

142 FERC ¶ 61,134
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Southwestern Public Service Company

v.

Docket No. EL13-35-000

Southwest Power Pool, Inc.

ORDER ON COMPLAINT AND ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued February 21, 2013)

1. On December 31, 2012, Xcel Energy Services Inc. (Xcel) filed a complaint on behalf of Southwestern Public Service Company (SPS), and collectively with Xcel, Complainants) against Southwest Power Pool, Inc. (SPP) pursuant to sections 206 and 309 of the Federal Power Act (FPA) and Rule 206 of the Commission's Rules of Practice and Procedure.¹ Complainants assert that SPP violated the FPA by implementing a 40 percent increase in Tri-County Electric Cooperative, Inc.'s (Tri-County) Annual Transmission Revenue Requirement (ATRR) through an annual update under SPP's transmission formula rate protocols in its open access transmission tariff (OATT or Tariff). Complainants request a January 1, 2013 refund effective date. In this order, we set the complaint for hearing and settlement judge procedures.

I. Background

2. SPP is a Regional Transmission Organization (RTO) that administers its Tariff on a regional basis for transmission facilities located within its boundaries. Tri-County is a non-jurisdictional not-for-profit distribution cooperative with headquarters in Hooker, Oklahoma serving approximately 23,000 customers in Oklahoma, Kansas, Texas, Colorado, and New Mexico. Xcel is the service company affiliate of SPS, an electric

¹ 16 U.S.C. § 824e (2006); 16 U.S.C. § 825h (2006); 18 C.F.R. § 385.206 (2012).

utility that provides generation, transmission, and distribution services. Complainants are currently transmission-owning members of SPP and provide transmission services over their transmission facilities under the SPP OATT.

II. SPP's Rate Filing (Docket No. ER12-959-000)

3. On February 1, 2012, as supplemented on February 2, 2012, SPP filed certain revisions to its OATT to implement Tri-County's formula rate for transmission service. In its filing, SPP asserted that while each transmission owner was responsible for filing rate changes for its zone, SPP was responsible for filings necessary to incorporate such rate changes into the SPP Tariff.² SPP maintained that its OATT revisions consisted solely of Tri-County's proposed formula rate and protocols. SPP stated that the formula rate would be used to calculate the ATRR and the resulting update to Attachment H, ATRR for Network Integration Transmission Service for Tri-County's transmission facilities. SPP also submitted OATT revisions to Attachment T, Rate Sheets for Point-to-Point Transmission Service of its OATT to incorporate Tri-County's charges for point-to-point transmission service for the SPP Zone 11.³

4. Xcel, Central Valley Electric Cooperative, Inc., Farmers' Electric Cooperative, Inc., Lea County Electric Cooperative, Inc., and Roosevelt County Electric Cooperative, Inc. (New Mexico Cooperatives), Occidental Permian, Ltd. and Occidental Power Marketing, L.P. (Occidental), and Westar Energy, Inc. and Kansas Gas and Electric Company (together, Westar) (collectively Intervenors) filed timely motions to intervene and protests. Intervenors collectively argued that Tri-County failed to provide sufficient evidence that its facilities meet the requirements of Transmission Facilities as defined in Attachment AI of SPP's OATT.⁴

5. The Commission ultimately found that the record in the proceeding did not provide enough information to determine the appropriate classification of the facilities that form the basis for the annual revenue requirements proposed by Tri-County. Furthermore, the Commission found that Tri-County's proposed formula rate template and protocols raised issues of material fact that could not be resolved and would be more appropriately addressed in the hearing and settlement judge procedures. Accordingly, the Commission concluded that SPP's proposed OATT revisions were not shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or

² SPP February 1, 2012 Filing at 2.

³ *Id.* at 4.

