

156 FERC ¶ 61,185  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket Nos. ER16-1546-000  
ER16-1546-001

ORDER ACCEPTING TARIFF REVISIONS AND ESTABLISHING HEARING AND  
SETTLEMENT JUDGE PROCEDURES

(Issued September 19, 2016)

1. In this order, we accept Southwest Power Pool, Inc.'s (SPP) proposed revisions to its Open Access Transmission Tariff (Tariff) to add a formula rate template and implementation protocols to accommodate the recovery of an annual transmission revenue requirement for SPP member Arkansas Electric Cooperative Corporation, (Arkansas Electric)<sup>1</sup> effective July 1, 2016, subject to refund, and establish hearing and settlement judge procedures.

**I. Background**

**A. The Instant Filing**

2. On April 29, 2016, SPP made the instant rate filing on behalf of Arkansas Electric, pursuant to section 205 of the Federal Power Act (FPA)<sup>2</sup> and Part 35 of the Commission's regulations.<sup>3</sup> SPP's proposed revisions to its Tariff govern transmission

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<sup>1</sup> Arkansas Electric is a wholesale electric power supply cooperative serving 17 members. SPP states that, as an electric cooperative borrower from the Rural Utilities Service (RUS), Arkansas Electric is not subject to the Commission's jurisdiction over public utilities under the Federal Power Act, 16 U.S.C. § 824(f) (2012) (FPA).

<sup>2</sup> 16 U.S.C. § 824d (2012).

<sup>3</sup> 18 C.F.R. pt. 35 (2016).

service using certain facilities of Arkansas Electric upon Arkansas Electric's transfer of functional control of these facilities to SPP on July 1, 2016.<sup>4</sup>

3. SPP proposes to modify Attachment H of its Tariff to accommodate Arkansas Electric's recovery of revenues for the transmission facilities that it will place under SPP's functional control. Specifically, SPP proposes to include, as Addendum 38 to Attachment H, Arkansas Electric's formula rate and formula rate protocols used to calculate Arkansas Electric's revenue requirement. Additionally, SPP proposes revisions to Attachment T, Rate Sheet for Point-To-Point Transmission Service, to add a reference to the Arkansas Electric formula rate template on the American Electric Power (AEP) - West Zone (AEP Zone) and Oklahoma Gas and Electric Company (OG&E) Zone rate sheets. SPP asserts that the Commission has previously approved similar modifications to the Tariff to accommodate zones that include multiple owners.<sup>5</sup> SPP also proposes revisions to Addendum 2 of Attachment O to include Arkansas Electric as a participant in SPP's planning region.<sup>6</sup>

4. In support of its filing, SPP submitted, on behalf of Arkansas Electric, testimony and supporting exhibits from: Michael Mueller, Arkansas Electric's Manager – Planning Engineer; and Alfred Busbee, Project Manager for GDS Associates, Inc.<sup>7</sup>

5. Arkansas Electric explains that the facilities it will transfer to SPP qualify as transmission facilities under Attachment AI, Transmission Facilities, of the SPP Tariff. These facilities include approximately one mile of 161 kV electric transmission line, seven miles of 115 kV transmission line, as well as transmission equipment located in five substations and three switching stations.<sup>8</sup>

6. Arkansas Electric explains that approximately 5.58 percent of its transmission investment is located in SPP, and Arkansas Electric uses this percentage as an allocation throughout the formula rate to allocate its rate base and expenses items. Arkansas Electric's transmission investments in SPP are physically located within the AEP and OG&E pricing zones,<sup>9</sup> and Arkansas Electric allocates its revenue requirement to these

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<sup>4</sup> SPP Transmittal at 1.

<sup>5</sup> *Id.* at 6-7 & n.21.

<sup>6</sup> *Id.* at 6-7.

<sup>7</sup> *Id.* at 5-6.

<sup>8</sup> Ex. SPP-1, Michael Mueller Direct Test. at 4-5.

