126 FERC ¶ 61,061
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;
Suedeen G. Kelly, Marc Spitzer, and
Philip D. Moeller.

Southwest Power Pool, Inc. Docket No. ER09-336-000

ORDER ACCEPTING TARIFF REVISIONS

(Issued January 23, 2009)

1. On November 25, 2008, pursuant to section 205 of the Federal Power Act (FPA),[1] Southwest Power Pool, Inc. (SPP) filed revisions to its Open Access Transmission Tariff (Tariff) to add Attachment AP–Allocation of Costs Associated with Reliability Penalty Assessments (Attachment AP) to the Tariff. SPP states that it filed Attachment AP to provide SPP a mechanism to notify SPP market participants and members that SPP intends to seek recovery of reliability penalties from SPP market participants and members and specifying the steps that SPP will take to seek recovery of such penalties.[2] As discussed below, the Commission accepts the revisions, effective January 24, 2009, as requested.

I. Background

2. Section 1211 of the Energy Policy Act of 2005 (EPAct 2005)[3] added section 215 to the FPA, which provides for the development and enforcement of mandatory reliability standards by an electric reliability organization (ERO) to be certified by the

[1] 16 U.S.C. § 824d (2006).

[2] SPP November 25, 2008 Filing at 1.

[3] 16 U.S.C. § 824o (2006).

Commission. The ERO may impose penalties for violations of reliability standards, subject to Commission approval.[4] On July 20, 2006, the Commission certified the North American Electric Reliability Corporation (NERC) as the ERO.[5]

3. Order Nos. 672 and 672-A[6] implemented the requirements of EPAct 2005 regarding the selection, standard-setting procedures, and operational aspects of the ERO. In these orders, the Commission denied requests to (1) exempt non-profit regional transmission operators (RTO) and independent system operators (ISO) from monetary penalties for violations of the reliability standards, and (2) authorize RTOs and ISOs to recover such monetary penalties from their customers on an automatic basis. Rather, the Commission stated that it would consider proposals to recover the costs of any such penalties imposed on RTOs and ISOs under section 205 of the FPA on a case-by-case basis.[7]

4. Each NERC-developed, Commission-approved reliability standard includes an "applicability" section that identifies the types of Registered Entities that must comply with the standard based on the NERC functional model. All RTOs and ISOs have registered as transmission service providers under the NERC functional model, and have registered for other functions as appropriate. Under section 215(e) of the FPA, an RTO or ISO that fails to comply with the requirements of the applicable reliability standards may be assessed a penalty by a Regional Entity,[8] the ERO, or the Commission.

5. In Order No. 693, the Commission stated that it is important to have as much certainty and stability as possible regarding which users, owners, and operators of the

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[4] The Commission, on its own motion, may also investigate violations of the reliability standards and impose penalties. 16 U.S.C. § 824o(e)(3) (2006).

[5] *North American Electric Reliability Corp*., 116 FERC ¶ 61,062, *order on reh'g*, 117 FERC ¶ 61,126 (2006).

[6] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 634-35, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

[7] Order No. 672 at P 634-35; Order No. 672-A at P 55-58.

[8] A Regional Entity is an entity having enforcement authority pursuant to Order No. 672. *See* section 39.8 of the Commission's regulations, 18 C.F.R. § 39.8 (2008). SPP's Regional Entity function serves as the Regional Entity for SPP's RTO function that is a registered entity.

bulk power system must comply with which reliability standards. NERC, as the ERO, has developed its compliance registry process to accomplish this goal. The Commission has held that NERC's compliance registry process is a reasonable means "to ensure that the proper entities are registered and that each knows which Commission-approved reliability standard(s) are applicable to it."[9] For example, NERC registers only those distribution providers or load-serving entities that have a peak load of 25 MW or greater and are directly connected to the bulk electric system, or are designated as a responsible entity as part of a required underfrequency load shedding program or a required undervoltage load shedding program. For generators, NERC registers individual units of 20 MVA or greater that are directly connected to the bulk power system, generating plants with an aggregate rating of 75 MVA or greater, any blackstart unit that is material to a restoration plan, and any generator of any size that is material to the reliability of the bulk-power system.[10]

