

119 FERC ¶ 61,262
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.

Golden Spread Electric Cooperative, Inc.

v.

Docket No. EL07-59-000

Southwestern Public Service Company

ORDER DISMISSING COMPLAINT AND DENYING REQUEST FOR
ARBITRATION PROCEDURES

(Issued June 8, 2007)

1. On May 9, 2007, Golden Spread Electric Cooperative, Inc. (Golden Spread) filed with the Commission an abbreviated complaint against Southwestern Public Service Company (SPS), together with a request for Commission approval of neutral binding arbitration and a request for a waiver of the Commission's regulations,¹ to allow Golden Spread to file its complaint in shell form, without all of the materials that usually accompany a complaint. In its complaint, Golden Spread asks the Commission to issue an order: (a) authorizing Golden Spread and SPS to submit the disputes that are the subject matter of the complaint to binding arbitration;² and (b) stating that any award that results from the arbitration proceeding shall become final 30 days after it is filed with the Commission and served on all of the parties.³ Golden Spread further asks the Commission to dismiss the complaint if the Commission is unwilling to issue such an order, so that Golden Spread can seek relief in another forum.⁴

¹ Golden Spread refers specifically to Rule 206 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206 (2006), which governs the contents of complaints.

² Golden Spread attached as Appendix A to the complaint an agreement between Golden Spread and SPS to submit the disputes to binding arbitration.

³ Complaint at 1-2. In support of this request, Golden Spread cites Rule 605(e) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.605(e) (2006).

⁴ *Id.* at 2.

2. On May 10, 2007, SPS filed an answer to Golden Spread's complaint. SPS agrees with Golden Spread's request for neutral, binding arbitration. SPS states that the best way to expeditiously resolve the parties' disputes is through binding arbitration.⁵
3. Golden Spread is a non-profit electric generation and transmission cooperative that supplies wholesale electric power and energy to its sixteen member cooperatives, which supply retail power and energy to over 180,000 retail customers located in the South Plains, Panhandle and Western regions of Texas, and the Panhandle of Oklahoma. Golden Spread is a partial requirements customer of SPS.
4. SPS, an operating subsidiary of Xcel Energy, is an investor-owned utility that operates in a service territory located in eastern New Mexico and the Panhandle of Texas. SPS sells wholesale electric energy to customers located in its service territory and in other parts of the United States.
5. Golden Spread takes partial requirements service from SPS under Service Schedule A of the Power Sales Agreement (PSA) between Golden Spread and SPS. Under the PSA, SPS provides firm power and energy to Golden Spread up to a contractual demand limit referred to as the "Firm Power Commitment." Golden Spread states that the parties cannot agree on the amount by which Golden Spread is entitled to increase its Firm Power Commitment.⁶ Golden Spread further states that the parties agree that they must resolve their disputes quickly, and agree that the most expeditious and reasonable manner of resolving these disputes is through binding arbitration.⁷
6. The parties contemplate that the arbitration proceeding will be bifurcated, with the first phase determining whether a contract breach has occurred, and the second phase determining the appropriate remedy, including any monetary damages due.⁸
7. On May 15, 2007, the parties filed a joint motion for expedited action on the request that the Commission authorize them to settle their disputes through binding arbitration. They state that prompt resolution of this matter is necessary to remove uncertainty over the extent to which Golden Spread is entitled to rely on SPS to ensure that adequate capacity is available to meet Golden Spread's growing load.⁹
8. On May 18, 2007, Occidental Permian Ltd. (Occidental) filed a motion to intervene, an answer to the joint motion for expedited action, and comments.

⁵ SPS Answer at 3-4.

⁶ Complaint at 5.

⁷ *Id.* at 4-5.

⁸ *Id.* at 6, n. 4.

⁹ Motion for Expedited Action at 1.

Occidental states that it is a major consumer of electricity in its oil and gas operations in Texas and New Mexico and purchases substantial amounts of electric energy from SPS and from most of SPS's wholesale requirements customers, either directly or through affiliates. It further states that it is the largest retail customer on the SPS system.¹⁰

9. Occidental argues that Golden Spread's complaint fails to comply with the Commission's Rules of Practice and Procedure governing complaints.¹¹ Occidental submits that Golden Spread's complaint, among other things, fails to specify the action or inaction that violates applicable statutory standards or regulatory requirements and fails to quantify the financial effect of the dispute. Occidental maintains that Golden Spread has not provided sufficient information in its complaint to enable the Commission to determine the best course of action in addressing the dispute or to allow potential intervenors to assess how the outcome of this proceeding may affect their interests.¹²

