

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Southwest Power Pool, Inc.

Docket No. ER06-451-016

ORDER ON REHEARING AND CLARIFICATION

(Issued April 6, 2007)

1. In this order, the Commission addresses Golden Spread Cooperative, Inc.'s (Golden Spread) request for rehearing and motion for clarification of the November 17, 2006 Order¹ on the Balancing Authorities Settlement Agreement (Balancing Agreement) related to the Southwest Power Pool, Inc.'s (SPP) energy imbalance service market (imbalance market). As discussed below, we deny rehearing and grant clarification.

I. Background

2. SPP has been authorized as a regional transmission organization (RTO) since October 1, 2004.² The Commission accepted SPP's commitment to develop an imbalance market, including implementation of a real-time, offer-based energy market

¹ *Southwest Power Pool, Inc.*, 117 FERC ¶ 61,207 (2006) (*November 17 Order*).

² *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,009 (2004), *order on reh'g*, 110 FERC ¶ 61,137 (2005).

that will be used to calculate the price of imbalance energy.³ On February 1, 2007, SPP launched its imbalance market and began dispatching wholesale electricity within its region.⁴

3. On May 22, 2006, SPP submitted the Balancing Agreement as part of its offer of settlement, as directed in the Commission's March 20, 2006 Order on SPP's imbalance market.⁵ The Balancing Agreement, negotiated between SPP and its balancing authorities resolved issues related to the division of functional responsibilities among SPP and balancing authorities participating in the SPP imbalance market. In the *November 17 Order*, the Commission conditionally approved the partial contested settlement, finding that, as a package, it presents a just and reasonable outcome of the proceeding.⁶

II. Rehearing Request

4. Golden Spread argues that the Commission erred in approving the public interest standard of review⁷ included in section 13.3 of the Balancing Agreement.⁸ Golden

³ *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110, at P 134, *order on reh'g*, 109 FERC ¶ 61,010 (2004).

⁴ SPP launched its market after its market readiness certification was accepted by the Commission. *Southwest Power Pool, Inc.*, 118 FERC ¶ 61,055 (2007).

⁵ *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,289, at P 90-91 (2006) (*SPP Market Order*). In the *SPP Market Order*, among other things, the Commission found that SPP's proposed revisions in the SPP Membership Agreement provided some detail on the Northern American Electric Reliability Council (NERC) functional responsibilities, but did not adequately address the functional responsibilities of SPP and the balancing authorities and how they will work together to implement the new imbalance market arrangements. *Id.* at P 89. Therefore, the Commission established settlement judge proceedings and directed SPP to make a filing containing: (1) a detailed allocation between SPP and the balancing authorities of the tasks within the balancing function and the reliability function; and (2) a proposed resolution of the allocation of the costs and liability among SPP and the balancing authorities. *Id.* at P 91.

⁶ *November 17 Order*, 117 FERC ¶ 61,207 at P 1.

⁷ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

Spread asserts that, by approving the Balancing Agreement with the *Mobile-Sierra* public interest standard, the Commission is denying Golden Spread and other non-signatories of their statutory right to be subjected only to rates, terms, and conditions of service that are

⁸ Section 13.3 of the Balancing Agreement provides as follows:

Absent a filing with the Commission to reflect the agreement of the Parties as detailed in [s]ection 13.4, the standard of review for changes or conditions to this Agreement, whether proposed by a Party, a non-Party or the Federal Energy Regulatory Commission acting *sua sponte* shall be the “public interest” standard of review Notwithstanding the foregoing in this [section] 13.3, if the Commission changes its policy (in existence at the time of the execution) with regard to non-signatories and imposes a standard different than the Mobile-Sierra standard set forth in this provision, then the Parties shall modify this Agreement to reflect the new standard. Any changes to this Agreement shall be prospective only. . . .