6. Each Regional Entity has a Compliance Monitoring and Enforcement Program with which to monitor, assess, and enforce compliance with reliability standards. Each Regional Entity's program is based on NERC's *pro forma* Compliance Monitoring and Enforcement Program, and is set out in Exhibit D of the Regional Entity's delegation agreement with NERC.[11]

7. In Order No. 693, the Commission stated that it will not assess penalties against an entity that has not previously been put on notice, through the NERC registration process, that it must comply with particular reliability standards. Under this process, if NERC later discovers that an unregistered entity should have been subject to a reliability standard, NERC may add the entity, and possibly other entities of a similar class, to the registration list and direct future corrective action.[12] The Commission believes that this

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[9] *Mandatory Reliability Standards for the Bulk Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 92 (quoting *North American Electric Reliability Corp*., 116 FERC ¶ 61,062, at P 689 (2006)), *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

[10] Order No. 693 at P 93.

[11] *See, e.g.*, *North American Electric Reliability Council, et al.*, 119 FERC ¶ 61,060, at P 25 (2007); *order on reh'g*, 122 FERC ¶ 61,245 (2008). SPP's Compliance Monitoring and Enforcement Program is contained in Exhibit D to the delegation agreement between SPP and NERC, and is identical to NERC's *pro forma* compliance program. *Id*. at P 424.

[12] *See* NERC Rules of Procedure, § 500.

should prevent an entity from being subject to a penalty for violating a reliability standard without prior notice that it must comply with that reliability standard.

8. In a Commission guidance order that directed RTOs seeking to recover costs they incur for reliability penalties assessed under section 215 of the FPA to provide notice of such potential recovery in their tariffs or contracts, the Commission acknowledged the careful balance required when addressing recovery of reliability penalties by RTOs and ISOs.[13] As the facilitators and managers of the nation's largest and most complex energy markets, RTOs and ISOs are essential to maintaining the reliability of the electric system. However, because these entities are typically member-supported non-profit organizations, they do not have an independent source of funds with which to pay any penalties assessed to them by the ERO. Granting blanket authority to pass through monetary penalties to their customers automatically, however, could significantly reduce the incentives for RTOs and ISOs to maintain strict compliance with reliability standards.

9. On June 20, 2008, PJM Interconnection, L.L.C. (PJM) filed proposed revisions to its amended and restated operating agreement to create a method for allocation of penalties regarding violations of NERC reliability standards when a specific entity other than a Registered Entity is at least partly responsible for the violations. On September 18, 2008, the Commission accepted PJM's proposed revisions, subject to a compliance filing.[14]

II. SPP Proposal

10. SPP states that the purpose of the proposed Attachment AP is to notify SPP members and market participants that they may be allocated the cost of monetary reliability penalties, and to describe the conditions and procedures under which they may be allocated such costs.[15] SPP states that it is a Commission-approved RTO[16] and a Registered Entity under the NERC compliance registry, responsible for numerous

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[13] *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247 (2008) (Guidance Order).

[14] *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,260 (2008) (*PJM*).

[15] *See* SPP November 25, 2008 Filing at 1.

[16] *Id*.

functions defined in the NERC functional model.[17] SPP states that Attachment AP authorizes SPP to assign the costs of any reliability penalty directly to an SPP market participant or member based on the determination of a Regional Entity, NERC, or the Commission as to the cause of the violation.[18]

11. SPP states that its purpose in proposing Attachment AP is to allow SPP, a not-for-profit entity that has no mechanisms for accumulating reserves to pay the costs of any reliability penalty, to recover the costs of any NERC penalties assessed to SPP.[19]

12. SPP states that Attachment AP meets the requirements of the Guidance Order in that it (1) notifies SPP market participants and members that they could be allocated reliability penalty costs; (2) does not authorize SPP to pass-through reliability penalty costs automatically; and (3) does not authorize SPP as an RTO to undertake a *de novo* investigation of a violation in order to apportion fault.[20] SPP also states that Attachment AP reflects the provisions accepted by the Commission in *PJM*.[21]

13. Under Attachment AP, SPP may seek recovery of the costs of any monetary reliability penalty by filing under section 205 of the FPA either for direct recovery of penalty costs from any market participant or member or for an allocation of penalty costs among all market participants and members, or both. In addition, Attachment AP provides for the participation of a market participant or member in the Compliance Monitoring and Enforcement Program penalty assessment process with SPP, if the market participant or member is alleged to have been directly involved in the event causing the potential penalty.

