

168 FERC ¶ 61,006
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

American Wind Energy Association
The Wind Coalition

Docket No. EL19-11-000

v.

Southwest Power Pool, Inc.

ORDER ON MOTION FOR STAY AND ESTABLISHING REFUND EFFECTIVE
DATE

(Issued July 2, 2019)

1. On May 20, 2019, Southwest Power Pool, Inc. (SPP) filed a motion requesting that the Commission stay the effectiveness of its April 18, 2019 order on complaint¹ so as to allow SPP's preexisting exit fee structure to remain in place until the Commission issues an order accepting a replacement exit fee structure. For the reasons discussed below, we deny SPP's requested stay of the April 2019 Order. Additionally, we establish a refund effective date of April 5, 2019 for this proceeding.

I. Background

2. In the April 2019 Order, the Commission found that SPP's membership exit fee, as applied to non-transmission owners, is unjust and unreasonable. The Commission directed SPP to submit a compliance filing revising the exit fee provisions in SPP's Governing Documents Tariff to eliminate the exit fee for non-transmission owners.² On

¹ *Am. Wind Energy Ass'n v. Sw. Power Pool, Inc.*, 167 FERC ¶ 61,033 (2019) (April 2019 Order).

² *Id.* PP 2, 49, 63.

May 1, 2019, the Commission's Secretary granted a motion filed by SPP requesting an extension of time from June 17, 2019 to August 1, 2019 to submit its compliance filing.³

II. Stay Request

3. SPP requests that the Commission stay the effectiveness of the April 2019 Order until such time as the Commission issues an order accepting a replacement exit fee formula. SPP asserts that its request for stay satisfies the Commission's test for determining whether to grant a stay.⁴

4. First, SPP states that irreparable injury will result from the uncertainty regarding the status and applicability of SPP's exit fee during the period between the date of issuance of the April 2019 Order and the Commission's ultimate action on a replacement exit fee. SPP states that the April 2019 Order is silent on whether the existing obligations set forth in its membership agreement and bylaws remain in effect until such time as a replacement mechanism is in place and that there will be no certainty regarding the exit fee obligation formula until such time as the Commission approves SPP's replacement formula.

5. SPP states that it lacks certainty regarding the applicability and calculation of the exit fee obligation on entities that withdraw from SPP during the period between the April 2019 Order and Commission action on the replacement exit fee.⁵ SPP notes that, prior to the April 2019 Order, two SPP members indicated their intentions to withdraw or partially withdraw from SPP. Specifically, SPP states that Rayburn County Electric Cooperative, Inc. (Rayburn) submitted a letter to SPP on March 12, 2018 indicating its intention to withdraw from SPP and requesting a termination date of January 1, 2020. In addition, SPP notes that, although East Texas Electric Cooperative, Inc. (ETEC) has announced its intention to transfer only some of its load to the Electric Reliability Council of Texas, such action constitutes a "Partial Termination" under the membership agreement, and an exit fee attributable to that Partial Termination is properly levied.⁶

6. Additionally, SPP asserts that it is at risk that its financing arrangements may be adversely affected in the absence of the requested stay. SPP notes that two of its lenders have notified SPP that they consider the April 2019 Order to constitute an event of

³ Notice of Extension of Time, Docket No. EL19-11-000 (May 1, 2019).

⁴ SPP Motion for Stay at 7.

⁵ *Id.* at 8-11.

⁶ *Id.* at 11.

default under SPP's credit agreements. SPP also states that noteholders under a third debt instrument have indicated that the April 2019 Order would likely constitute an event of default.⁷ SPP states that, while efforts are underway to assure lenders that any replacement formula will cover the full amount needed to service its debt, until those negotiations are successfully concluded, SPP remains at risk that its financing arrangements may be adversely affected. SPP asserts that without the requested stay there is no guarantee that SPP's lenders will waive any default-related obligations triggered by the April 2019 Order, resulting in irreparable injury to SPP and its members. SPP adds that, without a stay, SPP's lenders are irreparably deprived of the benefit of the bargain they struck in providing SPP with debt financing. SPP states that keeping the current exit fee structure in effect until a replacement is effective will facilitate more favorable renegotiation, to the extent necessary, of SPP's debt instruments, and may forestall SPP's lenders from triggering adverse actions against SPP.⁸

7. Second, SPP argues that granting the stay will not harm third parties. SPP states that, because there is a two-year notice period for any future withdrawal from SPP, SPP is at least two years away from having to enforce an exit fee against any other member. SPP asserts that granting the stay will not harm third parties because the exit fee provisions will not be invoked for any new parties for at least two years. SPP also notes that Rayburn and ETEC have been on notice of the exit fee obligations and that both entities joined SPP and announced their intentions to withdraw with full knowledge and recognition of the exit fee obligations.⁹

8. Third, SPP asserts that the requested stay is in the public interest because the injuries SPP described in its motion would be almost entirely avoided if the Commission allows SPP to maintain the status quo until the Commission accepts a new formula. SPP asserts that the public interest is not served if SPP defaults on its loans, triggering a possible downgrading of its credit and higher costs of credit for SPP and its members.¹⁰

9. SPP requests expedited action on its motion for stay by June 5, 2019, in order to provide certainty to SPP, its members, and its lenders, and to avoid irreparable injury,

⁷ *Id.*

⁸ *Id.* at 11-15.

