145 FERC ¶ 61,115
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.

Southwest Power Pool, Inc. Docket No. ER13-2382-000
Tri-County Electric Cooperative, Inc.

ORDER GRANTING TEMPORARY WAIVER

(Issued November 8, 2013)

1. On September 16, 2013, Southwest Power Pool, Inc. (SPP) and its member Transmission Owner, Tri-County Electric Cooperative, Inc. (Tri-County) (collectively, Applicants), submitted a joint request for a temporary, limited waiver of the provisions of Addendum 17 of Attachment H of the SPP Open Access Transmission Tariff (Tariff) to permit SPP and Tri-County to suspend temporarily their respective obligations to implement the annual update to Tri-County's Annual Transmission Revenue Requirement (ATRR) on January 1, 2014, pursuant to the rate protocols contained in the Tariff (2014 Annual Update). As discussed below, we will grant Applicants a temporary waiver until the issuance of the Commission's order on the Initial Decision in Docket No. ER12-959-000; however, our grant of this temporary waiver does not prejudge the outcome of the proceeding in Docket No. ER12-959-000.

I. Background

2. On February 1, 2012, SPP submitted for filing in Docket No. ER12-959-000 revisions to the SPP Tariff under section 205 of the Federal Power Act (FPA).[1] The purpose of the revisions was to incorporate a transmission formula rate and applicable protocols for the facilities owned by Tri-County, and revisions to Attachment H, stating the Tri-County ATRR and associated transmission rates of SPP.[2]

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[1] 16 U.S.C. § 824d (2012).

[2] In August 2010, Tri-County became a member of the SPP Regional Transmission Organization, and since then, has been a Transmission Owner in SPP's Zone 11. Applicants' Waiver Request at 2-3 (citing *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,009 (2004), *on reh'g*, 110 FERC ¶ 61,137 (2005)).

3. On March 30, 2012, the Commission accepted the proposed SPP Tariff rates for filing, to become effective April 1, 2012, and found that the record did not provide enough information to determine the appropriate classification of the facilities underlying Tri-County's ATRR and that Tri-County's formula rate and protocols raised issues of material fact. Therefore, the Commission established hearing and settlement judge procedures.[3]

4. On October 26, 2012, Xcel Energy Services, Inc. (Xcel) filed a complaint in Docket No. EL13-15-000 on behalf of Southwestern Public Service Company (SPS) pursuant to section 206 of the FPA, asserting that SPP's transmission rates for the SPS pricing zone (SPP Zone 11) are unjust and unreasonable, because the rates include the costs of Tri-County facilities that are not Transmission Facilities as defined by Attachment AI of SPP's Tariff.

5. SPP then implemented an update to Tri-County's ATRR effective January 1, 2013 (2013 Annual Update). On December 31, 2012, Xcel submitted a complaint under section 206 of the FPA in Docket No. EL13-35-000, asserting that the 2013 Annual Update should not have been implemented because the initial rate had not yet been approved by the Commission as required by SPP's proposed formula rate protocols.

6. On February 21, 2013, the Commission issued an order on rehearing of the March 30 Order, in which it directed SPP to submit a compliance filing that either: (a) removes from SPP's OATT the tariff sheets under which SPP has been collecting Tri-County's rate and provides that SPP will cease collecting the Tri-County rate effective as of the date after the date of that order and until the Commission issues an order following the hearing and settlement judge proceedings; or (b) provides a voluntary commitment by Tri-County to refund the difference between the proposed rate and the rate ultimately determined by the Commission to be just and reasonable, following hearing and settlement judge procedures.[4] Also on February 21, 2013, the Commission

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[3] *Southwest Power Pool, Inc.*, 138 FERC ¶ 61,231, at PP 14-15 (2012) (March 30 Order). The parties agreed to divide the hearing and settlement judge proceeding on SPP's proposed tariff rates into two Phases, with Phase I addressing whether any of the facilities proposed by Tri-County qualified as transmission for inclusion in SPP Zone 11 and Phase II addressing the reasonableness of the proposed formula rate protocols. *Southwest Power Pool, Inc.*, Order of Chief Judge Phasing Proceedings, Suspending Phase II for 60 Days, and Waiving Period for Answers, Docket Nos. ER12-959-003 and ER12-959-004 (Aug. 22, 2012).

