

127 FERC ¶ 61,076
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket Nos. ER09-342-000
ER08-1206-000
ER08-1206-001

ORDER ACCEPTING AND SUSPENDING PROPOSED SERVICE AGREEMENTS,
CONSOLIDATING PROCEEDINGS, AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued April 24, 2009)

1. On November 25, 2008, in Docket No. ER09-342-000, Southwest Power Pool (SPP) filed, pursuant to section 205 of the Federal Power Act,¹ an unexecuted amended Service Agreement for Network Integration Transmission Service (AEP Service Agreement) between SPP as the Transmission Provider and American Electric Power Service Corporation as Agent for Southwestern Electric Power Company (SWEPCO) and Public Service Company of Oklahoma (collectively, AEP) as the Network Customer as well as an executed amended Network Operating Agreement (AEP Network Operating Agreement) between SPP as the Transmission Provider, AEP as the Network Customer, and AEP and AEP Texas North Company as Host Transmission Owners.
2. On July 1, 2008, in Docket No. ER08-1206-000, as amended on December 17, 2008, SPP submitted under section 205 an unexecuted amended Service Agreement for Network Integration Transmission Service (OMPA Service Agreement) between SPP as the Transmission Provider and Oklahoma Municipal Power Authority (OMPA) as the Network Customer, as well as an executed amended Network Operating Agreement

¹ 16 U.S.C. § 824d (2006).

(OMPA Network Operating Agreement) between SPP as the Transmission Provider, OMPA as the Network Customer, and AEP, Oklahoma Gas and Electric Company, and Western Farmers Electric Cooperative (WFEC) as Host Transmission Owners.²

3. For the reasons discussed below, the Commission will consolidate the dockets, accept the AEP Service Agreement and Network Operating Agreement, as well as the OMPA Service Agreement and Network Operating Agreement for filing, suspend them for a nominal period, and make the AEP agreements effective November 1, 2008 and the OMPA agreements effective June 1, 2008, subject to refund. We also establish hearing and settlement judge procedures regarding costs associated with a proposed network upgrade on the Southwestern Power Administration's (SPA)³ system, as discussed below.

I. Description of the Filings

4. SPP states that the agreements filed in the instant proceedings modify the currently effective agreements and that it is submitting the AEP Service Agreement and the OMPA Service Agreement because they include terms and conditions that do not conform to the standard forms of service agreements that are in SPP's Open Access Transmission Tariff (OATT). In addition, SPP states that it has submitted each filing on a partially executed basis because of disputes between SPP and AEP (in the case of the AEP Service Agreement) and between SPP and OMPA (in the case of the OMPA Service Agreement) concerning proposed language in section 8.9 of Attachment 1 of each service agreement. SPP states that the relevant language assigns to AEP and to OMPA a portion of the costs

² SPP initially filed the OMPA Service Agreement unexecuted because of a dispute between OMPA and WFEC regarding whether the OMPA Service Agreement should include wholesale distribution service charges for two WFEC substations. Subsequent to its July 1, 2008 filing, SPP requested that the Commission defer action to provide OMPA and WFEC an opportunity to resolve the dispute. In its December 17, 2008 filing, SPP states that the dispute between OMPA and WFEC has been resolved; however, the OMPA Service Agreement remains unexecuted because of a dispute between SPP and OMPA, as discussed below.

³ SPA is an agency of the U.S. Department of Energy. SPA was established in 1943 by the Secretary of the Interior, as a bureau of the Department of the Interior. On October 1, 1977, pursuant to the Department of Energy Organization Act, 42 U.S.C. § 7101, SPA was transferred to the Department of Energy. SPA operates under the direction of an Administrator with delegated authority to carry out the responsibilities of the Secretary under section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825(s), to market power generated at multiple-purpose reservoir projects constructed in the Southwest by the Corps of Engineers of the Department of the Army.

of reconductoring the SPA⁴ Clarksville-Dardanelle 161 kV transmission line (Network Upgrade) required for the designation of the J. Lamar Stall (Stall) network resource and the John W. Turk, Jr. (Turk) network resource.⁵ The disputed language in the AEP Service Agreement provides as follows, in pertinent part:

In addition, the Transmission Provider will make contractual arrangements for the construction of the following network upgrade on the Southwestern Power Administration [SPA] system:

Clarksville-Dardanelle 161kV Ckt 1 Upgrade #2 Reconductor 34.4 mile 161kV line required by June 1, 2012.

