

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Southwest Power Pool, Inc.

Docket Nos. RT04-1-005
ER04-48-005

ORDER ON REHEARING AND DIRECTING COMPLIANCE FILING

(Issued February 11, 2005)

1. This order addresses requests for rehearing of the Commission's order issued in this proceeding on October 1, 2004 (October 1 Order),¹ in which the Commission granted SPP status as a regional transmission organization (RTO), subject to a further compliance filing. As discussed below, we will grant in part and deny in part the rehearing requests and direct a further compliance filing.
2. This order benefits customers by encouraging continued development of cost-effective wholesale regional power markets and further development of RTOs.

Background

3. By order issued February 10, 2004 (February 10 Order),² the Commission conditionally granted SPP's application for recognition as an RTO. Pursuant to Order Nos. 2000 and 2000-A,³ we directed SPP to make additional tariff, organizational

¹ *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,009 (2004).

² *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110, *order on reh'g*, 109 FERC ¶ 61,010 (2004).

³ *Regional Transmission Organizations, Order No. 2000*, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,089 at 31,226-27 (1999), *order on reh'g, Order No. 2000-A*, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 & 31,092 (2000), *affirmed sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

and other changes prior to our granting SPP RTO status. These changes primarily related to SPP's scope and configuration, independence and governance, operational authority, grandfathered agreements and bundled retail load, available transmission capability (ATC) calculations, market monitoring unit, and transmission planning and expansion responsibilities.

4. SPP submitted its compliance filing to the February 10 Order, and the Commission addressed that filing on July 2, 2004 (July 2 Order).⁴ In the July 2 Order, we recognized that SPP had made significant progress toward satisfying the prerequisites for RTO status.⁵ However, we directed SPP to make further filings in order to be fully compliant with the February 10 Order and achieve recognition as an RTO.

5. In the October 1 Order addressing SPP's second compliance filing, the Commission granted SPP RTO status, subject to SPP filing the specific revisions discussed in that order. Those revisions pertained to SPP's Members Committee representation and corporate governance, operational authority, grandfathered agreements and bundled retail load, ATC calculations, and market monitoring agreement with its chosen independent market monitor (IMM).

6. Southwest Industrial Customer Coalition (Southwest Industrial), Southwestern Public Service Company (SPS), and the TDU Intervenors⁶ timely sought rehearing of the October 1 Order. Relevant portions of the order and corresponding rehearing arguments are discussed by issue below.

Members Committee Representation

October 1 Order

7. We accepted SPP's proposal to add two new seats for retail customers on its Members Committee, as consistent with the July 2 Order, but noted that SPP had not included in its Bylaws the criteria by which SPP will distinguish between large and small retail customers.⁷ Accordingly, we directed SPP to revise its Bylaws to define large and

⁴ *Southwest Power Pool, Inc.*, 108 FERC ¶ 61,003 (2004).

⁵ July 2 Order at P 3.

⁶ TDU Intervenors include: the Missouri Joint Municipal Electric Utility Commission, Oklahoma Municipal Power Authority; West Texas Municipal Power Agency; Lafayette Utilities System, Louisiana Energy and Power Authority, and the Municipal Energy Agency of Mississippi.

⁷ We stated that such distinction was necessary for section 6.6, as well as section 5.1.1.1. of SPP's Bylaws. October 1 Order at P 22.

small retail customers, in a manner consistent with *WestConnect*.⁸ As noted in *WestConnect*, one of the eight proposed sectors was earmarked for large retail customers and another was earmarked for small retail customers. The *WestConnect* tariff defines large retail customers as non-residential end-use customers with individual or aggregated loads of 1-MW or more, and small retail customers as residential customers and other customers with individual or aggregated loads of less than 1-MW.⁹

Request for Rehearing

8. While Southwest Industrial supports the use of a 1-MW threshold to distinguish between large and small retail customer representatives on SPP's Members Committee, it objects to SPP's proposal to permit load aggregation for purposes of satisfying the 1-MW threshold. Southwest Industrial argues that small storefronts could combine their consumption to total 1-MW or more, and thereby qualify as a large retail customer, without necessarily reflecting the same customer interests in SPP as "true" large retail customers, such as oil refineries or chemical companies. Southwest Industrial is concerned that load aggregation could ultimately result in the large retail customer's interests being unrepresented during Member Committee deliberations. Southwest Industrial contends that ERCOT distinguishes between small and large retail customers based on a 1-MW standard and does not permit load aggregation for purposes of meeting this standard.¹⁰

