

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Southwest Power Pool, Inc.) Docket No. ER08-1419-004

ANSWER OF SOUTHWEST POWER POOL, INC.

Pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure,¹ Southwest Power Pool, Inc. (“SPP”) submits this answer to protests to SPP’s compliance filing submitted on November 2, 2009 in this proceeding.²

I. BACKGROUND

On November 2, 2009, SPP submitted a compliance filing in response to the Commission’s directive in its June 18, 2009 Order on Rehearing and Compliance Filing to revise section IX.7 of Attachment O of SPP’s tariff³ “to provide that resource-specific data in the planning process be disclosed by SPP, *under applicable confidentiality provisions*, if the information is needed to participate in the transmission planning

¹ 18 C.F.R. § 385.213 (2008).

² SPP seeks leave to answer to assist the Commission’s decision-making process and clarify the issues. The Commission regularly allows answers for such purposes. *See, e.g., Cal. Indep. Sys. Operator Corp.*, 110 FERC ¶ 61,007, at P 9 (2005) (answer assisted the Commission’s decision-making process); *PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,031, at P 10 (2003) (accepting answers because “it will not delay the proceeding, will assist the Commission in understanding the issues raised, and will insure a complete record upon which the Commission may act”).

³ Southwest Power Pool, Open Access Transmission Tariff, FERC Electric Tariff, Fifth Revised Volume No. 1 Superseding Forth Revised Volume No. 1 (“SPP Tariff”).

process and/or to replicate transmission planning studies.”⁴ In compliance, SPP amended section IX.7 to permit access to resource-specific data to market participants that sign a confidentiality agreement, provided that access to this highly commercially sensitive data would be limited to non-competitive duty personnel.⁵

II. RESTRICTING ACCESS TO COMMERCIALY SENSITIVE RESOURCE-SPECIFIC DATA TO NON-COMPETITIVE DUTY PERSONNEL IS PROPER AND CONSISTENT WITH ORDER NOS. 890, 890-A, AND 890-B

SPP’s compliance amendments to section IX.7 of Attachment O of its tariff, providing all market participants access to commercially sensitive resource-specific data but limiting reviewers within a company to non-competitive duty personnel, is fully consistent with Order Nos. 890, 890-A, and 890-B.⁶ As SPP explained in its Compliance Filing, in Order No. 890, the Commission expressed a desire for “protections to ensure that particular entities do not gain an inappropriate competitive advantage”⁷ from the required disclosure of transmission planning information. The Commission further noted that “[i]n order for the Final Rule’s transmission planning process to be as effective

⁴ *Sw. Power Pool Inc.*, 127 FERC ¶ 61,271, at P 41 (2009) (“Rehearing Order”) (emphasis added).

⁵ *Southwest Power Pool, Inc.*, Docket No. ER08-1419-004, Compliance Filing (Nov. 2, 2009) (“Compliance Filing”).

⁶ *See Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 2006-2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,241, at PP 276 & n.177, 312, 326, 471-76, *order on reh’g*, Order No. 890-A, 2006-2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,261, at P 206 (2007), *order on reh’g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299, at PP 36-37 (2008), *order on reh’g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

⁷ Order No. 890 at 476.

as possible, [the Commission] emphasize[s] that all transmission providers, both jurisdictional and non-jurisdictional, *must be assured that the information they provide in that process will not be used inappropriately in the wholesale power market.*⁸ With regard to protecting resource-specific data (e.g., production cost models and generation dispatch methodologies), in Order No. 890-B, the Commission specifically permitted “confidentiality limitations [that] could include, among other things, *restrictions on the release of proprietary and commercially sensitive information to those engaged in the marketing, sale, or purchase of electric power at wholesale.*”⁹ Simply put, SPP’s proposed limitations on the access to commercially sensitive resource-specific data to non-competitive duty personnel (i.e., not directly engaged in the marketing, sale or purchase of electric power at wholesale, the direct supervision of employees who are, or the provision of consulting services in connection with such activities) falls squarely within the restrictions permitted by Order No. 890-B.

