

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Southwest Power Pool, Inc.

Docket No. ER06-448-001

ORDER DISMISSING REHEARING AS MOOT

(Issued June 22, 2007)

1. On March 3, 2006, the Commission accepted and suspended, and made effective December 1, 2005, subject to refund, a proposed unexecuted Network Integration Transmission Service Agreement (NITSA) between Southwest Power Pool, Inc. (SPP) and Oklahoma Municipal Power Authority (OMPA), an executed Network Operating Agreement (NOA) between SPP, OMPA and American Electric Power Company (AEP), and an unexecuted NOA between SPP, OMPA and Western Farmers Electric Cooperative (WFEC). The Commission also established hearing and settlement judge procedures.<sup>1</sup> WFEC filed a timely request for rehearing. In this order, in light of the parties' subsequent settlement, we dismiss WFEC's request for rehearing as moot.

**I. Background**

2. OMPA, a member of SPP, serves as a wholesale power supplier to 35 municipalities in Oklahoma and is a supplier of contract capacity and supplemental energy to three cities in Kansas. WFEC, also a member of SPP, is a rural electric cooperative with financing from the Rural Utilities Service (RUS) and thus is not a

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<sup>1</sup> *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,241 (2006) (*March 3 Order*).

Commission-jurisdictional “public utility.”<sup>2</sup> A part of OMPA’s load is located in the WFEC control area.

3. SPP provides OMPA with transmission service using the transmission facilities under its control, which, as relevant here, include WFEC’s transmission facilities; as described below, at issue are the charges and the cost support for such service. The Commission accepted the agreements, suspending them for a nominal period, to become effective December 1, 2005, subject to refund, and established hearing and settlement judge procedures.

4. WFEC filed a request for rehearing.<sup>3</sup>

5. Subsequently, all three parties settled, but WFEC reserved its right to pursue a jurisdictional claim raised in its request for rehearing.<sup>4</sup>

## II. Discussion

### A. WFEC’s Request for Rehearing

6. WFEC seeks rehearing of the Commission’s assertion of jurisdiction over the rates, terms and conditions of services being provided to OMPA. WFEC states that it is not subject to the Commission’s “public utility” jurisdiction under the FPA, and claims that it provides the services at issue here, specifically, energy imbalance service and wholesale distribution service. Therefore, according to WFEC, the Commission lacks authority under the FPA to review the rates, terms and conditions of those services. WFEC argues this is especially the case with respect to the wholesale distribution service, which WFEC claims does not involve facilities subject to SPP’s functional control or tariff administration.

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<sup>2</sup> Pub. L. No. 109-58, § 1291(c), 119 Stat. 594, 985 (2005) (codifying exemption from Federal Power Act (FPA) jurisdiction for electric cooperatives with RUS financing); *see also Dairyland Power Coop.*, 37 FPC 12 (1967); *Salt River Project Agric. Improvement & Power Dist. v. F.P.C.*, 391 F.2d 470 (D.C. Cir. 1967).

<sup>3</sup> WFEC also filed an answer to an OMPA request for rehearing, but OMPA’s withdrawal of this request mooted WFEC’s answer.

<sup>4</sup> *See Southwest Power Pool, Inc.*, 118 FERC ¶ 61,230 (2007) (approving uncontested settlement).

7. Additionally, WFEC attempts to distinguish *Basin Electric*,<sup>5</sup> where, according to WFEC, a non-jurisdictional utility's revenue requirement was subjected to review because the service was provided by the jurisdictional public utility and the non-jurisdictional utility's rates were a component of the jurisdictional public utility's rates. WFEC asserts the current situation is not the same as that of *Basin Electric*, because WFEC, and not SPP, is the party providing the services in question to OMPA, and SPP is only a billing agent for WFEC's charges (which are clearly distinguishable from other charges on SPP's invoices as distinct line items). WFEC also argues that *Basin Electric*, and another similar case, *Vernon*,<sup>6</sup> are different from the situation here because, according to WFEC, the non-jurisdictional utilities in each of the cases subjected themselves to the Commission's jurisdiction voluntarily, and that is not true here.<sup>7</sup> Also, WFEC claims that, as in two prior cases, *Columbia Gas* and *Bonneville*,<sup>8</sup> WFEC's charges are not a component of any jurisdictional rate, but are, instead, completely independent non-jurisdictional charges that happen to be referenced in a jurisdictional utility's service agreements and invoices; WFEC describes *Columbia Gas* in particular as

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<sup>5</sup> *Basin Electric Power Cooperative*, 113 FERC ¶ 61,079 (2005) (*Basin Electric*).

