

168 FERC ¶ 61,168
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Southwest Power Pool, Inc.
Sunflower Electric Power Corporation

Docket No. ER19-2273-000

ORDER ACCEPTING PROPOSED TARIFF REVISIONS AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued September 19, 2019)

1. On June 27, 2019, pursuant to section 205 of the Federal Power Act (FPA)¹ and Part 35 of the Commission's regulations,² Southwest Power Pool, Inc. (SPP) submitted, on behalf of Sunflower Electric Power Corporation (Sunflower) and Mid-Kansas Electric Company, Inc. (Mid-Kansas) (together, Sunflower/Mid-Kansas), revisions to SPP's Open Access Transmission Tariff (SPP Tariff) to reflect the merger of Mid-Kansas into Sunflower and to revise various aspects of Sunflower's formula rate template and formula rate implementation protocols (Protocols) (together, Formula Rate).³

2. In this order, we accept SPP's proposed revisions to become effective January 1, 2020, or the first day of the month after the date the merger is consummated if the merger occurs after January 1, 2020, subject to refund, and establish hearing and settlement judge procedures.

I. Background

3. Sunflower/Mid-Kansas are non-profit, membership corporations, operating as cooperatives, and are transmission owning members of SPP. SPP explains that Sunflower/Mid-Kansas are not "public utilities" for purposes of sections 205 and 206 of the FPA, although the Sunflower/Mid-Kansas transmission rates are subject to Commission review as a component of the SPP Tariff. SPP further states that

¹ 16 U.S.C. § 824d (2018).

² 18 C.F.R. pt. 35.13 (2019).

³ The Sunflower and Mid-Kansas formula rates are contained in Addendum 19 and Addendum 20 to Attachment H of the SPP Tariff, respectively.

Sunflower/Mid-Kansas are operated by Sunflower with a single management group, currently operate as a single market participant in the SPP Integrated Marketplace, and that their accounting operations are on a single accounting system.⁴

4. SPP states that in August 2018, Sunflower/Mid-Kansas filed with the Kansas Corporation Commission (Kansas Commission) an application to merge Mid-Kansas into Sunflower. According to SPP, the Kansas Commission approved a unanimous merger settlement agreement on March 28, 2019. SPP further states that January 1, 2020 is the expected date for consummation of the merger.⁵

II. Filing

5. SPP, on behalf of Sunflower/Mid-Kansas and as administrator of the SPP Tariff, proposes to revise the existing Sunflower Formula Rate contained in Attachment H of the SPP Tariff and to combine the existing Sunflower (Zone 12) and Mid-Kansas (Zone 15) pricing zones into a single Sunflower zone. SPP also proposes revisions to remove the Mid-Kansas formula rate template and formula rate implementation protocols from the SPP Tariff. SPP requests that the Commission accept the proposed revisions with an effective date of January 1, 2020, or the first day of the month after the date the merger of Mid-Kansas into Sunflower is consummated if the merger occurs after January 1, 2020.

6. SPP states that Sunflower has agreed to allow its Formula Rate to be treated as being accepted subject to refund with interest, based on the outcome of this proceeding. SPP notes that Sunflower makes this commitment without waiving or impacting its non-jurisdictional status.⁶

7. SPP requests waiver of the Commission's prior notice requirement to permit the proposed effective date. SPP also requests waiver of the Commission's cost of service filing requirements in section 35.13 of the Commission's regulations. According to SPP, the instant filing is for a formula rate, and a cooperative utility which is not subject to FPA section 205 is not subject to these filing requirements.⁷

III. Notice of Filing and Responsive Pleadings

8. Notice of SPP's filing was published in the *Federal Register*, 84 Fed. Reg. 31,865 (2019), with interventions and protests due on or before July 18, 2019. The Kansas

⁴ SPP Transmittal at 2-5.

⁵ *Id.* at 5.

⁶ *Id.* at 11.

⁷ *Id.* at 12.

Commission filed a notice of intervention and a protest. Kansas Municipal Energy Agency (KMEA) filed a timely motion to intervene and protest. Kansas Electric Power Cooperative, Inc. (KEPCo) filed a timely motion to intervene, comments supporting certain aspects of SPP's filing, and a protest. Kansas Power Pool and Western Kansas Industrial Electric Consumers (WKIEC) filed timely motions to intervene and comments. Additional timely motions to intervene were filed by: the City of Garden City, Kansas; ITC Great Plains, LLC; Mid-Kansas; and Sunflower.

9. Kansas Power Pool, WKIEC, and KEPCo support the merger of the Sunflower/Mid-Kansas zones into a single Sunflower zone and the merger of the Sunflower/Mid-Kansas formula rate templates and formula rate implementation protocols into a single Sunflower Formula Rate. WKIEC also states that it views the instant filing and Formula Rate contained therein as fair and reasonable.

