

112 FERC ¶ 61,100  
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 Nos. ER05-666-000  
ER05-666-001  
ER05-666-002

ORDER ON PROPOSED TARIFF REVISIONS

(Issued July 21, 2005)

1. On March 1, 2005, as amended on May 23, 2005,<sup>1</sup> Southwest Power Pool, Inc. (SPP) submitted various proposed revisions to its open access transmission tariff (OATT), principally pertaining to generation imbalance service, limited liability, monthly demand charges and zone transmission load, network integration transmission service, and optional reservation processing for short-term firm transmission service. As discussed below, we will accept in part, conditionally accept in part and reject in part the proposed tariff revisions, and direct a compliance filing.

**Background**

2. SPP has been authorized as a regional transmission organization (RTO) since October 1, 2004,<sup>2</sup> and submits the proposed tariff revisions in furtherance of its role as an RTO. SPP states that all of the proposed changes were approved by its Regional Transmission Working Group, Markets and Operations Policy Committee, and Board of Directors and were thoroughly vetted through the stakeholder process.

3. As further detailed below, the proposed tariff revisions would make the following changes to SPP's OATT: (1) revise section 3 to add a new Schedule 4-A to offer generation imbalance service; (2) revise section 10 to provide more extensive liability protection and indemnification provisions; (3) revise section 34 to resolve problems associated with adjusting for point-to-point reservations when the reservations are made

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<sup>1</sup> SPP amended its filing in response to a deficiency letter issued on April 21, 2005 (April 21 deficiency letter). On June 13, 2005, SPP filed a supplement to its May 23, 2005 amendment.

<sup>2</sup> See *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,009 (2004), *order on reh'g*, 110 FERC ¶ 61,137 (2005).

on an RTO, not an individual transmission owner, basis; (4) modify Schedule 9 to provide transmission owners (TOs) taking network integration transmission service under the OATT the opportunity to not pay otherwise applicable monthly demand charges, if such TOs would have received back the same amount under Attachment L; (5) put in place a new Attachment AC providing for a one-year experimental process allowing customers requesting short-term firm point-to-point service to obtain service through redispatch which otherwise would have been rejected due to lack of capacity; and (6) correct various zone name references and other clerical errors throughout the OATT. SPP requests an effective date for the proposed tariff revisions of May 1, 2005.

### **Notice of the Filing and Responsive Pleadings**

4. Notice of SPP's March 1, 2005 filing was published in the *Federal Register*,<sup>3</sup> with interventions, comments, and protests due on or before March 22, 2005. The Louisiana Public Service Commission filed a notice of intervention. Tenaska Power Services Company (Tenaska); East Texas Electric Cooperative, Inc., Northeast Texas Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc. (collectively, East Texas Cooperatives); Golden Spread Electric Cooperative, Inc. (Golden Spread); Kansas Municipal Utilities (KMU); Missouri Joint Municipal Electric Utility Commission; and Oklahoma Municipal Energy Authority and West Texas Municipal Power Agency (collectively, TDU Intervenors) each filed a timely motion to intervene and protest. Zilkha Renewable Energy, LLC (Zilkha) filed a timely motion to intervene and supportive comments. Xcel Energy Services, Inc. (Xcel) and Western Farmers Electric Cooperative (Western Farmers) each filed an untimely motion to intervene. On April 6, 2005, SPP filed an answer to the protests (April 6 answer), and East Texas Cooperatives and TDU Intervenors subsequently filed a reply to the answer.

5. Notice of SPP's May 23, 2005 filing was published in the *Federal Register*,<sup>4</sup> with interventions, comments and protests due on or before June 13, 2005. Golden Spread and TDU Intervenors filed a timely protest, and, on June 28, 2005, SPP filed an answer (June 28 answer).<sup>5</sup> Golden Spread subsequently filed a reply to SPP's answer.

6. The proposed tariff changes, comments and protests, and SPP's answer are discussed by issue below.

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<sup>3</sup> 70 Fed. Reg. 12,674 (2005).

<sup>4</sup> 70 Fed. Reg. 32,767 (2005).

<sup>5</sup> Unless otherwise indicated, the April 6 answer and June 28 answer will be referred to collectively as SPP's answer.

## **Procedural Matters**

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, we will grant Xcel's and Western Farmer's untimely motions to intervene, given their interest in this proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest and reply to the answer unless otherwise ordered by the decisional authority. We will accept SPP's answer and TDU Intervenors', East Texas Cooperatives', and Golden Spread's replies, because they have provided information that assisted us in our decision-making process.

9. Further, on April 21, 2005, a deficiency letter issued seeking additional information regarding SPP's proposed limited liability provisions. On April 28, 2005, SPP made a filing expressing concern that compliance with the deficiency letter would delay Commission action on the non-liability-related tariff revisions. To avoid such delay, SPP requested that the Commission sever the limited liability provisions from the rest of its filing and expeditiously issue an order on the remainder. Zilkha filed comments in support of SPP's bifurcation request.

