

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

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

Southwest Power Pool, Inc.

Docket No. ER09-444-000

ORDER ACCEPTING IN PART AND REJECTING IN PART TARIFF FILINGS

(Issued February 20, 2009)

1. On December 22, 2008, Southwest Power Pool, Inc. (SPP) filed revised tariff sheets to amend its open access transmission tariff (Tariff or OATT) to adopt changes to its Credit Policy. SPP requests an effective date of February 20, 2009. For the reasons discussed below, the Commission will accept in part and reject in part SPP's proposed changes.

I. Background

2. Section 7 of SPP's Tariff governs billing and payment for services provided under the Tariff. Attachment X to the Tariff provides SPP's Credit Policy. SPP states that it is proposing to modify various aspects of its Tariff and Credit Policy to enhance protections for SPP and market participants against risk of loss arising from customer defaults and to improve the process for customers to obtain credit for transactions under the Tariff. SPP states that its proposed revisions were developed through SPP's stakeholder process, which permitted all entities with an interest to participate in the development and approval of the modifications. SPP asserts that because the proposed revisions have been vetted through its stakeholder process, the Commission should extend substantial deference to the wishes of SPP's stakeholders.¹

II. Description of the Filing

3. SPP proposes to modify its Credit Policy to change the period for customers to cure a payment delinquency and to revise its Remedies for Default. Specifically, SPP proposes to adopt a five-business day cure period and to change the number of times a

¹ SPP's Transmittal Letter at 1-2.

customer may be delinquent in paying an invoice before SPP may suspend the customer's unsecured credit limit.

4. Section 7.3 of SPP's Tariff currently permits customers ten business days to make a delinquent payment before the customer is found to be in default. SPP proposes to change the cure period to five business days. SPP also proposes to clarify the method for providing customers with written notice to cure upon delinquency by requiring that the notice to cure be accompanied by a copy of the unpaid invoice.

5. Section 8.3 of Attachment X outlines SPP's remedies in the event of a customer default. Section 8.3 of Attachment X currently provides customers with three business days to cure an Event of Default² and ten business days to cure any failure to pay an invoice issued under section 7.3 of the Tariff by its due date. SPP proposes to change these periods to five business days.

6. Section 8.3 of Attachment X of SPP's Tariff also governs SPP's ability to suspend a customer's Unsecured Credit Allowance when an Event of Default occurs. SPP proposes to revise section 8.3 of Attachment X to include payment defaults under Tariff section 7.3 as an event that would trigger SPP's ability to suspend a customer's unsecured credit. SPP also proposes to amend section 8.3 of Attachment X to provide that a customer's first default would not result in a suspension of its Unsecured Credit Allowance, provided the customer remedies the default within the cure period. If the customer does not remedy the default within the cure period, SPP states that it would suspend the customer's Unsecured Credit Allowance for ninety days. Additionally, SPP states that if the customer commits a second default within a twelve-month period of the first violation, SPP would suspend the customer's Unsecured Credit Allowance for ninety calendar days, even if one or both occurrences were remedied within the specified cure period.³

² Article 8 of SPP's Tariff enumerates five circumstances that shall constitute an "Event of Default" under SPP's Credit Policy by a Credit Customer. These include (a) section 8.1.1 - Failure to post any required Financial Security required under this Credit Policy in the time period specified; (b) section 8.1.2 - Incurring liabilities to SPP in excess of the applicable Total Credit Limit or committing a Total Potential Exposure Violation (SPP is proposing deletion of this section as discussed in the order); (c) section 8.1.3 - Failure to pay in full any amount payable under the Tariff; (d) section 8.1.4 - A Credit Customer's involvement in financial difficulties; and (e) section 8.1.5 - Commission of any other Default specified under this Credit Policy, including Defaults specified in sections 3.2.2, 5.3.3, 6.3.4, 7.1.2.3, 7.1.3.6 and 7.2.

³ SPP's Transmittal Letter at 3.

7. SPP also proposes to eliminate the requirement in section 6.3.3 of Attachment X that a credit customer submit a legal opinion in order to post a Guaranty as security for credit. However, SPP would retain the requirement that a credit customer seeking to post a Guaranty provide a copy of a board resolution authorizing the Guaranty and also that the customer certify that the Guaranty does not conflict with or violate any obligations or undertakings of the Guarantor.⁴ To effect these changes, SPP proposes to delete section 6.3.3 of Attachment X, move the language requiring a board resolution to be attached to a credit application to section 6.3.2, add the certification provision to section 6.3.2, and modify section 14 of the Guaranty Agreement contained in Appendix D to Attachment X.

