

140 FERC ¶ 61,087
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Empire District Electric Company

Docket No. ER12-1813-000

ORDER ACCEPTING AND SUSPENDING PROPOSED TRANSMISSION
FORMULA RATE AND PROTOCOLS, AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued July 31, 2012)

1. On May 18, 2012, Empire District Electric Company (Empire) filed revisions to its Open Access Transmission Tariff (OATT), pursuant to section 205 of the Federal Power Act (FPA).¹ Empire proposes to implement a cost-based transmission formula rate and protocols² and seeks to update and keep current its rates for Network Integration Transmission Service (Network Service), Point-to-Point Transmission Service (PTP Service), and Scheduling, System Control, and Dispatch Service (Schedule 1 Service) in the Empire zone of the Southwest Power Pool, Inc. (SPP) regional transmission organization (RTO).³ In this order, the Commission accepts Empire's proposed formula rate template and implementation protocols, suspends them for five months, makes them

¹ 16 U.S.C. § 824d (2006).

² Empire's filed rate is made up of its formula rate template and accompanying formula rate implementation protocols. Empire Transmittal at 2. The implementation protocols describe the procedures applicable to the annual update process (Eichman Testimony, Ex. EDE-1).

³ Empire notes that the stated rates for Network Service and PTP Service are also included in the SPP OATT at FERC Electric Tariff, Sixth Revised Volume No. 1. Empire states that, SPP will make a separate filing to revise the SPP OATT to reflect the proposed revision to Empire's Network Service and PTP Service rates and to incorporate the proposed Empire formula rate into the SPP OATT.

effective January 1, 2013, subject to refund, and establishes hearing and settlement judge procedures.

I. Background

2. Empire is a public utility company based in Joplin, Missouri that provides electric service to approximately 166,500 customers located in southwest Missouri, southeast Kansas, northeast Oklahoma and northwest Arkansas. Empire states that, in addition to regulation by the Commission at the wholesale level, it is regulated by four state Commissions at the retail level, i.e., the Missouri Public Service Commission, the Kansas Corporation Commission (Kansas Commission), the Oklahoma Corporation Commission, and the Arkansas Public Service Commission.⁴ Empire adds that it is a transmission-owning member of SPP and that it transferred functional control of its transmission facilities, most of which operate at 69 kV and 161 kV, to SPP in 2004. Consequently, Empire states that it no longer provides network or point-to-point transmission service pursuant to its OATT; instead, all requests for transmission service on Empire's transmission system now are made through SPP in accordance with the terms and conditions of the SPP OATT.

3. Empire states that the current stated annual transmission revenue requirement for Network Service is \$14,075,000. The charge for PTP Service is based on an annual rate of \$15,382.514/MW and a monthly rate of \$1,281.876/MW. Empire explains that these rates, along with the Schedule 1 Service charges, were established in 1996 as part of a settlement.⁵

II. Empire's Filing

4. Empire proposes to replace its stated rates by implementing a formula rate template that will annually adjust its transmission revenue requirement. Empire states that, with its proposed formula rate template and implementation protocols, it seeks to reduce the regulatory lag it faces for recovery of its transmission rates and also to provide customers with the transparency of periodic rate adjustments. Empire adds that the formula rate will minimize administrative and litigation-related costs typically associated with rate filings for Empire and its customers.⁶ Empire states its proposal is consistent

⁴ Empire Transmittal at 1-2.

⁵ *Id.* at 2.

⁶ *Id.* at 2-3.

with the Commission's policy of encouraging transmission owners to move from stated rates to formula rates.⁷

5. Empire proposes to implement a formula rate template that will use actual calendar year cost data, most of it from the FERC Form No. 1, supplemented by company data, to calculate annually the rates for Network Service, PTP Service and Schedule 1 Service. Empire proposes that the revised tariff sheets become effective August 1, 2012, with the initial rate year ending June 30, 2013. Empire states that subsequent rate years would cover the period from July 1 through June 30. Empire states that, under the proposed protocols, it would recalculate the annual transmission revenue requirement and post the rates for the next rate year on or before June 15, 2013. Empire notes that, unlike many formula rates in effect in SPP, Empire's formula rate does not use projected transmission costs and, as such, does not include a true-up mechanism.

