

137 FERC ¶ 61,227
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Southwest Power Pool, Inc.

Docket Nos. ER08-1419-003
ER08-1419-004

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued December 16, 2011)

1. On July 17, 2009, Southwest Power Pool, Inc. (SPP) filed a request for rehearing of the Commission's June 18, 2009 order in this proceeding.¹ In addition, on November 2, 2009, SPP submitted a compliance filing, as required by the June 18 Order.² As discussed below, this order denies SPP's request for rehearing and accepts SPP's compliance filing subject to a further compliance filing.

I. Background

2. In an order issued on October 16, 2008,³ the Commission accepted, subject to modification, SPP's proposal to establish a process to evaluate a group, or portfolio, of economic upgrades (Balanced Portfolio proposal) to be included in SPP's Transmission Expansion Plan, rather than evaluate the benefits of individual upgrades. The October 16 Order, among other things, directed SPP to create a mechanism consistent with the Attachment K⁴ transmission planning transparency principle of Order No. 890,⁵ to allow

¹ *Southwest Power Pool, Inc.*, 127 FERC ¶ 61,271 (2009) (June 18 Order).

² SPP requested and the Commission granted SPP an extension of time until November 2, 2009 to submit the required compliance filing. *See Southwest Power Pool, Inc.*, Notice of Extension of Time, Docket Nos. ER08-1419-001 and ER08-1419-002 (July 22, 2009).

³ *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,054 (2008) (October 16 Order).

⁴ SPP labeled its Attachment K transmission planning process as "Attachment O."

market participants to review the system design software to check assumptions that underlay the metrics and analyses of upgrades included in a potential Balanced Portfolio, since Order No. 890 requires “transmission providers to disclose to all customers and other stakeholders the basic criteria, assumptions, and data that underlie their transmission system plans...[to] enable customers, other stakeholders, or an independent third-party to replicate the results of planning studies.”⁶

3. Subsequently, on November 17, 2008, SPP filed a request for clarification or, in the alternative, rehearing of the October 16 Order and a compliance filing. SPP asserted that section VI.6(b) of Attachment O⁷ of its Open Access Transmission Tariff (Tariff)⁸ already provided a mechanism that allowed market participants to review the results of the system design software. In addition, SPP stated that in an order issued on July 11, 2008 in Docket No. OA08-61-000,⁹ the Commission accepted, among other

⁵ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

⁶ October 16 Order, 125 FERC ¶ 61,054 at P 37 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 471).

⁷ Since the time that SPP filed the Balanced Portfolio proposal, it has renumbered several sections of Attachment O (Transmission Planning Process) of its Tariff. For example, the language formerly in section VI.6(b) is now contained in section V.2(b). Similarly, section IX (Information Exchange) is now section VII of SPP’s Attachment O. For the purposes of this order, we will refer to the then-existing section numbers.

⁸ Section VI.6(b) of Attachment O of the SPP Tariff provides as follows (in pertinent part):

The related study results, criteria, assumptions and data underlying the studies used to develop the list of upgrades within proposed Balanced Portfolios and proposed reliability upgrades shall be posted on the SPP website, with password protected access if required to preserve the confidentiality of information in accordance with the provisions of the Tariff and the SPP Membership Agreement and to address CEII requirements.

⁹ *Southwest Power Pool, Inc.*, 124 FERC ¶ 61,028 (2008).

things, section IX.7(d)¹⁰ of Attachment O, which SPP states it included to maintain the confidentiality of certain data due to information exchange principles Order No. 890. In its compliance filing, SPP added a new subsection (f) to section IV.6 of Attachment O, which provided that in developing a potential Balanced Portfolio, SPP would publish a timely report, including but not limited to, the study input assumptions, the estimated costs included in the potential Balanced Portfolio, and the expected economic benefits of the potential Balanced Portfolio. SPP argued that no further tariff revisions were needed to comply with the October 16 Order.

4. In the June 18 Order, the Commission denied SPP's request for clarification or rehearing, finding section IX.7(d) of Attachment O to SPP's Tariff to be inconsistent with the transparency requirement of Order No. 890.¹¹

5. Also in the June 18 Order, the Commission held that SPP's filing did not comply with the directives in the October 16 Order and directed SPP to submit revised tariff sheets with provisions ensuring that system design software results needed for stakeholders to verify the application of the 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.¹² The Commission also directed SPP to revise its Attachment O to specify that costs resulting from third-party impacts included in the Balanced Portfolio cost-benefit analysis will be net of any reimbursements resulting from such third-party impacts.¹³

¹⁰ Section IX (Information Exchange), subsection 7(d) (Confidentiality Requirements) of Attachment O to SPP's Tariff provided as follows:

Resource specific data shall not be made available by the Transmission Provider if the data has been designated confidential by the data provider or if the data can be used to:
(i) Determine security constrained unit commitment or economic dispatch for resources; or (ii) Perform an economic evaluation of costs and benefits.

