

153 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwestern Public Service Company

Docket No. ER14-2363-001

ORDER DENYING REHEARING

(Issued October 8, 2015)

1. On February 23, 2015, the Commission issued an order¹ that denied Southwestern Public Service Company's (SPS) request for waiver of the provisions in Schedules 1A and 11 of the Southwest Power Pool, Inc. (SPP) Open Access Transmission Tariff (Tariff), under which SPP bills for transmission services based on coincident peak loads in the prior year. Sharyland Utilities, L.P. (Sharyland), for which SPS acted as agent for transmission services, seeks rehearing of the February 2015 Order. As discussed below, we deny rehearing.

I. Background

2. In SPS's July 3, 2014 request for waiver, it stated that prior to 2014, it provided wholesale full requirements services to certain divisions of Sharyland that were connected to the SPS system in the SPP region and served as transmission agent for Sharyland in connection with that service.² SPS asserted that Sharyland physically disconnected from the SPS system and SPP in December 2013, and was integrated into the Electric Reliability Council of Texas (ERCOT) transmission system effective January 1, 2014.³ SPS stated that, despite Sharyland's migration to ERCOT, SPP continued to bill SPS, as the transmission agent for Sharyland, for transmission services under Schedules 1A and 11 of SPP's Tariff because those schedules are billed based on

¹ *Sw. Pub. Serv. Co.*, 150 FERC ¶ 61,128 (2015) (February 2015 Order).

² SPS Request for Waiver at 4-5.

³ *Id.* at 6.

the 12 coincident peak loads of the prior year.⁴ SPS explained that, because Sharyland load was in SPP in 2013, SPP was billing SPS for Schedule 1A and Schedule 11 charges based on the 2013 Sharyland load in 2014.⁵ SPS stated that it anticipated that it would have to pay SPP approximately \$2.9 million under Schedules 1A and 11 in 2014 based on Sharyland's 2013 load, which had a coincident peak demand averaging 140 MW.⁶

3. SPS requested that the Commission grant waiver of Schedules 1A and 11 of the SPP Tariff with respect to the 2014 charges to SPS based on Sharyland's load that was no longer connected to SPS or SPP in 2014. SPS argued that waiver was appropriate because it satisfied the Commission's criteria for waivers, i.e. SPS had acted in good faith, the waiver was limited in scope, granting the waiver would remedy a concrete problem, and granting the waiver would have no undesirable consequences, such as harming third parties.⁷

4. In particular, SPS asserted that it acted in good faith because it arranged transmission service through SPP on behalf of Sharyland, took the necessary regulatory steps to assist in Sharyland's migration to ERCOT, and worked with SPP on the Sharyland transition.⁸ SPS argued that the request for waiver was limited in scope because it addressed only 2014 charges related to Sharyland's load under Schedules 1A and 11 of the SPP Tariff and because it would apply only to the unusual circumstance where a wholesale load entirely disconnected from a Regional Transmission Organization (RTO) transmission system and is currently receiving no transmission service from that RTO, but the rate schedules nevertheless provide for continued billing that is based on that disconnected load.⁹ SPS further contended that granting the waiver request would remedy the concrete problem of SPP's billing being inconsistent with cost causation and

⁴ Schedule 1A assesses an administrative charge to recover SPP's expenses relating to administering the SPP Tariff. Schedule 11 assesses a monthly base plan zonal charge to recover the revenue requirement of facilities classified as Base Plan Upgrades under the SPP Tariff. *See id.* at 10-11.

⁵ *Id.* at 8-9.

⁶ *Id.* at 9.

⁷ *Id.* at 11-12.

⁸ *Id.* at 12-14.