6. Empire explains that the formula rate is similar to other transmission formula rates previously accepted by the Commission, as modified to reflect facts unique to Empire, such as the inclusion of provisions accepted for filing in Empire's generation formula rate.⁸

7. Empire states that proposed formula rate contains a fixed 10.5 percent base return on equity (ROE), as supported in Ex. EDE-5 by the testimony of Dr. James Vander Weide and his application of the Commission's Discounted Cash Flow (DCF) analysis to two separate proxy groups of electric utilities with risk profiles similar to Empire's. Dr. Vander Weide also supports the proposed ROE based on the application of his alternative DCF approach to a large group of Value Line electric utilities.⁹ Empire proposes to include a 50 basis point ROE adder for its continued participation in SPP. In addition, the proposed formula rate contains fixed values for depreciation rates, the costs of Post-Employment Benefits Other than Pensions (PBOPs), a 55 percent cap on the share of common equity in the capital structure, and a placeholder for ROE incentives for SPP regional projects.¹⁰ Empire explains that, consistent with prior Commission orders, these inputs can only be changed by a future filing under section 205 or 206 of the FPA.

⁷ *Id.* at 3.

⁸ *Id.*

⁹ *Id.* at 4, n.16 (citing Vander Weide Test., Ex. EDE-5 at 12-13, 21-22).

¹⁰ Eichman Testimony, Ex. EDE-1 at 17-18.

8. Empire states that, after crediting the revenue requirement from SPP regional projects collected under the SPP Tariff Schedule 11, the initial annual transmission revenue requirement is \$22,529,005. As a result of the proposed rate change, the increase in the annual transmission revenue requirement for Network Service in the Empire zone is \$8,454,000.

9. Empire requests waiver of section 35.13(d)(1)-(2) (except for Statements BG and BH), section 35.13(d)(5), and section 35.13(h) of the Commission's regulations.¹¹ Empire states that good cause exists to grant the requested waivers, arguing that the Commission has granted such waiver requests in similar proceedings where a party has proposed to implement a formula rate.¹²

III. Notice of Filing and Responsive Pleadings

10. Notice of Empire's Filing was published in the *Federal Register*, 77 Fed. Reg. 31,346 (2012), with interventions and protests due on or before June 8, 2012. Kansas Electric Power Cooperative, Inc., filed a timely motion to intervene. Timely motions to intervene and protests were filed by: (1) the Cities of Monett, Mount Vernon and Lockwood, Missouri and Chetopa, Kansas (Cities), (2) the State of Missouri, and (3) the Kansas Commission. On June 25, 2012, Empire filed a motion for leave to answer and an answer. On June 29, 2012, Empire filed a supplement to its answer. On July 9, 2012, the State of Missouri filed a motion for leave to answer and a limited answer.

A. Protests

1. ROE

11. Cities argue that Empire's proposed 10.5 percent base ROE and 50 basis point adder for RTO participation are excessive. Cities state that they are not opposed to the 50 basis point adder, but argue that Empire should not be guaranteed a 50 basis point adder, but rather should be permitted to seek up to 50 basis points of incentive ROE subject to the zone of reasonableness determined in a hearing.¹³ Cities, the Kansas Commission and the State of Missouri contend that Empire does not follow the specific policy and guidance regarding the application of DCF methodology endorsed in a number of Commission orders.¹⁴ Kansas Commission argues that the median for the Vander

¹¹ See 18 C.F.R. § 35.13(d)(1)-(2), (d)(5) and (h) (2012).

¹² Empire Transmittal at 7.

¹³ Cities Protest at 4.

¹⁴ *Id.*, State of Missouri Protest at 6-7; Kansas Commission Protest at 4.

Weide proxy group, based on the Commission's policy for electric ROEs, is 9.80 percent; thus, it concludes that Empire's proposed ROE appears to be unjust and unreasonable, and overstates the median ROE by 70 basis points.¹⁵ According to Cities, when the Vander Weide analysis is corrected to conform to Commission policy and precedent, the result is a median ROE of 9.18 percent.¹⁶ The State of Missouri supports an investigation into whether the variances made by Empire and its departures from accepted Commission methods and practices lead to just and reasonable rates.