10. Occidental challenges Golden Spread's assertion that the complaint will not have "significant effects on persons or organizations who are not parties to the proceeding."¹³ Occidental argues that if SPS loses the arbitration, it will have to provide for Golden Spread's increased Firm Power Commitment. According to Occidental, if SPS does have to provide for Golden Spread's Increased Firm Power Commitment, it will have to increase its capacity, which may be very expensive to do. So, according to Occidental, this proceeding could significantly affect the rates that SPS's other customers pay and the service that they receive.¹⁴

11. Occidental asks the Commission to reject Golden Spread's complaint as facially insufficient. It also refers to Rule 604 of the Commission's Rules of Practice and Procedure, which provides, among other things, that the Commission will not consent to the use of alternative dispute resolution if, *inter alia*, "the matter significantly affects persons or organizations who are not parties to the proceeding."¹⁵ Occidental also asks the Commission to reject the complaint on the further grounds that, contrary to Golden Spread's assertion, this proceeding will significantly affect persons and organizations (*i.e.*, SPS's other customers, such as Occidental) who are not parties to the proceeding.¹⁶

¹⁰ Motion to Intervene at 3.

¹¹ 18 C.F.R. § 385.206(b) (2006).

¹² Motion to Intervene at 4-5.

¹³ Complaint at P 13.

¹⁴ Motion to Intervene at 5.

¹⁵ 18 C.F.R. § 385.604(a)(2)(iv) (2006).

¹⁶ Motion to Intervene at 6.

12. Finally, Occidental asks the Commission to deny the joint motion for expedited action as unsupported and unreasonably depriving potential intervenors of the normal time to assess their interests and decide whether to intervene and comment.¹⁷

13. On May 25, 2007, Golden Spread filed an answer to Occidental's motion to intervene. Golden Spread asks the Commission to deny Occidental intervenor status, grant Golden Spread's and SPS's joint motion for expedited action and authorize them to proceed to binding arbitration.¹⁸ Alternatively, if the Commission is not willing to permit Golden Spread and SPS to use neutral, binding arbitration to resolve their dispute, then Golden Spread asks the Commission to dismiss the complaint, without prejudice, so that Golden Spread may seek relief in state court, consistent with the contract.¹⁹

14. Golden Spread acknowledges that the resolution of the rights and obligations of SPS and Golden Spread under their contract could affect what Occidental pays to either SPS or to Golden Spread's members. But Golden Spread argues that this does not translate into an automatic right to intervene in this proceeding. Golden Spread argues that the parties are not trying to *change* their contract, but to properly *interpret* it, and that they wish to invoke arbitration, as provided in the Commission-approved filed rate, in order to make the outcome binding.²⁰

15. Golden Spread further argues that the outcome of the proceeding will not directly affect Occidental, and that any indirect affect will be insubstantial. According to Golden Spread, Occidental would not experience higher capacity charges, unless and until SPS filed for and received retail and wholesale rate increases that resulted in Occidental's paying higher charges. And, to the extent that Occidental purchases power and energy from Golden Spread's members, it will, if Golden Spread is successful in the arbitration proceeding, obtain the benefit of any cost savings that Golden Spread receives.²¹

16. Golden Spread maintains that Occidental has no direct, substantial interest in this proceeding and that the outcome of the proceeding would only affect Occidental in the same manner that it affects each and every other customer of SPS and Golden Spread. Golden Spread further notes that arbitration of the parties' dispute would not limit the Commission's power to exercise its authority under section 206 of the Federal Power

¹⁷ *Id.* at 7-8.

¹⁸ Golden Spread Answer to Motion to Intervene at 2.

¹⁹ *Id.*

²⁰ *Id.* at 3.

²¹ Golden Spread Answer to Motion to Intervene at 4.

Act (FPA).²² Finally, Golden Spread argues that denying the parties their contractual right to neutral, binding arbitration will not further the public interest.²³

17. Golden Spread submits that its abbreviated complaint is reasonable, since it fully informed SPS of the subject matter and SPS was able to answer the complaint. According to Golden Spread, both it and SPS considered the abbreviated complaint adequate under the circumstances.²⁴

18. Golden Spread says that the lack of economic quantification of an arbitration award favorable to Golden Spread is merely the result of the course of action that SPS and Golden Spread have chosen. That is, in their view, the most efficient resolution of the complaint is to first establish Golden Spread's contract rights and then, and only if the arbitration finds SPS in breach of contract, to address the issue of damages. Golden Spread submits that this approach is inherent in the nature of arbitration proceedings, and that the Commission's acceptance and promotion of arbitration and other forms of dispute resolution encourages such an approach.²⁵