⁴ *See, e.g.*, Westar February 22, 2012 Protest at 3; Occidental February 22, 2012 Protest at 3; Xcel February 22, 2012 Protest at 2.

otherwise unlawful. The Commission accepted SPP's tariff revisions, to be effective April 1, 2012, and established hearing and settlement judge procedures.⁵

III. Complaint (Docket No. EL13-35-000)

6. On December 31, 2012, Complainants filed a complaint against SPP pursuant to sections 206 and 309 of the FPA. According to Complainants, SPP posted on its website information concerning the annual update to Tri-County's formula rate, which would take effect on January 1, 2013 and which would result in an increased ATRR of 40 percent.⁶ Complainants seek an investigation of the justness and reasonableness of the 40 percent increase in Tri-County's ATRR through an annual update in SPP's transmission formula rate. Complainants allege that SPP's implementation of the increase was unlawful because: (1) the transmission formula rate and protocol provisions are still in dispute in hearing and settlement judge procedures in Docket No. ER12-959-000; and (2) the Commission's March 30 Order merely accepted, but did not approve Tri-County's initial formula rate.⁷ Furthermore, Complainants argue that, by implementing the annual update, SPP failed to follow the protocols in its transmission formula rate, because SPP did not provide adequate notice of the update. In addition, Complainants assert that SPP's protocols are unjust and unreasonable because they permit Tri-County to keep over-collections of the formula rate due to errors in the annual update, and they lack refund protection.⁸

7. Among other issues, Complainants assert that they seek to: (1) ensure that Tri-County's margin calculation is just and reasonable; (2) ensure that Tri County has not included an improper acquisition adjustment for assets purchased from SPS in its rates; (3) ensure that SPP's transmission formula rate protocols protect customers from overcharges during the annual recalculation of the formula rate; (4) require SPP to provide proper notice of formula rate updates to customers; (5) require a reasonable amount of time between the release of the annual update and implementation to allow customers a legitimate opportunity to challenge an updated rate before it goes into effect; (6) ensure that SPP's customers have a reasonable opportunity to challenge annual updates to the ATRR, including supporting documentation; and (7) ensure there is a

⁵ *Southwest Power Pool, Inc.*, 138 FERC ¶ 61,231 (2012) (March 30 Order).

⁶ Complaint at 7.

⁷ *Id.* at 7-11.

⁸ *Id.* at 8.

refund or true-up mechanism in the event formal challenges are raised that require adjustment to SPP's OATT provisions or updates.⁹

IV. Notice of Filing and Responsive Pleadings

8. Notice of the complaint was published in the *Federal Register*, 78 Fed. Reg. 1851 (2013), with interventions and answers due on or before January 22, 2013. On January 4, 2013, Exelon Corporation filed a motion to intervene. On January 22, 2013, Central Valley Electric Cooperative, Inc., Farmers Electric Cooperative, Inc., Lea County Electric Cooperative, Inc., and Roosevelt County Electric Cooperative, Inc., filed a collective motion to intervene. On January 22, 2013, Western Farmers Electric Cooperative (WFEC), Occidental and Tri-County also filed motions to intervene and comments. On January 22, 2013, the Law Office of Mark Sokolow filed comments. On January 22, 2013, SPP filed an answer to the complaint, and on February 1, 2013, Complainants filed an answer to SPP's answer.

A. Comments and Protests

9. In its comments, Occidental states that it fully supports Complainants' contention that SPP violated the FPA when it implemented a 40 percent increase in Tri-County's ATRR. Occidental argues that SPP failed to follow the requirement under its OATT that the transmission formula rate be approved before an annual update is implemented.¹⁰ Occidental explains that according to Commission regulations, "the fact that the Commission permits a rate schedule, tariff or service agreement or any part thereof or any notice of cancellation to become effective, shall not constitute approval by the Commission of such rate schedule or tariff or part thereof or notice of cancellation." Occidental cites Commission precedent supporting the proposition that "the distinction between accepting for filing a proposed rate change (i.e., permitting a rate to become effective) and approval of that rate as just and reasonable is recognizable by the Commission's own regulations, as well as by judicial and Commission precedent."¹¹

⁹ *Id.* at 6.

¹⁰ Occidental January 22, 2013 Comments at 3.