10. On August 2, 2019, Sunflower/Mid-Kansas filed an answer to the protests. On August 20, 2019, KMEA filed an answer to the Sunflower/Mid-Kansas answer. On August 29, 2019, Sunflower/Mid-Kansas filed an answer to the KMEA answer.

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept the Sunflower/Mid-Kansas and KMEA answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Proposed Formula Rate

a. Rate of Return

i. SPP's Filing

13. Sunflower explains that as cooperatives, Sunflower and Mid-Kansas do not have shareholders as a source of capital. Sunflower states that instead, the existing formula rate templates for Sunflower and Mid-Kansas calculate its return based on the maximum

of either a Times Interest Earned Ratio (TIER) or Debt Service Coverage (DSC) metric.⁸ Sunflower explains that the proposed formula rate template will continue to use a higher of TIER or DSC metric as the basis for the return. Sunflower asserts that, for a given TIER or DSC, the resulting rate of return varies based on several factors, including debt to total capitalization ratio and average interest rate. Sunflower also states that it currently uses a fixed TIER of 1.7566 and fixed DSC of 1.3659, which produces a 5.11 percent return on rate base based on 2017 data for the merged Sunflower entity.⁹ Sunflower states that the proposed revisions to its formula rate template include a fixed TIER of 2.45 and a fixed DSC of 2.19, which Sunflower states produces slightly less than a 7.42 percent overall return on rate base based on the same 2017 data.¹⁰

14. Sunflower states that, in order to determine a reasonable rate of return produced by the maximum of either a TIER or DSC metric, it calculated an ROE based on the discounted cash flow model, as well as the capital asset pricing model, risk premium model, and expected earnings model. Sunflower contends that its use of these models is based on the Commission's Order Directing Briefs related to an ongoing proceeding involving transmission owners in New England.¹¹ Based on an average of these models' results, Sunflower calculates that the base ROE should be set at 9.59 percent and that Sunflower should be allowed to receive a 50-basis point adder for participation in an organized regional market, and thus the total ROE should be 10.09 percent. In its calculation of a reasonable rate of return as support for the proposed TIER and DSC metrics, Sunflower explains that it should be allowed to use a hypothetical capital structure of 53.12 percent equity and 46.88 percent debt because it is a non-jurisdictional transmission owner, resulting in an overall rate of return of 7.42 percent, inclusive of a regional transmission organization (RTO) adder. Thus, Sunflower explains that the proposed TIER and DSC metric produces a rate of return slightly less than 7.42 percent.¹²

⁸ Ex. SPP-005 (Testimony of H. Davis Rooney) at 17-18. TIER and DSC are debt coverage metrics. TIER is the ratio of interest expense plus net income (numerator) to interest expense (denominator). DSC is the ratio of net income plus interest expense plus depreciation (numerator) to debt principal payments plus interest expense (denominator).

⁹ *Id.* at 19.

¹⁰ *Id.* at 19-20.

¹¹ Ex. SPP-011 (Testimony of Larry W. Riegle) at 11-12 (citing Docket Nos. EL11-66-001, EL11-66-004, and EL11-66-005).

¹² *Id.* at iii-iv.

ii. Protests and Answers

15. Protestors argue that the proposed TIER and DSC are unjust and unreasonable. Accordingly, protestors assert that the Commission should set the proposed revisions for evidentiary hearing and settlement judge procedures. Specifically, KMEA and the Kansas Commission argue that the methodology used to determine Sunflower's base ROE has yet to be adopted by the Commission and currently remains controversial and unsettled.¹³ KMEA contends that the use of the models in addition to the discounted cash flow model is unnecessary, flawed, and will artificially increase ROEs at the expense of the customer. Accordingly, KMEA argues that additional time and procedures are necessary to evaluate whether Sunflower's use of an ROE to set its TIER is appropriate; and if so, whether the proxy group of companies used represents risk profiles comparable to Sunflower and whether the proposed proxy capital structure is appropriate.¹⁴

16. Additionally, protestors assert that the proposed TIER and DSC are unjust and unreasonable for a number of other reasons. The Kansas Commission argues that Sunflower did not use the most current six-month study period available in the ROE analysis, Sunflower's conclusion that it is no more risky than any other utility in the proxy group is not supported, and Sunflower fails to indicate whether it considered whether Sunflower is less risky than other utilities in the proxy group.¹⁵ KMEA argues that the proposed TIER does not reflect Sunflower's actual costs of borrowing, but instead Sunflower backs into the proposed TIER in order to achieve a desired result.¹⁶

17. KEPCo and the Kansas Commission argue that Sunflower does not explain why the proposed hypothetical capital structure is reasonable.¹⁷ According to KEPCo, Sunflower/Mid-Kansas had no need for hypothetical capital structures in their previous formula rate templates and there is no evidence that Sunflower is having trouble raising capital. KEPCo argues that the hypothetical capital structure will unnecessarily and artificially increase rates. KEPCo estimates that the use of the hypothetical capital structure will increase Sunflower's revenues by more than \$10.6 million per year

¹³ KMEA Protest at 5-6; Kansas Commission Protest at 8-9.