<sup>6</sup> *City of Vernon*, 111 FERC ¶ 61,092 (2005) (*Vernon I*), *order on reh'g*, 112 FERC ¶ 61,207 (2005) (*Vernon II*), *order on reh'g*, 115 FERC ¶ 61,297 (2006) (*Vernon III*), *order deny'g motion to stay or for extension of time*, 116 FERC ¶ 61,091 (2006) (*Vernon IV*).

<sup>7</sup> *Basin Electric*, 113 FERC ¶ 61,079 at P 3-4, 14, 20-21; *Vernon II*, 112 FERC ¶ 61,207 at P 2, 3 n. 4. WFEC also cites *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,366 at P 12 (2005), to a like effect. See WFEC Request for Rehearing at 22 & n.36.

WFEC, in this regard, also cites cases which it describes as involving tariffs that expressly provided for review of non-jurisdictional utility revenue requirements. We acknowledge that the SPP OATT provisions quoted by WFEC elsewhere in its pleading do not expressly provide for such review. Our analysis and conclusions are not based on the SPP OATT containing such provisions, however.

<sup>8</sup> *Columbia Gas Transmission Corp.*, 404 F.3d 459 (D.C. Cir. 2005) (*Columbia Gas*); *Bonneville Power Administration v. FERC*, 422 F.3d 908, 924 (9th Cir. 2005) (*Bonneville*) (citing *Columbia Gas* for the proposition that the Commission must restrict itself to its jurisdictional limitations).

the court finding that the Commission “lacked authority to expand its jurisdiction over statutorily exempt facilities.”<sup>9</sup>

8. Finally, WFEC claims that the Commission erred in setting for hearing WFEC’s rates, terms and conditions for energy imbalance and wholesale distribution services.<sup>10</sup>

## **B. Analysis**

9. The parties’ settlement resolves the parties’ dispute over energy imbalance and wholesale distribution service; the dispute underlying the request for rehearing is thus resolved without the need for the Commission to review the merits of the rates, terms and conditions that are the subject of WFEC’s request for rehearing. There are no remaining issues in this proceeding. Where there are no longer any live issues presented, the request for rehearing should be dismissed.

10. We agree with the presiding judge that the issues raised by WFEC on rehearing have been rendered moot by the parties entering into the settlement.<sup>11</sup> WFEC has voluntarily entered into an agreement which terminates all live issues in this proceeding, which the Commission has approved, thereby mooting the issue of jurisdiction with regard to the rates being charged OMPA for energy imbalance and wholesale distribution services.<sup>12</sup> As there are no live issues left, and the request for rehearing has been rendered moot by the actions of the parties themselves (*i.e.*, their settlement – which we have approved), the Commission will dismiss WFEC’s request for rehearing.

11. If we were to rule on the merits of WFEC’s request for rehearing, however, we would deny rehearing. As we noted in the *March 3 Order*, the services at issue are: provided by SPP, *i.e.*, a jurisdictional public utility, and not by WFEC; pursuant to SPP’s filed OATT, *i.e.*, a jurisdictional rate schedule; and at rates identified in SPP’s OATT,

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<sup>9</sup> WFEC Request for Rehearing at 23; *accord id.* at 24.

<sup>10</sup> WFEC Request for Rehearing at 25-27.

<sup>11</sup> *Southwest Power Pool, Inc.*, 117 FERC ¶ 63,034 at P 66 (2006).

