

150 FERC ¶ 61,091
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket Nos. EL14-49-000

AES Shady Point, LLC

EL14-65-000

ORDER ON PETITIONS FOR DECLARATORY ORDERS

(Issued February 18, 2015)

1. In this order, we address two petitions for a declaratory order, one submitted by Southwest Power Pool, Inc. (SPP) and another submitted by AES Shady Point, LLC (Shady Point). Both ask for an interpretation of SPP's Open Access Transmission Tariff (Tariff). SPP seeks a finding that the Commission's acceptance of a notice of termination of a one-year point-to-point (PTP) transmission service agreement between SPP and Shady Point does not preclude SPP from seeking contract damages for breach of the service agreement in a state court proceeding. By contrast, Shady Point seeks a finding that the Tariff prohibits SPP from recovering damages from Shady Point for lost revenues for the period after Shady Point ceased taking service from SPP. As discussed below, we grant SPP's Petition and deny Shady Point's Petition. Specifically, we find that SPP may pursue legal action in a state court against Shady Point for alleged contract damages for an alleged breach of the service agreement, but we make no finding on whether such a claim has any merit.

I. Background

A. SPP's Petition

2. SPP's Petition in Docket No. EL14-49-000 states that SPP executed a one-year PTP transmission service agreement with Shady Point and that Shady Point defaulted on its obligation to make payments owed under that agreement. SPP states that, in response

to this default and in accordance with section 7.4 of the Tariff,¹ it filed a notice of termination with the Commission that the Commission accepted.² SPP then invoiced Shady Point for one year of service and SPP states that Shady Point has told it that, as a consequence of the Commission accepting the notice of termination, Shady Point is relieved of its obligation to pay for the remaining service for which it contracted, arguing that the only remedy available to SPP for Shady Point's non-performance was its termination of service. SPP disagrees with this contention and plans to pursue a damages claim in state court for the remaining term of the one-year contract. In arguing that it should be allowed to pursue its claim in state court, SPP asks the Commission to confirm that the Commission's acceptance of SPP's request to terminate service to Shady Point did not foreclose SPP pursuing a claim in state court for damages under its contract. SPP clarifies that it is not asking the Commission to determine that SPP is entitled to contract damages and is not asking the Commission to determine the amount of those damages, but merely is seeking confirmation that SPP can pursue its claims in state court.

3. Notice of SPP's Petition was published in the *Federal Register*, 79 Fed. Reg. 29,181 (2014), with interventions and protests due on or before June 9, 2014. Timely motions to intervene were filed by Exelon Corp., Entergy Services, Inc., and Western Farmers Electric Cooperative (Western Farmers). Shady Point filed a timely motion to intervene and protest. Shady Point's protest argues that SPP's Petition should be denied or rejected because the limitation of liability language of section 10.2 of the Tariff,³ SPP's Credit Policy, and the overall circumstances of the Tariff all prohibit SPP from seeking lost revenues as damages from Shady Point.⁴ SPP filed an answer to Shady Point's protest.

¹ SPP, Tariff, pt. I, § 7.4 Customer Default (1.0.0) (stating in pertinent part that, “[u]pon the occurrence of such a default, the [t]ransmission [p]rovider may initiate a proceeding with the Commission to terminate service but shall not terminate service until the Commission so approves any such request...”).

² *Southwest Power Pool, Inc.*, Docket No. ER13-989-000 (Apr. 23, 2013) (delegated letter order).

³ SPP, Tariff, pt. I, § 10.2 Liability (1.0.0) (stating in pertinent part that, “[i]n no event shall the [t]ransmission [p]rovider, a [t]ransmission [o]wner or any [t]ransmission [c]ustomer be liable for any incidental, consequential, punitive, special, exemplary or indirect damages, loss of revenues or profits, arising out of, or connected in any way with the performance or non-performance under this Tariff or any Service Agreement thereunder”).

⁴ Shady Point Protest to SPP Petition at 2.

