

145 FERC ¶ 61,137
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

November 18, 2013

In Reply Refer To:
Southwest Power Pool, Inc.
Docket Nos. ER13-1768-000
ER13-1769-000

Southwest Power Pool, Inc.
201 Worthen Drive
Little Rock, AR 72223

Attention: Matthew Harward, Attorney

Dear Mr. Harward:

1. On June 25, 2013, Southwest Power Pool, Inc. (SPP) filed revisions to Attachment AN of its Open Access Transmission Tariff (Tariff) (Docket No. ER13-1768-000) to incorporate a new Balancing Authority Agreement (SPP BA Agreement) between SPP and the SPP Balancing Authority Participants (BA Participants) to implement the SPP Balancing Authority (SPP BA). SPP also filed revisions to the SPP Bylaws and the SPP Membership Agreement contained in SPP's Governing Documents Tariff (Docket No. ER13-1769-000) to facilitate the implementation of the SPP BA. In this order, the Commission conditionally accepts SPP's tariff revisions, effective March 1, 2014, as requested, subject to a compliance filing to be submitted within 30 days of the date of this order.

2. On October 18, 2012, the Commission issued an order conditionally accepting SPP's proposal for its Integrated Marketplace.¹ As part of SPP's transition from its current Energy Imbalance Service Market to the Integrated Marketplace, and in compliance with the October 18 Order, SPP proposed the formation of a new SPP BA to consolidate and assume the responsibilities of the 16 separate balancing authority areas currently operating within the SPP footprint. As a result of this new structure, SPP has revised its existing BA Agreement, as submitted in the instant filing, to reflect the revised

¹ *Southwest Power Pool, Inc.*, 141 FERC ¶ 61,048 (2012) (October 18 Order), *order on reh'g and clarification*, 142 FERC ¶ 61,205 (2013).

responsibilities between SPP and the SPP BA Participants.² In addition to the revisions to the Tariff, SPP proposes to add two new subsections to section 3.15 (Liability, Insurance, and Indemnification) of the SPP Bylaws. According to SPP, these new subsections are necessary to ensure consistency with the terms for limitation of liability and indemnification in the SPP BA Agreement.³ SPP further proposes to revise its Membership Agreement to delete Appendix A, which contains the North American Electric Reliability Corporation functional model. SPP explains that this revision is necessary because Appendix A will become obsolete as SPP assumes the responsibilities as the SPP BA.⁴

3. SPP requests a March 1, 2014 effective date for the tariff revisions. SPP also requests waiver of the Commission's notice requirement to permit the March 1, 2014 effective date, a date more than 120 days after the filing date.⁵ SPP states that waiver is appropriate because March 1, 2014 was the effective date granted by the Commission in the October 18 Order and a date requested by SPP in other compliance filings related to the Integrated Marketplace.⁶

4. Notice of SPP's filing was published in the *Federal Register*, 78 Fed. Reg. 40,471 (2013), with interventions and protests due on or before July 16, 2013. Western Farmers and Sunflower and Mid-Kansas Electric Company, LLC filed timely motions to intervene. On July 18, 2013, KCP&L and KCP&L GMO filed an out-of-time motion to intervene. No comments or protests were filed.

² The SPP BA Participants are the current SPP balancing authority areas, and include: American Electric Power; Board of Utilities of Kansas City, Kansas; City of Independence, Missouri; City Utilities of Springfield; The Empire District Electric Company; Grand River Dam Authority; Kansas City Power & Light Company (KCP&L); KCP&L Greater Missouri Operations Company (KCP&L GMO); Lincoln Electric System; Nebraska Public Power District; Oklahoma Gas and Electric Company; Omaha Public Power District; Southwestern Public Service Company; Sunflower Electric Power Corporation (Sunflower); Westar Energy, Inc; and Western Farmers Electric Cooperative (Western Farmers).

³ SPP Transmittal at 6.

⁴ *Id.* at 7.

⁵ *Id.* at 13.

⁶ *Id.* (citing Southwest Power Pool, Inc., Submission of Tariff Revisions to Implement SPP Integrated Marketplace of Southwest Power Pool, Inc., Docket No. ER12-1179-003 (filed Feb. 15, 2013) and Southwest Power Pool, Inc., Compliance Filing, Docket No. ER12-1179-004 (filed Apr. 19, 2013)).

5. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), 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) (2013), the Commission will grant KCP&L and KCP&L GMO's late-filed motion to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

6. The Commission conditionally accepts SPP's revisions to the SPP BA Agreement, the SPP Bylaws and the SPP Membership Agreement, subject to the conditions discussed below.

7. Section 17.3 of the SPP BA Agreement states that the *Mobile-Sierra* "public interest" standard of review will apply for modifications to the agreement by a party, non-party, or the Commission acting *sua sponte*. Specifically, the language provides:

Absent a filing with the Commission to reflect the agreement of the Parties as detailed in Section 17.4, the standard of review for changes or conditions to this Agreement, whether proposed by a Party, a non-Party or the Federal Energy Regulatory Commission acting *sua sponte* shall be the "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the "*Mobile-Sierra*" doctrine). Notwithstanding the foregoing in this Section 17.3, if the Commission changes its policy (in existence at the time of execution) with regard to non-signatories and imposes a standard different than the *Mobile-Sierra* standard set forth in this provision, then the Parties shall modify this Agreement to reflect the new standard. Any changes to this Agreement shall be prospective only. The Commission's action on the initial filing of this Agreement shall be under the just and reasonable standard.