⁹ *Id.* at 13.

¹⁰ *Id.*

which SPP states is exacerbated the longer SPP's exit fee obligations remain unresolved.¹¹

III. Answers

10. American Wind Energy Association and Advanced Power Alliance¹² (Complainants), Rayburn, Solar Energy Industries Association (Solar Energy Industries), SPP Generation Market Participants,¹³ and SPP Load-Serving Entities (SPP LSEs)¹⁴ filed answers to SPP's Motion for Stay. On June 5, 2019, SPP filed an answer to Complainants, Rayburn, Solar Energy Industries, and SPP Generation Market Participants' answers.

11. SPP LSEs support SPP's motion, arguing that "justice so requires" the stay to be granted, as all three criteria for a stay are met here: preventing irreparable injury; imposing no harm upon third parties; and serving the public interest.¹⁵

12. Complainants, Rayburn, Solar Energy Industries, and SPP Generation Market Participants oppose SPP's motion, arguing that SPP has not demonstrated it will suffer irreparable injury without the stay.¹⁶ Complainants, Solar Energy Industries, and SPP Generation Market Participants also argue that granting the stay will harm non-

¹¹ *Id.* at 14.

¹² Advanced Power Alliance was formerly known as The Wind Coalition.

¹³ SPP Generation Market Participants are: EDF Renewables, Inc., Enel Green Power North America, Inc., and E.ON Climate & Renewables North America, LLC.

¹⁴ SPP LSEs are: American Electric Power Service Corporation, The Empire District Electric Company, the Evergy Companies, Golden Spread Electric Cooperative, Inc., Basin Electric Power Cooperative, Western Farmers Electric Cooperative, Sunflower Electric Power Corporation, Mid-Kansas Electric, Inc., Nebraska Public Power District, City Utilities of Springfield, Missouri, Lincoln Electric System, Omaha Public Power District, Midwest Energy, Inc., Oklahoma Gas & Electric Company, and Xcel Energy Services, Inc.

¹⁵ SPP LSEs Answer at 1-2.

¹⁶ Complainants Answer at 3-4; Rayburn Answer at 8-10; Solar Energy Industries Answer at 3-6; SPP Generation Market Participants Answer at 3-5.

transmission owners by delaying elimination of the barrier to membership identified in the April 2019 Order.¹⁷

13. SPP Generation Market Participants argue that there is no uncertainty regarding the status and applicability of SPP's exit fee because, under the Federal Power Act, SPP's current exit fee provisions remain in effect until the Commission accepts SPP's compliance filing revising the exit fee formula.¹⁸ SPP Generation Market Participants state that the Commission can address concerns about uncertainty by clarifying that the current exit fee formula remains in effect until the Commission accepts SPP's revisions on compliance.¹⁹ Complainants and Rayburn maintain that SPP's argument that a stay is needed to resolve uncertainty is contrary to the Commission's general policy of denying stay requests to assure definiteness and finality in proceedings.²⁰ Complainants, Rayburn, Solar Energy Industries, and SPP Generation Market Participants state that, if SPP seeks certainty, it should work expeditiously to develop and submit a compliance filing.²¹

14. Complainants, Rayburn, Solar Energy Industries, and SPP Generation Market Participants contend that SPP's assertions about possible negative effects to its financing arrangements are speculative and theoretical.²² Solar Energy Industries state that SPP has not explained why administrative revisions that do not impact cost recovery are leading to defaults and assert that SPP need only demonstrate to its lenders that it has the means and ability to recover its debt obligations.²³ Complainants and SPP Generation Market

¹⁷ Complainants Answer at 2; Solar Energy Industries Answer at 7; SPP Generation Market Participants Answer at 5-6.

¹⁸ SPP Generation Market Participants Answer at 4.

¹⁹ *Id.* at 5-7.

²⁰ Complainants Answer at 4; Rayburn Answer at 10 (citing *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,003, at P 29 (2012) (quoting *City of Vernon, Cal.*, 116 FERC ¶ 61,091, at P 11 (2006)).

²¹ Complainants Answer at 4; Rayburn Answer at 10; Solar Energy Industries Answer at 6; SPP Generation Market Participants Answer at 4.