10. SPP's request for bifurcation is now moot. However, we will grant SPP its requested effective date of May 1, 2005 for the tariff revisions accepted or conditionally accepted in this order.<sup>6</sup>

## **Generation Imbalance Service**

### **Proposed Revisions**

11. SPP seeks to revise section 3 of its OATT, and proposes a new Schedule 4-A, in order to offer generation imbalance service. SPP proposes to use its energy imbalance rates already on file under Schedule 4 as the generation imbalance rates charged under

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<sup>6</sup> See *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106 (1992). We further note that, although SPP requests a waiver of the Commission's 60-day notice requirement, such a waiver is not necessary, because SPP submitted the proposed tariff revisions more than 60 days prior to its requested May 1, 2005 effective date. In addition, as SPP recognizes in its filing, our acceptance of any of the proposed tariff revisions in this case has no bearing upon tariff revisions relating to SPP's transmission cost allocation filing in Docket No. ER05-652-000.

Schedule 4-A.<sup>7</sup> Therefore, SPP asserts that its generation imbalance proposal neither requires a rate change, nor disrupts any existing agreements. SPP would assess a generation imbalance charge only when a generator sells across control area boundaries; the charge will not apply when generation is sold entirely within a single control area.

### **Protests**

12. TDU Intervenors object to Schedule 4-A to the extent that it applies Schedule 4 pricing, including a \$100/MWh minimum rate, to generation imbalances. They state that SPP offers no justification for this proposal, and that nothing in Order No. 2003 dictates that generation imbalance service be priced at the same punitive \$100/MWh rate that is charged for load-side imbalances under Schedule 4. They argue that, far from tracking cost, SPP is seeking a maximum penalty, because 110 percent of incremental cost rarely reaches \$100/MWh.

### **SPP's Answer**

13. In response, SPP reiterates that its filing does not propose any new rates. SPP asserts that it merely seeks to adopt the energy imbalance provisions of its TOs for like service. SPP contends that these rates have already been approved by the Commission and that, therefore, TDU Intervenors' argument constitutes a collateral attack on prior Commission orders.

### **TDU Intervenors' Reply**

14. TDU Intervenors assert that their protest does not constitute a collateral attack on prior orders. They state that SPP seeks in this case to apply existing rates that have been accepted for one service (*i.e.*, Schedule 4 energy imbalance service rates) to another service (*i.e.*, Schedule 4-A generator imbalance service rates), for which purpose the

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<sup>7</sup> The Schedule 4 rates for TOs in SPP's footprint varies from: (1) oversupply by transmission customer at either: (a) a per MWh rate of 90 percent of the transmission provider's hourly avoided out-of-pocket cost (OPC) except that, in the event that any such oversupply condition causes an increase in the transmission provider's hourly OPC, the transmission provider shall charge the transmission customer at a rate of 110 percent of the increased costs incurred by the transmission provider for the oversupply, or (b) a rate \$100.00 per MWh for energy deliveries from the transmission customer to the transmission provider; to: (2) a maximum for undersupply by the transmission customer at: (a) the greater of \$100.00 per MWh, or (b) 110 percent of the anticipated cost per MWh for system generating resources supplying energy. These rates apply to energy imbalances outside the established deviation band of +/- 1.5 percent with a minimum of 1 to 2 MW of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the transmission customer's scheduled transaction(s).

proposed rates have not yet been accepted, and therefore, SPP's proposal here is indistinguishable from proposing a new or changed rate. TDU Intervenors assert that energy imbalance service and generator imbalance service are clearly distinct.<sup>8</sup>

### **Discussion**

15. We will reject SPP's proposed revisions to section 3 and new Schedule 4-A, regarding generation imbalance service. As TDU Intervenors correctly assert, generation imbalance and energy imbalance are two distinct services. Generation imbalance service is provided when a difference occurs over a single hour between the scheduled and actual delivery of energy between the generator and the control area; energy imbalance service is provided when a difference occurs between the scheduled and actual delivery of energy to a load located within a control area over a single hour. While it is true that the Commission has already approved SPP's Schedule 4 rates for energy imbalance service, we have not approved those rates for generation imbalance service. SPP has provided no separate or additional cost support for using the Schedule 4 rates as rates for generation imbalance service. We find that SPP has failed to provide sufficient support to determine if its generation imbalance provisions are just and reasonable, and therefore, we will reject them. If SPP decides to submit another generation imbalance proposal in the future, the proposal should include appropriate cost support consistent with the Commission precedent regarding generation imbalance services<sup>9</sup> and an explanation as to how the generation imbalance service will be coordinated with SPP's proposed imbalance market.<sup>10</sup>

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<sup>8</sup> They cite Imbalance Provisions for Intermittent Resources Assessing the State of Wind Energy in Wholesale Electricity Markets, 111 FERC ¶ 61,026 (2005).

<sup>9</sup> See *Tampa Electric Company*, 90 FERC ¶ 61,330 (2000) (accepting generation imbalance charges of 110 percent of seller's incremental cost where deliveries from the generator in any hour were less than scheduled for that hour, and payments to transmission customers of 90 percent of seller's incremental cost where deliveries from the generator in any hour were more than were scheduled for that hour); *Consumers Energy Company*, 87 FERC ¶ 61,170 (1999) (same); *Niagara Mohawk Power Corporation*, 86 FERC ¶ 61,009 (1999) (same).

<sup>10</sup> See Docket No. ER05-1118-000 (regarding SPP's pending proposal to institute an imbalance market and mitigation mechanism).

## **Limited Liability and Indemnification Provisions**

### **Proposed Revisions**

16. SPP seeks to add the word “Party” to its current Force Majeure provision, section 10.1 of its OATT, to provide that a “Party’s” Force Majeure event will not include any act of negligence or intentional wrongdoing by that “Party.”