8. The *Mobile-Sierra* "public interest" presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra*

presumption. In *New England Power Generators Association v. FERC*,⁷ however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above.

9. We find that the *Mobile-Sierra* “public interest” presumption does not apply to the SPP BA Agreement because it embodies rates, terms, or conditions that are generally applicable. The SPP BA Agreement, among other things, requires any new entities wishing to become part of the SPP BA and a signatory to the SPP BA Agreement to accept the provisions of the SPP BA Agreement as-is, with limited room for negotiation. Consequently, we find that the SPP BA Agreement does not embody “contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption.”⁸

10. As we have stated recently, in the context of reviewing agreements that do not involve “contract rates,” the Commission has discretion as to whether to approve a request to impose on itself or third parties the more rigorous application of the statutory “just and reasonable” standard of review that is often characterized as the *Mobile-Sierra* “public interest” standard of review.⁹ The Commission also stated in these orders that it will not approve imposition of that more rigorous application of the statutory “just and reasonable” standard of review on future changes to an agreement sought by the Commission or non-settling third parties, absent compelling circumstances such as were found to exist in *Devon Power*. We find that the circumstances presented here do not satisfy that test. Thus, we find it unjust and unreasonable to impose the more rigorous application of the statutory “just and reasonable” standard of review in the instant proceeding with respect to future changes to the SPP BA Agreement sought by the Commission acting *sua sponte* or at the request of a non-party. Therefore, we accept the SPP BA Agreement for filing, subject to SPP submitting a compliance filing within 30 days of the date of this order to modify the provision in section 17.3 of the SPP BA Agreement that seeks to bind the Commission and third parties to the *Mobile-Sierra* “public interest” standard of review.

⁷ *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

⁸ *Panhandle Eastern Pipe Line Co.*, 143 FERC ¶ 61,041, at P 84 (2013); *Entergy Arkansas, Inc.*, 143 FERC ¶ 61,299, at P 92 (2013).

⁹ *See, e.g., MidAmerican Energy Co.*, 138 FERC ¶ 61,028, at P 7 (2012) (citing *Devon Power LLC*, 134 FERC ¶ 61,208, *order on reh’g*, 137 FERC ¶ 61,073 (2011) (*Devon Power*), *aff’d*, *New England Power Generators Ass’n v. FERC*, 707 F.3d 364 (D.C. Cir. 2013); *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at P 24 (2011)).

11. SPP also proposes a list of Governing Documents in section 2.19 of the SPP BA Agreement, including joint operating agreements and seams agreements with various parties. We note that the Joint Operating Agreement between SPP and Western Area Power Administration (SPP-WAPA Joint Operating Agreement)¹⁰ is not listed as one of these documents and would not fall into the category of a joint operating agreement or seams agreement executed by SPP after the filing of the SPP BA Agreement.¹¹ Accordingly, we direct SPP to include the SPP-WAPA Joint Operating Agreement in the definition of Governing Documents in the compliance filing to be submitted within 30 days of the date of this order.

12. We grant SPP's request for waiver of the Commission's notice requirement in section 35.3 of the Commission's regulations to permit a March 1, 2014 effective date for the proposed tariff revisions.¹²

By the direction of the Commission. Commissioner Norris is concurring with a separate statement attached.

Kimberly D. Bose,
Secretary.

¹⁰ Southwest Power Pool, Inc., Submission of Joint Operating Agreement of Southwest Power Pool, Inc. and Western Area Power Administration, Docket No. ER12-1586-000 (filed Apr. 20, 2012).

¹¹ See section 2.19(g) of the SPP BA Agreement.

¹² 18 C.F.R. § 35.3 (2013).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket Nos. ER13-1768-000
ER13-1769-000

(Issued November 18, 2013)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally accepts revisions to SPP's Tariff to incorporate a new Balancing Authority Agreement and to implement the SPP Balancing Authority. The Commission's acceptance of the tariff revisions is conditioned upon SPP submitting a compliance filing that modifies section 17.3 of the Balancing Authority Agreement to no longer bind non-parties and the Commission acting *sua sponte* to the *Mobile-Sierra* public interest standard of review. I agree with the order that the Balancing Authority Agreement embodies contract rates, terms, or conditions that are generally applicable, and thus is not the type of contract rate to which the public interest presumption would apply. However, while the D.C. Circuit has determined that the Commission may exercise discretion under the Federal Power Act to apply the public interest standard where the *Mobile-Sierra* presumption does not apply,¹ I continue to disagree, as a policy matter, that the Commission should exercise such discretion.²

I believe the Commission can exercise its respect for rate certainty and stability and recognize the value of settlements, while protecting the rights of third parties and without sacrificing a future Commission's ability to review rates that may no longer be just and reasonable due to a change in circumstances. Therefore, I disagree with the analysis in this order of whether the Commission should permit the application of the public interest standard to future changes to the Balancing Authority Agreement.

For these reasons, I respectfully concur.

John R. Norris, Commissioner

¹ *New England Power Generators Ass'n, Inc. v. FERC*, No. 11-1422, at 10-12 (D.C. Cir. Feb. 15, 2013).

² *Devon Power LLC*, 134 FERC ¶ 61,208 (2011), *Norris, dissenting in part*.