

173 FERC ¶ 61,151
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

Southwest Power Pool, Inc.
GridLiance High Plains LLC

Docket Nos. ER18-2358-004
ER19-1357-003

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued November 19, 2020)

1. On August 7, 2020, the Commission issued an order,¹ which answered “no” to the following certified question² regarding Attachment AI³ of Southwest Power Pool, Inc.’s (SPP) Open Access Transmission Tariff (Tariff):⁴

Does meeting the Attachment AI criteria in the SPP Tariff qualify facilities as “Transmission” for purposes of Commission jurisdiction and inclusion in the SPP Tariff and thereby eliminate any need to analyze the facilities under the Commission’s seven-factor test?⁵

¹ *Sw. Power Pool, Inc.*, 172 FERC ¶ 61,129 (August 2020 Order).

² The Presiding Administrative Law Judge (Presiding Judge) in the above-captioned dockets certified this question to the Commission pursuant to Rule 714 of the Commission’s Rules of Practice and Procedure. 18 C.F.R. § 385.714 (2020).

³ SPP Tariff, Attachment AI (Transmission Facility Criteria and Pre-Filing Review Process) (1.0.0).

⁴ *Sw. Power Pool, Inc.*, 172 FERC ¶ 63,004 (2020) (July 2020 Certified Question).

⁵ To determine what facilities would be under the Commission’s jurisdiction and what facilities would remain under the state’s jurisdiction for purposes of retail stranded cost adders or other retail regulatory purposes in the context of unbundled retail wheeling, in Order No. 888, the Commission developed a seven-factor test to determine what facilities are transmission facilities and what facilities are local distribution facilities. *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.

On September 8, 2020, GridLiance High Plains LLC (GridLiance) filed a timely request for rehearing of the August 2020 Order.

2. Pursuant to *Allegheny Defense Project v. FERC*,⁶ the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act (FPA),⁷ we are modifying the discussion in the August 2020 Order and continue to reach the same result in this proceeding, as discussed below.⁸

I. Background

3. The certified question presented to the Commission arose during the course of hearing and settlement judge procedures in the consolidated proceeding in Docket Nos. ER18-2358-000 and ER19-1357-000, concerning disputes in which GridLiance is a party. The Docket No. ER18-2358-000 proceeding originated when the Commission accepted and suspended SPP's proposal to add an annual transmission revenue requirement for certain facilities located in the Oklahoma panhandle (Oklahoma Assets)⁹ once GridLiance transfers functional control of those facilities to SPP. The Docket No. ER19-1357-000 proceeding originated following a formal challenge to GridLiance's annual informational filing reflecting its annual transmission revenue requirement for the 2019

[¶] 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).

⁶ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁷ 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁸ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the August 2020 Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁹ GridLiance acquired the Oklahoma Assets from Tri-County Electric Cooperative, Inc., and subsequently constructed certain upgrades and extensions to those assets. August 2020 Order, 172 FERC ¶ 61,129 at P 8.

rate year (2019 Annual Update), which included, among other things, the costs of the Oklahoma Assets.

4. On October 17, 2019, the Commission set the formal challenge for hearing and settlement judge procedures and consolidated Docket Nos. ER18-2358-001 and ER19-1357-000.¹⁰ In the October 2019 Order, the Commission clarified that, in the event that the Oklahoma Assets fail to meet the definition of Transmission Facilities under Attachment AI,¹¹ the Oklahoma Assets could be included in SPP transmission rates if they meet the Commission's seven-factor test.¹²

5. On July 9, 2020, prompted by GridLiance's May 5, 2020 motion for certification, the Presiding Judge certified the question—does meeting the Attachment AI criteria in the SPP Tariff qualify facilities as “Transmission” for purposes of Commission jurisdiction and inclusion in the SPP Tariff and thereby eliminate any need to analyze the facilities under the Commission's seven-factor test—to the Commission.¹³ In the August 2020 Order, the Commission determined that the answer to this question is “no,” taking into account its prior findings from the proceeding in which SPP filed proposed Tariff

¹⁰ *GridLiance High Plains LLC*, 169 FERC ¶ 61,021 (2019) (October 2019 Order).

