

119 FERC ¶ 61,175
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Western Area Power Administration

Docket No. NJ05-1-001

ORDER ACCEPTING COMPLIANCE FILING,
AS MODIFIED

(Issued May 21, 2007)

1. On August 4, 2005, Western Area Power Administration (WAPA) filed an amendment to its reciprocity tariff to comply with the Commission's order issued on July 6, 2005.¹ In this order, we find WAPA's tariff, as modified, will continue to be an acceptable reciprocity or "safe-harbor" tariff, as discussed below.

Background

2. WAPA filed a petition for declaratory order seeking a determination that, with its proposed revisions, its tariff continued to be a reciprocity or "safe-harbor" tariff.² Among other things, WAPA proposed to eliminate a termination clause under Attachment J, Paragraph 1.0 of its tariff, which provided that in the event of a rate change the transmission customer could terminate its agreement for transmission service upon ninety days' notice.

3. In the July 6, 2005 Order, the Commission stated that WAPA's tariff would continue to be an acceptable reciprocity tariff only if WAPA reinserted a termination

¹ *Western Area Power Admin.*, 112 FERC ¶ 61,044 (2005) (July 6, 2005 Order).

² *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 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).

clause for transmission customers.³ Furthermore, the Commission added that, consistent with the approach taken for rates charged by public utilities, such termination rights should only be applicable where WAPA proposes a new or revised formula, or other new rate, and that they should not apply where WAPA was merely updating the charge pursuant to the current formula rate.⁴

4. On August 4, 2005, WAPA filed a revision to its reciprocity tariff to reinsert a termination clause. WAPA proposes a termination clause to be added to Attachment J, Paragraph 1.0 which, as relevant here, states:

If the adjustment in the formula or rate results in an increase in the charges for Transmission Customers, the Transmission Customer, may terminate the service billed by the Transmission Provider under the rate formula adjustment or rate adjustment by providing written notice to the Transmission Provider within ninety (90) days after the effective date of the rate formula adjustment or rate adjustment. Said termination shall be effective on the last day of the billing period requested by the Transmission Customer not later than two (2) years after the effective date of the new rate. Service provided by the Transmission Provider shall be paid for at the new rate regardless of whether the Transmission Customer exercises the option to terminate service. This provision does not apply in those instances where rates change because the Transmission Provider updates charges pursuant to an existing formula rate.

5. WAPA highlights the last sentence of the termination clause, *i.e.*, the language providing that any change in the charges under an existing formula rate does not constitute a rate change warranting termination of service. WAPA explains that its proposed termination language will only apply if WAPA proposes a new or revised formula rate, and will not apply when WAPA merely updates the charge for service pursuant to an existing formula rate. WAPA adds that a transmission customer may terminate pursuant to this section only if an adjustment in the formula or rate results in an increase in charges to the transmission customer.

³ We note that the Commission recently reformed the *pro forma* OATT in Order No. 890, clarifying and expanding the obligations of transmission providers to ensure that transmission service is provided on a non-discriminatory basis. *See Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007). A non-public utility that wishes to continue to qualify for safe harbor treatment after the effective date of Order No. 890 can continue to satisfy the Commission's reciprocity condition by amending its OATT so that its provisions substantially conform or are superior to the reformed *pro forma* OATT. *Id.* at P 191.

⁴ July 6, 2005 Order, 112 FERC ¶ 61,044 at P 14.

Notice of Filing

6. Notice of WAPA's filing was published in the *Federal Register*, 70 Fed. Reg. 48,387 (2005), with interventions and protests due on or before August 25, 2005. On August 25, 2005, Northern California Power Agency (NCPA) filed a timely motion to intervene, Southwest Transmission Dependent Utility Group (Southwest) filed a timely motion to intervene and comment, and Calpine Corporation (Calpine) filed a protest. On September 8, 2005, WAPA filed an answer to Southwest's comment and Calpine's protest.

