

168 FERC ¶ 61,179
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwestern Electric Power Company

Docket Nos. ER18-1225-001

Minden, Louisiana

EL18-122-001

v.

Southwestern Electric Power Company

ORDER APPROVING CONTESTED SETTLEMENT AND DISMISSING REQUEST
FOR REHEARING

(Issued September 19, 2019)

1. On December 7, 2018, as amended on December 19, 2018,¹ pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,² Southwestern Electric Power Company (SWEPCO) submitted a settlement agreement (Settlement) between itself and the City of Minden, Louisiana (Minden) (together, Settling Parties) intended to resolve the matters set for hearing and settlement judge procedures in this proceeding. On January 29, 2019, the Settlement Judge reported the Settlement to the Commission as contested.³ In addition, on July 13, 2018, the City of Prescott, Arkansas (Prescott) filed a request for rehearing⁴ of the Commission's June 13, 2018 order in the above-captioned

¹ The December 7, 2018 filing was amended to include the settlement agreement signed by the parties, which had been filed in a different docket due to an error in an eTariff filing code.

² 18 C.F.R. § 385.602 (2019).

³ *Sw. Elec. Power Co.*, 166 FERC ¶ 63,010 (2019).

⁴ Although Prescott has styled its filing as a request for clarification, it is in effect a request for rehearing seeking a change in the Commission's determinations in the June Order. Accordingly, the Commission considers Prescott's filing to be a request for rehearing.

dockets.⁵ For the reasons discussed below, we approve the Settlement and dismiss the request for rehearing as moot.

I. Background

2. Minden is a municipality located in Webster Parish, Louisiana that operates a municipal utility system that is interconnected with Entergy Louisiana LLC (Entergy), a wholly owned subsidiary of Entergy Corporation and a transmission owning member of Midcontinent Independent System Operator, Inc. (MISO). Minden has received requirements service from SWEPCO since 1995 and, in 2008, it entered into a power supply agreement pursuant to which SWEPCO supplies Minden with all of Minden's capacity and energy requirements in excess of Minden's allocated hydroelectric capacity and energy supplied by the Southwestern Power Administration (Minden PSA). Minden is located geographically in the Entergy service area and prior to Entergy joining MISO, Minden reimbursed SWEPCO for both Southwest Power Pool, Inc. (SPP) transmission service and transmission service through Entergy.

3. On February 28, 2018, in Docket No. EL18-122-000, Minden filed a complaint under section 206 of the Federal Power Act (FPA)⁶ alleging, among other things, that certain provisions of the Minden PSA were unjust and unreasonable (Complaint). Minden noted that after Entergy's integration into MISO in 2013, American Electric Power Service Corporation (AEP)⁷ entered into a network integration transmission service agreement with MISO to wheel capacity and energy from SPP through MISO to Minden over a pseudo-tie. Minden alleged that after Entergy's integration into MISO, Minden's invoices from SWEPCO exhibited a marked increase in MISO congestion charges and that SWEPCO failed to effectively hedge the MISO congestion charges contrary to the requirements of the Minden PSA.⁸

4. On March 29, 2018, in Docket No. ER18-1225-000, SWEPCO submitted for filing proposed revisions to the depreciation rates included as inputs to the formula rate pursuant to which the charges under the Minden PSA are calculated (Rate Filing). Minden protested that filing and in an order issued on May 30, 2018, the Commission

⁵ See *Minden, La. v. Sw. Elec. Power Co.*, 163 FERC ¶ 61,194 (2018) (June Order).

⁶ 16 U.S.C. § 824e (2018).

⁷ SWEPCO is a wholly-owned subsidiary of AEP.

⁸ June Order, 163 FERC ¶ 61,194 at P 6.

accepted and suspended the proposed revisions to the Minden PSA, subject to refund, and established hearing and settlement judge procedures.⁹

5. In the June Order, the Commission set the Complaint for hearing, established hearing and settlement judge procedures, consolidated that proceeding with the ongoing hearing and settlement judge proceedings in the Rate Filing proceeding, and established a refund effective date of February 28, 2018.¹⁰ Settlement conferences were held on June 14, 2018, August 22, 2018, and September 20, 2018, resulting in the instant Settlement and a Restated Power Supply Agreement (Revised Minden PSA).