<sup>9</sup> Ex. SPP-2, Alfred W. Busbee Direct Test. at 4-8.

two zones based on each zone's share of its transmission facility investment.<sup>10</sup> Arkansas Electric explains that the depreciation values used in its formula rate are from Arkansas Electric's Rural Utilities Service (RUS) Form 12. Arkansas Electric asserts that the classification, functionalization, and allocation factors included in its formula rate reflect standard Commission ratemaking.<sup>11</sup> In addition, Arkansas Electric asserts that its proposed formula rate protocols mirror the protocols accepted by the Commission and in use pursuant to MISO's Attachment O, with the exception of textual variations due to the protocols being applicable to an individual transmission owner in SPP.<sup>12</sup>

7. Regarding its requested return on equity (ROE) formula rate component, Arkansas Electric asserts that the Commission has declined to establish a formal standard of review applicable to revenue requirements filed by non-jurisdictional transmission owners, such as Arkansas Electric, transferring its facilities to a Regional Transmission Organizations' (RTO) functional control. Arkansas Electric contends that the Commission has permitted non-jurisdictional transmission owners in RTOs to use the same overall rate of return as that of the dominant zonal transmission owner.<sup>13</sup> Arkansas Electric thus proposes an ROE of 11.2 percent, reflecting a base ROE of 10.7 percent based on the ROE of AEP, the dominant zonal transmission owner in the AEP Zone, and a 50 basis point adder for RTO participation.<sup>14</sup>

8. SPP states that, in the event the Commission determines further proceedings are necessary in order to complete its evaluation of Arkansas Electric's revenue requirement, formula rate, and formula rate protocols, Arkansas Electric has voluntarily agreed to allow its revenue requirement, formula rate, and formula rate protocols to be treated as being accepted, subject to refund with interest at the Commission interest rate. SPP

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<sup>10</sup> Ex. SPP-3, Populated Formula Rate Template at 10.

<sup>11</sup> Ex. SPP-2, Alfred W. Busbee Direct Test. at 13.

<sup>12</sup> *Id.* at 14. Arkansas Electric is a transmission owner under the MISO tariff. Transmittal at 4.

<sup>13</sup> *Id.* at 12 (citing *Pac. Gas and Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002) (citations omitted)).

<sup>14</sup> Ex. SPP-2, Alfred W. Busbee Direct Test. at 11-12. Arkansas Electric mistakenly states that it is proposing a base ROE of 10.8 percent, with a 50 basis point adder for a total ROE of 11.2 percent. We note that the populated formula rate template included in Ex. SPP-3 and AEP's base ROE on file with the Commission reflect a base ROE of 10.7 percent. Thus, we interpret the references to a 10.8 percent ROE in Ex. SPP-2 to be typographical errors.

further states that Arkansas Electric has informed SPP that Arkansas Electric makes this voluntary commitment without waiving or in any way limiting or altering Arkansas Electric's non-jurisdictional status.<sup>15</sup>

9. SPP states that it has filed these proposed revisions to its Tariff at Arkansas Electric's request and on Arkansas Electric's behalf. SPP adds that it is not independently supporting or justifying the Arkansas Electric annual transmission revenue requirement, formula rate, or protocols, but is merely modifying the Tariff to accommodate Arkansas Electric's recovery of transmission service revenues for its transmission facilities.<sup>16</sup>

10. SPP requests partial waiver of any provisions of 18 C.F.R. § 35.13 that may be deemed to require cost support in the form of cost-of-service statements. SPP notes that the Tariff revisions are to include a revenue requirement for Arkansas Electric, and that SPP is only serving an administrative role by making this filing.<sup>17</sup>

#### **B. Notice of Filing, Deficiency Letter, and Responsive Pleadings**

11. Notice of SPP's filing was published in the *Federal Register*, 81 Fed. Reg. 28,855 (2016), with interventions and protests due on or before May 20, 2016. Timely motions to intervene were filed by Southwestern Power Administration and South Central MCN LLC.

12. On June 30, 2016, Commission staff issued a letter informing SPP that the filing was deficient and requesting additional information (Deficiency Letter). On July 21, 2016, SPP submitted a response to the Deficiency Letter (Deficiency Response). Notice of SPP's Deficiency Response was published in the *Federal Register*, 81 Fed. Reg. 49,645 (2016), with interventions and protests due on or before August 11, 2016. None was filed.