⁹ *Id.* at 15.

the SPP Tariff's requirements for network integration transmission service.¹⁰ Finally, SPS argued that the waiver would have no undesirable consequences because, even though granting the waiver would require other SPP customers to incur greater costs, such a result follows cost causation given that, on a net basis, those customers have received greater benefits as a result of SPP's cancelling transmission projects to reflect Sharyland's migration to ERCOT.¹¹

5. Sharyland filed comments in support of SPS's requested waiver. Sharyland asserted that SPP and SPS avoided tens of millions of dollars in transmission investment because of Sharyland's migration to ERCOT and that SPP could not provide any services related to Sharyland's load in 2014. Sharyland argued that, therefore, the Commission should not permit SPP to assess SPS in 2014 for Schedules 1A and 11 charges based on Sharyland's 2013 load.¹² Sharyland also stated that, unless the Commission grants the requested waiver, the Sharyland 2013 load will be used for both SPP and ERCOT transmission billings.¹³

6. In the February 2015 Order, the Commission denied SPS's request for waiver because it did not meet the Commission's requirements for granting waiver of a tariff provision. The Commission found that granting the waiver would harm third parties because it would increase the costs that other SPP customers would have to pay under Schedules 1A and 11 of the SPP Tariff.¹⁴ The Commission explained that it was not persuaded that other SPP customers would have benefitted from the departure of Sharyland on a net basis because of the cost savings associated with cancelling transmission projects due to Sharyland's migration to ERCOT. The Commission stated that those savings were uncertain because future events could have changed the need for those projects, independent of Sharyland's load moving to ERCOT, but the costs that would be assessed to other SPP customers if the waiver was granted would be definite. The Commission also noted that any savings realized by SPP members from the migration of Sharyland's load to ERCOT are separate from the requested waiver, and that

¹⁰ *Id.* at 15-21.

¹¹ *Id.* at 21-22.

¹² Sharyland Comments at 2.

¹³ *Id.* at 8.

¹⁴ February 2015 Order, 150 FERC ¶ 61,128 at P 34.

it would be inappropriate to net these savings against the costs that would be imposed on third parties by granting the requested waiver.¹⁵

II. Request for Rehearing

7. On March 25, 2015, Sharyland filed a request for rehearing of the February 2015 Order. Sharyland asserts that the Commission disregarded the unique circumstances presented in this case. Specifically, Sharyland contends that SPP and SPS each knew by July 2011 that Sharyland would disconnect from SPP by the end of 2013, that it would be impossible for SPP or SPS to provide service to the Sharyland load after that time, and that SPP would not incur any costs associated with Sharyland's load as of January 1, 2014.¹⁶

8. Sharyland argues that the Commission erred in looking only at the potential harm to SPP customers and not considering the potential harm to customers of SPS or Sharyland who may be required to pay costs for service they did not receive.¹⁷ Sharyland also states that the Commission ignored the offsetting benefits to SPP from the Sharyland migration and did not address the remaining factors that are typically considered in evaluating waiver requests.¹⁸

9. Sharyland states that the February 2015 Order focused solely on the Commission's fourth criterion for granting a waiver, i.e. whether the waiver would have undesirable consequences, such as harming third parties. Sharyland asserts that the Commission erroneously rejected the net benefit to SPP customers from cost savings associated with transmission projects that were cancelled as a result of Sharyland's departure from the SPP region.¹⁹

10. Sharyland also argues that the Commission's determination that granting the requested waiver would harm third parties is arbitrary and capricious because it is contrary to the Commission's policy on cost causation.²⁰ Sharyland states that, under that

¹⁵ *Id.* 35.

¹⁶ Sharyland Request for Rehearing at 1.

¹⁷ *Id.* at 1-2.

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 4.

policy, the party that receives service and causes costs to be incurred should bear its corresponding share of the costs. Sharyland asserts that the Commission's ruling in the February 2015 Order violates that policy because it allows load on the SPP system that actually receives service from SPP, and thereby causes costs to be incurred, to avoid paying for that service and the associated costs.²¹ Sharyland argues that the Commission's cost causation policy is also violated because its load is paying charges in ERCOT in 2014 that are analogous to the Schedule 1A and Schedule 11 charges that SPP assessed for its load in 2014.²² Sharyland further contends that the Commission's determination is arbitrary and capricious because it failed to address the cost causation arguments raised by SPS and Sharyland in their pleadings.²³

