

168 FERC ¶ 61,174
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Nebraska Public Power District

Docket Nos. EL18-194-001

v.

Tri-State Generation and Transmission Association,
Inc., Southwest Power Pool, Inc.

Southwest Power Pool, Inc.

ER16-204-000
(not
consolidated)

ORDER DENYING REHEARING AND DISMISSING PROTEST

(Issued September 19, 2019)

1. On January 18, 2019, in Docket No. EL18-194-001, Nebraska Public Power District (NPPD) requested rehearing of the Commission's December 20, 2018 order¹ denying NPPD's complaint against Tri-State Generation and Transmission Association, Inc. (Tri-State) and Southwest Power Pool, Inc. (SPP). In addition, on July 19, 2019, in Docket No. ER16-204-000, NPPD filed a protest of an annual update informational filing that Tri-State submitted on July 14, 2019 in accordance with its formula rate protocols. As discussed below, we deny rehearing and dismiss NPPD's protest.

I. Background

2. In 2015, SPP submitted a filing in Docket No. ER16-204-000 to revise its Open Access Transmission Tariff (Tariff) in order to incorporate Tri-State's transmission facilities into SPP transmission pricing zone 17 (SPP Zone 17) and to establish for Tri-State a formula rate, formula rate templates, and annual transmission revenue

¹ *Neb. Pub. Power Dist. v. Tri-State Generation and Transmission Ass'n, Inc. and Sw. Power Pool, Inc.*, 165 FERC ¶ 61,248 (2018) (Complaint Order).

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requirement (ATRR).² NPPD protested SPP's proposal to place Tri-State's transmission facilities in SPP Zone 17,³ but subsequently executed a joint offer of partial settlement with SPP, Tri-State, and others that resolved all issues related to Tri-State's formula rate template, formula rate protocols, and ATRR (Settlement Agreement). The Commission approved the Settlement Agreement in 2017.⁴

3. On August 21, 2018, in Docket No. EL18-194-000, NPPD filed a complaint requesting that the Commission direct Tri-State to remove from its ATRR the costs related to (1) two grandfathered agreements (the GFAs) and (2) certain facilities that, according to NPPD, were not physically connected to the SPP transmission system.⁵ In the complaint, NPPD also requested that the Commission direct Tri-State to include Schedule 1 point-to-point revenue as a credit to the Schedule 1 Revenue Requirements for Network Service.⁶

4. In the Complaint Order, the Commission denied the complaint. The Commission determined that the issues raised in the complaint were attacks on cost components that were included in and covered by the Settlement Agreement.⁷ Because NPPD had joined the Settlement Agreement as a settling party, the Commission found that the standard of review set forth in the Settlement Agreement was applicable to the disposition of NPPD's

² See *Sw. Power Pool, Inc.*, Opinion No. 562, 163 FERC ¶ 61,109 (2018), *reh'g denied*, Opinion No. 562-A, 166 FERC ¶ 61,019 (2019).

³ The issue of whether SPP's proposal to place Tri-State's transmission facilities and ATRR in SPP Zone 17 was just and reasonable was addressed in Opinion Nos. 562 and 562-A, where SPP's proposal was found just and reasonable. See *id.*

⁴ *Sw. Power Pool, Inc.*, 159 FERC ¶ 62,098 (2017) (Letter Order Approving Settlement Agreement).

⁵ Complaint Order, 165 FERC ¶ 61,248 at P 5.

⁶ *Id.*

⁷ See *id.* P 34 (finding that the costs of the GFAs were included in Appendix 1 of the Settlement Agreement in Worksheet O); *id.* P 35 (finding that the expenses for the facilities that make up Tri-State's ATRR were listed in exhibits filed during litigation in Docket No. ER16-204, and the facilities were deemed by the parties as qualified SPP facilities); *id.* P 36 (determining that the Settlement Agreement does not require the alleged revenue crediting).

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complaint.⁸ Consistent with the Settlement Agreement, the Commission thus determined that the “public interest” application of the just and reasonable standard applied here, and that NPPD failed to demonstrate that its proposed modifications to the cost components of Tri-State’s ATRR, which were included in the Settlement Agreement, satisfied this standard.