Similarly, contrary to protesters, SPP’s compliance filing does not violate the Commission’s directive in the Rehearing Order.¹⁰ In the Rehearing Order, the Commission directed SPP to (i) file “revised tariff sheets with provisions ensuring that system design software results needed for stakeholders to verify the application of the

⁸ Order No. 890 at P 475 (emphasis added).

⁹ Order No. 890-B at P 37 (emphasis added).

¹⁰ *See, e.g.,* Motion To Intervene And Protest Of Golden Spread Electric Cooperative, Inc., Arkansas Electric Cooperative Corporation, East Texas Cooperatives, Kansas Electric Power Cooperative, Inc., Sunflower Electric Power Corp. and Mid-Kansas Electric Company, LLC, Docket No. ER08-1419-004, at 10 (Nov. 23, 2009) (“Cooperatives Protest”); Protest of Western Farmers Electric Cooperative, Docket No. ER08-1419-004, at 2 (Nov. 23, 2009) (“WFEC Protest”); Protest Of Occidental Permian Ltd. And Occidental Power Marketing, L.P., Docket No. ER08-1419-004, at 4-5 (Nov. 23, 2009) (“Occidental Protest”).

assumptions in creating the adjusted production cost-benefit metrics will be made available *subject to the signing of confidentiality agreements or other needed arrangements to protect sensitive information;*” and (ii) “revise section IX.7, . . . to provide that resource-specific data in the planning process be disclosed by SPP, *under applicable confidentiality provisions*, if the information is needed to participate in the transmission planning process and/or to replicate transmission planning studies.”¹¹ Clearly, the Commission did not contemplate that SPP would be required to disclose commercially sensitive information without appropriate protections. As described above, the protections that SPP’s proposed language provides are permitted by Order No. 890-B.

Importantly, the data SPP is protecting is not SPP data but rather the confidential, competitively sensitive commercial data of its members. Without the proposed restrictions on access to commercially sensitive data (i.e., resource-specific data), SPP cannot assure its members “that the information they provide in [the transmission planning] process will not be used inappropriately in the wholesale power market.”¹² As a result, absent these protections, SPP members are likely to stop providing resource-specific data to SPP transmission planners, providing generic generation data instead, which could impact the precision of SPP’s transmission planning.

Protesters’ assertions that SPP’s proposed restriction may “disadvantage[] smaller SPP participants”¹³ provide no basis to lessen the restrictions on access to commercially sensitive resource-specific data. As the Commission has recognized, while compliance

¹¹ Rehearing Order at PP 40, 41 (emphasis added).

¹² Order No. 890 at P 475.

¹³ Cooperatives Protest at 10; WFEC Protest at 2; Protest of TDU Intervenors, Docket No. ER08-1419-004, at 4-5 (Nov. 23, 2009).

with confidentiality provisions such as SPP proposes can impose some hardship on smaller entities, “this concern must be balanced against the fact that . . . [an] open planning process cannot be fully successful if certain entities (whether jurisdictional or nonjurisdictional) can use the information to obtain an undue advantage in power markets.”¹⁴ Moreover, SPP is not proposing to “*withhold* system design software results that contain any resource specific information under the guise of confidentiality,” as one protester suggests.¹⁵ Rather, SPP merely is limiting access to such data to *individuals* within a market participant company that are not engaged in the marketing, sale or purchase of electric power at wholesale, as permitted by Order No. 890-B. All market participant organizations, regardless of size, may obtain resource-specific data in compliance with the proposed confidentiality protections.