Commission Determination

9. We will deny Southwest Industrial's request for rehearing on this point. While it might be true that ERCOT prohibits the use of load aggregation to satisfy the 1-MW standard, we are not persuaded, based upon the lack of evidence in the record here, that excluding load aggregation is necessary in this case or that we should take a standardized approach on this matter. We do, however, encourage SPP and its members to use the stakeholder process to explore whether such a change would improve representation on SPP's Members Committee. In addition, Southwest Industrial may file a complaint in the future if its speculation comes to fruition.

⁸ *Arizona Public Service Co., et al.*, 101 FERC ¶ 61,033 at P 44, *order on reh'g*, 101 FERC ¶ 61,350 (2002) (*WestConnect*).

⁹ Southwest Industrial cites *WestConnect*, FERC Elec. Tariff, Orig. Vol. 1, Att. 1: Master Definitions List.

¹⁰ Southwest Industrial cites Amended and Restated Bylaws of Electric Reliability Council of Texas, dated Oct. 15, 2002, Art. 2, § 3,11 (available at: www.ercot.com/aboutercot/publicdisclosure/bylaws.htm).

Operational Authority

October 1 Order

10. In the October 1 Order, we noted that SPP provided a list clearly identifying the transmission facilities that will be under its operational control as an RTO, as directed in the July 2 Order. We further stated that SPP's modifications to the Membership Agreement were acceptable and consistent with our prior directives. In addition, we noted that SPP adopted the NERC Functional Model in identifying its responsibilities as an RTO, as required in the February 10 Order. We further found that SPP's proposed Operational Authority Reference Document set forth its clear and sufficient authority to exercise day-to-day control over the appropriate transmission facilities within its footprint, as required by the February 10 and July 2 Orders. We noted that the document provided a comprehensive table identifying NERC functional requirements and SPP's responsibilities and where authority is granted to SPP.¹¹

11. However, in order to make the Operational Authority Reference Document binding, we required SPP to revise its Membership Agreement to include that document expressly, or incorporate it by reference, and file it as part of the Membership Agreement. We further required SPP to confirm by affidavit that no agreement referred to in the Operational Authority Reference Document will constrain SPP's ability to direct revisions to transmission maintenance plans or generation maintenance plans (where a generator maintenance plan affects SPP's ability to assure reliable operation of transmission facilities under its functional control).¹²

12. In response to TDU Intervenors' concern that the Membership Agreement does not include a binding obligation on transmission owners to comply with SPP's directives, we noted that the Membership Agreement is a filed tariff. As such, we stated that SPP and the jurisdictional signatories to the Membership Agreement are bound by its terms and conditions.¹³

13. Further, we found to be beyond the scope of the proceeding Southwest Industrial's argument that utilities must obtain state authorization to transfer their facilities to the SPP RTO.¹⁴

¹¹ October 1 Order at P 32.

¹² *Id.* at P 33.

¹³ *Id.* at P 34.

¹⁴ *Id.* at P 35.

Requests for Rehearing

14. On rehearing, Southwest Industrial and TDU Intervenors challenge the Commission's finding that the Operational Authority Reference Document sets forth SPP's clear and sufficient authority to exercise day-to-day control over the appropriate transmission facilities within its footprint. Southwest Industrial asserts that the document provides no evidence that SPP has in fact obtained the requisite authority.¹⁵ On this point, Southwest Industrial further challenges the Commission's finding that the issue of whether utilities must seek state authorization to transfer facilities to the SPP RTO is beyond the scope of the proceeding. Southwest Industrial asserts that evidence of state authorization is necessary to show that SPP has the ability to exercise day-to-day control over the transmission facilities within its footprint. TDU Intervenors contend that the Operational Authority Reference Document reflects no substantive corrections or improvements to the Operational Authority White Paper previously submitted by SPP, which, in the July 2 Order, the Commission rejected as lacking adequate specificity regarding SPP's operational authority. As such, TDU Intervenors argue that the Commission erroneously reversed itself without explanation in the October 1 Order, by accepting the Operational Authority Reference Document.

