112 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Western Area Power Administration Docket No. NJ05-1-000

ORDER CONDITIONALLY GRANTING PETITION FOR DECLARATORY ORDER

(Issued July 6, 2005)

1. On January 26, 2005, Western Area Power Administration (Western) filed proposed revisions to its non-jurisdictional open access transmission tariff (OATT) in order to incorporate its Standard Large Generator Interconnection Procedures (LGIP) and its Standard Large Generator Interconnection Agreement (LGIA). Western requests that the Commission issue a declaratory order determining that, with this filing, Western's OATT maintains its status as a reciprocity or "safe-harbor" tariff. In this order, the Commission conditionally grants Western's petition for declaratory order. This order benefits customers because it ensures that the terms, conditions, and rates for interconnection service meet the Commission's reciprocity requirements.

Background

2. In Order No. 2003,[1] pursuant to its responsibility under sections 205 and 206 of the Federal Power Act (FPA)[2] to remedy undue discrimination, the Commission required all

[1] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g,* Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *reh'g pending*; *see also Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004).

[2] 16 U.S.C. §§ 824d-824e (2000).

public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to append the *pro forma* LGIP and LGIA to their OATTs. The Commission left it to Transmission Providers[3] to justify any variation from the *pro forma* LGIP or LGIA based on either regional reliability requirements or the "consistent with or superior to" rationale.[4]

3. Western, a Federal power marketing agency, is not a public utility within the Commission's jurisdiction under sections 205 and 206 of the FPA. It is therefore not subject to the open access requirements of Order Nos. 888[5] and 2003 applicable to public utilities, although it may voluntarily file an OATT with the Commission.

4. In Order No. 888, the Commission established a safe harbor procedure for the filing of reciprocity transmission tariffs by non-public utilities. Under this procedure, they may voluntarily submit to the Commission a transmission tariff and request for declaratory order that the tariff meets the Commission's comparability (non-discrimination) standards. If the Commission finds that such a tariff contains terms and conditions that substantially conform or are superior to those in the *pro forma* open access transmission tariff contained in Order No. 888 (*pro forma* tariff) the Commission will deem it to be an acceptable reciprocity tariff and will require public utilities to

[3] The "Transmission Provider" is the entity with which the Generating Facility is interconnecting. The term "Generating Facility" means the specific device (having a capacity of more than 20 megawatts) for which the Interconnection Customer has requested interconnection. The owner of the Generating Facility is referred to as the "Interconnection Customer."

[4] *See* Order No. 2003 at P 826.

[5] *See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs, 1996 ¶ 31,036, (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs, ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom.*, *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D. C. Cir 2000) *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

provide open-access transmission service upon request to that particular non-public utility.[6]

5. Order No. 2003, in turn, states that a non-public utility that has a safe harbor tariff may add to its tariff an interconnection agreement and interconnection procedures that substantially conform or are superior to the *pro forma* LGIA and *pro forma* LGIP if it wishes to continue to qualify for safe harbor treatment.[7] The Commission previously determined Western's tariff to be an acceptable reciprocity tariff and, in these filings, Western proposes to incorporate its proposed LGIA and LGIP into its reciprocity tariff so that it can continue to qualify for safe harbor treatment.

6. Western's filing reflects variations from the *pro forma* LGIP and *pro forma* LGIA. Western states that the proposed variations accommodate: (1) Western's status as a non-jurisdictional entity; (2) Western's status as a Federal power marketing agency; (3) Western's operation in multiple regional reliability organizations; and (4) ministerial clarifications.

Notice of Filing

7. Notice of Western's filing was published in the *Federal Register,* 70 Fed. Reg. 6435 (2005), with motions to intervene and protests due on or before February 16, 2005, Timely motions to intervene were filed by Modesto Irrigation District (California), Cities of Redding and Santa Clara, *et. al*., Transmission Agency of Northern California, and Spring Canyon Energy LLC. Motions to intervene out of time were filed by Salt River Project Agricultural Improvement and Power District (Salt River) and Calpine Corporation (Calpine). Calpine also protests Western's filing.

Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We find good cause to grant Salt

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[6] In Order No. 888-A, the Commission clarified that under the reciprocity condition, a non-public utility must also comply with the OASIS and standards of conduct requirements or obtain waiver of them. *See* Order No.888-A at 30,286.

[7] *Id.* at P 842.

River's and Calpine's untimely, unopposed motions to intervene, given their interests in this proceeding, the early stage of this proceeding and the lack of undue delay or prejudice.

