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October 18, 1995

BY HAND
No. 258

The Honorable Anne K. Bingaman
Assistant Attorney General
U.S. Department of Justice
Constitution Avenue and Tenth St. N.W.
Washington, D.C. 20530

Re: Southwest Power Pool, Inc.
Business Review Request

Dear Ms. Bingaman:

On behalf of the Southwest Power Pool, Inc. ("SPP"), this is a request for a business review letter pursuant to the Business Review Procedure of the Department of Justice, 28 C.F.R. § 50.6. In this request, including the enclosed Exhibits, SPP has made its best efforts to comply with the criteria specified for the Antitrust Division's Pilot Business Review Program. 58 Fed. Reg. 6132-33 (1993). On behalf of SPP, the undersigned represents that SPP has undertaken a good faith search for the documents and information specified in the Division's Pilot Business Review Program Notice, and, where applicable, has provided all responsive material.

SPP requests a statement of the Department of Justice's present enforcement intention with regard to SPP's plan to establish an electronic bulletin board which will contain the terms of offers to sell or buy short-term electrical energy and transmission service on an immediate basis. This system is referred to as the Next Hour Energy Exchange ("NHEE"). Through the NHEE, SPP members may post the quantity and price of energy and transmission service for sale or purchase during the next hour. The NHEE will provide purchasers with computations of the delivered cost opportunities including transmission charges and permit them to select purchases or sales.

Hon. Anne K. Bingaman
U.S. Department of Justice
October 18, 1995
Page 2

I. SPP, ITS MEMBERS, AND THE MARKET

SPP was established in 1941. It is one of the nine Regional Reliability Councils within the United States. As such, SPP is dedicated to facilitating joint planning and coordination among its members to provide for increased operating efficiency, supply, and reliability of electric service. On January 3, 1994, SPP was incorporated as a mutual benefit nonprofit corporation under the Arkansas Nonprofit Corporation Act of 1933. Copies of the Articles of Incorporation and By-Laws are Exhibits "A" and "B" to this request. A copy of the Criteria for the operation of the Pool is attached as Exhibit "C." A copy of the Annual Report of the North American Electric Reliability Council is attached as Exhibit "D." This Report explains that the nine regional Councils work to assure the reliability of the transcontinental bulk electric systems, and provides additional information concerning SPP (pages 36-39).

SPP membership is open to any electric utility, Federal Power marketing agency, transmission service provider, and any entity generating electric energy for sale or resale located and/or serving customers in and around the states of Arkansas, Kansas, Louisiana, Oklahoma, Mississippi, Missouri, Texas and New Mexico, and interconnected with a SPP member. SPP membership currently consists of the members listed on Exhibit "E."¹

The Pilot Program calls for an identification of the ten largest customers in the relevant geographic market for products or services involved in the information exchange and an estimate of their annual purchases. SPP reports capacity and demand

¹ The Pilot Program calls for identification of competitive significance of persons or firms in the relevant product and geographic markets which will not participate in the information exchange. SPP members both buy and sell power with entities in other regions. One region is the Western Systems Coordinating Council ("WSCC") which generally covers Western utilities. The significant entities in the WSCC generally are members of the Western Systems Power Pool ("WSPP") which provides a means, including an electronic price posting system, for members to engage in transactions. Other reliability council directly interconnected with the SPP are the Mid-American Interpool Network (MAIN), the Electric Reliability Council of Texas (ERCOT), the Mid-Continent Area Power Pool (MAPP) and the Southeast Reliability Council (SERC). The SPP's NHEE will not preclude transactions with any non-SPP members; members may conduct business with such non-SPP members just as they do today.

Hon. Anne K. Bingaman
U.S. Department of Justice
October 18, 1995
Page 3

information annually to the Office of Emergency Operations, Department of Energy. The most recent report, dated April 1, 1995, is submitted as Exhibit "F." Item 1 of the report states the energy and peak demand for a ten-year period commencing with 1994. In terms of demand, this information identifies the largest members of SPP. This is the most responsive information in SPP's possession.

The Pilot Program calls for a description of the characteristics of the market in which the information will be exchanged. The geographic area encompasses the states of Arkansas, Louisiana, Kansas, Oklahoma, and parts of Mississippi, Missouri, New Mexico, and Texas. The products generally will involve the sale of short-term energy and transmission. As described below, NHEE transactions will occur under the WSPP Agreement which only allows short-term (no more than one year long transactions) approved by the Federal Energy Regulatory Commission ("FERC"). Currently, sales of these services within the SPP occur bilaterally without the benefit of a computer bulletin board showing offers on a real-time basis. In order to transact today, SPP members generally telephone others to find out about the availability and pricing of services² which are provided pursuant to FERC approved rate schedules. The availability of information to a purchaser generally will depend upon how many sellers it calls.

