

149 FERC ¶ 61,291  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

Southwest Power Pool, Inc.

Docket No. ER15-279-000

ORDER ACCEPTING TARIFF REVISIONS AND ESTABLISHING HEARING AND  
SETTLEMENT JUDGE PROCEDURES

(Issued December 31, 2014)

1. On October 31, 2014, Southwest Power Pool, Inc. (SPP) filed, on behalf of Central Nebraska Public Power and Irrigation District (Central), revisions to SPP's Open Access Transmission Tariff (Tariff) to implement Central's stated transmission service rate to accommodate recovery of the annual transmission revenue requirements (ATRR) to be included in the Nebraska Public Power District (NPPD) pricing zone (Zone 17) under the Tariff (October 31 Filing). As discussed below, we accept the proposed Tariff revisions, to be effective January 1, 2015, as requested, subject to refund with interest and establish hearing and settlement judge procedures.

**I. Background**

2. In its October 31 Filing, SPP explains that, as a Regional Transmission Organization, it administers its Tariff on a regional basis for transmission facilities located within its boundaries. SPP also administers the Integrated Marketplace through centralized day ahead and real-time energy and operating reserve markets with locational marginal pricing and market-based congestion management. According to SPP, Central is a political subdivision of the State of Nebraska with headquarters in Holdrege, Nebraska, and it was created to enable the people of south-central Nebraska to develop that state's irrigation and electric power potential. Central's major facilities include its main water storage reservoir, a diversion dam, a 75-mile supply canal, and four hydroelectric generating plants with related substations. Central joined SPP on October 14, 2014, intending to become a Transmission Owner and Transmission Using

Member, and to transfer functional control of the limited transmission facilities, specifically the Jeffrey, Johnson No. 1 and Johnson No. 2 substations, owned or controlled by Central to SPP for the purpose of cost recovery under the Tariff.<sup>1</sup> SPP adds that all three substations are integrated with non-radial transmission facilities under the functional control of SPP, and all three substations meet the definition of “Transmission Facilities” set forth in Attachment AI of the SPP Tariff.<sup>2</sup>

3. SPP states that under the SPP Membership Agreement and Tariff, SPP members possess the unilateral right to submit changes to the SPP member’s rates or rate structures.<sup>3</sup> According to SPP, the SPP Membership Agreement further provides that “[n]o approval is required from SPP for such filings.”<sup>4</sup> SPP states that Central has requested SPP to implement these Tariff revisions. SPP adds that it is not independently supporting or justifying the Central ATRR but merely modifying the Tariff to accommodate Central’s recovery of transmission service revenues for its transmission facilities.

## **II. SPP’s Filing**

4. The October 31 Filing includes prepared direct testimony, supporting exhibits and appendices from Central’s General Manager, Mr. Don Kraus, and other expert witnesses that provide background information on Central and on the facilities involved in the October 31 Filing. The prepared direct testimony of Mr. David F. DesLauriers explains how Central develops the cost of service and calculates the proposed ATRR of \$536,767 for which it seeks recovery through the stated rates in the October 31 Filing.<sup>5</sup> In addition to the prepared direct testimony, SPP submits Tariff modifications to: (1) Attachment H, section I, Table 1 to specify the revenue requirement to be included as Line 17b in Zone 17 (NPPD); and (2) Attachment T to add Central to the NPPD rate sheet for Point-To-

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<sup>1</sup> October 31 Filing at 1-3.

<sup>2</sup> Section II.1 of Attachment AI defines transmission facilities to include: “[a]ll existing non-radial power lines, substations, and associated facilities, operated at 60 kV or above, plus all radial lines and associated facilities operated at or above 60 kV that serve two or more eligible customers not Affiliates of each other.”

<sup>3</sup> October 31 Filing at 4 (citing Membership Agreement at § 3.10).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Exh. 2, Direct Testimony of David F. DesLauriers at 5-18.

