

169 FERC ¶ 61,024
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Westar Energy, Inc.

Docket No. ER18-1418-001

ORDER ON CONTESTED SETTLEMENT

(Issued October 17, 2019)

1. On July 3, 2019, on behalf of the Settling Parties,¹ pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,² Westar submitted an offer of settlement (Settlement) in the matter set for hearing and settlement judge procedures in this proceeding. In this order, we approve the Settlement.

I. Procedural History and Settlement

2. On April 23, 2018, Westar filed, pursuant to section 205 of the Federal Power Act (FPA),³ revisions to its Open Access Transmission Tariff (Westar Tariff) to update the loss factors contained in the Westar Tariff. Westar proposed to update the loss factors contained in the Westar Tariff based on a loss study report that was prepared by Westar and that utilizes 2016 data and load flow models supplied by Southwest Power Pool, Inc. (SPP). KEPCo, KMEA, KPP, and Nemaha-Marshall Electric Cooperative Association, Inc. (Nemaha-Marshall) intervened and filed comments or protests regarding the proposed revisions.

¹ The Settling Parties are Westar Energy, Inc. (Westar), Kansas Electric Power Cooperative, Inc. (KEPCo), Kansas Power Pool (KPP), and Kansas Municipal Energy Agency (KMEA).

² 18 C.F.R. § 385.602 (2019).

³ 16 U.S.C. § 824d (2018).

3. On June 26, 2018, the Commission accepted the proposed revisions, effective June 28, 2018, subject to refund, and established hearing and settlement judge procedures.⁴ After multiple settlement conferences, Westar submitted the Settlement on July 3, 2019.

4. Articles I and II of the Settlement set forth the background and scope of the Settlement. Article III provides the terms of the Settlement, including the loss factors, a three year moratorium with respect to the loss factors, and certain conditions on Westar's next filing to modify the loss factors contained in the Settlement. Article IV establishes rights and reservations and states that the standard of review the Commission shall apply when acting on proposed modifications to the Settlement shall be the just and reasonable standard of review.

5. Nemaha-Marshall filed initial comments opposing the Settlement and Commission Trial Staff (Trial Staff) filed initial comments supporting the Settlement. Nemaha-Marshall, Westar, Commission Trial Staff, and Kansas Parties⁵ filed reply comments. On August 8, 2019, the Settlement Judge issued his report stating that the Settlement is contested by virtue of the initial comments opposing the Settlement filed by Nemaha-Marshall.⁶

II. Responsive Filings

A. Comments

6. Trial Staff states that the Settlement provides for a reduction in the transmission and distribution loss factors from those proposed by Westar in its initial filing in this proceeding and ensures that the loss factors will remain in place for three years. Trial Staff states that, based on its review of the information provided during the settlement process, it believes that the Settlement's loss factors are reasonable.⁷

7. Nemaha-Marshall argues that the Settlement is unjust and unreasonable because it removes all references to "composite loss factors" from the relevant section of the Westar Tariff. Nemaha-Marshall states that the composite loss factors are relied on in several other agreements and are necessary to protect against customers paying Westar for

⁴ *Westar Energy, Inc.*, 163 FERC ¶ 61,218 (2018).

⁵ Kansas Parties are KEPCo, KPP, and KMEA.

⁶ *Westar Energy, Inc.*, 168 FERC ¶ 63,011 (2019).

⁷ Trial Staff Initial Comments at 7.

transmission losses that Westar does not incur and that are already being recovered under other tariffs on file with the Commission.⁸ Nemaha-Marshall explains that section 28.5 of the Westar Tariff addresses real power losses for network integration transmission service over Westar's facilities placed under SPP's control.⁹ Nemaha-Marshall states that these real power losses are provided as composite loss factors, which include both transmission and distribution loss factors, and distribution loss factors which are used for charges that relate only to distribution facilities.¹⁰ Nemaha-Marshall states that the loss factors set forth in the Settlement create an unreasonable impact on network integration transmission service agreements (NITSA) and generation formula rate agreements.¹¹

8. Nemaha-Marshall states that Westar's transmission facilities are under the control of SPP and transmission service over those facilities is provided under SPP's Open Access Transmission Tariff (SPP Tariff). Therefore, Nemaha-Marshall states that Westar does not incur any separate, uncompensated transmission losses.¹² Accordingly, Nemaha-Marshall states that the Commission has required that "[t]he composite loss percentages in [s]ection 28.5 shall exclude transmission losses."¹³ Additionally, Nemaha-Marshall notes that Westar's NITSA's require transmission losses to be excluded from the composite loss factors in section 28.5.¹⁴

9. Nemaha-Marshall states that the Settlement goes beyond the initial filing's scope of updating the specific loss factors and creates confusion and uncertainty regarding Westar's ability to charge for transmission losses that it does not incur. Nemaha-Marshall alleges that the initial filing did not propose any changes to the structure of the composite loss factor or distribution loss factors under the Westar Tariff, and states that the Settlement removes all references to "composite loss factor" from section 28.5 without explanation.¹⁵ Nemaha-Marshall states that the removal of the term "composite

⁸ Nemaha-Marshall Initial Comments at 1.