19. Golden Spread further argues that the ripple effect of a determination of the parties' arbitration award on SPS's other customers is not sufficient to confer standing to intervene in this proceeding. SPS also maintains that, contrary to Occidental's argument, the complaint does specify the violation of the Commission's statutory or regulatory standards, since the contract under consideration here is a filed rate, and Golden Spread is asserting that SPS has not complied with the filed rate.²⁶

20. Golden Spread challenges Occidental's assertion that, by permitting SPS and Golden Spread to participate in neutral, binding arbitration, the Commission would be abdicating its regulatory responsibilities.²⁷ Golden Spread argues that, far from abdicating its regulatory responsibilities, securing finality through alternative dispute resolution is precisely what the Commission is intending to achieve through its rules governing that form of dispute resolution.²⁸

21. Golden Spread contends that by characterizing the Commission's acceptance of the results of binding arbitration as a "rubber stamp," Occidental is collaterally attacking

²² 16 U.S.C. § 824e (2000).

²³ Golden Spread Answer to Motion to Intervene at 4.

²⁴ *Id.* at 4-5.

²⁵ *Id.* at 5.

²⁶ *Id.*

²⁷ *Id.* at 6, quoting from Motion to Intervene at 6-7.

²⁸ *Id.*

the Commission's discretion to promulgate rules governing binding arbitration. Golden Spread asserts that the Commission has the discretion to allow parties to resolve contractual disputes through arbitration and has consistently expressed a preference for arbitration, when the parties have sought it.²⁹

22. Golden Spread is concerned that, if it and SPS do not resolve their differences through neutral, binding arbitration, it may be years before the parties have a final determination of their rights and responsibilities under the contract, with the distinct possibility of greater damages exposure for SPS should Golden Spread finally prevail. Golden Spread says that the parties merely wish to establish their rights and obligations under the contract as expeditiously as possible.³⁰

23. Golden Spread argues that if this proceeding affects Occidental at all, it does so only tangentially. It submits that if Occidental is able to block Golden Spread's and SPS's recourse to neutral, binding arbitration, the result will eviscerate the Commission's rules on alternative dispute resolution and have a chilling effect on other parties' use of such rules in the future. Golden Spread maintains that if Occidental deems the results of the arbitration process to be contrary to the public interest, Occidental retains the right to have the Commission review the award under section 206 of the FPA.³¹

24. Golden Spread says that for reasons of proper resource planning, economic efficiency and reliability, the parties need an efficient resolution of their rights under the contract. It submits that Occidental has presented no legitimate basis for denying the parties a prompt resolution of their dispute. Golden Spread requests that the Commission accept Golden Spread's complaint for filing, deny Occidental's motion to intervene, and approve the parties' use of binding arbitration to resolve their dispute in an expeditious and cost-effective manner.³²

25. On May 29, 2007, SPS filed an answer to the motion to intervene, answer to joint motion for expedited action and comment. SPS asks the Commission to deny Occidental's motion to intervene and to promptly issue an order authorizing Golden Spread and SPS to engage in binding arbitration to resolve their contract dispute.³³

26. SPS argues that it adequately represents Occidental's interests, since it (SPS) is arguing the very position that Occidental advocates, *i.e.*, that Golden Spread is not

²⁹ *Id.* at 6.

³⁰ *Id.* at 7-8.

³¹ *Id.* at 8.

³² *Id.* at 8-9.

³³ SPS Answer to Motion to Intervene at 2, 5.

entitled to the increases in the Firm Power Commitment that Golden Spread requests and the SPS declined to provide.³⁴ SPS further contends that even if Golden Spread were to prevail in arbitration, the arbitration award would not injure Occidental. Rather Occidental, as a retail customer of Golden Spread's members, would be the indirect beneficiary of an arbitration award in Golden Spread's favor.³⁵

27. SPS also asserts that Occidental has no direct interest in this proceeding, since it: (a) is not a party to the contract under consideration; (b) is not a wholesale customer; and (c) is not a competitor of SPS.³⁶ Rather, Occidental is a retail customer of both SPS and Golden Spread's members.³⁷ SPS maintains that the outcome of this proceeding will have no direct or substantial effect on Occidental until after further retail rate proceedings at the state level,³⁸ and that Occidental's status as a retail customer is not a sufficient basis on which to grant Occidental status as an intervenor in this proceeding.³⁹

28. SPS further argues that this is not a case in which SPS is proposing to amend or otherwise modify a rate schedule. Rather, according to SPS, this is a proceeding in which the meaning of an existing rate schedule is the subject of dispute and the only parties to the agreement propose to resolve that dispute using alternative dispute resolution techniques. SPS maintains that the agreement contemplates that this is precisely the means by which the parties would resolve their contract disputes.⁴⁰

29. SPS also maintains that if Occidental, which is neither a wholesale customer nor a party to the contract at issue, can block the parties from using binding arbitration to achieve a prompt resolution of their disputes, then other parties may not pursue alternative resolution to resolve contract disputes. SPS is further concerned that if Occidental impedes the prompt resolution of a question of contract interpretation, SPS will be exposed to an ever growing contingent liability in the form of contract damages and related interest.⁴¹

³⁴ *Id.* at 2.