¹¹ Under Attachment AI, a Transmission Facility is included as part of the SPP transmission system if it meets any one of the following six criteria: (1) all existing non-radial power lines, substations, and associated facilities, operated at 60 kilovolts (kV) or above, plus all radial lines and associated facilities operated at or above 60 kV that serve two or more eligible customers not affiliates of each other; (2) facilities that are utilized for interconnecting the various internal zones to each other as well as those facilities that interconnect the transmission system with other surrounding entities; (3) control equipment and facilities necessary to control and protect a facility qualifying as a Transmission Facility; (4) for a substation connected to the transmission system, where power is transformed from a voltage higher than 60 kV to a voltage lower than 60 kV, the facilities on the high voltage side of the transformer will be included with the exception of transformer isolation equipment; (5) the portion of the direct-current interconnections with areas outside of the SPP region (DC ties) that are owned by a transmission owner in the SPP region, including those portions of the DC tie that operate at a voltage lower than 60 kV; and (6) a facility operated below 60 kV that has been determined to be transmission by the Commission pursuant to the seven-factor test set forth in Commission Order No. 888 (or any applicable successor test). SPP Tariff, Attachment AI, section II (Criteria for Inclusion of Transmission Facilities) (1.0.0).

¹² October 2019 Order, 169 FERC ¶ 61,021 at P 22.

¹³ July 2020 Certified Question, 172 FERC ¶ 63,004 at P 1.

revisions to add Attachment AI¹⁴ and Opinion No. 535.¹⁵ The Commission concluded that, consistent with these prior orders, the seven-factor test may be applied either to classify or declassify any facility as a Transmission Facility under Attachment AI.¹⁶

II. Rehearing Request

6. GridLiance argues that the August 2020 Order is contrary to Order No. 888, Order No. 2000,¹⁷ and other Commission precedent. According to GridLiance, the seven-factor test as set forth in Order No. 888 was not intended as the exclusive test for determining which facilities are local distribution for jurisdictional purposes.¹⁸ GridLiance states that, in Order No. 888-A, the Commission stated that “[a]s a means of facilitating jurisdictional line drawing, we will entertain proposals by public utilities, filed under section 205 of the FPA,¹⁹] containing classifications and/or cost allocations for transmission and local distribution facilities.”²⁰ GridLiance maintains that, although Order No. 888 was issued before the prevalence of modern regional transmission

¹⁴ *Sw. Power Pool, Inc.*, 112 FERC ¶ 61,355 (2005) (2005 Attachment AI Order), *order on reh’g and clarification*, 114 FERC ¶ 61,242 (2006) (2006 Attachment AI Rehearing Order) (together, Attachment AI Orders).

¹⁵ *Sw. Power Pool, Inc.*, Opinion No. 535, 149 FERC ¶ 61,051 (2014). In Opinion No. 535, the Commission stated that, read together, the Attachment AI Orders hold that the seven-factor test may be applied to determine whether a facility qualifies as a Transmission Facility under Attachment AI. *Id.* P 165.

¹⁶ August 2020 Order, 172 FERC ¶ 61,129 at PP 24-25.

¹⁷ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) (cross-referenced at 89 FERC ¶ 61,285), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (cross-referenced at 90 FERC ¶ 61,201), *aff’d sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

¹⁸ Rehearing Request at 9 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,783-84 (“We will consider jurisdictional recommendations by states that take into account other technical factors that the state believes are appropriate in light of historical uses of particular facilities.”)).

¹⁹ 16 U.S.C. § 824d.

²⁰ Rehearing Request at 9-10 (citing Order No. 888-A, FERC Stats & Regs. ¶ 31,048 at 30,336).

organizations (RTOs), there is no indication that RTOs should not be understood to have such filing rights.²¹

7. In GridLiance’s view, the “open architecture policy” that the Commission established in Order No. 2000 of providing RTOs with the flexibility to improve their organizations in terms of structure, operations, market support, and geographic scope was “partially in response to commenters’ concerns that excessive classification of facilities as local distribution may be used by vertically integrated transmission owners to put competing generators at a disadvantage.”²² GridLiance argues that an analogous situation is at issue here where “the competitor is a transmission owner seeking to place qualifying assets under the functional control of an RTO, and a vertically integrated utility seeks to stymie comparable treatment by holding the newcomer to a different regulatory standard.”²³