¹¹ June 18 Order, 127 FERC ¶ 61,271 at P 15 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 471).

¹² *Id.* P 40.

¹³ *Id.* P 30.

6. On July 17, 2009, SPP filed its request for rehearing and on July 17, 2009, Kansas City Power and Light Company (KCP&L) filed a motion to intervene out of time and request for clarification. On August 3, 2009, Golden Spread Electric Cooperative, Inc. (Golden Spread) filed an answer to SPP's request for rehearing and on August 6, 2009, American Electric Power Service Corporation (AEP) filed a motion to intervene out of time. SPP submitted its compliance filing on November 2, 2009.

II. Request for Rehearing

A. SPP's Request for Rehearing

7. On rehearing, SPP contends that the Commission erred in requiring disclosure of "resource-specific data" of SPP's members and market participants, and in finding that section IX.7(d) of Attachment O was unjust and unreasonable.¹⁴ SPP asserts that because of the proprietary and competitively sensitive nature of the resource-specific data that SPP members provide to SPP to use in transmission studies, it is reasonable to prohibit disclosure of such information to third parties, even with confidentiality protections. SPP states that it uses resource-specific fuel costs, incremental heat rates, and non-public market sensitive generation commitment and dispatch orders to develop Balanced Portfolios and study transmission service requests.¹⁵ SPP contends that such information is of the type that market participants would always designate as confidential and would not share with their competitors, regardless of any arrangements to keep it confidential. SPP asserts that fear of disclosure of competitive information could cause market participants to withhold their resource-specific data, thus diminishing the accuracy of SPP's studies. SPP further asserts that showing such information to competitors, even under protective order, is inconsistent with maintaining a competitive marketplace.

8. In SPP's view, a confidentiality agreement would not adequately protect competitively sensitive cost data. SPP suggests that while such an agreement may prevent further distribution of the data, it could not be written to prevent the market participant that receives and sees its competitors' confidential and proprietary information from making future decisions based on the knowledge transferred.

9. SPP also contends that releasing resource-specific data is contrary to section 3.5 of the SPP Membership Agreement, which states that SPP members provide commercially sensitive information to SPP with the expectation that SPP will treat such information in a confidential manner, including not disclosing it to third parties that may be potential

¹⁴ See SPP Request for Rehearing at 6.

¹⁵ *Id.* at 7 (citing SPP Tariff at Attachment O, section IV(6)(d)).

competitors.¹⁶ SPP asserts that releasing resource-specific data is also inconsistent with section 7.1.4 of Attachment AE (Energy Imbalance Service Market) of its Tariff, which provides that market participants do not have the right to review data designated as confidential and that SPP shall not disclose any confidential information of a market participant.¹⁷

10. As it argued in its previous rehearing, SPP contends that the SPP Tariff already contains provisions that provide stakeholders appropriate access to data in order to replicate the results of the transmission planning studies, including Balanced Portfolio studies. Pointing to section VI.6(b) of Attachment O of the Tariff, SPP reiterates that it does not disclose commercially sensitive information, including resource-specific data “to those engaged in the marketing, sale, or purchase of electric power at wholesale.”¹⁸ SPP asserts that the Commission expressly recognized this restriction in Order No. 890-B, and thus SPP’s approach is appropriate given the proprietary nature of the information.¹⁹

11. SPP also argues that its previously added section IV.6(f) of Attachment O enables interested parties to closely replicate the Balanced Portfolio and other transmission planning studies by using their own generation information and otherwise available generic generation data. SPP asserts that at a minimum, the Commission should clarify that SPP is not required to disclose commercially and competitively sensitive resource-specific generation data to those that are engaged in the marketing, sale, or purchase of electric power at wholesale.²⁰

12. Finally, SPP claims that “[t]he Commission erred in holding that Order No. 890-A’s requirement that ‘transmission providers maintain information as confidential’ is consistent with ‘[r]eleasing confidential information under appropriate confidentiality agreements.’”²¹

¹⁶ *Id.* at 9

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 12 (citing Order No. 890-B, 123 FERC ¶ 61,299 at P 37).

¹⁹ *Id.*

²⁰ *Id.* at 14.

²¹ *Id.* at 5-6.

B. Late Interventions

13. In support of its motion to intervene out of time, AEP argues that while the date for intervention has passed, the Commission has not yet acted on SPP's compliance filing. AEP adds that its untimely intervention would not delay the development of a procedural schedule or record in this proceeding nor would it impair the interests of any other party.

