

170 FERC ¶ 61,128
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Southwest Power Pool, Inc.

Docket No. ER15-2115-004

ORDER ON REHEARING AND CLARIFICATION

(Issued February 20, 2020)

1. On July 12, 2017, Southwest Power Pool, Inc. (SPP) — on behalf of the Settling Parties¹ and pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure² — made an offer of settlement (Settlement) in the matter set for hearing and settlement judge procedures in this proceeding. On June 20, 2019, the Commission issued an order rejecting the Settlement³ and remanded the proceeding to the Chief Judge to resume hearing procedures on the basis that the Settlement was contested and could not be approved under *Trailblazer Pipeline Company*.⁴
2. On July 22, 2019, NIPCO filed a request for rehearing of the Settlement Order (Request for Rehearing).
3. As discussed below, the Commission denies NIPCO’s rehearing request.

¹ The Settling Parties are SPP, Northwest Iowa Power Cooperative (NIPCO), Missouri Public Service Commission (Missouri Commission), Basin Electric Power Cooperative (Basin Electric), and MidAmerican Energy Company (MidAmerican).

² 18 C.F.R. § 385.602(h) (2019).

³ *Sw. Power Pool, Inc.*, 167 FERC ¶ 61,235 (2019) (Settlement Order).

⁴ 85 FERC ¶ 61,345 (1998) (*Trailblazer*); *order on reh’g*, 87 FERC ¶ 61,110 (1999).

I. Procedural History and Background

4. On July 7, 2015, pursuant to Section 205 of the Federal Power Act (FPA)⁵ and Part 35 of the Commission's regulations,⁶ SPP submitted revisions to its Open Access Transmission Tariff (Tariff) to include a Formula Rate Template (Template), including worksheets, and Formula Rate Implementation Protocols (Protocols) (the Protocols and Template are hereinafter referred to as the Formula Rate) on behalf of NIPCO, to accommodate the recovery of NIPCO's annual transmission revenue requirement (ATRR).⁷ The proposed Tariff revisions were necessitated by NIPCO, transferring functional control of their transmission facilities to SPP in order to become a transmission owning member of SPP in pricing Zone 19.

5. As part of the proposed Tariff revisions, SPP amended Attachment W (Grandfathered Agreements) of the Tariff to list two grandfathered agreements (GFAs); GFA numbers 806 and 807.⁸ Each GFA provides for reciprocal or in-kind transmission service to the parties to the agreement. The GFAs provide for transmission service over NIPCO's transmission facilities to the counterparties to serve the counterparties' load located in SPP, and for transmission service over the counterparties' transmission facilities in Midcontinent Independent System Operator, Inc. (MISO) to NIPCO to serve its load located in MISO. Under such arrangements, the parties to the agreements attempt to balance, or provide equal amounts of service to one another.

6. On September 30, 2015, the Commission accepted the proposed revisions, effective October 1, 2015, subject to refund, and established hearing and settlement judge procedures.⁹

⁵ 16 U.S.C. § 824d (2018).

⁶ 18 C.F.R. § 35.13 (2019).

⁷ SPP uses a license-plate rate design (i.e., zonal rate design) for transmission service under its Tariff, with its footprint separated into a number of transmission pricing zones. Transmission service rates for load located within the SPP region are based, in part, on the sum of the revenue requirements for each transmission owner within the zone in which the load is located. The Tariff specifies an annual ATRR for each SPP transmission pricing zone.

⁸ The Tariff defines GFAs to include "agreements providing long-term firm transmission service executed prior to April 1, 1999." Tariff, Definitions, G.

⁹ *Sw. Power Pool, Inc.*, 152 FERC ¶ 61,251 (2015).