11. Sharyland asserts that the Commission also erred in viewing the costs that would not be collected from SPS under Schedules 1A and 11, and would instead be collected from other SPP customers, as an adverse consequence of granting the waiver. Sharyland argues that those costs are not an adverse consequence, and that granting the requested waiver would instead require those third parties to bear only those costs for which they are responsible due to the services received, while preventing other parties who do not receive service from SPP from having to pay for the associated costs of service.²⁴

12. In addition, Sharyland contends that the Commission's decision is arbitrary and capricious because it is inconsistent with Commission precedent granting other waiver requests that potentially would cause harm to third parties.²⁵ Sharyland argues that granting SPS's requested waiver cannot reasonably be said to have any undesirable consequences because it would remedy the problem of SPP receiving approximately \$2.9 million for 2014 services that it did not provide and because there is no plausible basis on which to conclude that SPP has incurred or will incur any unjustified costs relating to these charges. Accordingly, Sharyland asserts that the Commission should grant rehearing and, upon rehearing, grant SPS's requested waiver.²⁶

²¹ *Id.* at 5-6.

²² *See, e.g., id.* at 7, n.21.

²³ *Id.* at 6.

²⁴ *Id.* at 7.

²⁵ *Id.* at 7-10.

²⁶ *Id.* at 10.

III. Commission Determination

13. We deny Sharyland's request for rehearing. The Commission does not grant waivers lightly, and the petitioner bears the burden of justifying its request.²⁷ In its request for waiver, SPS failed to carry its burden because it had not shown that the waiver would not have undesirable consequences, such as harming third parties.

14. We note that SPS and Sharyland knew as of July 2011 that Sharyland would disconnect from SPP at the end of 2013; SPS nonetheless entered into a network integration transmission service (NITS) agreement in 2012 for Sharyland's load with a term that extended until 2016 in part because it "viewed the longer NITS agreement as protecting transmission service to the Sharyland load in the event that the ERCOT transition was delayed."²⁸ Therefore, even though Sharyland and SPS had advance notice of Sharyland's planned disconnection, SPS still entered into a NITS agreement that would obligate it to pay applicable charges under the agreement and SPP Tariff for Sharyland's load until 2016²⁹ because SPS believed there was a benefit to that extended term. We are not persuaded that it is inequitable for SPP to assess charges to SPS based on Sharyland's load when SPS agreed to be subject to those charges in exchange for the benefit of reducing the risk of not receiving any service for Sharyland's load if the ERCOT transition were delayed.

15. Sharyland does not dispute that granting the requested waiver would have had the adverse consequence of increasing the costs assessed to other SPP customers under Schedules 1A and 11 of the SPP Tariff.³⁰ Instead, Sharyland argues that the Commission erred because it ignored the offsetting benefits to SPP customers from cost savings resulting from transmission projects that were cancelled because of Sharyland's migration to the ERCOT region.³¹ The February 2015 Order addressed this argument,

²⁷ See, e.g., *Wisconsin Power and Light Co.*, 150 FERC ¶ 61,221, at P 38 (2015).

²⁸ SPS Request for Waiver at 8; *accord. id.* at Ex. A (Aff. of Joseph C. Taylor) at P 9 ("I was also concerned with the loss of transmission service to Sharyland load if the ERCOT transition did not occur as planned. If the 2012 NITS agreement had a termination date of December 31, 2013, and for some reason the transfer of Sharyland's load to ERCOT was delayed beyond the end of 2013, continued transmission service to that load would be in doubt.").

²⁹ See SPP Comments at 4.

³⁰ See, e.g., Sharyland Request for Rehearing at 7.

³¹ See *id.* at 2, 5.

finding that it was unpersuasive because those alleged cost savings are uncertain, while there would be definite costs assessed to other SPP customers if the waiver was granted.³² The Commission explained that it is uncertain whether future events would have changed the need for the cancelled transmission projects, independent of Sharyland's load moving to ERCOT. Sharyland's request for rehearing merely reasserts that SPP customers have benefitted from the cancelled transmission projects, but still does not demonstrate a direct correlation between Sharyland's disconnection from SPP and cost savings to SPP's other customers due to cancelled transmission projects. Accordingly, the alleged cost savings resulting from the cancellation of these projects remain speculative.

