

111 FERC ¶ 61,012
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Southwest Power Pool, Inc.

Docket No. ER05-562-000

ORDER ACCEPTING AND SUSPENDING FILING AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued April 8, 2005)

1. On February 9, 2005, Southwest Power Pool, Inc. (SPP) filed revisions to its Open Access Transmission Tariff (OATT) to add Schedule 12, which would allow SPP to recover the electric annual charges (annual charges) that it pays to the Commission every year from transmission customers and transmission owners.

2. In this order, the Commission accepts and suspends for a nominal period Schedule 12 of SPP's OATT, and establishes hearing and settlement judge procedures. This action benefits customers because it helps SPP to comply with Commission requirements concerning annual charges set forth in Order No. 641.¹

I. Background

A. The Omnibus Budget Reconciliation Act of 1986 and Order 641

3. Pursuant to section 3401 of the Omnibus Budget Reconciliation Act of 1986,² the Commission must recover its costs through, among other means, annual charges.³ The

¹ *Revision of Annual Charges Assessed to Public Utilities*, 65 Fed. Reg. 65,757 (Nov. 2, 2000), FERC Stats. & Regs., Regulations Preambles July 1996 - 2000 ¶ 31,109 (2000), *reh'g denied*, Order No. 641-A, 66 Fed. Reg. 15,793 (Mar. 21, 2001), 94 FERC ¶ 61,290 (2001) (Order No. 641).

² 42 U.S.C. § 7178 (2003).

³ 18 C.F.R. Part 382 (2004).

Commission sets annual charges each fiscal year based on our estimated electric regulatory programs costs for that year. In the following fiscal year, the Commission adjusts the charges to eliminate any excess recovery by recalculating the annual charges and carrying the prior year's amount as a credit or debit on the next fiscal year's assessment.

4. Order No. 641 initiated a new method for calculating its annual charges for public utilities. Annual charges are now based on transmission rather than assessing charges on both power sales and transmission.

B. Summary of SPP's Filing

5. SPP's proposed Schedule 12 contains SPP's equation for recovering from transmission customers and transmission owners the annual charges it pays to the Commission. The Commission assesses these annual charges to public utilities based on their actual megawatt-hours (MWh) of transmission of electric energy in interstate commerce during the previous calendar year. Under Schedule 12, SPP would recover the estimated amount of annual charges that the Commission will assess in the coming year to SPP, with a later true-up when the actual costs are known. SPP proposes to bill both transmission customers, and transmission owners that are covered by section 39.1 of SPP's OATT,⁴ the charges specified under Schedule 12 in accordance with the procedures in section 7 of SPP's OATT.

6. SPP's filing describes its proposed collection process. Beginning in April, and each successive month thereafter, SPP will bill transmission customers and transmission owners a charge under Schedule 12 on all energy delivered under Point-To-Point Transmission Service and Network Integration Service and on all energy delivered to Bundled Retail and Grandfathered Loads to which SPP's OATT section 39.1 applies. SPP will also include a true-up rate in its bills. This rate will reconcile SPP's recovery of annual charges with the total revenue SPP collects under Schedule 12. Section 3 of Schedule 12 demonstrates the calculation of the true-up rate. SPP does not plan to apply the true-up rate for the first two years after the Commission's annual rate is effective.

⁴ SPP OATT section 39.1 is entitled Bundled Retail and Grandfathered Load and states:

Notwithstanding Sections 37 and 38 of this Tariff, each Transmission Owner (which is not otherwise taking Network Integration Transmission Service) is subject to the non-rate and conditions of this Tariff for: (1) its bundled retail load not having a choice of power suppliers; (2) its bundled retail load that had the right to choose a different power supplier under a state retail access program or legislation and that was retail load serviced by the Transmission Owner.

II. Interventions, Protest, and Answers

7. Notice of SPP's filing was published in the *Federal Register*,⁵ with interventions and protests due on or before March 1, 2005. Oklahoma Municipal Power Authority (OMPA) and the Missouri Joint Municipal Electric Utility Commission (MJMEUC) (together, the Protestors) jointly filed a motion to intervene and a limited protest. SPP filed an answer to the limited protest of OMPA and MJMEUC.

8. The Protestors do not object to Schedule 12 on its own, but they express concern about the potential for double recovery of these annual charges. The Protestors state that it must be assumed that the zonal rates under SPP's OATT, which recover the revenue requirements of transmission owners, already recover the Commission's annual assessment charges. The Protestors assert that Schedule 12 does not propose to modify the zonal rates or ensure that customers do not pay twice for the costs of the Commission's annual assessments. They request that the Commission require SPP to propose such protections. Alternatively, the Protestors recommend that the Commission initiate section 206 proceedings with respect to the zonal rates that cover the costs of Commission-jurisdictional transmission owners in SPP. The Commission should establish the earliest possible refund date and issue a suspension order ensuring that Schedule 12 will go into effect no sooner than the refund effective date in the section 206 proceedings. The Protestors cite *New PJM Companies*⁶ to support their assertion that in the past, when the Commission has recognized the potential for double recovery of Commission annual assessment costs, it has set zonal rates for hearing.

9. In its answer, SPP notes that four transmission owners under the SPP OATT are not subject to the Commission's jurisdiction, and therefore do not have a Commission assessment component in the rates associated with the use of their transmission facilities. Furthermore, SPP states that SPP's current rates included in its OATT for its jurisdictional transmission owners, are typically the product of "black box" settlements, and, as a result, SPP does not know whether they include annual charges. Nonetheless, SPP believes that these amounts are likely to be *de minimis*, especially for companies whose rates have not been adjusted for a number of years. In addition, SPP states that the Protestors seek a spot adjustment based on one cost component of existing rates. SPP asserts that, historically, the Commission has not allowed such spot adjustments,

⁵ 70 Fed. Reg. 9063 (2005).

