

108 FERC ¶ 61,148  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

New Century Services, Inc.

Docket No. ER99-1610-006

ORDER ESTABLISHING PAPER HEARING

(Issued August 5, 2004)

1. On February 11, 2003, the U.S. Court of Appeals for the District of Columbia Circuit issued an order<sup>1</sup> finding that the Commission's prior orders in this proceeding<sup>2</sup> did not answer contentions by Golden Spread Electric Cooperative, Inc. (Golden Spread) that allowing Southwestern Public Service Company (SPS) to sell power to its affiliates at market-based rates would frustrate Golden Spread's contractual protection against possible SPS market power.

2. In this order, we establish a paper hearing and direct the parties to provide the Commission with more current information on which to resolve the issues presented. This order benefits customers by enabling the Commission to make a more informed decision on Golden Spread's contentions.

**Background**

3. Since 1995, SPS has been authorized to make wholesale power sales at market-based rates. *Southwestern Public Service Company*, 72 FERC ¶ 61,208 (1995). On January 29, 1999, New Century Services, Inc. (as agent for SPS and its affiliates) filed an amended and restated market-based rate tariff for SPS that would enable SPS to make market-based power sales to its affiliates. Golden Spread filed a protest opposing the application and arguing that, at a minimum, the Commission should limit affiliate sales in corridors where SPS had denied Golden Spread's requests for transmission service.

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<sup>1</sup> *Golden Spread Electric Cooperative, Inc. v. FERC*, 319 F.3d 522 (D.C. Cir. 2003) (Remand Order).

<sup>2</sup> *New Century Services, Inc.*, 86 FERC ¶61,307 (1999) (Initial Order); *reh'g denied*, *New Century Services, Inc.*, 96 FERC ¶61,223 (2001) (Rehearing Order).

4. In the Initial Order, the Commission granted SPS's request for authority to make wholesale power sales to its affiliates at market-based rates and rejected Golden Spread's contention that sales by SPS to its affiliates should be prohibited or limited. The Commission noted that SPS's proposal complied with the Commission's posting and pricing requirements for affiliate transactions as set forth in *Detroit Edison Company, et al.*, 80 FERC ¶ 61,348 (1997) (*Detroit Edison*), namely, sales by SPS to its affiliate, e prime,<sup>3</sup> must be at a rate no lower than the rate charged non-affiliated purchasers, the rate offered affiliates must be offered at the same time to non-affiliates, and the actual rate charged must be posted simultaneously.<sup>4</sup> In response to Golden Spread's request that the Commission prohibit affiliate sales in corridors where transmission service has been denied, the Commission found that SPS's affiliates will have to obtain transmission under Public Service Company of Colorado's (PS Colorado) and SPS's open access tariff, just as non-affiliates must do, thereby ensuring that all customers are treated on a non-discriminatory basis.<sup>5</sup>

5. In response to the Initial Order, Golden Spread filed a request for rehearing. In the Rehearing Order, the Commission denied Golden Spread's rehearing request and explained that SPS's authority to make sales to affiliates at market-based rates would be subject to the conditions established in *Detroit Edison*.

6. Golden Spread filed a petition for judicial review arguing that neither the Initial Order nor the Rehearing Order addressed its concern that authorizing SPS to sell power to its affiliates at market-based rates might enable SPS to exert market power over Golden Spread and frustrate Golden Spread's contractual protection against possible SPS market power. The court stated in the Remand Order that, while Golden Spread expressed its primary concern rather obscurely in its papers before the Commission,

the core of its argument was that under the new tariff SPS would be able to "park" all of its excess capacity with affiliates such as e prime, which could then turn around and sell that capacity at market rates. In times of shortage for Golden Spread . . . the affiliate would be able to exert market power, extracting supra-competitive prices from Golden Spread.<sup>[6]</sup>

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<sup>3</sup> In *Public Service Company of Colorado and e prime, Inc.*, 74 FERC ¶ 61,351 at 62,075 (1996), *clarifying order*, 84 FERC ¶ 61,268 (1998), we identify e prime as a power-marketer affiliate of PS Colorado.