16. For example, the proposed transmission projects might have been cancelled regardless of Sharyland's disconnection due to load levels being lower than the forecasts which initially indicated that the now-cancelled projects were necessary. Similarly, other entities leaving or joining SPP could have changed the need for those projects. Such future events also could have affected the scope or configuration of those transmission projects, which could have altered the ultimate costs of the projects and thus the amount of any cost savings realized from cancelling the projects. Moreover, even if we assume that future events would not have affected the need for, or scope of those transmission projects, the alleged cost savings resulting from the cancelled transmission projects are still speculative because those savings are based on estimates that SPS acknowledged were approximations.³³ Given the level of uncertainty surrounding the amount of cost savings, if any, directly attributable to Sharyland's disconnection, we find that it would be inappropriate to view these speculative cost savings as a benefit offsetting the definite costs that would be assessed to other SPP customers if the waiver is granted.

17. Sharyland also contends that the Commission erred in looking only at the potential harm to other SPP customers and not the potential harm to customers of SPS or Sharyland who may be required to pay costs for transmission service they did not receive.³⁴ As noted above, the petitioner bears the burden of justifying its waiver request and SPS failed to bear the burden of showing that *the waiver* would not have undesirable consequences, such as harming third parties. While denial of the waiver allows SPP to assess 2014 charges to SPS, this is the result of applying the provisions of Schedules 1A and 11 of the SPP Tariff. Under the circumstances of this case, we find that it is not appropriate to view charges that are assessed in accordance with the terms of a

³² See February 2015 Order, 150 FERC ¶ 61,128 at P 35.

³³ See SPS Answer at 7.

³⁴ Sharyland Request for Rehearing at 1-2.

Commission-approved tariff as a harm that must be relieved by imposing harm on other customers as a result of the Commission waiving those tariff provisions.

18. In addition, Sharyland argues that the February 2015 Order violates the Commission's policy on cost causation and that the Commission failed to address the cost causation arguments raised by SPS and Sharyland in their pleadings in this proceeding.³⁵ Sharyland contends that granting the waiver would be consistent with cost causation policy because it would result in other SPP customers bearing only the costs for the services received, while preventing other parties who do not receive service from SPP from having to pay for the associated costs of that service.³⁶ Sharyland asserts that the denial of the waiver is contrary to the Commission's cost causation policy because SPS was assessed charges in 2014 based on Sharyland's 2013 load, but Sharyland did not receive any services from SPP during 2014.³⁷ We find that Sharyland's arguments relating to cost causation are misplaced.

19. The Commission's cost causation policy has been described as requiring that "all approved rates reflect to some degree the costs actually caused by the customer who must pay them."³⁸ Due to SPP's obligation under the 2012 NITS agreement to provide service for the Sharyland load through 2016, we are not persuaded that cost causation policies would or should exempt Sharyland from all cost responsibility in 2014 for the facilities that SPP planned to use to serve Sharyland's load. The fact that Sharyland did not end up using SPP facilities in 2014 does not by itself mean that Sharyland had no responsibility for causing the fixed costs of the facilities. Under the circumstances of this case, we do not find that cost causation principles weigh in favor of waiving a Commission-approved tariff provision.

20. In analogous circumstances, the Commission has found that entities seeking to change from one RTO to another should be prepared to assume the costs attributable to

³⁵ *See id.* at 5-6.

³⁶ *See id.* at 7.

³⁷ *See, e.g., id.* at 1-2, 5-7, 10.

