

143 FERC ¶ 61,039
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket No. ER12-1772-000

ORDER CONDITIONALLY ACCEPTING COMPLIANCE FILING

(Issued April 18, 2013)

1. On May 11, 2012, Southwest Power Pool, Inc. (SPP) submitted a compliance filing to revise Attachment O (Transmission Planning Process) of its Open Access Transmission Tariff (Tariff), as required by the Commission in an order issued in this proceeding on December 16, 2011.¹ In this order, we conditionally accept SPP's compliance filing, effective July 26, 2010, subject to SPP making a further compliance filing within 30 days of the date of this order.

I. Background

2. On October 16, 2008, the Commission accepted, subject to modification, SPP's Balanced Portfolio proposal, which established processes to evaluate a group or portfolio of economic transmission projects to be included in SPP's Transmission Expansion Plan and to recover the costs of such upgrades.² In the October 2008 Order, the Commission directed SPP to create a mechanism consistent with the transmission planning transparency principle of Order No. 890³ to ensure "that system design software results

¹ *Southwest Power Pool, Inc.*, 137 FERC ¶ 61,227 (2011) (December 2011 Order).

² *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,054 (2008) (October 2008 Order).

³ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at PP 348-350, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) (directing that transmission providers must disclose to all customers and other stakeholders the basic

(continued...)

needed for stakeholders to verify the application of the assumptions in creating the adjusted production cost-benefit metrics will be made available subject to the signing of confidentiality agreements or other needed arrangements to protect sensitive information.”⁴

3. On November 17, 2008, SPP filed a request for clarification or, in the alternative, rehearing of the October 2008 Order, and, on December 15, 2008, a compliance filing. SPP asserted that provisions in Attachment O already provided a mechanism that allowed market participants to review the results of the system design software. SPP argued that no further tariff revisions were needed to comply with the October 2008 Order.

4. On June 18, 2009, the Commission denied SPP’s request for clarification or rehearing, finding Attachment O to SPP’s Tariff to be inconsistent with the transparency requirements of Order No. 890.⁵ The Commission further held that SPP’s compliance filing did not comply with the directives in the October 2008 Order and directed SPP to submit revised tariff sheets consistent with its prior directive.

5. On July 17, 2009, SPP filed a request for rehearing of the June 2009 Order and, on November 2, 2009, a compliance filing. In the December 2011 Order, in response to both filings, the Commission again rejected SPP’s argument that SPP’s Attachment O adequately complied with Order No. 890’s transparency requirement because the proprietary and competitively sensitive nature of the resource-specific data made it just and reasonable to prohibit disclosure of such information to third parties.⁶ Instead, the Commission found that SPP’s Attachment O provisions violated the Order No. 890 transparency requirement that stakeholders have sufficient information to replicate all transmission planning studies, and failed to fully comply with the October 2008 Order.⁷ The Commission also rejected SPP’s argument that the Commission’s actions were

criteria, assumptions, and data that underlie their transmission system plans to enable customers, other stakeholders, or independent third-parties to replicate the results of planning studies).

⁴ October 2008 Order, 125 FERC ¶ 61,054 at P 37.

⁵ *Southwest Power Pool, Inc.*, 127 FERC ¶ 61,271, at P 15 (2009) (June 2009 Order) (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 471).

⁶ December 2011 Order, 137 FERC ¶ 61,227 at P 19.

⁷ *Id.* P 23.

inconsistent with the Commission's requirement in Order No. 890-A that transmission providers must maintain certain information as confidential.⁸