¹⁴ KMEA Protest at 7.

¹⁵ Kansas Commission Protest at 9.

¹⁶ KMEA Protest at 6.

¹⁷ KEPCo Protest at 5-7; Kansas Commission Protest at 9-10.

compared to using Sunflower's actual capital structure, which includes only 27 percent equity.¹⁸

18. The Kansas Commission also argues that Sunflower makes no showing that the 50 basis point adder is necessary to incentivize Sunflower to remain in SPP. According to the Kansas Commission, the Commission must find some basis for granting the requested incentive.¹⁹ Additionally, KMEA argues that the formula rate should identify the specific incentive adder(s) granted and how the incentive adder(s) converts to TIER or DSC. KMEA further argues that this will ensure transparency in the calculation of the overall return, TIER, or DSC and ensure that the makeup of the return, TIER, or DSC may be understood independently.²⁰

19. In their answer, Sunflower/Mid-Kansas disagree with protestors' arguments that the proposed TIER and DSC are unjust and unreasonable. Sunflower/Mid-Kansas contend that the fact that its ROE analysis includes models and analysis under consideration by the Commission should not render the return unreasonable.

20. In response to KMEA, Sunflower/Mid-Kansas argue that the TIER metric is not the cost of borrowing, but instead requires both return on equity and cost of borrowing to be calculated. Additionally, Sunflower/Mid-Kansas assert that Sunflower had an approximately 15.4 percent return on rate base when the existing TIER and DSC were initially authorized, and that the proposed TIER and DSC in this proceeding correct a significant deterioration of the return on rate base since the initial authorization. Sunflower/Mid-Kansas also argue that the proposed TIER and hypothetical capital structure are in line with those approved by the Commission for other entities in SPP.²¹

21. In response to KMEA's argument that the proposed formula rate does not identify the specific incentive adders granted, Sunflower/Mid-Kansas state that the proposed formula rate contains the same language as the existing formula rate regarding incentives.

¹⁸ KEPCo Protest at 5-7.

¹⁹ Kansas Commission Protest at 11.

²⁰ KMEA Protest at 8.

²¹ Sunflower/Mid-Kansas August 2 Answer at 11-14.

Sunflower/Mid-Kansas also assert that the Commission accepted RTO participation adders for Sunflower and Mid-Kansas in previous proceedings.²²

22. In its answer, KMEA asserts that Sunflower/Mid-Kansas's statements regarding Sunflower's current TIER and DSC levels do not demonstrate that the proposed ROE, hypothetical capital structure, and cost of debt used to achieve the proposed TIER and DSC are just and reasonable.²³

b. Competitive Transmission

i. SPP's Filing

23. Sunflower states that the proposed formula rate template includes revisions that will allow Sunflower to make adjustments to certain parts of its formula rate template for competitively bid transmission projects in the event that Sunflower is selected as the winning bidder to construct projects under the Order No. 1000²⁴ (Competitive Bid Adjustment Mechanism) process in the SPP Tariff. Sunflower states that its current formula rate template is designed to calculate each project's revenue requirement using the average system cost ratios for the entire transmission system, but SPP's bidding process allows use of incremental project specific costs to calculate the revenue requirements for competitively bid projects. Thus, Sunflower states that the proposed revisions to the Competitive Bid Adjustment Mechanism will provide greater flexibility, which is necessary to fairly compete in the competitive transmission process, and will accurately reflect the costs of any competitive transmission project which Sunflower is selected to construct.²⁵

²² *Id.* at 19 (citing *Sw. Power Pool, Inc.*, 143 FERC ¶ 61,025 (2013); *Sw. Power Pool, Inc.*, Docket No. ER14-228-000 (Dec. 19, 2013) (delegated order)).

²³ KMEA Answer at 3.

