

144 FERC ¶ 61,253
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kansas Municipal Energy Agency

Docket No. EL13-84-000

v.

Sunflower Electric Power Corporation
Mid-Kansas Electric Company, LLC
and
Southwest Power Pool, Inc.

ORDER DISMISSING COMPLAINT

(Issued September 30, 2013)

1. On August 8, 2013, the Kansas Municipal Energy Agency (Kansas Municipal) filed a complaint (Complaint) under section 206 of the Federal Power Act (FPA)¹ against Sunflower Electric Power Corporation (Sunflower), Mid-Kansas Electric Company, LLC (Mid-Kansas, and together with Sunflower, Mid-Kansas/Sunflower) and the Southwest Power Pool, Inc. (SPP), in which Kansas Municipal maintains that Sunflower has registered the load and city-owned generation of certain members of Kansas Municipal (EMP2 Cities) in the SPP integrated marketplace (Integrated Marketplace) without authorization. Kansas Municipal maintains that by refusing to de-register EMP2 Cities' loads and resources, Sunflower is improperly preventing Kansas Municipal from registering for the Integrated Marketplace. Kansas Municipal also states that Sunflower has submitted false and misleading information to SPP in violation of the SPP tariff and market behavior rules, and it argues that the Commission should consider initiating an investigation.

2. As discussed below, the Commission dismisses Kansas Municipal's complaint on the ground that the dispute is appropriately before a state court.

¹ 16 U.S.C. § 824e (2006).

I. Background

A. Description of the Parties

3. Kansas Municipal is a municipal energy agency which plans, finances, and constructs projects for the purchase, sale, generation, and transmission of electricity for the purpose of securing electric and other energy for its 77 municipal members, including the EMP2 Cities.² The EMP2 Cities are small municipal electric systems located in the Mid-Kansas electric service territory that have contracted with Kansas Municipal to participate in a power pool known as the Energy Management Project 2 (EMP2). Kansas Municipal manages the combined power supply portfolio of the EMP2 Cities, and the EMP2 Cities receive transmission service under Kansas Municipal's network integration transmission service agreement with SPP.

4. Sunflower is a generation and transmission cooperative with six rural electric distribution cooperative members. Sunflower has outstanding Rural Utility Service debt and is not a public utility. Sunflower is a member of SPP.

5. Mid-Kansas was formed by Sunflower's member cooperatives in 2005 for the purpose of purchasing all of Aquila, Inc.'s Kansas electric assets and operations. Sunflower operates Mid-Kansas' generation and transmission assets. Mid-Kansas is a member of SPP. Kansas Municipal contracted with Mid-Kansas on March 19, 2009 to provide energy imbalance service for the EMP2 Cities under a load following agreement (LFA) under which Mid-Kansas provides the difference between the EMP2 Cities' hourly energy requirements and the energy scheduled and generated by, and delivered to, the EMP2 Cities. The LFA expires on December 31, 2015.

6. Kansas Municipal states that SPP is launching the Integrated Marketplace commencing March 1, 2014. The Integrated Marketplace will include a market-based congestion management process and energy markets, including day-ahead and real-time energy and operating reserve markets, and allocation of auction revenue rights and a market for transmission congestion rights. Kansas Municipal states that it has included SPP as a respondent in the proceeding because SPP administers the SPP open access transmission tariff (Tariff), and Kansas Municipal maintains that it is SPP that must accept Kansas Municipal as a market participant for the EMP2 Cities under the Tariff.

² The EMP2 Cities include the cities of Ashland, Beloit, Hoisington, Lincoln, Osborne, Pratt, Russell, Stockton, Washington, and Sharon Springs, Kansas.

B. Kansas Municipal's Complaint

7. Kansas Municipal maintains that Sunflower has registered the load and generation of the EMP2 Cities in the SPP Integrated Marketplace without authorization. Kansas Municipal states that while preparing its registration materials, it confirmed with SPP that Sunflower had been registered as the market participant for the EMP2 Cities' load in the energy imbalance service market.³

8. Kansas Municipal states that it informed Sunflower that it was preparing its registration information, and it requested certain information from Sunflower, which Sunflower subsequently provided. Kansas Municipal then sent Sunflower a summary of SPP market registration updates it was planning to make, and it informed Sunflower that it expected that Sunflower would de-register the EMP2 Cities' load by SPP's June 15, 2013 deadline.⁴

9. Kansas Municipal states that it submitted its registration to SPP, and SPP subsequently notified it that there were conflicts with all of the EMP2 Cities' resources and loads. Kansas Municipal states that Sunflower had not de-registered as the market participant for the EMP2 Cities' load, and Sunflower had registered the EMP2 Cities' city-owned generation resources.⁵

10. Kansas Municipal states that SPP advised it that SPP would hold Kansas Municipal's registration until SPP received clarification on how to proceed. According to Kansas Municipal, SPP advised that if the dispute is not resolved in time for the October modeling activities, SPP would terminate the load and resources from its October 2013 model update.⁶

11. Kansas Municipal states that it currently schedules the EMP2 Cities' load, decides how it will meet the EMP2 Cities' requirements, and dispatches the EMP2 Cities' resources. Kansas Municipal states the EMP2 Cities designated it as their market participant effective January 1, 2014, and as the EMP2 Cities' market participant in the Integrated Marketplace, it would continue to manage the EMP2 Cities' load and power supply resources as it does today.⁷

³ Complaint at 9.