2. Revenue Crediting for Grandfathered Point-to-Point Contracts

12. Cities argue that Empire's proposal to credit the revenues from grandfathered point-to-point contracts appears to be inconsistent with Commission precedent. Testimony from witness Eichman states that the formula rate includes revenue credits from point-to-point transmission service revenues received by Empire from grandfathered bundled service agreements executed prior to Order No. 888. Cities note that the Commission found in *Idaho Power Co.* that Idaho Power must include the demand from Idaho Power's grandfathered agreements in the divisor, rather than crediting the revenues thereunder.¹⁷ Cities cite the need for more information from Empire to determine whether this issue would significantly impact Cities' Network Service charges.

3. Other Formula Rate Template and Data Input Issues

13. Cities state that the Empire formula rate appears to use end-of-year balances for data inputs in violation of the Commission's rules and precedent. Cities point out that section 35.13 of the Commission's regulations, 18 C.F.R. § 35.13(h)(4)(i), requires a utility to use "an average of the thirteen monthly balances" for each of Period I and II. Cities state that the Commission has summarily required the used of the 13 month average plant balances in formula rate contexts and should require Empire to use the same standard.¹⁸

¹⁵ Kansas Commission Protest at 4.

¹⁶ Cities Protest at 4.

¹⁷ *Id.* at 15 (citing *Idaho Power Co.*, 126 FERC ¶ 61,044 (2009), *reh'g denied*, 137 FERC ¶ 61,235 (2011) (*Idaho Power Co.*)).

¹⁸ Cities Protest at n.30 (citing *Xcel Energy Servs., Inc.*, 125 FERC ¶ 61,092, at PP 16-17 (2008)).

14. Kansas Commission argues that it is unclear how and when Empire intends to update the equity ratio that is included in the filing's proposed capital structure. Kansas Commission adds that it is unclear whether Empire is requesting authority to update the equity ratio with actual data each year, or if the proposed 49 percent equity to 51 percent debt ratio will be a static input that resists change, unless a filing under FPA section 205 or 206 is made with the Commission. Kansas Commission also contends that the application of the proposed 55 percent equity cap is vague and unclear. Kansas Commission states that the filing does not provide sufficient record evidence of the circumstances under which Empire is proposing that the 55 percent equity cap will be applied and under what circumstances the cap would be removed. Accordingly, Kansas Commission requests that the Commission set this and related equity and debt issues for an evidentiary hearing.¹⁹

15. Cities state that they cannot decipher Empire's statement that "[b]ased on 2011 data" it includes a value for PBOPs. Cities state that Empire does not support its PBOP value with testimony or other data such as an actuarial study.²⁰ The State of Missouri alleges that the fixed and actual PBOP amount of \$3,801,763 has not been shown to be just and reasonable and contends that Attachment 5 of the Empire Filing offers no other support and that the amount is excessive in comparison to recent PBOP expenses. Additionally, the State of Missouri states that it is not clear whether this amount should be normalized.²¹ Kansas Commission argues that Empire has not sufficiently supported this amount in its filing and that this request presents a potential for a double recovery of PBOP costs, if any portion of this amount is also included in Empire's retail distribution rates.²²

16. The State of Missouri claims that the depreciation rates listed in the Empire Filing at Attachment 10 contain no information necessary to confirm or verify that the rates are just and reasonable. The State of Missouri also claims that general plant depreciation expense, including amortization of limited term plant, includes depreciation expenses associated with general plant that should be allocated to Empire District Gas Company,

¹⁹ Kansas Commission Protest at 3-4.

²⁰ Cities Protest at 18.

²¹ State of Missouri Protest at 4.

²² Kansas Commission Protest at 5.

and seeks further information to determine what lesser amount should be used in Appendix A, Ex. EDE-2, line 68 and the line 72 calculation.²³

17. Cities argue that the value listed for accumulated amortization (-\$1,590,888) is usually a positive value and Empire offers no explanation for why it is negative. Cities also contend that the stated value listed under “Other Electric revenues” pg. 2, line 22, of Ex. EDE-2, Formula Rate Template Inputs is not traceable to the FERC Form No. 1, and argues that there is no other support or explanation offered for this value.²⁴

18. Kansas Commission argues that the Empire Filing lacks a clear description of what constitutes Hedging Costs. Kansas Commission adds that it is not opposed to including reasonable Long Term Interest and Hedging Costs in the formula rate template; however, Kansas Commission requests that the Commission require Empire to clearly define what constitutes hedging costs, to delineate between actual costs and hedging costs, and to provide evidence to justify the division.²⁵

19. In addition, the State of Missouri asserts that Empire has not demonstrated that the following inputs will lead to just and reasonable rates: the prepayment amount, the Cash Working Capital calculation, the plant in service allocated to transmission, the Total Wages expense, and certain one-time expenses from Empire’s FERC Form No. 1.