¹¹ *Id.* at 5 (citing *New York State Electric & Gas Corp.*, 82 FERC ¶ 61,310, at 62,231 (1998) (citing to 18 C.F.R. § 35.4, *Alabama Power Co., et al. v. Federal Energy Regulatory Commission*, 993 F.2d 1557, 1565 n.4 (D.C. Cir. 1993); *Northern States Power Co. (Minnesota) and Northern States Power Co. (Wisconsin)*, 64 FERC ¶ 61,172, at 62,521 n.5 (1993); *Utah Power & Light Co.*, 9 FERC ¶ 61,091 (1979) (asserting that the Commission's acceptance of tendered rate increases does not constitute approval of the increased rate))).

Occidental contends that the Commission has authority in all instances to order refunds of amounts collected in violation of a tariff. According to Occidental, because the Commission has not approved Tri-County's ATRR, any revenues Tri-County receives as a result of its annual update are in violation of the SPP OATT and should be refunded with interest, to SPP Zone 11 ratepayers.¹²

10. In its comments, WFEC urges the Commission to take action to ensure that SPP charges only just and reasonable rates in accordance with the FPA, Commission regulations and the terms of the SPP Tariff. WFEC asserts that the ATRR at issue in this proceeding may cause inappropriate transmission charges and harm to transmission customers like SPS, WFEC and the New Mexico Cooperatives. WFEC also urges the Commission to require SPP to implement appropriate refund procedures for excessive rates and charges and provide resulting refunds accordingly.¹³ The Law Office of Mark Sokolow similarly comments that with the low cost of gas, SPP should probably issue refunds to its customers.¹⁴

11. In its protest, Tri-County alleges that Complainants have repeatedly attempted to "undo" the Commission's March 30 Order, and that the Commission should reject all collateral attacks on the March 30 Order.¹⁵ Tri-County also requests that the Commission avoid taking action on the complaint that may be disruptive to the hearing and settlement judge procedures established in Docket No. ER12-959-000. Tri-County asserts that the Complainants' claim that the support for the annual update is inadequate is baseless and should be rejected by the Commission.¹⁶ Tri-County asserts that it included, as an appendix to its protest, the additional information used to calculate the annual update that Tri-County provided to Complainants in accordance with the transmission formula rate protocols. For these reasons, Tri-County asks that the Commission dismiss the complaint.¹⁷

¹² *Id.* at 6.

¹³ WFEC January 22, 2013 Comments at 4.

¹⁴ Law Office of Mark Sokolow January 22, 2013 Comments at 1.

¹⁵ Tri-County January 22, 2013 Protest at 6.

¹⁶ *Id.*

¹⁷ *Id.* at 6-7.

B. SPP's Answer

12. In its answer, SPP requests that the Commission dismiss the complaint because SPP acted in accordance with the requirements of its OATT and the Tri-County protocols, which SPP claims the Commission accepted and made effective in the March 30 Order.¹⁸ According to SPP, Attachment H, section 1 of its OATT provides that a transmission owner's revenue requirement may be changed without making a filing if that transmission owner utilizes Commission-approved formula rate processes to determine the transmission owner's revenue requirements.¹⁹ SPP asserts that its OATT also provides that once a transmission owner has a Commission-approved formula rate, the successful completion of that transmission owner's annual formula rate update will constitute regulatory acceptance sufficient to authorize the SPP to update that transmission owner's revenue requirements on the SPP website.²⁰

13. According to SPP, the Tri-County protocols specify that SPP must post an annual update on its website on or before January 1 of each year after approval of Tri-County's initial formula rate. SPP states that the protocols also require SPP to include supporting documentation for data used in its annual update. In addition, the protocols include procedures for reviewing and challenging the annual update, and for modifying SPP's data inputs.²¹ Pursuant to these requirements, SPP states that it posted the 2013 annual update, including supporting documentation, on its website on November 16, 2012. SPP additionally argues that, contrary to the Complainants' assertions, SPP was not precluded from implementing the annual update because of the ongoing hearing and settlement judge procedures in Docket No. ER12-959-000.²² In this regard, SPP argues that the filed rate doctrine requires SPP to implement the currently effective rate, and that pursuant to the Commission's March 30 Order, the Tri-County formula rate has been in effect since April 1, 2012.