14. Section 2 of Attachment AP addresses a situation in which SPP as a Registered Entity is assessed a monetary penalty for a violation of a NERC reliability standard, and the NERC or Regional Entity Compliance Monitoring and Enforcement Program determines that a market participant or member directly contributed to the violation. Under Attachment AP, SPP could directly assign to that market participant or member

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[17] SPP states that the functions for which it is responsible are transmission service provider, transmission planner, reliability coordinator, planning authority, reserve sharing group, and interchange authority. *See id*. at 2.

[18] *Id*. at 7, citing Attachment AP, Section 2.

[19] *Id*. at 9-10.

[20] *Id*. at 7.

[21] *Id*.

part or all of the costs of the monetary penalty assessed to SPP, if all of the following conditions are met:

- SPP provides "reasonable prior written notice" to the market participant or member that SPP believes the market participant or member contributed to the violation and that SPP intends to seek to hold the market participant or member responsible for part or all of any monetary penalty SPP is assessed for the violation;

- The market participant or member is provided the opportunity to participate fully in all Compliance Monitoring and Enforcement Program discussions and proceedings;

- SPP notifies NERC, the Regional Entity, and the Commission that it believes that the market participant or member may have contributed to the alleged violation and that it intends to hold the market participant or member responsible for part or all of any monetary penalty assessed to SPP for the violation, to the extent the investigation determines that the market participant or member contributed to the violation;

- SPP files under section 205 of the FPA to assign the costs of the penalty directly to the market participant or member; and

- The Commission accepts the filing and determines that the market participant or member is responsible for part or all of the cost of the monetary penalty assessed to SPP.

15. Section 3 of Attachment AP addresses the situation in which SPP as a Registered Entity is assessed a monetary reliability penalty that cannot be directly assigned under Section 2 of Attachment AP. Such a situation would arise if SPP is responsible for the violation or where SPP is assessed the penalty because SPP is the Registered Entity for a given reliability standard and the entity responsible for the violation cannot be assessed a penalty because of its status. In that case, the costs of the reliability penalty can be spread among all market participants and members, if SPP files, under section 205 of the FPA, a proposed method for allocating part or all of the costs to market participants and members, and the Commission accepts the filing and "finalizes" the allocation method.[22]

16. SPP states that Attachment AP was developed through SPP's stakeholder process and was approved by the SPP regional tariff working group on September 25, 2008, and

[22] Section 3, Attachment AP.

by SPP's board of directors on October 28, 2008.[23] SPP requests that the Commission accept Attachment AP to become effective January 24, 2009.[24]

III. Notice of Filing and Responsive Pleadings

17. The Commission issued notice of SPP's filing on December 3, 2008, which was published in the *Federal Register*, 73 Fed. Reg. 75,426 (2008). Interventions and protests were due on or before December 16, 2008.

A. Interventions, Limited Protest, and Comments

18. East Texas Cooperatives[25] (East Texas) filed a motion to intervene and limited protest. Western Farmers Electric Cooperative (Western Farmers) filed a motion to intervene and comments. J.P. Morgan Ventures Energy Corporation and Golden Spread Electric Cooperative, Inc. filed motions to intervene.

19. East Texas states in its limited protest that it generally supports Attachment AP. However, East Texas asserts that the Commission should require Attachment AP to be modified to provide that an SPP market participant or member that is a Registered Entity has the right to allocate part or all of penalty costs to SPP, if the market participant or member is assessed a monetary penalty for violation of a reliability standard and SPP's conduct contributed to the violation. East Texas says this proposed modification conforms to a provision accepted in *PJM*.[26]

20. Western Farmers states that the Commission should require Attachment AP to be modified to provide that, when SPP gives a market participant or member notice of an alleged violation, the notice will name any other entities involved in the alleged violation and describe details such as the amount of the proposed penalty and the facts involved. Western Farmers also argues that the Commission should only accept Attachment AP on the condition that SPP file to modify the SPP Compliance Monitoring and Enforcement

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[23] SPP November 25, 2008 Filing at 3.