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 4.

¹² *Id.*

¹³ *Id.* at 6 (quoting *Sw. Power Pool, Inc.*, 136 FERC ¶ 61,223, at P 13 (2011)).

¹⁴ *Id.*

¹⁵ *Id.* at 7.

loss factor” will be confusing because the NITSA’s will reference a term in the Westar Tariff that no longer exists. Nemaha-Marshall further alleges that removing the term removes protection for transmission customers by making it easier for Westar to include transmission losses in section 28.5. According to Nemaha-Marshall, this in turn will cause those loss factors to be used in generator formula rate agreements and subject network transmission service customers to double payment of transmission losses, which the Commission sought to prevent.¹⁶

10. Nemaha-Marshall states that none of the four approaches the Commission set forth in *Trailblazer Pipeline Company*¹⁷ for addressing contested settlements are applicable here.¹⁸ Nemaha-Marshall explains that the Commission cannot determine that the Settlement is just and reasonable under the first *Trailblazer* approach because there is no record evidence regarding the double collection of transmission losses and there is a disputed issue of material fact regarding whether Westar incurs transmission losses that are not already recovered under the SPP Tariff.¹⁹ Nemaha-Marshall states that the second *Trailblazer* approach is not applicable because the issue is not the loss factors themselves, but the non-rate composite loss factor language.²⁰ Nemaha-Marshall explains that there is no basis for the Commission to approve the Settlement under the third *Trailblazer* approach because Nemaha-Marshall is similarly situated to the Settling Parties and there is no evidence to show that the benefits of the Settlement outweigh the costs of double recovery of transmission losses under both the Westar Tariff and SPP Tariff.²¹ Finally, Nemaha-Marshall asserts that the Commission cannot sever the issues and approve the

¹⁶ *Id.* at 8-9.

¹⁷ 85 FERC ¶ 61,345 (1998) (*Trailblazer*), *order on reh’g*, 87 FERC ¶ 61,110 (1999).

¹⁸ Nemaha-Marshall Initial Comments at 10. The four *Trailblazer* approaches laid are: (1) the Commission renders a binding merits decision on each contested issue, (2) the Commission approves the settlement based on a finding that the overall settlement as a package is just and reasonable, (3) the Commission determines that the benefits of the settlement outweigh the nature of the objections and the interests of the contesting party are too attenuated, and (4) the Commission approves the settlement as uncontested for the consenting parties, and severs the contesting parties to allow them to litigate the issues raised. *Trailblazer*, 85 FERC ¶ 61,345 at 62,342-345.

¹⁹ Nemaha-Marshall Initial Comments at 10.

²⁰ *Id.*

²¹ *Id.* at 11.

Settlement under the fourth *Trailblazer* approach because the issue is applicable to all NITSA's and generation formula rate agreements.²²

11. Nemaha-Marshall states that the Commission should remedy Westar's unreasonable and impermissible inclusion of transmission losses in its composite loss factors by directing Westar to (1) reinsert references to "composite loss factors" in section 28.5 of the Westar Tariff, and (2) remove transmission losses from the "composite loss factors" in section 28.5 of the Westar Tariff.²³ Nemaha-Marshall states that at the very least the Commission should require the restoration of the "composite loss factors" to section 28.5 of the Westar Tariff.²⁴

12. In the event that the Commission accepts the Settlement, Nemaha-Marshall requests that the Commission do so on the condition that all references to "composite loss factor" be reinserted into section 28.5 of the Westar Tariff and that the Commission require that any changes to section 28.5 of the Westar Tariff do not create adverse and unreasonable effects on other agreements that rely on the loss factors.²⁵ Finally, Nemaha-Marshall requests that, if the Commission approves the Settlement, the Commission clarify that the approval of the Settlement is not a determination that the inclusion of the loss factors is just and reasonable as opposed to the specific loss factors which are set forth in the settlement. Nemaha-Marshall further requests that the Commission clarify that approval of the Settlement is not a determination that any other aspect of the loss factors is just and reasonable and not unduly discriminatory or preferential.²⁶

B. Reply Comments

13. Westar states that Nemaha-Marshall fails to present any reasonable basis upon which the Commission can rely on to reject, condition, or modify the Settlement.²⁷ Westar states that the Commission has explained that "[g]enuine issues of material fact are not created by mere conjecture, or allegations ... but, rather, some affirmative

²² *Id.*

²³ *Id.* at 12.