6. The Commission further found that Attachment O unduly impeded review of SPP's Balanced Portfolio analyses by some market participants. The Commission determined that SPP's blanket restriction on access to resource-specific data did not strike an appropriate balance between transparency and confidentiality in the Balanced Portfolio review process.⁹ The Commission additionally held that SPP's proposed definition of Competitive Duty Personnel¹⁰ was too broad to allow interested SPP market participants to access resource-specific data, subject to confidentiality agreements, that may be needed to participate fully in SPP's Balanced Portfolio process and/or replicate its transmission planning studies.¹¹ Specifically, the Commission concluded that SPP's language regarding the provision of consulting services in connection with the marketing, purchase, or sale of electric power at wholesale in the SPP Region could encompass a wide variety of utility operations to effectively limit the counsel and outside consultants that market participants can turn to for assistance with evaluating Balanced Portfolio studies.¹² The Commission found that it is reasonable for counsel and outside consultants to be allowed access to system design software results needed to evaluate a Balanced Portfolio, subject to appropriate safeguards such as confidentiality agreements.¹³

7. Consequently, the Commission directed SPP to submit a further compliance filing to revise the Information Exchange provisions of Attachment O of its Tariff to remove unreasonable restrictions on access to resource-specific data, and to provide for access to such data under appropriate confidentiality protections.¹⁴

⁸ *Id.* P 24.

⁹ *Id.* P 21.

¹⁰ SPP's proposed definition of Competitive Duty Personnel included individuals directly engaged in "the provision of consulting services in connection with the marketing, purchase, or sale of electric power at wholesale in the SPP Region." *Id.* P 28. SPP proposed to restrict such individuals from access to resource-specific data.

¹¹ *Id.* P 41.

¹² *Id.*

¹³ *Id.* P 44.

¹⁴ *Id.* P 47.

II. SPP's Compliance Filing

8. On May 11, 2012, SPP submitted a filing revising Attachment O of its Tariff to remove the restriction on access to certain resource-specific data. Specifically, the revisions provide that confidentiality agreements

shall allow access to applicable system design software results needed to participate in the SPP Transmission Expansion Plan process, replicate the results of specified transmission planning studies, or to confirm assumptions used in creating adjusted production cost-benefit metrics used to analyze a specified Balanced Portfolio; provided however, if the results include resource-specific data (including input data), access will be limited to individuals that are not Competitive Duty Personnel.¹⁵

9. SPP additionally proposes to revise the definition of Competitive Duty Personnel to eliminate its application to counsel and outside consultants (including those that provide consulting services in connection with the marketing, purchase, or sale of electric power at wholesale). In particular, SPP proposes to limit the definition of Competitive Duty Personnel to any individuals directly engaged in Competitive Duties,¹⁶ including, “(1) the marketing, purchase, or sale of electric power at wholesale, or (2) the direct supervision of any employee with responsibilities for the marketing, purchase, or sale of electric power at wholesale.”¹⁷ SPP asserts that this modification will provide broader access to the information necessary for market participants to participate in SPP's planning process and to replicate transmission planning studies under appropriate confidentiality protections.

10. SPP further states that, at stakeholder request, it is proposing Tariff revisions to clarify that personnel engaging in Competitive Duties will be exempted from restrictions on access to transmission planning information if the entity for which they perform such duties has received a Commission-approved waiver of the Commission's Standards of Conduct requirement.¹⁸ Specifically, SPP's proposed Tariff language provides:

¹⁵ See Proposed SPP Tariff, Attachment O, section VII.7(d).

¹⁶ See Proposed SPP Tariff, Attachment O, section VII.7(d)(i).

¹⁷ See Proposed SPP Tariff, Attachment O, section VII.7(d)(ii).

¹⁸ See *id.* See also *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123

(continued...)

“However, ‘Competitive Duties’ shall not include those duties enumerated above by any entity that has received a Commission-approved waiver of the Commission’s Standards of Conduct requirement.”¹⁹ According to SPP, this proposed clarification expressly ensures that personnel of an entity having received a Commission-approved waiver of the Commission’s Standards of Conduct requirement will have appropriate access to resource-specific data under appropriate confidentiality protections.