⁴ *Id.* at 9-10.

⁵ *Id.* at 11.

⁶ *Id.* at 11-12.

⁷ *Id.* at 12-13.

12. Kansas Municipal argues that Sunflower's efforts to become the market participant for the EMP2 Cities are unworkable.⁸ Kansas Municipal explains that it will be allocated auction revenue rights for the EMP2 Cities, which can be converted to transmission congestion rights, but Sunflower's registration would separate the load and resources from the allocation of transmission congestion rights used to hedge against possible congestion associated power deliveries to the EMP2 Cities. As market participant in the Integrated Marketplace, Kansas Municipal is responsible for the daily, monthly and annual reporting of the EMP2 Cities' data to SPP, and it will be responsible for receiving, reviewing, and if necessary, disputing billing statements from SPP. Thus, Kansas Municipal contends that Sunflower would have no information upon which to submit real time energy supply and offer information to SPP on behalf of the EMP2 Cities.⁹

13. Kansas Municipal argues that Mid-Kansas/Sunflower lack the contractual arrangements with Kansas Municipal or the EMP2 Cities needed to authorize Sunflower to make decisions for the EMP2 Cities. It maintains that the only explanation it received from Sunflower regarding a contractual relationship consisted of vague references to the LFA between Mid-Kansas and Kansas Municipal.¹⁰ Kansas Municipal states that Sunflower is not a party to the LFA, and it is improper for Sunflower to rely on the LFA to justify its actions. Kansas Municipal also maintains that the LFA grants no such authority to Mid-Kansas. According to Kansas Municipal, the LFA only addresses the provision of energy imbalance in the current energy imbalance service market, and it does not contemplate the Integrated Marketplace or address participation in it. Kansas Municipal states that the LFA does not cede control of the EMP2 Cities' assets or decisions to Mid-Kansas or Sunflower.¹¹

14. Kansas Municipal maintains that if the LFA intended to appoint Sunflower or Mid-Kansas as the EMP2 Cities' market participant, it would contain provisions addressing the issue, and it would use the term "market participant" and refer to the Integrated Marketplace. Kansas Municipal states that the LFA does not deal with the registration of resources or speak to the conduct of operations in the Integrated Marketplace.¹²

⁸ *Id.* at 14.

⁹ *Id.* at 13-14.

¹⁰ *Id.* at 15.

¹¹ *Id.*

¹² *Id.* at 15-16.

15. Kansas Municipal maintains that Sunflower's market registration with SPP contains several misrepresentations. According to Kansas Municipal, the SPP Tariff requires the customer to represent and warrant that its actions have been duly authorized. Kansas Municipal maintains that Sunflower incorrectly represented to SPP that it was authorized to transact on behalf of the EMP2 Cities. Kansas Municipal states that it informed Sunflower that Kansas Municipal was the proper party to register for the EMP2 Cities, and Sunflower knows that it was not authorized to do so.¹³

16. Kansas Municipal requests that the Commission grant fast track processing and expedited treatment for its complaint so that it can be included as the market participant for the EMP2 Cities' loads and resources in SPP's October 2013 model update.¹⁴ Alternatively, if the Commission does not issue an order determining that Kansas Municipal is the proper market participant for the EMP2 Cities' loads and resources by the deadline for the October 2013 model, Kansas Municipal requests that the Commission authorize and direct SPP to accept Kansas Municipal as the market participant notwithstanding the deadline.¹⁵

17. Kansas Municipal states that the financial impact to Kansas Municipal and EMP2 Cities cannot be determined at this time, although there will be financial harm in the event the issue is not resolved.¹⁶

II. Notice of Complaint and Responsive Pleadings

18. Notice of Kansas Municipal's complaint was published in the *Federal Register*, 78 Fed. Reg. 50,409 (2013), with interventions, protests and respondents' answer to the complaint due on or before August 22, 2013. Mid-Kansas/Sunflower and SPP filed timely answers to Kansas Municipal's complaint. Kansas Municipal filed an answer to Mid-Kansas/Sunflower and SPP's answers. Mid-Kansas/Sunflower filed an answer to this answer, and Kansas Municipal filed an answer to it.

¹³ *Id.* at 17-18.