[4] *Southwest Power Pool, Inc.*, 142 FERC ¶ 61,135, at P 16 (2013) (Rehearing Order).

issued orders on each of the complaints, setting each for hearing and settlement judge procedures.[5]

7. On March 19, 2013, in compliance with the Rehearing Order, SPP filed a letter prepared by Tri-County stating that Tri-County voluntarily committed to "refund the difference between the proposed rate and the rate ultimately determined by the Commission to be just and reasonable in Docket No. ER12-959, effective as of the day after the date of the February 21, 2013 Order."[6]

8. On April 22, 2013, an Initial Decision was issued in which the Presiding Judge found that the Tri-County facilities at issue did not qualify as Transmission Facilities under the Tariff. Therefore, the Presiding Judge concluded that Tri-County's facilities should not be rolled into SPP's Zone 11 rates.[7] The Initial Decision is currently pending before the Commission, and Phase II (which will address the reasonableness of the proposed formula rate protocols) is suspended pending Commission action on the Initial Decision.[8]

II. Applicants' Request for Limited Waiver

9. Applicants seek a waiver of the provisions of the Tri-County rate protocols contained in Addendum 17 of Attachment H of the SPP Tariff, and any other provisions of the Tariff, that otherwise require SPP to implement an annual update to Tri-County's ATRR to become effective on January 1, 2014. Applicants assert that unless waiver is granted, they will soon implement the annual update to Tri-County's ATRR, which will require preparation of a substantial amount of data and supporting documentation in order to populate the formula rate that SPP will post on its website for public review and comment.[9] Applicants state that Tri-County's preliminary analysis indicates that the

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[5] *Southwestern Public Service Company v. Southwest Power Pool, Inc.*, 142 FERC ¶ 61,136 (2013) (Docket No. EL13-15-000); *Southwestern Public Service Co. v. Southwest Power Pool, Inc.*, 142 FERC ¶ 61,134 (2013) (Docket No. EL13-35-000). On March 12, 2012, Docket No. EL13-35-000 was consolidated with Docket No. EL13-15-000. *Southwestern Public Service Company v. Southwest Power Pool, Inc.*, 142 FERC ¶ 63,016 (2013).

[6] SPP, Compliance Filing, Docket No. ER12-959-000 (filed Mar. 19, 2013).

[7] *Southwest Power Pool, Inc.*, 143 FERC ¶ 63,003, at P 112 (2013) (Initial Decision).

[8] *Southwest Power Pool, Inc.*, Order of Chief Judge Continuing Suspension of Phase II Proceedings, Docket No. ER12-959-004 (July 8, 2013).

[9] Applicants' Waiver Request at 6.

2014 Annual Update would result in an increase to the rates currently in effect that are being collected subject to refund, and that any such annual update would likely be challenged, as has occurred with Tri-County's 2013 Annual Update.

10. Applicants state that in order to avoid the unnecessary expenditure of resources by the Commission and the parties, SPP and Tri-County request a temporary, limited waiver of the Tri-County formula rate protocols found in Addendum 17 of Attachment H of SPP's Tariff that effectuates Tri-County's 2014 Annual Update until after the Commission issues its order on the merits of the Initial Decision. Applicants assert that if their waiver request is granted, they commit to post the 2014 Annual Update 60 days after the Commission's order on the Initial Decision, or as otherwise ordered by the Commission. In support of their request, Applicants state that their waiver request satisfies the Commission's standard for granting waivers "'where good cause for a waiver of limited scope exists, there are no undesirable consequences and the resultant benefits to customers are evident.'"[10]

11. In addition, Applicants argue that granting the waiver will allow Tri-County and SPP to maintain the status quo with respect to Tri-County's current rate for the 2013 rate year that is in effect subject to refund. They state that the waiver will be temporary, effective until such time as the Commission's order on the Initial Decision determines how and to what extent that rate should change. Applicants also contend that nothing in their request for waiver is intended to affect or diminish any party's or the Commission's rights under FPA section 206, and that Commission approval of the waiver will not cause any delay in the distribution of any funds that Tri-County may eventually be required to refund. Finally, they argue that to the extent any increase is eventually implemented under the delayed Annual Update, all parties and the Commission will have all their rights to challenge those increased charges at such time.[11]

