

135 FERC ¶ 61,223
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket Nos. ER10-1697-000
ER11-2677-000
ER11-2677-001

ORDER ACCEPTING NETWORK INTEGRATION TRANSMISSION
SERVICE AGREEMENT AND NETWORK OPERATING AGREEMENT, WITH
EXCEPTION

(Issued June 10, 2011)

1. On July 1, 2010, as amended on January 13, 2011, under section 205 of the Federal Power Act (FPA),¹ Southwest Power Pool, Inc. (SPP) submitted for filing an unexecuted network integration transmission service agreement (NITSA) between SPP as transmission provider and Kansas Power Pool, Inc. (KPP) as network customer, and an executed network operating agreement (NOA) among SPP as transmission provider, KPP as network customer, and Mid-Kansas Electric Company (Mid-Kansas) as host transmission owner (collectively, the July 1 Agreements, and individually, the July 1 NITSA and the July 1 NOA). On March 14, 2011, the Commission notified SPP that the July 1, 2010 filing was deficient and asked SPP to provide additional information to the Commission by April 13, 2011 (Deficiency Letter). On April 13, 2011, SPP supplemented the July 1, 2010 filing by submitting a response to the Deficiency Letter (Response to Deficiency Letter). In this order, we accept the July 1 Agreements, as amended, effective June 1, 2010, as discussed below, except for Attachment B to the July 1 NITSA, which is accepted for informational purposes only.

I. Background

2. SPP is a Commission-approved regional transmission organization (RTO). As such, SPP administers transmission service pursuant to its open access transmission

¹ 16 U.S.C. § 824d (2006).

tariff (SPP Tariff) over portions of Arkansas, Kansas, Louisiana, Missouri, Nebraska, New Mexico, Oklahoma, and Texas. SPP currently has 56 members and serves more than five million customers in a 370,000 square mile area. KPP is a municipal energy agency, authorized by Kansas statutes and created by and for its members. KPP has 41 members, and provides power services to 28 municipal utilities in Kansas with a total load of approximately 368 MW.

3. Mid-Kansas was formed by the distribution cooperative members of Sunflower Electric Power Corporation to purchase the Kansas electric assets of Aquila, Inc. Mid-Kansas's assets include generation and transmission facilities, and agreements for the use of member-owned electric distribution facilities. Mid-Kansas owns approximately 1,083 miles of transmission lines and associated substation facilities and 395 MW of gas-fired generation resources.

II. SPP's Filings

4. In the July 1 filing, SPP states that it filed the July 1 NITSA on an unexecuted basis because the parties could not resolve issues regarding service provided over lower-voltage facilities owned by Mid-Kansas or its member cooperatives. In response to requests by SPP and KPP, the Commission twice extended the comment date to permit the parties additional time to attempt to resolve these issues.

5. Under the July 1 Agreements, SPP proposes to provide network transmission service to KPP over the Mid-Kansas transmission system. SPP explains that the July 1 Agreements include terms and conditions that do not conform to the standard form of service agreements contained in SPP's Tariff.² According to SPP, the July 1 Agreements are identical in all material respects to agreements accepted by the Commission on January 20, 2010,³ except for the two changes noted below:

- (1) Section 8.8 of Attachment 1 of the unamended July 1 NITSA provides that "Wholesale Distribution Service Charges, if any, are specified in the Service and Operating Agreement for Local Delivery Service between Network Customer and Mid-Kansas Electric

² See SPP Tariff at Attachment F (*pro forma* NITSA) and Attachment G (*pro forma* NOA).

³ The July 1 Agreements modify the NITSA but not the NOA that was accepted for filing in *Southwest Power Pool, Inc.*, Docket No. ER09-1562-000, at 2 (January 20, 2010) (unpublished letter order).

Company, LLC, executed contemporaneously with this Agreement, which is included as Attachment B.”⁴

- (2) Section 8.9 of Attachment 1 of the July 1 NITSA specifies that the transmission service requested by KPP from a specified designated network resource is contingent upon completion of certain upgrades.