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ *Id.* at 23.

III. Answers

A. SPP Answer

19. SPP states that it views the complaint's substantive allegations as involving the intent of the parties to the LFA, and it takes no position on them.¹⁷ SPP explains that its interests lie in ensuring that the load and resources in dispute are registered in its Integrated Marketplace. According to SPP, it is imperative that all required load, resource, and transmission service information be collected and verified so that the required model updates are in place prior to market start.¹⁸

20. SPP states that pending further Commission direction, or notification that the LFA parties have resolved their dispute, it will include the load related to the EMP2 Cities in its October 1 market model and recognize Sunflower as the market participant for these assets. SPP explains that this decision reflects its need to account for all load in the market models in anticipation of the start of the Integrated Marketplace. SPP states that registering these loads to Sunflower is consistent with current treatment of these loads in the preexisting energy imbalance service market models.¹⁹

21. SPP maintains that it will ensure that the EMP2 Cities' resources are captured in the Integrated Marketplace models, but it will recognize Kansas Municipal as the market participant for these assets. SPP states that the Pratt 5 resource asset is registered in its current energy imbalance service models to Kansas Municipal, and it will continue that registration in the Integrated Marketplace.²⁰

22. SPP states that none of the other resources that are the subject of the complaint are currently registered in the energy imbalance service market, but it must designate a market participant for them for registration purposes. SPP notes that Kansas Municipal states that it manages this power supply portfolio for the EMP2 Cities. SPP concludes that Kansas Municipal would appear to be the entity more closely connected to these assets, and registering these other resources to Kansas Municipal is also consistent with the current registration of the Pratt 5 resource asset in the energy imbalance service market. SPP states that it will

¹⁷ SPP Answer at 5-6.

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 7.

²⁰ *Id.* at 8.

register the EMP2 Cities resources to Kansas Municipal in the amounts included in Kansas Municipal's registration.²¹

23. SPP explains that for purposes of administering the Integrated Marketplace, its default position is to retain, to the extent possible, the asset modeling and registration treatment as reflected in SPP's models. This allows SPP to meet the critical objective of ensuring that the assets are registered and participating in the Integrated Marketplace.²²

24. SPP notes that there are important and irreversible consequences to its registration decisions, particularly as concerns the registration of generation. SPP states that Sunflower's proposed registration, which it is not accepting, would have these resources registered as block demand resources. In contrast, Kansas Municipal's proposed registration, which SPP is accepting, registers these resources as generation assets. Whether a resource is registered as block demand or conventional generation has implications for the market models and the manner of participation in the Integrated Marketplace and, once modeled, cannot be changed until the next model update.²³

B. Mid-Kansas/Sunflower Answer

25. Mid-Kansas/Sunflower maintain that their dispute with Kansas Municipal is a contract dispute. They state that the registration and market participation activities that Kansas Municipal wishes to pursue are governed by contract, and if the Commission were to grant the complaint, it must first determine the parties' rights and responsibilities under the LFA.²⁴ Mid-Kansas/Sunflower argue that in the past the Commission has found that such disputes must be resolved in court, not at the Commission. They note that a state-court proceeding has been instituted in this matter,²⁵ and they argue that the Commission should dismiss the complaint

²¹ *Id.*

²² *Id.* at 8-9.

²³ *Id.* at 9-10.

²⁴ Mid-Kansas/Sunflower Answer at 37.

²⁵ See Exhibit MK-8 to Mid-Kansas/Sunflower Answer (Petition filed in the District Court of Ellis County, Kansas on August 15, 2013).

so that the dispute can be resolved in court.²⁶ They also explain the position that they take in the dispute with Kansas Municipal.

26. Mid-Kansas/Sunflower state that under the LFA, Mid-Kansas agreed to provide services to Kansas Municipal, including firm energy or load-following services, and Kansas Municipal agreed to provide capacity and energy to Mid-Kansas.²⁷ Mid-Kansas/Sunflower assert that the LFA expressly recognizes Sunflower's role as balancing authority, as well as the right of Mid-Kansas and Sunflower to allocate the Mid-Kansas rights and responsibilities under the LFA among themselves.²⁸

27. Mid-Kansas/Sunflower state that the steps currently taken under the LFA, and those that will be taken under the LFA when the Integrated Marketplace goes into effect, will be essentially the same, and nothing about the Integrated Marketplace makes continued performance of the LFA impossible.²⁹ Mid-Kansas/Sunflower maintain that the LFA does not end, nor do their rights and responsibilities change, because SPP is moving from the current market system to the Integrated Marketplace. They state that the LFA does not mention that its applicability is subject to any particular market, and it gives Sunflower the right to register the EMP2 Cities' load and resources with SPP without regard to a particular market design. They also maintain that the LFA expressly contemplates changes to market rules by providing for reimbursements between the parties in instances where new SPP transmission or pricing policies cause a party to incur additional expenses.³⁰

28. Mid-Kansas/Sunflower argue that Commission precedent supports resolution of contract disputes such as this one in court. They state that the Commission uses a three-factor test in determining whether to exercise jurisdiction over a contract dispute. Specifically, the Commission considers (1) whether it possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation

²⁶ Mid-Kansas/Sunflower Answer at 38.

