

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Golden Spread Electric Cooperative, Inc.
Lyntegar Electric Cooperative, Inc.
Farmers' Electric Cooperative, Inc.
Lea County Electric Cooperative, Inc.
Central Valley Electric Cooperative, Inc.
Roosevelt County Electric Cooperative, Inc.

Docket No. EL05-19-000

v.

Southwestern Public Service Company

ORDER ON COMPLAINT ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES

(Issued December 21, 2004)

1. In this order we establish hearing and settlement procedures to address the complaint filed by Golden Spread Electric Cooperative, Inc., *et al.* (Complainants) against Southwestern Public Service Company (Southwestern). The complaint involves cost-based rates and fuel adjustment clause charges under the filed rate. This order benefits customers because it provides the parties with a forum in which to resolve their dispute.

Background

2. Complainants are six cooperatives that purchase requirements service from Southwestern. One cooperative, Golden Spread Electric Cooperative, Inc. (Golden Spread), is a partial requirements customer; the others are full requirements customers. Southwestern is an investor-owned utility with a service territory in eastern New Mexico, the Panhandle of Texas, and small portions of Kansas and Oklahoma.

Complaint

3. On November 2, 2004, Complainants filed the instant complaint against Southwestern stating that Southwestern's cost-based rates for full and partial requirements service are excessive, unjust and unreasonable, and unduly discriminatory or preferential. Complainants assert that overcharges for partial requirements service to Golden Spread are in excess of \$3.2 million annually. Complainants also assert that overcharges to Lyntegar Electric Cooperative, Inc. (Lyntegar), a member of the full requirements customer class, are in excess of \$689,000 annually. Further, Complainants' preliminary analysis, based on the cost of service, indicates a level of overcharges to other complainants comparable to those imposed on Lyntegar, though calculations have not yet been completed; thus, cost support data for cooperatives other than Golden Spread and Lyntegar are not included with the complaint.

4. In support of their arguments, Complainants filed testimony and exhibits recommending a different rate based on (1) allocated cost-of-service analysis; and (2) return on common equity analysis. However, Complainants state that there is a lack of detailed data, and that the data they can analyze is inconsistent with data Southwestern filed with the Commission. For example, Complainants state that requirements load data and monthly peak data filed by Southwestern in another docket varies from load data reported in Southwestern's revised 2003 FERC Form 1. Thus, Complainants contend that further investigation is needed to confirm the proper data to be used in a cost-of-service analysis, though they claim that Southwestern's rates are substantially excessive without regard to which data set is used.

5. Complainants also allege that Southwestern's corporate parent subjects Southwestern to a disproportionate allocation of costs.¹ For example, Complainants assert that a comparison of Form 1 filings finds that Southwestern is bearing 36 percent of the common-type costs even though its generation ratio is 27.22 percent, relative number of customers ratio is 12.13 percent, and relative salaries ratio is 15.56 percent. Complainants request that the Commission establish a hearing, investigation, and refund effective date of January 1, 2005.

¹ Complainants describe Southwestern as an investor-owned utility that is an operating company subsidiary of Xcel Energy, Inc., a public utility holding company which in turn owns, *inter alia*, Northern States Power Company, Northern States Power Company (Wisconsin), and Public Service Company of Colorado.

6. In addition, Complainants allege that Southwestern has historically violated, and continues to violate, the fuel charge adjustment clause (FAC) provisions of its rate schedules and the Commission's FAC regulations.² Complainants assert that Southwestern may be flowing through its FAC virtually all energy-related purchased power costs, and that some of the costs are not permissible under the filed rate or the Commission's regulations. Complainants also express concern that Southwestern is not appropriately crediting the FAC (and as a result, its requirements customers) when it makes off-system sales. Complainants state that higher cost energy purchases have been allocated to the requirements customers through the FAC while lower cost energy purchases have been allocated to off-system sales, resulting in requirements customers subsidizing Southwestern's marketing function.