14. KCP&L argues that good cause exists to grant its motion to intervene out of time for the purpose of seeking limited clarification of the June 18 Order. KCP&L states that it has been a full participant in the SPP stakeholder process leading to the development of the Balanced Portfolio proposal. KCP&L asserts that "at no time, was there any indication that the final outcome of this proceeding could result in a directive by the Commission to SPP that it must disclose proprietary and highly sensitive generation cost and dispatch data provided by KCP&L to competing suppliers in the SPP market."²²

C. Commission Determination

1. Procedural Matters

15. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2011), prohibits answers to requests for rehearing. We will, therefore, reject Golden Spread's answer.

16. We also deny the late filed motions to intervene. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. AEP and KCP&L have not met this higher burden of justifying their late interventions.²³

17. Furthermore, while KCP&L requests what it styles "limited clarification," it is a non-party effectively seeking clarification or rehearing—KCP&L essentially suggests the parameters the Commission should establish for SPP to limit access under confidentiality agreements.²⁴ Accordingly, consistent with denial of KCP&L's late motion to intervene, KCP&L's request for rehearing or clarification is rejected. Because KCP&L is not a

²² See KCP&L Motion at 4.

²³ See, e.g., *Midwest Indep. Transmission Sys. Oper., Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

²⁴ See KCP&L Motion at 7.

party to this proceeding, it lacks standing to seek rehearing of the June 18 Order under the Federal Power Act and the Commission's regulations.²⁵

2. Substantive Matters

18. For the reasons discussed below, we deny SPP's rehearing request.

19. SPP maintains that the Commission should have found section IX.7(d) of Attachment O to the SPP Tariff adequately complied with Order No. 890's transparency requirement. SPP contends that because of the highly proprietary and competitively sensitive nature of the resource-specific data, it is just and reasonable to prohibit disclosure of such information to third parties. However, as the June 18 Order explained, restricting access to resource-specific data, as section IX.7(d) does, denies access to data that market participants need to replicate the results of transmission planning studies, such as an SPP Balanced Portfolio analysis. Therefore section IX.7(d) is inconsistent with the June 18 Order and with the Order No. 890 transparency requirement that stakeholders have sufficient information to replicate transmission planning studies.²⁶

20. The Commission appreciates that tension exists between ensuring transparency in transmission planning processes, such as the Balanced Portfolio process, and protecting confidential information, including commercially sensitive information. As SPP points out, using resource-specific data that best reflect actual operations on the transmission system leads to more precise and effective transmission study results. Market participants who provide that information need to be assured that the confidential information they provide will be used for its intended purpose in planning the transmission system, and will not be disclosed in a manner that harms them commercially. At the same time, Order No. 890's requirement that transmission providers disclose to all customers and other stakeholders the basic criteria, assumptions, and data that underlie their transmission system plans to enable customers, other stakeholders, or an independent third-party to replicate the results of planning studies is essential to an open and transparent transmission planning process.²⁷ The Commission disagrees with SPP's position that opacity is needed here to preserve competitive markets. To the contrary, without certain generator dispatch and economic information, it becomes difficult or impossible to conduct meaningful load flow studies for some

²⁵ See 16 U.S.C. § 8251(a) (2006); 18 C.F.R. § 385.713(b) (2011). See also *Southern Co. Servs., Inc.*, 92 FERC ¶ 61,167 (2000).

²⁶ See June 18 Order, 127 FERC ¶ 61,271 at P 15 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 471).

²⁷ See Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 471.

transmission planning purposes,²⁸ and the competitive playing field is tilted toward those who have this information and away from those who do not. The Commission therefore required disclosure of criteria, assumptions, data and other information that underlie transmission plans.²⁹

21. Although no brightline rule exists to determine the appropriate balance between ensuring transparency in the transmission planning process and ensuring that confidential information is not disclosed inappropriately, the established principles in Order No. 890 guide our decision here. The Commission has evaluated the confidentiality provisions of SPP's Attachment O, and finds that section IX.7(d) unduly impedes review of SPP's Balanced Portfolio analyses by some market participants. By imposing a blanket restriction on access to resource-specific data, section IX.7(d) does not strike an appropriate balance between transparency and confidentiality in the Balanced Portfolio review process. Moreover, the Commission has elsewhere found that provisions similar to SPP's section IX.7(d) are unjust and unreasonable.³⁰ For example, in addressing Entergy Services Inc.'s Attachment K compliance filing that contained a proposed provision virtually identical to SPP's section IX.7(d),³¹ the Commission found that:

²⁸ See *id.* P 478.

²⁹ *Id.*

³⁰ See *e.g.*, *Entergy Servs., Inc.*, 127 FERC ¶ 61,272, at P 147 (2009) (*Entergy*). See also *Southern Co. Servs.*, 127 FERC ¶ 61,282, *order on reh'g and compliance*, 132 FERC ¶ 61,091 (2010) (*Southern Co. Servs.*); *Duke Energy Carolinas, LLC*, 127 FERC ¶ 61,281, at P 30, *order on reh'g*, 130 FERC ¶ 61,181 (2009); *E.ON U.S. LLC*, 127 FERC ¶ 61,276, at P 54 (2009), *order granting clarification*, 130 FERC ¶ 61,178 (2010); *South Carolina Elec. & Gas Co.*, 127 FERC ¶ 61,275, at P 25 (2009), *order granting reh'g*, 130 FERC ¶ 61,180 (2010).

