1308-001, SPP submitted an errata to its initial filing to correct designations.

¹⁰ *Southwest Power Pool, Inc.*, 124 FERC ¶ 61,279 (2008).

¹¹ Settlement conferences under the initially consolidated dockets were held February 14, April 28, July 1, and August 21, 2008, during which the parties discussed the issues and established a timeline for responses to proposed term sheets. Another settlement conference is scheduled for October 30, 2008. *See* Order Scheduling Settlement Conference issued August 22, 2008 (Docket No. ER08-313-000).

Customer and SPS as Host Transmission Owner. In Docket Nos. ER08-1358-000 and ER08-1359-000, SPP filed executed NITSAs and partially executed NOAs between SPP as Transmission Provider and SPS as both Network Customer and Host Transmission Owner. SPP submitted these Agreements because they include terms and conditions that do not conform to standard forms of service agreements that are in SPP's OATT.

14. SPP proposes revisions to Section 2.0 of the NITSAs and to Section 3.3 of the NOAs to reflect SPS' delivery points as listed in Appendix 3 of the NITSAs. In each docket, SPP proposes additional language to Section 8.3 in Attachment 1 of the NITSAs specifying a monthly meter charge and radial facilities charge, both based on the Xcel OATT, Attachment O – SPS. SPP states that this language is similar to the language proposed by Xcel on behalf of SPS in Docket Nos. ER08-923-000 and ER08-313-000, which the Commission accepted, suspended, and consolidated in the July 2 Order.

15. SPP requests an effective date of July 6, 2008, for all revisions in these dockets, which is the same effective date Xcel requested in Docket Nos. ER08-923-000 and ER08-313-000, ER08-1307-000, ER1308-000, and ER08-1308-001.

16. Notice of SPP's filings were published in the *Federal Register*, 73 Fed. Reg. 47,145 (2008), with interventions and protests due on or before August 26, 2008. Cap Rock Energy Corporation filed timely motions to intervene in each proceeding. Golden Spread filed a motion to intervene, protest and motion to summarily reject filing or, in the alternative, a request for a five-month suspension and statement in support of the request for consolidation in each filing. West Texas Municipal Power Agency (West Texas) filed a motion to intervene and to consolidate and a protest in Docket Nos. ER08-1358-000 and ER08-1359-000. Xcel filed a motion to intervene, request for consolidation and comments in each filing. SPP filed Answers to Golden Spread's protests in each docket on September 10, 2008.

A. Golden Spread's Protests

17. In its protests in these proceedings, Golden Spread reiterates many of the concerns it raised in Docket Nos. ER08-313-000, ER08-923-000, ER08-1307-000, and ER08-1308-000 and ER08-1308-001. Golden Spread argues the Commission should summarily reject SPP's filings because SPP failed to provide cost of service information to support its proposed rate changes pursuant to 18 C.F.R. § 35.13.¹² Golden Spread also asserts SPS must first seek a determination from the Commission as to which facilities are Transmission Facilities pursuant to Attachment AI of the SPP OATT before

¹² Golden Spread's August 26, 2008, Protests at P 7.

adjustments can be made to transmission service rates.¹³ Golden Spread also contends SPS has violated the Commission's comparability requirements by failing to propose similar amendments to all its customers' NITSAs.¹⁴

18. In its Protest, West Texas states that the Commission should not take any action to prejudice any party to the on-going settlement proceedings. West Texas further states that since the issue of appropriate meter charges and radial facilities charges are already the subject of settlement discussions, the subject proceedings should be consolidated with ER08-313-000, *et al.*

B. SPP's Answer

19. SPP responds that under SPP's Membership Agreement, SPP's transmission-owning members (such as SPS) possess the unilateral right to file with the Commission pursuant to section 205 of the Federal Power Act (FPA) modifications to change the rates or rate structure for transmission service over their transmission facilities operated by SPP.¹⁵ SPP states that it therefore relies upon its transmission-owning members to justify and obtain Commission approval of their rates, which SPP then administratively incorporates into its tariff and associated service agreement through filings such as this one.¹⁶ SPP explains it is merely seeking to implement rate provisions for SPS that the Commission has already accepted and SPP should not be required to re-submit cost of service information already submitted by SPS. Moreover, SPP argues it is only serving an administrative role in filing the service agreement modifications, and SPS ultimately bears the responsibility for justifying the proposed rate provisions.¹⁷

¹³ *Id.* P 5-6.

¹⁴ *Id.* P 7 (citing *American Electric Power Service Corporation*, 67 FERC ¶ 61,168 (1994)).

¹⁵ SPP cites SPP Membership Agreement at section 3.10; *Atl. City Elec. Co. v FERC*, 295 F.3d 1, 9-11 (D.C. Cir. 2002) (stating that FPA section 205 provides that a public utility may file changes to rates, charges, classifications, or service at any time upon 60 days notice, and the Commission cannot require public utilities to cede this right).

