

169 FERC ¶ 61,058
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket No. ER19-2640-000

ORDER ACCEPTING NOTICE OF CANCELLATION

(Issued October 18, 2019)

1. On August 20, 2019, Southwest Power Pool, Inc. (SPP) submitted, pursuant to section 35.13 of the Commission's regulations,¹ a Notice of Cancellation of an executed Service Agreement for Network Integration Transmission Service between SPP as transmission provider and Southwestern Public Service Company (SPS) as network customer (Fifteenth Revised SPS Service Agreement), and an executed Network Operating Agreement between SPP as transmission provider and SPS as both network customer and host transmission owner (Fifteenth Revised SPS NOA) (collectively, Fifteenth Revised SPS Agreement). In this order, we accept the Notice of Cancellation, effective June 1, 2019.

I. Background

2. On February 25, 2019, in Docket No. ER19-1114-000, SPP filed the Fifteenth Revised SPS Agreement with the Commission. In that proceeding, SPP stated that it filed the Fifteenth Revised SPS Agreement because it did not conform to the form of service agreements set forth in the SPP Tariff.² Specifically, SPP stated that section 4.0

¹ 18 C.F.R. § 35.13 (2019).

² Submission of Network Integration Transmission Service Agreement and Network Operating Agreement of Southwest Power Pool, Inc., Docket No. ER19-1114-000 (Feb. 25, 2019) (February Filing).

of the Fifteenth Revised SPS Service Agreement contained non-conforming terms and conditions.³ The Fifteenth Revised SPS Agreement was accepted on April 22, 2019.⁴

II. Filing

3. In the Notice of Cancellation, SPP states that the Fifteenth Revised SPS Agreement has been replaced and superseded by the Sixteenth Revised SPS Agreement,⁵ which has an effective date of June 1, 2019.⁶ SPP asserts that the Sixteenth Revised SPS Agreement conforms to the *pro forma* service agreements set forth in the SPP Tariff and is therefore reported solely in SPP's Electric Quarterly Report (EQR), commencing in the second quarter of 2019. SPP requests waiver of the Commission's prior notice requirement to permit a June 1, 2019 effective date for the cancellation of the Fifteenth Revised SPS Agreement.⁷ SPP represents that waiver is appropriate because June 1, 2019 is the effective date of the Sixteenth Revised SPS Agreement.

III. Notices and Responsive Pleadings

4. Notice of SPP's filing was published in the *Federal Register*, 84 Fed. Reg. 45,485 (2019), with interventions and protests due on or before September 10, 2019. On

³ *Id.* at 2. The non-conforming language highlighted in section 4.0 of the Fifteenth Revised SPS Service Agreement states that: "For the Oneta Resources listed in Appendix 1, the Network Customer notified Transmission Provider that Network Customer will not exercise its right to the transmission reservation priority provided by Section 2.2 of the SPP Tariff and that the service will terminate on the dates specified in Appendix 1." The termination date of the transmission reservation for the Oneta Resources listed in Appendix 1 of the Fifteenth Revised SPS Service Agreement is June 1, 2019.

⁴ See *Sw. Power Pool, Inc.*, Docket No. ER19-1114-000 (Apr. 22, 2019) (delegated order).

⁵ The Sixteenth Revised SPS Agreement comprises a Service Agreement for Network Integration Transmission Service between SPP as transmission provider and SPS as network customer (Sixteenth Revised SPS Service Agreement), and an executed Network Operating Agreement between SPP as transmission provider and SPS as both network customer and host transmission owner.

⁶ Filing at 2.

⁷ *Id.* at 3.

September 10, 2019, Golden Spread Electric Cooperative, Inc. (Golden Spread) filed a timely motion to intervene and protest. On September 25, 2019, Xcel Energy Services, Inc. (Xcel), on behalf of its utility operating company affiliate SPS, filed a motion to intervene out-of-time and an answer to Golden Spread's protest. SPP also filed an answer to Golden Spread's protest on September 25, 2019.