Point Transmission Service.<sup>6</sup> SPP requests the Commission accept the proposed tariff revisions without suspension or hearing to become effective January 1, 2015. SPP also requests waiver of any provisions of section 35.13 of the Commission's regulations deemed to require cost support in the form of cost of service statements in support of the proposed revisions.<sup>7</sup>

### **III. Notice of Filing and Responsive Pleadings**

5. Notice of SPP's filing was published in the *Federal Register*, 79 Fed. Reg. 66,711 (2014), with interventions and protests due on or before November 21, 2014. Central and Western Area Power Administration filed motions to intervene. On November 21, 2014, NPPD filed a motion to intervene and protest. On December 5, 2014, Central filed a motion for leave to answer and answer to NPPD's protest.<sup>8</sup> On December 17, 2014, NPPD filed a motion for leave to answer and answer to Central's answer.

6. In its protest, NPPD raises a number of issues with Central's proposed revenue requirements and avers generally that Central has failed to demonstrate that its proposed revenue requirement is just and reasonable. For example, NPPD argues that Central's proposed 11.74 percent return on equity is derived from an unsupported range of returns of 11.03 percent to 16.74 that should be summarily rejected as unsupported. According to NPPD, Central utilized as its starting point the 7.03 percent to 11.74 percent zone of reasonableness produced by a discounted cash flow (DCF) analysis performed on a proxy group approved by the Commission for deriving a return on equity for ISO New England, Inc. transmission owners in Opinion No. 531,<sup>9</sup> then adjusted upward the lower end of such zone by 400 basis points and adjusted the upper end of the zone by 500 basis points to reflect its view that Central's small size, as compared to the size of the publicly traded members of the proxy group, presents greater risks for Central. However, NPPD witness Mr. Alan C. Heintz explains there is no support for increasing the low-end and high-end

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<sup>6</sup> *Id.* at 5-6. Attachment T includes NPPD rates for both Firm Point-To-Point and Non-Firm Point-To-Point transmission service.

<sup>7</sup> *Id.* at 7.

<sup>8</sup> Central styled its answer, in part, as an answer to NPPD's motion to reject. *Id.* at 3. However, NPPD's pleading was, in substance, a protest. Therefore, we do not address Central's arguments regarding motions to reject.

<sup>9</sup> NPPD Protest at 7 (citing *Martha Coakley, Massachusetts Attorney General v. Bangor Hydro-Electric Co.*, Opinion No. 531, 147 FERC ¶ 61,234 (2014) (Opinion No. 531)).

by 400-500 basis points, respectively, of a previously Commission-approved DCF zone of reasonableness to reflect any unique or extraordinary risks of the utility under review.<sup>10</sup> NPPD contends that Commission precedent makes clear that relative differences in business and financial risks should be addressed “by the placement of the base return on equity *within* the range of returns produced by the proxy group” (emphasis in original).<sup>11</sup> Mr. Heintz notes there is no precedent supporting Central witness Dr. H. Edwin Overcast’s view that Central faces greater relative risks by virtue of its small capitalization compared to the size of members of the proxy group. Mr. Heintz adds that Central cites to no Commission cases where the small size of a utility was determined to represent increased risks.<sup>12</sup>

7. NPPD also contends that Central’s reliance upon Opinion No. 531 is misplaced for a number of reasons. First, the data utilized to support the DCF analysis in Opinion No. 531 are based on the six-month period ending March 2013, and are thus outdated for Central’s application to rates effective January 1, 2015. Second, Central failed to update the analysis of the proxy group to: (1) exclude utilities with corporate credit ratings more than one notch above or below the credit rating of the utility at issue; (2) include only companies that are paying dividends and have neither made nor announced a dividend cut during the six-month study period; (3) include only companies with no major merger activity during the six-month period; and (4) exclude company results which fail to exceed the average bond yield by some amount.<sup>13</sup> Moreover, NPPD argues that Central’s failure to provide evidence of how it develops the underlying cost of capital in rates for services provided to its own customers is grounds for rejection of its proposed ATRR. In the alternative, NPPD contends that Central should base its transmission ATRR on the same cost of capital as utilized by Central to develop rates for services to its own customers.

