

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Southwest Power Pool

)

Docket No. EL24-110-000

**MOTION TO INTERVENE AND COMMENTS OF
THE AMERICAN PUBLIC POWER ASSOCIATION AND THE
LARGE PUBLIC POWER COUNCIL**

The American Public Power Association (“APPA”) and the Large Public Power Council (“LPPC”) hereby move to intervene in this proceeding and file comments in response to the Petition for Declaratory Order and Request for Expeditious Action filed by the Southwest Power Pool, Inc. (“SPP”) in this docket on May 21, 2024 (“the Petition”). SPP asks the Commission

for a declaratory order determining whether SPP is required under the Federal Power Act (“FPA”), SPP’s Commission-accepted Open Access Transmission Tariff and Membership Agreement, and Commission precedent to file certain Generator Interconnection Agreements (“GIA”) on an unexecuted basis when an SPP Member that is a public power entity asserts that filing and approval of such a GIA would violate state law.¹

APPA and LPPC submit that the answer is “no.” As explained below, LPPC asks the Commission to determine that sections 39.1 of SPP’s Tariff and 3.12 of the Transmission Owner Membership Agreement place definitively in the hands of the Omaha Public Power District (“OPPD”) governing board the determination whether entering into a GIA with a private Energy Storage Resource in Nebraska would violate state law, subject only to state court review. The Commission’s consideration of an unexecuted GIA for purposes of interconnecting a resource that OPPD has determined cannot do business in Nebraska would deprive OPPD of the right and authority vested in it under the SPP Tariff and the Membership Agreement.

¹ Petition at p. 1 (footnotes omitted).

1. STATEMENT OF APPA AND LPPC INTEREST AND MOTION TO INTERVENE

APPA is the national service organization representing the interests of not-for-profit, state, municipal, and other locally owned electric utilities in the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hours sales to ultimate customers and serve over 49 million people, doing business in every state except Hawaii.

LPPC is an association of 28 of the nation's largest municipal and state-owned utilities, representing the larger, asset-owning members of the public power community and approximately 90% of the transmission assets owned by public power.² Located throughout the nation, many of LPPC's members are transmission-owning members of independent system operators (“ISOs”) and regional transmission organizations (“RTOs”), while others are considering membership in regions of the nation in which ISOs/RTOs and other organized markets are yet being developed.

The tariff and membership agreement provisions placed in issue in the Petition are of direct interest not only to APPA and LPPC members in SPP, but others in organized markets now under development in which the considerations given to public power are vitally important. Accordingly, APPA and LPPC seeks to intervene in this docket and to provide these comments.

II. COMMENTS

A The Commission Has Correctly Recognized that Sections 3.12 of the SPP Membership Agreement and 39.1 of the SPP Tariff Are Critical to Many Public Power Members in Determining Whether to Join an Organized Market.

² LPPC's members are: American Municipal Power, Inc. (AMP), Austin Energy, Chelan County Public Utility District No. 1, Clark Public Utilities, Colorado Springs Utilities, CPS Energy (San Antonio), ElectriCities of North Carolina, Grand River Dam Authority, Grant County Public Utility District, IID Energy (Imperial Irrigation District), JEA (Jacksonville, FL), Long Island Power Authority, Los Angeles Department of Water and Power, Lower Colorado River Authority, MEAG Power, Nashville Electric Services, Nebraska Public Power District, New York Power Authority, Omaha Public Power District, Orlando Utilities Commission, Platte River Power Authority, Puerto Rico Electric Power Authority, Sacramento Municipal Utility District, Salt River Project, Santee Cooper, Seattle City Light, Snohomish County Public Utility District No. 1, and Tacoma Public Utilities. LPPC's members are also members of the American Public Power Association (“APPA”).