6. SPP states that the non-conforming provisions are consistent with SPP’s Tariff and notes that the Commission has previously accepted filings containing similar provisions.⁵ SPP also requests waiver of the Commission’s prior notice requirement so that the July 1 Agreements may become effective June 1, 2010.

7. SPP explains that on December 30, 2010, Mid-Kansas filed for approval with the Kansas Corporation Commission (KCC) six agreements related to the provision of wholesale distribution service (December 30 Filing) to replace the single service and operating agreement in the July 1 filing. The December 30 Filing with the KCC included three unexecuted local delivery service agreements and three unexecuted local delivery operating agreements between Mid-Kansas and KPP (December 30 Local Delivery Agreements). The December 30 Local Delivery Agreements govern service over the 34.5 kV facilities owned by Mid-Kansas’s members and specify which Mid-Kansas members’ facilities will be used to provide service to KPP. These 34.5 kV facilities are the same 34.5 kV facilities that are the subject of the service and operating agreement included as Attachment B to the July 1 NITSA.

8. On January 13, 2011, at Mid-Kansas's request, SPP updated the July 1 NITSA to replace the service and operating agreement for local delivery service with the six new December 30 Local Delivery Agreements as Attachment B to the July 1 NITSA.

III. Notices and Responsive Pleadings

9. Notice of SPP’s July 1, 2010 filing was published in the *Federal Register*, 75 Fed. Reg. 40,808 (2010) with interventions and protests due on or before July 22, 2010. On July 7, 2010, KPP filed a motion to intervene. On July 21, 2010, SPP filed a motion to extend the time to file comments to September 20, 2010, which the Commission granted

⁴ Thus, while under many NITSA’s, SPP may provide customers with wholesale distribution services and bill and collect fees for such services, section 8.8 makes it clear that the responsibility for such wholesale distribution services in the instant proceeding is set forth in a separate agreement.

⁵ See *Southwest Power Pool, Inc.*, Docket No. ER09-208-000 (Dec. 17, 2008) (unpublished letter order); *Southwest Power Pool, Inc.*, Docket No. ER07-1201-001 (Dec. 18, 2007) (unpublished letter order).

on August 20, 2010. On September 17, 2010, KPP filed a motion for an additional extension of time to file comments to November 19, 2010, which the Commission granted on September 30, 2010. On November 19, 2010, KPP filed a protest. On December 7, 2010, Mid-Kansas filed a motion to intervene out-of-time, a protest, and an answer. On December 15, 2010, the KCC filed a motion to intervene out-of-time and answer. On December 22, 2010, KPP filed an answer.

10. Notice of SPP's January 13, 2011, filing was published in the *Federal Register*, 76 Fed. Reg. 4100 (2011), with interventions and protests due on or before February 3, 2011. On February 3, 2011, KPP and Mid-Kansas filed motions to intervene and protests. On February 8, 2011, KPP filed an additional protest. On March 4, 2011, the KCC filed a motion to intervene out-of-time and answer.

11. On March 15, 2011, the Commission issued the Deficiency Letter. Notice of SPP's response to the Deficiency Letter was published in the *Federal Register*, 76 Fed. Reg. 22,389 (2011), with interventions and protests due on or before May 4, 2011. On May 4, 2011, Mid-Kansas and the KCC filed comments.

A. KPP Protests

12. KPP states that the fundamental disagreement between KPP and Mid-Kansas regarding the proposed wholesale distribution service charges is whether KPP should be charged for such service at all.⁶ KPP asserts that the facilities forming the basis for the proposed charges perform a transmission function under the Commission's seven-factor test, should be included in SPP's Tariff, and their costs should be included in the Mid-Kansas zonal transmission rate. KPP asserts that in *Western Farmers*, the Commission found that charges similar to the Mid-Kansas wholesale distribution service charges were subject to the Commission's review.⁷

13. KPP explains that the issue of whether these facilities perform a transmission function or a distribution function may be decided by the KCC within several months. KPP urges the Commission to suspend the proposed wholesale distribution charges and place them into effect subject to refund and the outcome of a hearing to determine whether such charges are just and reasonable and hold the hearing in abeyance.