8. NPPD claims that Central has improperly inflated its transmission rate base by misallocating accumulated depreciation, failing to support the inclusion in rate base of construction work in progress (CWIP), and improperly including Central’s FERC Hydro License in its transmission rate base. Specifically, according to NPPD, Central claims that its three substations that meet the definition of “Transmission Facilities” under Attachment AI of SPP’s Tariff have an original cost of \$1,885,200 and associated

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<sup>10</sup> *Id.* Exh. 1, Direct Prepared Answering Testimony of Alan C. Heintz at 6.

<sup>11</sup> *Id.* at 9.

<sup>12</sup> *Id.* Exh. 1, Direct Prepared Answering Testimony of Alan C. Heintz at 6-8.

<sup>13</sup> *Id.* at 9-10.

accumulated depreciation of \$292,410, resulting in net transmission plant of \$1,572,790.33. As explained by NPPD witness Mr. Heintz, such a relatively small level of accumulate depreciation, when compared to the *annual* transmission depreciation expense of \$52,075, suggests that the substations are only 6 years old. NPPD witness Mr. Heintz further demonstrates that Central has allocated \$2,500,354 of accumulated depreciation to the transmission plant not at issue in this proceeding, which has an original cost of \$3,469,421. Mr. Heintz explains that this level of depreciation would cause such plant to be 72 percent depreciated, in contrast with the plant at issue being depreciated only 15 percent, which requires further investigation and resolution. With regard to the proposed inclusion of 100 percent CWIP in rate base, NPPD contends that Central's support for the inclusion of \$287,355 for two construction work orders falls short of the showing required by Order No. 679.<sup>14</sup> As to Central's proposal to include the cost of its FERC Hydro License in the transmission rate base, Mr. Heintz explains that the Hydro License is not properly allocated to SPP transmission customers because such license relates to the generation function.<sup>15</sup>

9. NPPD contends that Central's claimed operating and maintenance expenses are excessive due to the inclusion of costs unrelated to the transmission function and the Transmission Facilities at issue. Such costs include: (a) ancillary service-related costs included in Account No. 561 that were incurred for Scheduling, System Control and Load Dispatch service; (b) costs related to the control center in Gothenberg, Nebraska; (c) costs related to the Kingsley substation (a facility that Central has not proposed to be included as one which meets the definition of Transmission Facilities, Attachment AI of the SPP Tariff); (d) Account No. 909 costs of \$9,224 which "relate primarily to public relations expenses that may not directly, or indirectly benefit transmission customers;"<sup>16</sup> and (e) inflated legal costs of \$400,000 amortized over a three year period which may result in over-recovery.

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<sup>14</sup> *Id.* at 12-13. NPPD states that in order to qualify for this incentive-based rate treatment, the applicant must demonstrate that the facilities meet the following criteria: (1) the facilities ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent with the requirements of FPA section 219; (2) the total package of incentives is tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project; and (3) the resulting rates are just and reasonable. 18 C.F.R. § 35.35(d) (2014).

<sup>15</sup> NPPD Protest Exh. 1, Direct Prepared Answering Testimony of Alan C. Heintz at 8-10.

<sup>16</sup> *Id.* at 15-16.

10. NPPD argues that Central may be better positioned to recover its revenue requirement through a formula rate that would be adjusted annually rather than through a stated rate that, in all likelihood, will be recovering revenue in excess of its cost of service after the existing rates are in effect after three years. Therefore, NPPD requests that the Commission require that Central submit its rates for review every three years.<sup>17</sup> In the alternative, NPPD states that Central could resolve this issue by agreeing to a formula rate that would be adjusted annually.

