

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwestern Public Service Company

Docket No. ER06-320-000

ORDER CONDITIONALLY ACCEPTING AND SUSPENDING RATES AND  
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued February 10, 2006)

1. On December 13, 2005, Xcel Energy Services Inc. (Xcel), on behalf of its utility operating company affiliate Southwestern Public Service Company (Southwestern), filed under section 205 of the Federal Power Act (FPA)<sup>1</sup> a proposed power sale agreement (Power Agreement) providing for selling full requirements power and energy to Tri-County Electric Cooperative, Inc. (Tri-County). In this order, we accept the Power Agreement, suspend it for a nominal period, and set it for hearing.

**Background**

2. Southwestern provides generation, transmission, and distribution services in Texas, New Mexico, Oklahoma and Kansas. The majority of Southwestern's customers and facilities are in Texas and New Mexico. Southwestern has a substantial wholesale load, serving several full or partial requirements wholesale customers in Texas and New Mexico. It has Commission authorization to make wholesale sales at market-based rates, but has recently filed to give up that authorization within its control area.<sup>2</sup>

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<sup>1</sup> 16 U.S.C. § 824(d) (2000).

<sup>2</sup> In a June 2, 2005 Order on updated market power analysis regarding Southwestern's authority to sell power at market-based rates, in Docket No ER01-205, *et al.*, the Commission instituted an investigation pursuant to section 206 of the FPA (16 U.S.C. § 824(e) (2000)) to determine whether Southwestern may continue to charge market-based rates for power sales within its control area. *Xcel Energy Services, Inc.*,

(continued)

3. The Power Agreement provides for the sale of requirements power and energy from Southwestern to Tri-County to meet the entire capacity and energy requirements of the loads in Oklahoma and Kansas that are currently served by Southwestern and that would be transferred to Tri-County under an Asset Purchase Agreement.<sup>3</sup>

4. The Power Agreement specifies that Southwestern will provide full requirements service to Tri-County for a fifteen-year term to enable Tri-County to serve the retail loads acquired from Southwestern. The agreement allows Tri-County, upon three years' notice, but no earlier than January 1, 2010, to convert from full requirements service to partial requirements service.

5. According to Southwestern, the rates specified in the Power Agreement were negotiated with reference to Southwestern's costs. The Power Agreement provides for a fixed rate for two years based on the level of production revenues that Southwestern currently receives through its cost-based retail rates. Following this initial two-year period, the demand charge will escalate for the remaining term of the Power Agreement based on expected cost increases on the Southwestern system.<sup>4</sup>

6. Southwestern states that it expects revenues for the first two years of service to be the same as if the loads to be served under the Power Agreement were retained as retail customers of Southwestern. For this reason, Southwestern requests waiver of the billing estimate comparison required by section 35.13 of the Commission's regulations.<sup>5</sup>

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111 FERC ¶ 61,343 (2005). On August 1, 2005, as amended on September 30, 2005 and January 12, 2006, Southwestern filed in that proceeding to withdraw its request for continued authorization to sell power at market-based rates within its control area. Those filings are currently pending before the Commission.

<sup>3</sup>Southwestern also filed, under section 203 of the FPA, a request for authorization to transfer certain assets to Tri-County. This would allow Southwestern to transfer to Tri-County its obligation to serve retail loads in Oklahoma and Kansas. That request for section 203 authorization is pending before the Commission in Docket No. EC06-40-000 and will be addressed by a separate order.

<sup>4</sup>This Power Agreement provides that the demand charge per kW-month for full requirements service will escalate \$.90 per kW-month to \$5.20 per kW-month (from \$4.30 per kW-month) in the third year of the agreement and will increase an additional \$.10 per kW-month each year thereafter for the remainder of the agreement (unless Tri-County converts from full to partial requirements power service).

<sup>5</sup> 18 C.F.R. § 35.13 (2005).

To the extent necessary, Southwestern also requests waiver of any other requirements of section 35.13 concerning the filing of rate changes.

7. Southwestern proposes that the Power Agreement become effective upon the consummation of Southwestern's sale of jurisdictional facilities to Tri-County. Southwestern explains that the disposition of facilities is subject to approval by the Oklahoma, Kansas and Texas state regulatory commissions and that it therefore does not know when the transaction will be consummated. Therefore, it requests waiver of the Commission's requirement that rate filings be made no more than 120 days before the proposed effective date.<sup>6</sup>

### **Notice of Filing and Responsive Pleadings**

8. Notice of Southwestern's filing was published in the *Federal Register*, 71 Fed. Reg. 595 (2006), with comments, protests, and interventions due on or before January 13, 2006. A timely motion to intervene and protest was filed by Occidental Permian, Ltd. (Occidental). Golden Spread Electric Cooperative filed a motion to intervene out of time. On January 30, 2006, Southwestern filed a motion to oppose Occidental's intervention and to answer Occidental's protest.