7. While Southwest supports the intent of WAPA's change, it is concerned that the proposed language concerning "adjustment in the formula" and its final sentence directed at "updates" might lead to misunderstandings and does not track the language of the July 6, 2005 Order. Southwest suggests the following substitute language:

If the Transmission Provider proposes a new or revised formula, or other new rate, that when put into effect, results in an increase in the charges for Transmission Customers, the Transmission Customer may terminate the service billed by the Transmission Provider under the new or revised formula or other new rate by providing written notice to the Transmission Provider within ninety (90) days after the effective date of the rate increase. Said termination shall be effective on the last day of the billing period requested by the Transmission Customer not later than two (2) years after the effective date of the new rate. Service provided by the Transmission Provider shall be paid for at the new rate through the effective date of the termination of service pursuant to the notice. This election to terminate does not apply in those instances where the rate increase results from changed inputs by the Transmission Provider to an existing rate formula.⁵

8. Calpine argues that WAPA's proposal does not comply with the Commission's directive and precludes the exercise of termination rights by transmission customers when WAPA's rate change is a rate decrease. Calpine alleges that there may be circumstances in which WAPA decreases a charge, but where the revised reduced charge nevertheless is above a reasonable and appropriate level. Calpine also alleges that WAPA uses the terms "rate formula or rate adjustment," and makes no mention of "other new rates." Calpine contends that the Commission's July 6, 2005 Order directly addressed the need for WAPA to protect transmission customers in circumstances in which "Western proposes a new or revised formula, or other new rate."⁶

⁵ Southwest's motion to intervene and comment at 4.

⁶ July 6, 2005 Order, 112 FERC ¶ 61,044 at P 14.

9. Calpine proposes replacing WAPA's proposed revisions to Attachment J, Paragraph 1.0 with the following language:

If the Transmission Provider proposes a new or revised formula, or other new rate, the Transmission Customer may terminate the service billed by the Transmission Provider under the new or revised rate formula or other new rate by providing . . .⁷

10. In response to Calpine's and Southwest's objections, WAPA explains that it used the term "rate adjustment" because it is specifically defined in the regulations adopted by the Deputy Secretary of the United States Department of Energy (DOE) that govern WAPA's rate development (10 C.F.R. Part 903 (2006)). These regulations state that a "rate adjustment" is defined to include the development of new rates as follows:

Rate adjustment means a change in an existing rate or rates, or the establishment of a rate or rates for a new service. It does not include a change in rate schedule provisions or in contract terms, other than changes in the price per unit of service, nor does it include changes in the monetary charge pursuant to a formula stated in a rate schedule or a contract.⁸

WAPA argues that the Commission should reject Southwest's and Calpine's requests to deviate from this defined term because it has specific applicability to WAPA, complies with the July 6, 2005 Order, and incorporates the "new rate" issue raised by Southwest and Calpine.

11. In response to Calpine's objection to the limitation to rate increases, WAPA argues that there is no "just and reasonable" review of its rates as that term is defined under the Federal Power Act (FPA),⁹ and that Calpine's initial intervention in this proceeding, in fact, recognized that WAPA was not subject to the Commission's "just and reasonable" ratemaking requirements under section 205 of the FPA. WAPA asserts that, when the Commission reviews its rates in accordance with 18 C.F.R. Part 300 (2006), it uses a different standard of review, *i.e.*, that rates are not arbitrary and capricious, and are not in violation of laws, DOE regulations, or agreements with power generating agencies. According to WAPA, this standard of review has been well established under DOE Delegation Order No. 00-037.00, as well as in numerous Commission orders.¹⁰

⁷ Calpine's protest at 2.

⁸ 10 C.F.R. § 903.2(m) (2006).

⁹ See 16 U.S.C. § 824d (2000).

¹⁰ WAPA's answer at 5. WAPA cites *United States Dep't of Energy – Western Area Power Admin.*, 85 FERC ¶ 61,273 (1998).

12. Moreover, WAPA claims that it sets the lowest possible rates consistent with sound business principles and that the Commission reviews those rates. WAPA claims that, if the rate decreases, the customer will not be harmed and, in fact, will be better off than at the time of contract execution.

13. Finally, WAPA contends that it is unaware of the Commission requiring termination provisions in other non-jurisdictional entities' tariffs and that requiring WAPA to reinsert a termination provision into its reciprocity tariff goes beyond what the Commission has required for other non-jurisdictional entities in their safe-harbor filings. WAPA believes that allowing a customer to terminate service only when the rate adjustment results in a rate increase is an equitable solution to address the concern outlined in the July 6, 2005 Order, while not requiring WAPA's reciprocity tariff to be superior to the *pro-forma* open access transmission tariff.

Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. While answers to a protest generally are not permitted pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹¹ unless otherwise ordered by the decisional authority, we will accept WAPA's answer because it provided information that assisted us in our decision-making process.