²⁴ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

²⁵ Ex. SPP-001 (Testimony of James Brungardt) at 11.

ii. Protests and Sunflower/Mid-Kansas Answer

24. The Kansas Commission argues that the proposed revisions to Sunflower's Competitive Bid Adjustment Mechanism are unjust and unreasonable. The Kansas Commission contends that Sunflower is unable to track operations and maintenance (O&M) or administrative and general (A&G) expenses on a project-by-project basis over the life of a project, meaning that any cost over-run resulting from a commitment in Sunflower's bid would effectively be passed on to other transmission customers in Sunflower's zone, creating an improper cross-subsidization. The Kansas Commission further states that Sunflower proposed similar revisions in a proceeding before the Kansas Commission, but ultimately agreed to not include O&M and A&G expenses as committable items and agreed to limit the Competitive Bid Adjustment Mechanism to competitively bid projects located in Sunflower's zone.²⁶

25. In their answer, Sunflower/Mid-Kansas state that Sunflower agrees to modify the proposed Competitive Bid Adjustment Mechanism to not include O&M and A&G as committable items. However, Sunflower/Mid-Kansas state that Sunflower proposes to maintain its flexibility to apply the Competitive Bid Adjustment Mechanism to all competitively bid projects for which Sunflower is selected as the winning bidder and constructs the projects pursuant to a notification to construct from SPP, as opposed to only competitively bid projects that are located in Sunflower's zone.²⁷

c. Removal of Caps on Projected Expenses

i. SPP's Filing

26. Sunflower states that the proposed formula rate template reflects the removal of an existing 1.10 cap (i.e., 10 percent) on projected expenses that was agreed to as part of the settlement agreement when Sunflower/Mid-Kansas initially filed their formula rates for inclusion under the SPP Tariff. Sunflower contends that no other formula rates under the SPP Tariff utilize such a cap on projected expenses and the cap limits the amount of expenses that can be included in the projected rate year, which shifts cost recovery to the true-up calculation recovered two years after the rate year.²⁸ As an example, Sunflower states that if it has a large number of projects coming online in 2019, the capped ratio would only allow a projection of expenses to be no greater than 10 percent of the 2017 expenses, but those actual expenses would need to be recovered in 2021 when the 2019

²⁶ Kansas Commission Protest at 5, 7-8.

²⁷ Sunflower/Mid-Kansas August 2 Answer at 7.

²⁸ Ex. SPP-001 (Brungardt Test.) at 24-25.

true-up is applied to rates. Sunflower states that removing the 10 percent cap will allow Sunflower to recover the necessary costs during the projected rate year as the formula is intended.²⁹

ii. Protests and Sunflower/Mid-Kansas Answer

27. KEPCo argues that removal of the cap on projected expenses potentially exposes customers to excessive projected expenses, particularly overstatement of O&M expenses. While KEPCo agrees that the 1.10 cap on projected expenses is too low, KEPCo believes that a cap of 1.30 would strike a reasonable balance between the current cap, which KEPCo believes is too low, and no cap at all.³⁰

28. Sunflower/Mid-Kansas argue that KEPCo does not support its argument that absent a cap, there will be an overstatement of O&M expense. Sunflower/Mid-Kansas contend that, given that there is no evidence or precedent to support a cap, KEPCo's speculation should be rejected.³¹

d. Formula Rate Implementation Protocols

i. SPP's Filing

29. Sunflower states that the proposed Protocols contain revisions to the existing Sunflower protocols, and that these revisions can be grouped into three general categories: (1) revisions to bring the protocols in line with recent Commission precedent; (2) revisions to reflect the merger of Mid-Kansas into Sunflower; and (3) revisions to reflect a transition method as agreed to in the merger settlement agreement. Sunflower states that under the current Protocols, Sunflower's revenue requirement is based on projections with a subsequent true-up against actuals in the next projected rate year.³²

30. Sunflower explains that the proposed Protocols were modeled after Mountrail-Williams Electric Cooperative's (Mountrail-Williams) protocols, which were the result of a settlement agreement approved in Docket No. ER17-1610-001. Sunflower states that the proposed Protocols outline the different requirements and timelines of Sunflower and

²⁹ *Id.* at 25.

³⁰ KEPCo Protest at 7-8.

³¹ Sunflower/Mid-Kansas August 2 Answer at 20-21.

³² Ex. SPP-001 (Brungardt Test.) at 30-32.

other interested parties such as filing dates and requirements, notice of customer meetings and dates of other specific events related to the formula rate process.³³

31. According to Sunflower, there will need to be a calculation of true-ups for both the 2018 and 2019 rate years, on a separate Sunflower and Mid-Kansas basis if the Formula Rate were to become effective January 1, 2020. Therefore, Sunflower states that the proposed Protocols specifically address, through a transition method, how each of those true-ups will be applied to the 2020 and 2021 rate years for the single, post-merger Sunflower revenue requirement. Sunflower additionally states that it is proposing a transition method to address concerns over the rate impacts of the merger on the true-ups for 2018 and 2019 when Sunflower/Mid-Kansas operated as separate entities. In the transition method, Sunflower proposes to assign each zonal transmission customer their load ratio share of the cost or refund associated with the 2018 and 2019 true-up calculations by calculating the difference between the standalone and merged true-ups for each zonal transmission customer.³⁴

ii. Protests and Answers

32. KEPCo and KMEA argue that Sunflower's proposed Protocols do not provide a reasonable opportunity for stakeholders to obtain information and review Sunflower's annual informational filing. KEPCo and KMEA note that the proposed Protocols only allow a 60-day review period where interested parties may submit information requests on the annual informational filing. KEPCo and KMEA state this is a much shorter timeframe than under the existing Mid-Kansas protocols and other entities' protocols, such as, KMEA argues, the Midcontinent Independent System Operator, Inc. (MISO) protocols.³⁵