8. SPP states there is a conflict between the existing language of section 7.3 of its Tariff and the language of section 8.1.3 of Attachment X, concerning when a default occurs. According to SPP, under section 8.1.3 of Attachment X, a default occurs when a customer fails to make a payment by its due date, while under section 7.3, a default occurs when a customer fails to make payment by the end of the cure period after the customer has failed to pay by the due date. SPP proposes to address this apparent conflict by revising section 7.3 to define default consistent with section 8.1.3 of Attachment X, i.e., a default occurs upon a customer's failure to pay an invoice by its due date.⁵

9. SPP points to another inconsistency in the language of its Credit Policy. Section 8.1.2 of Attachment X indicates that "[i]ncurring liabilities to SPP in excess of the applicable Total Credit Limit or committing a Total Potential Exposure Violation" constitutes an Event of Default. However, the language in sections 5.3.2 and 5.3.3 of SPP's Tariff allows a customer to cure a Total Potential Exposure Violation before the violation triggers an Event of Default. SPP proposes to remedy the discrepancy by deleting section 8.1.2 of Attachment X, thereby clarifying that a Total Potential Exposure Violation occurs after the expiration of the cure period for the violation.⁶

III. Notice of Filings and Responsive Pleadings

10. Notice of SPP's filing was published in the *Federal Register*, 74 Fed. Reg. 1,207 (2008), with protests and interventions due on or before January 12, 2009. East Texas Electric Cooperative, Inc., Northeast Texas Electric Cooperative, Inc., Tex-La Electric Cooperative of Texas, Inc., and Calpine Corporation filed motions to intervene. Oklahoma Municipal Power Authority and Missouri Joint Municipal Electric Utility

⁴ *Id.* at 5.

⁵ *Id.* at 6-7.

⁶ *Id.* at 7.

Commission (together TDU Intervenors) filed a joint motion to intervene and protest. SPP filed an answer to the protest. TDU Intervenors filed an answer to SPP's answer.

A. TDU Intervenors' Comments

11. TDU Intervenors protest SPP's proposed revision to section 7.3 of the Tariff to create an automatic event of default upon the occurrence of a late payment, instead of the default occurring at the end of the cure period.⁷ TDU Intervenors state that under the current Tariff section 7.3, which is consistent with section 7.3 of the *pro forma* OATT, a default for nonpayment only exists if the customer fails to make the required payment before the end of the designated cure period.⁸

12. TDU Intervenors state that while they make their payments when due, and plan to continue making their payments when due, an occasional administrative error, either on the part of a customer or of SPP, may cause a payment to be made or received slightly after the invoice date. TDU Intervenors assert that such an error, assuming it is corrected during the designated cure period, does not merit the creation of an event of default and imposition of the related consequences. TDU Intervenors state that just two administrative errors during a year, even if remedied during the cure period would result in a 90-day suspension of the customer's Unsecured Credit Allowance.⁹ TDU Intervenors further state that a default may affect other agreements which may contain "cross-default" provisions. TDU Intervenors explain that the proposed change could, therefore, have an unjust effect on customers.¹⁰ TDU Intervenors request that SPP's proposed revision of section 7.3 of its Tariff be rejected.

B. SPP's Answer

13. SPP responds that its proposed revisions achieve the balance the Commission has repeatedly sought by minimizing the risk to the Regional Transmission Organization (RTO) and its market participants from loss due to defaults by RTO customers, while ensuring that credit requirements are not so strict as to unnecessarily restrict the ability of customers to participate in the marketplace. SPP states that its revisions minimize the risk of market participants by reducing the period of time that late payments remain outstanding before SPP can undertake the collection actions allowed "post-cure." SPP

⁷ TDU Intervenors' Motion to Intervene and Protest at 4.

⁸ *Id.* at 4-5.

⁹ *Id.* at 5-6.

¹⁰ *Id.* at 6.

states that, at the same time, its revisions recognize that occasional late payments may occur by increasing the number of times a payment may be late before additional penalties are imposed.¹¹ SPP further points out that its proposed Credit Policy revisions were developed through an extensive stakeholder process.¹² SPP states that its revisions are superior to the Commission's *pro forma* OATT because they ensure superior protection for all SPP stakeholders while providing customers the opportunity to be occasionally delinquent on a payment without suffering suspension of their unsecured credit allowances.¹³

14. SPP points out that the Commission has expressly determined that RTOs can reduce the time between when a cost is incurred and when payment is ultimately received to reduce credit risk to all market participants. SPP asserts that the Commission has repeatedly approved payment provisions that are more stringent than those contained in the *pro forma* OATT.¹⁴

15. In response to TDU Intervenors' argument that SPP's proposed Credit Policy revisions fail to account for occasional or minor administrative errors, SPP points to its proposed amendment to section 8.1.3 of Attachment X to permit a customer an occasional late payment without suffering a suspension of unsecured credit allowance.¹⁵ In response to TDU Intervenors' concern that SPP's proposed revision would result in serious consequences to customers who have entered into agreements containing "cross-default" provisions, SPP states that the possibility that a customer may have freely entered into such arrangements is not sufficient justification to deny SPP the ability to protect itself and its customers and market participants from adverse credit risk.¹⁶

C. TDU Intervenors' Answer

16. TDU Intervenors reiterate its objection to SPP's proposed revision to Tariff section 7.3 to create an automatic event of default upon the occurrence of a late payment. TDU Intervenors state that SPP fails to recognize that both the cause and consequences of a slightly late payment are often not under the control of the transmission customer.