11. NPPD contends that Central has failed to demonstrate that its claimed ATRR is just and reasonable, and asks that the Commission reject the proposed ATRR. If the Commission does not reject the proposed ATRR, NPPD asks the Commission to set the justness and reasonableness of the revenue requirement for hearing. NPPD supports holding the hearing in abeyance and utilizing the Commission's settlement judge procedures in an effort to resolve all issues efficiently.<sup>18</sup>

12. In its answer, Central asserts, among other things, that: (1) there is no requirement to file a rate case every three years simply because future costs may decrease, nor is Central required to file a formula rate that adjusts annually; (2) a flexible approach must be considered in evaluating Central's proposed estimated cost of equity; (3) there is no basis for NPPD's criticism of Central's explanation of its cost of capital included in rates nor its proposed hypothetical capital structure; (4) the three year amortization of legal expenses is appropriate; (5) it is not seeking a CWIP incentive for certain transmission assets; rather, it simply made adjustments to the historical test year rate base amounts to reflect known and measureable adjustments to rate base; (6) it correctly calculates accumulated depreciation for investments made into the upgrade of the Jeffrey, Johnson No. 1, and Johnson No. 2 substations; (7) allocation of the calculated cost of the Gothenburg Control center to transmission is appropriate; (8) the inclusion of \$9,224 of public relations expense from Account 909 is appropriate; and (9) the inclusion of \$155,756 from Accounts 560-570 is appropriate and properly allocated.<sup>19</sup>

13. Central also requests that the Commission reject NPPD's claim that costs related to a portion of Hydro License Fees are not properly allocated to transmission. Central's witness explains that it is appropriate to include costs that go to maintaining a license to operate the hydro facilities, as the license ensures the facilities are operating in a safe and environmentally sound manner. However, Central states that it will accept conditional

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<sup>17</sup> *Id.* at 17.

<sup>18</sup> *Id.* at 18.

<sup>19</sup> Central Answer at 6-23.

approval of its proposed ATRR, subject to a compliance filing excluding this expense, if the Commission determines that the inclusion of these fees is incorrect.<sup>20</sup>

14. In its answer, NPPD disputes Central's allegation that NPPD's protest is motivated by its desire to obtain "free" transmission service from Central, noting that NPPD does not utilize the facilities at issue. NPPD reiterates that, in light of such a large portion of Central's ATRR consisting of non-recurring costs, the Commission should require Central to submit its ATRR for review in three years. NPPD also argues that, in determining its proposed cost of equity, Central neither updated nor adjusted the Opinion No. 531 proxy group data as required by the Commission. Thus, the absence of updated proxy group data raises disputed issues of fact as to whether the data utilized in Opinion No. 531 is appropriate for this case.

15. With regard to Central's assertion that it is not seeking to include CWIP in rate base and clarification that it was simply adjusting its rate base to reflect known and measurable changes, NPPD responds that the balance of accumulated depreciation also needs to be updated through the end of 2014. NPPD asserts that Central's answer does not fully address NPPD's argument that Central failed to exclude O&M expenses unrelated to the three substations at issue. Assuming Central has included in its ATRR only O&M expenses booked exclusively to its Power Plant section, NPPD contends that Central has not demonstrated that all such costs are related to the three substations at issue. NPPD states that Central has failed to demonstrate that 100 percent of the \$155,766 of claimed O&M expenses booked to the Power Plant section are related to the portions of three substations that qualify as "Transmission" under SPP's Tariff. NPPD asserts that such failure raises disputed factual issues. Finally, NPPD requests that the Commission direct Central to eliminate the Hydro License Fee, as well as any other improperly included costs, from Central's as-filed ATRR. NPPD contends that all other issues regarding Central's ATRR should be set for hearing.

#### **IV. Discussion**

##### **A. Procedural Matters**

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014) prohibits an answer to a protest or an answer unless otherwise

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<sup>20</sup> *Id.* at 24.

ordered by the decisional authority. We will accept Central's answer and NPPD's answer because they have provided information that assisted us in our decision-making process.

