

142 FERC ¶ 61,135  
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.

Southwest Power Pool, Inc.

Docket No. ER12-959-001

ORDER ON REHEARING

(Issued February 21, 2013)

1. On March 30, 2012, the Commission accepted for filing, and set for hearing and settlement judge procedures, proposed tariff revisions filed by Southwest Power Pool, Inc. (SPP) to its Open Access Transmission Tariff (SPP OATT), on behalf of Tri-County Electric Cooperative, Inc. (Tri-County), to implement Tri-County's formula rate for transmission service.<sup>1</sup> Certain parties filed requests for rehearing or clarification of the March 30 Order. In this order, the Commission grants rehearing in part and denies rehearing in part, as discussed below.

**I. Background**

2. SPP is a Regional Transmission Organization (RTO) that administers its OATT 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 Energy Services Inc. (Xcel) is the service company affiliate of Southwestern Public Service Company (SPS), an electric utility that provides generation, transmission, and distribution services. SPS is a transmission-owning member of SPP and provides transmission services over its transmission facilities under the SPP OATT.

3. On February 1, 2012, as supplemented on February 2, 2012, SPP filed revisions to its OATT to implement Tri-County's proposed 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

---

<sup>1</sup> *Southwest Power Pool, Inc.*, 138 FERC ¶ 61,231 (2012) (March 30 Order).

changes into the SPP OATT.<sup>2</sup> 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 annual transmission revenue requirement (ATRR) and the resulting update to Attachment H, ATRR for Network Integration Service, for Tri-County's transmission facilities. SPP also submitted OATT revisions to Attachment T, Rate Sheets for Point-to-Point Transmission Service, to incorporate Tri-County's charges for point-to-point transmission service for the SPP Zone 11.<sup>3</sup>

4. Central Valley Electric Cooperative, Inc., Farmers' Electric Cooperative, Inc., Lea County Electric Cooperative, Inc., and Roosevelt County Electric Cooperative, Inc. (collectively, New Mexico Cooperatives), Xcel, 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 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.<sup>4</sup>

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 based on the record before it and would be more appropriately addressed in the hearing and settlement 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 otherwise unlawful. The Commission accepted SPP's OATT revisions, to be effective April 1, 2012, and established hearing and settlement judge procedures.

6. On April 25, 2012, Xcel, on behalf of SPS, filed a request for rehearing, motion for stay and request for clarification. On April 26, 2012, Occidental and New Mexico Cooperatives filed a request for clarification or, in the alternative, rehearing. On May 10, 2012, Tri-County filed an answer in opposition to Xcel's motion for stay.

---

<sup>2</sup> SPP February 1, 2012 Filing at 2.

<sup>3</sup> *Id.* at 4.

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

## II. The Rehearing Parties' Positions

### A. Refund Protection

7. Xcel, Occidental and New Mexico Cooperatives (collectively, Rehearing Parties) argue that, in allowing the proposed rates to become effective immediately and without a refund obligation, the March 30 Order failed to ensure that: (1) the ATRR of Tri-County is subject to a full section 205 review to ensure that transmission rates under the SPP OATT are just and reasonable; and (2) consumers are protected from excessive rates and charges, particularly where the March 30 Order's preliminary analysis found that the proposed rates may be unjust and unreasonable, unduly discriminatory or preferential or otherwise unlawful.

8. Xcel argues that the Commission should grant rehearing, suspend the SPP filing, and make it subject to refund and the outcome of a hearing. According to Xcel, the March 30 Order did not explain its departure from Commission precedent in which the Commission has accepted revenue requirement filings by or on behalf of non-public utilities in contested proceedings only where the non-public utilities 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.<sup>5</sup> Xcel contends that SPP's filing did not incorporate such a commitment by Tri-County. Xcel argues that the Commission should reverse its acceptance of SPP's filing and, instead, suspend the filing, subject to refund and hearing procedures. Xcel seeks a maximum suspension. It contends that nothing in the case law or other Commission precedent suggests that the Commission lacks the authority to suspend the rates of a jurisdictional public utility (i.e., SPP) that include the costs of a non-public utility (i.e., Tri-County).<sup>6</sup> Alternatively, without some commitment by Tri-County to provide refunds, and in the absence of refund protection, Xcel argues that the Commission should grant rehearing and defer accepting SPP's filing until the Commission completes its section 205 review.<sup>7</sup>

---

<sup>5</sup> Xcel Rehearing at 5-8 (citing *City of Riverside, California*, 128 FERC ¶ 61,207 (2009) (citing *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 925 (9<sup>th</sup> Cir 2005))); *City of Pasadena, California*, 128 FERC ¶ 61,290 (2009) (same).

