

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

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

Southwest Power Pool, Inc.

Docket Nos. OA08-5-003

Southwest Power Pool, Inc.

EL09-40-000

ORDER ON COMPLIANCE FILING AND INSTITUTING SECTION 206
PROCEEDING

(Issued March 19, 2009)

1. On August 11, 2008, Southwest Power Pool, Inc. (SPP) submitted a compliance filing containing revisions to section 2.2 of its Open Access Transmission Tariff (OATT) to incorporate certain rollover policies adopted by the Commission in Order No. 890.¹ In this order, the Commission accepts SPP's proposed tariff revisions adopting the Order No. 890 *pro forma* OATT's five-year minimum contract term and one-year notice period related to a firm transmission customer's ongoing right to renew or rollover its contract effective August 11, 2008. Additionally, as discussed below, the Commission institutes a proceeding pursuant to section 206 of the Federal Power Act (FPA)² to determine the justness and reasonableness of certain language in section 2.2 of SPP's existing OATT, establishes a refund effective date, and directs SPP and interested parties to file comments on this matter within 30 days of the issuance date of this order.

I. Background

2. In Order No. 890, the Commission adopted a five-year minimum contract term in order for a customer to be eligible for a rollover right and adopted a one-year notice period.³ The Commission determined that this rollover reform should be made effective

¹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008).

² 16 U.S.C. § 824e (2006).

³ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1231, 1245.

at the time of acceptance by the Commission of a transmission provider's coordinated and regional planning process. The Commission explained that rollover reform and transmission planning are closely related, because transmission service eligible for a rollover right must be set aside for rollover customers and included in transmission planning.⁴

3. Additionally, in Order No. 890 the Commission considered but did not revise the Order No. 888⁵ requirement that an existing transmission customer match competing offers as to term and rate in order to rollover its service. Specifically, section 2.2 of the Order No. 888 *pro forma* OATT provided that, if, at the time of the incumbent customer's rollover notification, a transmission provider's transmission system cannot accommodate all of the requests for transmission service, the incumbent customer must match a contract term at least "equal to a competing request" by any new eligible customer.⁶

4. On October 11, 2007, in Docket No. OA08-5-000, SPP submitted its Order No. 890 compliance filing, including revisions to section 2.2 of its OATT incorporating the rollover rights changes adopted in Order No. 890. However, in an order issued on May 16, 2008,⁷ the Commission noted that SPP's coordinated and regional planning process, filed on December 14, 2007 in Docket No. OA08-61-000, had not yet been accepted by the Commission. The Commission stated that this was contrary to Order No. 890's requirements that rollover reforms are not to become effective until after a transmission provider's transmission planning process is accepted. The Commission directed SPP to refile the rollover language established in Order No. 890 within thirty

⁴ *Id.* P 1231, 1265.

⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *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).

⁶ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at *pro forma* OATT, section 2.2.

⁷ *Southwest Power Pool, Inc.* 123 FERC ¶ 61,176 (2008) (May 16, 2008 Order).

days after acceptance of its transmission planning process. On July 11, 2008, in Docket No. OA08-61-000, the Commission accepted SPP's transmission planning process.⁸

II. SPP's Compliance Filing

5. SPP states that pursuant to the Commission's directive in the May 16, 2008 Order, it has revised section 2.2 of its OATT to incorporate the rollover rights concerning the five-year minimum contract term required to be eligible for rollover service and the one-year notice requirement adopted in Order No. 890, as modified by the Commission in Order No. 890-A and Order No. 890-B. SPP states that in all other respects, it is retaining previously approved variations from the Commission's Order No. 888 *pro forma* OATT.⁹ Specifically, SPP intends to retain language from its Order No. 888 OATT providing that, if at the time of an incumbent customer's rollover notification, SPP's transmission system cannot accommodate all the requests for transmission service, the incumbent customer must agree to accept a contract term at least as long as "the longest term competing request" by any new eligible customer.¹⁰

6. SPP requests an effective date of August 11, 2008 for its revisions to section 2.2. SPP states that in the May 16, 2008 Order the Commission directed SPP to request an effective date commensurate with the date of the instant filing.

III. Notice of Filing and Responsive Pleadings

7. Notice of SPP's filing was published in the *Federal Register*, 73 Fed. Reg. 49,455 (2008), with interventions and protests due on or before September 2, 2008. None was filed.

IV. Commission Determination

8. We will accept SPP's revisions to section 2.2 of its OATT incorporating the rollover rights revisions concerning the five-year minimum contract term required to be eligible for rollover service and the one-year notice requirement as in compliance with Order No. 890. However, as discussed below, pursuant to the Commission's authority under section 206 of the FPA, we find that the language in section 2.2 of SPP's existing

⁸ See *Southwest Power Pool*, 124 FERC ¶ 61,028 (2008).

⁹ SPP Filing at 3 (citing *Cargill Power Markets, LLC v. Southwest Power Pool, Inc.*, 122 FERC ¶ 61,068 (2008), *order on reh'g*, 124 FERC ¶ 61,110 (2008) (*Cargill Power*)).

¹⁰ See SPP's Order No. 888 OATT, section 2.2, as accepted by the Commission in *Southwest Power Pool, Inc.*, 96 FERC ¶ 61,034 (2001).

OATT requiring the incumbent customer to accept a contract term at least as long as the longest term competing request may not be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful, because the language may place limitations on customers' rollover rights that are contrary to Commission policy.