8. GridLiance contends that the August 2020 Order is also inconsistent with an order that the Commission issued three days after the August 2020 Order, in which the Commission approved Midcontinent Independent System Operator, Inc.’s (MISO) proposed revisions to its tariff to incorporate criteria for classifying a storage facility as a transmission-only asset.²⁴ GridLiance characterizes the Commission’s approval of MISO’s tariff criteria as “an alternative test that itself is sufficient to identify [Commission]-jurisdictional transmission” whereas the classification rules in SPP are more restrictive under the Commission’s finding in the August 2020 Order.²⁵

9. GridLiance argues that application of the criteria in Attachment AI is a “superior test of the jurisdictional line between transmission and distribution because of its objectivity and stakeholder support.”²⁶ In contrast, GridLiance views the seven-factor test as “far more subjective” and is concerned that the use of the seven-factor test on top

²¹ *Id.* at 10, n.33

²² *Id.* at 10.

²³ *Id.* at 11. Elsewhere in its rehearing request, GridLiance claims that the August 2020 Order will invite challenges from competitors without regard to whether there is an actual jurisdictional conflict. *Id.* at 16.

²⁴ *Id.* at 11-12 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,132 (2020) (SATO Order)).

²⁵ *Id.* at 12.

²⁶ *Id.* at 14.

of an Attachment AI determination could result in inconsistent determinations.²⁷ GridLiance maintains that the reference to the seven-factor test in Attachment AI was to give a facility owner another way to seek eligibility for its facilities, but not to enable others to argue for declassification.²⁸

10. GridLiance posits that if Attachment AI captures non-jurisdictional facilities, then, under *Detroit Edison Company*,²⁹ “it is likely that the Commission exceeded its statutory authority” in accepting Attachment AI.³⁰ GridLiance states that given the possibility that an existing facility meets Attachment AI but could fail the seven-factor test, it would be “incumbent on the Commission to issue a [s]ection 206 proceeding” with respect to such facilities to “ensure that only facilities deemed [Commission]-jurisdictional under a seven-factor test remain under the SPP Tariff.”³¹

11. GridLiance renews arguments from its May 5, 2020 motion for certification claiming that the Attachment AI Orders did not intend for the seven-factor test to be used offensively to declassify facilities that otherwise met Attachment AI. Instead, according to GridLiance, the Commission was responding to concerns that a facility could be improperly excluded by failing to meet Attachment AI but otherwise satisfying the seven-factor test.³²

12. GridLiance also claims that the August 2020 Order will produce the unintended consequence of “drastically increas[ing] the volume of disputed facilities within SPP,” which could include facilities that have been operating under the SPP Tariff since Attachment AI was approved 15 years ago.³³ In addition, GridLiance claims that the August 2020 Order could deter entities from transferring their facilities to SPP’s

²⁷ *Id.* at 13.

²⁸ *Id.*

²⁹ 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*).

³⁰ Rehearing Request at 15 (citing *Detroit Edison Co.*, 334 F.3d at 52).

³¹ *Id.* at 15-16.

³² *Id.* at 16-17.

³³ *Id.* at 9.

functional control, especially cooperative and public power facilities, which, according to GridLiance, often have lower voltage and/or radial facilities.³⁴

13. Finally, GridLiance alleges that the Commission erred “to the extent the Commission intended that the seven-factor test applies to existing facilities in all cases.”³⁵ Referring to the Oklahoma Assets at issue in this proceeding as an example, GridLiance states that these facilities provide no state-jurisdictional services and that disqualifying them based on the seven-factor test would serve no purpose.³⁶

14. On September 28, 2020, Xcel Energy Services Inc. (Xcel), on behalf of its affiliate Southwestern Public Service Company, submitted a motion for leave to answer and answer in response to GridLiance’s rehearing request. On October 5, 2020, GridLiance filed an answer to Xcel’s answer.

III. Discussion

A. Procedural Matters

15. Rule 713(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2020), prohibits an answer to a request for rehearing. Accordingly, we deny Xcel’s motion to answer and reject the answers filed by Xcel and GridLiance.