Network Customer shall pay the actual costs for construction of these facilities. For the purpose of funding the construction of these upgrades, the Network Customer shall make cash payments of Seventy Nine Thousand Five Hundred and Eleven Dollars (\$79,511) by January 1, 2009, One Million Five Hundred Ten Thousand Seven Hundred and Twelve Dollars (\$1,510,712) by May 1, 2009 and Five Million Five Hundred Sixty Five Thousand Seven Hundred and Eighty One Dollars (\$5,565,781) by May 1, 2010. Upon completion of the SWPA upgrades, funding of their costs shall be reconciled and trued-up against actual construction costs and requisite, additional funding or refund of excess funding shall be made between the Transmission Provider and the Network Customer.⁶

5. SPP states that AEP contends that the cost of the Network Upgrade should be includable in SPA's zonal annual transmission revenue requirement as a reliability upgrade, and not be assigned to AEP. SPP asserts that the Network Upgrade does not constitute a reliability upgrade. According to SPP, pursuant to Attachment Z1 of SPP's OATT, AEP's transmission service request was included in the third aggregate study

⁴ SPP notes that pursuant to Attachment AD of SPP's OATT, SPP uses SPA's transmission facilities under the SPP OATT, administers SPA's OATT, and provides scheduling services, regional reliability council services, operating reserve sharing, OASIS administration, and reliability coordination with respect to SPA's transmission facilities. *See* SPP November 25, 2008 filing at n.2.

⁵ *See* SPP November 25, 2008 filing at 2; SPP December 17, 2008 filing at 2.

⁶ AEP Service Agreement, Attachment 1, section 8.9. Except for the dollar amounts the OMPA Service Agreement contains the same language. The OMPA Service Agreement requires OMPA to pay \$7,152, \$135,889, and \$500,642 due by January 1, 2009, May 1, 2009, and, May 1, 2010, respectively,

group⁷ of 2006, and as SPP was studying the network upgrades necessary to provide transmission service to the aggregate group, SPP determined that the Network Upgrade was needed to ensure current SPP criteria and North American Electric Reliability Corporation Reliability Standards requirements are met on SPP's system. Thus, according to SPP, it identified the Network Upgrade as necessary for the requested transmission service and determined that the Network Upgrade did not meet the criteria for base plan funding provided under Attachment J of the SPP OATT. Moreover, SPP states, because it also determined that AEP's requested designation of the Stall network resource was one of three requests in the aggregate group that had a positive incremental impact on the Network Upgrade, a portion of the costs of the network facility should be allocated to AEP, pursuant to section V of Attachment Z1 of the SPP OATT.⁸

6. In its December 17, 2008 filing, SPP states that OMPA contends that SPP does not have jurisdictional rights to assign upgrades on a third-party transmission system (i.e., the SPA transmission system). SPP states that it monitors incremental impacts on SPA transmission facilities pursuant to the SPP/SPA Agreement included in Attachment AD of the SPP OATT.⁹ SPP notes that OMPA's transmission service request was included in the third aggregate study group of 2006, SPP identified the Network Upgrade as necessary for the requested transmission service, and SPP determined that the Network Upgrade did not meet the criteria for base plan funding provided under Attachment J of the SPP OATT.

7. SPP notes that the proposed amended agreements filed in the instant proceedings are identical in all material respects to the existing agreements accepted in Docket No. ER07-1220-000 (for AEP) and Docket No. ER08-1306-000 (for OMPA) except for certain revisions for which it has AEP's or OMPA's consent. Revisions common to the agreements filed in Docket No. ER09-342-000 and ER08-1206-000 include: (1) revisions to sections 2.0 of the service agreements and section 3.3 of the network operating agreements to reflect the fact that the AEP/OMPA delivery points are listed in

⁷ SPP combines all long-term point-to-point and long-term designated network resource requests received during a four month period into a single Aggregate Transmission Service Study. SPP then studies the network upgrade needs of the aggregate group. *See* SPP OATT, Attachment Z1.

⁸ SPP November 25, 2008 filing at 2-3. SPP makes this same statement with regard to the Turk network resource. *See* SPP December 17, 2008 filing at 3.

⁹ *See* SPP December 17, 2008 filing in Docket No. ER08-1206-001 (citing SPP OATT, Attachment AD (United States Department of Energy Southwestern Power Administration Agreement between United States of America and Southwest Power Pool, Inc.), section 14(a)).

