

125 FERC ¶ 61,389  
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 Electric Power Company

Docket Nos. ER08-1501-000  
ER09-86-000

ORDER CONSOLIDATING PROCEEDINGS AND ESTABLISHING HEARING AND  
SETTLEMENT JUDGE PROCEDURES

(Issued December 30, 2008)

1. On September 5, 2008, in Docket No. ER08-1501-000, American Electric Power Service Corporation (AEP) filed a power sales agreement with the Commission on behalf of Southwestern Electric Power Company (SWEPCO) and the city of Prescott, Arkansas (Prescott). Under the power sales agreement, SWEPCO will provide Prescott with requirements service for thirty years beginning January 1, 2009, and will include Prescott in its planning processes.
2. On October 17, 2008, in Docket No. ER09-86-000, AEP filed a power sales agreement with the Commission on behalf of SWEPCO and the city of Minden, Louisiana (Minden). Under the power sales agreement, SWEPCO will provide Minden with requirements service for twenty years beginning January 1, 2009, and will include Minden in its planning processes.
3. As discussed below, this order sets SWEPCO's proposed power sales agreements for hearing and settlement judge procedures.

**I. Background**

4. SWEPCO is an operating company of American Electric Power Company, Inc. SWEPCO owns and operates facilities for the generation, transmission, and distribution of electric power and energy in the states of Arkansas, Louisiana and Texas.
5. Prescott is a municipal corporation organized and existing under the laws of the state of Arkansas, and it currently takes wholesale electric service from Arkansas Electric Cooperative Corporation. Minden is a municipal corporation organized and existing under the laws of the state of Louisiana, and it currently takes wholesale electric service from SWEPCO under market-based rates.

## II. Description of the Filings

6. The two power sales agreements are similar, with certain differences rooted in the particular circumstances of Prescott and Minden. Under the power sales agreements, SWEPCO will charge Prescott and Minden for requirements service via a demand, energy and fuel charge. SWEPCO will calculate the demand and energy charge annually using a cost-based formula rate under which the charges for a billing year will be based on data from SWEPCO's most recent FERC Form No. 1.<sup>1</sup> SWEPCO will perform annual true-ups to adjust the charges billed in each calendar year to the actual costs from the same calendar year, and credit or bill Prescott and Minden, as necessary. SWEPCO will estimate fuel costs, which SWEPCO will true up annually, as well.

7. The Prescott power sales agreement provides a method to compute return on common equity (ROE) annually, by taking the average of the daily Moody's Long-Term Baa Corporate Bond Index for the month of December, and adding 535 basis points (5.35 percentage points).<sup>2</sup> The Minden power sales agreement uses the same method, but instead it adds 600 basis points (6.00 percentage points).<sup>3</sup>

8. The power sales agreements provide that, in the absence of mutual written agreement to change the power sales agreements, the parties and the Commission, acting *sua sponte*, may request to change them under the just and reasonable standard of sections 205 or 206 of the Federal Power Act,<sup>4</sup> with eight exceptions. The eight exceptions are set forth in section 15.03 of the power sales agreements, and may be challenged by the parties or the Commission under the public interest standard of review set forth in *United Gas Pipe Line Co v. Mobile Gas Serv. Corp. and FPC v. Sierra Pac. Power Co.*<sup>5</sup> For third parties that challenge the power sales agreements, the standard of review is "the most stringent standard under the law."<sup>6</sup>

9. Minden and Prescott are responsible for all arrangements for the use of Southwest Power Pool, Inc. and Entergy Services, Inc.'s transmission systems, but SWEPCO agrees to act as their agents in such matters. Additionally, Minden and Prescott are not located

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<sup>1</sup> For the initial period of January 1, 2009 through May 31, 2009, SWEPCO proposes to use 2007 FERC Form No. 1 data.

<sup>2</sup> SWEPCO September 5, 2008 Filing at 4-5.

<sup>3</sup> SWEPCO October 17, 2008 Filing at 4-5.

<sup>4</sup> 16 U.S.C. § 824d (2006).

<sup>5</sup> 350 U.S. 332 (1956) and 350 U.S. 348 (1956).

