

131 FERC ¶ 61,260
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

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 Nos. EL05-19-002

v.

Southwestern Public Service Company

Southwestern Public Service Company

ER05-168-001
(consolidated)

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued June 22, 2010)

1. On January 19, 2010, Southwestern Public Service Company (SPS) submitted an Offer of Settlement and Settlement Agreement (Settlement), between itself, the New Mexico Cooperatives,¹ and Occidental Permian Ltd. and Occidental Power

¹ The New Mexico Cooperatives are Central Valley Electric Cooperative, Inc.; Farmers' Electric Cooperative, Inc.; Lea County Electric Cooperative, Inc.; and Roosevelt County Electric Cooperative, Inc.

Marketing L.P. (collectively Occidental).² The Settlement resolves, among the Joint Settling Parties, all issues in the above-captioned consolidated dockets.³

2. The Settling Parties ask the Commission to accept the formula rate included in each of the four Replacement Power Service Agreements (RPSA) as the “rate” for service to the New Mexico Cooperatives upon the effectiveness of the RPSAs.⁴ The Settling Parties state that the Commission previously has accepted SPS’s use of formula rates for partial requirements service to Golden Spread Electric Cooperative, Inc. (Golden Spread)⁵ and for interruptible service to Public Service Company of New Mexico (PNM).⁶ The Settling Parties state that the formula rate template included in the RPSAs very closely tracks the Golden Spread and PNM formula rate templates. In addition, the Settling Parties state that the RPSAs contain the Wholesale Fuel Cost and Economic Purchased Power Adjustment Clause and associated Fuel Protocols accepted by the Commission for service to the New Mexico Cooperatives as part of the settlement of SPS’s rate case in Docket No. ER08-749-000.⁷

² SPS, the New Mexico Cooperatives, and Occidental are hereinafter referred to as the Joint Settling Parties. SPS and the New Mexico Cooperatives are hereinafter referred to as the Settling Parties.

³ Docket No. EL05-19-000 is a complaint proceeding filed by parties under section 206 of the Federal Power Act (FPA) against SPS alleging historical and continuing violation of various provisions of SPS’s fuel cost adjustment clause (FCAC). Docket No. ER05-168-000 is a proceeding wherein SPS filed to revise its FCAC. The Commission consolidated EL05-19-000 and ER05-168-000 and set them for hearing and settlement judge procedures. The parties participated in a hearing in February and March 2006, and the judge issued an Initial Decision on May 24, 2006. On April 21, 2008, the Commission issued an Opinion and Order on the Initial Decision. *Golden Spread Elec. Coop., Inc., et al. v. Southwestern Pub. Serv. Co.*, Opinion No. 501, 123 FERC ¶ 61,047 (2008) (Opinion No. 501). Requests for rehearing of Opinion No. 501 are pending before the Commission.

⁴ The Settlement includes one RPSA for each New Mexico Cooperative.

⁵ *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, 123 FERC ¶ 61,054 (2008).

⁶ *Southwestern Pub. Serv. Co.*, Docket No. ER10-260-000 (January 5, 2010) (unpublished letter order).

⁷ *Southwestern Pub. Serv. Co.*, 128 FERC ¶ 61,233 (2009).

3. The Settling Parties explain that upon Commission acceptance of the Settlement, those portions of the Settlement resolving the issues in the above-captioned dockets will take effect. The Settling Parties further state that the RPSAs, which are also part of the Settlement, will not become effective until SPS has received not only Commission approval, but also certain other regulatory approvals.⁸ The Joint Settling Parties state that SPS will advise the Commission when all of the regulatory approvals have been received, thereby establishing the effective date of the RPSAs (i.e., the first date of the month following the month in which the last of the regulatory approvals is made). While awaiting the required state orders, SPS will continue to provide full requirements service to the New Mexico Cooperatives pursuant to the current agreements under the Commission-approved rates, terms, and conditions established in SPS's most recent rate case in Docket No. ER08-749-000,⁹ unless and until further changed pursuant to an FPA section 205 or 206 filing with the Commission.

4. The Joint Settling Parties request expedited consideration of the Settlement. The Joint Settling Parties assert that expedited consideration would facilitate the time-consuming resource planning necessary to assure service to the New Mexico Cooperatives and their customers by providing certainty as to the outcome of the Commission's review, while the Settling Parties initiate the process of securing review of the RPSAs by the state regulatory authorities. The Joint Settling Parties state that Commission acceptance is the crucial first step in the various reviews and a prerequisite to the operational and resource planning that the Settling Parties must undertake.

5. On February 12, 2010, Commission Trial Staff submitted initial comments on the Settlement. On February 22, 2010, the Settling Parties submitted reply comments.

6. In its initial comments, Trial Staff states it believes the Settlement is fair and reasonable and in the public interest, and accordingly, does not oppose acceptance of the Settlement. However, Trial Staff requests that certain items be addressed by the Settling Parties in their reply comments. First, Trial Staff requests that the Settling Parties explain the methodology for determining depreciation expense in the worksheet titled "Southwestern Public Service Company FERC Depreciation Expense Calculation

⁸ The Settling Parties state that the RPSAs will not become effective unless and until the Public Utilities Commission of Texas (PUCT) and the New Mexico Public Regulation Commission (NMPRC) have issued orders assuring SPS that the sale of requirements capacity and energy to the New Mexico Cooperatives pursuant to the RPSAs at average system cost is reasonable and will not cause incremental costs to be imputed to such sales in SPS's retail base rate and fuel proceedings. The Settling Parties state that the New Mexico Cooperatives must also submit the RPSAs to the Rural Utilities Service for review.

