

140 FERC ¶ 63,024
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket No. ER12-140-000

CERTIFICATION OF UNCONTESTED SETTLEMENT¹

(Issued September 25, 2012)

TO THE COMMISSION:

I. SUMMARY

1. Under Rule 602 of the Rules of Practice and Procedure of the Federal Energy

¹ The undersigned certified this Settlement as uncontested. However, while it did not formally file Initial Comments pursuant to Rule 602(f), the comments by the Kansas Corporation Commission in its Answer to KPP's Motion for Interim Rate Relief, the KCC seems to again offer challenges to the effective date of December 20, 2011, for assessing refunds. In its Answer to KPP's Motion for Interim Rates, it states that consistent with its November 10, 2011 protest, the KCC asserts it has separate and distinct jurisdiction over the KPP and other Kansas entities that are exempt from federal regulation. It asserts further that since the KPP did not receive State approval of its ATRR until June 29, 2012, any amounts collected by KPP prior to that date must be refunded in full to the affected ratepayers. However, the KCC also states it is not opposing the Offer of Settlement "out of respect for the established ATRR in the Settlement Offer." Moreover, Chief Judge Wagner expressly rejected the KCC's position in granting KPP's Motion for Interim Rate Relief, noting that KCC was simply reiterating an argument the Commission rejected in its Order dated December 20, 2011, setting this case for hearing and settlement judge procedures. If the Commission, however, determines this is a "Contested Settlement," the undersigned believes certification is nevertheless appropriate pursuant to 18 C.F.R. Sec. 385.602(h), Rule 602, on the basis that the comments and position offered by the KCC, relate to an issue which is severable, and presents no genuine issue of material fact, as the Commission has already decided the aforementioned issue contrary to the KCC's position in its December 11, 2011 Order. Furthermore, as noted by the Chief Judge in his August 31, 2012 Order, KCC did not seek rehearing of the Commission's Order. Since this in the undersigned's view is a non-issue, and since the formal position of the KCC is not to oppose the settlement, the undersigned deems certification as "uncontested" to be appropriate in this case.

Regulatory Commission (Commission), 18 C.F.R. § 385.602 (2010), the Kansas Power Pool (KPP), filed certain documents on August 23, 2012, offering to settle this matter. The Offer of Settlement (Settlement Agreement) resolves the issues set for hearing by the Commission.

2. KPP indicates in its proposed Offer of Settlement that it has been authorized to state that neither SPP nor any of the intervenors in this proceeding, which includes Sunflower Electric Power Corporation and Mid-Kansas Electric Company, LLC (“MKEC”), Westar Energy Inc. and its affiliate Kansas Gas and Electric Company (“Westar”), and the Kansas Corporation Commission (“KCC”), collectively, “Intervenors”) opposes the Offer of Settlement.²

3. Moreover, KPP indicates that as the party whose filing initiated this proceeding and whose tariff provisions must be modified to implement the settlement, the Southwest Power Pool (SPP), joins this Offer of Settlement for the limited purpose of submitting the revised tariff sheets needed to implement it. If approved by the Commission without material condition or modification, or if approved by the Commission with condition or modification acceptable to KPP and SPP, KPP states that this Offer of Settlement will resolve all issues set for hearing in Docket No. ER12-140-000. In its view, the Offer of Settlement represents a fair and equitable resolution of all issues that have been raised in this proceeding.

II. CASE HISTORY

4. This proceeding arises out of a filing made by the SPP in the above-captioned docket, to modify its Open Access Transmission Tariff (“OATT”) to include formula rate provisions for calculating KPP’s annual transmission revenue requirements (“ATRR”) to be included in SPP’s zonal transmission rates.

5. On October 20, 2011, SPP submitted for filing, pursuant to Section 205 of the Federal Power Act, modifications to its Open Access Transmission Tariff (“OATT”) to include formula rate provisions for calculating KPP’s annual transmission revenue requirements (“ATRR”) to be included in SPP’s zonal transmission rates. As calculated by KPP in its testimony submitted with the October 20 filing, its proposed formula produced an initial ATRR of \$528,917 for KPP, based on 2009 cost data. On November 9, 2011, Westar filed a motion to intervene and protest. On November 10, 2011, motions to intervene and protests were filed by the KCC and MKEC.³ On

² As discussed below, each of the Intervenors was involved in the settlement of a related proceeding before the KCC, which forms the basis for this Offer of Settlement.