²⁴ *Id.* at 13.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Westar Reply Comments at 1.

demonstration of fact material to the decision that creates a dispute regarding the material fact.”²⁸ Westar argues that Nemaha-Marshall has provided no such demonstration. Westar states that Nemaha-Marshall’s comments only challenge removal of the concept of composite loss factors and do not address that the substantive issue that removing composite loss factors from section 28.5 of the Westar Tariff will provide customers greater clarity.²⁹

14. Westar asserts that it is clear that the reference to composite loss factors in the NITSA was added to ensure that Westar collects only distribution losses for delivery losses on its system under the NITSA.³⁰ Westar states that the clarifying language was necessary because section 28.5 of the Westar Tariff identified composite loss factors in addition to a transmission loss factor and distribution loss factor.³¹ Westar asserts that removal of the composite loss factor table and reference to the term “composite loss factor” from section 28.5 of the Westar Tariff will reinforce the protection the Commission sought in directing revisions to the NITSA as section 28.5 now includes Westar’s transmission loss factor and has a table separately identifying Westar’s distribution loss factors.³² Westar notes that, as Nemaha-Marshall’s expert agrees, the ultimate result of the calculation of loss factors “is the same.”³³ Westar asserts that the only difference is that the Settlement provides greater transparency into the loss factor calculations.

15. Westar admits that the Settlement will render the NITSA language moot—but not meaningless—as Westar will no longer calculate composite loss factors, nor will section 28.5 of the Westar Tariff contain a table identifying “composite loss factors.”³⁴ However, Westar states that the reason for including the additional language in the NITSA no longer exists and the language is therefore no longer required to ensure

²⁸ *Id.* at 2-3 (quoting *Tenneco Oil Co.*, 25 FERC ¶ 61,234, at 61,605 (1983)).

²⁹ *Id.* at 3.

³⁰ *Id.* at 4.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 5 (quoting Nemaha-Marshall Initial Comments, Affidavit of Riley Rhorer at ¶ 10, n2).

³⁴ *Id.*

Westar will recover the appropriate distribution losses under the NITSAs.³⁵ Westar asserts that to the extent any language is required to be revised in the NITSAs, the revisions can be made in another proceeding.³⁶ Westar states that the Settlement will not cause Westar to recover transmission losses in a manner any different than it did before the Settlement.³⁷

16. Westar states that the Commission may approve the Settlement under the first two *Trailblazer* approaches. First, Westar states that the Commission may approve the Settlement because Nemaha-Marshall has failed to raise any issue of material fact and has not demonstrated that additional record evidence is required in this proceeding.³⁸ Second, Westar states that the Commission may approve the Settlement because the Settlement provides substantial benefits to Westar customers and Nemaha-Marshall will receive the benefits of the Settlement, which outweigh the speculative concerns it has raised.³⁹

17. In their reply comments, Kansas Parties state that Nemaha-Marshall's comments are not relevant to the sole subject of this docket – the justness and reasonableness of the Westar transmission and distribution loss factors to be included in the SPP Tariff.⁴⁰ Kansas Parties state that it appears that Nemaha-Marshall is concerned that Westar may charge for losses that it does not incur and it is not permitted to recover. Kansas Parties state that Nemaha-Marshall has a legal right to redress that perceived wrong but those allegations have no bearing on the justness and reasonableness of the Settlement.⁴¹

18. Trial Staff states that the issues raised by Nemaha-Marshall lack merit. Trial Staff states that Nemaha-Marshall acknowledges that the Settlement replaces the composite loss factors with specific transmission and distribution loss factors and Nemaha-Marshall does not explain why this separation of the composite loss factors makes it easier for

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 6.

³⁸ *Id.* at 7.

³⁹ *Id.* at 8.

⁴⁰ Kansas Parties Reply Comments at 1-2.

⁴¹ *Id.* at 2.

Westar to include transmission losses in section 28.5 of the Westar Tariff.⁴² Trial Staff notes that the designation of specific loss factors should instead provide more transparency and less opportunity to hide extraneous values in the loss factors. Furthermore, Trial Staff notes that Nemaha-Marshall does not contend that any of the loss factors agreed to are wrong, inaccurate or not just and reasonable.⁴³

19. Trial Staff states that Nemaha-Marshall's contention that the Settlement should be rejected because it removes language that the Commission directed to be inserted into the Westar Tariff is unpersuasive. Trial Staff states that the Commission included such language to protect customers against paying for transmission losses not incurred by Westar. Trial Staff asserts that the specification of loss factors permits Nemaha-Marshall to protect its interest against paying for losses that are collected under rate schedules.⁴⁴ In addition, Trial Staff asserts that Nemaha-Marshall's contention that it is being charged for losses Westar does not incur is beyond the scope of this proceeding and is not among the issues the Commission set for hearing and settlement procedures. Trial Staff explains that Westar did not propose any revisions relevant to whether it charges customers for losses Westar does not incur. Therefore, Trial Staff concludes that the Commission may approve the Settlement under the first *Trailblazer* approach.⁴⁵