7. Settlement procedures were held and on July 12, 2017, SPP submitted the Settlement. NIPCO, MidAmerican, and Basin Electric (collectively, the Supporting Parties) filed initial comments in support of the Settlement. Commission Trial Staff (Trial Staff), Missouri River Energy Services (Missouri River), and Western Area Power Administration (Western) (collectively, the Contesting Participants) filed initial comments opposing the Settlement's rate treatment of the three GFAs.

8. The Contesting Participants argued that the Settlement's rate treatment of the GFAs was unjust and unreasonable. According to Trial Staff, the Commission had not created a uniform policy for ratemaking treatment of GFAs, but had determined the best treatment would be decided on a fact-specific, case-by-case basis.¹⁰ The Contesting Participants argued that in Order No. 888¹¹ the Commission required inclusion of all firm load, including that of a transmission owner, in the rate divisor (Zonal Rate Divisor).¹² According to the Contesting Participants, in this proceeding, the transmission service provided under the GFAs was firm and, therefore, should be included in the Zonal Rate Divisor.¹³

9. The Supporting Parties argued that the Settlement represented a just and reasonable resolution of all issues set for hearing and that the Settlement's rate treatment

¹⁰ Trial Staff August 1, 2017 Initial Comments Opposing Joint offer of Settlement and Settlement Agreement at 13-14 (Trial Staff Initial Comments).

¹¹ See, e.g., *id.* at 12-13 (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080) *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹² SPP calculates each network customer's load ratio share by dividing the customer's network load by SPP's total firm load in the zone. SPP assesses a monthly demand charge on each network customer for network service under Schedule 9 of the Tariff by multiplying the network customer's load ratio share by the combined annual revenue requirement for all transmission owners in the zone, and then dividing by 12. Tariff § 34.1.

¹³ Trial Staff Initial Comments at 13-15; Missouri River August 1, 2017 Comments Contesting Offer of Settlement at 18; Western August 1, 2017 Comments Contesting Offer of Settlement at 9-10.

of the GFAs, i.e., one that continues to credit all GFA revenues against NIPCO's ATRR, was consistent with the Tariff.¹⁴

10. In the Settlement Order, the Commission found that it could not approve the Settlement under the first three *Trailblazer* approaches, nor could it sever the contesting parties or contested issues under the fourth *Trailblazer* approach.¹⁵ Accordingly, the Commission rejected the Settlement, and remanded the proceeding to resume hearing procedures.¹⁶ Additionally, the Commission provided guidance in the Settlement Order as to how the GFAs should be treated under the Tariff and Commission precedent. Specifically, the Commission found that, under Commission precedent such as *Idaho Power Company*,¹⁷ the firmness of transmission service provided under a GFA is critical to determining whether the GFA revenues should be credited against the revenue requirement, reducing the numerator of the formula rate or whether the GFA loads should be cost allocated by including the load of demand in the rate divisor.¹⁸ Further, the Commission found this interpretation was consistent with Section 34.5 and Attachment L of the Tariff,¹⁹ which requires firm GFA load to be included in the Zonal Rate Divisor, and is not inconsistent with a revenue crediting approach for firm GFA load.²⁰

¹⁴ NIPCO August 1, 2017 Comments on Joint Offer of Settlement at 14; MidAmerican August 1, 2017 Initial Comments in Support of Joint Offers of Settlement and Settlement Agreements at 5.

¹⁵ In *Trailblazer*, the Commission identified four specific approaches that it can use to approve a contested settlement: (1) the Commission renders a binding merits decision on each contested issue; (2) the Commission approves the settlement based on a finding that the overall settlement as a package is just and reasonable; (3) the Commission determines that the benefits of the settlement outweigh the nature of the objections and the interests of the contesting party are too attenuated; and (4) the Commission approves the settlement as uncontested for the consenting parties, and severs the contesting parties to allow them to litigate the issues raised. *Trailblazer*, 85 FERC at 62,342-44.

¹⁶ Settlement Order, 167 FERC ¶ 61,235 at PP 54-63.