5. Despite finding that the public interest application of the just and reasonable standard governs the complaint, the Commission also determined that “even if NPPD was not required to satisfy the public interest application of the just and reasonable standard,”⁹ the Commission would have denied the complaint. With respect to the inclusion of the GFA costs in Tri-State’s ATRR, the Commission found that NPPD failed to show that Tri-State retained any of its preexisting entitlements under the GFAs, such that the capacity provided under those agreements was not fully available for service to eligible SPP Tariff customers on a day-to-day, nondiscriminatory basis, despite the fact that SPP had functional control of the GFA facilities.¹⁰ The Commission similarly concluded that NPPD failed to support its other arguments.¹¹

6. Subsequently, on July 19, 2019, NPPD filed a protest of Tri-State’s annual informational filing in Docket No. ER16-204-000, noting that the issue of whether the costs included in Tri-State’s ATRR at dispute in the annual update remain subject to Commission action on request for rehearing.

II. Request for Rehearing

7. NPPD argues that the Commission erred in finding that NPPD must demonstrate that its proposed modifications to Tri-State’s ATRR must satisfy the heightened *Mobile-Sierra* public interest application of the just and reasonable standard.¹² NPPD contends

⁸ *Id.* PP 33-34.

⁹ *Id.* P 38.

¹⁰ *Id.*

¹¹ *See id.* P 39 (“NPPD failed to support its arguments to rebut Tri-State’s statement that the facilities in question were found to meet the criteria for qualification as transmission facilities described in Section II of Attachment AI to the SPP Tariff”); *id.* P 40 (“We agree with Tri-State that SPP’s Tariff does not require that it credit the charges. NPPD did not show that the present circumstances require crediting of Schedule 1 point-to-point revenue.”).

¹² NPPD Request for Rehearing at 3.

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that the Commission's finding is contrary to Commission precedent that, according to NPPD, holds that formula rate protocols do not establish contractual rates but instead establish generally-applicable tariff provisions governing rate recovery for open access transmission service.¹³ As a result, NPPD asserts that its proposed changes to the Tri-State ATRR are instead subject to the "just and reasonable" standard.¹⁴

8. NPPD also claims that the Commission erred in finding that NPPD failed to support the allegations in its complaint on the merits.¹⁵ Specifically, NPPD contends that it demonstrated that: (1) NPPD and Tri-State have transferred the facilities used to provide service under the GFAs to SPP's functional control, and these facilities are "fully available" for service under the Tariff;¹⁶ (2) SPP cannot use the facilities not physically connected to the SPP Transmission System to provide services under the Tariff, so it is unjust and unreasonable to charge SPP customers the costs of facilities they cannot use;¹⁷ and (3) 100 percent of Tri-State's Schedule 1 Revenue Requirement was recovered from Network Customers and \$20,999 of Schedule 1 revenue was received from point-to-point customers, resulting in an over-recovery of \$20,999.¹⁸

III. Commission Determination

A. Procedural Matters

9. On February 8, 2019, Tri-State filed a motion for leave to answer and answer to NPPD's request for rehearing in Docket No. EL18-194-001. On February 13, 2019, NPPD filed an answer in opposition to Tri-State's motion for leave to answer and answer.

¹³ *Id.* at 5-6, 7-10 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,212, at PP 109-110 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,210, at P 53 (2014); *Midwest Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 36 (2013)).

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 3-4, 10-21.

¹⁶ *Id.* at 6, 10-13.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 7.

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Rule 713(d) of the Commission's Rules of Practice and Procedure prohibits answers to a request for rehearing.¹⁹ We therefore deny the motions and reject the answers.

10. On August 5, 2019, Tri-State filed a motion for leave to answer and answer to NPPD's protest in Docket No. ER16-204-000. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Tri-State's answer and will, therefore, reject it.

B. Substantive Matters

11. At the outset, we note that the Complaint Order referenced an outdated version of Article 8.1 of the Settlement Agreement.²⁰ Specifically, the text of Article 8.1 cited in the Complaint Order²¹ did not reflect clarifications proposed by Commission Trial Staff in comments that were agreed to by the settling parties and approved by the Commission.²² Accordingly, while the standard of review remains the same despite this clarification (i.e., the public interest application of the just and reasonable standard), we clarify that Article 8.1 provides as follows:

The standard of review for any change to this Partial Settlement Agreement proposed by a Settling Party to this proceeding shall be the "public interest" application of the just and reasonable standard 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), as clarified in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 554 U.S. 527 (2008) and *NRG Power Marketing v. Maine Pub. Utilities Commission*, 558 U.S. 165

¹⁹ 18 C.F.R. § 385.713(d)(1) (2019).