³⁵ *Id.*

³⁶ *Id.* at 3.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* SPS cites *Consumers Power Co.*, 54 FERC ¶ 61,323 at 62,030 n. 12 (1991) for the proposition that Occidental is attempting to use the wrong forum, *i.e.*, a wholesale proceeding, in which to raise its retail concerns.

⁴⁰ *Id.*

⁴¹ *Id.* at 4.

30. On June 1, 2007, Occidental filed a reply to Golden Spread's and SPS's answers. Occidental submits that it has an interest in this proceeding because it is a consumer of the electric energy that SPS and Golden Spread sell. Occidental states that, if SPS must increase Golden Spread's contract demand, it will have to obtain additional fuel cost resources at a higher cost and would automatically pass that higher cost through to Occidental and to its other wholesale and retail customers through its fuel adjustment clauses.⁴²

31. Occidental states that SPS's and Golden Spread's argument that the Commission should deny Occidental intervention because it is a retail, and not a wholesale customer is incorrect. Occidental contends that, when determining whether intervention is appropriate, the Commission focuses on the interest of the potential intervenor, and not on its status.⁴³ Occidental also challenges SPS's assertion that its interest is the same as SPS's interest. Occidental argues that if SPS loses the arbitration, it would necessarily seek to recover the resulting higher fuel costs from its customers, including Occidental.⁴⁴

32. Finally, Occidental argues that SPS and Golden Spread are free to submit their dispute to arbitration at any time, without Commission involvement, but have chosen not to do so. Occidental contends that, having chosen to involve the Commission, SPS and Golden spread are bound by the Commission's rules, one of which is that the Commission will not allow arbitration in instances where, as here, the matter that the parties will arbitrate significantly affects persons or organizations who are not parties to the proceeding.⁴⁵

Discussion

A. Procedural Matter

33. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Occidental's answer because it has provided information that assisted us in our decision-making process.

B. Analysis

34. We will grant Occidental's motion to intervene in this proceeding, deny the request for binding arbitration, and dismiss the complaint. Occidental has established

⁴² Occidental Answer at 2-3.

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 5-6.

that it has an interest in this proceeding that cannot be adequately represented by any other party.

35. We agree with Occidental that, despite its claims to the contrary, SPS will not adequately represent Occidental's interest in this proceeding. Should SPS be unsuccessful in the arbitration proceeding, SPS may seek to obtain the increased capacity and fuel costs from Occidental (and SPS's other customers). Although SPS would be defending against such an outcome, its interests and those of Occidental are not the same.⁴⁶

36. We do not agree with Golden Spread that Occidental's interest is merely tangential to this proceeding or that any effect from this proceeding on Occidental would be insubstantial.⁴⁷ Although it is not clear how big a customer Occidental is, it is in the neighborhood of 20 percent of SPS's peak load.⁴⁸ If Golden Spread's contract demand were increased substantially, it is possible there would be monetary effects on Occidental, both immediately and over time as retail rates reflect the change.

37. Nor do we agree with Golden Spread that "the potential 'ripple effect' on other SPS customers simply is not an issue when the question involves not a change in contract, but merely the determination of contract rights."⁴⁹ In this case the determination of those rights may result in SPS passing higher fuel and capacity costs on to its retail customers, such as Occidental. Even if that passage is delayed somewhat at the state level,⁵⁰ that does not obscure Occidental's potential liability as a result of an arbitration award that is adverse to SPS.

38. Nor do we agree with SPS that we should deny Occidental intervention because it is a retail, rather than a wholesale, customer.⁵¹ Occidental has an interest in this proceeding as a major customer of SPS and a consumer of the electric energy that SPS and Golden Spread sell.⁵² Further, our focus, when considering whether to allow intervention, is on the *interest* of the potential intervenor, rather than its *status*. Here,

⁴⁶ See Occidental Answer at 5.

⁴⁷ See Golden Spread Answer to Motion to Intervene at 3, 8.