¹⁷ *Idaho Power Co.*, 126 FERC ¶ 61,044, at PP 166-168 (2009) (*Idaho Power*).

¹⁸ Settlement Order, 167 FERC ¶ 61,234 at. PP 11-13.

¹⁹ Attachment L is titled "Distribution of Transmission Service Revenues Associated with the Zonal Annual Transmission Revenue Requirement".

²⁰ Settlement Order, 167 FERC ¶ 61,235 PP 15-19.

II. Discussion

11. NIPCO states that it is not challenging the Commission's decision to set the case for hearing, but rather is challenging the framing of issues and scope of the hearing.²¹

12. NIPCO alleges that the Commission failed to review the threshold question of the application of the *Mobile-Sierra* doctrine to the GFAs and the changes to such GFAs sought directly or indirectly by the Contesting Participants.²² Specifically, NIPCO argues that when transmission owners join Regional Transmission Organizations (RTO) or Independent System Operators, even indirect modifications to GFAs trigger a threshold analysis under *Mobile-Sierra*. NIPCO argues that the relief that Contesting Participants request was an unjustified modification to the GFAs under such analysis.²³ NIPCO believes that if the Commission adopts the Contesting Participants' proposed cost allocation method rather than NIPCO's proposed method of revenue crediting, then the impact to its ATRR would constitute such a modification.²⁴ NIPCO states that it is seeking rehearing to the extent that the Commission found that *Mobile-Sierra* does not apply, or in the alternative, seeks clarification that *Mobile-Sierra* issues are within the scope of the evidentiary hearing.²⁵

13. NIPCO next alleges that the Commission erred by framing the issue for evidentiary hearing as whether the service at issue was firm and by inappropriately relying on Order No. 888 and *Idaho Power*.²⁶ NIPCO states that the key question is instead whether the GFA loads can appropriately be included in the Zonal Rate Divisor for network service calculations. NIPCO argues that the GFA loads should not be

²¹ Request for Rehearing at 1-2.

²² *Id.* at 5, 7-20 (citing *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*) (collectively *Mobile-Sierra*)).

²³ *Id.* at 9-11.

²⁴ *Id.* at 12-13.

²⁵ *Id.* at 20.

²⁶ *Id.* at 5, 20-31.

included in the Zonal Rate Divisor because they do not constitute Network Load²⁷ under the Tariff.²⁸

14. NIPCO alleges further that the Commission's determination relied on flawed interpretations of the Tariff,²⁹ and that the Commission should have instead looked at Section 41 of the Tariff, which defines Resident Load as Network Load and as GFA load not taking network service or point-to-point service.³⁰ NIPCO argues that the GFA loads at issue here do not fall into these categories, and thus should not be subject to a demand charge.³¹ NIPCO argues that Attachment L, which includes provisions on the treatment of GFA revenues, should not be read to require payments in the current circumstances.³² Specifically, NIPCO states that the provisions do not require SPP to shift revenues from the GFAs to the zone.³³ NIPCO argues that even if Attachment L is ambiguous, then the Commission's interpretation cannot be applied without violating retroactive ratemaking principles.³⁴ Similarly, NIPCO alleges that the Commission erred by discounting the relevance of Commission precedent related to zonal placement of transmission facilities.³⁵

15. As discussed below, we deny NIPCO's request for rehearing.

²⁷ Network Load is the load that a customer "designates for [network service] under Part III of the [Tariff]." Tariff, Part I, Section I, Definitions N.

²⁸ Request for Rehearing at 21.

²⁹ *Id.* at 31-40.

³⁰ *Id.* at 31-32.

³¹ *Id.*

³² *Id.* at 33-39.

³³ *Id.* at 35 (citing Tariff, att. L, § II.A)

³⁴ *Id.* at 40.

³⁵ *Id.* at 40-42 (citing *Sw. Power Pool, Inc.*, 163 FERC ¶ 61,109 (2018) (*Tri-State*)).

