

127 FERC ¶ 61,078  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket No. ER09-758-000

ORDER CONDITIONALLY ACCEPTING TARIFF REVISIONS

(Issued April 24, 2009)

1. On February 25, 2009, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> Southwest Power Pool, Inc. (SPP) filed proposed revisions to the SPP Membership Agreement to accommodate the state and municipal law obligations of certain SPP members that are not under the jurisdiction of the Commission. For the reasons discussed below, the Commission will conditionally accept the proposed revisions for filing, to be effective April 27, 2009, subject to SPP filing revisions within 30 days, as discussed below.

**I. Background**

2. SPP is a regional transmission organization (RTO) with 54 members, many of which are non-jurisdictional: nine municipally-owned systems, eleven cooperatives, and four state authorities. According to SPP, these non-jurisdictional members are not “public utilities” as defined by the FPA.

3. In 2008, SPP filed revisions to its Membership Agreement to facilitate the membership of three non-jurisdictional entities located in Nebraska (Nebraska Entities).<sup>2</sup> The revisions were designed to acknowledge the Nebraska Entities’ non-jurisdictional

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> The Nebraska Entities are Nebraska Public Power District, Omaha Public Power District, and Lincoln Electric System.

status, accommodate their obligations under state and municipal law, and prevent any changes to their tax-exempt status. The Commission accepted the proposed revisions.<sup>3</sup>

## **II. SPP's Filing**

4. On February 25, 2009, SPP filed proposed revisions to the SPP Membership Agreement to extend the Membership Agreement revisions made for the Nebraska Entities to other non-jurisdictional SPP members. SPP asserts that each of the proposed revisions is similar to a revision filed for one or more of the Nebraska Entities. SPP states that the revisions also include certain non-substantive corrections and changes in terminology.

5. SPP notes that all the proposed revisions were developed through the SPP stakeholder process and were approved unanimously by the SPP Members Committee and the SPP Board of Directors on January 27, 2009. SPP requests that the proposed revisions become effective on April 27, 2009.

## **III. Notice and Responsive Pleadings**

6. Notice of SPP's filing was published in the *Federal Register*, 74 Fed. Reg. 9,812 (2009), with interventions and protests due on or before March 18, 2009. Golden Spread Electric Cooperative, Inc. (Golden Spread) filed a motion to intervene and conditional protest. East Texas Cooperatives filed a motion to intervene and request for clarification.<sup>4</sup> Dogwood Energy, LLC (Dogwood) and Western Farmers Electric Cooperative (Western Farmers) filed motions to intervene and comments. American Electric Power Service Corp. (AEP) filed a motion to intervene. On April 2, 2009, SPP filed an answer. On April 17, 2009, Western Farmers filed a reply to SPP's answer.

## **IV. Discussion**

### **A. Procedural Matters**

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely motions to intervene serve to make the entities that filed them parties to this proceeding.

8. 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 a protest unless otherwise ordered by the

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<sup>3</sup> *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,239 (2008) (Nebraska Order).

<sup>4</sup> East Texas Cooperatives are East Texas Electric Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas.

decisional authority. We will accept SPP's answer because it has provided information that assisted us in our decision-making process. We will reject Western Farmers' reply to SPP's answer because it did not assist us in our decision-making process.

**B. Substantive Matters**

9. The Commission conditionally accepts SPP's proposed revisions to the SPP Membership Agreement, to be effective April 27, 2009, consistent with the Commission's acceptance of similar provisions for the Nebraska Entities.<sup>5</sup> In Order No. 2000, the Commission expressed its belief that a properly formed RTO should include all transmission owners in a region, noting that it would be unfortunate if public power entities were not able to share in the benefits of such organizations because of tax rules or other government restrictions.<sup>6</sup> The Commission demonstrated that it would be flexible in its approach to participation of non-jurisdictional entities in RTOs by accepting provisions to allow the Nebraska Entities to become members in SPP.<sup>7</sup> The instant filing takes the next logical step by amending the SPP Membership Agreement to afford the same flexibility to other members of SPP, current and prospective. We find that the revisions proposed by SPP will accommodate other non-jurisdictional entities' participation in SPP and, accordingly, we accept them as modified here.

10. In light of the issues raised in the conditional protest and comments, we discuss four of the proposed revisions in greater detail.