B. **Western's Filing**

9. The Commission finds that Western's provisions, with one exception discussed below, substantially conform or are superior to the requirements of the *pro forma* LGIP and LGIA and that its tariff thus remains an acceptable reciprocity tariff.[8]

10. Under Western's original tariff, Attachment J, Section 1 provided that in the event of a rate change, the transmission customer could terminate the agreement upon ninety days' notice. Western states that, when it filed its original OATT, it had not yet developed separate rates for transmission and ancillary services to be charged under its OATT. It further explains that, at that time, Western included in Attachment J to the OATT a number of provisions from its General Power Contract Provisions that it felt were applicable to OATT service, including the "Change of Rates" provision, allowing Western to adjust its rates on a periodic basis and allowing customers to give notice of their intent to terminate service within 90 days after such changes.

11. In developing separate rates for transmission and ancillary services to be applied under the OATT, Western states that it adopted formula rates for most of the Federal transmission system projects. Under the formula rates, the most current data for revenue requirements and load are inserted into the formula annually, and the result of the formula establishes the charge for that year. Western does not believe this process constitutes a "rate change,"[9] however, Western is concerned that this existing tariff language leaves open the possibility that a customer may argue that it is allowed to terminate service in any year based on the changing results of the formula rate. Western argues that such a request would be inappropriate, as the customer is aware when contracting for service that the rate is adjusted annually based on the formula. Therefore, Western proposes to modify the existing rate change provision accordingly. Western has also eliminated the Transmission Customer's ability to terminate service when Western develops new rates or extends existing rates. Western believes that

[8] *See* Order No. 2003 at P 773.

[9] *See* Attachment J, 1.0 ("The Transmission Customer, by written notice to the Transmission Provider within ninety (90) days after the effective date of a rate change, may elect to terminate the service billed by the Transmission Provider under the new rate.").

removing a customer's ability to terminate service in these circumstances is equitable. Western notes that the remaining Transmission Customers still taking service from Western could otherwise be responsible for repayment of facility costs that were incurred due to the terminating customer's request.

12. Calpine objects to Western's proposal to eliminate Transmission Customers' termination rights while preserving its own termination rights. Consequently, Calpine argues that Western's proposal is neither equitable nor non-discriminatory, and cannot be found to meet the Commission's comparability standards in the same way Western's original tariff did.[10] Calpine observes that the Commission has stated that it evaluates reciprocity tariff proposals for satisfaction of the Commission's comparability standards, and that reciprocity tariffs that substantially conform with or are superior to the Order No. 888 *pro forma* tariff are acceptable reciprocity tariffs. Calpine points out that, while under Western's original tariff, transmission customers are not guaranteed just and reasonable rates, they are guaranteed the right to terminate service if they believe the transmission rate is no longer fair and reasonable. Calpine claims that, by abolishing this right, Western is denying its transmission customers the ability to protect themselves against unjust and unreasonable rates. As a result, it asserts that Western's proposed elimination of the rights previously accorded transmission customers is not comparable with or superior to the *pro forma* tariff.

13. We find Calpine's arguments persuasive, and will direct Western to reinstate a termination clause for Transmission Customers. Under the *pro forma* tariff, transmission customers have the assurance that the rates charged by a transmitting utility are subject to advance notice and Commission scrutiny pursuant to section 205 of the Federal Power Act before they can be changed. Under Western's original tariff, Transmission Customers are guaranteed the right to terminate service if they believe that a changed transmission rate is no longer reasonable. Western's proposed elimination of the rights previously accorded to Transmission Customers is not comparable with or superior to the *pro forma* tariff. Consequently, we can only find the tariff to continue to be an acceptable reciprocity tariff if Western reinserts a termination clause. We will therefore conditionally grant Western's petition on the condition that Western revise its tariff, within thirty days of the date of this order, to reinsert a termination clause.

14. We find, however, that consistent with the approach taken concerning rates charged by public utilities, such termination rights should only be applicable where

[10] The Commission approved Western's original tariff as an acceptable reciprocity tariff in *Missouri Basin Municipal Power Agency and United States Department of Energy-Western Area Power Administration*, 99 FERC ¶ 61,062 (2002).

Western proposes a new or revised formula, or other new rate; it will not apply where Western is merely updating the charge pursuant to the current formula rate. In these circumstances, the formula is the rate, and changes in the inputs and the resulting charges are not rate changes that will allow Transmission Customers to terminate their agreements.

The Commission orders:

Western's petition for a declaratory order is hereby conditionally granted, as discussed in the body of the order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.