III. <u>Notice of Filing and Responsive Pleadings</u>

12. Notice of SPP's filing was published in the *Federal Register*, 78 Fed. Reg. 58,297 (2013), with interventions, protests, and comments due on or before October 7, 2013. Central Valley Electric Cooperative, Inc., Farmers' Electric Cooperative, Inc., Lea County Electric Cooperative, Inc., and Roosevelt County Electric Cooperative, Inc. (collectively, New Mexico Cooperatives) filed a timely motion to intervene. Xcel and Occidental Permian, Ltd. (Occidental) each filed timely motions to intervene and comments.

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[10] *Id*. at 7 (quoting *Southwest Power Pool, Inc.*, 126 FERC ¶ 61,012, at P 36, *on reh'g*, 126 FERC ¶ 61,215 (2009); *Cal. Indep. Sys. Operator*, 124 FERC ¶ 61,031, at P 19 (2008)).

[11] *Id*. at 8.

13. Xcel contends that annual updates cannot be implemented until the Commission approves an initial rate for Tri-County. Therefore, Xcel asserts that the requested waiver is unnecessary, but it also states that it does not object to the waiver request.[12] In the event the Commission's decision in Phase I of Docket No. ER12-959 allows Tri-County to have a transmission formula rate (and thus an annual update), Xcel requests clarification on: (1) the date upon which any 2014 Annual Update would become effective; and (2) whether the annual update process and review procedures set forth in the currently-effective protocols will commence upon SPP posting the 2014 Annual Update. Xcel also states that, absent substantial modifications, the protocols are unreasonable. As an example, Xcel argues that the protocols do not specify an effective date for each annual update.[13] Nonetheless, Xcel seeks assurance that the annual update process and review procedures set forth in the protocols will commence upon SPP posting the 2014 Annual Update, or, as proposed by SPP, 60 days after the Commission renders an order on the Initial Decision in Phase I of Docket No. ER12-959. Thus, Xcel states that the date upon which the 2014 Annual Update rate becomes effective should at a minimum conform to the protocols' annual update process and review procedures, as well.

14. Occidental does not object to a delay in the filing of the 2014 Annual Update, but it submits that there is no obligation or even a right to file an annual update under the express terms of SPP's Tariff unless and until the Commission has approved Tri-County's initial transmission formula rate.[14] Occidental argues that section 1.B of the protocols in Addendum 17 of Attachment H of the SPP Tariff provides that an annual update to Tri-County's ATRR can only occur "'after approval of Tri-County's initial Transmission Formula Rate'" and that to date, the Commission has only accepted Tri-County's initial formula rate. According to Occidental, the Commission has long recognized that acceptance of a rate is not the same as approval of a rate.[15] Occidental contends that the Commission should confirm that SPP does not have the authority under its Tariff (prior to a Commission order approving Tri-County's initial transmission formula rate, if any) to implement any annual updates to Tri-County's ATRR.

15. Occidental maintains that if the Commission decides to grant the requested waiver, it should clarify that the grant of the waiver is without prejudice to the resolution of Docket No. EL13-35, as the question of whether the 2013 Annual Update was implemented in accordance with the SPP Tariff is in dispute in that proceeding.

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[12] Xcel Comments at 1.

[13] *Id*. at 5.

[14] Occidental Comments at 1.

[15] *Id*. at 3 (citing 18 C.F.R. § 35.4 (2013)).