14. SPP challenges Complainants' assertions that they were not given adequate notice of the posting of SPP's annual update, and that SPP's supporting documentation was insufficient. SPP notes that neither Attachment H of the SPP Tariff nor the Tri-County protocols require the notice that Complainants demand, and SPP contends that the

¹⁸ SPP January 22, 2013 Answer at 2.

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ *Id.* at 3-4.

²² *Id.* at 5-7.

supporting documentation posted on its website was consistent with that provided by other transmission owners in SPP.²³ Finally, SPP asserts that, to the extent the Commission does not dismiss the complaint, SPP does not oppose consolidating it with the ongoing hearing and settlement judge procedures established in Docket No. ER12-959-000.

C. Complainants' Answer

15. In their answer, Complainants reiterate that the Commission's acceptance of Tri-County's rate in the March 30 Order did not constitute Commission approval of the rate.²⁴ Accordingly, Complainants argue that, by implementing the annual update before the initial rate and pending protocols were approved, SPP failed to adhere to its tariff and to the terms of its pending protocols.²⁵ Complainants make an additional due process claim, stating that SPP's implementation of its annual update was unjust and unreasonable because SPP implemented the update without consideration of the due process rights traditionally afforded to customers under Commission precedent.²⁶

V. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Complainants' answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

18. We find that the complaint raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing

²³ *Id.* at 7.

²⁴ Complainants Answer at 3-6.

²⁵ *Id.* at 4.

²⁶ *Id.* at 6-7 (citing *Midwest ISO, et al.* 139 FERC ¶ 61,127 (2012) and *Virginia Electric Power Co.*, 123 FERC ¶ 61,098 (2008)).

and settlement judge procedures ordered below. Our preliminary analysis indicates that SPP's implementation of its annual update has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. We therefore find that the issues before us should be addressed in hearing and settlement judge procedures. In addition, we will leave it to the discretion of the Chief Administrative Law Judge to determine whether, when and to what extent consolidation of the proceedings in Docket Nos. ER12-959-000 and EL13-35-000 may be appropriate.²⁷

19. While we are setting this case for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their 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.²⁸ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.²⁹ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, 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 the date a complaint was filed, but no later than five months after the filing date. We will establish a refund effective date of February 22, 2013, as ordered below. However, while we are establishing a refund effective date, because Tri-County is not a public utility under the FPA, the Commission would not have authority to order Tri-County to pay refunds under FPA section 206.³⁰

²⁷ 18 C.F.R. § 385.503 (2012).

²⁸ 18 C.F.R. § 385.603 (2012).

²⁹ The Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

³⁰ See *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 673-74 (D.C. Cir. 2007) (finding that the structure of the FPA clearly reflects Congress's intent to exempt governmental entities and non-public utilities from the Commission's refund authority); *Bonneville Power Admin. v. Federal Energy Regulatory Comm.*, 422 F.3d 908 at 911 (2005) (stating that "FERC does not have refund authority over wholesale electric energy sales made by governmental entities and non-public utilities.").

We note nevertheless that in other cases, non-public utilities have committed to providing refunds when submitting their proposals for cost recovery for Commission review.³¹

21. In an order issued concurrently with the instant order, the Commission addresses Xcel's Request for Rehearing, Motion for Stay and Request for Clarification of the March 30 Order.³² Among other issues, Xcel raised concerns that the effect of the March 30 Order was to allow "the SPP Tariff rates to go into effect immediately . . .," and that in doing so, the Commission failed to provide any sort of consumer protection to those affected by the rate.³³ The crux of Xcel's argument is that, in other cases, the Commission has allowed such rates to go into effect only where the non-public utility has made a voluntary commitment to refund the difference between the as-filed rates and the rates found to be just and reasonable by the Commission.³⁴ Because the Commission deviated from this policy with respect to Tri-County's rates, Xcel asked that the Commission "grant rehearing and either suspend the filing subject to hearing procedures and refunds, or rescind its acceptance of the rates and conduct a full section 205 review of the rates prior to permitting them to go into effect."³⁵

³¹ See, e.g., *City of Riverside, California*, 136 FERC ¶ 61,137, at P 27 (2011); *New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,240, at P 31 (2012); *Lively Grove Energy Partners*, 140 FERC ¶ 61,252, at P 47, n.59 (2012).