4. Implementation Protocol Issues

20. Cities argue that section 1.5 of Empire’s implementation protocols gives Empire the right to make substantive single-issue filings to change the ROE, depreciation rates, the PBOP amount, and the proposed cap on common equity. Cities contend that this provision renders the proposed formula rate unjust and unreasonable. Cities argue that the Commission does not permit single-issue rate filings except in very limited circumstances and notes that, if Empire seeks to change any element of its formula rate, consistent with Commission precedent, the Commission should put the burden on Empire to support the entire formula rate.²⁶

21. Cities argue that Empire does not make clear that it bears the burden of proof in any challenge to the annual implementation of the formula rate; as such, the Commission

²³ State of Missouri Protest at 4.

²⁴ Cities Protest at 17-18.

²⁵ Kansas Commission Protest at 5-6.

²⁶ Cities Protest at 18-21.

should require Empire to include an explicit statement in which Empire assumes the burden of proof. In addition, Cities contend that sections II.4, III.1-3, and IV.1 of the implementation protocols are ambiguous and may operate to eliminate an interested party's right to challenge the incorrect application of the formula rate when errors are discovered.²⁷

22. Cities and the State of Missouri have concerns that Empire's proposed implementation protocols do not provide sufficient time for review of the annual implementation of the formula rate.²⁸ Specifically, Empire limits interested parties to a 60-day calendar period from the posting date to ask discovery questions about Empire's annual implementation of the formula rate. Cities state that this time period is unreasonably short, noting that interested parties in the Empire generation formula rate are provided 75 days to ask discovery, as agreed to in the settlement proceeding. In addition, the State of Missouri argues that the timeline for resolution of challenges is not adequate to ensure just and reasonable rates.

23. The State of Missouri contends that Empire has not shown it will allow sufficient access to documents that provide a basis for why certain inputs were chosen, or supporting documents for those choices. The State of Missouri adds that the implementation protocols do not define with any specificity what supporting documentation will be provided. To address this concern, the State of Missouri proposes that Empire provide more details and source documentation with the annual update filing, explaining that such a requirement would minimize the number and amount of follow-up information requests.²⁹ The State of Missouri also objects that Empire has not adequately demonstrated that it has removed all costs related to its affiliate, the Empire District Gas Company, or "a lack of 'double recovery' of costs."³⁰

24. Finally, the State of Missouri suggests that the Commission study whether Empire needs protocol language that provides that input support also be available after the effective date of the annual updates to allow for verification that costs included in the formula rate are not also included in state jurisdictional rates.³¹

²⁷ *Id.* at 21-23.

²⁸ State of Missouri Protest at 7-8, Cities Protest at 21.

²⁹ State of Missouri Protest at 8-9.

³⁰ *Id.* at 9.

³¹ *Id.*

5. **Request for Rejection, Suspension, Settlement Procedures and Evidentiary Hearing**

25. The State of Missouri requests that the Commission reject the Empire Filing on the basis that it has not demonstrated that its rates are just and reasonable.³² Alternatively, the State of Missouri and Cities request suspension of the effective date for the maximum extent possible, five months, because the rate Empire proposes is substantially excessive.³³ The State of Missouri adds that maximum suspension would also allow the parties to resolve the numerous issues that are in dispute. Cities add that the Commission should only accept the filing subject to refund.

26. Cities state that they need an opportunity for discovery and to thoroughly review the formula rate to ensure it will operate in a just and reasonable manner to produce just and reasonable charges for transmission service. Accordingly, Cities, the State of Missouri and Kansas Commission all request that the Commission set the Empire Filing for a full evidentiary hearing, hold the hearing in abeyance and establish settlement proceedings before an Administrative Law Judge.³⁴

B. **Empire's Answer and Supplement to Answer**

27. In response to intervenors' protests regarding the various DCF analyses employed by Dr. Vander Weide to establish the proposed Empire ROE, Empire acknowledges there is disagreement regarding the appropriate DCF model to be used. Empire states that the Commission should set the issue for settlement judge procedures.³⁵

28. Empire states that the State of Missouri mischaracterizes the 50 basis point adder for RTO participation, explaining that there is no "nexus test" required for the utility to receive the adder, but rather an entity will be presumed to be eligible for the incentive if it can demonstrate that it has joined an RTO, ISO or other Commission-approved transmission organization, and that its membership is ongoing. Empire states that it has

³² *Id.* at 11.

