

155 FERC ¶ 61,081
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

MDU Resources Group, Inc.

Docket No. ER16-866-000

ORDER DENYING WAIVER

(Issued April 21, 2016)

1. On February 1, 2016, MDU Resources Group, Inc. filed, on behalf of Montana-Dakota Utilities Co.¹ (Montana-Dakota), a request for waiver of Schedule 12 of the Southwest Power Pool, Inc. Open Access Transmission Tariff (SPP Tariff) under which SPP assesses transmission customers for the annual charges paid to the Commission (Annual Charges) under section 382.201 of the Commission's regulations.² Specifically, Montana-Dakota requests waiver of SPP's obligation to collect, and Montana-Dakota's obligation to pay, the Annual Charges (referred to as FERC Assessment Charges under Schedule 12 of the SPP tariff) effective February 2, 2016 on the basis that these charges are duplicative of the Annual Charges that Montana-Dakota pays under the Midcontinent Independent System Operator, Inc. (MISO) tariff for serving the same transmission load. In this order, we deny Montana-Dakota's waiver request.

I. Background

2. Montana-Dakota states that it is a public utility that provides natural gas and electric service to customers in the states of Montana, North Dakota, South Dakota, and Wyoming.³ Montana-Dakota explains that it has historically developed and shared

¹ Montana-Dakota is a division of MDU Resources Group, Inc. For clarity, we will refer simply to Montana-Dakota.

² Section 382.201(a) provides for Annual Charges to be assessed to public utilities for administration of the Commission's electric regulatory program. 18 C.F.R. § 382.201(a) (2015).

³ Montana-Dakota's Request for Waiver at 2 (Petition).

transmission facilities with Western Area Power Administration – Upper Great Plains Region (Western-UGP) and Basin Electric Power Cooperative (Basin) and, as a result, Montana-Dakota's transmission system is heavily integrated with Western-UGP, Basin, and Heartland Consumers Power District (Heartland).⁴

3. On November 10, 2014, in Docket Nos. ER14-2850-000 and ER14-2851-000, the Commission conditionally accepted in part, rejected in part, and established hearing and settlement judge procedures with regard to revisions SPP proposed to its Tariff, Bylaws, and Membership Agreement to facilitate the decision of Western-UGP, Basin, and Heartland (collectively, the Integrated System) to integrate into SPP.⁵ Western-UGP, Basin, and Heartland integrated into SPP as transmission owners on October 1, 2015.

4. Montana-Dakota states that it is a transmission owner in MISO, and, as a result of the integration of Western-UGP and Basin into SPP, it is now necessary for Montana-Dakota to receive Network Integration Transmission Service (NITS) from SPP, subjecting Montana-Dakota customers to NITS from two Regional Transmission Organizations (RTO) in order to serve the same customer load in MISO.⁶

II. Montana-Dakota Petition

5. Montana-Dakota seeks waiver of SPP's obligation to collect, and Montana-Dakota's obligation to pay, SPP's Annual Charge under Schedule 12 of the SPP Tariff as duplicative of the MISO Annual Charge already paid by Montana-Dakota as required by section 382.201(a) of the Commission's regulations.⁷

⁴ *Id.*

⁵ *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,113 (2014), *order on reh'g*, 153 FERC ¶ 61,051 (2015) (*Southwest Power Pool*). On December 10, 2015, SPP filed a partial settlement to resolve all issues raised by Montana-Dakota arising out of the integration of Western-UGP, Basin, and Heartland into SPP. Southwest Power Pool, Inc., Joint Offer of Partial Settlement, Docket Nos. ER14-2850-006 and ER14-2851-006 (filed December 10, 2015) (Partial Settlement). On January 21, 2016, the presiding judge certified the Partial Settlement to the Commission as uncontested. *Southwest Power Pool, Inc.*, 154 FERC ¶ 63,009 (2016). The uncontested settlement is pending action before the Commission.

⁶ Petition at 3.

⁷ 18 C.F.R. § 382.201(a).

6. Montana-Dakota asserts that, in a separate matter, the Commission indicated that a waiver of duplicative Annual Charges may be appropriate.⁸ Montana-Dakota states that the Commission will grant a waiver of a tariff provision for good cause, considering whether the waiver request: (1) is made in good faith; (2) is of limited scope; (3) addresses a concrete problem that will be remedied; and (4) does not have undesirable consequences.⁹ Montana-Dakota claims that its waiver request satisfies these factors.