6. The City of Prescott, Arkansas (Prescott) filed comments and supplemental comments opposing the Settlement on December 19, 2018 and January 8, 2019, respectively. Trial Staff filed initial comments expressing no opposition to the Settlement on January 8, 2019. On January 18, 2019, Trial Staff and the Settling Parties filed reply comments. On January 29, 2019, the Settlement Judge issued his Report of Contested Settlement stating that, consistent with Commission precedent, the Settlement is contested by virtue of Prescott's comments opposing the Settlement and that the matters at issue for consideration by the Commission are whether Prescott has raised genuine issues of material fact that preclude approval of the Settlement or warrant severance of the issues regarding the Prescott PSA.¹¹

II. Settlement

7. Article One contains the procedural history. Article Two sets forth definitions. The terms of the Settlement are set forth in Articles Three through Five. Article Three addresses the Revised Minden PSA, a moratorium, and a settlement payment. Section 3.1 provides that the Settling Parties agree to transact under the Revised Minden PSA effective January 1, 2018 and discusses the procedure for recalculating monetary differences between the Minden PSA and the Revised Minden PSA. Section 3.2 provides that the Revised Minden PSA includes modifications agreed to by SWEPCO and Minden, as reflected in clean and redlined versions included in Attachment A to the Settlement. Section 3.3 provides that neither SWEPCO nor Minden will initiate before December 31, 2021, in a forum other than the Commission, a proceeding that challenges or seeks a change to the rates, terms or conditions of the Revised Minden PSA. Section 3.4 states that SWEPCO will provide Minden a one-time settlement payment of

⁹ *Sw. Elec. Power Co.*, 163 FERC ¶ 61,155, at P 73 (2018).

¹⁰ June Order, 163 FERC ¶ 61,194 at PP 33-34.

¹¹ *Sw. Elec. Power Co.*, 166 FERC ¶ 63,010.

\$400,000, which will be made no later than thirty days after the Settlement's effective date.

8. Article Four addresses depreciation rates. Article Five addresses matters relating to transmission and Regional Transmission Operator (RTO) matters, formula rate charges, transmission charges, and limitations on costs. Section 5.1 addresses transmission and RTO matters. Section 5.1.1 provides that SWEPCO and Minden will enter into the Transmission Agency Agreement included as Attachment B to the Settlement, which affirms Minden's appointment of SWEPCO as Minden's agent to arrange for service on the RTO transmission systems, as provided for in section 3.2 of the Revised Minden PSA. Section 5.1.2 provides that SWEPCO will make reasonable efforts to assist Minden with being included on the appropriate RTO notification lists. Section 5.1.3 states that, if mutually agreed upon, SWEPCO and Minden will enter into a separate letter agreement similar to the Transmission Agency Agreement that will provide for SWEPCO to pass through MISO market charges to Minden based on the average of such charges incurred by SWEPCO. Section 5.2 provides that SWEPCO will continue its practice of providing Minden each year with the populated formula rate work papers and supporting documentation and will respond to Minden's request for additional data. Section 5.3 provides that SWEPCO will provide supporting files with the monthly invoices that SWEPCO prepares and delivers in accordance with section 4.9 of the Revised Minden PSA that will provide details concerning the MISO transmission and market charges that are set out in such monthly invoices. Article Six addresses the effective date and reservations and states that, except for Article Eight, the Settlement shall be effective on the date upon which the Commission issues a final order approving the Settlement and that Article Eight shall go into effect upon execution of the settlement agreement by the Settling Parties.

9. Article Seven addresses the standard of review. Section 7.1 provides that:

[t]he public interest standard of review set forth in *United Gas Pipe Line v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527 (2008) shall govern the Commission's consideration of any modification of this [Settlement] that is proposed by a Settling Party unilaterally or with the concurrence of less than all Settling Parties. The "ordinary" just and reasonable standard of review, as discussed in *Morgan Stanley*, 554 U.S. 527, 535 (2008), shall govern the Commission's consideration of any modification to this [Settlement] that is proposed by the Commission itself acting *sua sponte*. Nothing in this Settlement Agreement affects the standard of review for changes to the [Minden PSA] and/or the Formula Rate, as provided in

Section 15.03 of the PSA or the [Revised Minden PSA] and/or the Revised Formula Rate, as provided in Section 15.3 of the [Revised Minden PSA].