[24] *Id*. at 1, 11.

[25] East Texas Cooperatives consists of East Texas Electric Cooperative, Inc., Northeast Texas Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc.

[26] East Texas cites section 1.4 of PJM's Schedule 11, Amended and Restated Operating Agreement.

Program, to allow for intervention in and full participation in a NERC proceeding by any market participant or member implicated in the alleged violation.[27]

B. SPP's Answer

21. On December 31, 2008, SPP submitted an answer to East Texas's limited protest and Western Farmers' comments. SPP states that the Commission should reject East Texas's request that the Commission require the addition of a reciprocity provision. SPP states that such a provision was not approved by the SPP stakeholder process, and that the Guidance Order did not require such a provision. SPP also argues that Attachment AP is just and reasonable without the provision.[28]

22. SPP argues that the Commission should reject both of Western Farmers' requests. SPP states that the Commission should not require that SPP's notice of an alleged violation provide the names of other entities involved in the alleged violation, the amount of the proposed penalty, and the facts involved. SPP argues that such a requirement is beyond the scope of the present filing, raises confidentiality issues, may be infeasible in that the information may be unknowable, and is not required by the Guidance Order.[29]

23. SPP also argues that the Commission should reject Western Farmers' request that the Commission only accept Attachment AP on condition that SPP file to modify the SPP Compliance Monitoring and Enforcement Program to allow for intervention in and full participation in a NERC proceeding by any market participant or member implicated in the alleged violation. SPP states that Attachment AP represents SPP's attempt to comply with the Guidance Order's notice requirement, and that modification to the Compliance Monitoring and Enforcement Program is beyond the scope of this proceeding.[30] SPP asserts that Attachment AP already specifies that SPP's cost recovery is conditioned on the implicated market participant or member having the opportunity to participate in the

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[27] Western Farmers notes that it is *not* requesting that intervention and full participation in a NERC proceeding be allowed for all market participants and members where SPP itself is responsible for a violation and is seeking recovery of its monetary penalty costs through an allocation to all market participants and members. Western Farmers December 16, 2008 Motion to Intervene and Comments at 7, n. 11.

[28] SPP December 31, 2008 Answer at 4.

[29] *Id*. at 6.

[30] *Id*. at 7.

NERC process.[31] SPP notes that the Commission accepted a similar provision in *PJM*.[32] SPP also states that SPP's provision is a reasonable balance of the need for SPP to recover its penalty costs and the due process rights of market participants and members regarding the NERC process.[33]

C. Western Farmers' Motion for Leave to Answer and Answer to SPP's Answer

24. On January 21, 2009, Western Farmers filed a motion for leave to answer and answer to SPP's answer.

IV. Procedural Matters

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[34] the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

26. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[35] prohibits an answer to a protest or another answer unless otherwise ordered by the decisional authority. We will accept SPP's answer because it provides information that assisted us in our decision-making process. We are not persuaded to accept Western Farmers' motion for leave to answer and answer to SPP's answer and will, therefore, reject it.

V. Substantive Matters

27. The Commission accepts SPP's proposed Attachment AP to its Tariff, to become effective January 24, 2009. We find that Attachment AP provides a reasonable mechanism for SPP to seek recovery of the costs of a monetary penalty assessed against SPP for a reliability standard violation, either on a direct-assignment basis or to be allocated broadly to all market participants and members. Attachment AP also serves to notify market participants and members of their potential responsibility for costs of

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[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] 18 C.F.R. § 385.214 (2008).

[35] 18 C.F.R. § 385.213(a)(2) (2008).

monetary reliability penalties assessed to SPP. Therefore, Attachment AP meets the notice requirement set out in the Guidance Order.[36]

28. Also in accordance with the Guidance Order, Attachment AP does not provide for automatic pass-through of costs or for a *de novo* investigation by SPP as an RTO. Rather, under Attachment AP, SPP may only directly pass through the costs of a penalty when a Regional Entity, NERC, or the Commission concludes from its fact-finding that the targeted entity substantially contributed to the violation. Attachment AP also requires the Commission's approval, through a section 205 filing, of pass-through of the costs of each specific penalty.