Occidental also asserts that, although SPP and Tri-County commit to post the 2014 Annual Update 60 days after the Commission's order on the Initial Decision, if the Initial Decision is affirmed, Tri-County will have no facilities eligible for rate recovery in SPP, and thus Tri-County's ATRR will be reduced to zero. Occidental states that because there cannot be an annual update of a zero ATRR, the Commission should not accept SPP and Tri-County's pledge to file an annual update to Tri-County's ATRR within 60 days of the order on the Initial Decision. Occidental asserts that the Commission instead should rule that a decision regarding the annual update will be made at such time as the Commission's order on the merits of the Initial Decision establishes findings that will determine how and to what extent that rate should change.[16]

IV. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[17] the timely motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Commission Determination

17. We will grant the Applicants' request for a temporary, limited waiver of the provisions of Addendum 17 of Attachment H of the SPP Tariff in order to permit SPP and Tri-County to suspend temporarily their respective obligations to implement the 2014 Annual Update to Tri-County's ATRR pursuant to the formula rate protocols contained in SPP's Tariff. The Commission has historically granted certain waiver requests in cases involving an emergency situation and/or an unintentional error.[18] However, waiver is not limited to those circumstances. Where good cause for a waiver of limited scope exists, there are no undesirable consequences, and the resultant benefits to customers are

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[16] *Id*. at 5.

[17] 18 C.F.R. § 385.214 (2013).

[18] *See, e.g., ISO New England Inc.,* 117 FERC ¶ 61,171, at P 21 (2006) (allowing limited and temporary change to tariff to correct an error); *Great Lakes Transmission L.P.*, 102 FERC ¶ 61,331, at P 16 (2003) (granting emergency waiver involving *force majeure* event for good cause shown); *TransColorado Gas Transmission Co.,* 102 FERC ¶ 61,330, at P 5 (2003) (granting waiver for good cause shown to address calculation in variance adjustment).

evident, the Commission has found that a one-time waiver is appropriate.[19] We find the waiver request in this proceeding meets these criteria.

18. We find that the requested waiver will not have undesirable consequences. Based on the comments submitted by Xcel and Occidental, who do not oppose the grant of a temporary waiver, we find that the grant of waiver will be beneficial because it will allow Tri-County and SPP to maintain the status quo with regard to Tri-County's current rate for the 2013 rate year that is in effect and subject to refund. We also base our decision to grant temporary waiver on Applicants' representation that the 2014 Annual Update would likely be challenged, and that this temporary waiver will avoid the unnecessary expenditure of resources by the Commission and the parties.[20]

19. Our grant of this temporary, limited waiver does not prejudge the outcome of the Commission's order on the merits of the Initial Decision issued in Docket No. ER12-959-003, or the proceedings pending in Docket Nos. EL13-15-000 and EL13-35-000. In addition, this temporary, limited waiver expires upon issuance of the Commission's order on the merits of the Initial Decision. Thus, we will accept Applicants' commitment to post the 2014 Annual Update within 60 days of the issuance of the Commission's order on the Initial Decision, unless otherwise ordered by the Commission.

20. With respect to Xcel's request for clarification regarding: (1) the date upon which any 2014 Annual Update would become effective; and (2) whether the Annual Update process and review procedures set forth in the currently-effective protocols will commence upon SPP posting the 2014 Annual Update, we find that these clarifications are more appropriately addressed in Phase II of the hearing and settlement judge procedures ordered in Docket No. ER12-959-004, which are suspended pending Commission action on the merits of the Initial Decision in Docket No. ER12-959-003. In addition, because we are granting this temporary, limited waiver without prejudice to the outcome of the order on the Initial Decision and the outcome of the proceedings in Docket Nos. EL13-15-000 and EL13-35-000, we find that it is unnecessary to address Occidental's request that the Commission confirm that SPP does not have authority under its Tariff to implement any annual updates to Tri-County's ATRR.

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[19] *See Cal. Indep. Sys. Operator Corp.*, 135 FERC ¶ 61,067 (2011) (finding good cause exists to grant limited waiver where the waiver would be of limited scope, there are no undesirable consequences, and there are resultant benefits to customers); *see also Calpine Corp.*, 134 FERC ¶ 61,232 (2011); *Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,132 (2010); *Cal. Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,031 (2008); *Cal. Indep. Sys. Operator Corp.*, 118 FERC ¶ 61,226 (2007).

[20] Applicants' Waiver Request at 7.

The Commission orders:

Applicants' request for temporary waiver is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.