17. SPP also seeks to add a new section 10.2 to its OATT, which exempts SPP and its TOs from liability to any transmission customer or users for any act or omission in performing their obligations under SPP’s OATT or any service agreement thereunder, except in cases of gross negligence or intentional wrongdoing. In all cases, recovery of incidental, consequential, punitive, special, exemplary and indirect damages, as well as loss of revenues or profits, is precluded. In addition, “[t]o the extent the Transmission Customer or Users have claims against the Transmission Provider [SPP] or a Transmission Owner, such claims in total may not exceed the value of the assets of the Transmission Provider or such Transmission Owner’s electric transmission assets transferred to the functional control of the Transmission Provider for the enforcement of such claims.” Further, claims against individuals, solely by reason of their status as SPP’s directors, members, shareholders, officers, employees or agents or those of a TO or any affiliate are wholly barred.

18. SPP also seeks to modify section 10.3, to provide that the transmission customer shall at all times indemnify SPP and its TOs for any and all damages, arising out of or resulting from their performance of obligations under the tariff on behalf of the transmission customer, except in cases of gross negligence or intentional wrongdoing. Currently, that section provides for indemnification, except in cases of negligence or intentional wrongdoing. Where SPP engages in gross negligence or intentional wrongdoing but the TO does not, that will not affect the indemnification of the TO under this section and vice-versa. SPP asserts that it is necessary to indemnify SPP and its TOs for ordinary negligence, even though the proposed liability provisions would relieve SPP and its TOs from liability for such negligence, because the proposed liability provision applies only to customers under SPP’s tariff. SPP states that there remain many other entities that could sue SPP and its TOs for simply providing transmission service. SPP intends to spread indemnification costs amongst all of its customers through an increase in charges under Schedule 1 (Administrative Charges).

19. SPP also proposes a new section 10.4, which exempts SPP and TOs from liability for damages arising out of services provided under SPP’s OATT, including, but not limited to, any act or omission resulting in an interruption, deficiency or imperfection of service occurring as a result of conditions or circumstances beyond SPP’s or its TOs’

control or resulting from a commonly used electric system design, electric system operation practices or commonly occurring conditions. In addition, TOs would not be liable for acts or omissions made in a good faith attempt to comply with SPP directives.

20. SPP also proposes a new section 10.5, which provides that, to the extent SPP is required to pay any money damages, amounts, or compensation due to its indemnification of any other party, it will be allowed to recover such amounts (subject to crediting all amounts it recovers through insurance or through any indemnification it receives) under Schedule 1 of its OATT as part of the Administrative Charges, provided that the cap in Schedule 1, section 1, does not apply to or prohibit the recovery of such amounts.

21. SPP states that the Commission has accepted limited liability and indemnification provisions similar to those proposed here, including adoption of the gross negligence and intentional wrongdoing standard (as opposed to use of ordinary negligence).<sup>11</sup> SPP asserts that the Commission has clearly recognized the need to limit the liability of RTOs and the TOs whose facilities they control. SPP contends that the Commission has found it necessary to provide strong protection against the risk that excessive damage awards will be passed through to customers in the form of increased rates, and that the provisions proposed here will afford such protection.

### **Protests**

22. All of the protestors take issue with use of the gross negligence and intentional wrongdoing standard, rather than the simple negligence standard, in the limited liability and indemnification provisions. They argue that the stricter standard is at odds with the Commission's objective of maintaining transmission system reliability and provides little incentive for SPP and its TOs to responsibly execute their obligations under the OATT and Service Agreements.<sup>12</sup> TDU Intervenors further assert that the liability provisions in state-regulated tariffs supplied by SPP<sup>13</sup> demonstrate that the gross negligence standard is

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<sup>11</sup> SPP cites *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,164 (2005); *ISO New England, Inc.*, 106 FERC ¶ 61,280 at 62,052-54, *order on reh'g*, 109 FERC ¶ 61,147 at 61,597-98 (2004).

<sup>12</sup> Tenaska asserts that the California Independent System Operator Corporation (CA-ISO), Electric Reliability Council of Texas (ERCOT), New York Independent System Operator, Inc. (NYISO), and PJM Interconnection, L.L.C. (PJM) follow the ordinary negligence standard.

<sup>13</sup> SPP supplied the liability provisions in state-regulated tariffs in response to the April 21 deficiency letter.

not predominately used in those tariffs, as, according to TDU Intervenors, the Commission found was the case in the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) region.<sup>14</sup>

23. Golden Spread and TDU Intervenors take issue with the cap in section 10.2, which limits the total value of claims by transmission customers or users against SPP or TOs to “the value of the assets of the Transmission Provider or such Transmission Owner’s electric transmission assets transferred to the functional control of the Transmission Provider.” They assert that the cap is unworkable, especially if there are competing claims. Even if some limit upon the potential liability of SPP’s members is warranted, these protestors argue that SPP has not justified the particular limit proposed here. They further contend that no similar provision exists in the Midwest ISO tariff and that similar language in the tariff of RTO-New England (RTO-NE or ISO-NE) does not limit recovery to assets for which control is transferred to the RTO.<sup>15</sup>

24. With regard to revised section 10.3 (Indemnification), Tenaska and KMU argue that transmission customers cannot control the conduct of SPP or TOs and therefore should not be required to act as insurers against their conduct, particularly when SPP and TOs themselves seek to have no liability for such conduct. KMU claims that SPP and TOs are attempting, unfairly, to insulate themselves from simple negligence while simultaneously seeking to have transmission customers indemnify them for liability to third parties resulting from SPP’s or TOs’ simple negligence.