15. SPS does not object to the Operational Authority Reference Document or the allocation of functions described there. However, SPS argues that including the Operational Authority Reference Document as an attachment to the Membership Agreement is inappropriate, because, according to SPS, some Balancing Authorities are not subject to the rate or tariff jurisdiction of the Commission, some SPP members are not Balancing Authorities, and such inclusion may create impediments to SPP participation by non-jurisdictional entities. To that end, SPS further seeks Commission clarification that filing the Operational Authority Reference Document as part of the Membership Agreement does not represent an assertion of Commission jurisdiction pertaining to reliability matters and the standards for control areas under the NERC Functional Model. SPS states that the standards for control areas (*i.e.*, Balancing Authorities) are set by NERC and the appropriate regional reliability council, not the Commission.¹⁶ Moreover, SPS asserts that the Commission would not have the authority to order SPP to make unilateral modifications to the NERC Functional Model allocation.

¹⁵ For example, Southwest Industrial argues that SPS, and other transmission owners, have not yet gained the approval of its state commission.

¹⁶ SPS references NERC Operating Policies, Introduction to the Operating Policies, Subsection B at 1-5 ("A Control Area is obligated to adhere to all NERC Operating Requirements and Standards").

16. SPS also argues that, in the proceeding addressing the Midwest ISO's Transmission and Energy Markets Tariff (TEMT), the Commission set for settlement proceedings issues pertaining to the allocation of responsibilities between the RTO and Balancing Authorities.¹⁷ SPS asserts that the same should be done here, and more specifically, that the Commission should require SPP to negotiate a separate Balancing Authority Agreement with its Balancing Authority members, rather than filing the Operational Authority Reference Document.¹⁸ Otherwise, SPS contends, SPP and its members will be forced to rely on the Operational Authority Reference Document, which, according to SPS, lacks sufficient detail regarding the allocation of NERC Functional Model responsibilities and leaves significant issues, including liability and indemnity, unresolved.

Commission Determination

17. With regard to the Commission jurisdiction over reliability matters, we clarify that we are not seeking to claim jurisdiction over reliability matters beyond our traditional limited role, *i.e.*, when such matters affect the rates, terms and conditions of jurisdictional service.¹⁹ We will continue to defer to NERC on such matters. Our requirement that the Operational Authority Reference Document be included in the Membership Agreement was to make that document binding upon SPP; it did not mark a foray into areas beyond the Commission's jurisdiction.

18. While Southwest Industrial and TDU Intervenors argue that the Operational Authority Reference Document fails to set forth SPP's clear and sufficient authority to exercise day-to-day control over appropriate transmission facilities within its footprint, these parties have raised no new arguments on rehearing that were not addressed in the October 1 Order. As explained in that order (and summarized above), in conjunction

¹⁷ SPS cites *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 at P 138 (2004) (Midwest ISO Order).

¹⁸ SPS states that, on October 5, 2004, in Docket No. ER04-691-000, the Midwest ISO and Midwest ISO Transmission Owners filed an Offer of Settlement, including a Balancing Authority Agreement addressing allocation of responsibilities between the RTO and Balancing Authorities.

¹⁹ We note that the Operational Authority Reference Document recognizes NERC's role in operational matters and SPP's responsibilities relative to NERC Operating Policies, as noted in the Operational Authority Reference Document at p. 4-5. In particular, we note that SPP has on file with NERC a reliability plan that satisfies NERC requirements. Any changes to the SPP reliability plan should be filed with NERC as required by NERC Policy 9.

with the other changes SPP proposed in its second compliance filing, the Operational Authority Reference Document, as part of the Membership Agreement, satisfies the minimum operational authority requirements necessary to be a Commission-approved RTO.

19. Nonetheless, we recognize that some parties continue to believe the Operational Authority Reference Document lacks details they consider important, including the allocation of functional responsibilities between SPP and balancing authorities, as well as the costs and liability associated with SPP's new role in the region as an RTO. We note that addressing balancing authority issues sooner rather than later will allow the parties to address important Day-1 issues and get a head start on developing a balancing authority agreement for Day-2, when such agreements become critical. Therefore, we will direct SPP to submit these issues to the stakeholders so that interested parties have the opportunity to negotiate and resolve them. Such negotiations may result in some form of a balancing authority agreement that SPP can seek to file with the Commission. If the parties desire, they may seek the assistance of the Commission's dispute resolution staff or a settlement judge for this process.