11. SPP contends that, although there is no bright line rule to determine the appropriate balance between fostering transparency in the transmission planning process and ensuring that confidential information is not disclosed inappropriately,²⁰ the proposed revisions bridge the gap between transparency and confidentiality by allowing market participants the opportunity to receive the resource-based information while still maintaining the confidentiality requirements of Order Nos. 890, 890-A, and 890-B.²¹

12. SPP notes that the proposed Tariff revisions were developed and approved through the SPP stakeholder process. SPP requests that the Commission accept its filing with an effective date of July 26, 2010.²²

III. Notice of Filing and Responsive Pleadings

13. Notice of SPP’s compliance filing was published in the *Federal Register*, 77 Fed. Reg. 30,000 (2012), with interventions and protests due on or before June 1, 2012. Golden Spread Electric Cooperative, Inc. (Golden Spread) and Western Farmers Electric Cooperative (Western Farmers) filed timely motions to intervene. Arkansas Electric Cooperative Corporation (Arkansas Cooperative) filed a timely motion to intervene and protest.

(2009), *order on reh’g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010), *order on reh’g*, Order No. 717-D, 135 FERC ¶ 61,017 (2011).

¹⁹ See SPP Proposed Tariff, Attachment O, section VII.7(d)(ii).

²⁰ SPP Filing at 7 (citing December 2011 Order, 137 FERC ¶ 61,227 at P 21).

²¹ SPP Filing at 7, n.39.

²² SPP notes that the original effective date for this proceeding was October 17, 2008, but the requested effective date is consistent with SPP’s filing to establish its baseline electric tariff pursuant to Order No. 741. See *Southwest Power Pool, Inc.*, Baseline Electronic Tariff Filing, Docket No. ER10-1960-000 (July 26, 2010).

14. Arkansas Cooperative states that SPP's proposed revisions represent a significant improvement over SPP's previous Tariff proposals, particularly because SPP proposes to exempt personnel performing Competitive Duties from restrictions on access to necessary transmission study information if the entity for which they perform the duties has received a waiver of the Commission's Standards of Conduct requirement.²³ However, Arkansas Cooperative contends that, rather than merely exempting personnel at entities that have received a waiver of the Standards of Conduct, SPP should also exempt personnel at those entities that are not subject to the Standards of Conduct. Arkansas Cooperative explains that it cannot obtain a waiver of the Standards of Conduct by virtue of not being subject to the Standards of Conduct, and therefore, it will not have appropriate access to resource-specific data under appropriate confidentiality protections.

15. Therefore, Arkansas Cooperative requests that the Commission condition its acceptance of SPP's filing on a further compliance filing clarifying that the definition of Competitive Duties does not include the duties described in proposed section VII.7(d)(ii) of Attachment O when performed by an employee of an entity that is not subject to the Commission's Standards of Conduct requirements.

IV. 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 Golden Spread, Western Farmers, and Arkansas Cooperative parties to this proceeding.

B. Commission Determination

17. The Commission finds that SPP's proposed revisions to Attachment O comply with the directives in the December 2011 Order, subject to the removal of the language providing: "However, 'Competitive Duties' shall not include those duties enumerated above by an entity that has received a Commission-approved waiver of the Commission's Standards of Conduct requirement." Other than stating that this Standards of Conduct clause was added at its stakeholders' request, SPP did not provide any support for including this language as necessary for appropriate access to resource-specific data. Moreover, as discussed below, we find that this clause has the unintended consequence of

²³ Arkansas Cooperative Comments at 7, n.19.

failing to adequately protect confidential, resource-specific data consistent with Order No. 890,²⁴ and is unduly discriminatory.