¹⁶ SPP cites *Southwest Power Pool, Inc.*, 122 FERC ¶ 61,266 (2008) (accepting SPP's filing to track the revised rates that Xcel filed on behalf of SPS in Docket No. ER08-313-000, subject to refund and the outcome of that proceeding.).

¹⁷ SPP's Sept. 10, 2008 Answers to Protests at 2-4.

20. SPP further argues that the explicit language of Attachment AI of the SPP tariff, which was accepted by the Commission,¹⁸ provides that it is the responsibility of the transmission owner to file a request with the appropriate regulatory authority for a determination as to which of its facilities are Transmission Facilities under the SPP OATT. Therefore, SPP argues that SPS bears any burden of demonstrating which of its facilities are Transmission Facilities under the SPP Tariff and the consistency of its proposals with the filed rate established by the Commission in Docket No. ER05-1285-000.¹⁹

C. Xcel's Comments in Support of SPP's Filing

21. In comments submitted in the three dockets, Xcel states that along with SPS, it supports the filings. In addition, Xcel and SPS support the requested effective date of July 6, 2008.²⁰

D. Requests for Consolidation

22. Numerous parties request that the Commission consolidate the subject Docket Nos. ER08-1357-000, ER08-1358-000 and ER08-1359-000 with the already pending proceedings in Docket Nos. ER08-313-000, ER08-923-000, ER08-1307-000, ER08-1308-000, and ER08-1308-001. Xcel contends all the filings contain common issues of fact and law, and that consolidation will promote efficiency and allow related issues in the proceedings to be considered in the ongoing settlement discussions in Docket Nos. ER08-313-000, *et al.* Xcel cites the Commission's consolidation of Docket No. ER08-923-000 with ER08-313-000 in the July 2 Order as precedent for consolidation here.²¹ West Texas and Golden Spread also support consolidation.²² Golden Spread notes that the just and reasonableness of similar provisions will be determined by the Commission in at least six different proceedings, leaving the potential for disconnect and inconsistencies between proceedings if the Commission does not consolidate them.²³

¹⁸ SPP cites *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,355 (2005), *order denying reh'g*, 114 FERC ¶ 61,242 (2006).

¹⁹ SPP's Sept. 10, 2008 Answers to Protests at 4.

²⁰ Xcel's Aug. 26, 2008 Comments at 5.

²¹ *Id.* at 5-6.

²² West Texas Comments at 4; Golden Spread's Aug. 26 Protests at 9.

²³ Golden Spread's Aug. 26 Protests at 9.

III. Discussion

A. Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the 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 Procedure²⁴ prohibits the filing of an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept SPP's answers because they have provided information that assisted us in our decision-making process.

B. Commission Determination

24. Golden Spread requests that the Commission summarily reject SPP's filings, or in the alternative, consolidate the filings with the proceedings in Docket Nos. ER08-313-000, *et al.* The Commission may summarily reject portions of a proposed filing if it determines that there are no material issues of fact in dispute and the filing is in clear violation of an applicable statute, regulation or Commission policy.²⁵

25. Upon review, we find that all of the issues raised by the protestors regarding SPP's proposed revisions to the Agreements involve issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in hearing and settlement judge procedures. Thus, we deny Golden Spread's request for summary rejection and set all issues for hearing and settlement judge procedures.

26. In addition, because the subject filings contain common issues of fact and law, and in the interest of administrative efficiency, we will consolidate these filings with the proceedings in Docket Nos. ER08-313-000, ER08-923-000, ER08-1307-000, ER08-1308-000, and ER08-1308-001 for purposes of settlement, hearing, and decision.

27. While we are setting this matter for a trial-type evidentiary hearing, we encourage participants to make every effort to settle this 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.²⁶ If the parties desire, they may, by

²⁴ 18 C.F.R. § 385.213(a)(2) (2008).

²⁵ *E.g., Northern Border Pipeline Co.*, 60 FERC ¶ 61,176, at 61,644 (1992).

²⁶ 18 C.F.R. § 385.603 (2008).

mutual agreement, request a special judge as a settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.²⁷ The settlement judge shall report to the Chief Judge and to the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions.

28. 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) The proposed Agreements are hereby accepted, subject to refund, and suspended for a nominal period to become effective July 6, 2008.

(B) The proposed Agreements are hereby set for hearing and settlement judge procedures, as discussed in the body of this order.

(C) Docket Nos. ER08-1357-000, ER08-1358-000, and ER08-1359-000 are hereby consolidated with Docket Nos. ER08-313-000, ER08-923-000, ER08-1307-000, ER08-1308-000, and ER08-1308-001 for purposes of settlement, hearing, and decision.

(D) 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 SPS's proposed Agreements. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), 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

²⁷ 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 the date of this order. The Commission's website contains a list of Commission judges and a summary of their backgrounds and experience (www.ferc.gov – click on Office of Administrative Law Judges).

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.

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

(G) 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)

Nathaniel J. Davis, Sr.,
Deputy Secretary.