³⁸ *See, e.g., Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004); *see also id.* at 1369 ("[W]e have never required a ratemaking agency to allocate costs with exacting precision...It is enough, given the standard of review under the [Administrative Procedure Act], that the cost allocation mechanism not be 'arbitrary or capricious' in light of the burdens imposed or benefits received.") (internal citations omitted).

their decisions³⁹ and that the Commission has applied the existing RTO tariffs in determining the costs to be allocated to the entity seeking to exit or enter an RTO.⁴⁰ Sharyland completed its acquisition of Cap Rock Energy Corporation (Cap Rock) after the Public Utility Commission of Texas (Texas Commission) issued an order requiring Sharyland to evaluate moving Cap Rock's divisions in SPP to ERCOT.⁴¹ Therefore, Sharyland chose to complete its acquisition of Cap Rock after it was aware that it could be required to move Cap Rock's SPP divisions to ERCOT. Sharyland should have been prepared to assume the costs attributable to its business decision to acquire Cap Rock and its SPP divisions that were required to move to ERCOT.⁴²

21. Likewise, with respect to Sharyland's argument that cost causation policy is violated because its load is paying charges in ERCOT in 2014 that are analogous to the Schedule 1A and Schedule 11 charges assessed for its load in 2014,⁴³ Sharyland, as a sophisticated party choosing to complete an acquisition that required a change in RTOs, should have been prepared for the possibility that it would be assessed certain charges in both ERCOT and SPP based on 2013 load information.

22. Sharyland further argues that the Commission erred because it declined to address the remaining factors that it typically considers in evaluating waiver requests.⁴⁴ It was

³⁹ *Am. Transmission Sys., Inc.*, 129 FERC ¶ 61,249, at P 113 (2009) (“Transmission owners that seek to change RTOs should be prepared to assume the costs attributable to their decisions.”).

⁴⁰ *See id.* (“While we have held that companies are free to join and exit RTOs, we have applied the existing tariffs for each RTO in determining the costs to be allocated to the transmission owners seeking to exit and/or enter. We see no basis to modify the existing RTO rules simply because a particular cost allocation makes a transmission owner's business decision more expensive.”).

⁴¹ *See* Sharyland Comments at 5 (“Sharyland's acquisition of control of Cap Rock was approved by...the [Texas Commission] on July 8, 2010, and the transaction was completed on July 10, 2010...the PUCT July 8 order also required Sharyland to study and evaluate moving the Colorado City and Stanton divisions from SPP to ERCOT.”).

⁴² *See supra* n.39.

⁴³ *See, e.g.*, Sharyland Request for Rehearing at 7, n.21; Sharyland Comments at 8-9.

⁴⁴ *See* Sharyland Request for Rehearing at 2.

not necessary for the Commission to address all of these factors after it found that the waiver would harm third parties, and the Commission has denied waivers on that basis alone before.⁴⁵ The Commission uses the satisfaction of all four criteria as a guide to when it may be appropriate to grant waiver. If the Commission identifies a factor that by itself makes waiver inappropriate, it need not continue to analyze other factors before it denies waiver. After the Commission determined that the fourth criterion in the tariff waiver analysis could not be satisfied, it was unnecessary to analyze the other three criteria, because even if the other three criteria were deemed to be satisfied, we would deny the waiver in this case based on failure to satisfy the fourth.

23. Finally, Sharyland argues that the Commission's decision in the February 2015 Order is arbitrary and capricious because it is inconsistent with Commission precedent granting other waiver requests that potentially would cause harm to third parties. We disagree. The precedent cited by Sharyland is distinguishable from the case here because the facts in those cases were not similar to the facts here.

24. First, Sharyland cites an order in which the Commission granted a limited waiver of the Midcontinent Independent System Operator, Inc. \$1,000/MWh market offer cap in order to allow generating resources to recover their incremental actual and verifiable costs during extreme weather conditions when high fuel costs made it uneconomic for generators to offer at the market cap.⁴⁶ Sharyland argues that the waiver was granted despite the higher costs that would result from the waiver because the potential harm to third parties was mitigated by market monitor review.⁴⁷ Sharyland contends that this market monitor review did not mitigate additional costs to customers, while in the case here, there are in fact offsetting benefits to the higher costs to other SPP customers because their transmission costs have been reduced by Sharyland's departure from SPP.⁴⁸ The order cited by Sharyland is distinguishable for a number of reasons. Fundamentally, the waiver there was justified because the higher cost imposed on customers was necessary to ensure an adequate supply of energy for the grid, a significant reliability benefit. The "potential harm" the Commission referred to in that order was the

⁴⁵ See, e.g., *CleanLight Power + Energy, LLC*, 149 FERC ¶ 61,018, at P 15 (2014) (denying waiver request because granting the requested waiver "could have adverse consequences and potentially harm third parties.").