³³ Cities Protest at 24-25, State of Missouri Protest at 11.

³⁴ Cities Protest at 25, State of Missouri Protest at 11, Kansas Commission Protest at 8.

³⁵ Empire Answer at 2-3.

satisfied this presumption; thus, the Commission should grant the full 50 basis points for participation in SPP.³⁶

29. Empire responds that the methodology it uses to derive the depreciation rates in its 2011 FERC Form No. 1, i.e., the blended, weighted average of the depreciation rates approved by the Commission and the four retail jurisdictions in which Empire operates, is consistent with the methodology used to derive the depreciation rates in Empire's generation formula rate. Empire notes that, as in the generation formula rate, the composite depreciation rates in the proposed formula rate template are fixed and cannot be changed absent the Commission's approval under section 205 or 206 of the FPA to change the rates.³⁷

30. Empire explains that there is no double recovery of costs from its customers, as the State of Missouri claims. The allocation of a portion of the electric plant to transmission appears to include plant already included in Missouri jurisdictional plant because of the differences in ratemaking at the federal and state levels. Empire states that a portion of the annual transmission revenue requirement allocated to Empire is offset, for Missouri ratemaking purposes, by the revenue side of the equation. Empire adds that the revenues it receives from SPP for the retail portion of Empire's load as a result of the May 18 Filing will offset the charges Empire will pay to SPP. Empire also states that the costs included in the formula rate do not include costs recovered at the retail level. Because of the review rights of the protocols and the transparency provided in the formula rate, interested parties are able to verify there is no double recovery. Further, Empire adds that the general plant depreciation expense used in the formula rate and derived from Empire's FERC Form No. 1 excludes the Empire District Gas Company general plant. Empire explains that it does this by crediting the fee it charges the Empire District Gas Company for use of the common facilities in Account 922. The fee offsets the carrying costs associated with the Empire District Gas Company's use of the common facilities, including depreciation. Similarly, Empire states that only the portion of PBOP expense allocated to Empire's electric division is included in the formula rate.³⁸

31. Empire disputes Cities' protest of the use of end-of-year balances as a violation of FERC rules and precedent. Empire states that waiver of Period I and Period II reporting requirements under Part 35 is routinely granted, except for the requirement to provide Statements BG and BH, which Empire has specifically requested and provided support

³⁶ *Id.* at 3-4.

³⁷ *Id.* at 4-5.

³⁸ *Id.* at 5-6.

for. Empire argues that the 13-month average would add nearly a year to the rate lag associated with implementing a formula rate and undermine the transparency that it seeks by moving to a FERC Form No. 1-based formula rate.³⁹

32. Empire states that it is unreasonable for Cities and the State of Missouri to assert the PBOP expense should be rejected because an actuarial study was not provided. Empire explains that the formula rate operates to provide interested parties a transparent view of the data inputs used to develop the annual transmission revenue requirement. Empire encourages interested parties to request additional information on cost inputs and supporting documentation to independently verify the amount the utility seeks to recover.

33. Empire claims that the revenue crediting of the grandfathered point-to-point contracts is correct and is distinguishable from the case cited by Cities in support of their argument. Empire explains that in *Idaho Power Co.*, the utility had an obligation to provide firm service to the non-OATT customers, which was a significant factor in the Commission's finding that the demand under the pre-OATT agreements should be included in the divisor.⁴⁰ Empire argues that is not the issue here, as this case involves bundled service agreements that include production and interruptible (non-firm) transmission service.⁴¹

34. Empire clarifies the following items in the formula rate template: (1) the net amortized hedging expense for 2011 is \$144,520 (Attachment 9, pg. 2, line 2), (2) the correct entry for the total wages expense in the formula rate, Appendix A, pg. 1, line 2, and the amount reported in Empire's 2011 FERC Form No. 1, pg. 354, line 28.b, should be \$43,271, 938. Empire acknowledges that this affects other values in the formula rate.⁴²

35. Empire states that its implementation protocols generally conform to formula rate implementation protocols accepted by the Commission, and Empire is willing to discuss in settlement appropriate timeframes to review an historic formula rate such as that contained in the Empire Filing. Empire also requests the Commission set for settlement discussions the issue of whether Empire can include the right to make stand-alone FPA section 205 filings to change the fixed inputs in the formula rate. Empire states that this

³⁹ *Id.* at 6-7.

