

120 FERC 61,243
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Southwestern Public Service Company

Docket No. ER06-274-005

ORDER APPROVING CONTESTED PARTIAL SETTLEMENT

(Issued September 20, 2007)

1. On September 7, 2006, Southwestern Public Service Company (SPS) filed an Offer of Settlement (Settlement) intended to resolve all matters set for hearing in the above-captioned docket as between SPS and Cap Rock Energy Corporation (Cap Rock), Central Valley Electric Cooperative, Inc. (Central Valley), Farmers' Electric Cooperative, Inc. (Farmers), Lea County Electric Cooperative, Inc. (Lea County), and Roosevelt County Electric Cooperative, Inc. (Roosevelt) (collectively, Full Requirements Customers).¹ Commission Trial Staff (Trial Staff) and the Public Service Company of New Mexico (PNM) do not object. Golden Spread Electric Cooperative, Inc. (Golden Spread) and Occidental Permian, Ltd. (Occidental), as discussed herein, object to one provision of the Settlement Term Sheet (Attachment A to the Settlement). In this order, the Commission approves the contested partial settlement, finding that, as a package, it presents a just and reasonable outcome for the Full Requirements Customers in this proceeding.

Background

2. On December 1, 2005, SPS submitted to the Commission, to be effective February 1, 2006, changes in rates and rate design for the following cost-based wholesale requirements customers: Cap Rock, Central Valley, Farmers, Golden Spread, Lea County, PNM, and Roosevelt. In an order dated January 31, 2006, the Commission found that SPS' filing had not been shown to be just and reasonable and might be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful.² The

¹ SPS and the Full Requirements Customers are collectively referred to herein as the Settling Parties.

² *Southwestern Pub. Serv. Co.*, 114 FERC ¶ 61,091 (2006).

Commission therefore conditionally accepted SPS' proposed rates for filing, suspending them for five months and making them effective July 1, 2006, subject to refund. Hearing and settlement judge procedures were established. After several rounds of settlement discussions and meetings, on September 7, 2006, SPS filed the instant Offer of Settlement meant to resolve all issues in Docket No. ER06-274 as between SPS and the Full Requirements Customers. (SPS and PNM resolved their issues in a separate settlement filed on September 19, 2006 (SPS/PNM Settlement), which will be addressed in a separate order.)

Offer of Settlement

3. Section I of the Settlement Term Sheet describes the rates for service provided on and after July 1, 2006, which are designed to produce annual base revenues of \$144,544,755. The resulting rates are a Delivery Point Charge of \$85.75 per delivery point, a Demand Charge of \$4.44 per kW/month at the input to the transmission system, and an Energy Charge of \$0.03682 per kWh at the input to the transmission system. The Settlement further states that, effective with service on and after January 1, 2007, the Demand Charge will increase to \$4.61 per kW/month at the input to the transmission system.

4. Section II of the Settlement Term Sheet states that, if SPS agrees to a settlement in Docket Nos. ER06-274, EL05-19 or EL05-151 that stipulates that any methodology other than a 12 Coincident Peak (CP) demand cost allocation methodology is appropriate, SPS shall make no new rate filing with the Commission for a change in rates not based on a 12 CP methodology for the Full Requirements Customers for rates to be effective on or before December 31, 2007. Moreover, if the Commission issues a final order no longer subject to rehearing requiring use of a methodology other than a 12 CP methodology in setting rates for SPS wholesale service, SPS may file at any time for a change in rates based on such other methodology, provided that any rate increase resulting from such filing can only take effect prospectively on or after the date of such filing. The Settlement additionally provides that the Full Requirements Customers shall have full rights to take any position with respect to such filing.

5. Of particular relevance here, under section III of the Term Sheet, the Settling Parties agree that the Full Requirements Customers will continue to litigate in support of a 12 CP demand cost allocation methodology in Docket Nos. EL05-19, EL05-151, and ER06-274 so long as SPS has filed testimony in support of a 12 CP demand cost allocation methodology and so long as SPS's load profile at that time is consistent with the parameters established by Commission precedent for such methodology. The Full Requirements Customers also will have the option, but not the obligation, to participate in any appellate court proceedings in those dockets.

