

174 FERC ¶ 61,205
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Southwest Power Pool, Inc.

Docket No. ER18-2404-000

ORDER DENYING WAIVER REQUEST

(Issued March 19, 2021)

1. On September 10, 2018, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,¹ Southwest Power Pool, Inc. (SPP) requested waiver of the one-year billing adjustment limitation in section I.7.1 of the SPP Open Access Transmission Tariff (Tariff)² to facilitate SPP's resettlement of past invoices due to a billing error. As discussed below, we deny SPP's waiver request.

I. Background

2. Section I.7.1 of the Tariff states, in relevant part:

Billing adjustments for reasons other than (a) the replacement of estimated data with actual data for service provided, or (b) provable meter error, shall be limited to those corrections and adjustments found to be appropriate for such service within one year after rendition of the bill reflecting the actual data for such service.³

3. SPP states that Nebraska Public Power District (NPPD) utilizes point-to-point transmission service and has been billed in accordance with Schedule 7 of the Tariff. SPP further states that, in December 2017, it discovered a billing error related to two NPPD point-to-point transmission service reservations that were created to administer transmission congestion rights; SPP intended to flag these reservations as non-billable in

¹ 18 C.F.R. § 385.207(a)(5) (2020).

² Southwest Power Pool, Inc., Open Access Transmission Tariff, Sixth Revised Volume No. 1.

³ SPP Tariff, § I.7.1 (Billing Procedures).

its settlement system. SPP explains that, in June 2016, these reservations were inadvertently changed to billable as a result of human error. SPP indicates that this error resulted in NPPD being double-billed from June 2016 through December 2017 for point-to-point transmission service and point-to-point transmission congestion rights transmission service reservations. SPP notes that after identifying the billing error, it began resettlements in January 2018 to correct the error for the months January 2017 through December 2017. However, SPP states that the June 2016 through December 2016 time period was beyond the one-year limitation on billing adjustments permitted under section I.7.1 of the Tariff. SPP indicates that the financial impact of the billing error to NPPD for the time period beyond the one-year limitation for billing adjustments is \$901,758.⁴

II. Waiver Request

4. SPP states that section I.7.1 of the Tariff provides the billing procedure for invoices for all services furnished under the Tariff, except for services provided through the Integrated Marketplace, which are detailed in Attachment AE of the Tariff. SPP explains that in order to correct the billing error for the time period of June 2016 through December 2016, it requests a waiver of the one-year limitation period for billing adjustments articulated in section I.7.1 of the Tariff.⁵

5. SPP asserts that its request satisfies the standards that the Commission has used to grant waiver requests in the past. First, SPP asserts that the underlying billing error was made in good faith. SPP explains that in June 2016, the point-to-point transmission congestion rights transmission service reservations were inadvertently changed from non-billable to billable in SPP's settlements system, resulting in NPPD being double-billed for point-to point transmission service from June 2016 through December 2017. According to SPP, this mistake was the result of human error. SPP states that upon discovering the error, it promptly corrected the transmission service reservation designations in its settlements system and resettled NPPD's charges to the extent permitted by section I.7.1 of the Tariff.⁶

6. Second, SPP argues that the requested waiver is limited in scope. SPP states that it requests a one-time waiver of a requirement in a single Tariff provision to ensure that

⁴ Waiver Request at 1-2.

⁵ *Id.* at 3. SPP clarifies that the billing adjustments that are the subject of this waiver request do not fall into the category of either (a) the replacement of estimated data with actual data for service provided, or (b) provable meter error, for which there is a two-year limitation period. *Id.* n.4 (citing SPP Tariff, §§ I.7.1, I.10.6).

⁶ *Id.* at 4.

NPPD is properly charged the filed rate. SPP explains that the waiver would facilitate resettlements to correct a billing error that is outside the one-year limitation period permitted by section I.7.1. In addition, SPP notes that due to enhancements in the transmission reservation process, non-billable transmission service reservations are no longer necessary to administer transmission congestions rights.⁷

7. Third, SPP contends that the requested waiver would solve a concrete problem. SPP explains that when it discovered the error in December 2017, it was able to perform resettlements for the time period from January 2017 through December 2017; however, the time period from June 2016 through December 2016 was beyond the one-year limitation for billing adjustments permitted by section I.7.1 of the Tariff.⁸ SPP argues that the requested waiver would allow it to make the adjustments necessary to ensure that NPPD is charged the correct amount under the Tariff.⁹

8. Finally, SPP asserts that the requested waiver would not result in any undesirable consequences, such as harm to third parties. SPP explains that by permitting such adjustments, SPP customers will be charged the correct amounts pursuant to the filed rate, and no third party will be harmed.¹⁰ SPP argues that, in contrast, requiring the incorrect amounts to remain on the invoices results in NPPD being doubled-billed for point-to-point transmission service.¹¹

III. Notice of Filing and Responsive Pleadings

9. Notice of SPP's waiver request was published in the *Federal Register*, 83 Fed. Reg. 46,713 (Sept. 14, 2018), with interventions and protests due on or before October 1, 2018. NPPD filed a timely motion to intervene and comments.

