

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Aquila Merchant Services, Inc.

v.

Docket No. EL05-16-000

Southwest Power Pool, Inc.

ORDER SETTING COMPLAINT FOR HEARING, ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES AND REFUND EFFECTIVE DATE

(Issued December 21, 2004)

1. In this order, the Commission sets for hearing and settlement judge procedures a complaint filed by Aquila Merchant Services, Inc. (AMS) alleging that, from December 2002 through June 2004, Southwest Power Pool, Inc. (SPP) failed to apply the demand charge cap in SPP's Open Access Transmission Tariff (OATT) to redirected firm point-to-point transmission service, as required by the SPP OATT and section 22.2 of the *pro forma* OATT, resulting in overcharges to AMS and undue restrictions on AMS' rights. This order benefits customers by ensuring that SPP's rates under its OATT are consistent with Commission requirements.

I. Background

2. Section 22.2 of the *pro forma* tariff permits point-to-point transmission service customers to make changes to transmission reservation receipt and delivery points (redirect) on a firm basis.¹ In Order No. 888-A, the Commission explained that "a proposed modification...to receipt and delivery points on a firm basis under the *pro*

¹ *Entergy Services, Inc.*, 91 FERC ¶ 61,151 at 61,566, *order on reh'g*, 92 FERC ¶ 61,108 (2000).

forma tariff is not simply a scheduling change...but is a new request for service, as set forth in *pro forma* tariff section 22.2.”²

3. AMS³ is a firm point-to-point transmission service customer under SPP’s OATT. Occasionally, AMS redirects, on a firm basis, either its receipt or delivery point pursuant to section 22 of the SPP OATT.⁴ Section 22.2 of SPP’s OATT (Modification On a Firm Basis), which tracks the Commission’s *pro forma* OATT, provides, in relevant part, that:

Any request by a Transmission Customer to modify Receipt and Delivery Points on a firm basis shall be treated as a new request for service in accordance with section 17 hereof, except that such Transmission Customers shall not be obligated to pay any additional deposits if the capacity reservation does not exceed the amount reserved in the existing Service Agreement for Long-Term Firm Transmission Service or confirmed Application for Short-Term Firm Transmission Service.⁵

4. The payment provision for firm transmission service, section 25 of the SPP OATT, states that rates for firm point-to-point transmission service are as provided in

² *Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regulations Preambles January 1991 - June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996 - December 2000 ¶ 31,048 at 30,319 (1997), *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 Study Policy Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

³ AMS, a subsidiary of Aquila, Inc., is a power marketer authorized by the Commission to engage in sales for resale at negotiated rates and acquires transmission service under the SPP OATT.

⁴ AMS complaint at 4.

⁵ SPP FERC Electric Tariff, Fourth Revised Volume No. 1, Original Sheet No. 64 and First Revised Sheet No. 65.

schedule 7.⁶ Among the charges/credits in schedule 7 is a weekly price cap set forth in section 2 of schedule 7, which provides:

Caps: The total demand charge in any week, pursuant to a reservation for Daily delivery, shall not exceed the weekly rate times the highest amount in kilowatts of Reserved Capacity in any day during such week.⁷

II. AMS' Complaint

5. On October 26, 2004, AMS filed a complaint with the Commission, under section 206 of the Federal Power Act (FPA),⁸ alleging that SPP has improperly applied schedule 7, section 2 of its OATT, by refusing to apply the demand charge cap to charges in any week in which Aquila exercises its rights under the OATT to redirect its firm point-to-point capacity for the period from December 2002 through June 2004.⁹ AMS estimates that it has been subject to \$1,276,423.57, before interest, in overcharges by SPP.¹⁰ AMS requests that the Commission grant its complaint and: (1) direct SPP to cease its unauthorized practice, and recalculate its bills for transmission service for such period and repay to AMS any and all amounts incorrectly charged as a result, with interest; and (2) impose whatever other relief the Commission deems appropriate.

⁶ Schedule 7 provides:

The Transmission Customer shall compensate the Transmission Provider each month for Reserved Capacity at the sum of the applicable charges set forth below in addition to other applicable charges specified in the Tariff.

SPP FERC Electric Tariff, Fourth Revised Volume No. 1, Original Sheet No. 103.

⁷ SPP FERC Electric Tariff, Fourth Revised Volume No. 1, Original Sheet No. 104.

⁸ 16 U.S.C. § 824e (2004).

⁹ AMS complaint at 7.

¹⁰ AMS states that it is unable to quantify the future financial impact should SPP continue to misapply the weekly demand charge cap as provided in schedule 7, paragraph 2, however, as evidenced by the current overcharges the potential cost to AMS is significant.