10. Article Eight addresses other miscellaneous matters.

III. Comments

A. Prescott

11. Prescott states that the language in certain provisions of the Minden PSA is identical to language used in Prescott's own power supply agreement with SWEPCO (Prescott PSA), and asserts that, among the issues of material fact raised in the Complaint, is the issue of whether SWEPCO violated the agency and implementation terms of the Minden PSA that are identical to those in the Prescott PSA. Prescott argues that, in its capacity as Prescott's agent, SWEPCO has engaged in the same behavior Minden described in its complaint alleged to be in violation of the contract terms.¹²

12. Specifically, Prescott asserts that it is subject to the same contract provisions alleged by Minden to be unjust, unreasonable, and unduly discriminatory, including those addressing excess accumulated deferred income tax, depreciation study frequency and methodology, depreciation expense on contra-Allowance for Funds Used During Construction, unfunded reserves, and the prohibition on a right to file a price squeeze claim. Prescott argues that because it has been excluded from any meaningful participation in the proceeding, any resolution to the questions of material fact posed regarding whether SWEPCO's actions comport with the requirements of the contract language cannot be resolved with finality. Prescott believes that the result of such an outcome would be SWEPCO's continued performance, in its dealings with Prescott, of the actions described in the complaint alleged to be in violation of the contract language.¹³

13. In addition, Prescott argues that the Settlement ignores Commission jurisprudence regarding the uniform treatment of pseudo-tied entities and that the Settlement's piecemeal approach to pseudo-tie issues is inconsistent with other related proceedings.¹⁴

¹² Prescott Initial Comments at 4 (citing Complaint at 32; Ex. A, Attachment HHT-1 at 2).

¹³ *Id.* at 5 (citing Ex. A at 1-2).

¹⁴ *Id.* at 6 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,190 (2018); *Sw. Power Pool, Inc.*, 148 FERC ¶ 61,145 (2014)).

Prescott also argues that failure to address the issues for both Minden and Prescott, in light of identical contract terms and behavior giving rise to those issues, creates an inconsistency in the interpretation of those terms and disparate treatment of two similarly situated customers that may constitute or result in discrimination under section 205(b) of the FPA.¹⁵

14. Finally, Prescott argues that forcing it to re-file its claims in a separate docket is inefficient both for the parties and for the Commission. Alternatively, Prescott requests that the Commission sever the contested issues related to Prescott under Rule 602(h)(1)(iii) of the Commission's Rules of Practice and Procedure as severing these issues would be more efficient than a new complaint to be litigated *ab ovo*.¹⁶

15. In its supplemental comments, Prescott states that it is seeking an alternative remedy of severance of the issues related to Prescott, and in the event that request is granted, Prescott is including additional information required for the contents of complaints under Rule 206 of the Commission's Rules of Practice and Procedure.¹⁷

B. Trial Staff and Settling Parties

16. Trial Staff states that, although it would not support the return on equity established by the Settlement on a stand-alone basis, it does not oppose the Settlement because of its material tradeoffs related to non- return on equity provisions and its narrow applicability to Minden.¹⁸

17. Trial Staff asserts that the Commission should approve the Settlement under the third *Trailblazer* approach. Trial Staff states that in the June Order the Commission explained that the only issues set for hearing and settlement judge procedures involve the Minden PSA.¹⁹ Trial Staff states that although Prescott implies that the Settlement may affect the Prescott PSA, the Commission has already definitively held otherwise. Trial Staff asserts that Prescott is concerned by the fact that the Settlement states that it will

¹⁵ *Id.* at 6-7.

¹⁶ *Id.* at 7.

¹⁷ Prescott Supplemental Comments at 2.

¹⁸ Trial Staff Initial Comments at 1-2, 5.

¹⁹ Trial Staff Reply Comments at 3-4 (citing *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998) (*Trailblazer*), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999)).