⁹ *Southwestern Pub. Serv. Co.*, 128 FERC ¶ 61,233 (2009).

Methodology” (worksheet). Trial Staff states that the methodology is unclear and appears to permit the over-recovery of depreciation expense for assets.

7. In their reply comments, the Settling Parties explain that the depreciation worksheet cited by Trial Staff is part of the Formula Rate Implementation Procedures incorporated in each of the four RPSAs. The Settling Parties state that the methodology set forth in the worksheet does not permit SPS to over-recover depreciation expense because, as part of the calculation of depreciation expense, a check takes place to ensure that an asset has not been over-depreciated. The Settling Parties state that they revised the worksheet to clarify this and attached the revised worksheet to their reply comments as Exhibit 1. Moreover, the Settling Parties state that SPS will submit the revised worksheet as part of the compliance RPSAs that will ultimately be filed for each of the four New Mexico Cooperatives.¹⁰ The Settling Parties state that the New Mexico Cooperatives have no objections to the proposed modifications to the worksheet.

8. Trial Staff’s second request is that Settling Parties represent that they have expressly identified all the specific waivers they seek and that the blanket waiver on page 29 of the Settlement is a catch-all request submitted out of an abundance of caution. In their reply comments, the Settling Parties clarify that if they thought a specific waiver was required, the waiver was requested in the Settlement. The Settling Parties further confirm that they inserted the catch-all waiver in the Settlement out of an abundance of caution to assure that, if some detail or need for waiver was inadvertently overlooked, such inadvertent omission would not present a bar to the Commission approving the Settlement.

9. Trial Staff’s third request is that the Settling Parties affirm that any disputes concerning rates calculated under Schedule D would be subject to the dispute resolution provision of the Settlement, and that the Records and Audit Rights of the Settlement apply to provide the Settling Parties all the documentation they need to resolve disputes arising under Schedule D. In their reply comments, the Settling Parties confirm that any disputes arising under or concerning Schedule D will be referred to the Operating Committee and will be subject to the provisions contained in the Operating Committee and Dispute Resolutions section of the RPSAs. The Settling Parties further affirm that the Records and Audits Rights section of the RPSAs would apply to any such disputes referred to the Operating Committee.

10. Trial Staff’s fourth request is that the Settling Parties clarify the meaning of the term “LIP.” In their reply comments, the Settling Parties explain that “LIP” means

¹⁰ The Settling Parties explain that once SPS has secured all the regulatory approvals and assurances so that the four RPSAs may go into effect, a compliance filing resubmitting the RPSAs will be necessary to advise the Commission of the effective date for the RPSAs.

Locational Incremental Price. The Settling Parties state that SPS has agreed to define the term in the individual RPSAs when SPS makes its compliance filings with the Commission.

11. Finally, Trial Staff requests that the Settling Parties explain the derivation of the \$7.46/kW/month with a 2 percent escalator amount that SPS may charge the New Mexico Cooperatives for the provision of power during Phase I and II. In their reply comments, the Settling Parties explain the derivation of the \$7.46/kW/month with 2 percent escalator figure. The Settling Parties explain that should SPS provide power for one or more of the New Mexico Cooperatives to meet Phase I or Phase II load reduction, SPS will do so (1) at SPS's incremental cost, during Phase I where a New Mexico Cooperative has requested SPS to do so in a timely manner; or (2) at SPS's incremental cost plus 5 percent during either Phase I where the request was not timely, or during Phase II. The Settling Parties explain that the charge of \$7.46/kW/month with a 2 percent escalator is one of four possible measures of incremental capacity cost set forth in each of the RPSAs. The Settling Parties state that this particular measure was keyed to the price SPS pays to third party Lea Power Partners, LLC for long-term capacity from that entity's combined cycle plant recently put into service near Hobbs, New Mexico. The Settling Parties state that this purchase is the most recent long-term incremental capacity purchase made by SPS. The Settling Parties state that this particular measure of incremental cost remains unchanged at \$7.46/kW/month. The Settling Parties explain that the 2 percent annual escalator, effective after December 15, 2015, is a negotiated, black box escalator that the Settling Parties agreed was reasonable to account for other costs that could increase over time.

12. The Commission finds that the Settlement is fair, reasonable, and in the public interest. Accordingly, the Settlement is hereby approved. The Commission's approval of this Settlement Agreement does not constitute approval of or precedent regarding, any principle or issue in this proceeding.

13. Article II.I.4 of the Settlement states that, subject to the provisions of the Settlement, SPS and the New Mexico Cooperatives may propose changes to the rates, terms, and conditions contained in the rate schedule sheets and in the contracts submitted with the Settlement pursuant to Section 205 of the FPA and said changes, if permitted under the Settlement, shall be subject to the just and reasonable standard. In addition, Article II.I.4 states that absent the agreement of all parties to a proposed change, the standard of review for any changes to the Settlement proposed by a party shall be the "public interest" standard set forth in the *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 348 (1956). Article II.I.4 further states that the standard of review for

any changes proposed by a non-party or the Commission acting *sua sponte* shall be the most stringent standard permissible under applicable law.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.