6. AMS argues that SPP's failure to properly apply the demand charge cap when a customer has exercised its rights under section 22.2 results in charges in excess of the Commission-approved rates and unduly restricts AMS' firm redirect rights. Specifically, AMS argues that, under Commission precedent, a requested change of a customer's point of delivery or receipt is to be treated as a new request for service only for the purpose of applying section 17, *i.e.*, to determine the availability of capacity, but does not convert such service to a new service for purposes of pricing and applying the weekly demand charge cap.¹¹ AMS asserts that SPP treats such requests as a new request for service for compensation purposes, contrary to Commission precedent. AMS states that SPP's Business Practice 3.2¹² affirms that any request to redirect transmission service on a firm basis is treated as a new request for service, but that SPP has misinterpreted these business practices to permit it to treat any redirected service as a new, different, discrete service.¹³

7. In support, AMS argues that the Commission has made clear that when a customer redirects service, such redirection does not convert the service into a new service for all purposes. For example, AMS points to *Commonwealth Edison Co.*,¹⁴ where the Commission held that "[s]ection 22.2 of the *pro forma* tariff was intended to provide flexibility to transmission customers to permit them to react in a competitive market," and that "[a]ny request by Dynegy to change a delivery point is treated as a new request for service for purposes of the availability of capacity."¹⁵ AMS also notes that, in *Dynegy Power Marketing, Inc. v. Southwest Power Pool, Inc.*,¹⁶ the Commission has

¹¹ AMS complaint at 8.

¹² SPP's Business Practice 3.2 (Redirect on a Firm Basis), as applied to section 22.2, provides that: (1) Any request to redirect transmission service (change POR/POD) on a firm basis is treated as a new request for service; (2) For the period of redirection, the transmission customer will be charged the transmission and ancillary service charges for the redirected path; (3) The start and stop times of the new reservation must be contained within the start and stop times of the original reservation; and (4) The portion of a firm reservation not replaced by redirected service will remain in effect.

¹³ AMS complaint at 7-8.

¹⁴ 95 FERC ¶ 61,027 (2001) (*ComEd*).

¹⁵ AMS complaint at 9 (*citing ComEd*, 95 FERC at 61,083).

¹⁶ 96 FERC ¶ 61,275 (2001) (*Dynegy*).

reaffirmed that section 22.2 permits redirections of long-term, point-to-point transmission service for periods less than the remainder of the contract.¹⁷

8. In addition, AMS argues that SPP is not permitted to adopt different OATT terms, as it has done with respect to the demand charge cap, without filing the changes with the Commission. It states that, under Order No. 888, the *pro forma* tariff provides the minimally acceptable non-rate terms and conditions for open access transmission service.¹⁸ AMS argues that, to the extent that SPP seeks to depart from these terms and conditions, it must obtain Commission authorization to revise its OATT, and must show that the revisions are consistent with or superior to the *pro forma* tariff.¹⁹ AMS states that SPP cannot meet the Commission's consistent with or superior to standard for changing its OATT because SPP's practice of treating a redirect request as a new service in order to avoid the weekly demand cap circumvents the underlying purpose of section 22.2.

III. Notice of Filing and Responsive Pleadings

9. Notice of AMS' October 26, 2004 complaint was published in the *Federal Register*, 69 Fed. Reg. 63,521 (2004), with answers, interventions, or comments due on or before November 17, 2004. Kansas City Power & Light Company filed a motion to intervene. Duke Energy North America, LLC and Duke Energy Trading and Marketing, L.L.C. (collectively, Duke) filed a timely motion to intervene and comments. SPP filed a timely answer to AMS' complaint.

A. SPP's Answer

10. In its answer, SPP states that its application of section 22.2 and the demand charge cap under schedule 7 is consistent with the plain language of SPP's OATT and SPP's Business Practices and thus AMS' complaint should be dismissed. SPP asserts that AMS' argument that a new request for service is for the sole purpose of "determin[ing] the availability of capacity" is incompatible with the unambiguous language of SPP's OATT.²⁰ It states that the only limitation to the "new request for service" language in the

¹⁷ AMS complaint at 9 (*citing Dynegy*, 96 FERC at 62,047-48).

¹⁸ Order No. 888 at 31,732.

¹⁹ *See Central Hudson Gas & Electric Corp.*, 83 FERC ¶ 61,352 (1998), *order on reh'g*, 87 FERC ¶ 61,135 (1999).

²⁰ SPP answer at 5-6 (*citing* AMS complaint at 9).