³ As also discussed above, in its protest filed in this docket, the KCC contended
(continued)

November 23, 2011, KPP submitted an Answer to the protests, in which it updated its ATRR calculation to reflect 2010 cost data that had become available and corrected certain errors pointed out by some of the Intervenor. KPP's updated and corrected calculation of the initial ATRR was \$440,265.

6. On December 15, 2011, the Commission issued an order conditionally accepting the revised tariff sheets for filing, suspending them for a nominal period, to become effective December 20, 2011, subject to refund, and establishing hearing and settlement judge procedures.⁴ At the parties' request, the undersigned was appointed Settlement Judge.

7. On January 23, 2012, KPP and the staff of the KCC entered into a letter agreement pursuant to which KPP committed to make a filing with the KCC for approval of KPP's proposed ATRR formula. KPP made that filing on February 17, 2012 in KCC docket number 12-KPPE-630-MIS. The filing in the KCC docket proposed essentially the same ATRR formula that SPP filed on behalf of KPP in Docket No. ER12-140, but with

that the October 20 filing was an attempt to circumvent the Kansas Commission's jurisdiction and authority over KPP. The Kansas Commission asserted jurisdiction over KPP and argued that KPP's proposed rate recovery must first be filed with the Kansas Commission for approval before filing with FERC. The Commission disagreed. As a preliminary matter, the Commission did find that KPP, a municipal agency, was not a public utility within the meaning of section 201 of the FPA. However, the Commission stated that it does have jurisdiction under section 205 and 206 of the FPA over the rates for transmission service provided by SPP, a regional transmission organization (RTO) that is a public utility. The Commission explained that court decisions have made clear that when a non-jurisdictional transmission owner voluntarily joins an RTO and has its revenue requirement recovered as part of the RTO's rates, the Commission can examine the non-jurisdictional utility's revenue requirement to ensure that the RTO's rates will ultimately be just and reasonable. The Commission found that, based on the court rulings, it is appropriate to apply the just and reasonable standard of FPA section 205 to SPP's revisions to its OATT to implement KPP's proposed formula rate for transmission service, including KPP's revenue requirement in SPP's zonal rates. The Commission stated that its findings in the hearing order were not intended to make any determination as to KPP's obligations, if any, under Kansas state law to make filings before the Kansas Commission. Instead, the Commission's concern was focused on the justness and reasonableness of proposed wholesale rates under SPP's OATT, the determination of which it determined should be done through hearing and settlement judge procedures before the Commission.

⁴ *Southwest Power Pool, Inc.*, 137 FERC ¶ 61,197 (2011).

further minor correction the resulting initial ATRR calculated by KPP in the KCC filing was \$432,438. Westar and MKEC both intervened in the KCC proceeding.

8. On May 4, 2012, SPP submitted an informational filing to the Commission to notify all parties in this proceeding that it would adjust KPP's filed ATRR to \$432,438, effective as of December 20, 2011, the effective date granted in the Commission's December 2011 order. SPP explained that it made this change to be consistent with the initial ATRR that KPP calculated in its KCC filing.

9. On June 1, 2012, as the result of negotiations among KCC staff, MKEC, Westar and KPP in the KCC proceeding, a Stipulation and Agreement was submitted to the KCC reflecting a settlement entered into by KPP, KCC staff and MKEC. Westar was not a party to the Stipulation and Agreement, but it did not oppose the settlement. The Stipulation and Agreement provided for a stated ATRR of \$350,243 for KPP's transmission facilities, in lieu of the proposed formula for determining KPP's ATRR. The Stipulation and Agreement also obligated the parties thereto (*i.e.*, KCC staff, MKEC and KPP) to "pursue all reasonable efforts" to obtain this Commission's approval or acceptance of the agreed-upon stated ATRR.

10. On June 29, 2012, the KCC issued an order approving the Stipulation and Agreement.

11. Subsequently, the parties quickly agreed to settle this docket, and the aforementioned Offer of Settlement was memorialized and filed by the KPP on August 23, 2012.