14. Finally, KPP requests that, if the KCC does not address the issue of whether the disputed facilities are transmission or distribution within several months of the July 1 filing, the Commission should initiate the hearing process and make the classification

⁶ KPP November 19 Protest at 2-3.

⁷ *Id.* at 4, citing *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,241, at P 17 (2006), *order on reh'g*, 119 FERC ¶ 61,307, at P 11-14 (2007) (*Western Farmers*).

determination. KPP argues that while the Commission has often deferred to state commission functionalization decisions, in doing so it has:

. . . reiterate[d] our finding in Order No. 888 that to the extent that any facilities, regardless of their original nominal classification, in fact, prove to be used by public utilities to provide transmission service in interstate commerce in order to deliver power and energy to wholesale purchasers, such facilities become subject to this Commission's jurisdiction and review. In addition, the rates, terms and conditions of all wholesale and unbundled retail transmission service provided by public utilities in interstate commerce are subject to this Commission's jurisdiction and review.⁸

15. KPP repeats its earlier arguments in its February 3, 2011 and February 8, 2011 protests.⁹ In addition, KPP requests that the Commission consolidate the two proceedings because the issues presented in Docket No. ER11-2677-000 (and Docket No. ER11-2677-001) are essentially the same as those pending in Docket No. ER10-1697-000.¹⁰

B. Answers

1. Reclassification of 34.5 kV Facilities

16. In their answers to KPP's protest, Mid-Kansas and the KCC argue that KPP is, in essence, seeking Commission action in a matter subject to the KCC's jurisdiction.¹¹ Mid-Kansas and the KCC state that the KCC should decide whether the facilities at issue here are transmission or distribution facilities.¹² Mid-Kansas and the KCC assert that Mid-Kansas is not a "public utility" under the FPA. Mid-Kansas explains that it is exempt from the FPA under the Energy Policy Act of 2005 as an entity directly or

⁸ KPP November 19 Protest at 3, n.1, citing *MidAmerican Energy Co.*, 90 FERC ¶ 61,105, at 61,337 (2000) (footnotes omitted).

⁹ KPP February 3 Protest at 6-9; KPP February 8 Protest at 1-2.

¹⁰ KPP February 3 Protest at 2, 8-9.

¹¹ Mid-Kansas December 7 Answer at 8-13; KCC December 15 Answer at 4-7.

¹² Mid-Kansas December 7 Answer at 8-9; KCC December 15 Answer at 4-7.

indirectly owned by cooperatives that are Rural Utilities Service-financed cooperatives.¹³ Therefore, the proper venue for review is the KCC, according to Mid-Kansas.¹⁴

2. Wholesale Distribution Service Rate

17. Mid-Kansas contends that Schedule 10 of the SPP tariff contemplates local delivery agreements and state regulatory review:

The transaction-specific information, including all customer-specific rates and charges, will be set forth in the Service Agreement between the Transmission Provider and the Transmission Customer for the associated service being provided pursuant to the Tariff. All rates and charges for Wholesale Distribution Service shall be on file with the appropriate agency as required by law or regulation.¹⁵

18. However, Mid-Kansas claims that Schedule 10 does not contemplate that all agreements will be filed with the Commission for a just and reasonable review. Mid-Kansas states that it assumed that SPP filed its wholesale distribution service rate with the Commission for informational purposes because Mid-Kansas's state regulatory agency, the KCC, establishes the rates, terms and conditions of the wholesale distribution service.¹⁶

19. Mid-Kansas adds that KPP mischaracterizes the wholesale distribution service rate in its protest. According to Mid-Kansas, the rate does not represent SPP "charges" because SPP does not bill for or collect such charges. Mid-Kansas argues that in fact, no SPP transmission owner rates or revenue requirements are listed in the wholesale distribution service rate, and no local delivery facilities are included in the revenue requirement for SPP's transmission rates.