“resolve with finality the matters at issue in these proceedings.”²⁰ However, Trial Staff argues that the quoted language only means that, if the Commission approves the Settlement, then the complaint proceeding initiated by Minden will be resolved and approval of the Settlement will in no way affect Prescott’s ability to file a section 206 complaint against SWEPCO regarding the Prescott PSA.²¹ Trial Staff concludes that Prescott’s interest in the instant proceeding is sufficiently attenuated, and Prescott must file its own complaint if it believes that modifications to the Prescott PSA with SWEPCO are necessary.²²

18. Trial Staff states that the first *Trailblazer* approach does not apply because there are no contested genuine issues of material fact, nor does the fourth approach apply because Prescott has no separate issues to litigate in the instant proceeding.²³ Further, Trial Staff states that although it does not believe the Settlement as a whole meets the higher just and reasonable standard required by the second *Trailblazer* prong, it does not oppose finding that the Settlement meets the fair and reasonable standard.²⁴

19. In addition, Trial Staff states that the Commission must make an independent finding that the Settlement benefits the directly affected settling parties, which Trial Staff argues that the Settlement does as it benefits both SWEPCO and Minden through a consensual resolution of the dispute over the Minden PSA, thereby saving the parties from expending substantial resources in litigation.

20. Settling Parties note that Prescott intervened in this proceeding and requested that it receive any relief granted to Minden. They state that the Commission, while granting Prescott’s motion to intervene, denied Prescott’s request to automatically be granted the same relief as Minden.²⁵ Settling Parties assert that any facts relating to the Prescott PSA are not germane to the consideration of the Settlement.²⁶ They maintain that Prescott fails to raise issues that are material to consideration of the Settlement. Settling Parties

²⁰ *Id.* at 3 (citing Prescott Initial Comments at 5).

²¹ *Id.* at 3-4.

²² *Id.* at 4.

²³ *Id.*

²⁴ *Id.*

²⁵ SWEPCO and Minden Reply Comments at 2-3.

²⁶ *Id.* at 5.

assert that because Prescott is not a party to the Minden PSA and because the Prescott PSA will not be affected by this proceeding, Prescott will not be “immediately and irreparably affected” by this proceeding, and therefore, the Commission should determine that the Settlement is uncontested.²⁷

21. Settling Parties also contend that if it is determined that the Settlement is contested, it may be approved under the first three *Trailblazer* approaches. They state that the first *Trailblazer* approach is appropriate where the issues are primarily policy, and that here, Prescott’s comments raise only the policy question of whether it is appropriate to approve the Settlement without addressing concerns raised by Prescott. Settling Parties assert that as the Commission already has ruled that any relief granted to Minden will not automatically be extended to the Prescott PSA, the Commission can disregard Prescott’s comments and approve the Minden settlement on the merits.²⁸

22. Settling Parties argue that the Commission may approve the Settlement under the second *Trailblazer* approach by determining from the record that the Settlement is just and reasonable as to the Minden PSA. They argue that approval of the Settlement will leave Prescott in no worse position because the Prescott PSA would not have been at issue in any litigation in this proceeding. Concerning the third *Trailblazer* approach, Settling Parties argue that the Commission could find that Prescott’s interest is attenuated, because although the Commission granted Prescott party status, it expressly ruled that the Prescott PSA was not at issue in the case.

23. Concerning the fourth *Trailblazer* approach, Settling Parties argue that severing the Prescott issues for litigation is neither applicable nor appropriate. They contend that although the Commission has explained that this approach permits the contested party “to litigate the issues set for hearing,” issues concerning the Prescott PSA were not set for hearing in this case.²⁹ They add that in the June Order the Commission disposed of any contention that because Prescott was granted party status it should be able to force litigation through opposition to the Settlement.³⁰

²⁷ *Id.* at 6-7 (quoting *El Paso Nat. Gas Co.*, 25 FERC ¶ 61,292, at 61,673 (1983)).

²⁸ *Id.* at 9.

²⁹ *Id.* at 10 (citing *Great Lakes Gas Transmission Ltd. P’ship*, 153 FERC ¶ 61,053, at P 61 (2015)).

³⁰ *Id.*

IV. Discussion

A. Prescott's Rehearing Request

24. Prescott states that since the issuance of the June Order, SWEPCO has communicated substantively only with Minden and has established a proposed procedural schedule with Minden that excluded Prescott. Prescott asks that the Commission determine that it “is within the discretion of the Settlement Judge and parties to determine the extent to which SWEPCO conducts negotiations privately with a party.”³¹ Prescott further requests that the Commission require that Prescott should be included in settlement negotiations between Minden and SWEPCO until the Settlement Judge determines otherwise.³² In addition, Prescott requests that the Commission clarify that if Prescott and SWEPCO are unable to reach an agreement regarding the Prescott PSA in these settlement proceedings, Prescott will not be barred from filing a separate complaint under section 206 of the FPA or “pursuing relief in other fora” in the future, “whether through the doctrine of ‘equitable tolling’ or through application of Arkansas law.”³³

25. On July 20, 2018, on behalf of its affiliate, SWEPCO, AEP filed an answer to Prescott’s July 13, 2018 filing. As discussed above, the Commission construes Prescott’s filing as a request for rehearing. Rule 713(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2019), prohibits an answer to a request for rehearing. Accordingly, we reject the answer.