The Commission has long recognized both the value of public power's participation in the ISO/RTO model and other organized markets and the fact that public power's participation is entirely voluntary, calling for the accommodation public power's status under federal, state and local law. For its part, SPP appears correctly to understand the voluntary nature of a municipal utility's relationship with the ISO/RTO, and the fact that it is governed by contract (SPP's Membership Agreement) stipulating to the terms under which a non-jurisdictional utility is governed by SPP's tariff. As SPP explains, through the Membership Agreement,

OPPD has voluntarily agreed to be bound by the Tariff (as interpreted and enforced by the Commission) with respect to transmission and interconnection services involving its transmission facilities that it has placed under SPP's functional control. However, SPP, in order to accommodate the membership of OPPD and other nonjurisdictional entities as Transmission Owners in SPP in 2008, revised its Tariff to make clear that, if a conflict arises between the Tariff and a state law, regulation, or rate schedule, such state law, regulation, or rate schedule will govern with respect to the application of the Tariff to the public power entity.³

Section 3.12 of SPP's Membership Agreement stipulates that a non-jurisdictional Member of SPP cannot be required to take any action that would violate governing state law. Recited at p. 13 of the Petition, the OPPD-specific Membership Agreement provision states:

Notwithstanding any other provisions of this Agreement, Member shall not be required to take any action or do any other thing with respect to rates, charges, terms or conditions of service, the resolution of disputes under this Agreement or any other matter regarding its obligations and performance under this Agreement, that (a) Member is not permitted by the state law of Nebraska to undertake or that is prohibited in whole or in part by any state law or regulation of Nebraska applicable to Member; or (b) would require Member to violate a provision of such Nebraska state law or regulation in order to comply with this Agreement. Determination of compliance with and permissible action, conduct and obligations under this Section by Member shall be within the sole jurisdiction of Member's governing board, subject to applicable state of Nebraska court review.

Consistent with this provision, section 39.1 of the Tariff stipulates that while the Commission has exclusive jurisdiction to interpret provisions of the Tariff, "in the event that the governing board of such public-power entity(ies), subject to state court review, determines that a conflict exists between the applicable state law, regulations, or rate schedules, and provisions of this Tariff...such state law,

³ Petition at p. 3, citing the Commission's 2008 Order accepting SPP's tariff amendment (later renumbered section 39.1 of the Tariff, and the Membership Agreement, *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,239 (2008)).

regulations, or rate schedules shall govern with respect to the application of this Tariff to such public-power entity(ies)."

Together, these provisions preserve public power's statutory independence under the Federal Power Act and ensure that ISO/RTO participation does not violate state law. Similar provisions are under consideration in other regions of the nation where expansion of organized markets and the ISO/RTO model are being discussed and where public power represents a significant component of the electric grid.

The Commission's decisions approving sections 3.12 of the Membership Agreement and 39.1 of the Tariff reflect its understanding that the provisions are an essential consideration for municipal utilities in determining whether to become ISO participating Members. In its decision-making section 3.12 of the Membership Agreement available to all non-jurisdictional members the Commission said this:

The Commission demonstrated that it would be flexible in its approach to participation of non-jurisdictional entities in RTOs by accepting provisions to allow the Nebraska Entities to become Members in SPP. The instant filing takes the next logical step by amending the SPP Membership Agreement to afford the same flexibility to other members of SPP, current and prospective. We find that the revisions proposed by SPP will accommodate other non-jurisdictional entities' participation in SPP and, accordingly, we accept them as modified here.⁴

This accommodation remains vital to many APPA and LPPC members that are currently in SPP and to many considering membership in organizations now under development.

B Section 3.12 of The SPP Membership Agreement and Section 39.1 of the Tariff Authorize Omaha Public Power District ("OPPD") to Determine that State Law Prohibits it from Interconnecting with Eolian, L.P. ("Eolian").