25. East Texas Cooperatives argue that section 10.3 should be revised to provide that SPP and TOs will also indemnify each other, to ensure that SPP and TOs will be fully indemnified for actions arising out of or resulting from performance of tariff obligations.

26. Noting that section 10.4 exempts TOs from liability for acts or omissions done in compliance or good faith attempt to comply with SPP directives, KMU asserts that market participants and generators should also receive protection under that section, since they are similarly obligated to take action pursuant to SPP directives. Tenaska seeks modification of section 10.4 to include the following italicized language: “Transmission Owners shall not be liable for acts or omissions done in compliance or good faith attempts to comply with directive of the Transmission Provider, *provided such acts or*

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<sup>14</sup> They cite *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,164 at P 29 (2005) (finding that “many” state commissions in the Midwest ISO region allow utilities to limit their liability to gross negligence).

<sup>15</sup> TDU Intervenors cite ISO-NE FERC Electric Tariff No. 3, section I.5.2 (“To the extent the Customer has claims against the ISO or a Transmission Owner, the Customer may only look to the assets of the ISO or a Transmission Owner (as the case may be) for the enforcement of such claims . . .”).

*omissions do not constitute negligence or intentional wrongdoing on the part of the Transmission Owner.”* Tenaska states that, by including such a qualification, TOs will have the incentive to evaluate the directives of SPP.

27. East Texas Cooperatives and Golden Spread protest language in section 10.5 allowing SPP to recover under Schedule 1, as part of the Administrative Charges, any amount it was required to pay in money damages or due to its indemnification of another party. East Texas Cooperatives assert that no such provision exists in the PJM Interconnection, L.L.C. (PJM) or Midwest ISO tariff, and that, while ISO-NE’s tariff states that transmission customers must reimburse ISO-NE for indemnity payments, the requirement is more limited in scope than the one SPP proposes here.<sup>16</sup>

28. KMU argues that, if SPP intends to spread costs to all transmission customers through Schedule 1, then the indemnification provision (section 10.3) requires modification to clarify that SPP will not receive payment for damages under the indemnification section while also recovering such costs under Schedule 1, pursuant to section 1.

### **SPP’s Answer**

29. In response to protests regarding section 10.2 (Liability), SPP reiterates that Commission precedent supports adoption of the gross negligence and intentional wrongdoing standard. SPP contends that, in approving that standard for the Midwest ISO, the Commission stated that strong limited liability provisions are necessary, because excessive damage awards may be passed through to customers in the form of increased rates.<sup>17</sup>

30. SPP further asserts that the cap on liability is a reasonable solution to concerns relating to unrestrained liability, because, as a non-profit organization, SPP has no shareholder capital or rate base returns from which to pay excessive damage awards. SPP asserts that the Commission has recognized that any excessive damage awards would ultimately be funded by the same ratepayers receiving the award, as well as other customers.<sup>18</sup> As to how the cap will be enforced, SPP states in its April 6 answer that

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<sup>16</sup> East Texas Cooperatives cite ISO-NE FERC Electric Tariff No. 3, section 1.5.3 (“Each customer shall also reimburse the ISO for any indemnity payments made by the ISO pursuant to an operating agreement filed with the Commission.”).

<sup>17</sup> SPP cites Midwest Independent Transmission System Operator, Inc., 110 FERC at 61,614-15.

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

“the cap will serve as a limit upon all claims stemming from all incidents.”<sup>19</sup> SPP contends that this is justified by the fact that SPP is incapable of paying damage awards that exceed the value of the assets under its control. However, in its June 28 answer, SPP states that the cap “is intended to apply to limit all claims from a specific incident.”<sup>20</sup> SPP explains that, if a party sues in year one and the amounts paid to them matched the cap, that party would not be prevented from receiving relief in year five from a totally different incident and claim. In the event the total claims from a specific incident exceed the cap, damages would be prorated amongst all claimants. SPP further supports its proposal that the cap be based only a TO’s transmission assets, rather than a TO’s entire assets. SPP contends that generation and distribution facilities do not pertain to SPP’s transmission facilities function, while there is a direct tie between the liability cap and the service that SPP provides.

31. Relevant to section 10.3 (Indemnification) and KMU’s concerns about double recovery, SPP states that sections 10.3 and 10.5<sup>21</sup> make clear that double recovery will not occur under those sections, because, while revised section 10.3 provides for indemnification of SPP by transmission customers from damages in third-party actions, the proposed section 10.5 merely provides the specific mechanism through which such indemnification will occur. In response to East Texas Cooperatives’ request for cross-indemnification of SPP and TOs, SPP states that East Texas Cooperatives may raise this issue in SPP committees but that it is beyond the scope of the filing here.

32. With regard to section 10.4 (Further Limitation of Liability, which protects TOs from liability when acting at SPP’s direction) and KMU’s request that market participants and generators be afforded the same protection, SPP asserts that such an expansion of the provision must first be vetted through the stakeholder process.