16. As an initial matter, we note that whether a revenue-crediting or cost allocation approach should apply is an open issue to be explored at hearing. Thus, NIPCO's arguments that *Mobile-Sierra* should apply are not ripe for review at this time.³⁶

17. In any event, we disagree with NIPCO's argument that a *Mobile-Sierra* analysis is required in this proceeding. Although a *Mobile-Sierra* analysis may be relevant when considering Commission action that modifies a contract, it is not relevant when Commission action merely affects a contract.³⁷ Here, the question set for hearing is whether the transmission service underlying the GFAs should be reflected in SPP's transmission rates by a revenue crediting approach, as advocated by NIPCO, or a cost allocation approach, as proposed by the Contesting Participants. In other words, the Commission is addressing SPP's rate treatment of the service underlying the GFA, not whether the GFA itself should be modified.³⁸

18. Further, we disagree with NIPCO that by not discussing *Mobile-Sierra*, the Commission failed to address Commission policy goals of attracting non-public utility transmission owners to an RTO and preserving their GFAs under an RTO's tariff.³⁹ As set forth above, a *Mobile-Sierra* analysis is not triggered because the GFAs are not being modified. There was no need for the Commission to address those policy goals in the context of this proceeding.⁴⁰ Thus, we deny NIPCO's request for rehearing on this point.

³⁶ *Trailblazer Pipeline Co. LLC*, 168 FERC ¶ 61,005, at P 12 (2019)

³⁷ *Am. Gas Ass'n v. FERC*, 428 F.3d 255, 263 (D.C. Cir. 2005) ("Because the terms of primary service for which the parties have bargained remain unchanged, FERC's decision does not modify contracts, even if it affects them."); *Algonquin Gas Transmission, LLC*, 153 FERC ¶ 61,038, at P 98 (2015) ("Because we are not modifying Algonquin's negotiated rate agreements, we need not make the findings required to modify a contract to which the *Mobile-Sierra* "public interest" presumption is applicable, even assuming these negotiated rate agreements could fall into that category.").

³⁸ *Idaho Power*, 126 FERC ¶ 61,044 at P 166 (finding "the issue is not the justness and reasonableness of [the GFAs at issue], but whether Idaho Power's proposal to credit the revenues generated from these grandfathered agreements in the numerator of its formula rate, rather than including the loads associated with these agreements in the denominator, is just and reasonable. This is most directly a question of rate design and cost allocation, not contract modification.").

³⁹ Request for Rehearing at 14-20.

⁴⁰ In support of its contention that cost-allocating GFAs by including the load in the zonal rate denominator or imputing revenues constitutes modification of the GFAs, NIPCO cites a proceeding involving GFA treatment in MISO. Request for Rehearing

19. Additionally, we disagree that the Commission erred in framing the issue for evidentiary hearing as whether the GFA loads in question provide firm service.⁴¹ In the Settlement Order, the Commission concluded that the open question is whether service under the GFAs is firm.⁴² NIPCO's arguments do not convince us otherwise. Although NIPCO argues that the Commission inappropriately relied on Order No. 888 and *Idaho Power* to frame the issue, we disagree and affirm the finding that those precedents are the most relevant to determining the appropriate ratemaking treatment of the GFA loads.⁴³ In Order No. 888, the Commission required inclusion of all firm load, including that of the transmission owner, in the transmission rate divisor.⁴⁴ In *Idaho Power*, the Commission rejected Idaho Power Company's proposal to credit revenues from pre-Order No. 888 GFAs in the numerator rather than apply a cost allocation method by including the load in the rate divisor, and found that Idaho Power had not adequately demonstrated that the quality of its transmission services was inferior to firm, long-term service.⁴⁵ While NIPCO points out "substantial differences" between the *Idaho Power* case and this proceeding, namely the amount of load involved, that the issue involved a stand-alone public utility rather than an RTO, and the benefits provided under the various

at 14-16 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 128 FERC ¶ 61,046, at P 76 (2009); *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, order on reh'g, 109 FERC ¶ 61,157 (2004), order on reh'g, 111 FERC ¶ 61,043, reh'g denied, 112 FERC ¶ 61,086 (2005), *aff'd sub nom. Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007)). However, that proceeding involved integration of GFAs in the MISO energy and ancillary service markets, and the potential impacts on the GFAs in that proceeding were fundamentally different and therefore distinguishable from impacts associated with the rate design and cost allocation issues present in this proceeding.