**1. Proposed Section 3.0(h) – Conflicts with State Law**

11. SPP's proposed section 3.0(h) states, in pertinent part, that members reserve the right to exercise such operational authority over their facilities:

as necessary to preserve Member's rights, duties and obligations regarding electric service to its retail and wholesale native load customers pursuant to state law and consistent with NERC standards, if SPP's exercise of operational authority over the Tariff Facilities would

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<sup>5</sup> Nebraska Order, 125 FERC ¶ 61,239.

<sup>6</sup> *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 31,200-02 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

<sup>7</sup> Nebraska Order, 125 FERC ¶ 61,239 at P 15.

endanger said electric service or is contrary to or would curtail, surrender or delegate such state law rights, duties and obligations.<sup>8</sup>

**a. Positions of the Parties**

12. Golden Spread claims this provision inappropriately limits a transmission-owning member's delegation of authority over its facilities and provides members with broad discretion to reject SPP's operational authority.<sup>9</sup> Golden Spread argues that the word "rights" should be deleted from proposed section 3.0(h), and that the provision should specify all instances in which a member can reject SPP's operational authority. Golden Spread also states that the term "native load" is not defined in the Membership Agreement, and therefore requests that the Commission clarify that the term has the same meaning as in section 1.19 of SPP's tariff. In addition, Golden Spread argues that the provision should be clarified to require that customers purchasing generation from a Transmission Owner or its affiliate may not be treated more favorably than otherwise similarly situated customers with other sources of generation.

13. SPP answers that section 3.0(h) does not give a member unfettered discretion to reject SPP's operational authority, because the provision is limited to situations where SPP's exercise of operational control would conflict with a member's state-created right, duty or obligation.<sup>10</sup> In response to Golden Spread's request for greater specificity, SPP states that it would be impossible to articulate every situation in which SPP's operational authority may conflict with a member's state-created rights, duties or obligations, noting that the provision is intended to apply broadly to current and prospective SPP members. SPP claims that without the provision, non-jurisdictional entities will not be able to become members of SPP. SPP also argues that the provision, which is identical to a provision accepted with respect to the Nebraska Entities, should be accepted as consistent with the Nebraska Order, and that Golden Spread's protest should be rejected as a collateral attack on that order. SPP also asserts that Golden Spread's requested revisions are beyond the scope of the filing.

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<sup>8</sup> SPP, February 25, 2009 Initial Filing (citing FERC Electric Tariff, Membership Agreement, Original Volume No. 3, Proposed First Revised Sheet No. 16).

<sup>9</sup> Golden Spread, March 18, 2009 Conditional Protest, at 3-4.

<sup>10</sup> SPP, April 2, 2009 Answer, at 5-7.

**b. Commission Determination**

14. We find that SPP's proposed section 3.0(h) strikes an appropriate balance between non-jurisdictional members' rights, duties and obligations under the SPP Membership Agreement and their rights, duties and obligations under state law. Moreover, we find as unfounded Golden Spread's concern that a member could invoke any among a multitude of state-created rights in order to avoid its responsibilities under the Membership Agreement. SPP's proposal is aimed at facilitating the membership of non-jurisdictional entities and therefore appropriately refrains from attempting to create a comprehensive list of state-created rights, duties and obligations that could be adversely affected by such entity's participation in SPP.

15. Moreover, section 3.0(h) permits a member to exercise such operational authority over its facilities "*as necessary to preserve Member's rights, duties and obligations regarding electric service to its retail and wholesale native load customers pursuant to state law and consistent with NERC standards.*"<sup>11</sup> In order to exercise operational authority, a member would be required by section 3.0(h) to exercise only such authority that is necessary to preserve the member's rights, duties and obligations. Additionally, by its terms, this section applies only to those rights, duties and obligations that pertain to the member's provision of electric service to retail and wholesale native load pursuant to state law. Therefore, we reject Golden Spread's vague assertion that the absence of a comprehensive list of applicable state rights, duties and obligations in section 3.0(h), or that section's use of the terms "rights" and "native load," could be used by members to provide discriminatory service, or to avoid their responsibilities under the Membership Agreement for anything less than a legitimate conflict with state law.<sup>12</sup>

**2. Section 3.10 - Pricing**

16. SPP's proposed revisions to section 3.10 would, among other things, add the highlighted phrase: "Transmission Owner shall possess the unilateral right to file with FERC *or to submit to SPP for filing with FERC if the Member is non-jurisdictional* pursuant to Section 205 of the Federal Power Act modifications to change the rates or rate structure for transmission service over its Tariff Facilities. . . ." <sup>13</sup>

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<sup>11</sup> SPP, Initial Filing (citing FERC Electric Tariff, Membership Agreement, Original Volume No. 3, Proposed First Revised Sheet No. 16) (emphasis added).