A. Responsive Pleadings

1. Golden Spread Protest

5. Golden Spread argues that SPP's filing is inconsistent with the Commission's regulations and should not be accepted for procedural and substantive reasons. Golden Spread contends that SPP has not adequately explained why withdrawal of the Fifteenth Revised SPS Agreement is allowed under section 35.15 of the Commission's regulations. Golden Spread argues that, while SPP contends that the Sixteenth Revised SPS Agreement conforms to the *pro forma* service agreements in the SPP Tariff, SPP does not explain what language was removed from the Fifteenth Revised SPS Agreement to make this statement true. Golden Spread argues that SPP should identify all changes to the Sixteenth Revised SPS Agreement that satisfy the obligations of section 35.15 of the Commission's regulations.⁸

6. In particular, Golden Spread notes that, in the February Filing, SPP highlighted non-conforming language in section 4.0 of the Fifteenth Revised SPS Service Agreement that Golden Spread presumes may have been removed in the Sixteenth Revised SPS Service Agreement. However, Golden Spread also contends that language in sections 8.10 and 8.12 of Attachment 1 to the Fifteenth Revised SPS Service Agreement does not conform to the *pro forma* service agreement in the SPP Tariff.⁹ Golden Spread notes that sections 8.10 and 8.12 of Attachment 1 to the *pro forma* service agreement in Attachment F of SPP's Tariff are left blank, and argues that these sections in the Fifteenth Revised SPS Service Agreement contain considerable detail affecting the rates, terms and conditions of service beyond what is contemplated by the Commission's regulations regarding customization of terms and conditions in a *pro forma* agreement.¹⁰ Golden Spread asserts that the Commission must assume this language remains in the Sixteenth

⁸ Golden Spread Protest at 5-6 (citing 18 C.F.R. § 35.15).

⁹ *Id.* at 6-7.

¹⁰ *Id.* at 7 (citing 18 C.F.R. §§ 35.1(g) and 35.10a).

Revised SPS Service Agreement unless demonstrated otherwise and, therefore, filing of the agreements is required under section 35.1(a) of the Commission's regulations.¹¹

7. In addition, Golden Spread argues that eliminating the obligation for SPP to file the SPS agreements creates undue discrimination between network customers in SPP Zone 11.¹² Golden Spread notes that other SPP Zone 11 network customers have service agreements on file with the Commission because they constitute non-conforming agreements per SPP's classification. Golden Spread argues that, if SPP is permitted to remove the SPS agreement from the Commission's records, it eliminates an opportunity for similarly situated network customers to receive notice of changes to SPS's service in the future, review those changes, and if necessary, participate in proceedings to protect their interests. Further, Golden Spread contends that in this case, an incumbent transmission owner that takes service under the SPP Tariff as network customer would not be subject to filing its service agreements, while non-incumbent network customers such as Golden Spread would be subject to delay and additional challenges as SPP is obligated to continue to make such filings for those customers.¹³

2. Xcel Answer

8. Xcel contends that Golden Spread's protest seeks to upend the Commission's policy that service agreements which conform to utilities' *pro forma* agreements need not be filed with the Commission. Xcel rebuts Golden Spread's argument that SPP failed to satisfy the Commission's requirement that SPP provide "a statement giving the reasons for the proposed cancellation or termination," and contends that SPP clearly explained that the Fifteenth Revised SPS Agreement has been superseded by the Sixteenth Revised SPS Agreement, which conforms to SPP's *pro forma* agreements. Xcel argues that this process of superseding a previous service agreement is sufficient for a Notice of Cancellation.¹⁴

¹¹ *Id.* (citing 18 C.F.R. § 35.1(a) (2019)).

¹² *Id.* at 8-9.

¹³ *Id.* at 5.

¹⁴ Xcel Answer at 3 (citing Golden Spread Protest at 5).