III. THE SETTLEMENT

A. Terms of the Settlement

12. Article I – Background: This Article provides the procedural background relevant to the proceedings, as addressed above.

13. Article II – Stated KPP ATRR: Article II provides that the proposed formula pursuant to which KPP's ATRR would have been calculated annually will be replaced with a stated ATRR for KPP of \$350,243.00. This stated ATRR is lower than the initial KPP ATRR of \$432,438.00 (based on 2010 costs) that would have resulted from the proposed formula and that SPP is currently including in the Westar Zonal Annual Transmission Revenue Requirement ("Westar Zonal ATRR").⁵

⁵ The initial ATRR calculated by KPP in the original filing dated October 20, 2011 was \$528,917. On May 4, 2012, SPP submitted an informational filing to the

14. Article II additionally summarizes the key substantive provisions of the Offer of Settlement, including (i) referencing the revised OATT provisions necessary to accomplish the substitution of this stated ATRR for the proposed formula (which are attached to the Offer of Settlement as Attachment A), (ii) noting that the stated ATRR cannot be changed without a filing at the Commission, and (iii) establishing the proposed effective date of the stated ATRR as December 20, 2011, which is the effective date established in the Commission's order setting this matter for hearing. Article II also notes that by motion submitted simultaneously herewith, KPP and SPP have requested the Chief Administrative Law Judge to authorize interim implementation of the Offer of Settlement pending Commission approval.

15. Article III – Conditions Precedent to Effectiveness of the Settlement: Article III states that the Offer of Settlement will not become effective unless and until: (i) the Commission has issued a Final Order accepting or approving all of the terms and provisions of the Offer of Settlement without condition or modification, unless KPP and SPP accept in writing such condition or modification; and (ii) the Commission in its order approving or accepting the Offer of Settlement, including the revised OATT provisions, has waived compliance by SPP and/or KPP with any otherwise applicable regulations to the extent necessary to effectuate the Offer of Settlement.

16. Article IV – Reservations: Article IV provides that, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602, the Offer of Settlement is privileged and is inadmissible as evidence in any proceeding, and of no effect unless it is approved and made effective as to all of its terms and conditions without modification or condition, unless KPP and SPP accept in writing such modification or condition. Article IV provides further that no element of the Offer of Settlement constitutes precedent or should be deemed "settled practice" as that term was interpreted in *Public Service Commission of New York v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980).

17. Article V – Standard of Review: Article V of the Offer of Settlement proposes that the standard of review for the Offer of Settlement or any changes thereto shall be the "just and reasonable" standard of review.

Commission to notify all parties in this proceeding that it would adjust KPP's filed ATRR to \$432,438, effective as of December 20, 2011, to be consistent with the ATRR calculated by KPP in its filing with the Kansas Corporation Commission (which is described in the Offer of Settlement).

IV. RESPONSES TO REQUIRED SETTLEMENT QUESTIONS

18. The Settling Parties provide the following responses to the five questions required of an Explanatory Statement.

What are the issues underlying the settlement and what are the major implications?

19. The Offer of Settlement resolves all outstanding issues in Docket No. ER12-140-000 regarding the justness and reasonableness of KPP's proposed ATRR to be included in the Westar Zonal ATRR, under SPP's OATT.

Do any of the issues raise policy implications?

20. The Settlement Agreement and resolution of the underlying issues set for hearing raise no policy implications.

Are there other pending cases that may be affected?

21. The Settlement Agreement resolves issues in the above-captioned proceeding. There are no other pending proceedings affected by the Settlement Agreement.

Does the settlement involve issues of first impression, or are there any previous reversals on the issues involved?

22. The Settlement Agreement does not involve issues of first impression. The Settling Parties are not aware of any reversals of the issues involved.

Is the proceeding subject to the just and reasonable standard or is there *Mobile-Sierra* language making it the standard, i.e., the applicable standard of review

23. Article V of the Offer of Settlement proposes that the standard of review for the Offer of Settlement shall be the "just and reasonable" standard of review.