9. Occidental states that it buys electricity from Southwestern and most of Southwestern's wholesale requirements customers. It says that an affiliate of Occidental currently buying power from Southwestern in Kansas and Oklahoma would be part of the load to be transferred from Southwestern to Tri-County in the asset transfer transaction.

10. Occidental argues that Southwestern has not provided any cost-of-service information to demonstrate that the charges under the Power Agreement are just and reasonable and that, therefore, the proposed power sale agreement should be rejected. It says that Southwestern's filing violates the Commission's rules for filing rate changes, section 35.13. Moreover, Occidental states that Southwestern has failed to file any evidence to support its claim that the expected revenues for the first two years of service would be the same as if Southwestern continued to serve the load rather than transferring it to Tri-County. Occidental charges that, without proper cost support, the Commission cannot determine whether the proposed rates are just and reasonable.

11. In addition, Occidental states that Southwestern has failed to demonstrate that the Power Agreement is not unduly discriminatory or preferential or that it does not provide improper opportunities for abuse by Southwestern and its affiliates. Occidental states

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<sup>6</sup> 18 C.F.R. § 35.3(b) (2005).

that the partial requirements service option allows Tri-County to use the power it receives to make third party off-system wholesale sales. This arrangement allows Tri-County to purchase more power than it needs for its retail load obligations and resell the excess in the wholesale market. Occidental argues that because the fuel adjustment clause under the Power Agreement is based on Southwestern's average system fuel costs, without regard to Southwestern's actual costs to furnish the service, the ability to use partial requirements service to make third party off-system wholesale sales would result in Southwestern's other cost-based power sales customers subsidizing Tri-County's sales into the wholesale market.

12. In short, Occidental argues, the Power Agreement raises a number of issues that need to be addressed prior to Commission approval. Therefore, it argues that if the Commission does not reject the Power Agreement, it should set it for hearing and further investigation.

13. Southwestern requests that Occidental's motion to intervene be denied because the issues raised in its motion are beyond the scope of this proceeding and are already being addressed in various other proceedings before the Commission.

## **Discussion**

### **Procedural Matters**

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motion to intervene serves to make the entity that filed it a party to the proceeding. Notwithstanding Southwestern's opposition to Occidental's intervention, we grant Occidental's intervention. We are satisfied that Occidental has expressed an interest in the outcome of this proceeding that no other party represents and that its participation is in the public interest. Pursuant to Rule 214(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d)(1) (2005), we also grant Golden Spread Electric Cooperative's untimely motion to intervene, given its interests in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Southwestern's answer and will, therefore, reject it.

### **Substantive Matters**

15. Our preliminary analysis indicates that Southwestern's filing has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Moreover, we find that the Power Agreement raises

issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we will accept it for filing, suspend it for a nominal period, subject to refund, and set it for hearing and settlement judge procedures. The Power Agreement will become effective upon the consummation of the asset transfer as requested, if the Commission approves that transfer.<sup>7</sup> We agree with Occidental that the Power Agreement requires additional support. Therefore, we will direct Southwestern to provide additional support for the proposed rates, terms and conditions of the Power Agreement, including cost-of-service analysis in conformance with the requirements of section 35.13 of the Commission's regulations, with its case-in-chief in accordance with the procedural schedule to be adopted by the presiding administrative law judge.

16. The Power Agreement is not designated in compliance with Order No. 614.<sup>8</sup> Therefore, Southwestern is directed to file a revised Power Agreement, in conformance with Order No. 614, within 30 days after the consummation of the asset transfer, if the Commission approves that transfer.

17. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle the dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed under Rule 603 of the Commission's Rules of Practice and Procedure.<sup>9</sup> 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.<sup>10</sup> 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

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<sup>7</sup> The Commission finds good cause to waive its prior notice requirement in the event that the Power Agreement becomes effective more than 120 days after filing.

<sup>8</sup> Designation of Electric Rate Schedule Sheets, Order No. 614, [65 Fed. Reg. 18,221](#) (Mar. 31, 2000), FERC Stats. & Regs. ¶ 31,096 (2000).

<sup>9</sup> 18 C.F.R. § 385.603 (2005).

<sup>10</sup> 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. The Commission's website contains a list of Commission judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Southwestern's Power Agreement is hereby accepted for filing and suspended for a nominal period, to become effective upon the consummation of the asset transfer, if the Commission approves that transfer, subject to refund, as discussed in the body of this order. Additionally, we grant its request for waiver of the Commission's requirement that rate filings be made no more than 120 days prior to the proposed effective date.<sup>11</sup>

(B) 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 by 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 Power Agreement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), 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.

(D) Within thirty (30) 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 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.

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<sup>11</sup> 18 C.F.R. § 35.3(b) (2005).

(E) 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 this proceeding in a hearing room of the Commission, 888 First Street, N.E., 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.

(F) Southwestern is hereby directed to submit a compliance filing within thirty (30) days of the consummation of the asset transfer, if the Commission approves that transfer, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.