33. Relevant to section 10.5 (Transmission Provider Recovery, which allows SPP to recover through Administrative Charges amounts it was forced to pay in money damages or due to its indemnification of another party), SPP asserts that this provision is required because its recovery of ordinary day-to-day costs under Schedule 1-A is subject to a cap. SPP further contends that the tariffs of ISO-NE, Midwest ISO, and PJM each include provisions permitting them to pass through all of their operating costs to entities taking and providing transmission service pursuant to their respective tariffs.<sup>22</sup> SPP states that it

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<sup>19</sup> April 6 answer at 5.

<sup>20</sup> June 28 answer at 2.

<sup>21</sup> Section 10.5 allows SPP to recover through Administrative Charges amounts it was forced to pay in money damages or due to its indemnification of another party.

<sup>22</sup> SPP cites ISO-NE Tariff at section IV.A; Midwest ISO Tariff at Schedule 10; PJM Tariff at Schedule 9.

merely seeks to expand these provisions to include indemnity costs. SPP contends that, because it has limited assets, it would not be able to pay substantial indemnification costs if it cannot recover the costs associated with indemnification in rates.

### **East Texas Cooperatives' Reply**

34. East Texas Cooperatives assert that allowing SPP to recover indemnification costs through its administrative charges, as proposed here, would be inconsistent with other RTOs. East Texas Cooperatives contend that only ISO-NE's tariff has a cost recovery provision, and that it requires each customer to reimburse the ISO for any indemnity payments made *pursuant to an operating agreement filed with the Commission*.<sup>23</sup> East Texas Cooperatives further reiterates its request that SPP adopt an indemnification provision requiring SPP and its TOs to indemnify each other. East Texas Cooperatives state that its request is neither beyond the scope of this proceeding, nor requires a filing under section 206 of the Federal Power Act (FPA),<sup>24</sup> because SPP is proposing changes to its liability and indemnification provisions in this case.

### **Golden Spread's Reply**

35. Golden Spread asserts that SPP continually has failed to justify the liability cap. Golden Spread questions whether the cap would result in an adequate reduction of insurance premiums, to a level that justifies the risk that the injured parties will receive insufficient compensation.

### **Discussion**

36. We will conditionally accept for filing SPP's proposed limited liability and indemnification provisions (section 10.2 through 10.5) to become effective May 1, 2005, as requested. With regard to section 10.2 (Liability), we find the gross negligence and intentional wrongdoing standard to be just and reasonable for several reasons. As noted by the United States Court of Appeals for the District of Columbia Circuit, prior to unbundling, many state commissions had approved retail tariff provisions permitting utilities to limit their liability for service interruptions to instances of gross negligence or willful misconduct.<sup>25</sup> Courts found that such provisions balance lower rates for all customers against the burden of limited recovery for some, and that the technological

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<sup>23</sup> East Texas Cooperatives cites ISO-NE tariff section 1.5.3.

<sup>24</sup> 16 U.S.C. § 824e (2000).

<sup>25</sup> Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 727 (D.C. Cir. 2000).

complexity of modern utility systems and resulting potential for service failures unrelated to human errors justify liability limitations.<sup>26</sup> We agree. SPP and its TOs are solely regulated by the Commission for their provision of transmission services under the SPP OATT, so the Commission is the only regulator with the ability to ensure that they are protected from potentially excessive damage awards by adequate limitation of liability provisions.<sup>27</sup> Several state commissions in SPP's footprint allow utilities to limit their liability to gross negligence.<sup>28</sup> We believe that SPP and its TOs should be afforded similar protection. Otherwise, disparate treatment is a disincentive to participate in SPP.<sup>29</sup>

37. In addition, as we stated with regard to the Midwest ISO, the risk of potentially excessive damage awards could be reflected in higher insurance premiums and higher cost of capital, which, in turn would be borne by customers and could result in inequities among customers.<sup>30</sup> Strong limited liability provisions can help ensure that excessive damage awards will not be passed through to customers in the form of increased rates.<sup>31</sup>

38. Furthermore, SPP and its TOs must provide service to all customers, and cannot deny service to particular customers based on the risk of potential damages associated with interruption of service to those customers.<sup>32</sup> It is also difficult for them quantify the

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<sup>26</sup> *Id.*

<sup>27</sup> See *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,14 at P 29.

<sup>28</sup> The following state-regulated retail tariffs supplied by SPP use the gross negligence and intentional wrongdoing (or willful misconduct) standard: SWEPCO Texas; Kansas City Power & Light Co.; Midwest Energy, City of Sterling, Kansas; Midwest Energy, City of St. John, Kansas; and Westar Energy, Inc. The retail tariff of Oklahoma Gas & Electric, Arkansas provides that the utility will not be liable for service interruptions from causes beyond its control or through ordinary negligence.

<sup>29</sup> See *Midwest Independent Transmission System Operator, Inc.*, 110 FERC at P 29.