B. Substantive Matters

16. We are unpersuaded by GridLiance’s arguments on rehearing, and we continue to find that the answer to the Presiding Judge’s certified question is “no,” as discussed further below.

1. The August 2020 Order is Consistent with Commission Precedent

17. At the outset, we note that the August 2020 Order fully explains why the Commission’s determination to answer “no” to the certified question is consistent with the Attachment AI Orders and Opinion No. 535.³⁷ We will not repeat that discussion here. The August 2020 Order is also consistent with Order No. 888 and Order No. 2000,

³⁴ *Id.* at 14.

³⁵ *Id.* at 21.

³⁶ *Id.* at 21-22.

³⁷ August 2020 Order, 172 FERC ¶ 61,129 at PP 22-24.

both of which were issued prior to the Attachment AI Orders and neither of which were changed by the Attachment AI Orders.

18. As GridLiance recognizes, in Order No. 888-A, the Commission invited proposals under FPA section 205 that could serve “[a]s a means of facilitating jurisdictional line drawing.”³⁸ The filing of such proposals can also extend to RTOs, consistent with Order No. 2000 and the “open architecture” policy to which GridLiance refers on rehearing. Attachment AI is one such proposal, which the Commission accepted in the 2005 Attachment AI Order. We view Attachment AI as providing an initial screen to *facilitate* jurisdictional line drawing for facilities operated at or above 60 kV that will suffice to classify such facilities for inclusion under the SPP Tariff unless an entity seeks a determination from this Commission or a state commission to classify or declassify any facility by applying the seven-factor test. In such an instance, the Commission would review that classification under Attachment AI and make the ultimate determination on where the jurisdictional line is drawn.

19. We disagree with GridLiance’s suggestion that, given the possibility that Attachment AI could capture non-jurisdictional facilities, the Commission exceeded its statutory authority in approving Attachment AI.³⁹ To the contrary, the Commission’s answer to the certified question allows a challenging party to ensure that Attachment AI captures only jurisdictional facilities. Had the Commission answered “yes” to the certified question, as GridLiance prefers, the risk of Attachment AI capturing non-jurisdictional facilities would be amplified.⁴⁰ The Commission’s decision ensures that, while Attachment AI facilitates jurisdictional line drawing, as discussed above, the definitive line is drawn in a way that respects the Commission’s jurisdiction. Accordingly, the Commission did not exceed its statutory authority in approving Attachment AI.⁴¹

³⁸ Order No. 888-A FERC Stats & Regs. ¶ 31,048 at 30,336.

³⁹ Rehearing Request at 2, 15 (citing *Detroit Edison Co.*, 334 F.3d 48).

⁴⁰ Recognizing the possibility that the Oklahoma Facilities may fail the seven-factor test, GridLiance maintains that excluding such facilities from participation in SPP would be inappropriate because they are “exclusively providing [Commission]-jurisdictional service.” *Id.* at 21-22. This argument is flawed because it incorrectly assumes that jurisdictional wholesale distribution service must occur over jurisdictional transmission facilities. *Cf. Consumers Energy Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,020, at P 92 (2020) (noting that wholesale distribution service may occur over local distribution facilities).

⁴¹ GridLiance’s reliance on *Detroit Edison* is misplaced in any event. In that case, the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission

20. GridLiance also cites to Order No. 2000 in support of its argument that the declassification of certain facilities could present comparability concerns.⁴² This argument is not supported by the paragraph of Order No. 2000 cited by GridLiance, which instead discusses the importance of an RTO's autonomy in light of reclassification that may occur due to retail unbundling.⁴³ In any event, as the Commission explained in the August 2020 Order, GridLiance's comparability arguments are beyond the scope of the certified question.⁴⁴ Even if such arguments were relevant here, we do not see any comparability concern because incumbent and potential transmission owning members of an RTO are both subject to the same process for the classification of their facilities as either transmission or distribution. Specifically, under this comparable process, the classification of their facilities is facilitated by SPP's Attachment AI and, if no entity seeks a determination from this Commission or a state commission to classify or declassify any facility by applying the seven-factor test, there is no need to utilize the seven-factor test. If an entity seeks to classify or declassify any facility by applying the seven-factor test, despite the facilities' meeting the Attachment AI criteria, the Commission will review that classification and determine where the jurisdictional line is drawn.