³¹ The provision at issue in *Entergy* provided as follows:

Resource-specific data shall not be made available by the Participating Transmission Owners if the data has been designated confidential by the data provider or if the data can be used to (a) determine security constrained unit commitment or economic dispatch of resources or (b) perform an economic evaluation of costs and benefits.

Section IX.7(d) of Attachment O to SPP's Tariff is identical except that it refers to "Transmission Provider" rather than "Participating Transmission Owners."

As written, the [Southeast Inter-Regional Participation Process] provision requires Participating Transmission Owners to exempt from disclosure any resource-specific data that can be used to determine security constrained unit commitment and economic dispatch or to perform an economic evaluation of costs and benefits, even if that data would not otherwise be considered confidential. In addition, even if the resource-specific data is confidential, it is not clear why all such data must be exempt from disclosure, even under appropriate confidentiality protections that are already in the tariff. Moreover, this provision conflicts with the requirement that stakeholders have sufficient information to replicate all transmission planning studies, and is unduly discriminatory.³²

22. The Commission directed Entergy to revise the provision to require that resource-specific data in the planning process be disclosed, under applicable confidentiality provisions, if the information is needed to participate in the transmission planning process and/or to replicate transmission planning studies.³³ Subsequently, the Commission accepted Entergy's compliance filing, which removed the prohibition on disclosure of resource-specific data.³⁴

23. Accordingly, we affirm on rehearing that section IX.7(d) violates the Order No. 890 transparency requirement that stakeholders have sufficient information to replicate all transmission planning studies,³⁵ and we shall not clarify that the existing provisions of SPP's Tariff fully comply with the October 16 Order and Order No. 890.

24. Finally, we reject SPP's assertion that the Commission's actions here are inconsistent with Order No. 890-A's requirement that transmission providers maintain certain information as confidential. In Order No. 890-A, the Commission clarified the information exchange principle, under which transmission providers maintain information as confidential. The Commission did not however, rescind Order No. 890's transparency requirement for the disclosure of the criteria, assumptions, data, and other information that underlie transmission plans.³⁶ An appropriately constructed confidentiality agreement can satisfy both principles. For example, in *Southern Co.*

³² *Entergy*, 127 FERC ¶ 61,272 at P 147.

³³ *See id.*

³⁴ *See Entergy Services Inc.*, 130 FERC ¶ 61,264, at P 56 (2010).

³⁵ June 18 Order, 127 FERC ¶ 61,271 at P 15.

³⁶ *See* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 478.

Servs., the Commission found that confidentiality agreements may be used to restrict the availability of confidential competitive information in the transmission planning process such that it is available to customer personnel that are involved only in transmission functions, as opposed to merchant functions.³⁷ Accordingly, the Commission denies SPP's request for rehearing of the June 18 Order.

III. SPP's Compliance Filing

A. Compliance Requirement

25. In the June 18 Order, the Commission directed SPP to revise its Attachment O to specify that costs resulting from third-party impacts included in the Balanced Portfolio cost-benefit analysis will be net of any reimbursements resulting from such third-party impacts.³⁸ In addition, the Commission found that SPP had not complied with the Commission's previous directive to ensure that market participants may review SPP's system design software results to check the application of assumptions in creating the adjusted production cost-benefits metrics used to analyze a Balanced Portfolio. The Commission directed SPP to 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 were needed to participate in the transmission planning process and/or to replicate transmission planning studies.³⁹

B. SPP's Filing

26. SPP proposes to amend section IV.6(c)(v) of Attachment O to its Tariff to provide as follows: "The revenue requirements also shall include any specific costs that are projected to be incurred by the Transmission Provider or a Zone(s) as a result of third-party impacts (net of any reimbursements resulting from such third-party impacts) due to one or more upgrades within a proposed Balanced Portfolio."⁴⁰

27. SPP also proposes to revise section IX.7(d) of Attachment O to provide that confidentiality agreements:

³⁷ *See id.* P 42 ("As stated in Order Nos. 890 and 890-A, confidentiality agreements may restrict the availability of confidential competitive information such that it is available to customer personnel that are involved only in transmission functions, as opposed to merchant functions.").

³⁸ June 18 Order, 127 FERC ¶ 61,271 at P 30.

³⁹ *Id.* P 41.