20. Mid-Kansas and the KCC argue that KPP has misapplied the Commission's holding in *Western Farmers* because Mid-Kansas is fully regulated by the KCC and is charging rates under tariffs that have been in place for many years. According to Mid-Kansas and the KCC, SPP does not bill for and collect Schedule 10 charges, unlike the charges at issue in *Western Farmers*. Thus, Mid-Kansas's situation is more closely

¹³ KCC December 15 Answer at 5-6 and Mid-Kansas December 7 Answer at 9, n.15, citing Energy Policy Act of 2005, Pub. L. No. 109-58, § 1291, 119 Stat. 594, 985 (2005) (amending 16 U.S.C. § 824(f)).

¹⁴ Mid-Kansas December 7 Answer at 8-9.

¹⁵ *Id.* at 15, citing SPP OATT, Sixth Revised Volume No. 1 at 310.

¹⁶ KCC December 15 Answer at 5.

analogous to the Commission's order in *New York Independent System Operator, Inc.*, in which the Commission found that a non-jurisdictional utility is subject to a comparability review but not to the just and reasonable standard of review.¹⁷

21. In its answer, KPP urges the Commission to decide whether the lower voltage facilities serving KPP should be classified as transmission facilities or wholesale distribution facilities. If the Commission determines that the facilities are transmission facilities, KPP argues that their costs should be included in the zonal transmission rates charged by SPP, "which are clearly subject to the Commission's exclusive jurisdiction."¹⁸

22. Mid-Kansas repeats these arguments in its February 3, 2011 protest.¹⁹ The KCC reiterates its earlier arguments in its March 4, 2011 answer.²⁰

C. SPP Response to Deficiency Letter and Comments

23. In its response to the Deficiency Letter, SPP states that it has no role with regard to the negotiation or administration of the service agreements for local delivery service.²¹ SPP also clarifies that it does not have functional control over the 34.5 kV facilities Mid-Kansas will use to provide KPP with local delivery service.²²

24. In its comments on SPP's response to the Deficiency Letter, Mid-Kansas asserts that SPP fails to address the Commission's question of whether the local delivery agreements were filed with the Commission for informational purposes or because they set forth rates, terms and conditions of service that SPP provides.²³ Mid-Kansas requests that the Commission clarify either: (1) that the Mid-Kansas local delivery agreements need not be included as part of SPP's filing of its service agreements; or in the alternative, (2) that they should be included solely for informational purposes.²⁴

¹⁷ *Id.* at 6-7; Mid-Kansas December 7 Answer at 15-16, both citing *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,366 (2005).

¹⁸ KPP Answer at 3-5.

¹⁹ Mid-Kansas February 3 Protest at 3-7.

²⁰ KCC March 4, 2011 Answer at 4-7.

²¹ Response to Deficiency Letter at 1-2.

²² *Id.* at 4.

²³ Mid-Kansas Comments on Response to Deficiency Letter at 1-2.

²⁴ Response to Deficiency Letter at 3.

25. The KCC asserts that SPP's claim that it "exercises functional control over transmission facilities" is overly broad because it implicates all transmission facilities.²⁵ The KCC states that it retains jurisdiction over the local delivery service facilities in question in this proceeding because the owners of those facilities are Rural Utility Service-financed cooperatives. The KCC requests that the Commission expressly state that the acceptance of the July 1 Agreements, as amended, is subject to the final determination of the KCC as to the classification of the subject facilities, as well as the justness and reasonableness of the service and operating agreements for local delivery service for such facilities.

IV. Discussion

A. Procedural Issues

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), KPP's July 7, 2010 motion to intervene and Mid-Kansas's December 7, 2010 motion to intervene serve to make KPP and Mid-Kansas parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), the Commission will grant the late-filed motion to intervene of the KCC, given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits answers to protests and answers unless otherwise ordered by the decisional authority. We will accept Mid-Kansas, the KCC, and KPP's answers because they provided information that assisted us in our decision-making process.

B. Substantive Issues

28. The Commission agrees with the KCC and Mid-Kansas that Mid-Kansas is generally exempt from regulation as a public utility under the FPA because it is an entity that is "directly or indirectly" owned by cooperatives that are Rural Utilities Service-financed cooperatives.²⁶ KPP cites *Western Farmers* in support of its argument that the Commission has jurisdiction over Mid-Kansas's wholesale distribution charges.²⁷ In that

²⁵ KCC Comments on Response to Deficiency Letter at 1-3 (citing SPP's response to the Deficiency Letter at 4).