9. In addition, Xcel contends that Golden Spread's request that a conforming service agreement be filed with the Commission is a collateral attack on Order No. 2001¹⁵ and should be rejected. Xcel also argues that singling out transmission conforming agreements would itself be arbitrary and unduly discriminatory.¹⁶

10. Xcel further states that, while Golden Spread alleges an inability to review the SPS Agreements, Golden Spread had not indicated whether it has requested a copy of the agreements between SPP and SPS pursuant to section 35.1(g) of the Commission's regulations, which obligates SPP to make a conforming service agreement available to the public upon request even if the agreement does not need to be filed with the Commission. Xcel argues that Golden Spread's request to overturn Order No. 2001 must be rejected, unless and until Golden Spread has demonstrated that the protections of section 35.1(g) are insufficient. At a minimum, Xcel believes that these protections refute Golden Spread's arguments that it is unable to review conforming service agreements unless they are filed with the Commission.¹⁷

11. Finally, Xcel states that sections 8.10 and 8.12 of SPP's *pro forma* service agreement are left blank, indicating that the details that may be filled in depend upon the characteristics of the customer's service and may not be applicable to every customer taking network service in SPP.¹⁸ Xcel contends that the Commission has previously explained that a "fill-in-the-blank" provision is intended to "vary from case to case" and "does not need to be filed with the Commission."¹⁹ Xcel argues that as long as the details that are "filled in" for a particular customer are rates, terms or conditions that are already

¹⁵ *Revised Public Utility Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008)).

¹⁶ Xcel Answer at 3-5.

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 6.

¹⁹ *Id.* (citing *Sw. Power Pool, Inc.*, 133 FERC ¶ 61,040, at P 14 (2010)).

permissible under the SPP Tariff, or otherwise set forth in the SPP Tariff, there is no need to require the filing of the service agreement as a non-conforming agreement. Finally, Xcel argues that the practice of filing a Notice of Cancellation of a non-conforming service agreement when the service under the agreement becomes “conforming” follows Order No. 2001’s requirements and has previously been accepted by the Commission.²⁰

3. SPP Answer

12. SPP rebuts Golden Spread’s allegations that the Sixteenth Revised SPS Agreement fails to meet the criteria under section 35.1(g) of the Commission’s regulations by being reported solely in SPP’s EQR.²¹ SPP provides a copy of the Sixteenth Revised SPS Agreement as Attachment 1 to its answer, and it asserts that the only differences between SPP’s *pro forma* agreement and the Sixteenth Revised SPS Agreement are “fill-in-the-blank” sections that the Commission has previously ruled conform to the *pro forma* agreements.²² SPP notes that the non-conforming language in section 4.0 of the Fifteenth Revised SPS NITSA has been removed. Further, SPP points out that the Commission has previously stated that it views section 8.10 of Attachment 1 to the *pro forma* service agreement as a “fill-in-the-blank section” and does not consider the service agreement to be non-conforming because SPP filled-in the blank.²³ SPP asserts that, consistent with the Commission’s previous order, the changes to section 8.10 of Attachment 1 of the Sixteenth Revised SPS Service Agreement are simply “fill-in-the-blank” and conform to the *pro forma* service agreement. SPP also contends that section 8.12 of Attachment 1 of the Sixteenth Revised SPS Service Agreement is simply a “fill-in-the-blank” section detailing specific compensation for upgrade sponsors.²⁴

13. Further, SPP rebuts Golden Spread’s argument that the Sixteenth Revised SPS Agreement is not in public view because it was reported in SPP’s EQR.²⁵ SPP asserts that, upon a request to SPP, all service agreements that SPP includes in its EQR are

²⁰ *Id.* (citing, e.g., *Pub. Serv. Co. of N.M.*, Docket No. ER19-2111-000 (Aug. 6, 2019) (delegated order)).

²¹ SPP Answer at 5.

²² *Id.* at 6.

²³ *Id.* (citing *Sw. Power Pool, Inc.*, 133 FERC ¶ 61,084 (2010)).