⁴⁰ SPP Tariff, Attachment O, proposed section IV.6(c)(v).

shall allow access to applicable system design software results needed to participate in the SPP Transmission Expansion Plan process, replicate the results of specified transmission planning studies, or to confirm assumptions used in creating adjusted production cost-benefits metrics used to analyze a specified Balanced Portfolio; provided however, if the results include resource specific data (including input data), access will be limited to individuals that are not Competitive Duty Personnel.⁴¹

28. SPP defines “Competitive Duty Personnel” as individuals directly engaged in “Competitive Duties,” which include (1) the marketing, sale, or purchase of electric power at wholesale in the SPP Region; (2) the direct supervision of any employee with such responsibilities or (3) the provision of consulting services in connection with the marketing, purchase, or sale of electric power at wholesale in the SPP Region.⁴² SPP states that under revised section IX.7(d), counsel or outside consultants that do not provide consulting services in connection with the marketing, purchase, or sale of electric power at wholesale in the SPP region are not Competitive Duty Personnel.⁴³

29. SPP contends that its proposal to restrict access to resource-specific data to Non-Competitive Duty Personnel is consistent with the Commission’s transmission planning transparency requirement set forth in Order Nos. 890, 890-A, and 890-B.⁴⁴ According to SPP, “the Commission in Order No. 890-B specifically permitted ‘confidentiality limitations [that] could include, among other things, *restrictions on the release of proprietary and commercially sensitive information to those engaged in marketing, sale, or purchase of electric power at wholesale.*’”⁴⁵ SPP asserts that its proposed Tariff revisions comport with Order Nos. 890, 890-A and 890-B.

⁴¹ *Id.* at proposed section IX.7(d).

⁴² *Id.*

⁴³ SPP Compliance Filing at 6-7 (citing SPP Tariff, Attachment O, proposed section IX.7(d)(i)).

⁴⁴ *Id.* at 7 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 276 & n.177, 312, 326, 471-76; Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 206; Order No. 890-B, 123 FERC ¶ 61,299 at P 36-37).

⁴⁵ *Id.* (citing Order No. 890-B, 123 FERC ¶ 61,299 at P 37 (emphasis added by SPP); Order 890-A, FERC Stats. & Regs. ¶ 31,261 at P 148).

30. In addition, SPP argues that its proposal is consistent with the Commission's Standards of Conduct,⁴⁶ which SPP states "require that a transmission provider's 'transmission function employees must function independently from its marketing function employees' and 'are prohibited from disclosing, or using a conduit to disclose, non-public transmission function information to . . . marketing function employees.'"⁴⁷ SPP adds that the Commission has determined that if an "employee responsible for contract administration 'regularly carries out or supervises . . . or is actively and personally engaged' in the negotiation of [wholesale power] contracts, then he or she is considered a marketing function employee."⁴⁸ SPP argues that the resource-specific data that is used in transmission planning and the Balanced Portfolio studies is highly proprietary to the data providers and is the type of transmission planning information from which marketing function employees could gain an undue advantage in the wholesale power market. In addition, SPP asserts that "the Commission recognizes that 'compliance with the Standards of Conduct can impose costs on small entities,' but has explained that '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.'"⁴⁹

31. SPP states that consistent with the October 16 and June 18 Orders, it requests an effective date of October 17, 2008 for its proposed tariff amendments.

C. Notice of Filing and Responsive Pleadings

32. Notice of SPP's compliance filing was published in the *Federal Register*, 74 Fed. Reg. 59,154 (2009), with interventions and protest due on or before November 23, 2009. On November 10, 2009, Robert A. Durham filed comments. On November 23, 2009, Lincoln Electric System and Midwest Energy, Inc. filed timely motions to intervene. Golden Spread, Lincoln Electric System, Arkansas Electric

⁴⁶ *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010).

⁴⁷ SPP Compliance Filing at 8 (citing 18 C.F.R. §§ 358.2(b)-(c)).

⁴⁸ *Id.* (citing Order No. 717, FERC Stats. & Regs. ¶ 31,280; Order No. 717-A, FERC Stats. & Regs. ¶ 31,297).

⁴⁹ *Id.* (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 475; Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 200).

Cooperative Corporation (AECC), East Texas Cooperatives,⁵⁰ Kansas Electric Power Cooperative, Inc. (KEPCo), Sunflower Electric Power Corporation (Sunflower), and Mid-Kansas Electric Company, LLC (Mid-Kansas) (collectively, SPP Stakeholders) jointly filed a timely motion to intervene and protest.⁵¹ Occidental Permian Ltd. and Occidental Power Marketing, L.P. (collectively, Occidental), TDU Intervenors,⁵² and Western Farmers Electric Cooperative (Western Farmers) filed protests. On December 8, 2009, SPP filed an answer to the protests and on December 23, 2009, SPP Stakeholders along with Western Farmers filed an answer to SPP's answer.

D. Discussion

1. Procedural Matters

33. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serves to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011) prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answer filed by SPP, and the answer filed by SPP Stakeholders and Western Farmers and will, therefore, reject them.