<sup>12</sup> We note that the Commission accepted identical language, including the word "rights," in the revisions to the Membership Agreement filed for the Nebraska Entities, and Golden Spread has provided no basis upon which we should change course here.

<sup>13</sup> SPP, Initial Filing (citing FERC Electric Tariff, Membership Agreement,

**a. Positions of the Parties**

17. East Texas requests that the provision be clarified to allow non-jurisdictional members to make a unilateral filing with the Commission for approval of transmission rates without having to go through SPP first. East Texas asserts that although it does not believe it was SPP's intent, the language added to section 3.10 could be read as limiting non-jurisdictional members' options by requiring them first to submit rates to SPP for filing.<sup>14</sup> Therefore, East Texas requests clarification of this section.

18. SPP answers that, as East Texas suggested, it was not SPP's intent to limit non-jurisdictional members' rights, and that no clarification is needed. Nonetheless, SPP confirms that section 3.10, as modified, allows non-jurisdictional members the option of continuing to file their rates with the Commission or electing to have SPP file their rates for them.<sup>15</sup>

**b. Commission Determination**

19. We find that section 3.10, as proposed, could be read as limiting non-jurisdictional members' options to submitting rates first to SPP. Noting that SPP did not intend such an understanding of this section, we accept section 3.10, subject to SPP revising the provision to clarify that non-jurisdictional members have the option of filing rates directly with the Commission or having SPP file such rates for them.

**3. Section 3.11 – No Waiver of Jurisdictional Immunity**

20. SPP's proposed section 3.11 provides that a non-jurisdictional member will not be subject to Commission jurisdiction by virtue of its membership in SPP, and it will not be bound or obligated by any Commission order, decision, rule or regulation requiring a change in rates, terms, or conditions of transmission service or compensation for using the transmission facilities of a non-jurisdictional member that conflicts with state law.<sup>16</sup> Proposed section 3.11 also includes an acknowledgement by SPP and non-jurisdictional members that, in the context of its jurisdiction over SPP's rates, the Commission may review a non-jurisdictional member's revenue requirement and rates to the extent they comprise or affect the rates charged by SPP or other members.

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Original Volume No. 3, Proposed First Revised Sheet No. 20) (emphasis added).

<sup>14</sup> East Texas, March 18, 2009 Request for Clarification, at 4.

<sup>15</sup> SPP, Answer at 12.

<sup>16</sup> SPP, Initial Filing at 3-4.

**a. Positions of the Parties**

21. Golden Spread argues that this provision amounts to giving the member blanket immunity from Commission authority and represents a private agreement between SPP and its members to avoid Commission orders. SPP answers that the provision merely articulates and preserves a non-jurisdictional member's immunity from Commission jurisdiction, indicating that such immunity is not waived by executing the Membership Agreement. SPP states that a similar provision was accepted in the Nebraska Order and that the Commission has recognized its limited review when addressing non-jurisdictional entities in the context of Commission-regulated RTOs in *TRANSLink Development Co., LLC*.<sup>17</sup>

22. Western Farmers support proposed section 3.11 to the extent that it clarifies that non-jurisdictional members do not become jurisdictional public utilities under the FPA merely by signing the Membership Agreement. Western Farmers do not object to the acknowledgement that the Commission may review non-jurisdictional members' revenue requirements and rates in the stated circumstances. However, Western Farmers argue that the acknowledgement is incomplete and somewhat misleading. Western Farmers contend that section 3.11 should be revised to state that a member's acknowledgement that the Commission can review its rates is not consent or agreement to such review and that the Commission's review is only to the extent required by the FPA.<sup>18</sup>

23. SPP answers that Western Farmers' suggested revisions limiting the Commission's authority to review the member's rates are unnecessary, because section 3.11 already states that the Commission's review of the member's rates is limited to the context of the Commission's jurisdiction over SPP's rates. SPP adds that the Commission's approval of similar provisions has been upheld by the courts, citing *Pacific Gas & Electric Co. v. FERC*.<sup>19</sup>

**b. Commission Determination**

24. We find SPP's proposed section 3.11 to be just and reasonable to the extent that it confirms that execution of the SPP Membership Agreement does not affect an entity's

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<sup>17</sup> SPP, Answer at 6 (citing *TRANSLink Development Co., LLC*, 101 FERC ¶ 61,140 (2002) (*TRANSLink*)).