26. We dismiss Prescott’s rehearing request of the June Order as moot. Prescott’s request that the Commission require that it be included in settlement negotiations between Minden and SWEPCO is moot because the settlement negotiations on the Minden PSA have concluded. Further, we clarify that Prescott is not barred from filing a separate complaint under section 206 of the FPA relating to the Prescott PSA; in fact, Prescott has filed a complaint in Docket No. EL19-60-000 seeking relief regarding the Prescott PSA.³⁴

³¹ Prescott Request for Rehearing at 1.

³² *Id.*

³³ *Id.* at 2, 4.

³⁴ See Complaint of City of Prescott, April 5, 2019, Docket No. EL19-60-000. The Commission issued an order on the complaint. See *City of Prescott, Ark. v. Sw. Elec. Power Co.*, 168 FERC ¶ 61,177 (2019).

B. The Settlement

27. Under *Trailblazer*, the Commission may approve a contested settlement under one or more of the following four approaches: (1) the Commission may make a decision on the merits of each contested issue; (2) the Commission may determine that the settlement provides an overall just and reasonable result; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated; or (4) the Commission may determine that the contesting parties can be severed.³⁵

28. Prescott opposes the Settlement on the basis that language in certain provisions of the Minden PSA is identical to language in the Prescott PSA and Prescott asserts therefore that whether SWEPCO violated the agency and implementation terms of the Minden PSA raises issues of material fact that prevent the Commission from approving the Settlement. We disagree. We find Prescott's interests to be too attenuated and that the benefits of the Settlement outweigh the nature of the objections, and we approve the Settlement under the third *Trailblazer* approach.

29. As noted above, in the June Order, the Commission granted Prescott's motion to intervene in Minden's complaint proceeding but denied Prescott's request to extend to Prescott any relief with regard to the Minden PSA that was granted to Minden in this proceeding. As stated in the June Order, only the Minden PSA, not the Prescott PSA, is at issue in this proceeding.³⁶ Furthermore, approval of the Settlement will resolve issues set for hearing in the consolidated proceeding concerning the complaint initiated by Minden and SWEPCO's proposed revisions to the Minden PSA but will have no bearing on Prescott's ability to seek any relief it believes is necessary concerning issues it has with the Prescott PSA. As noted, Prescott has in fact filed a complaint against SWEPCO in which it raises the same issues as it does here; thus Prescott has access to another forum in which to pursue relief. Additionally, the bargained-for benefits of the Settlement include a lump-sum payment to Minden, rate reductions in the Revised Minden PSA, and a Transmission Agency Agreement.³⁷ We find that the benefits of the Settlement for the directly affected Settling Parties are considerable and outweigh the objections of the contesting party, Prescott.

³⁵ *Trailblazer*, 85 FERC ¶ 61,345 at 62,342-45.

³⁶ June Order 163 FERC ¶ 61,194 at n.63.

³⁷ The Transmission Agency Agreement confirms the appointment of SWEPCO as Minden's agent to arrange for Network Integration Transmission Service and Ancillary Services and to manage congestion rights and costs on behalf of Minden, as contemplated by the parties in the terms of the Revised Minden PSA.

30. Accordingly, for the reasons discussed above, we find that the Settlement resolves all issues in dispute in the above-captioned proceedings and is hereby approved. The tariff records filed by SWEPCO in eTariff are accepted as filed, effective January 1, 2018. This order terminates Docket Nos. ER18-1225-000, ER18-1225-001, EL18-122-000, and EL18-122-001.

The Commission orders:

(A) The Settlement is hereby approved, as discussed in the body of this order.

(B) The tariff records filed by SWEPCO are hereby accepted as filed, as discussed in the body of this order, effective January 1, 2018.

(C) Prescott's rehearing request is hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.