²⁴ *Id.*

²⁵ *Id.* at 7.

publicly available and the data included in all service agreements reported in EQR are available online through the Commission's website.²⁶

14. Finally, SPP asserts that its Notice of Cancellation complies with the requirement in section 35.15 of the Commission's regulations that a public utility submit a statement giving the reason for a proposed cancellation or termination. SPP notes that its filing of the notice of cancellation provided the statement "[b]ecause the Fifteenth Revised SPS Agreement[] ha[s] been replaced and superseded by the Sixteenth Revised SPS Agreement[], SPP submits this notice of cancellation of the Fifteenth Revised SPS Agreement[] to the Commission."²⁷ SPP argues that, if the Commission does not accept the Notice of Cancellation, two active agreements will continue to exist for the same network transmission service and each service agreement include competing rates, terms, and conditions. SPP states that the Sixteenth Revised SPS Agreement was properly executed by the parties and properly reported in SPP's EQR; therefore, the Fifteenth Revised SPS Agreement should be cancelled as it has been replaced and superseded. Therefore, SPP requests that the Commission reject Golden Spread's protest and accept SPP's Notice of Cancellation.²⁸

IV. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), Golden Spread's timely, unopposed motion to intervene serves to make it a party to this proceeding.

16. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2019), the Commission will grant Xcel's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

17. 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 unless otherwise ordered by the decisional authority. We accept Xcel and SPP's answers because they have provided information that assisted us in our decision-making process.

²⁶ *Id.*

²⁷ *Id.* at 7-8.

²⁸ *Id.*

B. Substantive Matters

18. We accept SPP's Notice of Cancellation, effective June 1, 2019.

19. SPP stated that it is filing the notice of cancellation because the Fifteenth Revised SPS Agreement has been superseded by the Sixteenth Revised SPS Agreement, which has been executed by the parties to the agreements and reported in SPP's EQR. We therefore find that SPP's filing complies with section 35.15 of the Commission's regulations, which permits public utilities to cancel or terminate a service agreement required to be on file with the Commission if the filing party submits a statement giving the reason for the proposed cancellation or termination.

20. In response to Golden Spread's protest regarding a lack of clarity as to the removal of language in the Fifteenth Revised SPS Agreement that did not conform to SPP's *pro forma* service agreements, we agree that SPP's initial filing lacked clarity on this point. However, we note that in its answer, SPP demonstrated that the Sixteenth Revised SPS Agreement does not carry forward the non-conforming language present in section 4.0 of the Fifteenth Revised SPS Service Agreement.²⁹ Further, we agree with SPP and Xcel that sections 8.10 and 8.12 of Attachment 1 to SPP's *pro forma* service agreement are considered to be "fill-in-the-blank" sections and we do not consider a service agreement to be non-conforming because SPP filled-in the blanks.³⁰

21. Golden Spread's contention that it is unable to view the Sixteenth Revised SPS Service Agreement because it is not filed with the Commission, or that it will be unable to view any further revisions to the agreement is unpersuasive. Under section 35.1(g) of the Commission's regulations, service agreements conforming to the form of service agreement that are part of the public utility's approved tariff must be made available for public inspection and provided to members of the public upon request. Golden Spread has not alleged or demonstrated that it has attempted to submit such a request to SPP.³¹

22. We also dismiss Golden Spread's assertion that eliminating the obligation for SPP to file the SPS agreements creates undue discrimination between network customers in SPP Zone 11. The reason why other SPP Zone 11 network customers have service agreements on file with the Commission is that they are non-conforming agreements. To

²⁹ *Id.* at Attachment 1.

³⁰ *See Sw. Power Pool, Inc.*, 133 FERC ¶ 61,084.

³¹ We further note SPP's statement that upon request, all service agreements that SPP includes in its EQR are made publicly available. SPP Answer at 7.

the extent that other network customers' executed service agreements conform to the *pro forma* service agreements set forth in the SPP Tariff, those other agreements would not need to be filed with the Commission but instead would be reported in SPP's EQR, consistent with Order No. 2001.³² In addition, as discussed above, the opportunity for the public to view conforming service agreements exists even if they are reported in SPP's EQR.

23. Finally, we grant SPP's request for waiver of the Commission's prior notice requirements and grant the effective date of June 1, 2019, as the non-conforming language in section 4.0 of the Fifteenth Revised SPS Agreement regards service to a resource that terminated by its own terms on June 1, 2019.

The Commission orders:

SPP's Notice of Cancellation is hereby accepted, effective June 1, 2019, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³² See Order No. 2001, 99 FERC ¶ 61,107 at P 196.