In the SPP Rehearing Order, the Commission notes that its compliance directive does not preclude Tri-County from making a further voluntary commitment to refund the difference between the proposed rate and the rate ultimately determined by the Commission to be just and reasonable for the period from April 1, 2012 to the date of that order.

³² Concurrent with the instant order, the Commission is issuing an order on another Xcel complaint against SPP in Docket No. EL13-15-000 (the complaint challenges SPP's inclusion of the costs of Tri-County's facilities in SPP's Zone 11 transmission rates). In that order, the Commission sets the complaint for hearing and settlement judge procedures. See *Southwestern Public Service Company v. Southwest Power Pool, Inc.*, 142 FERC ¶ 61,136.

³³ Xcel Request for Rehearing, Motion for Stay and Request for Clarification at 4 - 6.

³⁴ *Id.* at 7.

³⁵ *Id.* at 4.

22. However, in the concurrently issued rehearing order, the Commission grants rehearing based on its determination that it would not be just and reasonable to allow SPP to continue to pass through Tri-County's proposed rate prior to the Commission's order establishing a just and reasonable rate following hearing and settlement judge proceedings, without refund protection in place to ensure that ratepayers are ultimately paying only a just and reasonable rate.³⁶ Therefore, to ensure that SPP's rates are just and reasonable pending the outcome of hearing and settlement judge proceedings, the Commission acted pursuant to its authority under section 206 of the FPA³⁷ and directed that, within 30 days SPP either: (a) submit a compliance filing, removing from SPP's OATT the tariff sheets under which SPP has been collecting Tri-County's rate and ceasing collecting the Tri-County rate effective as of the day after the date of the rehearing order and until the Commission issues an order following hearing and settlement judge proceedings; or (b) submit a compliance filing providing a voluntary commitment by Tri-County to refund the difference between the proposed rate and the rate ultimately determined by the Commission to be just and reasonable following hearing and settlement judge procedures, with such voluntary commitment to be effective as of the day after the date of the rehearing order.³⁸

23. Section 206(b) of the FPA requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206 (as the Commission is doing in the instant case), the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect

³⁶ See *Transmission Agency of Northern California v. FERC*, 495 F.3d 663 at 672 (D.C. Cir. 2007) (*TANC*) (upholding the Commission's decision that subjecting the transmission revenue requirements of non-jurisdictional utilities to a full section 205 review is the only way to ensure the justness and reasonableness of the rate of the independent system operator or RTO whose rate recovers the non-jurisdictional utility's transmission revenue requirement); *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,131, at P 70 & n.92 (2011) (*MISO*).

³⁷ 16 U.S.C. § 824e (2006).

³⁸ We note that, in other instances, non-public utilities have committed to providing refunds when submitting their proposals for cost recovery for Commission review. See *City of Riverside, California*, 136 FERC ¶ 61,137, at P 27 (2011); *New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,240, at P 31 (2012). See also *Lively Grove*, 140 FERC ¶ 61,252, at P 47, n.59; *American Municipal Power, Inc.*, 141 FERC ¶ 61,073 (2012) (establishing an effective date after the applicants submitted revised and superseding proposed revenue requirements in order to make explicit their refund commitment).

that, if the instant case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by November 30, 2013. Thus, we estimate that if the case were to go to hearing immediately, we would be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions, or by July 31, 2014.

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), a public hearing shall be held concerning this complaint. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering 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 (2012), 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 within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, 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 Commission, 888 First Street, NE, Washington, DC 20426. Such a 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 in Docket No. EL13-35-000, established pursuant to section 206(b) of the FPA, is February 22, 2013.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.