<sup>18</sup> Western Farmers, March 18, 2009 Comments, at 4.

<sup>19</sup> SPP, Answer at 9 (citing *Pacific Gas & Electric Co. v. FERC*, 306 F.3d 1112 (D.C. Cir. 2002) (finding that the Commission may review the effect of a non-jurisdictional entity's rates on the system operator's rates)).

jurisdictional status. As Western Farmers acknowledge, the Commission has jurisdiction to review the rates of a jurisdictional transmission provider, such as SPP, whose rates include charges originating with a non-jurisdictional entity in the context of the provision of jurisdictional services.<sup>20</sup> Proposed section 3.11 acknowledges the Commission's authority over jurisdictional rates, while at the same time confirming that non-jurisdictional entities' membership in SPP will not create Commission jurisdiction that does not otherwise exist. Western Farmers provide no explanation for their proposed revision to section 3.11, which would state that the Commission's authority to review non-jurisdictional rates that comprise or affect jurisdictional rates exists only to the extent required by sections 201, 205 and/or 206 of the FPA, nor do we discern a rationale for this revision. Therefore, we find that proposed section 3.11 achieves its intended effect of confirming that SPP membership has no impact on an entity's jurisdictional status, and we will reject Western Farmers proposed revision.<sup>21</sup>

25. However, we find that section 3.11 may overstate non-jurisdictional entities' exemption from Commission review. As proposed, section 3.11 states, in part, that "[A] non-jurisdictional Member shall not be bound or obligated by any FERC order, decision, rule or regulation requiring a change in the rates, terms or conditions for transmission service or compensation for utilizing the transmission facilities of a non-jurisdictional Member, which conflicts with applicable state law, including any order requiring the suspension of the use of such rates, terms or conditions or the payment of refunds of rates or compensation previously collected or received."<sup>22</sup> This provision does not acknowledge that otherwise "non-jurisdictional" entities remain subject to the Commission's authority under certain provisions of the FPA.<sup>23</sup> Although nothing in the SPP Membership Agreement could waive such Commission jurisdiction, we find that this

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<sup>20</sup> See, e.g., *Southwest Power Pool, Inc.*, 119 FERC ¶ 61,307, at P 15 (2007).

<sup>21</sup> Western Farmers also request that SPP be required to amend section 3.11 to include provisions indicating that non-jurisdictional members do not necessarily agree to the Commission's review of non-jurisdictional rates to the extent that they affect or comprise jurisdictional rates. We find this proposed revision to be unnecessary, as nothing in the acknowledgement of the Commission's review contained in section 3.11 indicates that non-jurisdictional entities agree with such review.

<sup>22</sup> SPP, Initial Filing (citing FERC Electric Tariff, Membership Agreement, Original Volume No. 3, Proposed First Revised Sheet No. 20).

<sup>23</sup> See, e.g., 16 U.S.C. § 824e(e)(2) (2006) (vesting the Commission with authority to require refunds from otherwise non-jurisdictional entities that voluntarily make short-term sales in organized markets at rates set by a Commission-approved tariff and violate the terms of that tariff or Commission rules).

provision of section 3.11 may be misleading and should be clarified. Accordingly, SPP is directed to revise the above-quoted provision of section 3.11 to clarify that “*except as otherwise provided in the Federal Power Act, a non-jurisdictional Member shall not be bound. . . .*”<sup>24</sup>

#### **4. Section 3.12 – Compliance with State Law**

26. SPP’s proposed section 3.12 provides that a member will not be required to take any action that it is not permitted to take pursuant to state law or that would require the member to violate a provision of state law in order to comply with the Membership Agreement. Section 3.12 further states that a determination of permissible action under this section will be within the sole jurisdiction of the member’s governing board, subject to state court review.<sup>25</sup>

##### **a. Positions of the Parties**

27. Dogwood contends that SPP should clarify that this section applies only to non-jurisdictional members, rather than all members. Dogwood asserts that, as written, section 3.12 could be read to allow a jurisdictional member to disregard SPP tariff obligations that the jurisdictional member’s “governing board” determines, in its sole discretion and without Commission notification, conflict with state or municipal law.