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<sup>15</sup> SPP Transmittal at 7 & n.22. We note that Mr. Busbee's testimony is inconsistent with the SPP transmittal letter regarding the interest rate on refunds, stating that "[i]nterest on any refunds will be based on [Arkansas Electric's] actual short-term debt costs, capped at the [Commission] interest rate." Mr. Busbee asserts that the Commission has accepted this interest rate for one other SPP transmission owner. Ex. SPP-2 at 6 (citing SPP Tariff, Attachment H, § II.3.2(2)).

<sup>16</sup> SPP Transmittal at 5.

<sup>17</sup> *Id.* at 9.

13. In the Deficiency Letter, Commission staff requested SPP to provide a depreciation study to support the proposed depreciation rates, if one was available, and to explain why the proposed depreciation rates are appropriate. Arkansas Electric states that no depreciation study is available, and that the original source for its depreciation rates is Rural Electrification Administration Bulletin 183-1 (RUS Bulletin). Arkansas Electric explains that as an RUS borrower, it is subject to the requirements of the RUS Bulletin and its guarantee agreement with the RUS when setting its transmission rates. Arkansas Electric further explains that deviation from these transmission rates requires RUS approval.<sup>18</sup> Arkansas Electric also notes that in a case before the Arkansas Public Service Commission (Arkansas Commission), the Arkansas Commission rejected a recommendation that Arkansas Electric be required to conduct a full depreciation study, concluding there was no evidence the benefits of such a study would outweigh the costs.<sup>19</sup> Arkansas Electric further contends that any deviation from its currently adopted depreciation rates may negatively affect its capital levels, and notes that the rates proposed here are used in its Attachment O formula rate template in MISO.<sup>20</sup>

14. Commission staff also requested that Arkansas Electric explain whether it intended for the depreciation rates to be stated values that cannot be changed absent a filing made pursuant to section 205 or 206 of the FPA. In the Deficiency Response, Arkansas Electric also confirms that the depreciation rates are stated values that cannot be changed absent an appropriate filing pursuant to section 205 or 206 of the FPA.<sup>21</sup>

## II. Discussion

### A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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<sup>18</sup> Ex. SPP-4, Alfred W. Busbee Supplemental Test. at 3 & n.2; *see* Ex. SPP-5, *Revision of REA Bulletin 183-1*, U.S. Dep't of Agric., Rural Electrification Admin. (issued Oct. 28, 1977).

<sup>19</sup> *Id.* at 3-4 & n.3 (citing *In the Matter of the Application of Arkansas Electric Cooperative Corporation for Approval of Changes in Wholesale Power Rates to its Members*, Order, Arkansas Commission Docket No. 04-141-U (issued Aug. 5, 2005)).

<sup>20</sup> *Id.* at 4-5.

<sup>21</sup> *Id.* at 6.

## B. Standard of Review

16. The Commission has addressed the standard of review to be applied to petitions involving non-jurisdictional transmission revenue requirements in an opinion reviewing the transmission revenue requirement filed by the City of Vernon, California (Vernon).<sup>22</sup> In Opinion No. 479, the Commission recognized that, as a municipally-owned utility, Vernon was not subject to the Commission's jurisdiction under section 205 of the FPA. However, the Commission noted that because Vernon voluntarily submitted its transmission revenue requirement as a component of the California Independent System Operator Corporation's (CAISO) jurisdictional rate, Vernon's transmission revenue requirement was "subject to a full and complete section 205 review as part of our section 205 review of that jurisdictional rate."<sup>23</sup> The Commission explained that, in *Pacific Gas and Electric Company v. FERC*, the U.S. Court of Appeals for the District of Columbia held that the Commission had statutory authority to review Vernon's transmission revenue requirement "to the extent necessary to ensure that the CAISO rates are just and reasonable."<sup>24</sup> Subsequently, the court upheld the Commission's decision that subjecting the transmission revenue requirements 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>25</sup>

17. However, in *TANC*, the court rejected the Commission's authority to order Vernon to pay refunds under section 205 of the FPA. 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 section 205 of the FPA over wholesale electric energy sales.<sup>26</sup> The court reasoned that section 201(f) of the FPA exempts from Part II of the FPA "any political subdivision of a state."<sup>27</sup>

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<sup>22</sup> See *City of Vernon, Cal.*, 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>23</sup> *Id.* P 44.