⁴⁶ Sharyland Request for Rehearing at 7-8 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,083 (2015)).

⁴⁷ *Id.* at 8.

⁴⁸ *Id.*

possibility that a generator would offer more than its actual costs, and that potential harm was mitigated by market monitor review. Here, as discussed above, it is inappropriate to view the speculative cost savings that are cited by Sharyland as offsetting the definite harm to other SPP customers that would result from granting the waiver.⁴⁹ In addition, in the order cited by Sharyland, the Commission found that the waiver addressed a problem which would discourage resources from offering service at a time when they are needed.⁵⁰ The requested waiver in this case is not necessary to support reliability or ensure that resources are not discouraged from offering service when it is needed.

25. Second, Sharyland asserts that, in *Hudson Transmission Partners, LLC*,⁵¹ the Commission acknowledged a party's claim that granting the requested waiver would result in competitive harm, but nonetheless granted the waiver because it found that the waiver was justified after considering the "rights, obligations, and overall equities."⁵² Sharyland argues that the overall equities similarly favor granting SPS's requested waiver in this case because SPP and SPS were aware by July 2011 that the Sharyland load would depart SPP at the end of 2013, Sharyland agreed to limit its SPP load to 150 MW to avoid the need for additional transmission facilities to serve Sharyland load growth before its departure, Sharyland's departure benefitted SPP by avoiding the need for new transmission facilities after December 31, 2013, and because SPP and SPS were aware by July 2011 that Sharyland load would be used to assess analogous ERCOT administrative charges beginning in 2014.⁵³ It is true that where a waiver may potentially harm third parties, the Commission may consider whether there are beneficial considerations in granting the waiver that outweigh the harm. The Commission did consider whether the overall circumstances in the present case justified granting the waiver, but found that they did not. As noted above, the following circumstances were considered: the cost savings cited by Sharyland are too uncertain to offset the definite harm that would result from granting the waiver; SPS and Sharyland had notice that charges would be assessed in 2014 based on Sharyland's 2013 load, while other SPP customers had no similar reason to expect that their Schedule 1A and Schedule 11 charges could be increased retroactively; SPS and Sharyland received some benefit from the extended NITS term

⁴⁹ See *supra* at PP 16-17.

⁵⁰ *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,083, at P 15 (2015).

⁵¹ *Hudson Transmission Partners, LLC*, 134 FERC ¶ 61,030 (2011).

⁵² Sharyland Request for Rehearing at 8-9 (citing *Hudson Transmission Partners, LLC*, 134 FERC ¶ 61,030, at P 21 (2011)).

⁵³ *Id.* at 9.

that resulted in the 2014 charges; and Sharyland should have been prepared to assume the costs attributable to its decision to acquire Cap Rock, including any such costs assessed pursuant to SPP's existing Tariff.

26. Finally, Sharyland argues that the Commission has granted a waiver when doing so would result in harm to a third party, because the overall efforts by the California Independent System Operator Corporation to reform its generator interconnection queue backlog would bring benefits to the third party.⁵⁴ Sharyland contends that the circumstances here are similar because, while SPP customers may suffer harm from the higher rates they would pay if the waiver is granted, they nonetheless benefit from the foregone higher transmission costs avoided by Sharyland's departure from SPP.⁵⁵ As discussed above, these speculative cost savings do not justify granting SPS's requested waiver under the circumstances here because they are not sufficiently certain to offset the definite harm to other SPP customers that would result if the waiver is granted.

The Commission orders:

Sharyland's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵⁴ *Id.* at 9-10 (citing *California Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,293 (2008)).

⁵⁵ *Id.* at 10.