Appendix 3 of the AEP/OMPA Service Agreements; (2) additional language added to section 8.7 of Attachment 1 to the service agreements to specify additional redispatch requirements; and (3) additional language in section 8.9 of Attachment 1 of the service agreements specifying that the transmission service requested by AEP/OMPA from the specified designated resources depends on and is contingent upon the completion of the specified facility study network upgrades.

8. In addition, SPP made the following revisions to the agreements filed in Docket Nos. ER08-1206-000 and ER06-1206-001: (1) revised section 3.0 of Attachment 1 of the OMPA Service Agreement to specify that the control areas in which all Network Load is located are separate; (2) revised various portions of the OMPA Network Operating Agreement to reflect that there is more than one Host Transmission Owner; (3) revised section 3.8 of the OMPA Network Operating Agreement regarding agreements for power factor requirement and/or charge provisions; (4) added language to section 9.3 of the OMPA Network Operating Agreement clarifying that duplicate communications circuits are not required if the telemetry circuits are currently in place for prior OMPA communication purposes; and (5) revised sections 8.8 of Attachment 1 to the OMPA Service Agreement to provide that the wholesale distribution service charges for which OMPA will be responsible will be established through application of a rate formula established under Appendix 6 of the OMPA Service Agreement; and (6) made clerical revisions to sections 4.5 and 11 of the OMPA Network Operating Agreement.

9. SPP requests waiver to allow the agreements filed in Docket Nos. ER09-342-000 and ER08-1206-000 to become effective on November 1, 2008 and June 1, 2008, respectively.

10. On February 23, 2009 a deficiency letter was issued requiring that SPP, among other things, provide all study results, relevant data, and power flow analyses used to conduct the aggregate facility study in which SPP determined that the Network Upgrade was necessary.

II. Notice of Filings and Responsive Pleadings

11. Notice of SPP's November 25, 2008 filing in Docket No. ER09-342-000 was published in the *Federal Register*, 73 Fed. Reg. 75,426 (2008), with interventions and protests due on or before December 16, 2008. On December 16, 2008, AEP and OMPA each filed a timely motion to intervene and protest. SPA, Associated Electric Cooperative, Inc. and East Texas Cooperatives filed motions to intervene out-of-time. On December 31, 2008, SPP filed an answer to the protests filed by AEP and OMPA. On January 7, 2009, OMPA filed an answer as well as a protest, request for rejection or

suspension, and motion for consolidation.¹⁰ On January 15, 2009, AEP filed an answer and motion to consolidate, and on January 21, 2009, WFEC filed an answer.¹¹ SPP filed another answer on January 22, 2009.¹²

12. Notices of SPP's July 1, 2008 and December 17, 2008 filings in Docket Nos. ER08-1206-000 and ER08-1206-001 were published in the *Federal Register*, 73 Fed. Reg. 41,056 (2008) and 74 Fed. Reg. 272 (2009), with interventions and protests due on or before July 22, 2008 and January 7, 2009, respectively. OMPA and WFEC timely filed motions to intervene and OMPA filed a protest, request for rejection or suspension, and motion for consolidation. AEP filed a motion to intervene and protest. SPA and the Arkansas Electric Cooperative Corporation filed motions to intervene out-of-time. On January 22, 2009, SPP filed an answer to the protests.

13. Notice of SPP's response to the January 23, 2009 deficiency letter was published in the *Federal Register*, 74 Fed. Reg. 11,938 (2009), with interventions and protests due on or before March 20, 2009. SPP submitted a response to the deficiency letter on February 23, 2009. AEP and OMPA filed comments on SPP's response, SPP filed an answer to the comments, and OMPA filed an answer to SPP's answer.¹³

III. Summary of Pleadings

A. AEP Service Agreement (Docket No. ER09-342-000)

1. Protests

a. AEP

¹⁰ OMPA submitted this pleading in Docket Nos. ER09-342-000 and ER08-1206-000.

¹¹ WFEC submitted its answer in Docket Nos. ER09-342-000 and ER08-1206-000.

¹² In this answer, SPP provided no substantive responses but requested that to the extent the Commission accepts AEP's and OMPA's responses to SPP's first answer, SPP be permitted to incorporate by reference its answer submitted in Docket No. ER08-1206-001 on January 22, 2009.