OATT recognizes that redirected service will not trigger an additional deposit obligation. SPP argues that there is no indication in the language of section 22.2 that a firm redirect will receive any other special treatment as compared to other new service requests or that firm redirects will not pay the same transmission charges under schedule 7 as all other new service requests. SPP asserts that the Commission, in interpreting jurisdictional service agreements, has held that where specific limitations on a contractual duty are mentioned other matters not mentioned will be excluded.²¹ SPP concludes that this same principle applies with equal force in construing tariff obligations as well.²²

11. SPP also states that any doubts about the meaning of “a new request for service” are dispelled because the SPP OATT requires any party seeking redirection to make such a request “in accordance with Section 17.”²³ SPP explains that, under section 17, once it evaluates a completed firm point-to-point transmission service application, if SPP determines that the requested service can be provided, the transmission customer must enter into a service agreement for the new redirected service. SPP argues that this application process evidences that redirection involves a new service and transaction separate from the transmission customer’s original service. In accordance with SPP’s OATT, therefore, SPP states that the new firm point-to-point transmission service is subject to a new transmission charge under schedule 7.²⁴ SPP further states that the application of a new transmission charge, in turn, causes the weekly time period for the application of the demand charge cap to start again at the commencement of the new redirected service.²⁵ Accordingly, SPP states that the weekly demand charge cap is not available in any week a transmission customer exercises its rights to redirect service under section 22.2 of SPP’s OATT (except when one reservation is greater than five days

²¹ *Id.* (citing *Cleveland Electric Illuminating Company*, 82 FERC ¶ 61,254 at 62,017 (1998)).

²² *Id.* at 6-7 (citing, e.g., *AEP Generating Co. and Kentucky Power Co.*, 39 FERC ¶ 61,158 at 61,626 (1987); *Alabama State Docks Dept. v. Bunge Corp.*, 655 F.2d 64, 66-67 (5th Cir. 1981)).

²³ See Section 15.2, SPP FERC Electric Tariff, Fourth Revised Volume No. 1, Original Sheet No. 44A. Section 17 establishes procedures for arranging firm point-to-point transmission service on SPP’s system.

²⁴ See Section 25, SPP FERC Electric Tariff, Fourth Revised Volume No. 1, Original Sheet No. 67.

²⁵ SPP answer at 8.

and then the cap applies to that reservation). Thus, SPP states, the redirected service represents a new transaction for purposes of imposing a new transmission charge.²⁶

12. SPP notes that the reasonableness of SPP's interpretation of section 22.2 as a "new service" can also be demonstrated by a comparison with the Commission's *pro forma* tariff language for non-firm redirects. It states that, in section 22.1 of the *pro forma* tariff, the Commission explicitly stated that non-firm redirects will not affect the transmission charge.²⁷ Thus, SPP asserts that, when the Commission intended for the redirect to be under the same transmission charge, it so stated in the tariff. SPP explains that section 22.2 contains no similar language, demonstrating that the Commission did not intend any such limitations.

13. In addition, SPP states that section 3.2 of its Business Practices lists certain conditions that apply to redirected service under section 22.2. These conditions, SPP asserts, offer guidance on the operation of redirection under SPP's OATT and clearly establish redirected service as a "new, different, discrete service" with no delimiting provisions concerning compensation. It asserts that, absent this treatment of redirected service, a transmission customer could gain a competitive advantage by redirecting their service over a more expensive path, but continue to pay the lower charges associated with the path under the transmission customer's original service, which is contrary to the provisions of SPP's OATT and the Commission's pro-competitive policies.²⁸

14. SPP also argues that the precedent cited by AMS is distinguishable. It argues that the issue in *ComEd* was whether a party exercising its redirect rights to change the designated delivery points for one month of a twelve-month contract would convert a long-term contract into two short-term contracts, and thereby, prevent the transmission customer from retaining its long-term rollover rights under section 22.2. SPP notes that the Commission found that a party exercising redirect rights in this manner "does not convert its existing long-term firm transmission service agreement into two separate short-term transmission service agreements...[but] retains its long-term firm service

²⁶ *Id.* at 9.

²⁷ *Id.* at 10. Under section 22.1 of the Commission's *pro forma* tariff, a transmission customer can redirect its firm point-to-point transmission service "on a non-firm basis...in amounts not to exceed its firm capacity reservation, without incurring any additional Non-Firm Point-To-Point Transmission Service charge or executing a new Service Agreement."