6. The instant settlement leaves the issues between SPS and Golden Spread and SPS and Occidental unresolved. In its transmittal letter submitting the instant settlement, SPS states that the rates to be paid by Golden Spread “shall be subject to the outcome of a hearing to be held in Docket No. ER06-274-003 and are not affected by...this settlement...”³ One such unresolved issue involves the appropriate demand cost allocation methodology. Prior to the filing of the instant settlement, by order dated August 2, 2006, the Chief Judge severed the unresolved issues from the settlement proceedings in order to allow those issues to proceed to hearing in Docket No. ER06-274-003 (Severance Order). In the Severance Order, as clarified in a subsequent August 14, 2006 order (Clarifying Order), the Chief Judge denied the request of the Full Requirements Customers to remain parties in the hearing for the limited purpose of litigating the demand cost allocation issue. The Chief Judge, however, later granted reconsideration and allowed the Full Requirements Customers’ interventions in a limited manner (Reconsideration Order). The continued participation of the Full Requirements Customers in the litigation phase of the proceeding gives rise to Golden Spread’s and Occidental’s objections to the settlement, as discussed below.

Comments on the Offer of Settlement

7. Occidental and Golden Spread filed comments on the Settlement, which with one exception they do not oppose. Their sole objection is to section III of the Term Sheet, to the extent that it allows the Full Requirements Customers to litigate in support of the 12 CP methodology. Both Occidental and Golden Spread point out that the Clarification Order held that the Full Requirements Customers have no interest in, and thus are not entitled to participate in, the now-severed litigation. Even absent the Clarification Order, Occidental argues that, having settled all their issues with SPS, the Full Requirements Customers have no legitimate interest in the litigation.⁴ Occidental and Golden Spread note that, if SPS and the Full Requirements Customers are dissatisfied with the result of the litigation, section II of the Term Sheet permits SPS to seek appropriate rate changes and allows the Full Requirements Customers to participate in any proceedings resulting from such proposed changes.

³ SPS Transmittal Letter at 2 n.4.

⁴ Occidental suggests that the Full Requirements Customers wish to litigate demand cost allocation in order to reverse Commission precedent favoring a 3 CP allocation. According to Occidental, however, “concerns with the possible precedential effect of a proceeding are not sufficient to warrant a party’s participation.” Occidental’s Comments at 5 (citing *Kansas-Nebraska Natural Gas Co.*, 21 FERC ¶ 61,285, at 61,781–82 (1982) (*Kansas-Nebraska*); *Northeast Utils. Serv. Co.*, 53 FERC ¶ 61,135, at 61,456 (1990) (*Northeast*)).

8. In addition to their objections to section III, Occidental and Golden Spread ask the Parties to clarify that there are no undisclosed agreements or consideration related to or underlying the Settlement. Golden Spread is concerned that some of the settlement rates, for instance the Demand Rates, are identical to or higher than the rates originally filed by SPS. Golden Spread also is concerned that the redlined versions of the revised contracts attached to the Settlement may not accurately reflect all changes proposed by the Settlement.

9. SPS, Cap Rock, and the New Mexico Cooperatives⁵ filed reply comments. All three reply comments emphasize the Chief Judge's Reconsideration Order, issued after the initial comments, which granted the Full Requirements Customers the right to continue to participate in the litigation and which affirmed that they have a live interest. The New Mexico Cooperatives and SPS maintain that the Full Requirements Customers, despite having settled their issues with SPS, remain at odds with Golden Spread on the demand cost allocation issue. Because that issue will be resolved in the litigation phase, the Full Requirements Customers have more than an interest in the precedential effect of the litigation. Specifically, the New Mexico Cooperatives and SPS explain that the Full Requirements Customers take service on the SPS system, and thus the Commission's ruling on the demand cost allocation applicable to that system will directly impact them.⁶ SPS and the New Mexico Cooperatives argue that if SPS and the Full Requirements Customers lose on the demand cost allocation issue in this proceeding, the fact that they can raise the issue in a subsequent filing is of little avail because the Commission's decision in this case may be highly persuasive or even dispositive in any future case.

10. The reply comments also make two clarifications. First, the reply comments state that the Parties have exchanged no consideration and entered no agreements other than what the terms of the Settlement set forth. Cap Rock and SPS also explain that the reason the Parties agreed to an increased Demand Rate as part of the Settlement is to account for an increase in SPS' purchased capacity costs beginning January 1, 2007.

⁵ The New Mexico Cooperatives are: Central Valley, Farmers, Lea County, and Roosevelt.

⁶ The New Mexico Cooperatives and SPS distinguish *Kansas-Nebraska* and *Northeast*. According to the New Mexico Cooperatives and SPS, those cases involved requests to intervene at the outset of a proceeding, whereas the instant case involves an interest in *remaining* a party in this proceeding. Additionally, unlike the parties attempting to intervene in *Kansas-Nebraska* and *Northeast*, because the Full Requirements Customers take service from the subject utility, here SPS, they emphasize that they have clear economic interests in this proceeding.