<sup>30</sup> *Id.* at P 30.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at P 31.

potential risk associated with service to such customers and price such service accordingly. Ultimately, all customers bear the cost associated with the risk of such service, including those customers who do not have special reliability needs.<sup>33</sup>

39. We further find the gross negligence and intentional wrongdoing standard to be appropriate for the indemnification provision (section 10.3). As SPP notes, even though the proposed liability provision would relieve SPP and its TOs from liability for ordinary negligence, that provision applies only to customers under SPP's tariff. There remain many other entities that could sue SPP and its TOs for providing transmission service, and therefore, we believe that an adequate indemnification provision is necessary for the same reasons stated above with regard to limited liability. While certain transmission customers express concern about the costs that they will incur as a result of the higher indemnity standard, SPP proposes to spread the indemnification costs amongst all of its customers (rather than having one particular transmission customer provide indemnification) through an increase in charges under Schedule 1 (Administrative Charges), a proposal that, for the reasons discussed below, we find appropriate. Rolling-in costs in the manner proposed should minimize the burden on all transmission customers. We emphasize, however, that our acceptance here of the gross negligence and intentional wrongdoing indemnity standard is limited to SPP, in its role as an RTO, and its TOs; we do not intend to extend such protection to all transmission providers.

40. We will reject the cap in the liability section, which limits the total value of claims for gross negligence to the value of SPP's assets or a TO's electric transmission assets transferred to SPP's functional control. No other RTO tariff includes a cap of the nature proposed here,<sup>34</sup> and SPP provides no rationale as to why the cap is necessary in the SPP region. While SPP states that there is a need for "some definable limit" on liability,<sup>35</sup> SPP has not supported the particular cap proposed here. In addition, SPP fails to adequately or even consistently explain the effect that such a provision might have on competing claims against SPP or its TOs, first stating that the cap will serve as a limit

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<sup>33</sup> Id.

<sup>34</sup> As noted by TDU Intervenors, the ISO-NE tariff provides for a cap, but it is not limited to electric transmission assets. ISO-NE FERC Electric Tariff No. 3, section I.5.2.

<sup>35</sup> May 23, 2005 Transmittal Letter at 4.

upon “all claims stemming from all incidents,”<sup>36</sup> but then stating that the cap will limit “all claims from a specific incident” in a given year.<sup>37</sup> Accordingly, we will direct SPP to remove the cap from proposed section 10.2.

41. We will not direct SPP to adopt an indemnity provision requiring SPP and its TOs to indemnify each other, as suggested by East Texas Cooperatives. While we have found that reciprocal indemnification provisions may be appropriate when proposed,<sup>38</sup> SPP has not proposed such a provision here.

42. In addition, with regard to section 10.4 (Further Limitation of Liability, which exempts TOs from liability for acts or omissions done in compliance or good faith attempts to comply with SPP directives), we will not require SPP to extend that section’s protections to market participants and generators, as KMU requests. As with reciprocal indemnification, we have found it appropriate to limit the liability of generators who act in good faith to comply with RTO directives, when such provisions are proposed.<sup>39</sup> However, SPP has not sought to include generators in any of the provisions proposed here. In addition, any such proposal should first be vetted through the stakeholder process. Nor will we require SPP to revise section 10.4 to incorporate a “negligence or intentional wrongdoing” standard, as Tenaska requests.<sup>40</sup> We find that section 10.4, as

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<sup>36</sup> April 6 answer at 5.

<sup>37</sup> June 28 answer at 2.

<sup>38</sup> See *ISO New England, Inc.*, 106 FERC ¶ 61,280 at 229 (2004) (finding that a cross-indemnification is appropriate because the RTO and TOs each should be responsible for their respective liabilities not otherwise addressed by the limited liability provisions set forth in the OATT, but rejecting RTO-NE’s cross-indemnification provision that included a gross negligence standard).

<sup>39</sup> See *Midwest Independent Transmission System Operator, Inc.*, 110 FERC at P 34 (approving proposal to offer limited liability to generators, and further, that generators should therefore be included in the indemnification provision).

<sup>40</sup> More specifically, Tenaska seeks language providing that TOs will not be liable for acts or omissions done in good faith compliance with SPP directives, *provided such acts or omissions do not constitute negligence or intentional wrongdoing* on the part of the TO.

proposed, is consistent with the gross negligence limited liability standard,<sup>41</sup> and together with that provision, provides an adequate incentive for TOs to evaluate the directives of SPP.

43. Further, despite arguments to the contrary, we find proposed section 10.5 (Transmission Provider Recovery, which allows SPP to recover as part of its administrative charges under Schedule 1 any amounts it was required to pay due to its indemnification of another party) to be appropriate and consistent with Commission precedent. SPP is a non-profit organization, so it has no shareholders from whom to recover indemnification costs; instead, SPP must look to entities taking transmission service pursuant to the SPP tariff. Since SPP has limited assets, it would not be able to pay substantial indemnification costs without recovering the costs associated with indemnification in rates. Moreover, the Commission has stated that another RTO, RTO-NE, may pass on indemnification costs to all market participants on a rolled-in basis under its administrative services and capital funding tariffs.<sup>42</sup> Essentially, the same result would be achieved here through section 10.5.

44. KMU argues that, if SPP intends to spread costs to all transmission customers through Schedule 1, then the indemnification provision should be clarified to state that SPP will not receive payment for damages under the indemnification provision while also recovering such costs under Schedule 1. We do not share KMU's concern. As SPP points out, while revised section 10.3 provides for indemnification of SPP by transmission customers from damages in third-party actions, the proposed section 10.5 merely provides the specific mechanism through which such indemnification will occur. Based upon the foregoing, we will accept section 10.5 for filing without modification.

