

154 FERC ¶ 61,021
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

January 21, 2016

In Reply Refer To:
Southwest Power Pool, Inc.
Docket No. ER14-1174-000

Midwest Independent
Transmission System Operator,
Inc.
Docket No. EL11-34-002

Southwest Power Pool, Inc.
v.
Midcontinent Independent System
Operator, Inc.
Docket No. EL14-21-000

Midcontinent Independent System
Operator, Inc.
v.
Southwest Power Pool, Inc.
Docket No. EL14-30-000

Wright & Talisman, P.C.
1200 G Street, NW
Suite 600
Washington, DC 20005

Attn: Barry S. Spector

Southwest Power Pool, Inc.
201 Worthen Drive
Little Rock, AR 72223

Attention: Michael B. Riley

Dear Mr. Spector and Mr. Riley:

1. On October 13, 2015, you filed, in the above-referenced proceedings, an Offer of Settlement (Settlement Agreement) among Southwest Power Pool, Inc. (SPP), Midcontinent Independent System Operator, Inc. (MISO), Associated Electric Cooperative, Inc. (AECI), Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company, by and through their agent Southern Company Services, Inc. (collectively, Southern Companies), the Tennessee Valley Authority (TVA), Louisville Gas and Electric Company and Kentucky Utilities Company (together, LG&E/KU), PowerSouth Energy Cooperative (PowerSouth),¹ and NRG Energy, Inc. (NRG) (collectively, the Settling Parties). As discussed below, the Settlement Agreement appears to be fair and reasonable and in the public interest, and is hereby approved.
2. The Settlement Agreement provides the terms and conditions under which MISO will provide compensation related to available system capacity² usage and firm point-to-point transmission service between MISO Midwest and MISO South on SPP's or the Joint Parties' system. MISO also agrees to provide compensation to SPP and the Joint Parties to settle all claims for periods prior to February 1, 2016.³ Additionally, the Settlement Agreement addresses certain amendments to section 5.2 of the Joint Operating Agreement between MISO and SPP (MISO-SPP JOA). The Settlement Agreement also provides that it will supersede the Operations Reliability Coordination Agreement (ORCA). Also, it provides that MISO will remove from its Open Access Transmission, Energy and Operating Reserve Markets Tariff the "hurdle rate" mechanism accepted by the Commission in Docket No. ER14-2445-001.⁴
3. The Settling Parties filed a Joint Motion for Interim Relief and Request for Expedited Action (Joint Motion), requesting that the provisions in Articles II, III, and VII of the Settlement Agreement be implemented on February 1, 2016, pending the

¹ The Settlement Agreement refers to AECI, Southern Companies, TVA, LG&E/KU, and PowerSouth as the Joint Parties.

² Available system capacity is defined as the transmission system capacity available for MISO intra-regional flows between the 1,000 MW contract path and an upper transfer limit. The Settlement Agreement provides that the upper limit of SPP and the Joint Parties' Available System Capacity is 3,000 MW for flows from MISO Midwest to MISO South and 2,500 MW for flows from MISO South to MISO Midwest.

³ Settlement Agreement at 14.

⁴ *See Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,225 (2014).

Commission's consideration and acceptance of the Settlement Agreement. No answers to the Joint Motion were filed.

4. In accordance with section 375.307(a)(1)(iv) of the Commission's regulations,⁵ the Chief Judge found that acceptance of the Settling Parties' motion to implement interim rates was in the public interest and allowed the Settling Parties and the ratepayers they serve to benefit without delay from the Settlement Agreement. Thus, the Chief Judge accepted the compensation and transfer limit provisions of Articles II, III, and VII of the Settlement Agreement for good cause shown, and the Settling Parties were authorized, pursuant to section 35.1(e) of the Commission's regulations,⁶ to institute the interim rates, effective February 1, 2016. The Chief Judge stated that the interim rates shall remain in effect pending Commission approval of the Settlement Agreement and in the event the Commission does not approve the Settlement Agreement, SPP and the Joint Parties will refund with interest all payments made by MISO.

5. On October 23, 2015, Mr. Eric S. Morris filed comments, as discussed below. On November 2, 2015, the MISO Transmission Owners⁷ and Commission Trial Staff filed separate comments in support of the Settlement Agreement. On November 12, 2015, SPP filed reply comments in response to Mr. Morris' comments.

⁵ 18 C.F.R. § 375.307(a)(1)(iv) (2015), *conforming Changes*, Order No. 699, 72 Fed. Reg. 45,320 (Aug. 6, 2007), FERC Stats. & Regs., ¶ 31,254 (2007).

⁶ 18 C.F.R. § 35.1(e) (2015).

⁷ The MISO Transmission Owners in this proceeding are: Ameren Services Company, as agent for Union Electric Company; Ameren Illinois Company; Big Rivers Electric Corporation; City Water, Light & Power (Springfield, IL); Cleco Power, LLC; Dairyland Power Cooperative; Duke Energy Corporation for Duke Energy Indiana, Inc.; Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Otter Tail Power Company; Prairie Power Inc.; South Mississippi Electric Power Association; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; and Wabash Valley Power Association, Inc.