33. Additionally, KEPCo asserts that the proposed Protocols have no procedures for review and submission of information requests related to the annual true-up adjustment. In response to Sunflower's statement that the proposed Sunflower Protocols were modeled after Mountrail-Williams' protocols, KEPCo notes that Mountrail-Williams' protocols were the product of a settlement. KEPCo argues that the fact that those protocols were approved by the Commission as part of a settlement does not establish them as just and reasonable.³⁶

³³ *Id.* at 31.

³⁴ *Id.* at 32-35.

³⁵ KEPCo Protest at 3-4; KMEA Protest at 10-11.

³⁶ KEPCo Protest at 2-5.

34. KMEA also asserts the proposed Protocols should: (1) include a minimum notice requirement for the annual meeting; (2) include a requirement that Sunflower will respond to outstanding information requests after the end of the information exchange period by a certain date; (3) require Sunflower to provide an explanation supporting its response when it disagrees with an informal challenge; (4) specify that the Protocols do not limit the right of the utility to make an FPA section 205 filing to change the formula rate, or the rights of parties to request changes pursuant to FPA section 206; (5) state that the annual informational filing will include information needed to determine the reasonableness of Sunflower's projected costs; and (6) specify that the annual informational filing will describe mistakes, corrections, or adjustments made during the rate period. Additionally, KMEA argues that a proposed provision in the Protocols stating that Sunflower may make a limited FPA section 205 filing to change certain aspects of its rates is contrary to Commission policy disfavoring single-issue ratemaking and inappropriately attempts to limit the Commission's review of future section 205 filings.³⁷

35. In their answer, Sunflower/Mid-Kansas state that Sunflower is willing to change its proposed Protocols to include: (1) a requirement that the annual meeting will take place between seven and twenty days after publication of the annual informational filing; and (2) a provision reserving parties' rights under FPA sections 205 and 206. Sunflower/Mid-Kansas assert that KEPCo's and KMEA's other requested changes to the proposed Protocols go beyond what is necessary under the Commission's guidance, that the proposed Protocols already provide sufficient protections, and that further changes should not be required.³⁸

36. KMEA asserts in its answer that, while Sunflower agrees to modify certain protocols, it did not propose any specific language. KMEA argues that the Commission should reject the proposed provision on limited FPA section 205 filings as contrary to Commission policy even if the Commission sets this case for further procedures.³⁹

³⁷ KMEA Protest at 10-12 (citing *Transource Kansas, LLC*, 163 FERC ¶ 61,176 (2018); *ATX Southwest LLC*, 152 FERC ¶ 61,193 (2015)).

³⁸ Sunflower/Mid-Kansas August 2 Answer at 15-18 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149 (2013)).

³⁹ KMEA Answer at 5, 9-10.

37. In response to KMEA's answer, Sunflower/Mid-Kansas state that they agree to remove the provision regarding limited FPA section 205 filings if the Commission determines that this provision is unreasonable.⁴⁰

e. Rate Impacts

i. Protests and Answers

38. KMEA argues that Sunflower/Mid-Kansas did not address the rate impacts on affected customers, such as KMEA. KMEA further argues that it has not been able to reliably calculate the dollar impact of the proposed merging of transmission pricing zones or the proposed rate treatments, based solely on the information provided in the instant filing. According to KMEA, the Commission must perform a thorough evaluation of the merged Sunflower/Mid-Kansas rate proposal to ensure that the rates, terms and conditions under the SPP Tariff are just and reasonable.⁴¹

39. In response to KMEA's request for a rate impact analysis, Sunflower/Mid-Kansas contend that they requested waiver of this requirement of Part 35 of the Commission's regulations because the filing in this proceeding is a formula rate, and the Commission has confirmed that a cooperative utility that is not subject to FPA section 205 is not subject to the Commission's cost of service regulatory filing requirements.⁴²

40. In its answer, KMEA maintains that it is reasonable to require SPP or Sunflower/Mid-Kansas to provide some level of rate impact analysis so that customers and the Commission can understand the proposed Formula Rate and the magnitude of the rate changes resulting from the merger of two transmission pricing zones.⁴³

f. Recovery of NERC Penalties

i. Protests and Answers

41. KMEA argues that Sunflower should not be permitted to recover North American Electric Reliability Corporation (NERC) penalties from wholesale customers. According to KMEA, Schedule 1 of the Sunflower formula rate template includes a line item to recover transmission-related penalties imposed on the company by NERC. KMEA

⁴⁰ Sunflower/Mid-Kansas August 29 Answer at 9.