<sup>12</sup> The settlement specifically states, in section 8.10, that it terminates all outstanding issues; however, in section 6, it adds that it shall have no effect on WFEC’s request for rehearing on the issue of jurisdiction.

*i.e.*, at jurisdictional rates. WFEC, although it owns the transmission facilities that are physically used to provide that service, is a transmission-owning member of SPP, and its facilities are under the control of SPP.<sup>13</sup> In a filing by WFEC earlier in the proceeding, WFEC concedes that it is a member of SPP, that its transmission facilities are administered through the SPP OATT, that SPP will provide network integration transmission service to OMPA, and also that SPP provides ancillary services to transmission customers.<sup>14</sup> And, on rehearing, WFEC admits that it “has transferred functional control of its transmission facilities to SPP and subjected them to SPP [OATT] administration.”<sup>15</sup> So, while WFEC (because it is a RUS-financed rural electric cooperative) may not itself be a public utility subject to Commission regulation under the FPA,<sup>16</sup> that fact is not relevant. SPP is a jurisdictional public utility, and SPP (and not WFEC) is providing the services at issue. It is SPP’s tariff and rates (and not WFEC’s rates) that are at issue.<sup>17</sup> SPP’s use of WFEC’s facilities to provide the services and the fact that SPP’s rates may ultimately be traceable to WFEC do not make the services or the rates at issue here WFEC services or rates.

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<sup>13</sup> See, e.g., *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110 at P 5 & n.4, 23, 69-70, 79-80 (2004), *order on reh’g*, 109 FERC ¶ 61,010 (2004); *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,009 at P 3, 26-34 (2004), *order on reh’g*, 110 FERC ¶ 61,137 (2005); *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,303 at P 2-3, 12-17, 22-30, *reh’g dismissed*, 113 FERC ¶ 61,115 (2005).

<sup>14</sup> See Motion to Intervene and Comments of WFEC at 6, 7-8, 9 (filed January 24, 2006).

<sup>15</sup> WFEC Request for Rehearing at 7; *accord id.* at 9 (acknowledging that OMPA is “a network transmission customer of SPP”).

<sup>16</sup> 16 U.S.C. § 824 (2000); Pub. L. No. 109-58, § 1291(c), 119 Stat. 594, 984-85 (2005).

<sup>17</sup> 16 U.S.C. §§ 824, 824d (2000) (Commission has jurisdiction over transmission of electric energy in interstate commerce and over the rates, terms and conditions for such transmission when provided by a public utility; public utility includes a person who operates jurisdictional facilities); see generally, e.g., *R. W. Beck Plant Management, Inc.*, 109 FERC ¶ 61,315 at P 8-15 (2004) addressing jurisdiction over operator of jurisdictional facilities).

12. WFEC claims that SPP merely passes through WFEC's charges to OMPA,<sup>18</sup> but that does not change our analysis or our conclusion. For the sake of argument, even if SPP charges OMPA exactly what WFEC charges SPP, it is still SPP charging OMPA for services that SPP provides OMPA using facilities under SPP's control and pursuant to SPP's tariff. That SPP does not "mark up" its costs does not change the fact that it is SPP that serves OMPA from facilities it controls and pursuant to its tariff.

13. While section 3 of the SPP OATT<sup>19</sup> does refer to the Transmission Owners, it importantly is SPP's OATT, a jurisdictional tariff, and it clearly and separately refers to the Transmission Provider (SPP) as distinct from the Transmission Owners; indeed, the Transmission Customer (OMPA) "shall pay the Transmission Provider [SPP] providing any of these [ancillary] services directly for the service" and provides for the transmission provider to bill a penalty charge for the Transmission Customer's (OMPA) failure to make "adequate arrangements" for ancillary services. Similarly, section 4, specifically addressing energy imbalance service,<sup>20</sup> goes on to provide that the Transmission Customer (OMPA) must "purchase this service from the Transmission Provider" (SPP) or make alternative arrangements. While the Transmission Provider (SPP) may, in turn, obtain this service from the affected control areas (such as WFEC) or elsewhere, it is the Transmission Provider (SPP) that will provide the service to the Transmission Customer (OMPA) and it is the Transmission Provider (SPP) and not the affected control areas (such as WFEC) that will bill the Transmission Customer (OMPA). Hence, it is the Transmission Provider (SPP) that provides the service. Likewise, section 10 of SPP's OATT, expressly dealing with wholesale distribution service, is no different, providing, for example, for rates to be spelled out in an agreement between the Transmission Provider (SPP) and the Transmission Customer (OMPA),<sup>21</sup> and providing further that such rates are "for the associated service being provided pursuant to [SPP's OATT]."