¹³ Because AEP and OMPA are disputing the same provision of the service agreement (i.e., section 8.9 of Attachment 1), which is identical in each docket (except for level of charges), the filers have made the same or similar arguments in Docket No. ER09-342-000 and Docket No. ER08-1206-000 and have, in some cases, cross-referenced their arguments in the two proceedings.

14. AEP disagrees with SPP that the Network Upgrade is necessary as a result of the transmission service requests and not needed to ensure reliability. In support of its position, AEP makes the following arguments: (1) the Network Upgrade has been identified consistently by SPP in aggregate study results as necessary for reliability independent of the transmission service requests; (2) it is not clear that SPP has followed appropriate SPP OATT procedures with respect to the recommendation and proposed cost allocation of the Network Upgrade; (3) the proposed cost allocation is inappropriate; and (4) additional redispatch options may need to be explored.

15. First, AEP states that SWEPCO determined that it needed to construct three new power plants¹⁴ to meet the requirement under the SPP OATT that each SPP member have sufficient system capacity to meet its load and reserve obligations.¹⁵ To meet this requirement, in September 2006, SWEPCO and the Turk Co-owners submitted transmission service requests to SPP. AEP states that these requests were included in SPP's Aggregate Study SPP 2006-AG3, which also included numerous unrelated transmission requests from other customers. According to AEP, from October 2006 to October 2008, SPP conducted system impact studies and numerous facilities studies. AEP states that from the initial report to the 2006-AG3-AFS10 (10th report), issued on April 18, 2008, there was no indication that SWEPCO and the other Turk Co-owners would be assigned responsibility for the costs of the Network Upgrade.¹⁶

16. In addition, AEP argues that SPP's own base case¹⁷ files, without any of the AEP requested transmission service, indicate that the loading on the Clarkville-Dardanelle facility will exceed its emergency rating in the study case representing the summer of 2017. AEP also states that based on its review of SPP's data and its own studies, the Clarkville-Dardanelle facility will exceed its emergency rating in 2012. For these reasons, AEP argues that the Network Upgrade is needed to maintain reliability rather than to accommodate the subject transmission service requests.

¹⁴ These power plants are (1) the Mattison facility, which is wholly-owned by SWEPCO; (2) the Stall unit which, is wholly-owned by SWEPCO; and (3) the Turk facility which will be co-owned by SWEPCO, OMPA, Arkansas Electric Cooperative, Corp., and Northeast Texas Electric Cooperative, Inc. (collectively, Turk Co-owners).

¹⁵ *See* AEP December 16, 2008 Protest at 2.

¹⁶ *See id.* at 3.

¹⁷ According to AEP, SPP conducts a "base case" and a "transfer case" study. The base case does not include any of the transfers or line loadings associated with transmission service requests, and the transfer case includes the line loadings associated with a particular grouping of facilities to be evaluated. *See id.* at 7-8.

17. Second, AEP states that it is not clear if SPP had followed appropriate SPP OATT procedures in determining that the costs should be directly assigned. AEP states that the relationship between SPP and SPA is governed by Attachment AD to the SPP OATT, under which SPP may recommend the upgrade of transmission facilities that involve SPA facilities and may propose SPA's share of the costs and method of participation.¹⁸

18. AEP states that it is not clear whether SPP has provided SPA with any recommendation that its Clarkville-Dardanelle facility be reconductored or any proposed allocation of such costs to SPA. AEP contends that because SPP and SPA do not appear to have reached any agreement as to the need for and cost allocation of the Network Upgrade, it would be premature for AEP to agree to any cost allocation proposal regarding the facility.

19. Third, AEP states that SPP has proposed to allocate the entire \$9 million cost of the Network Upgrade to AEP and the other Turk Co-owners. AEP contends that the Network Upgrade costs should not be directly assigned to AEP and the other Turk Co-owners because Attachment J of the SPP OATT (Recovery of Costs Associated with New Facilities) provides that network upgrades associated with new or changed designated resources are treated as base plan upgrades with respect to cost allocation if certain conditions are met.¹⁹

20. AEP states that even if the need for the expansion is accelerated by the subject transmission service requests, it would be inappropriate for transmission customers to be required to pay the full cost of a network upgrade that has been shown to be necessary. According to AEP, a more reasonable approach would be for such customers to be responsible only for incremental costs of accelerating the expansion. Further, AEP argues, because the proposed Network Upgrade is an upgrade on the SPA transmission system, SPP cannot charge SPA customers the costs without SPA's written agreement. AEP states that this means SPP customers are at an unfair disadvantage in the event that their transmission service requests affect the SPA transmission system.