<sup>6</sup> Xcel also suggests that there could be an exception to the Commission's general policy of not granting rehearing for the purpose of suspending a rate that already has gone into effect in a situation where the original decision not to suspend the rate was an abuse of discretion by the Commission. Xcel Rehearing at 9, n.29.

<sup>7</sup> *Id.* at 9-10 (quoting *Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 675, n.9 (D.C. Cir. 2007) (*TANC*) (the Commission "in complying with its duty to ensure that CAISO's rates are just and reasonable, may justifiably subject Vernon's

(continued...)

9. Occidental and New Mexico Cooperatives argue that the March 30 Order did not explain why the Commission did not impose a refund obligation or suspend the proposed rates even though numerous parties raised issues concerning the filing, and despite the fact that the Commission's preliminary analysis found that the proposed rates may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. They request clarification that the Commission intended to impose a refund obligation on SPP and/or to suspend the proposed rates filed by SPP. Absent such clarification, Occidental and New Mexico Cooperatives seek rehearing and argue that a refund obligation should be imposed with a five month suspension.

**B. Burden of Proof**

10. Rehearing Parties assert that the March 30 Order is inconsistent as to the appropriate burden of proof that applies to Tri-County's proposed rates. First, they cite Paragraph 13 of the March 30 Order, which stated that it was appropriate to apply the just and reasonable standard of FPA section 205 to Tri-County's proposed rates. However, they note that Ordering Paragraph (B) of the March 30 Order appears to conflict with Paragraph 13 by citing FPA section 206, rather than section 205. They request clarification that in the hearing, SPP and Tri-County bear the burden of proof to demonstrate that the proposed rates are just and reasonable under section 205. Thus, Rehearing Parties request clarification that Ordering Paragraph (B) should have referred to section 205, as the Commission has done in other cases when it set for hearing the proposed rates of a non-public utility incorporated into the rates of a public utility.<sup>8</sup>

**C. Motion for Stay**

11. Xcel requests that the Commission stay the March 30 Order until a determination has been made that the SPP filing's rates are just and reasonable or the Commission issues an order suspending the SPP filing and making it subject to refund and hearing procedures. Xcel argues that it meets the requirements for a stay: (1) SPS and its native load customers face irreparable harm because they would have no recourse from Tri-County's rates that are being currently recovered should the rates ultimately be found unjust and unreasonable; (2) Tri-County cannot be harmed by a delay in the effectiveness of its rates because it has not yet demonstrated that its rates are just and reasonable; and (3) a stay is in the public interest because the March 30 Order establishes an undesirable

---

TRR to a § 205 review *before approving* Vernon's participation in CAISO" (emphasis added by Xcel)).

<sup>8</sup> Xcel Rehearing at 12-13; Occidental and New Mexico Cooperatives Rehearing at 4-7. Absent such clarification, Occidental and New Mexico Cooperatives request rehearing.

precedent for other non-jurisdictional entities seeking to recover their rates through independent system operator or RTO rates without prior section 205 review.<sup>9</sup>

12. Tri-County responds that Xcel's motion for stay is essentially a request that the Commission suspend an already-effective rate under the FPA, and Tri-County contends that the Commission does not have that authority under the FPA.<sup>10</sup> Tri-County further argues that Xcel has not satisfied the requirements for a stay. In support, Tri-County argues that: (1) Xcel has not demonstrated anything more than hypothetical harm to SPS and its native load customers if a stay is denied; (2) contrary to Xcel's claim, Tri-County would be harmed by a suspension of SPP's filing, because Tri-County is entitled to regulatory certainty and finality that a rate accepted will not be suspended by the Commission after the rate's effective date; and (3) a stay would not be in the public interest because it would undermine the regulatory scheme under the FPA by contravening 18 C.F.R. § 2.4(a) and the well settled limits of the Commission's section 205 power as it has been consistently interpreted by the Commission and the courts since the enactment of the FPA.<sup>11</sup>

### **III. Discussion**

13. The March 30 Order, citing *TANC*, determined that "while Tri-County is not within the Commission's jurisdiction under FPA section 205, we find that, based on the court's rulings, it is appropriate to apply the just and reasonable standard of FPA section 205 to Tri-County's proposed rates" and that "[t]o determine the justness and reasonableness of such rates, . . . hearing and settlement judge procedures are appropriate."<sup>12</sup> On further consideration, however, we conclude that the March 30 Order erred in allowing SPP's rate proposal for Tri-County's ATRR to go into effect April 1, 2012, without a commitment from Tri-County to refund the difference between the as-filed rate and the rate ultimately found to be just and reasonable by the Commission.