29. Regarding East Texas's request that Attachment AP be revised to include a provision stating that a Registered Entity may allocate penalty costs to SPP if SPP is partly at fault (i.e., a reciprocity provision), we acknowledge that the Commission accepted a similar provision in *PJM*.[37] However, a reciprocity provision is not a required element of an RTO's reliability penalty provision. The Guidance Order only set forth the requirements that an RTO or ISO must meet in order to recover reliability penalty costs. While the Commission accepted the reciprocity provision in *PJM*, the Commission did not, in the Guidance Order or *PJM*, require reciprocity provisions to be included in all RTO or ISO reliability penalty cost recovery provisions. In addition, as SPP noted in its answer, the reciprocity provision in *PJM* was approved by PJM's stakeholder process. Such is not the case here, where a similar reciprocity provision was not approved by SPP's stakeholder process. We find that Attachment AP is just and reasonable without a reciprocity provision, and we therefore will not require SPP to insert one.

30. Regarding Western Farmers' request that the Commission require SPP to modify Attachment AP to provide that when SPP gives notice of an alleged violation to a market

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[36] The Guidance Order states:

> [W]e will not allow the direct assignment of penalty costs to another entity under section 205 unless that entity had previously been put on notice of its potential liability for penalty costs in the event that it contributed to the RTO or ISO's violation of a Reliability Standard and incurrence of the penalty. It is therefore important for the RTOs and ISOs to include provisions regarding the appropriate responsibility for reliability-related monetary penalties in their contracts with their members and customers and/or in their Tariffs . . . .

Guidance Order at P 24.

[37] *See PJM* at P 16.

participant or member, the notice will contain the names of other entities involved, the amount of the proposed penalty, and the facts involved, we deny this request. While providing such information does not raise confidentiality issues, as any such notice must be non-public,[38] we expect SPP to include in the notice any facts SPP has regarding the alleged violation and the market participant's or member's alleged role in it.

31. We also deny Western Farmers' request that we condition our acceptance of Attachment AP on SPP's making a filing to modify SPP's Compliance Monitoring and Enforcement Program to allow for intervention in and full participation in a NERC proceeding by the market participant or member implicated in the alleged violation. Attachment AP already conditions SPP's direct assignment of penalty costs on the implicated market participant or member being provided the opportunity to fully participate in all proceedings under the Compliance Monitoring and Enforcement Program.[39] Therefore, modification of the Compliance Monitoring and Enforcement Program is not necessary.

32. The Commission finds that SPP's proposal to revise its Tariff to add Attachment AP is just and reasonable. Therefore we accept the proposed revisions, to become effective January 24, 2009, as requested.

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[38] Pursuant to section 39.7(b)(4) of our regulations, 18 C.F.R. § 39.7(b)(4) (2008), each alleged violation and violation of a reliability standard generally is non-public until NERC files a notice of penalty concerning the matter with the Commission, unless the Commission has previously authorized public disclosure. Order No. 672 at P 533. If, under Attachment AP, SPP gives notice of an alleged violation to a market participant or member, and to NERC, the Regional Entity and the Commission while the alleged violation is non-public, SPP's notice also must be non-public. In particular, in these circumstances SPP must submit its notice to the Commission staff on a non-public basis, rather than file the notice with the Commission.

[39] Section 2 of Attachment AP, titled, "Direct Assignment of Costs Where Violation Can Be Directly Assigned," states in pertinent part:

> [S]uch Market Participant(s) or Member(s) may be assessed a portion of or all of the monetary penalty; provided that all of the following conditions have been satisfied:
>
> (1) During the course of an investigation by NERC, the [Regional Entity] or the Commission . . . the Market Participant(s) or Member(s) is provided the opportunity to fully participate in all discussions and/or proceedings under the Compliance Monitoring and Enforcement Program.

The Commission orders:

SPP's Attachment AP is accepted to become effective January 24, 2009, as discussed in the body of this order.

By the Commission. Commissioner Kelliher not participating.

Kimberly D. Bose,
Secretary.