21. Finally, AEP states that the parties should be afforded the opportunity to explore redispatch as an alternative to the proposed Network Upgrade. AEP suggests that, because two years have elapsed since the initial service request, such discussions should take place in the context of settlement procedures in order to avoid further construction delays. AEP requests that the Commission order SPP to classify the Network Upgrade as

¹⁸ *See id.* at 9-10.

¹⁹ *See id.* at 10-11.

a reliability upgrade and eliminate the direct assignment of costs to AEP and the other Turk Co-owners, or, in the alternative, order settlement procedures to allow the parties to resolve this matter.

b. OMPA

22. In its protest, OMPA argues that SPP improperly proposes to make the transmission customers pay for the costs of the Network Upgrade without any provision for reimbursement, with interest, as required by the service agreements.²⁰ OMPA states that SPA is considered a third-party system with regard to the Network Upgrade, thus SPP proposes to make the grant of service to AEP, OMPA, and another affected transmission customer subject to these customers agreeing to pay for the full cost of upgrades on a third-party transmission system without related credits and interest. OMPA argues that the Commission has found that neither the *pro forma* OATT nor the SPP OATT authorizes SPP to condition a transmission customer's right to transmission service on whether there is transmission capacity on a third-party's transmission system.²¹

23. OMPA also argues that even assuming SPP's consideration of third-party impacts was authorized under its OATT, it would be unjust and unreasonable to require a network customer to pay for such upgrades without consideration of the benefits provided to the third-party system. OMPA states that such an approach is particularly unfair here because neither SPP nor the third-party is obligated to refund or credit the upfront funding of the upgrade costs, with interest. OMPA states that under SPP's OATT, network customers may be charged both the incremental costs of directly assigned upgrades and the base network charge, and point-to-point customers pay only the "higher of" these two charges. According to OMPA, the Commission's approval of SPP's cost allocation proposal was premised on network customers being eligible for credits to reimburse them for the costs of directly assigned facilities.²² OMPA requests

²⁰ OMPA December 16, 2008 Protest at 5.

²¹ *Id.* at 5-6 (citing *Constellation Power Source, Inc. v. American Electric Power Serv. Corp. and Southwest Power Pool, Inc.*, 102 FERC ¶ 61,142, at P 15 (2003); *Tenaska Power Servs. Co. v. Southwest Power Pool, Inc.* 102 FERC ¶ 61,140, at P 22 (2003); *Exelon Generation Co. v. Southwest Power Pool, Inc.*, 101 FERC ¶ 61,226, at P 16 (2002), *clarified*, 103 FERC ¶ 61,292 (2003)).

²² *Id.* at 8 (citing *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,319, at P 24, 29 (2005)).

that the Commission reject the provisions of the AEP Service Agreement requiring network customers to pay the full cost of the third-party SPA Clarksville-Dardanelle reconductoring, without credits or refunds, including interest.

2. Answers

a. SPP

24. In response to AEP's argument that the Network Upgrade costs should not be directly assigned to AEP and the other Turk Co-owners, SPP argues that AEP used the wrong study data to reach its conclusions. SPP states that in the final study (2006-AG3 AFS-11 dated September 16, 2008), it properly re-categorized the Network Upgrade as an assignable network upgrade. SPP states that the re-categorization was based on incremental facility rating updates for the Clarksville-Dardanelle 161kV facility provided to SPP by SPA.²³

25. In addition, SPP states that there is no requirement in section 14 of Attachment AD for SPP to execute an agreement with SPA prior to obtaining commitments from all of the 2006-AG3 aggregate transmission study customers to fund the Network Upgrade pursuant to executed transmission service agreements. SPP states that without such commitments, there is no incentive for SPA to construct the Network Upgrade. SPP confirms, however, that it did coordinate with SPA on the Network Upgrade and on other network upgrades on the SPA system identified in the 2006-AG3 aggregate transmission study.

26. Concerning AEP's request to be afforded the opportunity to explore redispatch options, SPP states that section 32.8 of the SPP OATT makes redispatch available as an interim, not a permanent solution. SPP further notes that the Commission has recognized that AEP is only permitted to take and pay for redispatch service until the Network Upgrade is completed.