⁴⁰ *Id.* at 8, nn.21-22 (citing *Idaho Power Co.*, 126 FERC ¶ 61,044 at PP 216-217).

⁴¹ Empire Answer at 9.

⁴² *Id.* at 9-10.

provision in section I.5 of the implementation protocols is consistent with similar provisions in other Commission-accepted formula rate protocols, including the implementation protocols for Empire's generation formula rate.

36. Empire states that, contrary to Cities' assertion, the Commission's precedent does not require an applicant to include the burden of proof in its protocols. Empire adds that, contrary to Cities' assertion, the implementation protocols do not eliminate a party's right to challenge an incorrect application of the formula any time errors are discovered. Empire asserts that nowhere in any of these provisions, nor in any part of the implementation protocols, is there any explicit or implicit language that restricts the rights of parties to file a section 206 complaint at any time.⁴³

37. Empire re-states its request that the proposed revisions become effective August 1, 2012, explaining that the five-month suspension that intervenors are asking the Commission to impose would inequitably exacerbate the regulatory lag and further delay its opportunity to recover updated, cost-justified revenues.

38. In the supplement to its answer, Empire responds to Cities' protest regarding the negative value on Line 30, Accumulated Amortization of Appendix A of the formula rate. Empire explains why the value is negative, and what the implications would be if the value were positive.

C. State of Missouri Limited Answer

39. The State of Missouri requests that the Commission include certain issues that Empire clarifies in its June 25 answer in settlement discussions among the interested parties. The State of Missouri maintains that Empire has not provided sufficient information in its initial filing nor in its answer to allow confirmation that the formula rate is just and reasonable,⁴⁴ and continues to support a five-month suspension.⁴⁵

IV. Discussion

40. As discussed further below, we will accept Empire's proposed formula rate template and implementation protocols, suspend them for five months, make them effective January 1, 2013, subject to refund, and establish hearing and settlement judge procedures.

⁴³ *Id.* at 11-12.

⁴⁴ State of Missouri Answer at 2.

⁴⁵ *Id.* at 4.

A. Procedural Matters

41. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

42. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18.C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Empire's answers and the State of Missouri's answer because they have provided information that assisted us in our decision-making process.

B. Suspension, Hearing, and Settlement Judge Procedures

43. Empire's proposed formula rate template and implementation protocols raise issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures we order below.

44. Our preliminary analysis indicates that Empire's proposed rates and implementation protocols have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept them for filing, suspend their effectiveness, and set them for hearing and settlement judge procedures, as discussed below.

45. In *West Texas Utilities Co.*,⁴⁶ the Commission explained that when its preliminary analysis indicates that the proposed rates may be unjust and unreasonable, and may be substantially excessive, as defined in *West Texas*, the Commission will generally impose a five-month suspension. In the instant proceeding, our preliminary analysis indicates that the rates may be substantially excessive, as defined in *West Texas*, and therefore we will accept those rates for filing, suspend them for five months, to be effective January 1, 2013, subject to refund, and set them for hearing and settlement judge procedures.

46. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes 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

⁴⁶ In *West Texas Utilities Co.*, 18 FERC ¶ 61,189 (1982) (*West Texas*), the Commission found that it generally would suspend proposed rates for a five-month period when its preliminary analysis indicates that a proposed rate increase may be more than 10 percent excessive.

of the Commission's Rules of Practice and Procedure.⁴⁷ 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.⁴⁸

47. The settlement judge shall report to the Chief Judge and the Commission within 30 days 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.