<sup>4</sup> Initial Order, 86 FERC at 62,066, n.20, citing *Detroit Edison* and *Tucson Electric Power Company*, 82 FERC ¶ 61,141 (1998).

<sup>5</sup> Initial Order, 86 FERC at 62,066.

<sup>6</sup> 319 F.3d 522 at 524-25.

7. The court noted that, as part of a global settlement between Golden Spread and SPS, Golden Spread dropped its protest of SPS's three-year market-based rate review filing in exchange for a set of contracts designed to protect it against unfavorable market conditions. One such contract, a Replacement Energy Agreement (REA), allowed either Golden Spread or SPS, in the event of failure of its own generation facilities, to purchase excess energy from the other at cost-based rates. The court stated:

The agreement protected Golden Spread from the risk of having to buy emergency power from SPS at supra-competitive rates. But Golden Spread argues that the REA offers it no protection in a situation where SPS has committed its otherwise excess energy to an affiliate. With the new authority, it says, SPS can strip itself of "excess" energy, while at the same time leaving its affiliate free to insist on excessive prices from Golden Spread.<sup>[7]</sup>

8. The court found that the Commission's discussion in its two orders of the safeguards imposed to prevent underpriced sales to affiliates was unresponsive to Golden Spread's arguments. The court concluded that the policies discussed in the Commission's prior orders in support of its findings (the *Detroit Edison* conditions) were not really on point (as they were focused on avoiding sales by SPS to e prime at below market prices, rather than avoiding sales by SPS to e prime at above market prices). The court stated that the conditions on affiliate transactions laid out in *Detroit Edison* did not protect Golden Spread from the danger it alleged: that SPS could shift its otherwise uncommitted energy to e prime, leaving e prime free to insist on excessive prices from Golden Spread.

9. The court acknowledged that SPS's possible frustration of the REA would pose no great risk of harm to Golden Spread if there were enough alternative sources of supply with access to the relevant market. The court noted Golden Spread's fears that transmission constraints might prevent it from securing supplies for its customers in the Texas panhandle, and noted that the Commission had not directly disputed these claims of constrained transmission capacity. The court found that the Commission had not answered Golden Spread's contentions that authority for SPS to sell to affiliates would frustrate Golden Spread's contractual protection against possible SPS market power and remanded the matter back to the Commission for a further explanation of why it rejected Golden Spread's protest.

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<sup>7</sup> *Id.* at 525.

### Discussion

10. The issue the court has directed the Commission to answer on remand involves Golden Spread's allegation that, as a result of the Commission's decision to allow SPS to make sales at market-based rates to its affiliates, SPS might sell to its affiliate e prime, and that e prime, in turn, could insist on excessive prices from Golden Spread, thereby frustrating Golden Spread's contractual protection under the REA to purchase energy from SPS at cost-based rates. Essentially, this case raises the issue of the potential impact of affiliate abuse in the context of market-based rates, an issue about which the Commission has become increasingly concerned.<sup>8</sup>

11. In the instant case, we find it appropriate to update the record before reexamining whether SPS's ability to sell to affiliates will frustrate Golden Spread's contractual protection against possible SPS market power. Five years have passed since Golden Spread raised concerns in 1999 that allowing SPS to sell power to its affiliates at market-based rates might enable SPS to exert market power over Golden Spread and frustrate Golden Spread's contractual protection against possible SPS market power. Given that market conditions may change over time, and that several years of experience can inform our decision on whether the concerns originally expressed by Golden Spread are justified or speculative, we believe that we need more current information to respond to the court's remand.