B. Shady Point's Petition

4. Shady Point's Petition in Docket No. EL14-65-000 states that Shady Point owns and operates a 320 MW coal-fired electric generating facility, which is a "qualifying cogeneration facility" under the Public Utility Regulatory Policies Act of 1978. Shady Point states that the facility is located in Oklahoma and provides electric capacity and energy to Oklahoma Gas and Electric Company, with which it is directly interconnected, pursuant to a long-term power sales agreement. It adds that, in 2006, Shady Point requested firm Point-to-Point Transmission Service from SPP under the Tariff for a term of one year for the delivery of power from Shady Point's generating facility to a delivery point known as AEP West. Shady Point states that SPP determined that, based on SPP's Aggregate Transmission Service Study Procedures, no Network Upgrades were required to provide the requested service and, thus, SPP granted Shady Point 271 MW of PTP transmission service, which commenced on January 8, 2008. Shady Point states that the transmission reservation turned out to be unnecessary because Oklahoma Gas and Electric Company ultimately decided to renew its long-term power sales agreement with Shady Point. Shady Point further states that, between 2007 and 2011, Shady Point made payments to SPP totaling approximately \$2.5 million in return for a deferral of its obligation to begin taking reserved transmission service as provided under section 17.7 of the Tariff.⁵ The final deferral set a service commencement date for transmission service of January 8, 2013, and, in fulfillment of its reservation commitment, Shady Point executed a service agreement for service to begin on that date.

5. Shady Point states that, following advice from SPP, it purposely failed to make the required January payment, triggering a default and that, consistent with the Tariff, SPP then requested permission from the Commission to terminate Shady Point's service agreement, effective February 25, 2013. On April 23, 2013, the Commission accepted SPP's termination of the service agreement, effective February 25, 2013.⁶

⁵ SPP, Tariff, pt. II, § 17.7 Extensions for Commencement of Service (1.0.0) (stating in pertinent part that, "[t]he transmission [c]ustomer can obtain, subject to availability up to five (5) one-year extensions for commencement of service. The [t]ransmission [c]ustomer may postpone service by paying a non-refundable annual reservation fee equal to one-month's charge for firm [t]ransmission [s]ervice for each year or fraction thereof within 15 days of notifying the [t]ransmission [p]rovider it intends to extend the commencement of service...").

⁶ See n.2 *supra*.

6. Shady Point states that it expected to owe SPP payments for the service from January 8, 2013 through February 25, 2013 but was surprised when SPP sought payment for a full year of transmission service.⁷ When the parties were unable to resolve their differences, Shady Point filed its Petition.

7. Notice of Shady Point's Petition was published in the *Federal Register*, 79 Fed. Reg. 33,916 (2014), with interventions and protests due on or before July 9, 2014. Western Farmers filed a timely motion to intervene and comments. SPP filed a timely motion to intervene and protest. Western Farmers' comments urge the Commission to deny the relief requested by Shady Point, arguing that granting its Petition would allow it to default without risk of damages. SPP's protest argues that Shady Point's Petition should be denied because SPP's allegations are essentially unopposed, as Shady Point neither disputes the declarations requested by SPP nor argues that granting the SPP Petition would be of no assistance to a court in addressing SPP's damages claim.⁸ In addition, SPP argues that granting Shady Point's Petition would require the Commission to quantify what damages SPP is entitled to under the SPP Tariff, which is contrary to the Commission's policy of not deciding or awarding damages, a matter it leaves to the courts.⁹ Shady Point filed an answer to SPP's protest.

II. Discussion

A. Procedural Matters

8. 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 in the proceedings in which they were filed. 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 unless otherwise ordered by the

⁷ Shady Point states that, if SPP brings a case against Shady Point in state court, it will argue that SPP is estopped from seeking damages against it because SPP advised it that its only recourse was to default and then obtain Commission approval to terminate service and that termination would end any further liability by Shady Point.

⁸ SPP Protest to Shady Point Petition at 2.

⁹ *Id.* at 4-5.

decisional authority. We are not persuaded to accept the answers to protests and will, therefore, reject them.¹⁰

B. Substantive Matters

1. SPP's Petition

9. To decide whether to grant SPP's Petition, the Commission must determine whether the contractual dispute between SPP and Shady Point is one that must be resolved by the Commission or if it is one that SPP may seek to adjudicate in a proceeding in a state court. In deciding whether to assert primary jurisdiction over a contractual matter that otherwise would be subject to state court jurisdiction we are guided by the decision in *Arkansas Louisiana Gas Company v. Hall*,¹¹ where the Commission devised a three-part test. The Commission there stated 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.^[12]

10. The Commission has applied this same test in numerous other cases.¹³ Applying these same factors here, first, we do not claim special expertise in the area of determining

¹⁰ SPP states that its protest in Docket No. EL14-65 also serves as an answer in Docket No. EL14-49. While we are disallowing SPP's answer in Docket No. EL14-49, as an impermissible answer to a protest, we are allowing SPP's permissible protest in Docket No. EL14-65.

¹¹ 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*).