Section 13.4 provides as follows:

This Agreement may be modified or conditioned only by at least a two-thirds affirmative vote of the Balancing Authorities with the assent of SPP; provided, however, no such modification or condition may be imposed on a Party that does not agree to the modification or condition to the extent that the modification or condition will cause the Party to no longer be in compliance with NERC or regional reliability council requirements. SPP shall file with the Commission any modifications to this Agreement resulting from this [s]ection 13.4, which filing will be subject to the just and reasonable standard of review. Once the Commission accepts such modifications, then such modifications shall be considered as being part of this Agreement and all applicable terms of the Agreement, including [s]ection 13.3, shall apply to the modifications.

just and reasonable.⁹ It states that section 206 of the Federal Power Act (FPA)¹⁰ authorizes a complaint to be filed to determine whether the rates, terms and conditions under a regulated public utility's service are unjust and unreasonable. However, it argues that under the *Mobile-Sierra* doctrine, a contract cannot be reopened pursuant to a FPA section 206 complaint when the terms of the contract become unjust or unreasonable. Therefore, Golden Spread asserts that by approving a public interest standard contained in section 13.3, the Commission is allowing a higher or stricter standard than the just and reasonable standard of review for any challenges to the terms of the Balancing Agreement.¹¹ Thereby, denying Golden Spread and similarly situated parties of their section 206 rights.¹²

5. Golden Spread claims that the *Mobile-Sierra* doctrine applies to utilities that voluntarily give up their statutory rights by agreeing to a higher standard of review.¹³ However, in the instant case, the Commission is allowing utilities, by contract, to limit the statutory rights of their customers. It argues that it is unjust and unreasonable for the Commission to allow a diminution of the statutory rights of non-signatories who will be directly impacted by the Balancing Agreement.¹⁴

6. In addition, Golden Spread states that although the Commission stated in the *November 17 Order* that the Balancing Agreement provides for other means to make modifications to the terms of the Balancing Agreement, such mechanisms do not apply to non-signatories. It states that the provisions the Commission references only "provide signatories to negotiate changes, or to decide upon changes pursuant to the Balancing Agreement's provisions governing dispute resolution."¹⁵ Accordingly, Golden Spread argues that non-signatories do not have means to challenge a provision of the Balancing Agreement that they find to be unjust or unreasonable.

⁹ Golden Spread Rehearing Request at 3.

¹⁰ 16 U.S.C. § 824e (2000).

¹¹ *Id.* at 3.

¹² *Id.* at 5.

¹³ *Id.* at 6.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 6, citing *November 17 Order*, 117 FERC ¶ 61,207 at P 28.

7. Further, Golden Spread states that its concerns regarding the standard of review are due to its location within the SPP footprint. Specifically, it states that its loads are located in the Southwestern Public Service Company's (SPS) control area, which is a highly transmission constrained area. It maintains that the lack of transmission exposes Golden Spread to "unique risks" in the event of loss of resources. It states that due to transmission constraints, its only potential seller of replacement energy may be SPS.¹⁶ Because SPS may be the only bidder, Golden Spread argues that SPS would be free to bid up to the \$1000/MWh offer cap although its actual cost of producing the emergency energy may be a small fraction of that amount. Golden Spread asserts that section 206 complaints may not remedy such unjust and unreasonable results because "SPS can argue that it was functioning in its capacity as the balancing authority, and any [s]ection 206 complaint must meet the *Mobile-Sierra* public interest test."¹⁷

8. For these reasons, Golden Spread seeks the Commission to grant rehearing and direct SPP to modify section 13.3 of the Balancing Agreement to provide that challenges to any portion of the Balancing Agreement brought by a non-signatory, or initiated by the Commission will be determined according to the just and reasonable standard.

9. Additionally, Golden Spread seeks clarification of the Commission's acceptance of section 6 of the Balancing Agreement.¹⁸ Specifically, it states that it is not clear whether the limitation of liability afforded to SPP and balancing authorities include the obligation to make refunds when billing errors, caused by simple negligence or perhaps occurring in the absence of negligence, result in overbilling for customers.¹⁹ It notes that the Commission's usual practice is to require refunds to make the damaged party whole.²⁰ Accordingly, Golden Spread asks the Commission to clarify that the limitation of liability provisions of the Balancing Agreement do not immunize SPP or the balancing authorities

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 8.

¹⁸ Section 6 limits the liability of SPP and the balancing authorities to each other, and to third parties.

¹⁹ *Id.* at 9-10.

²⁰ *Id.* at 10, citing *Exelon Corp. v. PPL Elec. Util. Corp.*, 111 FERC ¶ 61,065 (2005); *Southern Illinois Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,234 (2006).

from the obligation to make refunds to parties that have been overcharged in violation of relevant provisions of the SPP tariff, or the tariffs of the individual balancing authorities.