12. However, we do not believe, at this time, that a trial-type evidentiary hearing is necessary to allow us to decide this issue properly in these circumstances. Rather, we believe, a paper hearing will allow us to make such a determination on an informed

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<sup>8</sup> See Southern California Edison Company (on behalf of Mountainview Power Company LLC), 106 FERC ¶ 61,183 at P 47-63 (2004); Southern Power Company, 104 FERC ¶ 61,041 at P 14-27 (2003), *reh'g pending*; Entergy Services, Inc. and EWO Marketing Company, 103 FERC ¶ 61,256, *reh'g denied*, 105 FERC ¶ 61,208 (2003); Ameren Energy Generating Company and Union Electric Company d/b/a Ameren UE, 103 FERC ¶ 61,128 (2003); Cinergy Services, Inc. on behalf of PSI Energy, Inc., CinCap Madison, LLC and CinCap VII, LLC, 102 FERC ¶ 61,128 (2003); Ameren Energy Marketing Company, 99 FERC ¶ 61,226 (2002). The Commission has long maintained that "where affiliates are entering agreements for which approval of market-based rates is sought, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted." Boston Edison Co. Re: Edgar Electric Energy Company, 55 FERC ¶ 61,382 at 62,167 (1991).

basis.<sup>9</sup> Accordingly, we will direct the parties to file initial and reply comments, containing all arguments and supporting evidence that they wish to present, to update the record with regard to the issue under remand, namely, whether and how “authority for SPS to sell to affiliates will frustrate Golden Spread’s contractual protection against possible SPS market power.” Initial comments will be due 30 days from the date of issuance of this order, and reply comments will be due 20 days from the date of the filing of the initial comments. We urge the parties to spell out their arguments with reference to particular facts and specific circumstances, rather than couched in general or vague assertions. After we evaluate the submittals presented in the paper hearing, we intend to issue a further order in compliance with the Remand Order.

13. Finally, we encourage the parties to explore the possibility of settling this case, a result they were able to reach in the litigation that led to the REA and other contracts.

The Commission orders:

(A) 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 I), the further proceedings directed in Ordering Paragraph (B) below shall be conducted concerning the issue of whether allowing SPS to sell power to its affiliates at market-based rates would frustrate Golden Spread’s contractual protections against possible SPS market power, as discussed in the body of this order.

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<sup>9</sup> The use of a paper hearing rather than a trial-type evidentiary hearing has been addressed in several cases. *See, e.g.*, Public Service Company of Indiana, 49 FERC ¶ 61,346 (1989), *order on reh’g*, 50 FERC ¶ 61,186, *opinion issued*, Opinion No. 349, 51 FERC ¶ 61,367, *order on reh’g*, Opinion No. 349-A, 52 FERC ¶ 61,260, *clarified*, 53 FERC ¶ 61,131 (1990), *dismissed*, Northern Indiana Public Service Company v. FERC, 954 F.2d 736 (D.C. Cir. 1992). As the Commission noted in Opinion No. 349, 51 FERC at pp. 62,218 -19 & n.67, while the Federal Power Act and case law require that the Commission provide the parties with a meaningful opportunity for a hearing, the Commission is required to reach decisions on the basis of an oral, trial-type evidentiary record only if the material facts in dispute cannot be resolved on the basis of the written record, *i.e.*, where the written submissions do not provide an adequate basis for resolving disputes about material facts.

(B) The parties to this proceeding are hereby directed to file written comments, as discussed in the body of this order, including, where needed, verified statements attesting to any factual assertions, within 30 days of the date of issuance of this order. A party's presentation should separately state the facts and arguments advanced by the party and shall include any and all exhibits, affidavits, and/or prepared testimony. All materials must be verified and subscribed as set forth in 18 C.F.R. § 385.2005 (2004).

(C) The parties to this proceeding may also file reply comments addressing the written comments filed by other parties in accordance with Ordering Paragraph (B) above, in the same format as described in Ordering Paragraph (B) above, within 20 days of the date of filing of those comments.

By the Commission

( S E A L )

Linda Mitry,  
Acting Secretary.