<sup>6</sup> SWEPCO September 5, 2008 and October 17, 2008 Filings at 5.

in SWEPCO's service territory; therefore, the power sales agreements provide for them to reimburse SWEPCO for all control area equipment, communication circuits, and third party costs to transfer the load of Minden and Prescott into SWEPCO's service territory.

10. SWEPCO requests a January 1, 2009 effective date for both agreements.

### **III. Notice of Filings**

11. Notice of SWEPCO's filing in Docket No. ER08-1501-000 was published in the *Federal Register*, 73 Fed. Reg. 53,214 (2008), with interventions and protests due on or before September 26, 2008. No comments or protests were filed.

12. Notice of SWEPCO's filing in Docket No. ER09-86-000 was published in the *Federal Register*, 73 Fed. Reg. 64,312 (2008), with interventions and protests due on or before November 7, 2008. Minden timely moved to intervene.

### **IV. Discussion**

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>7</sup> the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

14. The Commission's practice is to consolidate proceedings where the issues are closely intertwined with each other.<sup>8</sup> The factual situations are virtually the same in the two proceedings. Thus, we will consolidate Docket Nos. ER08-1501 and ER09-86-000 for purposes of hearing and decision.

15. Based upon the Commission's preliminary review of SWEPCO's proposed power sale agreements, we find that SWEPCO has not adequately supported its proposed formula-based ROE. SWEPCO's reliance on *American Electric Power Service Corporation* is misplaced.<sup>9</sup> *American Electric Power Service Corporation* is an unpublished letter order and does not constitute legal precedent binding on the Commission.<sup>10</sup> Notwithstanding *American Electric Power Service Corporation*, the Commission's policy is that ROEs must be supported through a discounted cash flow

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<sup>7</sup> 18 C.F.R. § 385.214 (2008).

<sup>8</sup> *Missouri River Energy Services*, 124 FERC ¶ 61,309, at P 39 (2008).

<sup>9</sup> *American Electric Power Service Corporation*, Docket Nos. ER07-740-000 and ER07-740-001 (August 2, 2007) (unpublished letter order).

<sup>10</sup> See, e.g., *Idaho Power Co.*, 95 FERC ¶ 61,482 (2001); *Cambridge Electric Light Co.*, 95 FERC ¶ 61,162 (2001).

analysis subject to review by this Commission, and that increases in cost-based ROEs must be accompanied by individual filings under Federal Power Act section 205.<sup>11</sup> The standard to deviate from this general policy is very high. To be specific, in order for the administrative law judge to approve the formula-based ROE, SWEPCO must provide unequivocal evidence indicating that the proposed ROE is just and reasonable,<sup>12</sup> therefore warranting deviation from our policy.

16. Our preliminary analysis indicates that SWEPCO's proposed agreements have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will set SWEPCO's proposed agreements for hearing and settlement judge procedures.

17. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>13</sup> 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.<sup>14</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, 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

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<sup>11</sup> See, e.g., *Southern California Edison Co.*, 92 FERC ¶ 61,070, at 61,262-63 (2000); *Midwest Independent Transmission System Operator, Inc.*, 100 FERC ¶ 61,292 (2002), *order affirming initial decision*, 102 FERC ¶ 61,143 (2003), *reh'g denied*, 106 FERC ¶ 61,302 (2004), *order on remand, Public Serv. Comm'n of the Commonwealth of Kentucky v. FERC*, 397 F.3d 1004 (2005); and *New England Power Co.*, 31 FERC ¶ 61,378, at 61,841-42 (1985).

<sup>12</sup> *Westar Energy Inc.*, 124 FERC ¶ 61,057, at P 26 (2008), citing *New England Power Co.*, 31 FERC ¶ 61,378, at 61,841-42, n.11 (1985) (discussing limited exceptions to the general policy against automatically adjustable rates).

<sup>13</sup> 18 C.F.R. § 385.603 (2008).

<sup>14</sup> 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 the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

assigning the case to a presiding judge. Should the settlement judge ultimately determine that a hearing is warranted, SWEPCO shall file a full case in chief pursuant to the Commission's regulations to support its proposals at hearing.

The Commission orders:

(A) SWEPCO's proposed agreements are accepted for filing, effective January 1, 2009, and set for hearing and settlement judge procedures described below.

(B) 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 SWEPCO's proposed agreements. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), 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. Such 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 within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, 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.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a 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 )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.