C. Other Issues

1. ROE

48. We will grant up to 50 basis points of incentive ROE for participation in SPP, subject to suspension and the zone of reasonable returns determined at hearing. The Commission's decision to grant Empire an incentive ROE for its participation in SPP is consistent with section 219 of the FPA.⁴⁹ The incentive applies to all utilities joining the transmission organization and is intended to encourage Empire's continued involvement with SPP.⁵⁰ Granting *up to* 50 basis points of incentive ROE does not imply that Empire will ultimately receive that much.⁵¹ Nor does granting up to 50 basis points of incentive

⁴⁷ 18 C.F.R. § 385.603 (2012).

⁴⁸ 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 available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

⁴⁹ 16 U.S.C. § 824s (2006).

⁵⁰ *See, e.g., ITC Great Plains LLC*, 126 FERC ¶ 61,223, at P 92 (2009); *San Diego Gas & Elec. Co.*, 118 FERC ¶ 61,073 at PP 25-26 (2006), *American Elec. Power Service Corp.*, 120 FERC ¶ 61,205, at P 34 (2007).

⁵¹ The amount of the incentive that Empire could receive may be limited by the top of the zone of reasonableness that the Commission ultimately adopts in this proceeding after the hearing. Accordingly, we grant Empire the full 50 basis point ROE incentive for participation in SPP, so long as the additional 50 basis points do not result in a final ROE above the zone of reasonableness as determined in the hearing ordered herein. *See, e.g., San Diego Gas & Elec. Co.*, 118 FERC ¶ 61,073 at P 25 & n.30.

ROE remove any issue pertaining to the base ROE or zone of reasonableness from consideration during the hearing and settlement procedures.

2. Waivers

49. Empire requests waiver of any requirement to submit additional cost of service statements. Specifically, Empire requests waiver of section 35.13(d)(1)-(2) (Period I and Period II data statements AA through BM, except for Statements BG and BH), section 35.13(d)(5) (workpapers related to Period I and Period II data), and section 35.13(h) (cost of service statements). The Commission will grant the requested waiver of the filing requirements under section 35.13 (with the exception of the attestation) to provide full Period I and Period II data and cost of service statements, consistent with our prior approval of formula rates.⁵² The filing by Empire is to establish a formula rate using a combination of sources of data including company records and FERC Form No. 1 data and, therefore, we find that full Period I and Period II data are not needed for an evaluation of the justness and reasonableness of Empire's proposed formula rate. However, this finding does not preclude parties at the hearing from demonstrating the need for additional specific information to allow for a full evaluation of this proposal.

The Commission orders:

(A) Empire's proposed formula rate template and implementation protocols are hereby accepted for filing and suspended for five months to become effective January 1, 2013, subject to refund, as discussed in the body of this order.

(B) Empire's request for waiver of the requirements of section 35.13(d)(1)-(2) to provide full Period I and II data statements (except for Statements BG and BH), section 35.13(d)(5), and section 35.13(h) is hereby granted, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA

⁵² See e.g., *Southern California Edison Co.*, 136 FERC ¶ 61,074 (2011); *Xcel Energy Services, Inc.* 122 FERC ¶ 61,098, at P 75 (2008); *American Electric Power Service Corp.*, 120 FERC ¶ 61,205, at PP 40-41 (2007); *Trans-Allegheny*, 119 FERC ¶ 61,219, at P 57 (2007); *Allegheny Power System Operating Cos.*, 111 FERC ¶ 61,308, at PP 55-56 (2005), *order on reh'g*, 115 FERC ¶ 61,156 (2006); *Commonwealth Edison*, 119 FERC ¶ 61,238, at PP 93-94 (2007).

(18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of Empire's proposed formula rate template and implementation protocols. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2012), 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 the 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 in writing or by telephone within five (5) days of the date of this order.

(E) 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.

(F) 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, NE, 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.

Appendix

The Empire District Electric Company
FERC FPA Electric Tariff
The Empire District Electric Company

[Schedule 1, Scheduling, System Control, and Dispatch Service, 1.0.0](#)
[Schedule 7, Firm Point-to-Point Transmission Service, 1.0.0](#)
[Schedule 8, Non-Firm Point-to-Point Transmission Service, 1.0.0](#)
[Attachment H, ATRR for Network Integration Transmission Service, 1.0.0](#)
[Attachment H-1, Transmission Formula Rate Template, 1.0.0](#)
[Attachment H-2, Transmission Formula Rate Implementation Protocols, 1.0.0](#)