⁶ *New PJM Companies*, 108 FERC ¶ 61,140 (2004).

based in part on the fact that over time costs fluctuate up and down; therefore, SPP believes that focusing on one cost component is not appropriate in this situation.⁷

10. Furthermore, SPP asserts that preventing it from collecting these costs would be inappropriate. SPP states that other Regional Transmission Organizations (RTOs) recover these exact costs and that Schedule 12 is consistent with Commission precedent.⁸ SPP argues that, under Commission policy, a party protesting a filing may not use that protest as a complaint against existing rates. Under that policy, protestors must submit a separate complaint.⁹

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. The Commission will accept SPP's answer to the Protestors because it has provided the Commission with information that assisted us in our decision-making process.¹⁰

⁷ See, e.g., *Carolina Power & Light Co.*, 860 F.2d 1097, at 1102 (D.C. Cir. 1988) (describing the Commission's policy of refusing to make spot adjustments to established rates on the basis of discrete changes in one component of a utility's costs); *Am. Elec. Power Serv. Corp.*, 80 FERC ¶ 63,006, at 65,059-60 (1997) (Commission policy does not favor spot adjustments to a single component of cost of service).

⁸ See *Midwest Indep. Transmission Sys. Provider, Inc. OATT at Schedule 10-FERC*; *PJM Interconnection, L.L.C. OATT at Schedule 9-FERC*.

⁹ See, e.g., *Entergy Servs., Inc.*, 104 FERC ¶ 61,084, at 61,303 (2003) (determining that a protest against a filing was, in effect, a complaint that should be filed separately); *Transcontinental Gas Pipe Line Corp.*, 79 FERC ¶ 61,362, at 62,528 (1997).

¹⁰ 18 C.F.R. § 385.213(a)(2) (2004).

B. Commission Determination

13. The Protestors cite *New PJM Companies* to support their request that the Commission initiate a section 206 proceeding with respect to the zonal rates under SPP's OATT. In *New PJM Companies*, American Electric Power Service Corporation (AEP) joined PJM Interconnection LLC (PJM) and filed tariff sheets containing its rates to be included in the PJM tariff. The Commission set AEP's cost-of-service rates for hearing to determine whether they should be reduced once it joins PJM to reflect the fact that AEP would no longer have to pay the Commission annual charges for its load in PJM (which would instead be paid, and collected from customers, by PJM).

14. Formerly, the Commission charged transmission owners for annual charges. The transmission owners passed these expenses on to their customers. After the advent of RTOs, the Commission began charging the RTOs for annual charges rather than the transmission owners. Thus, the Commission now bills SPP, rather than the transmission owners, for annual charges. The Protestors note that the current rate sheets in Attachment T of SPP's OATT for each of SPP's jurisdictional transmission owners have effective dates of November 1, 2000 and do not include a specific "tracker" mechanism to directly pass through the costs of the Commission's annual charges. Significantly, the November 1, 2000 effective date of these rate sheets precedes the date the Commission switched from billing the transmission owners to billing SPP, so the transmission owners likely included some mechanism for recovering the annual charges they were paying to the Commission. Since these rate sheets did not specify a "tracker" mechanism, it is likely that the annual charges were embedded in the rates of the Commission-jurisdictional transmission owners.

15. In keeping with our findings in *New PJM*, we find that the Protestors have raised significant issues concerning the possibility of double recovery, based on SPP's Schedule 12 filing and the zonal rates included in SPP's OATT, that cannot be resolved based on the record now before us, and are more appropriately addressed in the hearing ordered below. Our preliminary analysis indicates that there is a question of material fact regarding the potential for double recovery based on the existing zonal rates and SPP's proposed Schedule 12. Therefore, we will accept SPP's Schedule 12 of its OATT, make it effective March 1, 2005, as requested, suspend it for a nominal period, and set it for hearing and settlement judge procedures. For good cause shown, the Commission will grant SPP's request for waiver of the 60-day notice requirement, making Schedule 12 effective on March 1, 2005.¹¹

¹¹ See *Central Hudson Gas & Electric Corporation*, 60 FERC ¶ 61,106 at 61,338-39, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

16. Although we are setting this proceeding for a trial-type evidentiary hearing, we are hopeful that the parties can negotiate a mutually acceptable agreement that will resolve the issues. Accordingly, to aid the parties in their efforts at settlement, we will hold the evidentiary hearing in abeyance and provide for a settlement judge to assist in arriving at a settlement.¹² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding. Otherwise, the Chief Judge will select a settlement judge.¹³

The Commission orders:

(A) SPP's Schedule 12 is hereby accepted to become effective on March 1, 2005 and suspended, subject to the outcome of Settlement and Hearing Proceedings.

(B) SPP's request for waiver of the Commission's 60-day prior notice requirement and service requirements set forth in 18 C.F.R. § 385.2010 (2004) are hereby granted, as discussed within the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 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 the issues discussed herein. As discussed in the body of the order, we will hold the hearing in abeyance to give the parties time to attempt to settle, as discussed below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603, the Chief Administrative Law Judge is hereby directed to appoint a settlement judge within 15 days of the date of this order. To the extent consistent with this order, the designated settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable.

(D) Within 45 days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement

¹² 18 C.F.R. § 385.603 (2004).

¹³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202)502-8500 within five days of this order. FERC's website contains a listing of Commission Judges and a summary of their background and experience. (www.ferc.gov click on Office of Administrative Law Judges)

discussions. Based on this report, the Chief Judge may 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 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement discussions fail, a presiding administrative law judge, to be selected by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding, to be held within approximately fifteen (15) days of the date of the presiding judge's selection, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such 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.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.