⁴¹ KMEA Protest at 4-5.

⁴² Sunflower/Mid-Kansas August 2 Answer at 18.

⁴³ KMEA Answer at 4-5.

further argues that allowing Sunflower to recover in wholesale rates any penalties imposed by NERC for the company's failure to comply with mandatory standards is contrary to the public interest and shifts the cost of non-compliance to customers who have no ability to influence compliance.⁴⁴

42. Sunflower/Mid-Kansas contend that the NERC penalty component of the formula rate template is an unchanged component of Sunflower's existing Commission-approved formula rate template. Sunflower/Mid-Kansas state that the NERC penalty component was agreed upon by parties to a settlement in a Kansas Commission proceeding and argues that the Commission should not change this unchanged aspect of Sunflower's formula rate template.⁴⁵

43. In its answer, KMEA argues that the Commission accepted the NERC penalty component of the existing Sunflower formula rate template by delegated letter order, which is not precedential, and that the Commission has rejected automatic recovery of NERC fines and penalties from wholesale customers.⁴⁶ Additionally, KMEA contends that the entirety of Sunflower's proposed Formula Rate should be within the scope of review of this proceeding, given that the former Sunflower zone will be materially different. KMEA requests that the Commission reject the NERC penalty component of the formula rate template as contrary to Commission policy even if the Commission sets this case for further procedures.⁴⁷

44. In their answer, Sunflower/Mid-Kansas argue that the Commission should clarify that the scope of this proceeding is the proposed revisions to the Formula Rate and unrevised elements of the Formula Rate that are materially changed or impacted by the proposed revisions. Sunflower/Mid-Kansas also argue that KMEA's argument that the Commission should reject specific aspects of the proposed Formula Rate is significantly different than KMEA's initial protest that the Commission set the proposed Formula Rate for hearing and further procedures.⁴⁸

⁴⁴ KMEA Protest at 9.

⁴⁵ Sunflower/Mid-Kansas August 2 Answer at 19-20.

⁴⁶ KMEA Answer at 8 (citing *Entergy Services, Inc.*, 133 FERC ¶ 61,136 (2010)).

⁴⁷ *Id.* at 9-10.

⁴⁸ Sunflower/Mid-Kansas August 29 Answer at 3-4, 8.

g. Other Proposed Revisions

45. Sunflower states that the proposed formula rate template assigns Schedule 11 Point-to-Point and Attachment AU⁴⁹ revenue credits to Sunflower's base plan revenue requirement.⁵⁰ Sunflower states that revenue credits associated with zonal and regional Schedule 11 point-to-point service and certain credits received under Attachment AU of the SPP Tariff should be credited against the base plan revenue requirement.⁵¹

46. Sunflower proposes to include an additional table for Construction Work in Progress (CWIP) to Tab A-4 of the formula rate template to improve transparency and eliminate the need for a separate workpaper. Sunflower states that it has certain transmission assets which are not recovered in transmission rates, but are included in CWIP (i.e., direct assigned transmission facilities which are paid for by third party entities). Sunflower explains that for these projects, Sunflower, as the host transmission owner, will construct and own these facilities, but because they are not paid for by Sunflower's transmission customers, the CWIP associated with these facilities needs to be excluded from the formula rate template. Sunflower further states that in the past,

⁴⁹ Attachment AU sets forth the procedures by which the transmission provider will distribute revenues received from the MISO and NRG Energy, Inc. pursuant to the settlement agreement addressing matters related to the MISO-SPP Joint Operating Agreement. *See* SPP Tariff, Attachment AU.

⁵⁰ Ex. SPP-001 (Brungardt Test.) at 26-28.

⁵¹ *Id.* at 26. SPP Tariff, Schedule 11, Section II, Part A states:

In calculating the Base Plan Zonal Annual Transmission Revenue Requirements and Region-wide Annual Transmission Revenue Requirement, the Transmission Provider shall sum the applicable, Commission-approved annual transmission revenue requirements for upgrades eligible for cost recovery under this Schedule 11... such annual transmission revenue requirements shall be reduced by the previous calendar year's amount of (i) point-to-point revenue received by each Transmission Owner resulting from charges under Section III of this Schedule 11 and (ii) revenue distributed to each Transmission Owner under Section IV of Attachment AU and allocated in proportion to point-to-point transmission service Schedule 11 Revenue under Section V of Attachment AU.