2. Substantive Matters

a. Protests

34. SPP Stakeholders, Occidental, TDU Intervenors, and Western Farmers contend that SPP's proposed amendments to section IX.7(d) of Attachment O, specifically, the proposed definition of Competitive Duty Personnel, provide an advantage to large, vertically-integrated utilities in SPP and disadvantage smaller SPP participants. SPP Stakeholders assert that at a large vertically-integrated entity, individuals with decisional authority over transmission, marketing, and new resource development are more likely to be two or more levels removed from individuals whose functions include wholesale

⁵⁰ East Texas Cooperatives are East Texas Electric Cooperative, Inc., Northeast Texas Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc.

⁵¹ Because Golden Spread filed a timely motion to intervene earlier in this proceeding, the SPP Stakeholders' motion to intervene applied only to AECC, East Texas Cooperatives, KEPCo, Sunflower, and Mid-Kansas.

⁵² TDU Intervenors are the Oklahoma Municipal Power Authority, the Missouri Joint Municipal Electric Utility Commission, and the West Texas Municipal Power Agency.

purchases or sales of electricity. SPP Stakeholders contend that a large entity will therefore have less difficulty obtaining access to all information SPP uses to develop a Balanced Portfolio, while smaller entities that lack multi-layer organizations will be denied such access.⁵³

35. Similarly, SPP Stakeholders assert that SPP's proposed definition is inherently prejudicial to entities such as generation and transmission cooperatives that are engaged solely in sales at wholesale because it would be difficult to find any employee at such an organization whose job could not be characterized as being "in connection with the marketing, sale or purchase of electric energy at wholesale."⁵⁴ In addition, SPP Stakeholders, Occidental, and Robert A. Durham assert that SPP's proposed definition could also restrict access to resource-specific data by the counsel and consultants that small generation and transmission cooperatives generally must rely on for expertise on power supply arrangements and long-term planning. SPP Stakeholders argue that the implication of the third part of SPP's proposed definition is that counsel and consultants that perform any services "in connection with" the marketing, purchase, or sale of electric power at wholesale in the SPP region are Competitive Duty Personnel. SPP Stakeholders contend that for outside consultants and counsel (either in-house or outside counsel), access to resource specific data would be denied if any services provided could be described as being "in connection with" the marketing, purchase, or sale of electric power at wholesale. SPP Stakeholders argue that even if they could find other consultants that do not perform any services in connection with the marketing, purchase, or sale of electric power at wholesale in the SPP region these new consultants would not be familiar with the needs of the generation and transmission cooperative members and with historic power flow and congestion patterns in the SPP region.⁵⁵ SPP Stakeholders conclude that the services that could be offered by such consultants, even if they are available, would most likely be of limited usefulness. Robert A. Durham adds that SPP's interpretation of its proposed Tariff provisions is critical.⁵⁶

⁵³ See SPP Stakeholders Protest at 11. SPP Stakeholders also note that SPP has informally advised one of the SPP Stakeholders that the only knowledgeable person in that entity's organization who would be allowed access to resource-specific data would be the CEO. See SPP Stakeholders Protest at 12.

⁵⁴ *Id.* at 11.

⁵⁵ See *id.* at 10.

⁵⁶ Robert A. Durham states that while both he and his firm have signed confidentiality agreements with SPP and have received SPP's case data and input assumptions for years, in September 2009, SPP staff rejected such a request and informed

(continued...)

36. Additionally, Occidental takes issue with SPP's statement that its proposed tariff language is consistent with the Commission's Standards of Conduct. Occidental argues that the Standards of Conduct, which it states applies to the relationship between a transmission provider's transmission function and marketing function employees, does not apply to an Independent System Operator or Regional Transmission Organization like SPP and does not address information access for third parties under Order No. 890's transmission planning process.⁵⁷ SPP Stakeholders argue that SPP seeks to impose a higher burden on load-serving entity representatives seeking access to long-term transmission planning data than the Commission imposes in guarding against the potential exercise of market power by monopoly transmission providers.⁵⁸

37. According to TDU Intervenors, SPP's proposed section IX.7(d) of Attachment O conflicts not only with the Commission's directives in this proceeding but also with provisions of the Standard Large Generator Interconnection Procedures (LGIP) of SPP's Tariff. TDU Intervenors argue that under LGIP section 2.3, SPP is required to provide power flow data—which TDU Intervenors argue necessarily relies on and incorporates resource-specific data—to applicants for generator interconnections.⁵⁹ TDU Intervenors add that SPP's LGIP section 2.3 is modeled on the *pro forma* LGIP adopted by the Commission in Order 2003.⁶⁰

38. In addition, SPP Stakeholders, Occidental, and Western Farmers urge the Commission to instruct SPP to utilize the Commission's Model Protective Order⁶¹ as the

him that that case data would only be available to transmission owners or consultants working directly for SPP. Robert A. Durham Comments at 4.

⁵⁷ See Occidental Protest at 7.