27. In response to OMPA's argument that it is unjust and unreasonable to require network customers to fund upgrades on third-party transmission systems with no refund or credit requirement, SPP states that SPA does not participate in and is not subject to the base plan funding provisions of the SPP OATT.²⁴ SPP argues that Attachment J pertains to transmission facilities under SPP's OATT and not to network upgrades on SPA's transmission system. SPP reiterates that its relationship with SPA is governed by Attachment AD of the SPP OATT. SPP states that while Attachment AD authorizes it to

²³ SPP December 31, 2008 answer at 3.

²⁴ *Id.* at 7.

recommend to SPA what its share of any expansion or upgrade costs should be, SPP does not have the authority to impose what it deems to be the proper cost allocation upon SPA. Moreover, SPP states, if OMPA had concerns about not being able to receive credits for funding network upgrades on SPA's transmission system, it should have addressed such concerns when SPP proposed its Attachment AD.

28. Regarding OMPA's argument that it is improper to condition a customer's transmission service request on whether there is sufficient transmission capacity on a third-party transmission system, SPP argues that the cases on which OMPA relies are inapposite because they involved rollover transmission service but here the service in question is a new request for transmission service. SPP also argues that it is clear that both SPP and SPA consider SPA's transmission system to be a part of SPP's "Transmission System," and thus the SPA system is subject to the requirements of section 29.3 of SPP's OATT, which provides that requests for network transmission service may not commence until installation of all necessary equipment has been completed.²⁵

b. AEP

29. AEP argues that even with the clarifications SPP supplied in its answer regarding why it recategorized the Network Upgrade, SPP's classification is still fundamentally flawed. In addition, AEP argues that Attachment J does not specifically exclude SPA facilities from its application and that SPP is incorrectly interpreting Attachment AD to benefit SPA customers rather than addressing the needs of transmission customers on the SPP system. With regard to SPP's assertion that redispatch is an interim option, AEP states the customers should be given the ability to consider redispatch in the period between the start of their service and when the upgrade becomes necessary to satisfy the existing service need.

B. Comments on OMPA Service Agreement (Docket Nos. ER08-1206-000 and ER08-1206-001)

1. Protests

a. OMPA

30. OMPA opposes SPP's proposed allocation of the costs of the Network Upgrade without any provision for reimbursement with interest. OMPA requests that the Commission reject the direct assignment of the costs, or in the alternative, suspend the cost allocation provisions for a nominal period, subject to refund, and set the provisions

²⁵ *Id.* at 8-9.

for hearing. OMPA suggests that, among other things, the hearing should address whether the reconductoring would eventually be necessary to support service to SPA's existing customers.

31. OMPA argues that contrary to SPP's arguments in its December 31, 2008 answer in ER09-342-000, Attachment AD of the SPP OATT does not exempt the Network Upgrade from the provisions of Attachment J. OMPA states the sections 14(a) and 14(b) of Attachment AD appear to have been crafted to apply only in the context of service to SPA customers that is carved out of the SPP OATT but the operative terms of these sections do not address upgrades that are necessary to allow SPP to provide service to customers such as OMPA who take service under the SPP OATT.²⁶ OMPA states that the Commission should reject SPP's broad reading of these sections as exempting SPA from the cost allocation provisions of the SPP OATT.

32. OMPA also argues that SPP's interpretation of Attachment AD fails because it rests on the implicit assertion that SPA facilities are not under SPP's OATT. OMPA states that this position is contradicted by SPP's statement that section 29.3 of its OATT authorizes it to condition service upon completion of upgrades needed on SPA facilities because they are part of the SPP transmission system²⁷ and statements SPP and SPA have made in other proceedings.²⁸ OMPA reasons that if SPA is not subject to the base plan funding provisions it must be considered a third-party system and SPP cannot deny transmission service requests due to constraints on third-party systems.

33. Additionally, OMPA requests that the Commission make the OMPA Service Agreement effective June 1, 2008, rather than December 1, 2008, because the modified service agreement serves to amend or replace the service agreement originally filed in Docket ER08-1206-000, which had a proposed effective date of June 1, 2008. OMPA states that since June 2008, all of the parties have operated under the terms of the new service agreement and no party has challenged any aspect of the agreement other than the dispute, which has been resolved, regarding wholesale distribution charges assessed by WFECC.²⁹ OMPA argues that it would needlessly upset expectations to place the old (i.e., pre-June 2008) service agreement into effect retroactively for an additional six

²⁶ See OMPA January 7, 2009 Protest at 8-9.

²⁷ *Id.* at 10 (citing SPP December 31, 2008 answer in Docket No. ER09-342-000).

