

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket No. ER03-668-001

ORDER DISMISSING REHEARING

(Issued December 23, 2003)

1. On June 26, 2003, the Rural Utilities Service of the U.S. Department of Agriculture (RUS) filed a motion for clarification or rehearing of the Commission's May 27 Order in this proceeding.¹ In this order, we will provide clarification, sua sponte, of the May 27 Order, but dismiss RUS's motion to intervene out-of-time and dismiss its request for rehearing, as discussed below.

Background

2. On March 28, 2003, Southwest Power Pool, Inc. (SPP) filed an unexecuted service agreement for Network Integration Transmission Service (service agreement) and an unexecuted Network Operating Agreement (operating agreement) (collectively, agreements) with Kansas Electric Power Cooperative, Inc. (KEPCO).

3. In the May 27 Order, the Commission conditionally accepted the agreements for filing, subject to certain modifications. The Commission asserted its exclusive jurisdiction to ensure that rates, terms and conditions of the transmission of electric energy in interstate commerce, and the sale of electric energy for resale in interstate commerce by public utilities are just and reasonable, and therefore, the Commission rejected KEPCO's proposal to modify the service agreement to make it subject to RUS's approval.² In addition, the Commission accepted KEPCO's proposed modifications to

¹ Southwest Power Pool, Inc. 103 FERC ¶ 61,238 (2003) (May 27 Order).

² KEPCO proposed to modify section 6 of the service agreement to read, "The subject Service Agreement is subject to the approval of the [RUS], which KEPCO shall seek to secure as promptly as possible." See May 27 Order at P 6.

clarify that certain actions by the parties to the service agreement are subject to applicable regulatory oversight, noting that the provision did not infringe upon its exclusive jurisdiction.³

4. On June 26, 2003, RUS filed a motion to intervene out-of-time and motion for clarification or rehearing expressing concern that the May 27 Order could have potential negative effects on RUS's authority over KEPCO as a RUS borrower. RUS states it has good cause for filing its motion to intervene out-of-time after the May 27 Order as it recently became aware of the May 27 Order when it was contacted by KEPCO, and that prior to the Commission's ruling, RUS would have no reason to intervene as the Notice of Filing stated that the parties were in agreement. RUS asserts that its late intervention will not adversely affect or prejudice the other parties to this proceeding and meets the requirements of Rule 214 of the Commission's Rules and Regulations.⁴

Discussion

Procedural Matters

5. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. RUS has not met this higher burden of justifying its late intervention.⁵ In light of our decision to deny RUS's late motion to intervene, we will dismiss RUS's request for rehearing. Because RUS is not a party to this proceeding, it lacks standing to seek rehearing of the RUS order under the Federal Power Act (FPA) and the Commission's regulations.⁶ However, we will, sua sponte, provide clarification of the May 27 Order.

³ Section 8 of the service agreement provides that either party may, without the need for consent from the other, transfer or assign the service agreement to any person succeeding to all or substantially all of the assets of such party. KEPCO sought to add language to condition the assignment of the service agreement on receipt of "all required regulatory approvals (if any), including approval of RUS as to KEPCO. . . in connection with such transfer or assignment." See May 27 Order at P 8.

⁴ See, 18 C.F.R. §385.214 (2003).

⁵ See, e.g., Midwest Independent Transmission System Operator, Inc., 102 FERC ¶ 61,250 at P 7 (2003).

⁶ 16 U.S.C. § 8251(a) (2000); 18 C.F.R. § 385.713(b) (2003).

Analysis

6. Because of the significance of this matter, we clarify, sua sponte, that the May 27 Order was not an attempt to deny any legitimate authority that RUS, in the first instance, may have with respect to KEPCO as a RUS borrower. Rather, under FPA Section 205,⁷ the Commission has ultimate and exclusive jurisdiction over the service agreement and operating agreement between SPP, a public utility, and KEPCO, as to the rates, terms and conditions of the transmission of electric energy in interstate commerce provided by SPP. RUS, in the first instance, has the authority to impose conditions on RUS borrowers that are necessary to carry out its responsibilities under the Rural Electrification Act. This Commission then has authority to evaluate the reasonableness of the rates, terms and conditions of jurisdictional services.

7. RUS's primary concern is that it be able to assure that any new legal obligations incurred by a borrower do not impair the Government's loan security arrangements or expose the borrower to an unacceptable financial risk threatening loan repayment. The Commission recognizes this concern, but is itself concerned that, if language is included in a service agreement for transmission service filed with this Commission that makes the agreement subject to the approval of RUS, a conflict could arise between the Federal Power Act and the Rural Electrification Act. A RUS borrower's having RUS approval before commencing service and having an agreement filed with the Commission, however, would obviate the need to include the requested language in a service agreement for transmission service filed with the Commission and would avoid such a conflict.⁸

The Commission orders:

RUS's motion for late intervention and request for rehearing are hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

⁷ 16 U.S.C. § 824d (2000).

⁸ It appears in this case that SPP commenced providing service to KEPCO before KEPCO had the approval of RUS, and SPP was required, under the Federal Power Act, to file the agreements.