⁵⁸ See SPP Stakeholders Protest at 13 (citing Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 131, Order No. 717-A, FERC Stats. & Regs ¶ 31,297, Order No. 717-B, 129 FERC ¶ 61,123 at P 6).

⁵⁹ TDU Intervenors Protest at 4.

⁶⁰ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

⁶¹ The Model Protective Order is *available at*: <http://www.ferc.gov/legal/admin-lit.asp>.

basis for its confidentiality agreement here.⁶² SPP Stakeholders contend that the Model Protective Order directly addresses SPP's concern about the need to guard against the commercial use of protected information without overly restricting access to such information in a way that would harm smaller entities.⁶³

39. Protesters request that the Commission reject SPP's proposed Tariff revisions or require SPP to revise the language to ensure that all market participants, including smaller entities, can review and replicate SPP's transmission study results.

b. Determination

40. The Commission finds that revised section IV.6(c)(v) of Attachment O, which now specifies that costs resulting from third-party impacts included in the Balanced Portfolio cost-benefit analysis will be net of any reimbursements resulting from such third-party impacts,⁶⁴ complies with the June 18 Order's directive regarding third-party impacts.

41. With regard to revised section IX.7, however, the Commission finds that SPP's proposed revisions to do not comply with the June 18 Order. SPP has revised its Tariff to provide that resource-specific data in the planning process be disclosed by SPP to some SPP market participants (i.e., Non-Competitive Duty Personnel), under applicable confidentiality provisions. However, as discussed below, we find that SPP's proposed definition of Competitive Duty Personnel is too broad to allow interested SPP market participants to access resource-specific data, subject to confidentiality agreements, that may be needed to participate fully in SPP's Balanced Portfolio process and/or to replicate its transmission planning studies. This is true not only for small entities and generation and transmission cooperatives, but for larger entities as well. An employee of a market participant (of any size) who falls under SPP's proposed definition of Competitive Duty

⁶² SPP Stakeholders Protest at 14; Occidental Protest at 6; Western Farmers Protest at 3.

⁶³ *Id.* at 14 & n.24 (citing The Model Protective Order at P 8(a) (“If a Reviewing Representative’s scope of employment includes the marketing of energy, the direct supervision of any employee or employees whose duties include the marketing of energy; the provision of consulting services to any person whose duties include the marketing of energy, or the direct supervision of any employee or employees whose duties include the marketing of energy, such Reviewing Representative may not use information contained in any Protected materials obtained through this proceeding to give any Participant or any competitor of any Participant a commercial advantage.”)).

⁶⁴ *See* SPP Tariff, Attachment O, section IV.6(c)(v).

Personnel, would be denied access to the system design software results of a potential Balanced Portfolio even if he or she is willing to sign an appropriate confidentiality agreement. Further, a market participant that would be unable to utilize particular employees to evaluate Balanced Portfolio studies because they are Competitive Duty Personnel under SPP's proposed definition, may also be unable to engage counsel or outside consultants who have expertise in SPP's transmission system to assist with those duties. This is because the phrase "the provision of consulting services in connection with the marketing, purchase, or sale of electric power at wholesale in the SPP Region" could encompass a wide variety of utility operations to effectively limit the counsel and outside consultants that market participants can turn to for assistance with evaluating Balanced Portfolio studies.

42. In *Southern Co. Servs.*, the Commission found that resource-specific data provided in the planning process must be disclosed by participating transmission owners, under applicable confidentiality provisions, if the information is needed to participate in the transmission planning process and to replicate transmission planning studies.⁶⁵ Thus, the Commission directed the transmission provider to submit a compliance filing to revise its transmission planning tariff provisions exempting from disclosure any resource-specific data that can be used to determine security constrained unit commitment and economic dispatch or to perform an economic evaluation of costs and benefits.⁶⁶ On rehearing, the transmission providers requested that the Commission clarify that the requirement for transmission owners to disclose resource-specific data provided in the planning process is triggered only if the information is provided in the planning process and necessary for stakeholders to replicate the transmission planning studies and participate in the transmission planning process.⁶⁷ The transmission providers also requested that the Commission clarify whether confidential information required to be disclosed through the transmission planning process must be disclosed to marketing/competitive personnel.⁶⁸ In response, the Commission clarified that confidentiality agreements may restrict the availability of confidential competitive information in the transmission planning process such that it is available to customer personnel that are involved only in transmission functions, as opposed to merchant functions.⁶⁹ Thus, transmission providers must disclose resource-specific data if the

⁶⁵ See *Southern Co. Servs.*, 127 FERC ¶ 61,282 at P 61.

⁶⁶ *Id.*

⁶⁷ See *Southern Co. Servs.*, 132 FERC ¶ 61,091 at P 35.

⁶⁸ See *id.* P 37.