---

<sup>9</sup> Xcel Rehearing at 10-12.

<sup>10</sup> Tri-County May 10, 2012 Answer at 3-5 (citing 18 C.F.R. § 2.4 and numerous Commission orders).

<sup>11</sup> *Id.* at 8.

<sup>12</sup> March 30 Order, 138 FERC ¶ 61,231 at PP 12-13 (citing *TANC*, 495 F.3d at 672) (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).

Consistent with Commission policy in other instances involving non-public utilities, without such a refund commitment, the effective date for Tri-County's ATRR should be the date the Commission makes the ATRR effective in its order approving the ATRR following hearing and settlement judge procedures.<sup>13</sup>

14. We will deny Xcel's request to make Tri-County's rates that have been collected to date subject to refund under section 205. As discussed in *Riverside*, the structure of the FPA reflects Congress' intent to exempt non-public utilities, including governmental entities, from the Commission's refund authority.<sup>14</sup> FPA section 201(f) thus exempts from Part II of the FPA, including section 205, "any political subdivision of a state."

15. As the Commission held in *MISO*, although the Commission can subject the rates of non-public utilities (like Tri-County) to a section 205-like review to ensure that, in turn, SPP's rate, through which SPP will recover Tri-County's proposed rate, is just and reasonable,<sup>15</sup> Tri-County is not itself subject to section 205, including Commission-imposed rate suspension and refund obligations.<sup>16</sup> Therefore, a request such as Xcel's that the Commission suspend Tri-County's proposed rate, and make it effective subject to refund, is outside our jurisdiction. As indicated above, while we make a determination as to the justness and reasonableness of Tri-County's rate under the same just and reasonable standard found in section 205, because the rate is flowed through SPP's rates, Tri-County is not itself subject to the refund requirements of section 205, and we cannot direct Tri-County to pay refunds.

16. However, under the precedent discussed above, 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. Therefore, to ensure that SPP's rates are just and reasonable pending the outcome of hearing and settlement judge

---

<sup>13</sup> *Lively Grove Energy Partners, LLC*, 140 FERC ¶ 61,252, at P 47 and n.59 (2012) (*Lively Grove*). Cf. *City of Riverside, California*, 128 FERC ¶ 61,207, at P 26 (2009) (*Riverside*); *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,131, at P 70 & n.92 (2011) (*MISO*).

<sup>14</sup> *Riverside*, 128 FERC ¶ 61,207 at P 24 (citing *TANC*, 495 F.3d at 673-674).

<sup>15</sup> *MISO*, 135 FERC ¶ 61,131 at P 72 (citing *TANC*, 495 F.3d at 672).

<sup>16</sup> *Id.* (denying a request by Xcel to make the proposed rates of Central Minnesota Municipal Power Authority, a non-public utility, subject to refund).

proceedings, we will act pursuant to our authority under section 206 of the FPA<sup>17</sup> and direct that, within 30 days of the date of issuance of this order, 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 this 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 this order.<sup>18</sup>

17. We further clarify that the omission of a reference to section 205 from Ordering Paragraph B of the March 30 Order was inadvertent; on May 3, 2012, the Commission issued an Errata Notice in these proceedings revising Ordering Paragraph (B) to include a reference to section 205 of the FPA.<sup>19</sup> Further, as we stated in the March 30 Order, "it is appropriate to apply the just and reasonable standard of FPA section 205" when evaluating Tri-County's proposed rate.<sup>20</sup> Our determinations in this order do not change SPP's and Tri-County's burden to support the proposed rate in the hearing.

18. In view of our determinations above, we will dismiss Xcel's motion for a stay of the March 30 Order as moot.

---

<sup>17</sup> 16 U.S.C. § 824e (2006).

<sup>18</sup> 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).

Our 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 this order.

<sup>19</sup> *Southwest Power Pool, Inc.*, 139 FERC ¶ 61,091 (2012).

<sup>20</sup> March 30 Order, 138 FERC ¶ 61,231 at P 13.

The Commission orders:

(A) The requests for rehearing are hereby granted in part and denied in part, as discussed in the body of this order.

(B) The motion for stay is hereby dismissed, as discussed in the body of this order.

(C) SPP is hereby directed to submit, within 30 days of the date of this order, a compliance filing that either: (a) removes from SPP's OATT the tariff sheets under which SPP has been collecting Tri-County's rate and provides that SPP will cease collecting the Tri-County rate effective as of the day after the date of this order and until the Commission issues an order following hearing and settlement judge proceedings; or (b) provides 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, effective as of the day after the date of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.