II. THE NEXT HOUR ENERGY EXCHANGE

The NHEE is an electronic bulletin board designed to permit participating SPP members to evaluate and execute offers to sell or buy "economy energy" on an hourly basis. A description of the system is contained in the Next Hour Energy Recommendations to the Board of Directors, and Operating Subcommittee Report, enclosed as Exhibits "G" and "H" respectively. Through the NHEE, sellers of transmission service would provide rates and interface capabilities. Sellers of energy would provide rates and quantity availabilities. The system would compute for potential purchasers the delivered cost opportunities including the identity of the selling system, quantity available, transmission charges, and delivered price. Exhibit "G" at pages 3-4 (showing examples of information that would be available); Exhibit "H" at Operational Procedures § 15.3(c). Transactions may be made during the forty minute period beginning at the top of each hour. Sellers may

² Some information is posted on the WSPP's Electronic Bulletin Board which in the past has not been on a real-time basis. WSPP members are now starting to use a real-time computer network to transact business.

Hon. Anne K. Bingaman
U.S. Department of Justice
October 18, 1995
Page 4

revise their offers until the time an offer is selected by a buyer. Sellers of energy (but not of transmission service) may elect anonymity to potential buyers until the forty minute transaction period ends, at which time ultimate buyers and sellers are made known to each other and scheduling information is distributed to the pertinent control areas. The duration of NHEE transactions will be limited initially to one hour. Participants may restrict the availability of postings to other participants. Other procedures are set forth in Exhibit "H," Operational Procedures.

All NHEE transactions will occur pursuant to the rates, terms, and conditions of the WSPP Agreement, as amended, filed with and approved by the FERC. Western Sys. Power Pool, 55 FERC ¶ 61,099, modified & clarified, 55 FERC ¶ 61,495 (1991), aff'd sub nom. Environmental Action & Consumer Fed'n of America v. FERC, 996 F.2d 401 (D.C. Cir. 1993). The Agreement allows flexible rates subject to cost-based ceilings which FERC adopted to ameliorate market power problems. By using the FERC-approved existing agreement, SPP will avoid delays and the need for members to submit new and separate FERC filings.

In order to avail themselves of the rates, terms, and conditions of the WSPP Agreement, all SPP members using NHEE must be WSPP members. WSPP is an unincorporated association with membership open to electric utilities, power marketers and qualifying facilities and publicly-owned entities. Qualified entities become members by subscribing to the WSPP Agreement. Currently, SPP members comprise less than one-third of the WSPP's membership. It is relatively easy to qualify for WSPP membership with the WSPP having yet to deny a membership application. We expect that all SPP members would be able to qualify for WSPP membership.

III. THE NHEE IS PROCOMPETITIVE

A. The NHEE Serves Legitimate Business Purposes Which Enhance Competition

The NHEE makes price information available to participants on a real-time basis. In certain circumstances information exchanges can increase economic efficiency and render markets more, rather than less, competitive. "A number of factors including most prominently the structure of the industry involved and the nature of the information exchanges are generally considered in divining the procompetitive or anticompetitive effects of this type of inter-seller communication." United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978). "If the exchange of price information constitutes reasonable business

Hon. Anne K. Bingaman
U.S. Department of Justice
October 18, 1995
Page 5

behavior the exchange is not an illegal agreement. Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400 (9th Cir. 1986). Information exchanges may tend to establish an antitrust violation only when: (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices; or (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of § 1 under a rule of reason analysis. See In re Coordinated Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d, 432, 447 (9th Cir. 1990), cert. denied, 500 U.S. 959 (1991); Rosebrough Monument Co. v. Memorial Park Cemetery, 666 F.2d 1130, 1137 (8th Cir. 1981), cert. denied, 457 U.S. 1111 (1982).

Considered against this background, because it is procompetitive, the NHEE should pose no antitrust concern. Availability of price information in the NHEE is intended solely to facilitate the exchange of bona fide offers to buy and sell immediate, short-term energy and transmission services. Without a NHEE, purchasers will not have a real-time access to as many sellers. Purchasers generally only will have information from as many sellers as they contact. Given the short-term nature of the product (often hourly), and the relatively short lead time for many transactions, purchasers necessarily only will contact a few sellers in many instances.