III. THE MODEL PROTECTIVE ORDER CITED BY PROTESTORS DOES NOT SUFFICIENTLY ADDRESS SPP’S NEED TO PROTECT ITS MEMBERS’ COMMERCIALY SENSITIVE RESOURCE-SPECIFIC DATA

Contrary to some protesters’ suggestions,¹⁶ the Model Protective Order¹⁷ that is used in litigated proceedings, without modification, does *not* provide sufficient protection for SPP members’ commercially sensitive resource-specific data. The Model Protective Order is designed to protect confidential data in a narrow finite context – litigated FERC proceedings – not in the more general on-going context of transmission planning. The

¹⁴ Order No. 890 at P 475; *see also* Order No. 890-A at P 200.

¹⁵ Occidental Protest at 3-4 (emphasis in the original).

¹⁶ *See e.g.*, Cooperatives Protest at 14-15; WFEC Protest at 3; Occidental Protest at 6.

¹⁷ Model Protective Order, *available at* <http://www.ferc.gov/legal/admin-lit/model-protective-order.pdf>

occasional access to confidential data provided to a few market participants in the course of litigation does not justify wholesale, unlimited disclosure of such information on a day-to-day basis in the planning process.

Moreover, even in the narrow context of litigation, the Model Protective Order often is amended to limit disclosure of particularly commercially sensitive information to non-competitive duty personnel to provide stronger protection of such data.¹⁸ As Judge Hardnett recently observed, “Protective Orders often, if not usually, contain competitive duty personnel/market sensitive/competitively sensitive provisions.”¹⁹ Indeed, the very definition of “Competitive Duties” SPP proposes here to protect commercially sensitive information previously was approved by the Chief Administrative Law Judge in an SPP proceeding.²⁰

Contrary to protesters’ arguments, paragraph 8 of the Model Protective Order, prohibiting the use of commercially sensitive information “to give any Participant or any competitor of any Participant a commercial advantage,” alone does not afford market participants sufficient protection.²¹ Nor does the language of paragraph 7 of the Model Protective Order, which provides that confidential information “shall not be used except

¹⁸ See e.g., *Blumenthal v. ISO New England, Inc.*, Order Adopting Form of Protective Order, Docket Nos. EL09-47-000, EL09-48-000 (Sept. 24, 2009); *El Paso Natural Gas Co.*, Order On Motion Of El Paso Natural Gas Company For Issuance Of Protective Order, Docket No. RP08-426-000 (Mar. 2, 2009) (“*El Paso Order*”); *ISO New Eng. Inc.*, Order Of Chief Judge Adopting Protective Order, Docket Nos. ER07-1289-002, -003, -004, -005 (Mar. 6, 2008).

¹⁹ *El Paso Order* at P 13.

²⁰ *Sw. Power Pool Inc.*, Order Of Chief Judge Adopting Protective Order, Docket Nos. ER09-342-000, ER08-1206-000, -001 (June 15, 2009).

²¹ Model Protective Order at P 8, Cooperatives Protest at 14, WFEF Protest at 3.

as necessary for the conduct of this proceeding,” provide adequate protection. It would be cold comfort to SPP market participants that once their competitors have access to their commercially sensitive data, such competitors have promised not to be influenced by that data in their business decision-making and marketing processes. If the same individuals that review confidential information in planning studies also engage in marketing activities, then they will be able to use their competitors’ information to obtain an advantage in wholesale markets. The likely result of adopting the Model Protective Order’s approach, without revision, would be that SPP market participants would stop providing SPP with resource-specific data for use in the transmission planning process, adversely impacting SPP’s transmission studies.

IV. CONCLUSION

For the reasons stated in the Compliance Filing and this answer, the Commission should accept the Compliance Filing without modification.

Respectfully submitted,



Barry S. Spector
Carrie L. Bumgarner
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
Telephone: (202) 393-1200
Fax: (202) 393-1240
spector@wrightlaw.com
bumgarner@wrightlaw.com

**Attorneys for
Southwest Power Pool, Inc.**

December 8, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 8th day of December, 2009.



Carrie L. Bumgarner

**Attorney for
Southwest Power Pool, Inc.**