²⁸ *Id.* at 12.

agreement and the rights associated with such agreement when it changes delivery points pursuant to section 22.2.”²⁹ Thus, SPP argues that, in *ComEd*, the Commission recognized that redirection under section 22 does not convert a transmission customer’s existing long-term firm service to a short-term firm service, but results in the creation of two different services (*i.e.*, the original long-term firm service and the new short-term firm redirected service). SPP argues that the Commission did not determine that these rights are transferred or carried over to the new, short-term firm, redirected service, but that they are suspended during the period of redirection and revived at the stop time of the new, redirected reservation.³⁰

15. In support of its position, SPP points to *Midwest Independent Transmission System Operator, Inc.*,³¹ where the Commission examined a proposal by the Midwest ISO to revise its redirect service under section 22 to afford “higher of” pricing for firm redirected service. It argues that, while the Commission ultimately denied the proposal because the Midwest ISO failed to adequately justify the change, the Commission noted that under the Midwest ISO’s currently effective tariff “if redirect is made on a firm basis [the Midwest ISO’s firm redirect provision] considers it a new request for service and the transmission customer pays the new rate...in lieu of the initial rate, for the period that service is redirected.”³² SPP states that the Commission further found that under the Midwest ISO’s Business Practices “the transmission customer pays for all costs associated with the redirect service and does not pay for the initial service for the period of time that capacity was redirected.”³³ The Commission also stated that “Order No. 888

²⁹ *Id.* at 14 (*citing ComEd*, 95 FERC at 61,063).

³⁰ With respect to AMS’ reliance on *Dynegy*, SPP states that the Commission found that SPP’s “balance of the term” redirect policy would require a transmission customer to redirect its service “for a longer period than necessary to meet [its] needs.” SPP explains that, since this hindered a customer’s flexibility in exercising its right to redirect, the Commission held the application of SPP’s policy was improper. SPP answer at 16.

³¹ 102 FERC ¶ 61,069, *reh’g denied*, 103 FERC ¶ 61,217 (2003) (*Midwest ISO*).

³² SPP answer at 17-18 (*citing Midwest ISO*, 102 FERC at P 2).

³³ *Id.* (*citing Midwest ISO*, 103 FERC at P 9 n.9).

characterizes a firm redirect as a new service, thus a customer would pay the rate that corresponds to that service.”³⁴

B. Other Responsive Pleadings

16. In its comments, Duke states that it is concerned that SPP may be overcharging all OATT customers in its processing of redirect requests for service. Duke asserts that SPP’s actions may have subjected AMS and other similarly situated customers, such as Duke, to significant overcharges in violation of SPP’s OATT.

IV. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Analysis

18. We find that a matter raised by AMS in its complaint presents an issue of material fact that cannot be resolved based on the record before us. More specifically, it is unclear how SPP applied its OATT regarding the weekly demand cap during the week in which the redirection occurred and how SPP defined a “week” in this instance.³⁵ Accordingly, we will set the complaint for investigation, and establish a trial-type evidentiary hearing to address this issue, under section 206 of the Federal Power Act (FPA).³⁶

19. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle the 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.³⁷ If the parties desire, they may, by

³⁴ *Midwest ISO*, 103 FERC at P 9.

³⁵ Once this issue is resolved, we expect that we would be able to determine whether SPP incorrectly failed to apply the demand charge cap in its OATT to redirected firm point-to-point transmission service from December 2002 through June 2004.

³⁶ 16 U.S.C. § 824e (2000).

³⁷ 18 C.F.R. § 385.603 (2004).

mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.³⁸ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order 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.

20. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy of providing maximum protection to customers,³⁹ we will set the refund effective date at the earliest date possible, *i.e.*, 60 days after the date of the filing of the complaint or, December 24, 2004.

21. Section 206(b) 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 a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Although we do not have the benefit of the presiding judge's decision, based on our review of the record, we expect that, if this case did not settle, the presiding judge should be able to render a decision within 9 months of the commencement of hearing procedures or, if the case were to go to hearing immediately, by September 30, 2005. We thus estimate that if the case were to go to hearing immediately we would be able to issue our decision within approximately 4 months of the filing of briefs on exceptions and briefs on opposing exceptions, or by March 30, 2006.

³⁸ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

³⁹ *See, e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

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 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 how the weekly demand cap was applied during the week in which the redirect occurred and how SPP defined a "week" in this instance. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2003), 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 in writing or by telephone within five (5) days of the date of this order.

(C) Within sixty (60) days of the date of this order, 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.

(D) 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 Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. Such 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.

(E) The refund effective date established pursuant to section 206(b) of the Federal Power Act is December 24, 2004.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.