²⁰ Article 8.1 is the provision of the Settlement Agreement that sets forth the standard of review for changes to the Settlement Agreement, including for changes proposed by a "Settling Party."

²¹ Complaint Order, 165 FERC ¶ 61,248 at n.45.

²² See "Comments of Commission Trial Staff in Support of Settlement Agreement and Offer of Settlement," Docket No. ER16-204-002, at 10-11 (filed Mar. 13, 2017); *Sw. Power Pool, Inc.*, Certification of Uncontested Settlement, 158 FERC ¶ 63,009, at PP 19-22 (2017); Letter Order Approving Settlement Agreement, 159 FERC ¶ 62,098, at 2.

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(2010). The standard of review for any modifications to this Partial Settlement Agreement requested by a non-Settling Party or a non-party to this proceeding, or initiated by the Commission is the just and reasonable standard.²³

12. We deny rehearing. We affirm the Commission's determination that the public interest application of the just and reasonable standard—the heightened standard of review that applies to modifications to the Settlement Agreement proposed by a settling party—applies to NPPD's complaint. Specifically, each of the issues raised in the complaint are cost components of Tri-State's ATRR, to which NPPD agreed in the Settlement Agreement. Through its complaint, NPPD now seeks to modify those same components and thus modify the Settlement Agreement. Given this, we find that the Commission properly concluded that NPPD, as a settling party, must now satisfy the "public interest" application of the just and reasonable standard, consistent with the terms of the Settlement Agreement to which NPPD is a settling party. However, because we also continue to find that NPPD did not demonstrate that Tri-State's ATRR is unjust and unreasonable without adopting the changes proposed in the complaint (i.e., NPPD did not satisfy even the just and reasonable standard of review), we need not address this issue further, as the Commission appropriately dismissed the complaint in any event.²⁴

13. Specifically, we again find NPPD's arguments related to Tri-State's inclusion of the costs of the GFAs in Account No. 565 unpersuasive.²⁵ As the Commission observed in the Complaint Order, Commission policy permits a transmission provider to include costs in Account No. 565 in its ATRR if the costs are related to third-party facilities used by the transmission provider as grid facilities on a day-to-day basis to transmit power for customers under a tariff, or if these facilities effectively constitute part of the transmission provider's transmission system.²⁶ And the Commission has found that the inclusion of transmission payments under GFAs is appropriate if Tariff customers have

²³ See *Sw. Power Pool Inc.*, Certification of Uncontested Settlement, 158 FERC ¶ 63,009 at P 20.

²⁴ Complaint Order, 165 FERC ¶ 61,248 at P 38.

²⁵ NPPD Request for Rehearing at 4-5, 10-13.

²⁶ See Complaint Order, 165 FERC ¶ 61,248 at P 38 (citing *Ne. Utils. Serv. Co.*, 62 FERC ¶ 61,294, at 62,908 (1992); *New England Power Co.*, 65 FERC ¶ 61,153, at 61,755-56 (1993); *N.Y. State Elec & Gas Corp.*, Opinion No. 447, 92 FERC ¶ 61,169 (2000), *order on reh'g*, Opinion No. 447-A, 100 FERC ¶ 61,021 (2002), *reh'g denied*, Opinion No. 447-B, 101 FERC ¶ 61,037 (2002), *order on reh'g*, Opinion No. 447-C, 103 FERC ¶ 61,321 (2003)).

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access to GFA facilities on a day-to-day basis.²⁷ Thus, in the instant situation of a GFA between transmission-owning members of SPP, and where SPP has functional control of the transmission owners' facilities through the SPP membership agreement, the Commission properly determined that the inquiry is focused on whether the transmission capacity provided under the GFAs is fully available for service to eligible SPP Tariff customers on a day-to-day, nondiscriminatory basis.

14. Accordingly, as relevant to the inquiry here, if Tri-State retained any rights under the GFAs to transmit energy or nominate auction revenue rights above and beyond what it is entitled to for service that it takes directly from SPP under the Tariff, then the capacity provided under the GFAs would not be fully available for service to eligible SPP Tariff customers on a nondiscriminatory basis, and it would be unreasonable to include the costs of such GFAs in Tri-State's ATRR. As the Commission found in the Complaint Order, NPPD has *not* demonstrated that Tri-State retains any of its preexisting entitlements under the GFAs, such that the capacity provided under the GFAs is not fully available for service to eligible SPP tariff customers on a day-to-day, nondiscriminatory basis. NPPD appears to admit this.²⁸ Consequently, we find that the Commission did not err in finding that NPPD failed to justify this allegation.

