

142 FERC ¶ 61,136
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. EL13-15-000

Southwest Power Pool, Inc.

ORDER ON COMPLAINT AND ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued February 21, 2013)

1. On October 26, 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's transmission rates for SPS' pricing zone (SPP Zone 11) are unjust and unreasonable due to the inclusion of the costs of Tri-County Electric Cooperative, Inc. (Tri-County) facilities that are not Transmission Facilities as defined by Attachment AI of SPP's Open Access Transmission Tariff (OATT or Tariff) and SPP's Membership Agreement. 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 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 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 procedures. Accordingly, the Commission concluded that SPP's proposed OATT revisions were not shown to be just

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.

and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or 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. EL13-15-000)

6. On October 26, 2012, Complainants filed a complaint against SPP pursuant to sections 206 and 309 of the FPA. Complainants seek an investigation of the justness and reasonableness of SPP's Zone 11 rates—the same rates at issue in the Commission's March 30 Order. Complainants argue that SPP had an obligation under Attachment AI of its OATT to determine whether Tri-County's facilities were Transmission Facilities, as defined by SPP's Tariff. Complainants also assert that SPP's Zone 11 rates are unjust and unreasonable because: (1) they include the costs of Tri-County's facilities that have yet to be determined to be Transmission Facilities, as defined by SPP's OATT; and (2) Tri-County's transmission costs are higher than the net book value of the Tri-County facilities. Complainants contend that as a result of SPP's February 1, 2012 Filing and the Commission's March 30 Order, SPP's Zone 11 rates have been unjustly increased by \$1.98 million dollars on an annual basis, of which nearly 97.5 percent will be borne by loads other than Tri-County. According to Complainants, SPS and its native load customers alone bear approximately 60 percent of the Tri-County ATRR, which results in increased SPP transmission charges of approximately \$100,000 per month for SPS and its native load customers.⁶

7. Furthermore, Complainants assert that SPP's rates that include the costs of Tri-County's facilities are jurisdictional rates. As a non-jurisdictional entity, Tri-County has no right under the FPA to make a section 205 filing on its own behalf, according to Complainants. Nevertheless, Complainants assert that the Commission has the authority under section 206 of the FPA to review non-jurisdictional matters to the extent that they affect the Commission's jurisdictional responsibilities. For this reason, Complainants contend that the Commission has the authority to review the rates charged by SPP to recover costs for Tri-County's Transmission Facilities, and that the Commission should set a refund effective date of April 1, 2012 in its order addressing these rates.⁷

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

⁶ Complaint at 11-12.

⁷ *Id.* at 14-18.

IV. Notice of Filing and Responsive Pleadings

8. Notice of the complaint was published in the *Federal Register*, 77 Fed. Reg. 66,600 (2012), with interventions and answers due on or before November 15, 2012. On November 15, 2012, SPP filed an answer to the complaint. On November 15, 2012, the New Mexico Cooperatives filed a joint motion to intervene and comments. On November 20, 2012, Tri-County filed an out-of-time motion to intervene and comments. On November 30, 2012, the Complainants filed an answer.

A. SPP Answer

9. In its answer, SPP requests that the Commission dismiss the complaint because SPP had no obligation under Attachment AI to determine whether Tri-County's facilities are Transmission Facilities.⁸ According to SPP, Attachment AI modified the definition of Transmission Facilities, and it provided a three-year transition mechanism for the then-existing Transmission Owners to adjust their rates according to the revised definition. Tri-County was not an existing Transmission Owner when section IV of Attachment AI became effective,⁹ and thus, section IV does not apply to Tri-County or its facilities.¹⁰ SPP further contends that section 3.10 of SPP's Membership Agreement gives non-jurisdictional SPP Transmission Owners the right to file rates with the Commission for transmission service over SPP's facilities.¹¹ According to SPP, section 3.10 also permits non-jurisdictional entities to submit rate filings to the Commission, pursuant to section 205 of the FPA, without prior approval from SPP.¹² SPP also asserts that, to the extent that the Commission does not dismiss the complaint, the Commission should consolidate the complaint with the ongoing hearing and settlement judge proceedings in Docket No. ER12-959-000.¹³

⁸ SPP Answer at 2-3.

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.* at 6.

¹² *Id.*

¹³ *Id.* at 7.