21. Contrary to GridLiance's argument on rehearing, the Commission's determination in the SATOA Order is not relevant to the certified question presented here. As a preliminary matter, the certified question addresses the application of the seven-factor test under the SPP Tariff, which has no bearing on classifying a storage facility under

exceeded its statutory authority by accepting a tariff filing that allowed for unbundled retail customers to take distribution service. Here, in contrast, even if Attachment AI classified distribution facilities as transmission and such classification went unchallenged under the seven-factor test, the Attachment AI classification would not result in retail customers taking distribution service over such facilities.

⁴² Rehearing Request at 10-11 (referring to a vertically integrated utility seeking to "stymie comparable treatment by holding the newcomer to a different regulatory standard").

⁴³ Order No. 2000, FERC Stats. & Regs. 31,089 at 31,208 ("Commenters pointed to potentially extensive reclassification of transmission facilities to local distribution as part of the unbundling of retail rate schedules, and how this might lead to RTOs that are 'empty vessels' with little significant transmission under their control. We agree that RTOs must control all transmission facilities that are necessary to support competitive wholesale markets.").

⁴⁴ August 2020 Order, 172 FERC ¶ 61,129 at P 26.

MISO's tariff, as addressed in the SATOA Order.⁴⁵ The SATOA Order considered whether a storage facility as a transmission-only asset could be included in the MISO Transmission Expansion Plan (MTEP) or selected in the MTEP for cost allocation purposes.⁴⁶ In contrast, the Attachment AI criteria under the SPP Tariff apply to the type of facilities that have traditionally been subject to the seven-factor test for distinguishing local distribution facilities from transmission facilities.

2. GridLiance's Concerns as to Unintended Consequences are Without Merit

22. In its rehearing request, GridLiance also alleges that the Commission erred "to the extent that it intended that the Seven Factor test apply to existing facilities in *all cases*, such that it could be used to declassify facilities that satisfy Attachment AI."⁴⁷ In the August 2020 Order, the Commission held that "the seven-factor test may be applied either to classify or declassify any facility as a Transmission Facility under Attachment AI."⁴⁸ The Commission did not place any restrictions on when such application would be appropriate but instead referred to "any facility." We continue to find that entities may contest the initial classification from Attachment AI by seeking a determination – from

⁴⁵ We note that under MISO's storage as a transmission asset proposal, a storage facility as a transmission-only asset is defined in relevant part as

An Electric Facility *connected to or to be connected to the Transmission System* and approved for inclusion in Appendix A of the [MISO Transmission Expansion Plan], as a transmission facility that is part of the Transmission System.

MISO Tariff, Module A, § 1.S (Definitions) (63.0.0) (emphasis added). Thus, if the transmission facility to which the storage facility as a transmission-only asset is connected was determined by the seven-factor test to not be a transmission facility, then the storage facility, by definition, would no longer be a storage facility as a transmission-only asset.

⁴⁶ SATOA Order, 172 FERC ¶ 61,132 at P 53.

⁴⁷ Rehearing Request at 8, 21 (emphasis in pleading).

⁴⁸ August 2020 Order, 172 FERC ¶ 61,129 at P 24.

this Commission or a state commission – as to whether the facilities should be classified as transmission or distribution under the seven-factor test.⁴⁹

23. The Commission’s finding in the August 2020 Order does not reflect any change in policy. GridLiance does not cite any occasion where facilities meeting the Attachment AI criteria have been challenged and where the Commission has declined to apply the seven-factor test. As discussed above, we view the Attachment AI criteria as an initial screen that will suffice to classify facilities for inclusion under the SPP Tariff unless challenged. Accordingly, GridLiance’s contention that the August 2020 Order will “drastically increase the volume of disputed facilities within SPP” is speculative and unsupported and GridLiance is incorrect in asserting that the Commission must institute a proceeding under FPA section 206⁵⁰ for all existing facilities.

The Commission orders:

In response to GridLiance’s request for rehearing, the August 2020 Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁹ *Id.* (“[P]arties are not precluded from seeking a determination from this Commission or state commissions to classify or declassify any facility under the Commission’s seven-factor test.”)

⁵⁰ 16 U.S.C. § 824e.