

113 FERC ¶ 61,056  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Aquila Merchant Services, Inc.

Docket No. EL05-16-000

v.

Southwest Power Pool, Inc.

ORDER APPROVING UNCONTESTED SETTLEMENT AND  
DENYING COMPLAINT

(Issued October 20, 2005)

1. In this proceeding, Aquila Merchant Services, Inc. (Aquila) and Southwest Power Pool, Inc. (SPP) filed an uncontested settlement regarding factual issues set for hearing in response to a complaint proceeding by Aquila. In its complaint, Aquila alleges that from December 2002 through June 2004, SPP failed to apply the demand charge cap in SPP's Open Access Transmission Tariff (OATT) to redirected firm point-to-point transmission service, resulting in overcharges to Aquila and undue restrictions on Aquila's rights. The Commission is approving the settlement, but denying the complaint.

**I. Background**

2. Aquila<sup>1</sup> is a firm point-to-point transmission service customer under SPP's OATT.<sup>2</sup> Occasionally, Aquila redirects, on a firm basis, either its receipt or delivery point. Section 22 of SPP's OATT permits such redirection, but states that it will be treated as a request for new service. Specifically, section 22.2 (Modification on a Firm Basis) reads, in pertinent part, as follows:

Any request by a Transmission Customer to modify Receipt and Delivery Points on a firm basis shall be treated as a new request for service in accordance with section 17 hereof, except that such Transmission

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<sup>1</sup> Aquila, a subsidiary of Aquila, Inc., is a power marketer authorized by the Commission to engage in sales for resale at negotiated rates.

<sup>2</sup> SPP is a regional transmission operator.

Customers shall not be obligated to pay any additional [reservation deposits] ...

3. Also, section 3.2 (Redirect on a Firm Basis) of SPP's Business Practices similarly states that a request for redirected firm service is a new request for service. Specifically, that section states, in pertinent part:

Any request to redirect transmission service ... on a firm basis is treated as a new request for service.

4. In addition, in Order No. 888-A, the Commission explained that "a proposed modification ... to receipt and delivery points on a firm basis under the *pro forma* tariff is not simply a scheduling change ... but is a new request for service, as set forth in *pro forma* tariff section 22.2."<sup>3</sup>

5. Under SPP's OATT, Aquila's rate for firm point-to-point transmission service under its original long-term contract is lower than the rate for new short-term transmission service. This is because its rate for point-to-point transmission service under its original contract has a weekly price cap, whereas the rate for new transmission service does not.

## II. Complaint

6. On October 26, 2004, Aquila filed a complaint with the Commission alleging that SPP erroneously treated Aquila's redirected transmission service as new transmission service for purposes of pricing, and thus billed Aquila at a rate that did not have a weekly price cap.<sup>4</sup> Aquila alleges that this occurred from December 2002 through June 2004,

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<sup>3</sup> *Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regulations Preambles January 1991 - June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996 - December 2000 ¶ 31,048 at 30,319 (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 Study Policy Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). *See also Entergy Services, Inc.*, 91 FERC ¶ 61,151 at 61,566, *order on reh'g*, 92 FERC ¶ 61,108 (2000).

<sup>4</sup> Aquila filed its complaint under section 206 of the Federal Power Act. 16 U.S.C. § 824e (2003).

with the result that Aquila was billed a total of \$1,276,423.57<sup>5</sup> more than it should have been billed. In its complaint, Aquila seeks reimbursement of this amount, plus interest.

7. Aquila acknowledges that section 22.2 of SPP's OATT provides that a request to modify receipt and delivery points on a firm basis shall be treated as a request for new service. However, Aquila argues that its request should have been treated as a request for new service only for purposes of determining availability of capacity, and not for pricing purposes, citing *Commonwealth Edison Co. (Commonwealth)*.<sup>6</sup> Aquila notes that, in interpreting section 22.2 of Commonwealth's OATT, the Commission stated that "any request by [Dynegy Power Marketing, Inc.] to change a delivery point is treated as a new request for service for purposes of the availability of capacity."

8. SPP filed an answer to the complaint denying the allegations. SPP contends that it applied its tariff in accordance with the plain terms of the tariff. SPP argues that Aquila's contention that redirected service is only new service for purposes of availability and not for other purposes, such as price changes or continued application of the weekly price cap, is not supported by the tariff. Rather, SPP states that the plain language of section 22.2 shows that the treatment of redirected service is meant to encompass all the characteristics associated with any new service, with a single explicit exception pertaining to deposit requirements. SPP states that redirected service under section 22.2 is a separate transaction that is subject to the new pricing of the redirected path, not the pricing under the transmission customer's original long-term firm service agreement.