B. New Mexico Cooperatives Protest

10. In their joint motion to intervene and comments, the New Mexico Cooperatives agree with Complainants' contention that Attachment AI of the SPP OATT requires SPP to determine whether the Tri-County facilities meet SPP's definition of Transmission Facilities.¹⁴ The New Mexico Cooperatives also assert that when SPP included Tri-County's ATRR in SPP Zone 11 in its February 1, 2012 Filing, SPP improperly allowed Tri-County to recover the costs of facilities that do not meet the SPP definition of Transmission Facilities.¹⁵

C. Tri-County's Protest

11. In Tri-County's out-of-time motion to intervene, Tri-County asserts that the complaint should be dismissed because it is an impermissible collateral attack against the Commission's orders and proceedings involving Tri-County's formula rate in Docket No. ER12-959-000.¹⁶ According to Tri-County, Complainants' arguments are belated and appear to be a "backdoor" attempt to reverse the Commission's finding in the March 30 Order accepting Tri-County's rates as the "filed rate" without establishing a refund effective date.¹⁷ Tri-County also asserts that Complainants' allegations are baseless and should be dismissed for many of the reasons SPP noted in its answer.¹⁸

D. Complainants' Answer

12. Complainants counter that neither SPP nor Tri-County present sustainable grounds for rejecting the complaint, and that neither entity has provided an adequate response to Complainants' discussion of how the currently-effective increased Zone 11 rates are unjust and unreasonable.¹⁹ Complainants re-assert that under SPP's Tariff, SPP has an obligation to review the costs of non-jurisdictional facilities prior to filing rates to recover

¹⁴ New Mexico Cooperatives Comments at 6.

¹⁵ *Id.*

¹⁶ Tri-County Protest at 5.

¹⁷ *Id.*

¹⁸ *Id.* at 6 (citing SPP's explanation that it had no obligation under Attachment AI to determine whether Tri-County's facilities are Transmission Facilities prior to SPP's submission of its rate filing in Docket No. ER12-959-000).

¹⁹ Complainants Answer at 2.

such costs under section 205 of the FPA.²⁰ Furthermore, Complainants assert that the complaint raises novel issues, such as setting a refund effective date, that go beyond the scope of the Commission's March 30 Order.²¹

13. Complainants also argue that the Commission should establish a refund effective date because the increased Zone 11 rates, including the costs of Tri-County's facilities, are unjust and unreasonable.²² Complainants also state that SPP's Answer relies on section 3.10 of the SPP Membership Agreement as a defense, suggesting that section 3.10 of the SPP Membership Agreement overrides SPP's other fiduciary duties and obligations.²³ Complainants assert however, that section 3.10 only refers to a Transmission Owner's rights with respect to requesting a change in existing rates. Moreover, Complainants allege that such rights apply exclusively in the context of requesting a change in rates for transmission service over that Transmission Owner's facilities.²⁴

V. Discussion

A. Procedural Matters

14. 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. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2012), the Commission will grant Tri-County's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

15. 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 a protest or 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.

²⁰ *Id.*

²¹ *Id.* at 3.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

B. Substantive Matters

16. 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 and settlement judge procedures ordered below. Our preliminary analysis indicates that SPP's inclusion of Tri-County's facilities in its zone 11 rates 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 EL13-15-000 may be appropriate.²⁵

17. While we are setting these matters 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.²⁶ 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.²⁷ The settlement judge shall report to the Chief Judge and the Commission within 30 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.

18. 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 set the refund effective date at 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

²⁵ 18 C.F.R. § 385.503 (2012).

²⁶ 18 C.F.R. § 385.603 (2012).

²⁷ 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>).

would not have authority to order Tri-County to pay refunds under FPA section 206.²⁸ 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.²⁹

19. 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.³⁰ 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.³¹ 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.³² 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."³³

²⁸ 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.").

²⁹ 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).

³⁰ Concurrent with the instant order, the Commission is issuing an order on another Xcel complaint against SPP in Docket No. EL13-35-000 (the complaint challenges SPP's implementation of an annual update including a 40 percent increase in Tri-County's ATRR). 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 ¶ 61,134 (2013).

³¹ Xcel Request for Rehearing, Motion for Stay and Request for Clarification at 4 - 6.

³² *Id.* at 7.

³³ *Id.* at 4.

20. 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.³⁴ 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 FPA³⁵ 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.³⁶

³⁴ 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*).

³⁵ 16 U.S.C. § 824e (2006).

³⁶ 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).

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.

21. 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 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 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. EL13-15-000, established pursuant to section 206(b) of the FPA, is February 22, 2013.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.