**B. Standard of Review**

18. The Commission has addressed the standard of review to be applied to petitions involving non-jurisdictional transmission revenue requirements (TRR) in an opinion reviewing the TRR filed by the City of Vernon, California (Vernon).<sup>21</sup> In Opinion No. 479, the Commission recognized that, as a municipally-owned utility, Vernon was not subject to the Commission's Federal Power Act (FPA) section 205 jurisdiction. However, the Commission noted that because Vernon voluntarily submitted its TRR as a component of the California Independent System Operator Corporation's (CAISO) jurisdictional rate, Vernon's TRR was "subject to a full and complete section 205 review as part of our section 205 review of that jurisdictional rate."<sup>22</sup> The Commission explained that, in *Pacific Gas & Elec. Co. v. FERC*, the U.S. Court of Appeals for the District of Columbia held that the Commission had statutory authority to review Vernon's TRR "to the extent necessary to ensure that the CAISO rates are just and reasonable."<sup>23</sup> Subsequently, the court upheld the Commission's decision that subjecting the TRRs of non-jurisdictional utilities (such as Vernon) to a full section 205 review is "the only way to ensure that CAISO's rate is just and reasonable."<sup>24</sup>

19. However, in *TANC*, the court rejected the Commission's authority to order Vernon to pay refunds under FPA section 205. The court held that the structure of the FPA clearly reflects Congress's intent to exempt governmental entities and non-public utilities from the Commission's refund authority under FPA section 205 over wholesale electric

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<sup>21</sup> See *City of Vernon, California*, Opinion No. 479, 111 FERC ¶ 61,092, *order on reh'g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh'g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006).

<sup>22</sup> *Id.* P 44.

<sup>23</sup> *Id.* P 43 (quoting *Pacific Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1117 (D.C. Cir. 2002)).

<sup>24</sup> *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 672 (D.C. Cir. 2007) (*TANC*).

energy sales.<sup>25</sup> The court reasoned that FPA section 201(f) exempts from Part II of the FPA “any political subdivision of a state.”<sup>26</sup>

20. Therefore, while Central is not within the Commission’s jurisdiction under FPA section 205, we find that, based on the precedent cited above, it is appropriate to apply the just and reasonable standard of FPA section 205 to SPP’s proposed stated rates filed on behalf of Central. To determine the justness and reasonableness of such rates, we find that, as discussed below, hearing and settlement judge procedures are appropriate.

21. Furthermore, Central is not subject to Commission-imposed rate suspension and refund obligations under section 205 of the FPA. However, we note that Central has agreed to allow its rate to be treated as being accepted subject to refund with interest if further proceedings to evaluate its proposed rate are necessary.<sup>27</sup>

### **C. Hearing and Settlement Judge Procedures**

22. SPP’s proposed rate revisions on behalf of Central raise issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

23. Our preliminary analysis indicates that SPP’s proposed Tariff revisions have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the proposed revisions for filing, to be effective January 1, 2015, as requested, subject to refund, and set them for hearing and settlement judge procedures.

24. 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>28</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding,

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<sup>25</sup> *Id.* at 673-74.

<sup>26</sup> *Id.* at 674.

<sup>27</sup> October 31 Filing at 6 n.19.

<sup>28</sup> 18 C.F.R. § 385.603 (2014).

otherwise the Chief Judge will select a judge for this purpose.<sup>29</sup> The settlement judge shall report to the Chief Judge and the Commission within thirty (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 assigning the case to a presiding judge.

25. We grant SPP's requested waiver of section 35.13 of the Commission's regulations. Because Central is not subject to section 205 of the FPA, it is not subject to the Commission's cost of service regulatory filing requirements. However, to the extent that parties at the hearing can show the relevance of additional information needed to evaluate the proposal, the Administrative Law Judge can provide for appropriate discovery of such information.

The Commission orders:

(A) SPP's proposed Tariff revisions are hereby accepted for filing, to be effective January 1, 2015, subject to refund with interest, as discussed in the body of this order.

(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 the proposed Tariff revisions, as discussed in the body of this order. 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 (2014), 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

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<sup>29</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 (5) 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 (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

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 )

Kimberly D. Bose,  
Secretary.