20. With regard to arguments that state approvals are necessary to evidence the transfer of operational control, we note that our granting of RTO status to SPP was based on the Membership Agreement, including the Operational Authority Reference Document and related material that provide SPP operational control over the facilities referenced in the Membership Agreement. Any role that state commissions have in authorizing RTO participation does not preclude this Commission from granting RTO status based upon Commission requirements. We will review the matter, if necessary, after a state action that might affect SPP's control over a jurisdictional member's facilities.

Independent Market Monitor

October 1 Order

21. In the October 1 Order, we reiterated concerns regarding the independence and possible conflicts-of interest of SPP's chosen IMM, *i.e.*, Boston Pacific Company, Inc. (Boston Pacific). Upon review of SPP's IMM Agreement with Boston Pacific, we found that SPP had sufficiently addressed one condition set forth in the July 2 Order, namely, that the IMM may not directly represent market participants within SPP's region in proceedings before state regulators or this Commission. We further, found, however, that the IMM Agreement did not prohibit the IMM from working for clients with SPP-related business interests or for clients that have business interests inextricably connected to SPP, as required by the July 2 Order. At the same time, we found appropriate SPP's proposed

approach of having the Board of Directors review engagements that may raise conflict-of-interest concerns (or result in a material appearance of conflict). Accordingly, we directed SPP to revise section 4.2 of the IMM Agreement to state the following:

Before the Boston Pacific Team accepts any engagement that involves clients with SPP-related business interests or clients with business interests in markets inextricably connected to SPP, it must inform the SPP Board of Directors of such potential engagement and obtain the Board's determination that such engagement would not present a conflict of interest or result in the material appearance of conflict before accepting such engagement.²⁰

Request for Rehearing

22. On rehearing, TDU Intervenors argue that the Commission should have required SPP to incorporate into the IMM Agreement the prohibitions exactly as stated in the July 2 Order, *i.e.*, that the IMM may not “work for clients with SPP-related business interests” or for “clients that have business interests in markets inextricably connected to SPP.”²¹ TDU Intervenors state that the Commission's decision to require Board approval of engagements related to SPP or inextricably linked markets is unworkable, because of the great potential for, or appearance of, conflicts of interest. TDU Intervenors contend that, given the IMM's responsibilities to monitor or assess SPP-operated markets, SPP market rules, SPP transmission, bilateral energy or capacity markets, and unaffiliated power exchanges, virtually any Boston Pacific engagement involving wholesale electricity transactions in the SPP footprint (or inextricably connected markets) itself could come under the IMM's scrutiny at a later date.²² TDU Intervenors further assert that it is unclear how the Board of Directors will explore potential conflicts-of-interest, *e.g.*, whether market participants will receive notice and be invited to express their concerns to the Board prior to a Board vote, and whether Boston Pacific will be allowed to request non-public consideration by the Board of Directors, based upon confidentiality concerns of its potential clients.

²⁰ October 1 Order at P 84.

²¹ *See* July 2 Order at P 98.

²² For example, TDU Intervenors state that its review of bilateral contract markets could implicate a contract on which Boston Pacific had been an advisor, with Board approval.

23. TDU Intervenors further assert that the Commission should have required SPP to include language prohibiting Boston Pacific and its employees from using non-public information for any purpose other than carrying out Boston Pacific's responsibilities as SPP's IMM. TDU Intervenors seek adoption of provisions similar to those in the Midwest ISO's IMM contract.²³