28. SPP responds that it is unnecessary to revise section 3.12 as requested by Dogwood because the provision does not permit jurisdictional members to disregard SPP membership obligations *sua sponte* on the basis of state law or transfer any matters within the Commission’s jurisdiction to state courts.<sup>26</sup> Moreover, SPP argues that a similar provision was accepted for the Nebraska Entities and approved in *TRANSLink*.<sup>27</sup>

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<sup>24</sup> We recognize that language similar to section 3.11 was previously accepted as part of the Nebraska Order. However, given that SPP’s proposed revisions to the Membership Agreement in this proceeding are of broader applicability, we believe this clarification is necessary to prevent future misunderstanding. Our acceptance of similar language in the Nebraska Order does not change the fact that otherwise “non-jurisdictional” entities remain subject to the Commission’s authority under certain provisions of the FPA; nothing in the revisions to the Membership Agreement accepted for the Nebraska Entities could waive Commission jurisdiction.

<sup>25</sup> SPP, Initial Filing at 4.

<sup>26</sup> SPP, Answer at 12-13.

<sup>27</sup> *Id.* at 13 (citing *TRANSLink, LLC*, 101 FERC ¶ 61,140 at P 26).

Therefore, SPP believes that no clarification of section 3.12 is necessary. Nonetheless, SPP does clarify that section 3.12 is intended to apply only to non-jurisdictional SPP members created by and subject to state law; it does not apply broadly to all members whose transmission facilities are subject to Commission jurisdiction.

29. Western Farmers argue that section 3.12 should be modified to include conflicts with Rural Utilities Service (RUS)<sup>28</sup> requirements as well as state and municipal law, as a basis for non-compliance with SPP membership obligations. Western Farmers assert that without such a modification, section 3.12 will not apply to cooperatives, which are often under the authority of the RUS rather than state and municipal law.

30. SPP answers that adding a reference to RUS requirements is beyond the scope of this filing, which is intended to adopt the revisions to the Membership Agreement that were accepted for the Nebraska Entities. SPP states that because the Nebraska Entities are subject to state and municipal authority—not RUS authority—the revisions accepted in the Nebraska Order did not include a reference to RUS authority. Accordingly, SPP explains, neither does the proposed section 3.12 refer to RUS authority. SPP also states that section 8.5 of the Membership Agreement provides an avenue for resolving any conflict between the Membership Agreement and RUS requirements.<sup>29</sup> SPP explains that section 8.5 states that a member and SPP will endeavor in good faith to negotiate to amend the Membership Agreement in the event that a court or regulatory authority (such as the RUS) determines that the Membership Agreement is invalid, void or unenforceable as applied to the member.

**b. Commission Determination**

31. We agree with SPP and Dogwood that the intent of proposed section 3.12 is to allow for non-compliance with SPP membership obligations only by non-jurisdictional members, when compliance would force the member to violate state law. However, the phrasing of section 3.12 is not clear on this point. Because section 3.12 provides that the determination of compliance with permissible action is within the sole discretion of the member's "governing board," Dogwood is reasonably concerned that a jurisdictional member, in its board's sole discretion, could determine that compliance with SPP membership obligations conflicts with state law, and unilaterally determine that it need not comply. Therefore, we accept section 3.12, subject to SPP revising that provision to expressly apply only to non-jurisdictional members.

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<sup>28</sup> The RUS is a federal agency that provides financing to electric cooperatives under the Rural Electrification Act of 1936, 7 U.S.C. § 901-950b (2006).

<sup>29</sup> SPP, Answer at 10.

32. Finally, we will not require SPP to expand proposed section 3.12 to incorporate Western Farmers' request to apply that section to RUS-financed entities. SPP's proposed revisions to its Membership Agreement are aimed at allowing SPP members to comply with state and municipal law, consistent with the revisions accepted in the Nebraska Order. Western Farmers' request would go further. Exempting RUS-financed members from compliance with the Membership Agreement where a member's obligations to RUS and SPP may conflict could raise issues that are distinct from those that apply to members subject to state and municipal oversight. Accordingly, we find that Western Farmers' proposed revisions to section 3.12 should first be vetted through SPP's stakeholder process.<sup>30</sup> Therefore, we accept proposed section 3.12, subject to the modification discussed above.

The Commission orders:

(A) SPP's proposed revisions to the SPP Membership Agreement are hereby conditionally accepted for filing, to become effective April 27, 2009, as discussed in the body of this order.

(B) SPP is directed to file revisions to its Membership Agreement within 30 days of the date this order issues, as discussed above.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>30</sup> See, e.g., *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,100, at P 42 (2005).