¹² *Arkla*, 7 FERC at 61,322.

¹³ See, e.g., *Essar Steel Minnesota, LLC v. Great Lakes Gas Transmission Limited Partnership*, 142 FERC ¶ 61,194 (2013); *PJM Interconnection, L.L.C., New York State Elec. & Gas Corp., Dunkirk Power, LLC, Huntley Power, LLC, & Oswego Harbor, LLC*, 95 FERC ¶ 61,333, at n.63 (2001); *Portland General Electric Co.*, 72 FERC ¶ 61,009, at 61,021 (1995) (*Portland General*); *S. California Edison Co.*, 85 FERC ¶ 61,023, *reh'g denied*, 85 FERC ¶ 61,389 (1998).

damages for claimed breaches of contract; the Commission has left this specific issue to state courts. Thus, in past cases, the Commission has generally left to state court proceedings the interpretation of terms and conditions of contracts that relate to contractual damages and ordering of damages for breaches of contract.¹⁴ While the Commission would have greater expertise than a state court in interpreting the *pro forma* tariff, it does not follow that the Commission would necessarily have greater expertise than a state court with regard to the issue of possible damages based on a possible breach of contract. A state court is as well-equipped as the Commission to decipher the meaning of the contract provisions defining defaults in the contract between SPP and Shady Point, as well as questions related to the significance of advice given by SPP to Shady Point as to its options and whether this forecloses SPP from seeking damages.

11. Second, we find that the Commission's responsibilities do not require a uniform interpretation of the contractual language at issue here. In *Southwest Power Pool, Inc.*,¹⁵ the Commission, among other matters, accepted revisions proposed by SPP to the provisions in section 10.2 of SPP's Tariff dealing with limitations of liability. These Tariff revisions limited the liability of SPP to its customers and also limited the liability of SPP's customers to SPP. These Tariff provisions are specific to SPP and its customers and these exact provisions do not apply to other transmission providers and their customers. Moreover, the Commission did not dictate the particular phraseology of such provisions.¹⁶ Thus, there is no need for the Commission to provide an interpretation of

¹⁴ See *LSP-Cottage Grove, L.P.*, 111 FERC ¶ 61,108, at P 45 & n.34 (2005) (citing *South Carolina Public Service Authority v. FERC*, 850 F.2d 788, 795 (D.C. Cir. 1988)).

¹⁵ 112 FERC ¶ 61,100, *reh'g denied*, 113 FERC ¶ 61,287 (2005).

¹⁶ While the Commission explained in Order Nos. 888-A and 888-B that the *pro forma* tariff was not intended to address liability issues, the Commission stated that liability was a separate issue from indemnification. See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,301 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, at 62,081 (1998) (section 10.2 of the *pro forma* tariff). See also *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 1671, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, at P 993 (2007), where the Commission explained that the Commission had declined to amend the liability protections found in the *pro forma* tariff for the same reasons that the Commission rejected similar proposals in the past.

(continued ...)

the meaning of these contractual terms that would apply to the entire industry. The particular lost revenues language at issue in the instant proceeding is not the same as that of other transmission providers and it is not necessary for these varying provisions to be interpreted uniformly.

12. Third, we find that this case does not raise issues that are important for the Commission to decide itself to properly fulfill its regulatory responsibilities. As the Commission stated in *Portland General*, “[t]he parties to power sales contracts regularly define events of default, and we generally allow them to do so freely.”¹⁷

13. For these reasons, we will grant SPP’s request and find that it may, if it wishes, seek relief in a state court for payments that it alleges may be due to it from Shady Point. We make no finding, however, on whether this claim has any merit.

2. Shady Point’s Petition

14. In light of our determination that SPP may pursue this matter in state court, if it so wishes, we decline to decide the merits of a contractual dispute raised in a request for a declaratory order raising questions about possible damages after termination of a contract. We, therefore, will deny Shady Point’s Petition.

The Commission further explained that transmission providers were not precluded from relying on state laws that protected utilities or others from claims founded in ordinary negligence. Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,301. The Commission declined to adopt a uniform federal liability standard and decided that, while it was appropriate to protect the transmission provider through force majeure and indemnification provisions from damages or liability when service is provided by the transmission provider without negligence, it would leave the determination of liability in other instances to other proceedings.

¹⁷ *Portland General*, 72 FERC at 61,022.

The Commission orders:

(A) SPP's petition for a declaratory order is hereby granted, as discussed in the body of this order.

(B) Shady Point's petition for a declaratory order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.