Commission Determination

24. We will grant in part and deny in part TDU Intervenors' request for rehearing on this issue. Contrary to TDU Intervenors' argument, the July 2 Order did not require that the IMM Agreement recite the prohibitions exactly as set forth in that order. We believe that requiring the IMM to bring certain potential engagements to the attention of SPP's Board of Directors, and obtaining the Board's approval prior to accepting such engagements, captures the spirit of the prohibitions in the July 2 Order and will be effective in preventing conflicts-of-interest and the material appearance of conflicts-of-interest.²⁴ Further, as stated in the October 1 Order, we believe that this restriction will allow Boston Pacific to both function as SPP's IMM and undertake other assignments, while ensuring that it retains the requisite independence to fulfill its functions without questions regarding its integrity and allegiance.²⁵ Moreover, while we decline to mandate specific procedures for Board review, we do expect the Board to exercise its duty to SPP and SPP members in reviewing proposed engagements, with a focus on assuring market participants and regulators that Boston Pacific's non-SPP engagements do not create real or perceived conflicts.²⁶ We emphasize that ultimately the Commission, not the IMM, has oversight and enforcement authority. Finally, any alleged abuse or neglect of the Board's role in evaluating the IMM's possible conflicts may be raised to the Commission.

²³ TDU Intervenors assert that the Midwest ISO's IMM contract prohibits the IMM and its employees from undertaking a matter that could benefit from non-public information or from using information for any purpose other than carrying out the responsibilities assigned to the IMM per the market monitoring plan or the Midwest ISO.

²⁴ Notably, in response to SPP's first proposed IMM Agreement, TDU Intervenors had urged the Commission to require Board approval for certain engagements.

²⁵ October 1 Order at P 85.

²⁶ *Id.*

25. We will grant TDU Intervenors' request for rehearing to the extent that we will direct SPP to modify the IMM Agreement to prohibit Boston Pacific and its employees from using non-public information for purposes other than their responsibilities as SPP's IMM. We believe that this restriction combined with the other prohibitions discussed above and in the October 1 Order sufficiently address concerns regarding conflicts-of-interest and the use of non-public information.

Granularity Concerns

Request for Rehearing

26. On rehearing, TDU Intervenors maintain that the Commission failed to address its concerns regarding the granularity of the model used by SPP to sell transmission service. Specifically, TDU Intervenors argue that the model is more granular, *i.e.*, more refined, than the one used to implement Transmission Loading Relief (TLR). Because of this granularity difference, TDU Intervenors contend that SPP's transmission service model allows SPP to sell more transmission service than the TLR model results indicate the transmission system can accommodate. This means, according to TDU Intervenors, that SPP sells more transmission service than its TLR model will allow SPP to continue when TLRs are called. TDU Intervenors state that this practice is especially costly to customers under the SPP OATT, who are unable to successfully redispatch their transactions to avoid punitive energy imbalance charges. TDU Intervenors argue that the Commission must require SPP to address these granularity issues.

Commission Determination

27. While we believe this issue should be addressed further, based upon our experience with other RTOs and ISOs, such matters are effectively resolved through negotiation. Therefore, we will direct SPP to submit the TDUs' issue to the stakeholders, so that the implications of a solution, if any, may be fully vetted by the interested parties.

The Commission orders:

(A) Southwest Industrial's, SPS', and the TDU Intervenors' requests for rehearing are granted in part and denied in part as discussed in the body of this order.

(C) SPP is hereby directed to submit a compliance filing modifying its IMM Agreement with Boston Pacific, within 30 days of the date of this order, as discussed in the body of this order.

(B) SPP is hereby directed to submit issues concerning its operational authority and granularity matters to the stakeholders, as discussed in the body of this order.

By the Commission. Commissioner Brownell dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket Nos. RT04-1-005
and ER04-48-005

(Issued February 11, 2005)

BROWNELL, Commissioner, dissenting in part:

As I stated in my dissent in the underlying order, I believe Board approval is an insufficient safeguard to assure the IMM's independence. On this issue, I remain convinced that engaging in these types of business activities compromises the IMM's independence.

Additionally, I agree with the Southwest Industrial Customer Coalition (SwICC) that in the case of the SPP footprint, load should not be aggregated to exceed the 1 MW threshold for the second end-use Members Committee seat. Small retail customers of less than 1 MW have adequate representation on the Members Committee and I would agree that allowing them to aggregate their loads to have their concerns represented by the second seat, dilutes the position of large, single-location customers. The needs of large customers exceeding 1 MWs, such as manufacturers, large-scale commercial installations, university campuses, refineries, etc., are distinctively different as the SwICC points out. They are, in my estimation, entitled to full representation.

For these reasons, I respectfully dissent.

Nora Mead Brownell
Commissioner