⁴¹ Request for Rehearing at 21-32.

⁴² Settlement Order, 167 FERC ¶ 61,235 at PP 11-18; *id.* P 60 ("The disagreement among the parties indicates that the firmness of each GFA is also a material fact, and we are unable to resolve this dispute based on the existing record.").

⁴³ *Id.* PP 12-18 (citing Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,256; *Idaho Power*, 126 FERC ¶ 61,044 at PP 166-168; *Consumers Energy Co.*, 86 FERC ¶ 63,004, at 65,031-32 (1999), *aff'd in relevant part*, Opinion No. 456, 98 FERC ¶ 61,333, at 62,410 (2002)).

⁴⁴ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,738.

⁴⁵ *Idaho Power Co.*, 126 FERC ¶ 61,044 at PP 166-168.

GFAs,⁴⁶ we do not find that those distinctions alter the usefulness of that precedent given the Commission's finding in *Idaho Power* that cost-allocating GFAs is "appropriate where the services provided under [such GFAs] are firm in nature, rather than non-firm."⁴⁷ NIPCO cites two SPP cases related to network service agreements where there was a question as to whether GFA load was being reported as part of the service agreement, and if not, how the load could be accounted for in the calculation of total zonal load.⁴⁸ However, the issue as addressed by the Commission in those cases was whether the network service agreements should include GFA loads, not the ratemaking treatment of the GFA loads in the zonal load, and so the conclusions of those cases are inapplicable here. Thus, NIPCO's request for rehearing on this basis is denied.

20. We also find unpersuasive NIPCO's arguments that the Commission relied on inapplicable provisions in the Tariff while ignoring NIPCO's interpretation.⁴⁹ NIPCO argues that a plain reading of the Tariff requires a finding that the GFA load at issue here is Resident Load not subject to a demand charge because it is not Network Load.⁵⁰ However, the fact that GFA load is included in Resident Load, which is used to bill charges other than Schedule 9 charges, does not mean that it cannot be included in the network Zonal Rate Divisor. On the contrary, Section 34.5 of the Tariff defines the zone's Monthly Transmission System Peak, i.e., the divisor used to calculate the zonal Schedule 9 rate, as "[t]he maximum firm usage of the Transmission Provider's Transmission System in a calendar month."⁵¹ This definition of the Zonal Rate Divisor encompasses GFA load served with firm transmission service and supports the notion that the Tariff fully accommodates a cost allocation approach.

21. We also disagree that the Commission erred by misapplying key provisions of Attachment L of the Tariff.⁵² NIPCO argues that the Commission improperly reads Attachment L to suggest that "where the transmission owner has not already reduced its revenue requirement by the amount of revenues received from its GFAs," that

⁴⁶ Request for Rehearing at 25-27.

⁴⁷ *Idaho Power Co.*, 126 FERC ¶ 61,044 at P 167.

⁴⁸ Request for Rehearing at 27-31 (citing *Sw. Power Pool, Inc.*, 153 FERC ¶ 61,355, at P 15 (2015); *Sw. Power Pool, Inc.*, 153 FERC ¶ 61,368 at P 21 (2015)).

⁴⁹ Request for Rehearing at 31-40.

⁵⁰ *Id.* at 31 (citing Tariff, § 1 Definitions, N; Tariff, § 34.1).

⁵¹ Tariff, Definitions, T.

