

138 FERC ¶ 61,211
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Southwest Power Pool, Inc.

Docket Nos. ER12-891-000
EL12-47-000

ORDER ACCEPTING AND SUSPENDING TRANSMISSION SERVICE
AGREEMENTS, INSTITUTING SECTION 206 PROCEEDING, AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 23, 2012)

1. On January 25, 2012, pursuant to section 205 of the Federal Power Act (FPA),¹ Southwest Power Pool, Inc. (SPP) submitted for filing a revised executed Network Integration Transmission Service Agreement (Revised NITSA) and Network Operating Agreement (NOA).² The Revised NITSA is between SPP as transmission provider and Westar Energy, Inc. (Westar) as transmission customer. The NOA is among SPP as transmission provider, Westar as transmission customer, and Westar as host transmission owner. In this order, we accept and suspend the Revised NITSA and NOA for a nominal period, make it effective December 1, 2011, subject to refund, and establish hearing and settlement judge procedures. Also, because SPP's filing represents a rate reduction, we are instituting an investigation pursuant to section 206 of the FPA³ in Docket No. EL12-47-000 to determine whether the proposed rate reduction is just and reasonable.

¹ 16 U.S.C. § 824d (2006).

² The original NITSA and NOA were accepted by in April 2010. *See Southwest Power Pool, Inc.*, Docket No. ER10-824-000 (Apr. 19, 2010) (delegated letter order) (April 2010 Letter Order). The NOA submitted in this proceeding conforms to the *pro forma* NOA in the SPP OATT. SPP Transmittal Letter at 2, n.4.

³ 16 U.S.C. § 824e (2006).

I. Background

2. SPP's Open Access Transmission Tariff (OATT) contains a *pro forma* NITSA and NOA, which includes provision for wholesale distribution service. Schedule 10, Wholesale Distribution Service, in the SPP OATT, states, in relevant part, that wholesale distribution service will be provided by the individual transmission owners as necessary for them to provide network integration service under the SPP OATT. Schedule 10 also states that transaction-specific information, including all customer-specific rates and charges, will be set forth in the transmission service agreement between SPP and the transmission customer. The transmission service agreement in this case is the Revised NITSA.

3. SPP states that section 8.6 of Attachment 1 of the *pro forma* NITSA contains a "fill-in-the-blank" provision for Real Power Losses Distribution. In addition, section 28.5 of the Westar OATT provides for the calculation of real power losses based on the capacity and energy received by the customer, multiplied by a real power loss factor stated in the provision.⁴

II. SPP's Filing

4. SPP states that it is filing the Revised NITSA and NOA because they modify agreements on file with the Commission.⁵ SPP explains that the Revised NITSA contains provisions that also do not conform to the *pro forma* NITSA in the SPP OATT. SPP states that first, section 8.6 of the Revised NITSA specifies:

Real Power Losses – Distribution

The Network Customer shall replace all distribution losses in accordance with Westar Energy's Open Access Transmission Tariff, Section 28.5, based upon the location of each delivery point meter located on distribution facilities. The composite loss percentages in Section 28.5 shall exclude transmission losses.

SPP asserts that section 8.6 is just and reasonable because it provides details on how wholesale distribution losses will be calculated in accordance with a Commission-

⁴ Westar has filed revisions to the real power losses provision of its OATT, section 28.5, which are pending in Docket No. ER12-909-000.

⁵ SPP Transmittal Letter at 1-2.

approved tariff, i.e., the Westar OATT. SPP notes that the Commission has accepted a similar provision in other orders.⁶

5. Second, SPP explains that Appendix 3 of the Revised NITSA modifies the original NITSA to: (1) reflect the voltage level at the meter rather than at the point of delivery; (2) identify the location of the meter; and (3) insert a footnote explaining the terms used to identify the location of the meter.⁷ SPP asserts that the modifications to Appendix 3 provide information not currently set forth in the parties' agreement that "is necessary and benefits the Parties because it provides additional detail regarding the delivery points."⁸ SPP states that the Commission has accepted a similar provision in other orders.⁹

6. Finally, section 8.9 of Attachment 1 of the Revised NITSA adds language specifying that the cost support and monthly charges for wholesale distribution service are detailed in an additional, non-conforming Appendix 4, Wholesale Distribution Service Charge of the Revised NITSA.¹⁰ We note that the wholesale distribution service charge in Appendix 4 is a decrease from the currently effective wholesale distribution service charge.¹¹

7. SPP requests waiver of the Commission's 60-day notice requirement as set forth in 18 C.F.R. § 35.3 (2011) so that the Revised NITSA and NOA may become effective

⁶ *Id.* at 3, n.6, citing *Southwest Power Pool, Inc.*, Docket Nos. ER11-4180-000 and ER11-4180-001 (Nov. 2, 2011) (delegated letter order) (accepting a revised NITSA between Westar and SPP).