7. Montana-Dakota states that it faces unique circumstances because the integration of Western-UGP and Basin into SPP as transmission owners (while Montana-Dakota remained a MISO transmission owner) required Montana-Dakota to receive NITS from both SPP and MISO to serve customer load in MISO.¹⁰ Montana-Dakota states that the waiver request is made in good faith to avoid duplicate Annual Charges for Montana-Dakota's customers. Montana-Dakota adds that its waiver request is limited in scope because the waiver would not exempt Montana-Dakota from Annual Charges paid to MISO.¹¹ Montana-Dakota states that "[t]he requested waiver would simply remedy the concrete problem of Montana-Dakota and its customers being charged such FERC Assessments twice."¹² Furthermore, Montana-Dakota states that granting the waiver will not have any undesirable consequences or harm any party because no costs would be shifted to any other market participant or SPP.¹³

8. Montana-Dakota states that:

SPP has authorized Montana-Dakota to state that SPP does not oppose the waiver request so long as the SPP's FERC-assessment charge calculation does not include Montana-

⁸ Petition at 5 (quoting *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,113 at P 82).

⁹ *Id.* at 4 (citing *Indianapolis Power & Light Co.*, 149 FERC ¶ 61,047, at P 64 (2014); *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, at P 38 (2014); *Cal. Indep. Sys. Operator Corp.*, 146 FERC ¶ 61,184, at P 18 (2014); *Southwest Power Pool, Inc.*, 148 FERC ¶ 61,013, at P 13 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,132, at P 8 (2014)).

¹⁰ *Id.* at 5.

¹¹ *Id.* at 5-6.

¹² *Id.* at 6.

¹³ *Id.*

Dakota's transmission service and SPP's transmission customers are not obliged to incur any additional FERC-assessment cost associated with Montana-Dakota's use of the SPP transmission system.^[14]

III. Notices and Responsive Pleadings

9. Notice of Montana-Dakota's Petition was published in the *Federal Register*, 81 Fed. Reg. 6,844 (2016), with interventions and protests due on or before February 22, 2016. Timely motions to intervene were filed by SPP and Otter Tail Power Company.

IV. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Determination

11. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.¹⁵ Based on the information in the record, we will deny Montana-Dakota's request for waiver, as discussed below.

12. As public utilities that provide transmission service in interstate commerce, MISO and SPP are subject to the FERC-582 reporting requirements and the FERC Annual Charge.¹⁶ The FERC Assessment Charges, under Schedule 10-FERC of the MISO tariff

¹⁴ *Id.*

¹⁵ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 14 (2016); *Calpine Energy Serv., L.P.*, 154 FERC ¶ 61,082, at P 12 (2016); *N.Y. Power Auth.*, 152 FERC ¶ 61,058, at P 22 (2015).

¹⁶ 18 C.F.R. § 382.201(c). Section 382.201(c) of the Commission's regulations provides as follows:

(c) *Reporting requirement.* (1) For purposes of computing annual charges, as of January 1, 2002, a public utility, as defined in § 382.201(b), that provides transmission service must submit under

(continued...)

and Schedule 12 of the SPP Tariff, establish the formula by which MISO and SPP, respectively, recover their obligations to the Commission for the Annual Charge.

13. Order No. 641 established the Commission's current policy on Annual Charges.¹⁷ In Order No. 641, the Commission provided several examples of how the Commission would assess Annual Charges. The Commission stated that "it was concerned that the assessment of annual charges could result in a 'double counting' of transactions – by counting a single transaction both to the transmission-owning public utility and to the ISO or RTO public utility."¹⁸

14. To ensure that both the transmission owner and transmission provider (i.e., RTO) were not assessed the Annual Charge for the same transmission service, the Commission stated that if an RTO public utility has taken over the function of providing transmission service from individual public utilities and has, accordingly, a tariff or rate schedule (and thus rates) on file for such service, then it is the RTO public utility that will be responsible for paying Annual Charges. Where an individual public utility continued to provide transmission service, however, and still had, accordingly, a tariff or rate schedule (and thus rates) on file for such service, then that individual public utility will continue to be responsible for paying Annual Charges.¹⁹

oath to the Office of the Secretary by April 30 of each year an original and conformed copies of the following information (designated as FERC Reporting Requirement No. 582 (FERC-582)):
The total megawatt-hours of transmission of electric energy in interstate commerce, which for purposes of computing the annual charges and for purposes of this reporting requirement, will be measured by the sum of the megawatt-hours of all unbundled transmission (including MWh delivered in wheeling transactions and MWh delivered in exchange transactions) and the megawatt-hours of all bundled wholesale power sales (to the extent these latter megawatt-hours were not separately reported as unbundled transmission.)

¹⁷ *Revision of Annual Charges Assessed to Public Utilities*, Order No. 641, FERC Stats. & Regs. ¶ 31,109 (2000), *reh'g denied*, Order No. 641-A, 94 FERC ¶ 61,290 (2001) (Order No. 641).

¹⁸ Order No. 641, FERC Stats. & Regs. ¶ 31,109 at 31,843.

¹⁹ *Id.* at 31,855 n.70.