²⁶ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1291, 119 Stat. 594, 985 (2005) (amending 16 U.S.C. § 824(f)).

²⁷ KPP Protest at 4.

order, the Commission concluded that the rates for the ancillary, energy imbalance and wholesale distribution services at issue were SPP rates and thus jurisdictional. The Commission stated:

[T]he service at issue is provided by SPP, i.e., a jurisdictional public utility, pursuant to its filed OATT, i.e., a jurisdictional rate schedule, and at rates provided in the OATT, i.e., at jurisdictional rates.²⁸

29. Contrary to the Commission's finding in *Western Farmers*, the wholesale distribution service at issue here is not provided by SPP or any other entity that is itself subject to the Commission's jurisdiction.²⁹ Moreover, the facilities at issue are not under SPP's functional control. The wholesale distribution services at issue in this proceeding are not provided under a jurisdictional rate schedule.³⁰ SPP neither bills nor collects for the services.³¹ Accordingly, we find that the rates for the wholesale distribution service at issue here are not subject to the Commission's jurisdiction.

30. KPP also cites *MidAmerican Energy Co.* in arguing that the Commission retains the ultimate authority to determine the classification, as transmission versus local distribution, of the lower-voltage facilities at issue in this proceeding.³² However, the language KPP cites in *MidAmerican Energy Co.* refers to the Commission's retention of ultimate authority over the classification of facilities owned by "public utilities."³³ As discussed above, Mid-Kansas is exempt from regulation as a public utility, and accordingly, KPP's reliance on *MidAmerican Energy Co.* is misplaced. Therefore, the classification of the Mid-Kansas facilities at issue in this proceeding is not before the Commission.

²⁸ *Supra*, n. 26.

²⁹ *Western Farmers*, 114 FERC ¶ 61,241 at P 17.

³⁰ *Cf.*, *Western Farmers, order on reh'g*, 119 FERC ¶ 61,307 at P 11.

³¹ *See supra* P 5.

³² *See supra* P 14 (quoting *MidAmerican Energy Co.*, 90 FERC ¶ 61,105 at 61,337).

³³ The Commission "reiterate[d] our finding in Order No. 888 that to the extent that any facilities, regardless of their original nominal classification, in fact, prove to be used by *public utilities* to provide transmission service in interstate commerce in order to deliver power and energy to wholesale purchasers, such facilities become subject to this Commission's jurisdiction and review." *Id.* (emphasis added).

31. In light of the jurisdictional determinations made here, we will deny KPP's request to suspend the proposed wholesale distribution charges, place them into effect subject to refund, and initiate hearing procedures be held in abeyance pending the KCC proceedings. Instead, the Commission accepts the July 1 Agreements for filing as amended, with the exception of Attachment B, which is accepted for informational purposes only, without suspension or hearing. In addition, we will grant waiver of the Commission's 60-day prior notice requirement.³⁴

32. With regard to KPP's motion to consolidate Docket Nos. ER10-1697-000, ER11-2677-000, and ER11-2677-001, the Commission generally consolidates cases when there are common issues of law and fact for purposes of settlement, hearing, and decision only. Here, we are accepting the July 1 Agreements for filing without further proceedings. Accordingly, we will deny KPP's motion to consolidate Docket Nos. ER10-1697-000 ER11-2677-000, and ER11-2677-001.

The Commission orders:

(A) The July 1 Agreements, as amended, are hereby accepted for filing, with exception, to become effective June 1, 2010, as discussed in the body of this order.

(B) KPP's motion to consolidate Docket Nos. ER10-1697-000, ER11-2677-000, and ER11-2677-001 is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁴ See *Prior Notice Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,983-984, *order on reh'g*, 65 FERC ¶ 61,081 (1993) ("for service agreements [under umbrella tariffs]...waiver of notice will be granted if service agreements are filed within 30 days after service commences").