⁷ *Id.* at 3.

⁸ *Id.*

⁹ *Id.*, citing April 2010 Letter Order; *Southwest Power Pool, Inc.*, Docket Nos. ER11-4180-000 and ER11-4180-001 (Nov. 2, 2011) (delegated letter order); *Southwest Power Pool, Inc.*, Docket No. ER10-1698-000 (Aug. 20, 2010) (delegated letter order); *Southwest Power Pool, Inc.*, Docket No. ER10-1688-000 (Aug. 20, 2010) (delegated letter order).

¹⁰ *Id.*

¹¹ Compare Appendix 4 of the Revised NITSA (wholesale distribution service charge is \$983.92/month) and Appendix 4 of the original NITSA (wholesale distribution service charge is \$1,312.96/month).

December 1, 2011. SPP explains that a December 1, 2011 effective date will allow the Revised NITSA and NOA to have the same effective date as the changes to the wholesale distribution service charges referred to in section 8.9 and detailed in Appendix 4.

III. Notice of Filing and Responsive Pleadings

8. Notice of SPP's filing was published in the *Federal Register*, 77 Fed. Reg. 5,503 (2012), with interventions, protests, and comments due on or before February 15, 2012. Doniphan Electric Cooperative (Doniphan), Kaw Valley Electric Cooperative (Kaw Valley), and Nemaha-Marshall Electric Cooperative (Nemaha-Marshall) (collectively, Kansas Cooperatives) filed a motion to intervene and protest.¹² On February 28, 2012, Westar filed an answer to the protest.¹³ On March 16, 2012, Kansas Cooperatives filed an answer to Westar's answer.¹⁴

A. Kansas Cooperatives' Protest

1. Distribution Losses

9. Kansas Cooperatives state that while Westar is the transmission customer under the Revised NITSA, Doniphan pays for the transmission service provided under the Revised NITSA.¹⁵ Kansas Cooperatives state that the agency relationship between Westar and Doniphan is governed by a Generation Formula Rate Agreement (GFRA) between Westar and Doniphan.¹⁶ Kansas Cooperatives note that under the GFRA, Westar sells Doniphan power from Westar's generators, and serves as agent for obtaining

¹² Kaw Valley and Nemaha-Marshall are parties to revised NITSAs filed by SPP in Docket Nos. ER12-1017-000, and ER12-1018-000, respectively, which are similar to the Revised NITSA and are pending before the Commission.

¹³ Westar also filed the same answer in Docket Nos. ER12-1017-000 and ER12-1018-000.

¹⁴ Kansas Cooperatives also filed the same answer in Docket Nos. ER12-1017-000 and ER12-1018-000.

¹⁵ Kansas Cooperatives Protest at 1-2.

¹⁶ *Id.* The Doniphan-Westar GFRA was accepted by the Commission on January 5, 2010. *Westar Energy, Inc.*, 130 FERC ¶ 61,007 (2010). Kaw Valley and Nemaha-Marshall are also parties to GFRA with Westar.

transmission service and wholesale distribution service to deliver the power to Doniphan's load.¹⁷

10. Kansas Cooperatives argue that proposed section 8.6 should be rejected because Doniphan's responsibility to pay for delivery charges, including losses, is governed by the GFRA between it and Westar, specifically Article II, section 3(b).¹⁸ Kansas Cooperatives argue that section 8.6 is not a "fill-in-the-blank" provision for distribution losses, as SPP claims; rather, it is a new section to the Revised NITSA. Kansas Cooperatives assert that adding section 8.6 to the NITSA is inappropriate because it conflicts with the loss provision in the GFRA.¹⁹ According to Kansas Cooperatives, losses for transmission service are provided under the GFRA, which states that losses for transmission service are calculated according to Attachment M of the SPP OATT and do not include losses for transmission service from the SPP-operated transmission system to the customer's load.²⁰ Additionally, Kansas Cooperatives also argue that the losses provision is unreasonable because Doniphan (and the other Cooperatives) are not customers under the Westar OATT.²¹ Kansas Cooperatives contend that SPP's and Westar's proposed insertion is an attempt to "amend or override" the GFRA's loss provision.²²

11. Kansas Cooperatives state that the Commission rejected a previous attempt by SPP and Westar to insert a charge for Westar's wholesale distribution service losses into

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 2, 10.

¹⁹ Article I (34) of the GFRA states:

34. Losses shall be the percentage identified in the Transmission Provider's currently effective OATT multiplied by Customer's usage (measured in kWh and kW) as measured by the revenue-quality meter(s) installed at the Point(s) of Receipt. In no case will Losses include losses that may be incurred from the Point(s) of Receipt to Customer's Load.