7. As with the issue of cost-based rates, Complainants again complain that they do not have access to adequate data and that Southwestern refuses to provide access to transaction-specific data that is needed to thoroughly investigate the FAC charges. Complainants make a related claim that Southwestern's Electronic Quarterly Reports, which provide data for long-term sales on a monthly, not hourly, basis, do not provide the level of detail necessary for a comprehensive evaluation of FAC compliance with the Commission's regulations and the filed rate.

8. Complainants ask the Commission to investigate FAC charges dating back to the last Commission audit under section 205(f) of the Federal Power Act (FPA),³ or at least from 1994; they state that no refund date need be established on this matter.

Notice of Filings and Responsive Pleadings

9. Notice of the complaint was published in the *Federal Register*, 69 Fed. Reg. 64,924 (2004), with comments, interventions, and protests due on December 2, 2004. Timely motions to intervene were filed by Public Service Company of New Mexico and Cap Rock Energy Corporation. Southwestern responded to the complaint with an answer on December 2, 2004. On December 10, 2004, Complainants filed an answer to Southwestern's answer.

² 18 C.F.R. § 35.14 (2004)

³ 16 U.S.C. § 824d(f) (2000).

Southwestern's Answer to Complaint

10. Southwestern urges the Commission to reject the complaint, arguing that the claims contained therein are legally and factually unsupported, and stating that Complainants failed to meet the standard of section 206 of the FPA. Southwestern states that Complainants have not used a formal dispute resolution process to discuss issues raised in the complaint.

11. Among various errors in Complainants' cost-of-service study, Southwestern asserts that Complainants' witness used a return on common equity that is too low, and disputes Complainants' arguments regarding rate base and a credit against production-related costs. In sum, Southwestern argues that its current rates are well within the zone of reasonableness; in fact, according to Southwestern's interpretation of the data, a small rate increase is in order for Golden Spread.

12. With regard to the FAC provisions, Southwestern also argues that Complainants' assertions are not supported by evidence, and accuses Complainants of applying for a fishing license. Southwestern states that it provided Complainants with detailed information to support monthly FAC calculations, and that it was unaware of any unresolved FAC concerns until receiving the complaint. Southwestern accuses Complainants of attempting to negotiate new power supply arrangements by filing a complaint without making a genuine attempt to present their concerns and the basis for those concerns before filing the complaint, as Southwestern claims Complainants promised to do.

Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. The Commission is not persuaded to accept Complainants' answer and will, therefore, reject it.

B. Analysis

14. We are unable to resolve the complaint summarily at this time, because it raises issues of material fact that are better determined in the context of a trial-type evidentiary hearing. Based on a review of the parties' pleadings, our analysis indicates that the rates at issue may be unjust and unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, pursuant to section 206 of the FPA,⁴ we will set the complaint for a trial-type evidentiary hearing.

15. The Commission believes, however, that it would be in the best interest of the parties to resolve this dispute expeditiously and consensually, rather than through litigation. Accordingly, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁵ 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.⁶ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

16. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy,⁷ we will set the refund effective date 60 days after the date of the filing of this complaint, *i.e.*, January 1, 2005.

⁴ 16 U.S.C. § 824e (2000).

⁵ 18 C.F.R. § 385.603 (2004).

⁶ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

⁷ *See, e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

17. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon the initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision.

18. Although we do not have the benefit of the presiding judge's report, based on our review of the record we expect that the presiding judge would be able to issue an initial decision within approximately eleven months of the commencement of hearing procedures, or, if hearing procedures were to commence immediately, by November 30, 2005. If the presiding judge is able to render a decision within that time, and assuming the case does not settle, we estimate that we will be able to issue our decision within approximately three months of the filing of briefs on and opposing exceptions, or, assuming the case goes to hearing immediately, by July 31, 2005.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the complaint, as discussed in the body of this order. As discussed in the body of this order, we will hold the hearing in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), 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. To the extent consistent with this order, the designated settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(C) Within sixty (60) 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.

(D) If the settlement discussions fail, and the proceeding goes to hearing, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the presiding judge's designation, convene a pre-hearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.