V. COMMENTS ON THE PROPOSED SETTLEMENT

24. The Initial Comment period ran through September 12, 2012. Reply Comments were due by September 24, 2012. FERC Staff submitted Initial Comments on September 12, 2012, in support of the Settlement Agreement, indicating the Settlement was a reasonable and fair resolution of the issues in this matter, and essentially arguing the KCC's jurisdictional objections did not render this a contested settlement. As indicated, the KCC did not submit formal Initial Comments, but submitted an Answer on August 30, 2012, objecting to the KPP's Motion for Interim Rate Relief, which the Chief Judge denied.

25. The KPP filed Reply Comments on September 24, 2012 and a Reply on August 31, 2012, to KCC's Answer regarding the Motion for Interim Rate Relief. It indicates it believes the settlement should be approved and is uncontested.

VI. DISCUSSION OF THE SETTLEMENT

26. KPP has indicated that it is authorized by the other Settling Parties to make this filing and to represent that all Settling Parties urge the Commission to approve the Settlement Agreement without condition and modification. Rule 602(g)(3) provides that the Commission may approve an uncontested settlement if it finds it to be fair and reasonable and in the public interest. The undersigned finds that the Settlement Agreement provides a reasonable resolution of all the issue(s) in this case. The undersigned finds that the Settlement is in the interest of the parties and the public. The undersigned further finds that the Settlement is reasonable and uncontested, and recommends that it be approved.

VII. CONCLUSION

27. Overall and on balance, the Settlement Agreement is an Uncontested Offer of Settlement that reflects a just and reasonable negotiated resolution of the issues set for hearing in this proceeding. The undersigned finds the Settlement Agreement promotes certainty for the Settling Parties and promotes administrative efficiency for the Commission. The Settlement Agreement sets forth the mutual covenants and conditions agreed to by the Parties; is in the public interest; and, it is recommended that the Commission approve it.

CERTIFICATION OF SETTLEMENT AND RECORD

28. Pursuant to Rule 602(b)(2)(ii) & (g) of the Rules of Practice and Procedure, 18 C.F.R. § 385.602(b)(2)(ii) & (g), the undersigned hereby certifies the Settlement Agreement and the following documents to the Commission. The undersigned further recommends that the Commission approve the Settlement Agreement as requested by the parties. The settlement record includes:

- (a) The Transmittal Letter.
- (b) Explanatory Statement.
- (c) Settlement Agreement.
- (d) Proposed Commission Order Approving the Settlement.

(e) Joint Motion for Interim Rate Relief to Chief Judge dated August 23, 2012.

(f) KCC's Answer to Motion for Interim Rate Relief.

(g) KPP's Reply to KCC Answer.

(h) Staff's Initial Comments filed September 12, 2012.

(i). KPP's Reply Comments dated September 24, 2012.

(j). ALJ Draft proposed Order

RESPECTFULLY SUBMITTED this 25th day of September, 2012

Michael J. Cianci, Jr.
Settlement Judge

DRAFT
REGULATORY COMMISSION FEDERAL ENERGY
WASHINGTON, D.C. 202426

In Reply Refer To:
Docket Nos. ER12-140-000

Margaret A. McGoldrick
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(202) 879-4000
Counsel for Kansas Power Pool

Dear Ms. McGoldrick

1. On August 23, 2012, you filed an Offer of Settlement, including a Settlement Agreement and Explanatory Statement, in the above-referenced docket. On September 12, 2012, FERC Staff filed Initial Comments in support of the settlement. On September 21, 2012, KPP submitted Reply Comments. No other formal comments were received. On September 25, 2012, the Settlement Judge Michael J. Cianci, Jr., certified the uncontested Settlement to the Commission, recommending approval of the settlement.

2. The subject settlement is in the public interest and is hereby approved. The settlement resolves all issues set for hearing in the above captioned proceedings. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding, except to the limited extent expressly provided in the Settlement. The Commission retains the right to investigate the rates, terms, and conditions of tariffs pursuant to the Federal Power Act.

3. Pursuant to the requirements of Order No. 714, a compliance filing in e-Tariff format is required to reflect the Commission's action in approving settlement orders.^[1] Such a compliance filing is necessary for any settlement filing containing *pro forma* tariff sheets, but is not necessary if the settlement was filed in e-Tariff format with actual tariff records (as opposed to *pro forma* records.)

^[1] See *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. 31,276, at P 96 (2008).

4. This letter terminates the aforementioned Docket or all parties and issues.

Secretary

cc: All Parties