²² Complainants Answer at 3; Rayburn Answer at n.28; Solar Energy Industries Answer at 5; SPP Generation Market Participants Answer at 5.

²³ Solar Energy Industries Answer at 5-6.

Participants also note that the member withdrawals SPP identifies will not occur before the end of 2019.²⁴

15. In its answer, SPP reasserts that it fully justified and supported its request for stay. SPP states that it explained the factors that create irreparable injury to SPP, and, by extension, its members and customers who pay SPP's administrative costs and backstop SPP's debts. SPP contends that it also explained how the defaults that it has suffered as a result of the April 2019 Order could trigger SPP's lenders to accelerate the repayment of balances due under SPP's notes and/or freeze SPP's ability to draw on existing credit balances or otherwise seek to impose other onerous conditions on SPP's borrowings.²⁵

16. SPP also disputes SPP Generation Market Participants' claim that a stay is not necessary because "[p]er the Federal Power Act, the current SPP provisions governing the member exit fee formula remain in effect."²⁶ SPP states that although SPP Generation Market Participants offer no explication of this assertion, if they are correct, then there is no harm to the SPP Generation Market Participants or any other party from granting the request for stay because such a stay will merely keep the current exit fee provisions in effect until the Commission accepts a replacement.

17. With regard to harm to third parties, SPP contends that SPP Generation Market Participants make contradictory arguments in stating that, on the one hand, the stay is not needed because SPP is at least two years away from having to enforce an exit fee against any other member and that, on the other hand, SPP Generation Market Participants will suffer "substantial harm" from granting the stay because they want to join SPP immediately.²⁷ SPP argues that, if it is certain that the Commission will promptly act on a replacement exit fee in time to provide clarity to pending member withdrawals scheduled to occur in early 2020, then there is no impediment preventing Complainants, Rayburn, Solar Energy Industries, and SPP Generation Market Participants or their members from joining SPP now, because, with the two-year notice requirement, the earliest an exit fee could be imposed would be June 2021 if one of those parties joined SPP today and decided tomorrow to withdraw.²⁸

²⁴ Complainants Answer at 3; SPP Generation Market Participants Answer at 4.

²⁵ SPP Answer at 5-7.

²⁶ *Id.* at 11 (citing SPP Generation Market Participants' Answer at 4, 6-7).

²⁷ *Id.* at 13.

²⁸ *Id.* at 13-14.

IV. Discussion

A. Procedural Matters

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We accept SPP's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

19. As a preliminary matter, we note that in the April 2019 Order, the Commission did not establish a refund effective date. When the Commission institutes a section 206 proceeding on a complaint, section 206(b) of the Federal Power Act (FPA)²⁹ requires that the Commission establish a refund effective date that is no earlier than the date of the complaint and no later than five months subsequent to the date of the complaint. Section 206(b) permits the Commission to order refunds for a 15-month refund period following the refund effective date. The complaint was filed on November 5, 2018. We will set the refund effective date at April 5, 2019, five months after the date the complaint was filed.³⁰ Because no members withdrew from SPP between November 5, 2018 and April 5, 2019, setting the refund effective date at the latest date possible will provide maximum refund protection by allowing for refunds for fifteen months after April 5, 2019.³¹

²⁹ 16 U.S.C. § 824e(b) (2012).

³⁰ The Commission may set the refund effective date at any time after instituting a section 206 proceeding. *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016, 1031-32 (9th Cir. 2007).

³¹ See *Cal. Indep. Sys. Operator Corp.*, 151 FERC ¶ 61,247, at P 17 (2015) (setting refund effective date at the latest date possible under section 206(b) of the FPA); *Ky. Utils. Co.*, 145 FERC ¶ 61,161 (2013), *order on reh'g*, 146 FERC ¶ 61,057 (2014) (setting refund effective date that would be better protect customers); *ExxonMobil Corp. v. Entergy Servs., Inc.*, 118 FERC ¶ 61,032, P 15 (2007), *order on reh'g*, 119 FERC ¶ 61,261 (2007) (setting refund effective date at five months after complaint was filed in order to provide maximum protection to customers); *Detroit Edison Co.*, 58 FERC ¶ 61,233, *order on reh'g*, 59 FERC ¶ 61,102, at 61,376 (1992) (setting refund effective date at latest date possible in order to provide maximum protection to customers).