⁶⁹ See *id.* P 42 ("As stated in Order Nos. 890 and 890-A, confidentiality agreements may restrict the availability of confidential competitive information such that
(continued...)

information is provided in the planning process and necessary for stakeholders to replicate transmission planning studies and participate in the transmission planning process. However, transmission providers may use confidentiality agreements to restrict the availability of confidential competitive information to transmission function customer personnel. We find that instead of using confidentiality agreements to restrict the availability of confidential competitive information in the transmission planning process to customer personnel that are involved only in transmission functions, as the Commission found acceptable in *Southern Co. Servs.*, SPP's proposed definition of Competitive Duty Personnel restricts access to data needed in the Balanced Portfolio process in an overly broad manner.

43. Furthermore, in Order No. 717, the Commission reiterated that

[I]f an attorney is rendering legal advice, he may consult with both transmission function employees and marketing function employees. Likewise, a risk management employee may develop risk guidelines for both transmission function employees and marketing function employees. And regulatory personnel may present before regulatory bodies filings that cover both transmission and marketing issues. Of course, all such employees would remain subject to the No Conduit Rule, and are prohibited from transmitting transmission function information to marketing function employees.⁷⁰

44. While Order No. 717 addressed the Commission's Standards of Conduct, which apply to the relationship between a public utility's transmission and marketing personnel, we further find that if it is reasonable for certain advisor employees to render services to transmission and marketing function employees under the Standards of Conduct, subject to the No Conduit Rule, it is also reasonable for such employees as well as counsel and outside consultants to be allowed access to system design software results needed to

it is available to customer personnel that are involved only in transmission functions, as opposed to merchant functions.”).

⁷⁰ Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 131, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, Order No. 717-B, 129 FERC ¶ 61,123 at P 6). Under the “No Conduit Rule,” (a) a transmission provider is prohibited from using anyone as a conduit for the disclosure of non-public transmission function information to its marketing function employees; and (b) An employee, contractor, consultant or agent of a transmission provider, and an employee, contractor, consultant or agent of an affiliate of a transmission provider that is engaged in marketing functions, is prohibited from disclosing non-public transmission function information to any of the transmission provider's marketing function employees). See 18 C.F.R. § 358.6 (2011).

evaluate a Balanced Portfolio, subject to appropriate safeguards such as confidentiality agreements.

45. Thus, while there is no brightline rule to determine the appropriate balance between fostering transparency in the transmission planning process and ensuring that confidential information is not disclosed inappropriately, in this instance, we find that SPP's proposed revisions so unreasonably tip the balance toward protecting confidential information as to provide inadequate transparency. SPP cannot withhold needed planning data where an appropriate protective agreement can be used to satisfy both transparency and confidentiality needs. Order No. 890 stated that "in order for the Final Rule's transmission planning process to be as effective as possible, we emphasize that all transmission providers, both jurisdictional and nonjurisdictional, must be assured that the information they provide in that process will not be used inappropriately in the wholesale power market."⁷¹ At the same time, in order to ensure open and transparent transmission planning, transmission providers are required to "disclose to all customers and other stakeholders the basic criteria, assumptions, and data that underlie their transmission system plans...[and] that this information should enable customers, other stakeholders, or an independent third-party to replicate the results of planning studies."⁷² SPP must do both: allow interested market participants access to resource-specific data needed to participate in the Balanced Portfolio planning process, and protect sensitive data with appropriate confidentiality agreements.

46. While SPP is correct that the Commission has recognized that compliance with the Standards of Conduct can impose costs on small entities,⁷³ this does not provide a basis for SPP to impose restrictions on access to data needed by market participants to participate in transmission planning processes including its Balanced Portfolio process. Although we shall not require SPP at this juncture to adopt the Model Protective Order as the basis for its confidentiality agreement here as some protestors request, some variant thereof may be useful for the purpose of complying with this order. Neither SPP nor any party is foreclosed from proposing such a variant when SPP files to comply with this order, as directed below, and parties file their comments. Because the Model Protective Order was designed to protect confidential data in the litigation context and may not be perfectly suited in the context of transmission planning, we shall not mandate any particular protective agreement here.

⁷¹ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 475.

⁷² *Id.* P 471.

⁷³ *See id.* P 475.

47. Accordingly, we direct SPP to submit a compliance filing, within sixty days of the date of issuance of this order, revising subsection 7(d) of the Information Exchange provisions of Attachment O of its Tariff⁷⁴ to remove unreasonable restrictions on access to resource-specific data, and provide for access to such data under appropriate confidentiality protections, as discussed above.

The Commission orders:

(A) SPP's request for rehearing is denied, as discussed in the body of this order.

(B) SPP's tariff revisions are accepted for filing, effective October 17, 2008, subject to SPP's making a further compliance filing within 60 days, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁷⁴ As noted above, section VII now contains the Information Exchange provisions of Attachment O to SPP's Tariff.

Document Content(s)

ER08-1419-003.DOC.....1-20