²⁷ *Id.* at 40.

²⁸ *Id.* at 41-42.

²⁹ *Id.* at 42.

³⁰ *Id.* at 46.

of the type of question raised by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.³¹

29. Mid-Kansas/Sunflower maintain that none of the three factors is met here. They argue that their dispute with Kansas Municipal turns on the interpretation of the intention of the parties to the LFA, and this does not raise an issue on which the Commission possesses special expertise.³² They contend that there is no need for uniformity of interpretation because such uniformity is not required where the meaning of a contract provision depends on the intentions of the parties to the contract.³³ Mid-Kansas/Sunflower also assert that this case is not important in relation to the Commission's regulatory policies because the Commission generally treats questions of contract interpretation in this way, and because the LFA was filed with, was approved by, and is subject to the exclusive regulatory jurisdiction of the Kansas Corporation Commission. Mid-Kansas/Sunflower argue that if the interpretation of the LFA is important to the regulatory policies of any regulatory body, it is important to the policies of the Kansas Corporation Commission.³⁴

IV. Discussion

A. Procedural Matters

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or answers unless otherwise ordered by the decisional authority. We are not persuaded to accept any of the answers to answers filed in this proceeding and will, therefore, reject them.

B. Commission Determination

31. The dispute between Kansas Municipal and Mid-Kansas/Sunflower concerns whether Kansas Municipal or Sunflower is the entity authorized to register as the market participant for the EMP2 Cities in SPP's Integrated Marketplace. Mid-Kansas/Sunflower maintain that the LFA authorizes Sunflower

³¹ Mid-Kansas/Sunflower Answer at 51 (citing *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175 (1979) (*Arkla*)).

³² *Id.* at 51-53.

³³ *Id.* at 54.

³⁴ *Id.* at 55-56.

to do this; Kansas Municipal argues that the LFA does not. The resolution of this dispute therefore requires one to determine which party's interpretation of the LFA is correct.

32. Given the facts of this case and positions taken by the parties, we will exercise our discretion and decline to exercise primary jurisdiction. Instead, we will allow this matter to be decided in the first instance by the appropriate state court. We are guided in this decision by the Commission's decision in *Arkla*. There the Commission devised a three-part test for deciding whether to assert primary jurisdiction over a contractual matter that otherwise would be subject to judicial review. The Commission stated the three-part test as follows:

Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission.³⁵

33. All three of these factors support our refusal to resolve the contract dispute presented here. First, we do not possess special expertise in the matter in dispute, which is a question of contract interpretation of the type routinely dealt with by courts. Second, we find that the Commission's responsibilities do not require a uniform interpretation of the contractual language at issue here. An interpretation of this language under the law governing the LFA, i.e., Kansas law, will not impinge significantly on the operations of public utilities across the nation even if Kansas law leads to a different conclusion than would be reached under the law of some other state. Such differences are a part of our legal system, and public utilities, like other commercial entities, are able to arrange their affairs accordingly. Third, the LFA is an agreement between entities that are not subject to Commission jurisdiction, and it was not filed, and did not need to be filed, with the Commission for purposes of Commission review and approval under the FPA. The resolution of the dispute presented here requires interpretation of the LFA itself, not the Commission's governing statutes, regulations, or policy. As such,

³⁵ *Arkla*, 7 FERC at 61,322. The Commission has applied these same factors in addressing numerous other contractual disputes. See, e.g., *Trigen-Syracuse Energy Corp.*, 95 FERC ¶ 61,326 (2001); *Southern California Water Co. v. Southern California Edison Co.*, 94 FERC ¶ 61,286 (2001).

whether the LFA allows Kansas Municipal or Sunflower to register as the market participant does not implicate our regulatory responsibilities.

34. Additionally, we find SPP's proposed plan of action to register the EMP2 resources as Kansas Municipals' resources and to register the EMP2 loads to Sunflower is appropriate in these circumstances. Accordingly, we direct SPP to proceed as specified in its answer.

35. Finally, we dismiss Kansas Municipal's request to launch an investigation regarding the representations made by Mid-Kansas/Sunflower. The accuracy of their representations may hinge on the correct interpretation of the LFA which, as discussed above, is being addressed by the state court. Thus, an investigation on such matters will not be initiated at this time.

The Commission orders:

Kansas Municipal's complaint is hereby dismissed, as discussed in the body of this order.

By the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.