

121 FERC ¶ 61,245
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.

American Electric Power Service Corporation

Docket Nos. ER07-1069-002
ER07-1069-004

ORDER ON REHEARING
AND COMPLIANCE FILING

(Issued December 7, 2007)

1. On August 31, 2007, the Commission accepted for filing, subject to refund and the outcome of settlement and hearing procedures, proposed formula transmission rates by American Electric Power Service Corporation (AEP).¹ The Commission also required AEP to modify the proposed formula rates in specific respects. In this order, we address both requests for rehearing of the August 31 Order and a proposed compliance filing by AEP. We accept the compliance filing effective February 1, 2008, subject to refund and the outcome of the ongoing settlement and hearing procedures.

I. Background

2. On June 22, 2007, AEP submitted for approval under section 205 of the Federal Power Act (FPA)² revised tariff sheets on behalf of two of its operating companies: Southwestern Electric Power Company (SWEPCO) and Public Service Company of Oklahoma (PSO). The revised tariff sheets increase electric transmission rates in the AEP zone in the Southwest Power Pool, Inc. (SPP) and convert those rates into formula rates that would automatically adjust each year based on changes in AEP's cost of service. The proposed rates reflect a rate of return on common equity (ROE) of 11.9 percent, including a 50 basis point adder as an incentive for AEP's participation in SPP, which is a regional transmission organization (RTO). Rates would reflect the year-end balance of electrical plant in AEP's annual financial report to FERC (FERC Form No. 1).

¹ *American Electric Power Service Corp.*, 120 FERC ¶ 61,205 (2007) (August 31 Order).

² 16 U.S.C. § 824d (2000).

3. On August 31, 2007, the Commission conditionally accepted AEP's proposal for filing and suspended it for five months, to become effective on February 1, 2008, subject to refund, subject to the outcome of hearing and settlement judge procedures, and subject to a compliance filing.
4. In addition to establishing settlement and hearing procedures, the Commission summarily approved an ROE incentive of up to 50 basis points for AEP's continued participation in an RTO. The Commission's approval of this incentive assumed that AEP's overall ROE remains within the zone of reasonableness.
5. The August 31 Order did not expressly address a protester's concerns regarding an upcoming review of the classification of AEP's transmission and distribution facilities because AEP's rates were set for hearing and AEP has the burden to demonstrate that its classification of facilities is reasonable.
6. Finally, the Commission required AEP to conform its proposed tariff sheets in several respects. First, we required AEP to submit revised formulas that would incorporate details and calculations necessary to determine AEP's rates, including a basis for allocating (between SWEPCO and PSO) general and administrative expenses, a stated value for ROE, stated depreciation rates, and supporting worksheets. Second, the Commission required AEP to insert a zero value into placeholders for investment incentives that the Commission might approve in the future. Third, the Commission required AEP to eliminate language in the proposal that would have allowed AEP to make certain adjustments to post-employment benefits other than pensions (PBOPs) without seeking the Commission's approval. Fourth, the Commission required AEP to provide an attestation under 18 C.F.R. § 35.13(d)(6) (2007).

II. Requests for Rehearing

A. Five-month suspension

7. AEP requests rehearing of the Commission's decision to suspend AEP's proposal for five months. AEP asserts that a five-month suspension is appropriate only when proposed rates might be excessive by 10 percent or more. AEP asserts that the Commission failed to demonstrate that AEP's proposed rates are excessive to that extent. AEP further asserts that no intervenor either offered evidence that AEP's proposed rates might be excessive to that extent or demonstrated irreparable harm from a nominal suspension. According to AEP, a five month suspension would lead to harsh and inequitable results because AEP would be deprived of the opportunity to recover revenues at a time when, under AEP's construction program, AEP would be making significant investments in transmission plant. Finally, AEP asserts that a five-month suspension is inconsistent with the Commission's policies that favor formula rates.

8. We deny AEP's request for rehearing.³ In the August 31 Order, the Commission found, based on a preliminary analysis, that AEP's proposed rates may be substantially excessive.⁴ The five-month suspension is consistent with the Commission's well-established practice concerning rate increases that, based on the Commission's preliminary analysis, appear to be substantially excessive.⁵ AEP has not identified any consideration that would warrant a departure from that practice. We are not persuaded that the five-month suspension will unreasonably harm AEP during its construction program given that AEP chooses when to propose a rate increase and is aware of the potential for a five-month suspension.⁶ Similarly, a utility's move to a formula rate does not relieve the utility of the obligation to file proposed rates that do not appear to be substantially excessive.⁷

B. ROE Incentive for RTO Participation

9. Arkansas Electric Cooperative Corporation (AECC), Golden Spread Electric Cooperative, Inc., (Golden Spread) and Oklahoma Municipal Power Authority (OMPA) (collectively, Customers) and East Texas Cooperatives⁸ request rehearing of our decision to approve summarily AEP's proposed ROE adder of up to 50 basis points for AEP's participation in an RTO. Customers and East Texas Cooperatives assert that AEP is not eligible for an incentive for RTO participation because AEP is bound to participate in SPP as a condition of a merger that involved AEP. Customers and East Texas Cooperatives assert that, at the least, the Commission should have set the matter for hearing as the Commission did for AEP's affiliates in the East.⁹

³ *Southern California Edison Co.*, 116 FERC ¶ 61,099, at P 8-18 (2006) (the Commission does not, as a general rule, reconsider its decisions regarding the length of suspension periods).