²⁸ See *id.* at 6, 10 (citing SPP's January 22, 2009 answer in Docket No. ER08-1206-001, SPP's December 31, 2008 answer in Docket No. ER09-342, and SPA's filings in Docket No. NJ08-3 as examples).

²⁹ See *id.* at 14.

months. Lastly, OMPA requests consolidation with Docket No. ER09-342-000, stating that the dispute here arises from the same set of facts underlying the issues raised in Docket No. ER09-342-000.

b. AEP

34. AEP reiterates the arguments it made in its protest and answers in Docket No. ER09-342-000 and requests consolidation of the proceedings. AEP requests that the Commission order SPP to classify the Network Upgrade as a reliability upgrade and eliminate the direct assignment to AEP, OMPA, and the other transmission requests in aggregate study 2006-AG3. In the alternative, AEP requests that the Commission order settlement procedures to allow the parties to resolve this matter.

2. Answers

a. SPP

35. SPP restates its arguments made in Docket No. ER09-342-000, adding that in SPP's view base plan funding applies only to the facilities of transmission owners that are parties to the SPP Membership Agreement. SPP also argues that OMPA's request for a hearing on SPA's cost allocation methods is inconsistent with SPP's OATT and beyond the scope of the instant proceeding. SPP states that while Attachment J to the SPP OATT provides a process for upgrade sponsors to receive transmission revenue credits if the upgrade would defer or displace the need for a reliability upgrade, Attachment J is inapplicable to SPA's transmission system.

36. With regard to the effective date of the OMPA Service Agreement, SPP states that it agrees with OMPA that the effective date should be June 1, 2008 and that it will submit a revised version of the Service Agreement in a compliance filing. SPP states that the OMPA Service Agreement provides that the revised wholesale distribution service charges for OMPA's load on WFEC's control area are effective December 1, 2008; therefore, an earlier effective date for the OMPA Service Agreement will not change the date that these wholesale charges become effective.

b. WFEC

37. In its answer, WFEC takes no position on the issues or on the appropriate effective date. WFEC clarifies that based on the sale of WFEC substation facilities from WFEC to OMPA on November 25, 2008, the new lower wholesale distribution service charges are not effective until December 1, 2008, irrespective of the effective date of the proposed service agreement ultimately assigned by the Commission.

C. Request for Additional Data

38. In the January 23, 2009 Deficiency Letter, Commission Staff directed SPP to, among other things, provide all study results, relevant data and power flow files used to conduct the studies which supported the assignment of costs of the proposed Network Upgrade. SPP was also required to explain whether the Clarksville-Dardanelle 161kV facility becomes limiting for reliability purposes on the SPA system absent transmission service requested by OMPA and AEP.

1. SPP's Response

39. SPP submitted a public version and a non-public version of data containing reliability assessment power flow models. SPP states that the non-public files include models that contain information pertaining to the order in which SPP dispatches certain generating resources, which could be used to determine which resources within SPP are the most critical for reliable operation of SPP's transmission system, and geographical maps, which include Critical Energy Infrastructure Information. SPP explains that two upgrades (#1 and #2) to the Clarksville-Dardanelle 161kV CKT provide incremental capacity increases for that line. SPP states that the #1 upgrade consists of removing the wavetraps and installing fiber optic cable for communications purposes. The #2 upgrade consists of reconductoring 34.4 miles of existing transmission line that is required to mitigate the summer emergency rating of the conductor. SPP explains that the Network Upgrade (i.e., the #2 upgrade) was categorized as assignable to its transmission customers because the reliability assessment did not exceed the emergency conductor rating of the line (with the #1 upgrade completed) and the increased loading due to the requested transmission service did exceed the emergency conductor rating (with the #1 upgrade completed).

2. Comments and Answers

40. In its comments, OMPA states that it contacted SPP to obtain the power flow data included in the non-public version of the filing but SPP refused to provide that information citing section 7.1.4(a) of Attachment AE of its OATT. AEP states that in the past SPP has provided such power flow data to AEP, under a confidentiality agreement. OMPA and AEP disagree with SPP that section 7.1.4(a) of Attachment AE completely bars SPP from providing the power flow data. OMPA states that under section 2.3 of Attachment V to the SPP OATT, SPP is required to provide power flow data to applicants for generator interconnections. AEP states that without access to the power flow information, subject to a confidentiality agreement, and without communication

with SPA these issues cannot be resolved efficiently and in a just and reasonable manner. AEP and OMPA state that the Commission should require SPP to provide the power flow information subject to a confidentiality agreement or protective order.³⁰

41. In response to OMPA's and AEP's comments, SPP reiterates that under section 7.1.4(a) of Attachment AE of SPP's OATT it may not disclose power flow information to AEP and OMPA. However, SPP states, AEP and OMPA may request that the Commission allow access to the data under a protective order and if ordered to do so SPP would comply.³¹ OMPA responds that OMPA and AEP have already made such a request in their comments.