18. The Commission's Standards of Conduct require a transmission provider's transmission function employees to function independently from the transmission provider's marketing function employees, except as permitted by the regulations or by Commission order.²⁵ As SPP notes, the Commission may grant waivers of the Standards of Conduct to entities under section 358.1(c) of the Commission's regulations on the basis that a transmission provider in an RTO/ISO does not control or operate its transmission system and has no access to transmission function information. However, SPP fails to acknowledge that such an entity could still be a market participant, with personnel directly engaged in the marketing, purchase, or sale of electric power at wholesale, or the direct supervision thereof, that would be competitively advantaged by access to such resource-specific data. Similarly, SPP also fails to acknowledge that the Commission has granted numerous waivers of the Standards of Conduct to small public utilities with energy sales below 4 million MWh and/or with limited and discrete transmission facilities that do not form an integrated grid,²⁶ including generators and other utilities that are market participants.²⁷ Again, such entities could still be market participants, with personnel directly engaged in the marketing, purchase, or sale of electric power at wholesale, or the direct supervision thereof. Thus, SPP's proposed Standards of Conduct clause could provide a competitive advantage to such entities by permitting any employee at those entities, including those that would otherwise qualify as Competitive Duty Personnel, access to resource-specific data.

19. In addition, we find SPP's proposed Standards of Conduct clause to be unduly discriminatory because it only applies to public utilities. As noted by Arkansas Cooperative, non-jurisdictional cooperatives and other entities exempt from Commission jurisdiction under FPA section 201(f), in most circumstances, are not required to comply with the Standards of Conduct, nor would they otherwise have reason to seek waivers of

²⁴ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 475.

²⁵ See 18 C.F.R. § 358.2(b) (2012).

²⁶ See *Black Hills Power, Inc.*, 135 FERC ¶ 61,058 (2011). See also *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996); *New Harquahala Generating Company, LLC*, 131 FERC ¶ 61,051 (2010).

²⁷ See, e.g., *Meadow Creek Project Co. LLC.*, 140 FERC ¶ 61,233 (2012); *AV Solar Ranch 1, LLC*, 140 FERC ¶ 61,159 (2012).

the Standards of Conduct. Directing SPP to omit the Standards of Conduct waiver provision would resolve this issue.

20. Accordingly, we find that the proposal to include Standards of Conduct waiver as a criterion for permitting access to resource-specific data is unjust and unreasonable, and unduly discriminatory, and direct SPP to submit a compliance filing within 30 days of the date of issuance of this order to remove the specified language.

21. In the December 2011 Order, the Commission found that SPP's previously-proposed definition of Competitive Duty Personnel could have been read as inappropriately restricting access to resource-specific data to effectively limit the counsel and outside consultants that market participants can turn to for assistance with evaluating Balanced Portfolio studies.²⁸ We find that SPP's revised Tariff language, as modified herein, would provide appropriate access to resource-specific data to outside counsel and consultants, and therefore complies with the December 2011 Order. Specifically, the definition of Competitive Duty Personnel has been modified to eliminate its application to counsel and outside consultants (including those that provide consulting services in connection with the marketing, purchase, or sale of electric power at wholesale), subject to appropriate restrictions on the use and dissemination of resource-specific data by such non- Competitive Duty Personnel.²⁹ Therefore, we accept SPP's filing, subject to removal of the Standards of Conduct clause.

²⁸ December 2011 Order, 137 FERC ¶ 61,227 at P 41.

²⁹ We note that SPP's Confidentiality Agreement for Non-Competitive Duty Personnel for Disclosure of Confidential & Protected Material and CEII, posted on its website, explicitly requires that such resource-specific data shall not be used for any purpose(s) other than those specified in this agreement (i.e., performing transmission planning and/or transmission operations activities; participating in the transmission planning process pursuant to the Tariff and/or replicating the results of specified transmission planning studies; validating generation interconnection study results or aggregate study results; for any other use which has been approved in writing by SPP in advance and with such prior written approval attached to this agreement), and shall not be used to give any person or entity a competitive advantage (emphasis added). It also prohibits an individual who has executed the Confidentiality Agreement and obtained access to resource-specific data from disclosing that information to any person who is ineligible to receive it because he or she is Competitive Duty Personnel. *Available at: http://www.spp.org/publications/Confidentiality_Agreement_NCD_FINAL_8-22-12.pdf.*

The Commission orders:

(A) SPP's compliance filing is hereby conditionally accepted, effective July 26, 2010, as discussed in the body of this order.

(B) SPP is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.