¹¹ SPP's Answer at 3-4.

¹² *Id.* at 3-4.

¹³ *Id.* at 5.

¹⁴ *Id.* at 5-7.

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 10-12.

TDU Intervenor state that the repercussions of a declared event of default extend far beyond potential suspension of the customer's unsecured credit allowance by SPP. TDU Intervenor state that for example, extensive disclosure requirements to third parties often attach to events of default. TDU Intervenor argue that SPP fails to explain how its proposal balances the needs of customers or why the inconsistency in the Tariff cannot be remedied by revising the Credit Policy to be consistent with the current default policy.

IV. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁷ the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2008), prohibits answers to protests and answers unless otherwise ordered by the decisional authority. We will accept SPP's and TDU Intervenor's answers because they have provided information that assisted us in our decision-making process.

B. Commission Determination

19. The Commission has found that in establishing credit policy, the role of an RTO is to balance the competing goals of minimizing risk to non-defaulting market participants while, at the same time, ensuring that the credit or collateral requirements are not so stringent that they unnecessarily inhibit access to the marketplace.¹⁸ The Commission has also recognized the importance of developing creditworthiness requirements specific to each RTO through a stakeholder process because of the great variability and difficulty of measuring the credit exposure of RTOs.¹⁹ In the SPP Credit Policy Order, the Commission encouraged SPP to continue to refine its credit policy with stakeholder

¹⁷ 18 C.F.R. § 385.214 (2008).

¹⁸ *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,222, at P 1 (2006) (SPP Credit Policy Order); *see also Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,296, at P 16 (2006).

¹⁹ *Policy Statement on Electric Creditworthiness*, 109 FERC ¶ 61,186, at P 2 (2004).

input, keeping these goals in mind, and to submit such refinements for Commission approval as it gains more experience in its markets.²⁰

20. In accordance with this directive, the revisions that SPP submits here are the result of the SPP stakeholder process and have been approved by the SPP Board of Directors.²¹ Moreover, with certain modifications, SPP's filing achieves an appropriate balance between the goals of allowing RTOs to reduce their risk of exposure in the event of default while at the same time ensuring that the credit requirements are not so stringent that they unnecessarily inhibit access to the marketplace. For these reasons, the Commission accepts SPP's proposed revisions, with the exception of the revision to section 7.3 to define an event of default as occurring upon a customer's failure to pay an invoice by its due date.

21. As we stated in the SPP Credit Policy Order, the Commission cannot accept any proposal from the stakeholder process that is unduly burdensome or unduly discriminatory.²² Under section 7.3 of SPP's current Tariff, as well as section 7.3 of the *pro forma* OATT, a default for nonpayment exists only if the Transmission Customer fails to make the required payment before the end of the designated cure period. However, under SPP's more stringent proposal, a default would occur if the customer has not made a payment by its due date. We concur with TDU Intervenors that an occasional administrative error, either on the part of a customer or of SPP, may cause a payment to be made or received slightly after the invoice date and that such an error, assuming it is corrected during the now-shortened cure period, does not merit the creation of an event of default and imposition of related consequences. Moreover, one instance of default could result in harmful consequences for customers who have entered into agreements with third parties containing cross-default provisions.²³ SPP argues that a customer's decision to enter freely into an agreement containing such a provision should not prevent SPP from adopting measures to protect itself and its other customers from adverse credit risk. However, the Commission is concerned that an overly restrictive default provision as proposed by SPP could adversely affect customers having cross-default provisions in other agreements, and SPP has failed to demonstrate that these cross-default provisions are not standard and that customers can actually negotiate to avoid them. For these

²⁰ SPP Credit Policy Order at P 1.

²¹ SPP's Transmittal Letter at 2.

²² SPP Credit Policy Order at P 19.

²³ According to TDU Intervenors, some contracts contain "cross-default" provisions under which the event of default under SPP's proposed revision "has the potential to trigger a cascade of defaults in other agreements to which the customer is a party." TDU Intervenors' Motion to Intervene and Protest at 6.

reasons, we find that SPP's proposed revision to section 7.3 is not consistent with or superior to the *pro forma* OATT and may be so stringent as to unnecessarily inhibit access to the marketplace. Therefore, we reject the proposed revision to section 7.3 and direct SPP to file revisions to its tariff, within 30 days of the date of this order, to clarify that a default occurs only after a customer fails to make payment by the end of the cure period.

The Commission orders:

(A) SPP's proposed tariff revisions are accepted for filing to become effective February 20, 2009, with the exception of SPP's proposed revision to section 7.3 of its Tariff, as discussed in the order.

(B) SPP's proposed revision to 7.3 of its Tariff that defines a default as occurring upon a customer's failure to pay an invoice by its due date is rejected, as discussed in the order.

(C) SPP is directed to make a compliance filing, as discussed in the body of this order, within 30 days.

By the Commission. Commissioner Kelliher is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.