Sunflower would have to show the removal of this CWIP through supporting workpapers.⁵²

47. Sunflower states that the existing Sunflower template includes 100 percent of CWIP in the formula rate's revenue requirement calculation. According to Sunflower, Commission Order No. 679 permits a utility to include 100 percent of CWIP in its recovery calculations when the utility demonstrates a connection between its request and the investments being made.⁵³ Sunflower asserts that because most commercial lenders are not as familiar with cooperatives compared to investor-owned utilities, the assurances of having a formula rate with strong credit support features help increase the number of lenders that consider lending to Sunflower and allow Sunflower to obtain more competitive and favorable pricing on borrowings. Sunflower contends that 100 percent CWIP treatment relieves financing pressures by increasing upfront cash flows during project construction and decreases the amount of debt required to finance a project.⁵⁴

48. Sunflower also states that the proposed revisions to the formula rate template reflect the termination of operating lease agreements between Sunflower/Mid-Kansas. According to Sunflower, there is no longer a need for these lease payment adjustments in the formula rate because the leased assets will be consolidated into Sunflower's balance sheet upon consummation of the merger.⁵⁵ Lastly, Sunflower states that the proposed formula rate template reflects depreciation rates that are the weighted averages of the Sunflower and Mid-Kansas depreciation rates approved by the Commission, as of December 31, 2016.⁵⁶

2. Standard of Review

49. The Commission has addressed the standard of review to be applied to petitions involving non-jurisdictional transmission revenue requirements in an opinion reviewing

⁵² Ex. SPP-001 (Brungardt Test.) at 25-26.

⁵³ *Id.* at 29-30 (citing *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, at P 117 (2006)); Ex. SPP-005 (Rooney Test.) at 10-11.

⁵⁴ Ex. SPP-005 (Rooney Test.) at 12.

⁵⁵ Ex. SPP-001 (Brungardt Test.) at 21.

⁵⁶ *Id.* at 22. The depreciation rates in the Sunflower/Mid-Kansas formula rates were accepted by the Commission in Docket No. ER19-1520-000. *Sw. Power Pool, Inc.*, 167 FERC ¶ 61,202 (2019).

the transmission revenue requirement filed by the City of Vernon, California (Vernon).⁵⁷ In Opinion No. 479, the Commission recognized that, as a municipally-owned utility, Vernon was not subject to the Commission's jurisdiction under FPA section 205. However, the Commission noted that because Vernon voluntarily submitted its transmission revenue requirement as a component of California Independent System Operator Corporation's (CAISO) jurisdictional rate, Vernon's transmission revenue requirement was "subject to a full and complete section 205 review as part of our section 205 review of that jurisdictional rate."⁵⁸ The Commission explained that, in *Pac. Gas and Elec. Co. v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission had statutory authority to review Vernon's transmission revenue requirement "to the extent necessary to ensure that the CAISO rates are just and reasonable."⁵⁹ Subsequently, the court upheld the Commission's decision that subjecting the transmission revenue requirements of non-jurisdictional utilities (such as Vernon) to a full section 205 review is "the only way to ensure that CAISO's rate is just and reasonable."⁶⁰

50. However, in *TANC*, the court rejected the Commission's authority to order Vernon to pay refunds under FPA section 205. The court held that the structure of the FPA clearly reflects Congress's intent to exempt governmental entities and non-public utilities from the Commission's refund authority under FPA section 205 over wholesale electric energy sales.⁶¹ The court reasoned that FPA section 201(f) exempts from Part II of the FPA "any political subdivision of a state."⁶²

51. Therefore, while Sunflower/Mid-Kansas are not within the Commission's jurisdiction under FPA section 205, we find that, based on the precedent cited above, it is appropriate to apply the just and reasonable standard of FPA section 205 to SPP's

⁵⁷ See *City of Vernon, Cal.*, Opinion No. 479, 111 FERC ¶ 61,092, *order on reh'g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh'g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006).

⁵⁸ Opinion No. 479, 111 FERC ¶ 61,092 at P 44.

⁵⁹ *Id.* P 43 (quoting *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1117 (D.C. Cir. 2002)).

⁶⁰ *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 672 (D.C. Cir. 2007) (*TANC*).

⁶¹ *Id.* at 673-74.

⁶² *Id.* at 674.

proposed revisions filed on behalf of Sunflower.⁶³ To determine the justness and reasonableness of such rates, we find that, as discussed below, hearing and settlement judge procedures are appropriate.