²⁰ Kansas Cooperatives Protest at 10.

²¹ *Id.*

²² *Id.*

its *pro forma* OATT, and that the Commission questioned a separate previous attempt, which SPP then withdrew.²³

2. Appendix 4 Cost Support

12. Kansas Cooperatives argue that Westar has not provided sufficient information in Appendix 4 and that the Commission should order SPP to supply additional information regarding the description of and support for the wholesale distribution service charge since the proposed changes make SPP's filing a "change-in-rate" filing, yet Appendix 4 does not provide any information regarding the changes in the costs underlying the proposed rate change.²⁴ Kansas Cooperatives contend that Appendix 4 provides no underlying cost information for the changes in the "NPCC [Net Plant Carrying Charge]" percentages, the "Substation Distribution Plant Dollars" and allocation percentage for the Bellevue delivery point, or the "Circuit Distribution Plant Dollars" and allocation percentage for the Midway delivery point.²⁵ Kansas Cooperatives acknowledge that the proposed rate change lowers their charges, but they claim that without the underlying information, neither Doniphan nor the Commission can determine whether the changes in the wholesale distribution service charge are reasonable or should have been lowered even more.²⁶

B. Answers

1. Distribution Losses

13. Westar argues that the GFRA losses provision does not conflict with the Revised NITSA's proposed distribution losses provision.²⁷ Westar claims that Article II, section 3(a) of the GFRA clearly states that the GFRA does not include the provision of

²³ *Id.* at 4, citing *Westar Energy, Inc.*, 131 FERC ¶ 61,183 (2010), *order denying reh'g*, 134 FERC ¶ 61,176 (2011); *Southwest Power Pool, Inc.*, Docket Nos. ER11-2428-000 and ER11-2428-001 (filed Dec. 21, 2010 and amended Mar. 23, 2011) (the Commission issued a deficiency letter on Feb. 25, 2011).

²⁴ *Id.* at 12.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Westar Answer at 5.

transmission service.²⁸ Westar notes that any change to the loss calculation used to determine the amount of power purchased by Doniphan under the GFRA would require a filing under FPA section 205 to change the GFRA.²⁹ Westar states that the calculation of losses under the GFRA in order to determine the amount of power the Kansas Cooperatives should be charged for under those agreements is entirely separate from the calculation of losses under the Revised NITSAs.³⁰

14. Kansas Cooperatives argue that Westar is incorrect to claim that the proposed distribution losses provision in the Revised NITSA does not conflict with the GFRA losses provision.³¹ Kansas Cooperatives assert that they and Westar agreed to the GFRA losses provision as a single losses provision, covering all losses to the identified delivery points.³² In addition, Kansas Cooperatives argue that Westar's claim is inconsistent with Westar's billing practices for losses under the GFRA in the first year after the GFRA were approved by the Commission, in that during that time Kansas Cooperatives disputed whether the charge for losses included wholesale distribution service, and Westar resolved the dispute by agreeing not to charge separately for wholesale distribution

²⁸ The cited portion of Article II states:

3. Responsibility for Transmission, Ancillary and Wholesale Distribution Services.

a) Customer shall be responsible for making all arrangements and executing all agreements with the Transmission Provider [SPP] for use of Westar Energy's transmission system and any other third-party transmission systems, including any associated ancillary services for Westar Energy's and/or other third-party transmission systems, which are necessary to transmit the Full Requirements Electric Service from the Points of Delivery to the Point(s) of Receipt. This Agreement does not provide any such services and the costs of such services will not be included in the Formula Rate, and Customer shall not claim that the Generation Resources under this Agreement include any such services.

²⁹ Westar Answer at 4.

³⁰ *Id.* at 5.

³¹ Kansas Cooperatives Answer at 2, 7-8.

³² *Id.*

service losses.³³ Kansas Cooperatives also point out that in GFRA with other entities, Westar has included a separate provision for wholesale distribution service losses.³⁴ Kansas Cooperatives argue that the presence of a wholesale distribution service losses provision in the Westar-Burlingame GFRA undercuts Westar's assertion that the GFRA relate only to generation services.