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<sup>18</sup> WFEC acknowledges, in this regard, that it does not bill OMPA, but instead that SPP bills OMPA. *See* WFEC Request for Rehearing at 2, 12, 18, 19.

<sup>19</sup> This language is conceded by WFEC as "govern[ing] ancillary services." *See* WFEC Request for Rehearing at 10.

<sup>20</sup> This language is quoted by WFEC in its request for rehearing. *See id.* at 11.

<sup>21</sup> WFEC concedes this later in its pleading. *See id.* at 22

14. As noted in a filing by OMPA earlier in the proceeding,<sup>22</sup> WFEC has made SPP the transmission provider for OMPA, thus making the rates, terms, and conditions of that transmission service subject to the Commission's jurisdiction. SPP is not, as WFEC argues, a mere billing agent.<sup>23</sup> Rather, as a regional transmission organization, SPP controls the transmission facilities that provide the services and has the OATT pursuant to which the services are provided, and thus SPP is the entity providing services, even if the relevant charges are ultimately traceable to WFEC and even if they appear on SPP's invoices as line items and with no "mark-up".<sup>24</sup> At issue, therefore, are Commission-jurisdictional services at Commission-jurisdictional rates.<sup>25</sup> It is true WFEC is not a public utility,<sup>26</sup> but that does not change our analysis or our conclusion.

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<sup>22</sup> See Response of OMPA to Comments of WFEC at 3 (filed February 8, 2006).

<sup>23</sup> Beyond asserting that SPP is a mere billing agent, WFEC points to no persuasive evidence that would support such a conclusion. See WFEC Request for Rehearing at 9. To the contrary, as a regional transmission organization, SPP must be, and is, far more than a mere billing agent. See 18 C.F.R. § 35.34 (2006); *accord, e.g., Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 at 31,086, 31,090-91, 31,108 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001). Therefore, the cases WFEC cites supporting its argument that the charges in question are non-jurisdictional because SPP is merely a billing agent, such as *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,366 (2005), are inapposite here.

<sup>24</sup> 18 C.F.R. §§ 35.34(j)(3), (k)(1), (k)(4) (2006); *see supra* note 18 and accompanying text, and note 23.

<sup>25</sup> While WFEC certainly has not expressly agreed to subject itself to Commission review, and argues that in *Basin Electric* and *Vernon* the non-jurisdictional utility did, we have not relied on those cases as a basis for our action here. But, we note that they are more analogous than WFEC would make them out to be. While in those cases the non-jurisdictional utility's rates, according to WFEC, comprised only a part of the jurisdictional public utility's rates, while here the two rates apparently are the same, that fact does not make the cases any less analogous.

<sup>26</sup> Because we do not attempt to claim jurisdiction here over a non-public utility, WFEC, *Bonneville* is not applicable.

15. With regard to the remaining precedent cited by WFEC, *Columbia Gas* describes a different situation, where the court found the Commission had incorrectly relied on the filed rate doctrine in issuing a declaratory order stating that Columbia Gas's tariff required Columbia Gas to pay for meters at each of a gas production company's wells; a tariff on file with the Commission arguably had given the Commission the right to require the installation of meters by a jurisdictional entity on a non-jurisdictional entity's property. In short, that case was about the reach of the filed rate doctrine, not about whether the charges referenced in a jurisdictional public utility's service agreement and invoices are jurisdictional.

The Commission orders:

WFEC's request for rehearing is hereby dismissed as moot.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.