6. In his comments, Mr. Morris states that he is not a party to this proceeding. He also questions whether the Settlement Agreement's payment from MISO to SPP and the Joint Parties, or any portion thereof, is for "unreserved use."⁸

7. In its reply comments, SPP states that Mr. Morris did not raise any issue or argument that would preclude approval of the Settlement Agreement. SPP states that the Settlement Agreement resolves all disputes among the Settling Parties in these proceedings and that it does not characterize the payment from MISO to SPP and the Joint Parties as compensation for unreserved use. Moreover, SPP notes that it would be more appropriate for Mr. Morris to raise his concerns in Docket No. ER14-1736-000, where the parties are currently engaged in settlement negotiations regarding the allocation of MISO's costs incurred as a result of the Settlement Agreement.⁹ SPP adds that its Open Access Transmission Tariff does not currently have a revenue allocation methodology for distributing the payments made by MISO to SPP transmission owners; therefore, SPP commits to making a filing prior to February 1, 2016 to address the situation. Finally, SPP argues that Mr. Morris lacks standing to address SPP's revenue allocation in these proceedings because he is not an SPP customer and does not reside in the SPP region.¹⁰

8. On January 5, 2016, the Settlement Judge certified the Settlement Agreement to the Commission as an uncontested settlement.¹¹ We agree with the Settlement Judge's findings. We note that the comments filed by Mr. Morris, who acknowledges that he is not a party to this proceeding, do not present an issue that prevents treating the Settlement Agreement as an uncontested settlement.

9. We note that Article XIII, section 13.1 of the Settlement Agreement provides that:

[t]o the extent the Commission considers any changes to the provisions of this Settlement Agreement during its term, as defined in Article X, the standard of review for such changes shall be the most stringent standard permissible under applicable law. For the avoidance of doubt, the standard of review for any modifications to the Settlement Agreement, other than

⁸ Eric S. Morris Initial Comments at 1.

⁹ SPP Reply Comments at 4.

¹⁰ *Id.* at 4 & n.14 (citing *Cf. Morris v. Sw. Power Pool, Inc.*, 149 FERC ¶ 61,207, at P 14 n.27 (2014) (dismissing complaint for, among other reasons, failure to show sufficient "financial impact or burden.")).

¹¹ *Sw. Power Pool, Inc.*, 154 FERC ¶ 63,001 (2016).

amendments agreed to by all Parties, whether proposed by a Party, any third party, or the Commission acting *sua sponte*, shall be solely the most strict standard set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), as clarified in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 554 U.S. 527 (2008), and refined in *NRG Power Marketing v. Maine Public Utilities Commission*, 130 S.Ct. 693, 700 (2010).

10. Because the Settlement Agreement appears to provide that the standard of review applicable to modifications to the Settlement Agreement proposed by third parties and the Commission acting *sua sponte* is to be “the most stringent standard permissible under applicable law,” we clarify the framework that would apply if the Commission were required to determine the standard of review in a later challenge to the Settlement Agreement by a third party or by the Commission acting *sua sponte*.

11. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s-length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms or conditions that necessarily qualify for a *Mobile-Sierra* presumption.¹² In *New England Power Generators Association v. FERC*,¹³ however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above. In the event that the Commission applies this framework to the Settlement Agreement in the future, the Commission would consider the Settling Parties’ view that “the most stringent standard permissible under applicable law” is the “most strict standard set forth” in the cases cited in Article XIII, section 13.1 of the Settlement Agreement, as quoted above.

¹² *Panhandle Eastern Pipe Line Co.*, 143 FERC ¶ 61,041, at P 84 (2013); *Entergy Arkansas, Inc.*, 143 FERC ¶ 61,299, at P 92 (2013).

¹³ *New England Power Generators Ass’n v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. 2013).

12. The Settlement Agreement resolves all issues in dispute in these proceedings. The Settlement Agreement appears to be fair and reasonable and in the public interest, and is hereby approved. The Commission's approval of the Settlement Agreement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

13. SPP and MISO are directed to file revised tariff records in eTariff format,¹⁴ within forty-five (45) days of the date of this order, to reflect the Commission's action in this order.

14. This order terminates Docket Nos. ER14-1174-000, EL11-34-002, EL14-21-000, EL14-30-000.¹⁵

By direction of the Commission. Commissioner Clark is concurring with a separate statement attached.
Commissioner Honorable is not participating.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁴ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).

¹⁵ The Commission is issuing an order on the pending requests for rehearing in Docket Nos. ER14-1174-001, EL11-34-003, EL14-21-001, and EL14-30-001 concurrently with this order.

UNITED STATES OF AMERICA
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(Issued January 21, 2016)

CLARK, Commissioner, *concurring*:

I write separately today to note that I support the result in this case which resolves a significant, contentious issue among many parties. I appreciate the time and effort that those parties have expended to resolve the captioned matters in a global settlement.

Today's order leaves the door open as to how the Commission would analyze the settlement in the event a challenge is brought. While I do not pre-judge the outcome of any such challenge, based on my review of the settlement, it appears the settlement may embody certain non-contract rates, terms, and conditions that are generally applicable in nature. Specifically, I view the settlement as placing new conditions of transmission service on MISO market participants given the transfer limits established between MISO Midwest and MISO South. Because these terms could impact more than just the settling parties, including future MISO market participants, I do not think it is appropriate to extend the heightened *Mobile-Sierra* standard to those third parties or the Commission acting *sua sponte*. Consistent with my prior statements,¹⁶ if we are to preserve the integrity of the *Mobile-Sierra* standard, we should be judicious in its application.

For these reasons, I respectfully concur with this order.

Tony Clark
Commissioner

¹⁶ *ISO New England Inc.*, 143 FERC ¶ 61,150, *order on reh'g*, 150 FERC ¶ 61,209 (2015).