### **Remaining Proposed Tariff Revisions**

45. SPP also submits revisions to sections 34.1 and 34.3 of its OATT to redefine the Network Customer's Monthly Demand Charge and SPP's Monthly Zone Transmission Load, respectively. As revised, section 34.1 provides that the Network Customer will pay a monthly demand charge, determined by multiplying its load ratio share times one-twelfth of the difference between the annual transmission revenue requirement specified in Attachment H of the SPP OATT, minus the previous calendar year's total firm point-to-point transmission revenue allocated to the zone under Attachment L of SPP's OATT

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<sup>41</sup> See generally, *Midwest Independent Transmission System Operator, Inc.*, 110 FERC at P 34 (approving language almost identical to section 10.4 proposed here, along with a proposed gross negligence limited liability standard).

<sup>42</sup> *ISO New England, Inc.*, 109 FERC ¶ 63,015 at P 191 (2004).

for each zone in which the Network Customer's Network Load is physically located. As revised, section 34.3 provides that SPP's monthly zone transmission load is the zone's Monthly Transmission System Peak.<sup>43</sup>

46. In addition, SPP submits revisions to Schedule 9 of its OATT to provide the opportunity for TOs taking Network Integration Transmission Service to not pay otherwise applicable monthly demand charges, if, pursuant to Attachment L of the OATT, such TOs would have received back the amount they seek to not pay. This proposed revision would expire on January 31, 2010.

47. Further, SPP proposes a new Attachment AC that provides for a one-year experimental process (to expire on May 1, 2006) allowing transmission customers requesting daily, weekly, and monthly short-term firm transmission service the opportunity to request, obtain, and pay for certain system impact studies. The studies would provide information about the system constraints that prohibit a transmission provider's acceptance of the requested service and redispatch options that may alleviate those constraints. Additionally, customer response time requirements would be adjusted to provide an opportunity for the transmission customer to contract for any redispatch mitigation necessary for SPP's acceptance of the requested service.

48. Finally, SPP seeks to modify several portions of its OATT in order to correct various Zone name references and clerical errors.

### **Discussion**

49. Our preliminary analysis indicates that SPP's proposed tariff revisions addressing network customer monthly demand charges, SPP's monthly zone transmission load, network integration transmission service, optional reservation processing method for short-term firm transmission service, and clerical errors are just and reasonable, and indeed, no party has suggested otherwise. In fact, Zilkha supports the Schedule 9 amendment regarding network integration service. In addition, we view as especially positive SPP's endeavor to study and obtain information regarding constraints that may prohibit a request for service and redispatch options, as SPP plans to do under Attachment AC, the optional reservation processing method. Accordingly, we will accept these tariff revisions for filing, effective May 1, 2005, as requested. Attachment AC will expire one year from May 1, 2005, and its renewal is subject to Commission approval.

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<sup>43</sup> SPP proposes to delete language providing that SPP's monthly Zone transmission load will be determined by subtracting the coincident peak usage of all firm point-to-point transmission service customers from the Zone's Monthly Transmission System Peak, and then adding reserved capacity of all firm point-to-point transmission service customers.

The Commission orders:

(A) SPP's proposed generator imbalance provisions are hereby rejected, as discussed in the body of this order.

(B) SPP's proposed limited liability and indemnification provisions are hereby conditionally accepted for filing, effective May 1, 2005, as discussed in the body of this order.

(C) The remainder of SPP's proposed tariff revisions are hereby accepted for filing, effective May 1, 2005, as discussed in the body of this order.

(D) SPP is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Kelly dissenting in part with a separate statement to be issued later.

( S E A L )

Magalie R. Salas,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket Nos. ER05-666-000  
ER05-666-001  
ER05-666-002

(July 27, 2005)

The Commission issued an order in the above-captioned proceeding on July 21, 2005. *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,100 (2005). Commissioner Kelly's dissenting in part statement to the order is attached.

Linda Mitry,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket Nos. ER05-666-000  
ER05-666-001  
ER05-666-002

(Issued July 27, 2005)

KELLY, Commissioner, *dissenting in part*:

As I have written previously,<sup>1</sup> I believe that appropriate liability limitation provisions can strike a proper balance between reasonable customer rates and the rights of harmed parties to seek recovery for certain acts by jurisdictional utilities. Based on the record in this proceeding, however, I do not think that this order achieves such a balance. I also believe that this order's departure from the Commission's precedent on indemnification provisions is unsupported.

With respect to liability, Applicants' proposed tariff language in section 10.2 of Southwest Power Pool's (SPP) open access transmission tariff (OATT) provides in relevant part that the Transmission Provider and Transmission Owners:

shall not be liable for money damages or other compensation to any Transmission Customer or Users for actions or omissions by the Transmission Provider or Transmission Owner in performing its obligations under this Tariff or any service agreement thereunder, except to the extent such act or omission by the Transmission Provider is found to result from its gross negligence or intentional wrongdoing.

Section 10.2 further states:

In no event shall the Transmission Provider, a Transmission Owner or any Transmission Customer be liable for *any* incidental, consequential, punitive, special, exemplary or indirect damages, loss of revenues or profits, arising out of, or connected in *any* way with the performance or non-performance under this Tariff or any Service Agreement thereunder. [Emphasis added].

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<sup>1</sup> *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,164 (2005) (*Midwest ISO*).