⁴ August 31 Order at P 27.

⁵ 116 FERC ¶ 61,099, at P 9-12. (the Commission does not, as a general rule, open its preliminary analysis of the proposed rates – which it uses in evaluating the proposed rates – to review and challenge).

⁶ *Id.* at P 13-16.

⁷ *Id.* at P 18.

⁸ East Texas Cooperatives consist of East Texas Cooperatives, Inc., North Texas Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc.

⁹ Customers at 5. East Texas Cooperatives *citing American Electric Power Service Corp.*, 111 FERC ¶ 61,304, at P 14 (2005) (*AEP East*).

10. We deny the requests for rehearing. Under section 219 of the FPA, each transmitting utility that joins and continues to participate in an RTO is eligible for an ROE incentive, as long as the utility's ROE remains within the zone of reasonableness.¹⁰ When the Commission developed regulations to implement section 219, the Commission expressly indicated that a utility that joins an RTO as a condition of a merger is eligible for an incentive under section 219.¹¹ Although the Commission called for case-by-case evaluation of whether a proposed incentive is justified (as opposed to adopting a generic incentive for all utilities that join an RTO),¹² the Commission did so because proposed incentives might vary in form and must be administered so that the utility's rates remain within the zone of reasonableness.¹³ In Order No. 679, the Commission also determined that the Transmission Organization incentive applies to utilities that joined RTOs or ISOs because of merger conditions.¹⁴ As a result, the present challenge is an impermissible collateral attack on Order No. 679.¹⁵ Here, AEP's proposed adder encourages AEP's continued participation in an RTO, conforms to the Commission's established practice under FPA section 219, and therefore may be summarily approved.¹⁶

C. Plant Balances

11. Under section 35.17 of the Commission's regulations, utilities must base their rates on the average of thirteen monthly statements of the utility's costs.¹⁷ Here, AEP's

¹⁰ 16 U.S.C. § 824s.

¹¹ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, at P 331 & n.180, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007); *See also San Diego Gas & Elec. Co.*, 118 FERC ¶ 61,073, at P 25-26 (2007) (*San Diego*).

¹² Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 326.

¹³ Accordingly, the Commission did not limit the scope of the hearing in this proceeding concerning AEP's ROE. The parties in the hearing may evaluate AEP's ROE, including but not limited to whether the proposed ROE, with the RTO participation incentive of up to 50 basis points, is within the zone of reasonableness. August 31 Order at P 34. *See also San Diego*, 118 FERC ¶ 61,073 at P 25-26.

¹⁴ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 331 & n.180.

¹⁵ *See Carolina Power & Light Co.*, 95 FERC ¶ 61,282 at 61,988 (2001).

¹⁶ *See, e.g., Southern California Edison Co.*, 121 FERC ¶ 61,168, at P 158-159 (2007).

¹⁷ 18 C.F.R. § 35.17 (2007).

rates reflect end-of-year plant balances. Intervenors objected on the grounds that use of end-of-year balances is less accurate and therefore might result in excessive rates. The Commission set AEP's overall proposal for hearing without summarily ruling on this issue. East Texas Cooperatives now request rehearing on the grounds that, consistent with past practice, the Commission should have summarily required AEP to use thirteen monthly balances.

12. We grant East Texas Cooperative's request for rehearing. The Commission's intention in the August 31 Order was to allow flexibility in settlement negotiations; the Commission envisioned that some customers might prefer AEP's use of the end-of-year plant balances because such data is easily traceable to publicly available information. On further consideration, the Commission's action might have unfairly burdened customers in negotiations with AEP. Therefore, consistent with our past practice, we grant rehearing and summarily reject AEP's use of end-of-year plant balances.¹⁸ We direct AEP to include in its case-in-chief at the hearing a formula rate template that reflects the average of thirteen monthly plant balances, as well as any conforming changes to the formula rate template necessary to effect such a change, as provided in section 35.17.

D. Classification of Facilities

13. Under SPP's open access transmission tariff (OATT), transmission owners must file by September 1, 2008 for a regulatory determination as to which of the owner's facilities are transmission facilities.¹⁹ East Texas Cooperatives assert that AEP should be required to seek that determination here, as part of AEP's rate proposal. According to East Texas Cooperatives, AEP's classifications should be considered here so that customers do not unlawfully bear the burden of demonstrating that AEP has included excessive costs as part of AEP's rate proposal. East Texas Cooperatives add that, if AEP's classifications are not addressed as part of this proceeding, AEP should be required to file, by July 1, 2009, a true-up to AEP's formula rates based on the updated classifications that result from the proceeding under SPP's OATT. According to East Texas Cooperatives, customers would otherwise bear the burden of filing a complaint to have AEP's rates adjusted.