15. The Commission also explained that if two or more different public utilities, such as two or more RTO public utilities or two or more individual public utilities, transmit electric energy *sequentially* (as, for example, in the case of electric energy being transmitted over comparatively long distances, and thus by multiple public utilities over their respective transmission systems one after the other), each RTO public utility or individual public utility will be assessed an Annual Charge based on its respective transmission of such electric energy.²⁰

16. Before the integration into SPP, Western-UGP provided transmission service over the Integrated System to Montana-Dakota. However, after the integration, SPP instead provides the service that Montana-Dakota previously received from the Integrated System,²¹ and that service is now jurisdictional and subject to the FERC Annual Charge. This is required under Order No. 641 and the Commission's regulations, because there are two jurisdictional public utilities – SPP and MISO – providing service sequentially over different facilities under two different tariffs, and both are subject to Annual Charge assessments for the service that they provide.²²

17. Montana-Dakota relies on *Southwest Power Pool* to support its waiver request.²³ In *Southwest Power Pool*, SPP proposed to revise Schedule 12 of its Tariff to include language to specify that SPP will not assess Schedule 12 charges to transmission service provided to Western-UGP for its statutory load obligations. In rejecting SPP's proposal, the Commission found that, because Western-UGP will be taking transmission service over SPP's system, Western-UGP's transmission service should be reflected in the total amount of transmission service provided by SPP and subject to the FERC Assessment

²⁰ *Id.* The Commission stated that, for example, if the power seller must move power through two different RTOs to reach the power buyer, then each RTO would be assessed Annual Charges based on its respective transmission of that power.

²¹ Montana-Dakota Utilities Co., Motion to Intervene and Comments, Docket Nos. ER14-2850-000 and ER14-2851-000, at 5-7 (filed Oct. 9, 2014).

²² Order No. 641, FERC Stats. & Regs. ¶ 31,109 at 31,855; *cf.* 18 C.F.R. § 382.201.

²³ Petition at 5 (quoting *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,113 at P 82).

under 18 C.F.R. § 382.201(a).²⁴ However, the Commission recognized that because all the transmission service provided to Western-UGP under the SPP Tariff is reflected in 18 C.F.R. § 382.201(a), when Western-UGP is billed directly by the Commission for power sales under 18 C.F.R. § 382.201(d) of the Commission's regulations²⁵ (i.e., as a Federal Power Marketing Agency), it is possible that a double assessment of FERC costs may occur for these transactions, because Western-UGP would also pay for the same service transmitted over the same facilities through SPP's Schedule 12.²⁶ The Commission stated that Western-UGP could request waiver of section 382.201(d) of the Commission's regulations instead of section 382.201(a) for Western-UGP's transactions over SPP's system. Montana-Dakota's request for waiver of duplicative Annual Charges is, thus, distinguishable from the request that the Commission considered in *Southwest*

²⁴ *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,113 at P 82. Section 382.201(a) provides as follows:

(a) *Determination of costs to be assessed to public utilities.* The adjusted costs of administration of the electric regulatory program, excluding the costs of regulating the Power Marketing Agencies, will be assessed to public utilities that provide transmission service (measured, as discussed in paragraph (c) of this section, by the sum of the megawatt-hours of all unbundled transmission and the megawatt-hours of all bundled wholesale power sales (to the extent these latter megawatt-hours were not separately reported as unbundled transmission)).

²⁵ 18 C.F.R. § 382.201(d) provides as follows:

(d) *Determination of annual charges to be assessed to power marketing agencies.* The adjusted costs of administration of the electric regulatory program as it applies to Power Marketing Agencies will be assessed against each power marketing agency based on the proportion of the megawatt-hours of sales of each power marketing agency in the immediately preceding reporting year (either a calendar year or fiscal year, depending on which accounting convention is used by the power marketing agency to be charged) to the sum of the megawatt-hours of sales in the immediately preceding reporting year of all power marketing agencies being assessed annual charges.

²⁶ *Southwest Power Pool, Inc.* 149 FERC ¶ 61,113 at P 82.

Power Pool. That is, Montana-Dakota's waiver request concerns billing under one section of the regulations (section 382.201(a)) for transmission services provided over two separate public utilities' facilities under two different tariffs. *Southwest Power Pool* addressed Annual Charges arising from both sections 382.201(a) and 382.201(d) of the Commission's regulations for the same transmission service over the same transmission facilities provided under the same tariff.

18. We find that Montana-Dakota has not demonstrated that the Commission should grant its requested waiver of SPP's obligation to collect, and Montana-Dakota's obligation to pay, the Annual Charges under Schedule 12 of the SPP Tariff. Specifically, a concrete problem in need of a remedy is not present given the FERC Assessment Charge is properly assessed on both SPP and MISO as described and determined above. Additionally, Montana-Dakota has not demonstrated that granting the waiver will not have undesirable consequences, such as harming third parties. If the Commission were to grant Montana-Dakota's waiver request and exempt Montana-Dakota's transmission service on the SPP system from the FERC Assessment Charge, the assessment for all other jurisdictional transmission service would be increased to make up for the shortfall arising from Annual Charges that should properly be assessed to Montana-Dakota. Accordingly, the Commission denies Montana-Dakota's request for waiver.

The Commission orders:

Montana-Dakota's waiver petition is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.