52. Furthermore, Sunflower/Mid-Kansas are not subject to Commission-imposed rate suspension and refund obligations under section 205 of the FPA.⁶⁴ However, we note that Sunflower/Mid-Kansas have voluntarily agreed to allow the Formula Rate to be treated as being accepted, subject to refund with interest.⁶⁵

3. Commission Determination

a. RTO Participation Adder

53. We conditionally grant the request for a 50 basis point adder to Sunflower's base ROE for its participation in SPP. In the Energy Policy Act of 2005, Congress added section 219 to the FPA, directing the Commission to establish, by rule, incentive-based rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability or reducing the cost of delivered power by reducing transmission congestion.⁶⁶ The purpose of the rule that section 219 directed the Commission to establish is, *inter alia*, to promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in electric transmission infrastructure.⁶⁷ The Commission subsequently issued Order No. 679,⁶⁸ which sets forth processes by which a public utility may seek transmission rate incentives, pursuant to section 219 of the FPA.

⁶³ See *Sw. Power Pool, Inc.*, 151 FERC ¶ 61,211, at PP 38-41 (2015).

⁶⁴ *Id.* P 41.

⁶⁵ SPP Transmittal at 11.

⁶⁶ 16 U.S.C. § 824s(a), (b) (2018).

⁶⁷ *Id.*

⁶⁸ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

54. We find that, as conditioned below, the requested 50 basis point adder is consistent with section 219 of the FPA and Commission precedent.⁶⁹ Order No. 679 provides that an entity will be presumptively eligible for the incentive if it is a member of an RTO.⁷⁰ The Kansas Commission does not identify evidence to rebut this presumption of eligibility for Sunflower. We condition our approval on the adder being applied to a base ROE that has been shown to be just and reasonable, and subject to the resulting ROE being within the applicable zone of reasonableness,⁷¹ as may be determined in the hearing and settlement judge procedures ordered below. Further, our approval of this incentive is conditioned on Sunflower's continuing membership in SPP.

b. Hearing and Settlement

55. Our preliminary analysis indicates that the proposed revisions to Sunflower's Formula Rate have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. We find that, except for the 50 basis point adder, the proposed tariff revisions raise issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

56. Accordingly, we accept SPP's proposed revisions to become effective January 1, 2020, or the first day of the month after the date the merger is consummated if the merger

⁶⁹ See, e.g., *Valley Elec. Ass'n, Inc.*, 141 FERC ¶ 61,238, at P 26 (2012) (granting 50 basis point adder for RTO participation).

⁷⁰ Order No. 679, 116 FERC ¶ 61,057 at P 327 ("An entity will be presumed to be eligible for the incentive if it can demonstrate that it has joined an RTO, ISO, or other Commission-approved Transmission Organization, and that its membership is ongoing.").

⁷¹ On October 16, 2018, the Commission proposed a new methodology for determining whether an existing ROE is unjust and unreasonable under the first prong of section 206 of the FPA and for determining a new just and reasonable ROE under the second prong of section 206 of the FPA when an existing ROE has been found to be unjust and unreasonable. See *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018). As clarified in *Ark. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 165 FERC ¶ 61,119 (2018), the Commission expects participants in ongoing proceedings to address the merits and application of the proposed methodology in their proceedings.

occurs after January 1, 2020, as requested,⁷² subject to refund, and establish hearing and settlement judge procedures. We direct SPP, on behalf of Sunflower/Mid-Kansas, to inform the Commission, within 30 days of the consummation of the Sunflower/Mid-Kansas merger, of the effective date of the proposed revisions.

57. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁷³ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.⁷⁴ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

58. We grant SPP's requested waiver of section 35.13 of the Commission's regulations. Because Sunflower is not subject to section 205 of the FPA, it is not subject to the Commission's cost of service regulatory filing requirements. However, to the extent that parties at the hearing can show the relevance of additional information needed to evaluate the proposal, the Administrative Law Judge can provide for appropriate discovery of such information.

⁷² We grant SPP's request for waiver of the Commission's prior notice filing requirement, 18 C.F.R. § 35.3(a) (2019), to permit the proposed tariff revisions to be considered more than 120 days in advance of the requested effective date.

⁷³ 18 C.F.R. § 385.603 (2019).

⁷⁴ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

The Commission orders:

(A) SPP's proposed tariff revisions are hereby accepted to become effective January 1, 2020, or the first day of the month after the date the merger is consummated if the merger occurs after January 1, 2020, subject to refund, as discussed in the body of this order.

(B) SPP is hereby directed to inform the Commission, within 30 days of the consummation of the Sunflower/Mid-Kansas merger, of the effective date of the proposed revisions, as discussed in the body of this order.

(C) SPP's requested waiver of sections 35.13 of the Commission's regulations is granted, as discussed in the body of this order.

(D) SPP's request for waiver of the Commission's prior notice requirement, 18 C.F.R. § 35.3(a)(1) (2019), is hereby granted, as discussed in the body of this order.

(E) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of SPP's proposed tariff revisions, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (F) and (G) below.

(F) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2019), the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(G) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussion continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(H) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.