14. We deny East Texas Cooperatives' request for rehearing. Even without conducting the classification study that is required under SPP's OATT, AEP retains the burden of proving that its proposed rates are just and reasonable. At the hearing, parties may investigate AEP's proposed classification of facilities. If, at hearing, a customer

¹⁸ See, e.g., *San Diego*, 118 FERC ¶ 61,073 at P 29.

¹⁹ East Texas Cooperatives cite *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,355 at P 13 (2005), *order on reh'g*, 114 FERC ¶ 61,242 (2006).

raises a specific and colorable argument that AEP inappropriately classified a distribution facility as a transmission facility, then AEP must bear the burden to show that the facility was appropriately classified. The presiding administrative law judge will decide, in those circumstances, whether AEP has met its burden. We will determine in a future proceeding when and how AEP should adjust its rates to reflect any reclassification of AEP's facilities resulting from the classification study required under SPP's OATT.

III. Compliance Filing – Docket No. ER07-1069-002

15. On October 1, 2007, AEP submitted revised tariff sheets that purported to comply with our August 31 Order. According to AEP, the revised tariff sheets (1) add all necessary detail, (2) use a zero value in all incentive placeholders, and (3) do not allow adjustments to PBOPs without future filings. The added detail includes depreciation rates that are derived from state-approved settlement agreements. AEP requests waiver of the Commission's regulations (including regulations that require studies to support proposed depreciation rates) as necessary to allow the use of those state-derived depreciation rates. AEP suggests that, since 1983, the Commission has accepted depreciation rates for SWEPSCO based on state-approved depreciation rates. Finally, AEP also submitted an attestation under 18 C.F.R. § 35.13(d)(6) (2007).

16. Notice of AEP's compliance filing was published in the *Federal Register*, with interventions and protests due on or before October 22, 2007.²⁰ Customers (*i.e.*, AECC, Golden Spread and OMPA) jointly filed a motion to intervene and protest contending that AEP has not adequately complied, and requesting the Commission to set the compliance filing for hearing and settlement judge procedures. First, Customers assert that AEP has not added sufficient detail to its revised formulas. Customers note, for example, that AEP's revised formulas provide for general and administrative expenses to be allocated based on wages and salaries but also allow AEP to use a different allocator if AEP supplies supporting documentation. According to Customers, such flexibility is inconsistent with the Commission's direction to specify, in the formulas, the elements that will determine AEP's rates. Customers assert that the evidentiary hearing might reveal that even more detail is needed.

17. Second, Customers assert that AEP erred in specifying, in its formulas, a basis for allocating investment incentives among AEP's operating companies; according to Customers, it is inappropriate to determine the appropriate allocation outside the context of specific projects and incentives. Third, Customers assert that AEP failed to add zero values to Other Additions/Deductions to Rate Base, Common Plant, Payments in Lieu of Taxes, and Transmission Lease Payments. Fourth, Customers assert that AEP failed to support its proposed depreciation rates through an appropriate study or data. Customers suggest that reliance solely on a state-approved settlement agreement would be

²⁰ 72 Fed. Reg. 52,795 (2007).

inconsistent with the Commission's statutory responsibility under section 205 of the FPA. Finally, Customers assert that AEP's revised formulas improperly allow AEP's depreciation rates to change automatically based on state-approved depreciation rates, without the Commission's approval under section 205.

18. We accept AEP's compliance filing effective February 1, 2008, subject to the outcome of the pending settlement and hearing procedures. We direct AEP to address the issues that have been raised in response to the compliance filing in its case-in-chief and to include any applicable depreciation studies that support the depreciation rates in its formula rate in order to have a fully-developed record in this proceeding. Additionally, we note that AEP still has not reflected a stated ROE value in its formula rate template, as ordered by the August 31 Order; therefore, we direct AEP to reflect a stated ROE value in its formula rate template in its case-in-chief.

The Commission orders:

(A) AEP's request for rehearing, Customers' request for rehearing and East Texas Cooperatives' request for rehearing concerning the classification of AEP's transmission facilities are hereby denied, as discussed in the body of this order.

(B) East Texas Cooperatives' request for rehearing concerning thirteen monthly plant balances is hereby granted, as discussed in the body of this order. AEP is hereby directed to reflect the required change in its case-in-chief, as discussed in the body of this order.

(C) AEP's compliance filing is hereby accepted for filing, effective February 1, 2008, subject to refund, and subject to the outcome of the ongoing settlement and hearing procedures, as discussed in the body of this order. AEP is hereby directed to address Customers' concerns in its case-in-chief, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.