9. In *Cargill Power*, the Commission denied a complaint filed by Cargill Power Markets, LLC's (Cargill) arguing that application of the matching requirement in section 2.2 of SPP's existing OATT violated the "first come, first served" policy of Order No. 888. The Commission found that, based on the facts of that case, SPP correctly applied the provisions of section 2.2 as then currently effective by requiring the incumbent customer to match the term in a transmission service request submitted by a customer other than Cargill, which had a term longer than Cargill's earlier submitted transmission service request.¹¹ At the time the Commission acted on that complaint, SPP's October 11, 2007, compliance filing was pending before the Commission. We therefore declined to address in the complaint proceeding how SPP should process competing requests for rollover in the future, as to do so would be speculative and would prejudge how SPP should process competing requests for rollover under its then pending Order No. 890 OATT.¹² SPP's revisions to section 2.2 are now before us, in response to the requirements of Order No. 890 and the May 16, 2008 Order.

10. In Order No. 890, the Commission considered but did not revise the Order No. 888 requirement that an existing transmission customer match competing offers as to term and rate in order to rollover its service. In Order No. 890-A, the Commission inadvertently amended the matching requirement of section 2.2 to refer to the "longest competing request" rather than "equal to a competing request" as provided under the Order No. 888 *pro forma* OATT. On rehearing of Order No. 890-A, Cargill pointed out that a new requirement to match the longest-term competing request in order to roll over service violates the first-come, first-served principles affirmed in Order No. 890. Cargill suggested, for example, that one potential customer could submit a competing request well in advance of the incumbent's rollover, followed by a second longer-term competing request submitted by another potential customer closer in time to the incumbent's rollover. Cargill contended that the revision to section 2.2 would allow the second

¹¹ See *Cargill Power*, 122 FERC ¶ 61,068, at P 16 (2008). In *Cargill Power*, Cargill argued that, despite the fact that Cargill held a superior queue position by virtue of its earlier-submitted, 10-year transmission service requests, SPP required the incumbent transmission service customer seeking to exercise its rollover right to match Constellation Energy Commodities Group, Inc.'s later-submitted, 11-year transmission service requests allegedly because Constellation requested service for a longer term.

¹² *Id.* n.5.

customer to effectively preempt the earlier submitted competing request simply because both are vying for capacity subject to the incumbent's rollover right.

11. The Commission agreed with Cargill in Order No. 890-B, stating that the Commission's reference to the longest-term competing request in Order No. 890-A could require a rollover customer taking long-term service to match the length of any competing long-term request. Under the Commission's existing precedent regarding section 2.2 of the *pro forma* OATT, however, there would be only one potential competitor for rollover customers seeking long-term service, i.e., the first customer in the queue requesting competing service. The Commission explained that we did not intend to modify this policy and, therefore, revised the language of section 2.2 to require customers rolling over their service to accept a contract term at least equal to a competing request, i.e., returning to the language of the Order No. 888 section 2.2.¹³

12. In light of our affirmation of the "equal to a competing request" requirement of Order No. 888, the Commission finds that SPP's requirement that the incumbent customer agree to accept a contract term at least as long as "the longest term competing request" by any new eligible customer may no longer be just and reasonable or not unduly discriminatory. SPP's section 2.2 may produce a form of competition between customers vying for the same capacity on the system that is inconsistent with the reservation priorities otherwise required in the *pro forma* OATT. Consequently, we will institute an investigation, under section 206 of the FPA, in Docket No. EL09-40-000, into the justness and reasonableness of this language. We conclude that a trial-type hearing is not necessary to resolve the matter that is the subject of this proceeding. Rather, we believe a paper hearing will allow us to determine whether the rollover language is just and reasonable. The Commission will require SPP and other interested parties to file detailed comments addressing this issue within 30 days of the date of this order. Reply comments may be filed within 30 days of the end of the comment period. After receipt and consideration of these filings, the Commission will address the issue in a subsequent order. In their comments parties should address whether SPP's requirement that the incumbent customer agree to accept a contract term at least as long as "the longest term competing request" should be retained in light of the *pro forma* OATT's requirement that the incumbent customer must match a contract term at least "equal to a competing request" by any new eligible customer and any other issues relevant to this matter.

13. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than publication of notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than five months

¹³ See Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 152; Order No. 890 *pro forma* OATT, section 2.2.

subsequent to that date. In order to give maximum protection to customers, and consistent with our precedent,¹⁴ we will establish a refund effective date at the earliest date allowed. This date will be the date on which notice of our investigation in this proceeding is published in the *Federal Register*.

The Commission orders:

(A) SPP's compliance filing is hereby accepted, effective August 11, 2008, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred by the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 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), an investigation is hereby instituted, in Docket No. EL09-40-000, concerning the justness and reasonableness of the matching requirements to rollover transmission service section 2.2 of SPP's existing OATT.

(C) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the investigation ordered in Ordering Paragraph (B) above, under section 206 of the Federal Power Act, in Docket No. EL09-40-000.

(D) The refund effective date in Docket No. EL09-40-000, established pursuant to section 206(b) of the Federal Power Act, shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (C) above.

(E) SPP and interested parties are directed to file comments on the justness and reasonableness of the matching requirement of section 2.2 of SPP's OATT within

¹⁴ See, e.g., *PJM Interconnection, L.L.C.*, 90 FERC ¶ 61,137 (2000); *Cambridge Elec. Light Co.*, 75 FERC ¶ 61,177, *clarified*, 76 FERC ¶ 61,020 (1996); *Canal Elec. Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

30 days of the issuance date of this order and reply comments within 30 days of the end of the comment period.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.