20. Turning to SPP's request for stay, we find that SPP has not demonstrated that "justice so requires"³² the Commission to grant a stay, and therefore deny it. In determining whether this standard has been met, the Commission considers several factors, including: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest.³³ If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine other factors.³⁴

21. In order to support a stay, the movant must substantiate that irreparable injury is "likely" to occur.³⁵ The injury must be both certain and great and it must be actual and not theoretical. Bare allegations of what is likely to occur do not suffice.³⁶ The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.³⁷ Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.³⁸

22. We find that SPP's allegations of harm do not meet the standard of irreparable harm required to justify a stay. As the D.C. Circuit has explained, the standard for showing irreparable harm is strict:

³² *Tenn. Gas Pipeline Co., L.L.C.*, 157 FERC ¶ 61,154, at P 4 (2016); *Algonquin Gas Transmission, LLC*, 156 FERC ¶ 61,111, at P 9 (2016); *Enable Gas Transmission*, 153 FERC ¶ 61,055, at P 118 (2015); *Transcontinental Gas Pipe Line Co.*, 150 FERC ¶ 61,183, at P 9 (2015).

³³ Ensuring definiteness and finality in our proceedings also is important to the Commission. See *Enable Gas Transmission*, 153 FERC ¶ 61,055 at P 118; *Millennium Pipeline Co.*, 141 FERC ¶ 61,022, at P 13 (2012).

³⁴ See, e.g., *Algonquin Gas Transmission*, 156 FERC ¶ 61,111 at P 9.

³⁵ See *Transcontinental Gas Pipe Line Co., LLC*, 150 FERC ¶ 61,183, at P 10 (2015) (citing *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

[T]he injury must be both certain and great; it must be actual and not theoretical. . . . It is also well settled that economic loss does not, in and of itself, constitute irreparable harm. . . . Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.³⁹

23. Here, SPP has not shown that the risk of adverse effects on its financial arrangements constitutes irreparable harm. SPP asserts that the adverse effects that could occur absent the requested stay include higher costs of credit for SPP and its members, additional fees or security, a credit rating downgrade, acceleration of balances due, or limits on SPP's ability to access cash for financing its operations.⁴⁰ First, we find that these potential adverse effects have not actually occurred at this time and are not certain to occur. While SPP argues that two lenders have already declared SPP in default,⁴¹ SPP has not shown that the declarations of default have already caused or are certain to cause adverse effects on its financial arrangements. Second, we find that these potential adverse effects, if they were to occur, are economic losses that would make SPP's financial arrangements more expensive. Even if substantial, economic losses alone do not constitute irreparable harm. For these reasons, and given the strict standard for showing irreparable harm, we find that SPP has not demonstrated that it will suffer irreparable injury from adverse effects on its financial arrangements without the requested stay.

24. Furthermore, SPP asserts that it will suffer irreparable injury given the lack of certainty about the applicability and calculation of the exit fee obligation on entities that withdraw from SPP between the date of issuance of the April 2019 Order and the Commission's ultimate action on a replacement exit fee.⁴² As noted below, the

³⁹ *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

⁴⁰ SPP Motion for Stay at 12-13; SPP Answer at 6-7.

⁴¹ SPP Answer at 5-6.

⁴² SPP Motion for Stay at 8.

Commission will address the effective date for the revisions to the exit fee provisions and any refunds, as appropriate, on compliance.⁴³

25. SPP also argues that without the stay its lenders will suffer irreparable harm because they entered into debt agreements with SPP with the understanding that all SPP members would be subject to the exit fee.⁴⁴ However, SPP does not explain with specificity how lenders will be harmed without a stay. SPP's bare allegation that lenders will suffer irreparable harm is inadequate to demonstrate that irreparable harm will occur, particularly given the Commission's direction in the April 2019 Order that the revisions to SPP's exit fee provisions must ensure that SPP's debt is fully secured.⁴⁵

26. For the reasons discussed above, we deny SPP's motion for stay.

27. Finally, we note that in the April 2019 Order, after determining that SPP's existing exit fee structure was unjust and unreasonable as applied to non-transmission owners, the Commission directed SPP to submit a compliance filing with revisions to the exit fee provisions in SPP's Governing Documents Tariff consistent with the directives in the April 2019 Order.⁴⁶ The Commission will address the effective date for the revisions to the exit fee provisions and any refunds, as appropriate, on compliance.

The Commission orders:

(A) SPP's motion for stay of the Commission's April 2019 Order in this proceeding is hereby denied, as discussed in the body of this order.

⁴³ See *infra* P 27.

⁴⁴ SPP Motion for Stay at 12; SPP Answer at 6-7.

⁴⁵ April 2019 Order, 167 FERC ¶ 61,033 at P 63.

⁴⁶ April 2019 Order, 167 FERC ¶ 61,033 at P 63 (“[W]e direct SPP to submit a compliance filing within 60 days of the date of this order that revises the exit fee provisions in SPP's bylaws and membership agreement in its Governing Documents Tariff to eliminate the exit fee for non-transmission owners. Additionally, we direct SPP to revise its exit fee formula to ensure that the continued application of the exit fee to transmission owners ensures SPP's debt is fully secured.”).

(B) The refund effective date established pursuant to section 206(b) of the FPA is April 5, 2019, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.