10. NPPD states that it supports SPP's waiver request. NPPD asserts that a waiver is essential to make it whole following an inadvertent billing error by SPP that caused NPPD to be double-billed for point-to-point transmission services from June 2016

⁷ *Id.*

⁸ *Id.* at 4-5 (citing *Sw. Power Pool, Inc.*, 138 FERC ¶ 61,200, at P 5 (2012)).

⁹ *Id.* at 5.

¹⁰ *Id.* (citing *N.Y. Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,026, at P 45 (2006); *Cal. Indep. Sys. Operator Corp.*, 147 FERC ¶ 61,111, at P 14 (2014)).

¹¹ *Id.*

through December 2017. NPPD further asserts that SPP's waiver request fully satisfies the Commission's standard for waiving a tariff provision.¹²

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), NPPD's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Substantive Matters

12. We find that the relief sought by SPP, under the circumstances here, is prohibited by the filed rate doctrine and the rule against retroactive ratemaking. Accordingly, we deny SPP's waiver request, as discussed below.

13. The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."¹³ The related rule against retroactive ratemaking also "prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods."¹⁴ When evaluating whether granting the requested relief would violate either the filed rate doctrine or the rule against retroactive ratemaking, the Commission considers whether the ratepayers had sufficient notice that the approved rate was subject to change.¹⁵ In this

¹² NPPD Comments at 4.

¹³ *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

¹⁴ *Towns of Concord v. FERC*, 955 F.2d 67, 71 & n.2 (D.C. Cir. 1992).

¹⁵ *See Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993); *see also PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, at P 46 (2014) ("The waiver is effective prospectively, as of the date of this order, and therefore does not retroactively change the rules Further, the instant filing puts market participants on notice regarding a possible rule change."); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 794-97 (D.C. Cir. 1990) ("The same principle obtains when the Commission itself places parties on notice . . . that the rates they will be paying are subject to retroactive adjustment at a later date Notice does *not* relieve the Commission from the prohibition against retroactive ratemaking. Instead, it changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision."); *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 968-70 (D.C. Cir. 2003) (applying same concepts in waiver context); *Old*

case, we find that ratepayers did not have sufficient notice that the billing error from June 2016 through December 2016 was subject to change after the one-year billing adjustment deadline specified in the Tariff had passed.

14. Specifically, section I.7.1 of the Tariff sets a one-year limitation for “[b]illing adjustments for reasons other than: (a) the replacement of estimated data with actual data for service provided; or (b) provable meter error.”¹⁶ Therefore, the plain language of this provision, which is part of the filed rate, terms, and conditions of service, limits the time for correcting the billing error here to one year and neither of the exceptions to that general tariff provision applies. No party disputes the requirements of this provision. As a result, we find that section I.7.1 of the Tariff cannot be waived, under the circumstances here, without violating the filed rate doctrine and rule against retroactive ratemaking.¹⁷

15. Because we are denying the waiver request on the basis that, at the outset, the relief SPP seeks would violate the filed rate doctrine and the rule against retroactive ratemaking, we need not address whether SPP’s request otherwise would satisfy the four criteria used by the Commission to evaluate waiver requests.

Dominion Elec. Coop. Inc. v. FERC, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (“The filed rate doctrine and the rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations.”).

¹⁶ SPP Tariff, § I.7.1.

¹⁷ Although the filed rate doctrine and rule against retroactive ratemaking prevent us from granting SPP’s request to waive section I.7.1 of the Tariff in this case, to prevent such inequitable results in the future, SPP should consider revising its Tariff to permit the Commission to order the reopening of invoices that would otherwise be subject to a timebar. *See, e.g.*, SPP Tariff, Attach. AE, § 10.1.1.3(a); NYISO Market Administration and Control Area Services Tariff § 7.4.

The Commission orders:

SPP's waiver request is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket No. ER18-2404-000

(Issued March 19, 2021)

DANLY, Commissioner, *concurring*:

1. I fully support the Commission's ruling in this order rejecting Southwest Power Pool, Inc.'s (SPP) retroactive waiver request on filed rate doctrine grounds. SPP's waiver request indisputably runs afoul of the filed rate doctrine and we have "*no discretion* to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause *or for any other equitable considerations.*"¹ I write separately because the Commission's order provides no explanation for why it has applied the filed rate doctrine in this case but has not applied it in the numerous orders it has issued in the last six months where the doctrine is equally applicable.² After the issuance of this order, members of the electric industry must be as befuddled as I am in trying to understand when the Commission will grant a retroactive waiver request and when it will deny such a request. Not only are we obligated to provide such an explanation under the Administrative Procedure Act, but we owe clarity to the entities subject to our jurisdiction or who are affected by our actions.

2. Any party who is as bewildered by the Commission's actions in these cases as I am should see their case through to appeal. Eventually, the courts will remind us of our obligations.

For these reasons, I respectfully concur.

James P. Danly
Commissioner

¹ *Old Dominion Elec. Coop., v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (ODEC) (citing *Columbia Gas Transmission Corp.*, 895 F.2d 791, 794-97 (D.C. Cir. 1990)) (emphasis added).

² One such order was issued today. In that order, the Commission, without explanation, grants a retroactive waiver to the Midcontinent Independent System Operator, Inc. *See Midcontinent Indep. Sys. Operator, Inc.*, 174 FERC ¶ 61,202 (2021).