15. NPPD also argues that Tri-State's ATRR includes the costs of transmission facilities that are not physically connected to the SPP transmission system, and that such facilities do not qualify as Transmission Facilities under SPP's Tariff.²⁹ In the Complaint Order, the Commission found that NPPD failed to support its arguments to rebut Tri-State's statement that the facilities in question were found to meet the criteria for qualification as Transmission Facilities described in Section II of Attachment AI to the SPP Tariff.³⁰ On rehearing, NPPD contends that the Commission's determination

²⁷ Opinion No. 447-A, 100 FERC ¶ 61,021 at PP 11, 17-18 (explaining that "the inclusion of the transmission payments [under the GFA] reflects the fact that all customers that pay the single NYSEG transmission rate under the NYISO tariff now have access to the [GFA] facilities on an equal and non-discriminatory basis").

²⁸ NPPD Request for Rehearing at 6 ("NPPD demonstrated that NPPD and Tri-State have transferred the facilities used to provide service under [the] GFAs . . . to SPP's functional control, and that these facilities are now 'fully available' for service under SPP's Tariff.").

²⁹ *Id.* at 14-19.

³⁰ Complaint Order, 165 FERC ¶ 61,248 at P 39; *see also id.* at 17, 29.

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“avoids the issue presented,”³¹ and NPPD requests that the Commission “confirm that facilities not physically connected to the SPP Transmission System cannot qualify as Transmission Facilities included in Tri-State’s ATRR.”³² We deny rehearing. NPPD has not demonstrated that the facilities in question do not meet the SPP Tariff criteria for qualification as Transmission Facilities. The definition of Transmission Facilities under SPP’s Tariff³³ provides six qualifying criteria, and facilities need only meet one criterion to satisfy the definition. Accordingly, NPPD’s argument in its Complaint and on rehearing that the facilities at issue fail to meet *one* of the qualifying criteria is facially insufficient to support NPPD’s allegation that the facilities at issue do not qualify as Transmission Facilities. In regards to NPPD’s assertion that SPP cannot use the facilities not physically connected to the transmission system to provide service to customers other than Tri-State, NPPD does not support this claim, nor does it reconcile this assertion with the facts that four of the six facilities at question are among the facilities provided under the Western Nebraska Joint Transmission Agreement,³⁴ one of the GFAs, and the other two facilities are listed as delivery points in NPPD’s Network Integration Transmission Service Agreement.³⁵

16. Additionally, on rehearing, as it did in its complaint, NPPD asserts that Tri-State’s failure to credit Schedule 1 point-to-point revenue results in an over-recovery. Although NPPD reiterates this assertion it fails to establish that Tri-State has also recovered these costs from Network Customers. As noted in the Complaint Order, while the Settlement Agreement expressly calls for point-to-point wheeling revenue to be credited to Tri-State’s gross revenue requirement for network service consistent with the agreed-upon formula rate, it does not require such revenue crediting of the Schedule 1 point-to-point revenue to the Schedule 1 revenue requirement.³⁶ Therefore, the Commission did not err

³¹ NPPD Request for Rehearing at 6.

³² *Id.* at 19.

³³ See SPP Tariff, Attachment AI, Section II (stating that a “Transmission Facility is a facility that is included as part of the Transmission System that meets *any*” of the listed criteria) (emphasis added).

³⁴ The Western Nebraska Joint Transmission Agreement between NPPD and Tri-State, dated June 8, 1989, provides for the joint use and planning of transmission facilities separately owned by NPPD and Tri-State in Western Nebraska. Complaint Order, 165 FERC ¶ 61,248 at P 8.

³⁵ Tri-State, Answer, Docket No. EL18-194-000, at 22-23 (filed Sept. 17, 2018).

³⁶ Complaint Order, 165 FERC ¶ 61,248 at PP 36, 40.

in concluding that NPPD has failed to show that the existing rate may be unjust and unreasonable.

17. Finally, we dismiss NPPD's protest of Tri-State's 2019 annual update as moot, given that we are denying NPPD's request for rehearing.

The Commission orders:

(A) NPPD's request for rehearing in Docket No. EL18-194-001 is hereby denied, as discussed in the body of this order.

(B) NPPD's protest in Docket No. ER16-204-000 is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.