Consistent with the terms of section 3.12 of the Membership Agreement and section 39.1 of the Tariff, OPPD notified SPP of its determination that the operation by affiliates of Eolian of stand-alone, commercial scale battery energy storage resources ("ESRs") is impermissible under Nebraska state law, which governs the construction and acquisition of electric generation and transmission facilities. As SPP accurately represents, OPPD notified Eolian of its position by

⁴ *Southwest Power Pool, Inc.*, 127 FERC ¶ 61,078, at PP 9 (2009) (footnotes omitted).

letter dated April 8, 2024, which was followed by OPPD's April 16, 2024 Board of Directors' Resolution to the same effect, and OPPD's formal notice to SPP of this determination by letter dated May 9, 2024.⁵ Based on its determination that Eolian is not authorized to construct, own or operate ESRs under Nebraska law, OPPD's Board further determined that it cannot recognize Eolian as an "Interconnection Customer" under SPP Tariff, Att. V §§ 3.1 and 11.3, since it will not own an authorized "Generating Facility" under the SPP Tariff.⁶

As described above, and recited accurately in the Petition, both section 39.1 of the SPP Tariff, and section 3.12 of the Membership Agreement, put in OPPD's hands alone the determination (subject to state court review) whether a conflict exists between the SPP Tariff and state law. Tariff section 39.1 stipulates that in the event a governing board of a public power entity determines "subject to state court review...that a conflict exists between the applicable state law...and provisions of this Tariff...such state law...shall govern." Confirming that authority, section 3.12 of the OPPD Membership Agreement further specifies that a non-jurisdictional SPP Member "shall not be required to take any action or do any other thing...that (a) Member is not permitted by the state law of Nebraska to undertake or that is prohibited in whole or in part by any state law or regulation of Nebraska applicable to Member." The provision further specifies that "permissible action...and obligations" under the Agreement are "within the sole jurisdiction of the Member's governing board, subject to applicable state of Nebraska court review."

With this, under the SPP Tariff, the matter should be at an end. APPA and LPPC note that OPPD asked in the course of the GIA negotiations that Eolian seek timely approval by the

⁵ See Petition at pp. 15-17 and Appendix 1 to the Petition, attaching correspondence and OPPD Board Resolution.

⁶ See OPPD's May 9, 2024 letter to SPP, p. 2, notifying SPP of OPPD's April 16, 2024 Board Resolution. Appendix 1 to the Petition.

Nebraska Power Review Board ("NPRB") for authority to do business in Nebraska, notwithstanding OPPD's reading of the law.⁷ Given that, there is no call now for FERC to entertain the unexecuted GIA.

C. Sections 39.1 of the SPP Tariff and 3.12 of the Membership Agreement Are Filed Rates and Can Be Changed Only Under Federal Power Act ("FPA") Sections 205 or 206.

As SPP correctly represents, sections 39.1 of the Tariff and 3.12 of the Membership Agreement were accepted by the Commission and now constitute SPP's "Filed Rate."⁸ SPP's representation to this effect is correct and indisputable. According to SPP: "Those provisions—including provisions granting public power entities the authority to determine when a conflict exists between applicable state law and SPP's Tariff and clarifying that in the event of such a conflict, state law would control—have not been challenged and constitute the filed rate."⁹

With this, SPP has no authority to deviate from the provisions of the Tariff and Membership Agreement, absent a filing under FPA section 205 to change it, or a determination by the Commission under FPA section 206 that the Tariff is unjust and unreasonable and a substitute provision just and reasonable. As the Supreme Court held in *Nantahala Power & Light Co. v. Thornburg*,¹⁰ once filed "no change shall be made ... in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public"¹¹ in another filing with FERC. As the

⁷ Petition at p. 16.

⁸ Petition at p. 25.

⁹ *Id.*, citing *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1226-27 (D.C. Cir. 2018) ("explaining that the rate on file is the filed rate and neither the utility nor the Commission can disregard it").