<sup>24</sup> *Id.* P 43 (quoting *Pac. Gas and Elec. Co. v. FERC*, 306 F.3d at 1117).

<sup>25</sup> *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 672 (D.C. Cir. 2007) (*TANC*).

<sup>26</sup> *Id.* at 673-74.

<sup>27</sup> *Id.* at 674.

18. Therefore, while Arkansas Electric is not within the Commission's jurisdiction under section 205 of the FPA, we find that, based on the precedent cited above, it is appropriate to apply the just and reasonable standard of section 205 of the FPA to SPP's proposed rates filed on behalf of Arkansas Electric.<sup>28</sup> To determine the justness and reasonableness of Arkansas Electric's proposed rates, we find that, as discussed below, hearing and settlement judge procedures are appropriate.

19. Furthermore, Arkansas Electric is not subject to Commission-imposed rate suspension and refund obligations under section 205 of the FPA.<sup>29</sup> However, we note that Arkansas Electric has agreed to allow its revenue requirement, formula rate and formula rate protocols to be treated as being accepted, subject to refund with interest at the Commission interest rate.<sup>30</sup>

### C. Commission Determination

20. We find that SPP's proposed Tariff revisions filed on behalf of Arkansas Electric raise issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures we order below. These issues include, but are not limited to, the following: (1) how Arkansas Electric calculated the investment values determining the allocation of the revenue requirement between the AEP Zone and the OG&E Zone; and (2) the reasonableness of Arkansas Electric's proposed depreciation rates.

21. 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 Tariff revisions, effective July 1, 2016, subject to refund, and set them for hearing and settlement judge procedures.

22. We will accept Arkansas Electric's commitment to provide refunds, with interest, as of July 1, 2016. Arkansas Electric is not subject to Commission-imposed refund obligations under section 205 of the FPA and the Commission has previously accepted commitments by non-jurisdictional transmission owners that they will refund the difference between the proposed rate and the rate ultimately determined by the

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<sup>28</sup> See *Sw. Power Pool, Inc.*, 151 FERC ¶ 61,211, at PP 38-41 (2015).

<sup>29</sup> *Id.* P 41.

<sup>30</sup> SPP Transmittal at 7 & n.22; see also Ex. SPP-2, Alfred W. Busbee Direct Test. at 6.

Commission to be just and reasonable.<sup>31</sup> While Mr. Busbee's testimony states that the interest rate on any refunds will be based on Arkansas Electric's actual short-term debt costs, capped at the Commission interest rate, the formula rate protocols state that any refunds will be made at the Commission interest rate.<sup>32</sup> Therefore, because the formula rate protocol language filed with the Commission is controlling, the interest on any refunds will be at the Commission interest rate set forth in 18 C.F.R § 35.19a of the Commission's regulations.<sup>33</sup>

23. While we are setting SPP's proposed Tariff revisions for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before 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>34</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.<sup>35</sup> The settlement judge shall report to the Chief Judge and the Commission within 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.

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<sup>31</sup> See, e.g., *Sw. Power Pool, Inc.*, 147 FERC ¶ 61,003, at P 19 & n.40 (2014).

<sup>32</sup> See SPP, Open Access Transmission Tariff, Sixth Revised Volume No. 1, Attachment H Add. 38 (AECC), Attachment H Addendum 38 (AECC), (0.0.0) at section V. Further, SPP's transmittal letter states that the interest rate shall be the interest rate in the Commission regulations, consistent with the language in the formula rate protocols.

<sup>33</sup> We note that the Commission has recently instituted a proceeding to examine the SPP Tariff regarding the refund commitment for non-public utility transmission owners such as Arkansas Electric. Accordingly, the outcome of that proceeding may affect the terms and conditions under which Arkansas Electric may recover its revenue requirement through the SPP Tariff.

<sup>34</sup> 18 C.F.R. § 385.603 (2016).

<sup>35</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 this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience. (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

24. We grant SPP's requested waiver of section 35.13 of the Commission's regulations. Because Arkansas Electric 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 become effective July 1, 2016, subject to refund, as discussed in the body of the 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 FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), a public hearing shall be held concerning the justness and reasonableness of SPP's proposed Tariff revisions. 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 (2016), the Chief 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 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.