20. Trial Staff also contends that the Commission may approve the Settlement under the second *Trailblazer* approach. Trial Staff states that the loss factors were set for hearing and settlement procedures, and that Nemaha-Marshall does not seek to litigate the justness and reasonableness of these issues but instead argues that it would be adversely affected by the removal of language from the Westar Tariff regarding the exclusion of transmission losses from the composite loss factors. Trial Staff asserts that the effect of the removal of this language is mitigated by the specification of separate transmission and distribution loss factors and that the benefit of future litigation for Nemaha-Marshall would be nil.⁴⁶ Accordingly, Trial Staff states that the Commission

⁴² Trial Staff Reply Comments at 5-6.

⁴³ *Id.* at 6.

⁴⁴ *Id.*

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 8.

may approve the settlement under the second *Trailblazer* approach because the overall result is just and reasonable.⁴⁷

21. In its reply comments, Nemaha-Marshall argues that although the loss factors agreed to by the Settling Parties may be a reasonable resolution, the elimination of all references to composite loss factors from the Westar Tariff renders the Settlement unjust and unreasonable and contrary to the public interest.⁴⁸ Nemaha-Marshall contends that the removal of the language not only adversely affects its NITSA but also affects all NITSA's over Westar's facilities which contain the same required language.⁴⁹ Nemaha-Marshall asserts that a settlement that adversely affects agreements that are not included in this proceeding, and that directly contradicts and express Commission directive, should not satisfy the standard for just and reasonable rates under section 205.⁵⁰

III. Discussion

22. We approve the Settlement. Under Rule 602 of the Commission's regulations, the Commission may decide the merits of a contested settlement if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.⁵¹ In *Trailblazer*, the Commission identified four approaches it can use to approve contested settlements. Under the first approach described in *Trailblazer*, the Commission can approve the contested settlement by addressing each contested issue on its merits.⁵² That approach is appropriate where "the issues are primarily policy issues or where ... the parties have agreed the record is sufficient to decide the issue on the merits."⁵³ We apply that approach in reviewing the Settlement now before us.

⁴⁷ *Id.*

⁴⁸ Nemaha-Marshall Reply Comments at 3.

⁴⁹ *Id.* at 3-4.

⁵⁰ *Id.* at 4.

⁵¹ 18 C.F.R. § 385.602 (2019).

⁵² *Trailblazer*, 85 FERC ¶ 61,345 at 62,342.

⁵³ *Id.*

23. We find that Nemaha-Marshall's contention that the removal of references to the composite loss factors from section 28.5 of the Westar Tariff renders the Settlement unjust and unreasonable is unpersuasive. Nemaha-Marshall does not raise issues of material fact concerning the issue the Commission set for hearing and settlement procedures, i.e., the just and reasonableness of the loss factors proposed by Westar. Rather, Nemaha-Marshall alleges that the revisions removing references to the composite loss factors render the Settlement unjust and unreasonable because their removal adversely affects its NITSA and other similar agreements. However, section 8.6 of the NITSA states that "the Network Customer shall replace all distribution losses in accordance with Westar Energy's Open Access Transmission Tariff, Section 28.5, based upon the location of each delivery point meter located on distribution facilities. The composite loss percentages in Section 28.5 shall exclude transmission losses." Although the removal of references to the composite loss factors from section 28.5 of the Westar Tariff will render the second sentence moot, the language of section 8.6 of the NITSA still prohibits Westar from recovering transmission losses under the NITSA, as the Commission previously required.⁵⁴ Accordingly, revising section 28.5 of the Westar Tariff by removing references to composite loss factors does not change the Commission's finding that Westar is not permitted to recover transmission losses under the NITSA. Furthermore, nothing in the Settlement allows for Westar to collect transmission losses already recovered under the SPP Tariff. Accordingly, we approve the Settlement.

24. Westar is directed to file revised tariff provisions in eTariff format,⁵⁵ within 30 days of the date of issuance of this order, to reflect the Commission's action in this order.

The Commission orders:

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

⁵⁴ See *Sw. Power Pool, Inc.*, 136 FERC ¶ 61,223 at P 13 (granting Westar's request that the Commission allow SPP to revise language in section 8.6 of the NITSA to permit SPP to charge the distribution loss rate in section 28.5 of Westar's Tariff and directing SPP to include in section 8.6 the statement that "[t]he composite loss percentages in Section 28.5 shall exclude transmission losses" in order to ensure that Westar only collects distribution losses for delivery points on Westar's system).

⁵⁵ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 61,276 (2008).

(B) Westar is directed to file revised tariff provisions within 30 days from the date of issuance of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.