¹⁰ 476 U.S. 953 (1986),

¹¹ 16 U.S.C. § 824d(d).

statutory terms make clear, the filed rate "is not limited to `rates' *per se*," but also extends to matters "directly affect[ing] ... rates."¹²

D. Honoring OPPD's Determination Under the Commission-Approved Tariff and Membership Agreement Neither Conflicts with Federal Law nor Raises a Preemption Issue.

Notwithstanding SPP's contrary suggestion,¹³ the dispute does not "invoke[] issues such as federal supremacy and federal preemption" first and foremost because the action OPPD has taken follows directly from the Commission-approved Membership Agreement and Tariff. Whatever obligations OPPD may have had under the SPP Tariff in the absence of sections 3.12 of the Membership Agreement and 39.1 of the Tariff, SPP does not dispute the fact that OPPD is exercising its rights squarely within these provisions. In approving sections 3.12 and 39.1, FERC has determined *as a matter of federal law* that OPPD is authorized to determine, subject only to state court review, whether it may refrain from taking an action otherwise prescribed by the tariff upon a determination that it conflicts with state law.

Nor is a legitimate issue joined by SPP's comment that [a] Declaratory Order is required because [] Commission regulations such as Order Nos. 2003¹⁴ and 841¹⁵ and their sequels do not squarely address the issue at hand."¹⁶ What is presented here is the question whether the Commission will honor tariff provisions that were put in place as part of a package designed to

¹² *Nantahala Power*, 476 U.S. at 966-967 (citations omitted).

¹³ Petition at pp. 18-19.

¹⁴ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220, *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff'd sub nom. NARUC I, cert. denied*, 552 U.S. 1230 (2008).

¹⁵ *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), *order on reh'g & clarification*, Order No. 841-A, 167 FERC ¶ 61,154 (2019), *aff'd sub nom. NARUC II*.

¹⁶ *Id.* at 19-20.

facilitate broad market participation and induce non-jurisdictional utilities voluntarily to join an ISO and subject themselves to the provisions of the ISO tariff. As noted above, these provisions can only be changed pursuant to FPA sections 205 and 206.

With respect specifically to Order No. 2003, the Commission's reformation of the interconnection process was undertaken under the Commission's FPA sections 205 and 206 authority, as were the ensuing reforms undertaken in Order Nos. 2023, *et al.*¹⁷ Those orders do not bind non-jurisdictional utilities, nor was there even a remote suggestion that the orders may impact the rights and obligation of SPP's non-jurisdictional members.

Nor is it relevant that the Commission determined in Order No. 841 on a generic basis to authorize participation in FERC-jurisdictional markets by ESRs, over the request of certain non-public utilities for an "opt out." In that setting, the Commission had no reason to, and certainly did not, address the SPP Tariff and Membership Agreement provisions placed in issue here.

¹⁷ *Improvements to Generator Interconnection Procedures and Agreements*, Order No. 2023, 184 FERC ¶ 61,054 (2023), *order on reh'g*, Order No. 2023-A, 186 FERC ¶ 61,199 (2024).

III. CONCLUSION

For the reasons articulated above, LPPC asks the Commission to determine that there is no basis for SPP now to file unexecuted GIAs.

Respectfully submitted,

American Public Power Association

Desmarie Waterhouse
Senior Vice President, Advocacy &
Communications and General Counsel
Latif Nurani
American Public Power Association
2451 Crystal Drive
Suite 1000
Arlington, VA 22202
202-467-2900
dwaterhouse@publicpower.org
lnurani@publicpower.org

Large Public Power Council

/s/ Jonathan Schneider
Jonathan D. Schneider
Kelsey L. Robinson
STINSON LLP
1775 Pennsylvania Avenue NW
Suite 800
Washington, DC 20006
(202) 728-3034
jonathan.schneider@stinson.com
Kelsey.Robinson@stinson.com

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document on the parties listed on the official service list compiled by the Secretary of the Commission in this proceeding.

/s/ *Kelsey Robinson*
Kelsey L. Robinson