As was the case in *Midwest ISO*, these limited liability provisions seem broad enough to cover both claims that result from economic damages and from personal injury or death. As I wrote in *Midwest ISO*, I believe that there may be good reason to limit liability for economic damages that result from service provided under the tariff. It may be difficult, for example, for a utility to reduce the type of exposure for economic losses that may result from service interruption. Each transmission customer may experience losses that are unique to its particular circumstances. In contrast, however, I do not believe that a utility should be insulated from claims of recovery for personal injury or death directly caused by the negligent act of the covered utility. The existing negligence standard gives utilities the appropriate incentive to avoid negligent conduct and adhere to an appropriate standard of care. The proposed limitation on liability, which allows recovery only in cases of gross negligence or intentional misconduct, dilutes this incentive, and does not encourage the utility to protect against dangers such as negligently maintained transmission lines or irregular voltage surges. Thus, unlike the majority, I am not convinced of the wisdom of granting such sweeping protections against liability.

Further, in response to a Commission deficiency letter, applicants submitted information about the currently effective limitation on liability provisions in the state-regulated, retail tariffs of the SPP transmission owners. As in *Midwest ISO*, review of that information reveals that many retail tariffs are not as broadly-worded as the provision proposed here. Nevertheless, as in *Midwest ISO*, this order rules that SPP and its transmission owners must be afforded this relatively broad protection because to do otherwise would result in disparate treatment, as between federal and state regulated entities, and serve as a disincentive to participating in the SPP.

However, this argument is not compelling in light of the variances among the retail liability provisions reported by SPP. A more narrowly focused SPP liability provision would appear to be fully consistent with the liability provisions in many of the retail tariffs and it is unclear to me why the Commission should attempt to eliminate the disparity by aligning the federal tariff provisions with the more broadly framed retail tariff provisions as opposed to those that are more narrowly framed. Rather than accomplishing the apparent goal of eliminating disparity between federal and state regulated tariffs, this order merely replaces the existing disparity between the federal tariff and one set of retail tariffs, with a new disparity between the federal tariff and a different set of retail tariffs (with which the federal tariff was formerly consistent). I see no adequate support for the choice made and, in particular, no adequate showing that this choice will achieve the appropriate balance between reasonable customer rates and the ability of harmed parties to seek recovery.

Additionally, even though federal and state regulators deal with many of the same issues in their oversight of their respective jurisdictions, they often address those issues in different ways. For example, various aspects of cost-based ratemaking are addressed differently by this Commission and by individual state commissions. These differences have not caused insurmountable problems for the overall industry structure, which has long operated successfully under this multi-jurisdiction regime. Similarly, I have seen no arguments in this record that convince me that differences between liability provisions in the SPP and transmission owner retail tariffs would cause insurmountable problems for the overall industry structure, including serving as a disincentive to participation in SPP. Accordingly, the argument that disparity must be eliminated appears unsupported. This may be fortunate since, as noted above, the order here has not actually eliminated disparity between the SPP and retail tariff liability provisions.

The true question, then, is whether the proposed change in liability provisions is supported in its own right. To date, I have seen no such support. In Order No. 888,<sup>2</sup> the Commission specifically declined to include liability provisions in the *pro forma* OATT that exceeded those granted for force majeure.<sup>3</sup> Force majeure provisions essentially establish liability protection from all claims that arise due to circumstances beyond the covered entity's control. Circumstances resulting from the covered entity's negligence, whether ordinary or gross, would not be covered by the force majeure provisions. In Order No. 888-B, the Commission stated that, while it is appropriate for the Commission to provide protection from damages or liability that may occur when service is provided without negligence, the Commission would "...leave the determination of liability in other instances to other proceedings."<sup>4</sup> The Commission also recognized that "...tribunals other than the Commission may be called upon to adjudicate disputes arising from service under the tariff."<sup>5</sup> In other words, the courts may be the appropriate venue to determine liability when negligence is involved. Again, I have seen no compelling arguments for departing from the Commission's

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<sup>2</sup> *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>3</sup> *See, e.g.*, Order No. 888-A at 30,301-2.

<sup>4</sup> *See* Order No. 888-B at 62,081.

<sup>5</sup> *Id.*

thorough analysis of this issue in Order No. 888.

Finally, the order makes an unexplained departure from the Commission's long-standing indemnification precedent, as also set out in Order No. 888, and most recently affirmed in *Northeast Utilities*,<sup>6</sup> by extending indemnification to include acts that result from ordinary negligence. As stated in *Northeast Utilities*,<sup>7</sup> this "broader customer indemnification obligation that would include ordinary negligence would not give any incentive to the transmission provider to avoid negligent actions." This rationale should apply equally to Transmission Providers, whether they are traditional IOUs or RTOs, and to Transmission Owners, whether or not they are members of RTOs. I see no justification for this departure, either in the record or in the order.

I do not dispute that limiting liability for economic damages related to service interruptions can be appropriate in certain cases and I agree with the Commission's long-standing indemnification policy as affirmed in *Northeast Utilities*. However, the applicants have not shown that their broadly-worded provisions strike a proper balance between reasonable customer rates and the ability of harmed parties to seek recovery. Moreover, applicants have not presented any reason to depart from the Commission's precedent rejecting provisions that would require indemnification even in cases where the transmission provider is negligent. For the reasons discussed above, I respectfully dissent in part.

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Sudeen G. Kelly

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<sup>6</sup> *Northeast Utilities Service Company*, 111 FERC ¶ 61,333 (2005) (*Northeast Utilities*).

<sup>7</sup> *Id.* at P 27.