⁵² Request for Rehearing at 33-40.

transmission owners must negotiate.⁵³ According to NIPCO, the Commission ignored the significance of language in the Tariff stating this negotiation requirement only applies when “the ATRR of the selling Transmission Owner has not been reduced by the amount of the charges associated with the [GFA]” and that the provision cannot be triggered where a transmission owner has agreed to share the revenue of a GFA that contains revenue.⁵⁴ The Commission did not ignore this language in the Settlement Order and, in fact, quoted it in full.⁵⁵ However, we do not believe this provision can be read in isolation from the rest of the Tariff. Section 34.5 of the Tariff already requires that, if the GFA transmission service is firm, the load be included in the Zonal Rate Divisor. By contrast, NIPCO’s argument presumes that revenue crediting is appropriate and that NIPCO has discretion to decide this issue unilaterally when, in fact, the question of whether revenue crediting or cost allocation is appropriate remains an open issue in this proceeding. As discussed above, a revenue crediting approach would not be necessary or appropriate if the GFA transmission service is firm, as it would lead to the transmission owner under-recovering its transmission cost-of-service. Thus, if the GFA service is determined at the hearing to be firm, the exception to Attachment L’s applicability cited by NIPCO does not apply, and NIPCO’s request for rehearing on this basis is denied.

22. We further disagree with NIPCO’s argument that the Tariff is so ambiguous that application to NIPCO would constitute retroactive ratemaking.⁵⁶ As the precedent cited by NIPCO acknowledges, the bar on retroactive ratemaking “prohibits the Commission from adjusting current rates to make up for a utility’s over- or under-collection in prior periods,” but “does not extend to cases in which [customers] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.”⁵⁷ Here, the Commission has not adjusted NIPCO’s rates to compensate for past collections, but, rather, has clarified a framework for determining the appropriate ratemaking treatment of specific GFA loads under the various Tariff provisions. NIPCO does not explain why this would constitute retroactive ratemaking. Moreover, all parties were on notice that “resolution of some specific issue may cause a

⁵³ *Id.* at 38-39 (citing Settlement Order, 167 FERC ¶ 61,235 at P 18).

⁵⁴ *Id.* (quoting Tariff, att. L, § II.B.2(e)).

⁵⁵ Settlement Order, 167 FERC ¶ 61,235 at P 18 n. 28.

⁵⁶ Request for Rehearing at 40 (citing *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969-970 (D.C. Cir. 2003)).

⁵⁷ *Consol. Edison Co. of N.Y., Inc.*, 347 F.3d at 969-970 (internal citations omitted).

later adjustment to the rate being collected”⁵⁸ once SPP filed its Formula Rate to accommodate the recovery of NIPCO’s ATRR.

23. Finally, we find unpersuasive NIPCO’s argument that the Commission improperly dismissed the relevance of the *Tri-State* decision.⁵⁹ NIPCO again argues that it should have the right to present evidence that the magnitude of the alleged cost shift caused by the circumstances of this case was minimal compared to the cost shift at issue in *Tri-State*.⁶⁰ However, as the Commission explained in the Settlement Order, the cost shift here and the cost shift in *Tri-State* occurred in “a different set of facts and circumstances”: one relating to the placement of Tri-State transmission facilities in an SPP zone, and the other determining whether NIPCO has reasonably accounted for its GFA load in its proposed ATRR.⁶¹ None of the Tariff provisions or precedent cited suggest that the percentage degree of rate impact is a factor relevant to determining the appropriate ratemaking treatment currently at issue. Thus, we deny NIPCO’s request for rehearing on this basis.

The Commission orders:

NIPCO’s Request for Rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵⁸ *Id.*

⁵⁹ Request for Rehearing at 40-42 (citing *Tri-State*, 163 FERC ¶ 61,109).

⁶⁰ *Id.*

⁶¹ Settlement Order, 167 FERC ¶ 61,235 at P 53.