2. Appendix 4 Cost Support

15. Westar answers that the information that it provides in Appendix 4 is sufficient, and reflects a calculation method that has been accepted by the Commission.³⁵ Westar also notes that it presented full cost support to the Kansas Cooperatives in December 2011, and discussed the information with them, even incorporating one of their suggestions in the final determination. Westar's answer includes a meeting agenda from December 6, 2011 listing the topic "Wholesale Distribution Service Charge – update." Westar's answer also includes 45 pages of additional information on the wholesale distribution service charge.³⁶

16. Kansas Cooperatives argue that the additional cost support information in Westar's answer is insufficient and creates more concerns about Westar's wholesale distribution service charges.³⁷ Kansas Cooperatives state that Westar is wrong to base its treatment of the net plant carrying charge on Westar's transmission formula rate because a transmission carrying charge or transmission fixed charge rate should not be applied to wholesale distribution facilities.³⁸

17. Kansas Cooperatives also argue that the additional information provided in the Westar answer reveals that Westar's wholesale distribution service charges are flawed and over-allocate costs to Kansas Cooperatives in several ways. First, without a distribution cost-of-service, it is impossible to verify the depreciated cost of each piece of equipment that Westar seeks to allocate to Kansas Cooperatives.³⁹ Second, using

³³ *Id.* at 9.

³⁴ *Id.* at 9-10, citing GFRA between Westar and City of Burlingame, Kansas.

³⁵ Westar Answer at 7, citing *Commonwealth Edison*, 123 FERC ¶ 61,122 (2008).

³⁶ *Id.*

³⁷ Kansas Cooperatives Answer at 10.

³⁸ *Id.* at 11.

³⁹ *Id.* at 13.

different allocation percentages for each type of equipment “circuit” or a “substation” at each delivery point is not appropriate for network integration service customers.⁴⁰ Third, using the customer’s highest monthly transmission peak usage for the year as the numerator of the allocation percentage and the system peak usage of the circuit or substation as the denominator does not allocate the costs based on the customer’s contribution to that peak usage or loading, and therefore over-allocates the distribution costs at each delivery point.⁴¹

IV. Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure,⁴² the timely motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a) of the Commission’s Rules of Practice and Procedure prohibits an answer to a protest unless otherwise ordered by the decisional authority.⁴³ We accept Westar’s and Kansas Cooperatives’ answers because they provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Hearing and Settlement Judge Procedures

19. SPP’s filing raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Our preliminary analysis indicates that the Revised NITSA and NOA have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we accept the Revised NITSA and NOA for filing, suspend it for a nominal period, effective December 1, 2011, subject to refund, and set it for hearing and settlement judge procedures as ordered below.

⁴⁰ *Id.* at 13-14.

⁴¹ *Id.* at 14.

⁴² 18 C.F.R. § 385.214 (2011).

⁴³ *Id.* § 385.213(a)(2).

20. Also, because SPP's filing represents a rate decrease, we are instituting an investigation pursuant to section 206 of the FPA⁴⁴ in Docket No. EL12-47-000 to determine whether the proposed reduction is just and reasonable. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA, as amended by section 1285 of the Energy Policy Act of 2005,⁴⁵ requires that the Commission establish a refund effective date that is no earlier than publication of the notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than five months after the publication date. We establish a refund effective date to be the earliest date possible in order to provide maximum protection to customers, i.e., the date the notice of the initiation of the investigation in Docket No. EL12-47-000 is published in the *Federal Register*.

21. Section 206(b) of the FPA also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, whichever is earlier, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision. To implement that requirement, we will direct the presiding administrative law judge (judge) to provide a report to the Commission no later than 15 days in advance of the refund date in the event the judge has not by that date: (1) certified to the Commission a settlement which, if accepted, would dispose of the proceeding; or (2) issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of certification or a settlement or issuance of an initial decision.

22. While we are setting this case 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, 18 C.F.R. § 385.603 (2011). 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.⁴⁶ The settlement judge shall report to the Chief Judge and the Commission within 30 days

⁴⁴ 16 U.S.C. § 824e (2006).

⁴⁵ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005).

⁴⁶ The Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

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.

2. Effective Date

23. SPP requests an effective date of December 1, 2011, for the Revised NITSA and NOA, requesting a waiver of the Commission's 60-day notice requirement. Waiver is appropriate when a filing results in a rate decrease.⁴⁷ The Revised NITSA and NOA, as proposed, represent a decrease in the wholesale distribution service charge for Doniphan. Therefore, we grant the requested waiver, and accept and suspend the Revised NITSA and NOA with the requested effective date of December 1, 2011, subject to refund.

The Commission orders:

(A) The Revised NITSA and NOA are accepted for filing, suspended for a nominal period, to become effective December 1, 2011, subject to refund and hearing, as discussed in the body of this order and the ordering paragraphs below.

(B) 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 section 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 1), a public hearing shall be held concerning this filing. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011), 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.

⁴⁷ *Central Hudson Gas & Electric Corp., et al.*, 60 FERC ¶ 61,106, at 61,338, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

(D) 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.

(E) 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, NE, 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.

(F) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of a section 206 proceeding in Docket No. EL12-47-000.

(G) The refund effective date established pursuant to section 206(b) of the Federal Power Act will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (F) above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.