III. Discussion

10. We deny Golden Spread's rehearing request. As discussed below, we find that Golden Spread confuses the standard of review for future modifications to the Balancing Agreement with the standard of review under section 206 complaints alleging unjust and unreasonable wholesale electricity rates.

11. In the *November 17 Order*, among other things, the Commission found that the public interest standard of review for future modifications to the Balancing Agreement was a just and reasonable outcome of the proceeding.²¹ The Commission concluded that the public interest provision in the SPP Balancing Agreement is consistent with Commission precedent.²² Moreover, the SPP Balancing Agreement contained additional language that limits the *Mobile-Sierra* provision by providing that signatories will modify the Balancing Agreement to reflect any changes in Commission policy on standard of review.²³ Accordingly, should the Commission find that the *Mobile-Sierra* provision should no longer be applied in such contracts because it does not serve the public interest, SPP and its signatories will be obligated to reflect such a change in the Balancing Agreement.²⁴ Additionally, the Commission found that the public interest standard should apply because it provides SPP and the signatories the needed certainty.²⁵ Therefore, in keeping with precedent, recognizing the importance of providing certainty

²¹ *November 17 Order*, 117 FERC ¶ 61,207 at P 1, 29.

²² See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,177 (2005).

²³ *November 17 Order*, 117 FERC ¶ 61,207 at P 28.

²⁴ We also note that while parties can eliminate both the utility's right to make changes and the Commission's power to impose changes under section 206, the Commission could always effect changes if the terms are contrary to the public interest, *i.e.* order changes necessary to prevent impairment of the ability of the utility to perform service, excessive burdens on consumers, or undue discrimination. *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950 (D.C. Cir. 1983). Further, the public interest standard does not bar the Commission from protecting the interest of nonparties, *i.e.* the consumers. *Northeast Utility Service Co. v. FERC*, 55 F.3d 686, 690 (1st Cir. 1995).

²⁵ *November 17 Order*, 117 FERC ¶ 61,207 at P 29.

and stability in energy markets, and maintaining the sanctity of contracts, we affirm our decision in the *November 17 Order* that the public interest standard will govern future modifications to the Balancing Agreement.

12. In regard to the contention about the transmission constraint issues in the SPS control area, we note that Golden Spread raises no new arguments. The Commission has already addressed Golden Spread's concern about the SPS control area in prior orders²⁶ and such arguments are irrelevant to this proceeding involving the Balancing Agreement. However, we clarify that the public interest standard of review applied in the Balancing Agreement should not be confused with the standard of review applicable to section 206 complaints in the event of unlawfulness of wholesale electricity rates within the SPS control area. While the Balancing Agreement allocates operational responsibilities among SPP and balancing authorities participating in the SPP imbalance market, it does not include the rates to be paid for energy (emergency or otherwise) sold by SPS or any other balancing authority. If Golden Spread believes the rates that SPS charges for balancing service are unjust and unreasonable, it can file a 206 complaint and, barring any contractual language to the contrary, the Commission would be able to review the rates based on the just and reasonable standard.

13. In addition, we grant clarification to Golden Spread's request regarding limitation of liability provision of the Balancing Agreement. The limitation of liability afforded to SPP and balancing authorities under the Balancing Agreement does not eliminate their obligation to make refunds resulting from billing errors.

The Commission orders:

- (A) The request for rehearing is hereby denied as discussed in the body of this order.

²⁶ See, e.g., *Southwest Power Pool, Inc.*, 116 FERC ¶ 61,289, at P 10, 23, 53, 55-56 (2006).

(B) The request for clarification is hereby granted as discussed in the body of this order.

By the Commission. Commissioners Kelly and Wellinghoff dissenting in part with separate statements attached.

(S E A L)

Philis J. Posey,
Acting Secretary.

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KELLY, Commissioner, *dissenting in part*:

For the reasons set forth in my dissent in part on the underlying order in this proceeding,¹ I would have granted rehearing and rejected the *Mobile-Sierra* “public interest” standard of review provision contained in the Balancing Authorities Settlement Agreement. Therefore, I dissent in part from this order.

Sudeen G. Kelly

¹ *Southwest Power Pool, Inc.*, 117 FERC ¶ 61,207 (2006).

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WELLINGHOFF, Commissioner, dissenting in part:

I respectfully dissent in part for the reasons I previously identified in this case.¹

Jon Wellinghoff
Commissioner

¹ *Southwest Power Pool, Inc.* , 117 FERC ¶ 61,207 (2006).