In contrast, the NHEE provides potential buyers and sellers with instant access to terms offered by numerous potential matches. The wider array of alternatives makes the market more efficient, enhancing competition. It also may enhance price competition among utilities by facilitating lower retail rates. See Reserve Supply Corp. v. Owens-Corning Fiberglass Corp., 971 F.2d 37, 54 (7th Cir. 1992); E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2nd Cir. 1984).³

B. There Should Be No Improper Utilization Of Price Information

The design of NHEE helps to ensure that it will not facilitate price fixing among members. Posted offers to buy or sell are for immediate acceptance. Moreover, the intent of the

³ The SPP's NHEE is not novel. Other electronic bulletin boards detailing pricing information have been established and used. See Continental Power Exch., 68 FERC ¶ 61,235, at 62,100-01 (1994); Western Sys. Power Pool, 55 FERC ¶ 61,099, at 61,300 & 61,313-14 (1991).

Hon. Anne K. Bingaman
U.S. Department of Justice
October 18, 1995
Page 6

NHEE is facilitate competition, not to restrict it, by making offers to sell readily available to purchasers.

As a practical matter, it will be infeasible for competitors, to utilize the information to agree on prices. The short-term energy marketplace is highly competitive. As a result, competitors will use the NHEE to post prices at which they hope to make sales, not to fix prices. The many market participants, including many sellers, will prevent the fixing of prices.

**C. The Rate Ceilings Calculated And Imposed By
The FERC Minimize Any Theoretical Deleterious
Effects Of Making Pricing Information Available**

FERC regulation minimizes any theoretical harmful effects of making pricing information available. As noted above, all NHEE transactions are subject to the rate ceilings contained in the WSPP Agreement. As approved, the WSPP Agreement covers transactions for a duration of one year or less. Therefore, the WSPP Agreement, including FERC's rate ceilings, will cover all transactions under the NHEE.

The FERC calculated and imposed the WSPP rate ceilings expressly to assure that the rates conform to the "just and reasonable" requirement of the Federal Power Act ("FPA") and to mitigate any market power of WSPP participants. In determining to approve the WSPP Agreement, the FERC carefully considered the impact of pricing flexibility on the market. Specifically, it considered whether flexible pricing could permit certain participating utilities to exercise market power. The FERC determined that, "[w]ithout adequate assurance that the exercise of market power will not occur, i.e., be adequately mitigated, we must modify the pricing aspects of the proposal to ensure that the prices charged for coordination energy, transmission and exchange services will be just and reasonable under the FPA." 55 FERC at 61,313. The FERC concluded that the rate ceilings needed to be lowered in order to nullify any market power of WSPP members and to assure that the rates were "just and reasonable" under the FPA. See 16 U.S.C. § 824d(a).

The FERC imposed cost-based rate ceilings. These ceilings apply to all transactions under the WSPP Agreement. Because NHEE transactions will occur strictly under the rates, terms, and conditions of the WSPP Agreement, all NHEE transactions will be subject to FERC's rate ceilings. Because the cost-based rates are designed to nullify market power, there should not be a price fixing concern.

Hon. Anne K. Bingaman
U.S. Department of Justice
October 18, 1995
Page 7

Compliance of most of the major participants with the WSPP rate ceilings is readily monitored. All public utility WSPP members⁴ must file transactional information on a quarterly basis including: (1) all WSPP transactions, including the seller, buyer, and type and magnitude of service; and (2) the price of the service and the margin received. 55 FERC at 62,716; Western Sys. Power Pool, 59 FERC 61,249, at 61,905 (1992) ("[T]he data reporting would help us monitor Pool transactions to ensure that public-utility members did not engage in unjustified discounting in dealing with other Pool members, whether they be public utilities or nonpublic utilities. Second, the reporting would allow us to monitor whether the public-utility members of the WSPP transacted above the cost-based price ceilings").

Because all NHEE transactions will occur under the rates, terms and conditions of the WSPP Agreement, all participating SPP public utility members will comply with the reporting requirements of the WSPP Agreement.

IV. CONCLUSION

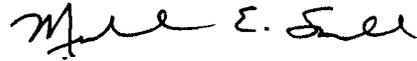
On the basis of the foregoing representations and discussion, we respectfully request that the Department of Justice provide SPP with a statement of its present enforcement intention with respect to the planned activities described above. SPP currently intends to commence operation of the NHEE in January 1996 and would like to do so after receiving a positive response from you. Therefore, we shall be pleased to confer with you at your earliest convenience and to provide any additional information or analysis you may require concerning this request.

⁴ The public utility members subject to the filing requirement include all of the investor-owned utilities and power marketers. Within the SPP, these members are by far the principal sellers.

Hon. Anne K. Bingaman
U.S. Department of Justice
October 18, 1995
Page 8

Thank you for your attention to this matter.

Very truly yours,



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Southwest Power Pool, Inc.**

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