11. The reply comments also clarify that the redline versions of the revised contracts submitted as part of the Settlement accurately show all substantive changes to those contracts.

12. Additionally, Trial Staff filed comments not opposing the Settlement. Trial Staff views the Settlement as a reasoned compromise, and notes that if the Full Requirements Customers are not permitted to participate in the litigation phase of this proceeding, the Settlement “might not go forward.”⁷

13. On October 16, 2006, the Settlement Judge issued a report on the Settlement. The Report states the Full Requirements Customers demonstrated their interest in this case when the Commission initially granted their interventions, and as the Chief Judge noted (in the Reconsideration Order) they merely wish to *continue* their involvement in the case. The Report adds that, although the Settlement resolves the Full Requirements Customers’ issues with SPS, it does nothing to extinguish their interest in the demand cost allocation issue. The Report notes that the Commission’s decision on the demand cost allocation in this docket will directly impact the rates paid by the Full Requirements Customers, and thus, as the Chief Judge found in the Reconsideration Order, they have a live interest in the matter despite the protests of Occidental and Golden Spread.

14. Additionally, the Report states that there are no protests to the settlement rates or other operational provisions. The Report states that the tariff as revised by the Settlement will not impact Golden Spread or Occidental because the rates apply only to the Full Requirements Customers. The Report also states that the revised rates and agreements contained in the Settlement provide an effective resolution of all outstanding issues between SPS and the Full Requirements Customers, and its approval will eliminate the need for additional costly and time consuming litigation. The Report adds that, with respect to the clarifications sought by Occidental and Golden Spread, the reply comments fully resolve those matters. The Report also states that the Settling Parties intend that the “just and reasonable” standard of review will apply to modifications to the Settlement.

Discussion

15. For the reasons discussed below, the Commission finds that the Settlement is just and reasonable, and, accordingly, the Commission approves the Settlement without modification.⁸

⁷ Trial Staff Comments at 7-8.

⁸ The Commission retains the right to investigate the rates, terms, and conditions under the just and reasonable standard of section 206 of the Federal Power Act. 16 U.S.C. § 824e (2000).

16. In order to approve a contested settlement, such as the instant settlement, the Commission must make "an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates."⁹ Consistent with this requirement, Rule 602(h)(1)(i) of the Commission's Rules of Practice and Procedure¹⁰ provides that the Commission may decide the merits of contested settlement issues if the record contains substantial evidence upon which to base a reasoned decision or the Commission finds that there is no genuine issue of material fact.

17. The Commission here finds that there is no genuine issue of material fact, and finds that the Settlement is just and reasonable. The revised rates and agreements contained in the Settlement resolve all outstanding issues between SPS and the Full Requirements Customers, are agreed to by SPS and the Full Requirements Customers, and the Commission's approval will eliminate the need for additional costly and time consuming litigation. Although the Settlement is contested with respect to the Full Requirements Customers' continued participation in the litigation phase of the proceeding, which issue is discussed below, there are no remaining objections to the settlement rates or other settlement provisions.¹¹ Indeed, the Settlement will not impact Golden Spread or Occidental because the rates apply only to the Full Requirements Customers.

18. As described above, the Settlement is contested only insofar as it allows the Full Requirements Customers to participate in the litigation phase of this proceeding. We find that the Chief Judge's Reconsideration Order, however, effectively addresses Golden Spread and Occidental's objections to the continued participation of the Full Requirements Customers. The Full Requirements Customers demonstrated their interest in this case when the Commission initially granted their interventions, and, as the Chief

⁹ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974); *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,339 (1998), *order on reh'g*, 87 FERC 61,110 (1999).

¹⁰ 18 C.F.R. § 385.602(h)(1)(i) (2007).

¹¹ We note that the reply comments filed by SPS, Cap Rock, and the New Mexico Cooperatives adequately address Occidental and Golden Spread's concerns that: (1) there are undisclosed agreements or consideration related to or underlying the Settlement; and (2) the redlined versions of the revised contracts attached to the Settlement may not accurately reflect all the changes proposed by the Settlement. *See, e.g.*, Cap Rock reply comments at 4-8.

Judge noted, they merely wish to *continue* their involvement in the case. Although the Settlement resolves the Full Requirements Customers' issues with SPS, it does not extinguish their interest in the appropriate demand cost allocation.¹²

The Commission orders:

The Settlement is hereby approved.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

¹² See *Southwestern Public Service Co.*, 29 FERC ¶ 61,056 at 61,123, *reh'g denied*, 29 FERC ¶ 61,279 (1984), *rev'd on other grounds*, 842 F.2d 1204 (10th Cir. 1988).