### **III. Hearing and Settlement Proceedings**

9. On December 21, 2004, the Commission issued an order establishing hearing and settlement proceedings.<sup>7</sup> The Commission determined that the complaint presented issues of material fact that could not be resolved based on the record in the proceeding. Specifically, the Commission stated that it was unclear how SPP applied its OATT regarding the weekly demand cap during the period in which the redirection occurred and how SPP defined a "week" for purposes of calculating the weekly rate cap. We stated that once this factual issue was resolved, we expected to be able to determine whether SPP incorrectly failed to apply the demand charge cap in its OATT to redirected firm point-to-point transmission service from December 2002 through June 2004.

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<sup>5</sup> Aquila states that this figure does not include interest.

<sup>6</sup> *Commonwealth Edison Co.*, 95 FERC ¶ 61,027 at 61,083 (2001).

<sup>7</sup> *Aquila Merchant Services, Inc. v. Southwest Power Pool, Inc.*, 109 FERC ¶ 61,307 (2004).

#### IV. Uncontested Settlement

10. On April 12, 2005, Aquila and SPP filed a settlement agreement resolving all factual issues set for hearing.<sup>8</sup> The parties left it to the Commission to decide the legal issue of whether SPP incorrectly failed to apply the demand charge cap to redirected firm point-to-point transmission service during the period in question. The settlement is uncontested, and the Commission's trial staff filed comments in support of the settlement. Comments were also filed by SPP. Aquila, SPP, and the Commission's trial staff filed reply comments. SPP and the Commission's trial staff also filed additional comments. On June 15, 2005, the presiding administrative law judge certified the uncontested settlement to the Commission.<sup>9</sup>

#### V. Discussion

11. The subject settlement is in the public interest and is hereby approved. The Commission's acceptance of the settlement does not constitute acceptance of, or precedent regarding, any principle or issue in this proceeding.

12. For the reasons discussed below, the Commission is denying the complaint. We note that Aquila and SPP agree that section 22.2 of SPP's OATT, section 3.2 of its Business Practices, and the *pro forma* OATT all provide that redirected service is a request for new service. The only issue before the Commission is whether such service is subject to the rate applicable under the original service agreement, which in this case includes a weekly price cap, or whether the rate for new service applies.

13. Section 22.2 of SPP's OATT and section 3.2 of SPP's Business Practices both support SPP's arguments. Section 22.2 clearly provides that an additional deposit is the only exception from the new service requirements. Thus, all other new service conditions apply to redirected service requests, including the rate charged for the redirected service. Accordingly, the Commission is not persuaded that *Commonwealth* stands for the proposition that section 22.2 of an OATT means that a request for redirected service is a request for new service only with respect to availability of capacity. The passage from *Commonwealth* that Aquila cites does not exclude other

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<sup>8</sup> Aquila and SPP filed their settlement under section 602 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.602 (2005).

<sup>9</sup> *Aquila Merchant Services, Inc. v. Southwest Power Pool, Inc.*, 111 FERC ¶ 63,064 (2005). That order describes the initial comments, reply comments, and additional comments filed by the parties to the proceeding regarding the settlement.

purposes or results, including removal of the weekly price cap. Moreover, *Commonwealth* is not squarely on point here, since in *Commonwealth* the Commission addressed the issue of whether redirecting service for a temporary period would convert a long-term firm transmission service agreement into two short-term agreements.

14. Also, the Commission notes that section 22.2 of the Midwest Independent Transmission System Operator, Inc.'s (MISO) OATT parallels SPP's section 22.2 in that MISO's OATT also states that redirected service is considered to be new service. This provision has not been interpreted to mean that redirected service on MISO is treated as new service only for purposes of availability of capacity. Rather, we have recognized that MISO can charge the rate applicable for new service, rather than the rate associated with the underlying contract, for redirected service on MISO's system.<sup>10</sup> Thus, the interpretation of section 22.2 in MISO's OATT undercuts Aquila's argument that redirected service is treated as new service only for purposes of availability of capacity.

The Commission orders:

(A) The settlement agreement between Aquila and SPP is hereby approved.

(B) Aquila's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>10</sup> See *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,069 at P 2 (2003).