B. Commission Determination

1. Definition of terms

15. The Commission finds that the use of the term "rate adjustment" in WAPA's reciprocity tariff is permissible. The term is specifically defined in the regulations governing WAPA's rate development, and includes a change in an existing rate as well as the establishment of a rate for new service. It is consistent with the Commission's directive in the July 6, 2005 Order. Therefore, we reject the requests of Southwest and Calpine to substitute their proposed language for WAPA's proposed language. However, several terms, such as "rate adjustment," "rate formula adjustment," and "new rate" used by WAPA in Attachment J, Paragraph 1.0 of its tariff are not defined. The Commission will require WAPA to add definitions to its tariff to clarify its use of those terms.

¹¹ 18 C.F.R. § 385.213(a)(2) (2006).

2. Standard of review

16. We agree with WAPA that the Commission does not review WAPA's rates under the "just and reasonable" standard of the FPA, as WAPA is not a public utility.¹² Instead, the scope of the Commission's review to confirm and approve WAPA's rates on a final basis is more limited and the Commission may reject the rates only if it finds that they are arbitrary, capricious, or in violation of the law, DOE regulations, or agreements between WAPA's Administrator and the applicable power generating agency.¹³ The just and reasonable standard of the FPA is, put simply, inapplicable.

3. Termination upon a rate increase

17. We will allow WAPA's tariff termination rights to apply, in contrast to Calpine's objection, only when there is a rate increase, as we have previously allowed such a provision for another power marketing administration.¹⁴ In *Southwestern*, the Commission granted Southwestern Power Administration's petition for a declaratory order that its tariff was an acceptable reciprocity tariff, subject only to its filing a revised reciprocity tariff in compliance with Order Nos. 2003 and 2006.¹⁵ Attachment K, section 2.3 of that tariff stated:

If such notice advises that the rates to be paid by the Transmission Customer for Transmission Service furnished by the Transmission Provider under this Agreement are greater than the then-effective rate for such service, the Transmission Customer may, by written notice to the Transmission Provider at any time within 90 days following the date of receipt of such notice from the Transmission Provider, terminate this Agreement in its entirety . . .

¹² See 16 U.S.C. §§ 824, 824d (2000).

¹³ E.g., *United States Dept. of Energy – Western Area Power Admin.*, 115 FERC ¶ 61,362 at P 6-8 (2006); 85 FERC ¶ 61,273 at 62,096.

¹⁴ *Southwestern Power Admin.*, 114 FERC ¶ 61,292 (2006) (*Southwestern*).

¹⁵ See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs., ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs., ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs., ¶ 31,171 (2005), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005). See also, *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, FERC Stats. & Regs., ¶ 31,180, *order on reh'g*, Order No. 2006-A, FERC Stats. & Regs., ¶ 31,196 (2005), *clarified*, Order No. 2006-B, FERC Stats. & Regs., ¶ 31,221 (2006).

18. As previously determined, WAPA's rates to its transmission customers are not subject to a statutory "just and reasonable" analysis, but rather, are subject to a more limited review, *i.e.*, whether the rates are arbitrary, capricious, or in violation of the law, DOE regulations, or agreements between WAPA's Administrator and the applicable power generating agency. In this regard, allowing customers a right to terminate even in the case of a rate decrease would be inconsistent with this more limited review¹⁶ and, if anything, could discourage WAPA from seeking to change its rates when the result is a decrease. Additionally, we are not convinced that customers would be harmed by continuing to take service in the event of a rate change that results in a rate decrease. Accordingly, the Commission finds that WAPA's providing termination rights solely when there is a change in rates that yields a rate increase is acceptable.

The Commission orders:

(A) WAPA's tariff, as modified pursuant to Ordering Paragraph (B) below, will continue to be a reciprocity or "safe-harbor" tariff, as discussed in the body of this order.

(B) WAPA is hereby directed to file further revisions to its tariff, as discussed in the body of this order, within 30 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁶ There is no provision in the Federal Power Act and no Commission precedent under that statute that entitles customers to terminate service upon a rate decrease, and there is no such provision or precedent here, under the relevant statutes governing WAPA, that would entitle WAPA's customers to terminate service upon a rate decrease. If there is no such right under the Federal Power Act, with its broader "just and reasonable" analysis, there is no basis to allow such a right here given the Commission's more limited review.