IV. Discussion

A. Procedural Matters

42. Pursuant to Rule 214 of the Commission's Rules and Procedure, 18 C.F.R. § 385.214 (2008), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2008), the Commission will grant the late-filed motions to intervene submitted by SPA, Associated Electric Cooperative, Inc., East Texas Cooperatives, and Arkansas Electric Cooperative Corporation given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

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

44. The Commission's practice is to consolidate proceedings where the issues are closely intertwined with each other.³² The factual situations are virtually the same in the two proceedings and involve the same facilities. In addition, no party has requested or presented justification to deny the requests for consolidation. Thus, we will grant AEP's and OMPA's motion to consolidate Docket Nos. ER09-342-000 and ER08-1206-000 for purposes of hearing and decision. We also grant OMPA's unopposed request to make the

³⁰ See AEP March 20, 2009 Comments; OMPA March 20, 2009 Comments.

³¹ See SPP April 4, 2009 answer at 6.

³² *Missouri River Energy Servs.*, 124 FERC ¶ 61,309, at P 39 (2008).

OMPA Service Agreement effective June 1, 2008, rather December 1, 2008, and direct SPP to submit a revised OMPA Service Agreement reflecting a June 1, 2008 effective date within 30 days of the date of issuance of this order.

B. Hearing and Settlement Judge Procedures

45. The rates, terms, and conditions of the proposed AEP Service Agreement and the proposed OMPA Service Agreement raise issues of material fact, including, but not limited to, whether the Network Upgrade would be required in the absence of the transmission service requests and the appropriate cost allocation of the Network Upgrade, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

46. Our preliminary analysis indicates that SPP's proposed AEP Service Agreement and the proposed OMPA Service Agreement have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the proposed AEP Service Agreement and Network Operating Agreement, as well as the proposed OMPA Service Agreement and Network Operating Agreement, and suspend them for a nominal period, make the AEP agreements effective November 1, 2008 and the OMPA agreements effective June 1, 2008,³³ as requested, subject to refund, and set them for hearing and settlement judge procedures. In addition, the Commission grants waiver of section 7.1.4(a) of Attachment AE of SPP's OATT to the extent necessary to facilitate hearing and settlement procedures.

47. While we are setting these matters 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. If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.³⁴ The settlement judge

³³ See *Cent. Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,339, *reh'g denied*, 61 FERC ¶ 61,089 (1992); *Prior Notice Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,983-84 (1993), *clarified*, 65 FERC ¶ 61,081 (1993).

³⁴ 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 days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

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.

The Commission orders:

(A) The proposed AEP Service Agreement and Network Operating Agreement, filed in Docket No. ER09-342-000, are hereby accepted for filing and suspended for a nominal period, to be effective November 1, 2008, as requested, subject to refund, as discussed in the body of this order.

(B) The proposed OMPA Service Agreement and Network Operating Agreement, filed in Docket No. ER08-1206-000, as revised in Docket No. ER08-1206-001, are hereby accepted for filing and suspended for a nominal period, to be effective June 1, 2008, as requested, subject to refund, as discussed in the body of this order.

(C) SPP is directed to submit a filing revising the effective date of the OMPA Service Agreement from December 1, 2008 to June 1, 2008, within 30 days of the date of issuance of this order, as discussed in the body of this order.

(D) The motions to consolidate Docket Nos. ER09-342-000 and ER08-1206-000 are hereby granted.

(E) Waiver is hereby granted of section 7.1.4(a) of Attachment AE of the SPP OATT to the extent necessary to facilitate hearing and settlement procedures, as ordered in Ordering Paragraphs (F) and (G) below.

(F) 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 Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning SPP's proposed service agreements. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (G) and (H) below.

(G) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), the Chief Administrative Law 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.

(H) 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.

(I) 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, N.E., 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)

Nathaniel J. Davis, Sr.,
Deputy Secretary.