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 5.

⁵⁰ As noted above, it is unclear whether SPS could immediately pass increased fuel costs and capacity charges through to its customers through its fuel adjustment clauses. Neither SPS nor Golden Spread addressed this issue.

⁵¹ SPS Answer to Motion to Intervene at 3.

⁵² See 18 C.F.R. § 385.214(b)(2)(ii) (2006).

there is the potential that Occidental may have to pay increased costs for fuel and capacity charges. That interest is sufficient to support its request for intervention.⁵³

39. We will deny the request to submit the dispute to binding arbitration. We recognize that arbitration can be a useful mechanism for resolving rate disputes, because it may reduce the time and expense associated with protracted litigation, and ease the burden on Commission resources.

40. But a request to invoke alternative dispute resolution must be consistent with the Commission's Rules of Practice and Procedure. Rule 604 of the Commission's Rules of Practice and Procedure⁵⁴ provides that the Commission will not consent to the use of an alternative dispute resolution proceeding when the matter significantly affects persons or organizations who are not parties to the proceeding.⁵⁵ Occidental is not (or would not be) a party to the arbitration proceeding and we have found that the arbitration proceeding could significantly affect Occidental's interests. We do not find that Golden Spread's and SPS's interest in an expeditious resolution of their dispute significantly outweighs Occidental's interest in this matter.⁵⁶

41. It is true, as SPS and Golden Spread note, that the Commission consistently favors the use of arbitration wherever the parties seek it, but only under circumstances where the matter does not affect persons or organizations with an interest in the process.⁵⁷ That is not the case here.⁵⁸

⁵³ *Consumers Power Co.*, 100 FERC ¶ 61,354 at P 7 (2002) (The Commission's regulation regarding intervention does not require that a movant show that it falls into one of the four categories in the rule (*i.e.*, consumer, customer, competitor, or security holder of a party), but rather that it show that its interest may be affected by the proceeding. The categories are examples of the types of interests that a proceeding may affect, not an exclusive listing of the types of interests that a movant must show.)

⁵⁴ 18 C.F.R. § 385.604 (2006).

⁵⁵ 18 C.F.R. § 385.604 (a)(3) (2006).

⁵⁶ *See* 18 C.F.R. § 385.604 (a)(3) (2006).

⁵⁷ *American Municipal Power-Ohio, Inc. v. Ohio Edison Company*, 42 FERC 61,141 at 61,525 (1988) (*American Municipal*).

⁵⁸ Also, the cases that SPS and Golden Spread cite involved fully-pled, not abbreviated complaints, so the interests of all affected parties were more apparent than they are from the shell complaint before us here. *See, e.g., PPL EnergyPlus, LLC*, 98 FERC ¶ 61,151 (2002); *American Municipal, supra*; *Texas-New Mexico Power Company v. El Paso Electric Company*, 30 FERC ¶ 61,242 (1985).

42. We do not think that our decision here will have a chilling effect on parties' requests to submit disputes to binding arbitration, since most such requests are specific to the parties involved and do not significantly affect persons or organizations who are not parties to the proceeding. In any event, the public interest (and consistency with our own Rules of Practice and Procedure) requires that we not consent to the use of alternative dispute resolution where, as here, the matter significantly affects persons or organizations (in this case Occidental) who are not parties to the proceeding.

43. Golden Spread asks that if we do not allow the parties to submit their dispute to binding arbitration, we dismiss the complaint. We will grant this request, and dismiss the complaint and deny the joint request for expedited action, without prejudice to Golden Spread's filing a complaint that complies with all of the requirements of Rule 206 of the Commission's Rules of Practice and Procedure.⁵⁹ Alternatively, the parties may wish to enter into arbitration on their own or to work with the Commission's Dispute Resolution Service to mediate the dispute.⁶⁰ Any arbitration award affecting rates, terms or conditions of jurisdictional service would be subject to the Commission's jurisdiction.

The Commission orders:

(A) Occidental's Motion to Intervene is hereby granted, as discussed in the body of this order.

(B) The request to submit the disputes that are the subject matter of the complaint to binding arbitration is hereby denied.

(C) The complaint is hereby dismissed, without prejudice to Golden Spread's filing a complaint that complies with all of the requirements of Rule 206 of the Commission's Rules of Practice and Procedure, as discussed in the body of this order.

⁵⁹ 18 C.F.R. § 385.206 (2006).

⁶⁰ Section 12 of the PSA allows the parties to submit the dispute to the Commission or to any other agency or court having jurisdiction over the subject matter.

(D) The motion for expedited action is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.