Southwest Power Pool, Inc.

STRATEGIC PLANNING COMMITTEE MEETING TASK FORCE on ORDER 1000

Monday, August 26, 2013

10:00 AM – 12:00 PM

Teleconference

877-932-5833 Passcode: 157403

• A G E N D A •

1. Call to Order ..... Ricky Bittle
2. Roll Call ..... Michael Desselle
3. Overview of FERC's July 18, 2013 Order ..... Paul Suskie/Matt Binette
4. Update on Rehearing and D.C. Circuit Court of Appeals ..... Matt Binette
5. Next Steps ..... Paul Suskie
    a. Parallel Track with RTWG (TRR104)
    b. Decision Points for September 10-11, 2013 SPCTF on Order 1000
6. Action Items ..... Michael Desselle

SPCTF on Order 1000
August 26, 2013

Overview & Recommendation for Compliance Filing for SPP's Regional Compliance - Order 1000

SPP Southwest Power Pool

Overview of Compliance Requirements

- SPP Staff has identified several items that need to be addressed in SPP's November 2013 compliance filing for Order 1000 per FERC's July 18th Order.
- SPP Staff has broken these down into XIII (13) areas which includes 25 sub-topics in an attempt to provide the SPCTF on O1000 a method to address these issues by area.
- SPP Staff believes some issues should be sent to other SPP groups.
- The recommendations for SPP November Compliance filing are not intended to convey any belief on the likelihood of success of SPP's Rehearing Request.

Overview of Compliance Requirements

- **SPP Staff has attempted to categorize each of the 25 sub-topics into 4 categories.**
- ***Red*** **– Staff's recommendation is that these requirements are prescriptive and must be changed per FERC's July 18th Order.**
- ***Blue*** **– Staff's recommendation is that some issues should be sent to other SPP groups.** [*Example: BPWG (AG Study Issue – IV); Finance Committee (Capital Commitment - IX); and RSC (Cost Allocation for Impacts on Other Planning Regions)]*
- ***Yellow*** **–Staff's recommendation is that a request for an extension is warranted –** *See AG Studies*.
- ***Green*** **– Staff recommends that Staff prepare straw proposals on items that need additional work or FERC has allowed options in its FERC's July 18th Order. These will be presented to the SPCTF on O1000 at the September 10-11 meeting.**

13 Areas – 25 Sub-Topics

I. ROFR Related Issues - (4 Sub-Topics)

II. Defining What Constitutes a Rebuild - (2 Sub-Topics)

III. Defining Reliability Projects for ROFR Purposes - (1 Sub-Topic)

IV. Aggregate Study Issues - (1 Sub-Topic) – [Note Request for an extension.]

V. Managerial Qualification Issues - (3 Sub-Topics)

VI. Fees & Deposit Issues - (4 Sub-Topics)

VII. Incumbent/Non-Incumbent Financial Strength - (1 Sub-Topic)

VIII. TOSP Scoring Issues - (2 Sub-Topics)

IX. Finance Committee Issue - (1 Sub-Topic)

X. Post-TOSP Issues [Delays & Project Costs] - (2 Sub-Topics)

XI. RSC Issue: Cost Allocation for Impacts on Other Regions - (1 Sub-Topic)

XII. Public Policy Related Issues - (2 Sub-Topics)

XIII. Merchant Transmission Developer Issues - (1 Sub-Topic)

I. ROFR Related Issues - (4 Sub-Topics)

1	**Nonincumbents** [Byway Projects] **Order Cite** 150, 153	**Compliance**	"Byway facilities are selected as part of SPP's regional transmission planning process and a portion of the cost of Byway facilities is allocated regionally. Therefore, in order to comply with Order No. 1000, SPP must eliminate any federal right of first refusal for Byway facilities. . . . Because we find that SPP's proposal to retain a federal right of first refusal for Byway facilities does not comply with Order No. 1000, ***we direct SPP to submit a compliance filing . . . revising the definition of Competitive Upgrades to include Byway facilities***."	***RECOMMENDATION: Prescriptive no Recommendation.*** ***Draft Sent to RTWG*** [See proposed revisions] Revise Attachment Y § I.1(b) to add "Byway" facilities.
2	**Nonincumbents** [Right of Way] **Order Cite** 170	**Compliance**	"We find that SPP's proposal to allow an incumbent transmission owner to maintain a federal right of first refusal for any new transmission facility built on a right-of-way with existing transmission facilities is not permitted by Order No. 1000, and, as such, we direct SPP to remove the proposed language in the compliance filing directed herein. . . . However, the Commission did not find that a public utility transmission provider, as part of its compliance filing, may add a federal right of first refusal for a new transmission facility built on an existing right-of-way. Accordingly, ***we direct SPP to file . . . a further compliance filing revising its OATT to remove the proposed language related to rights-of-way in section I.1.c of Attachment Y of its OATT***."	***Draft Sent to RTWG*** [See proposed revisions] Revise Attachment Y § I.1(c) to eliminate exception for rights of way.
		DECISION POINT	"However, we note that while rights-of-way may not be used to automatically exclude proposals to develop more efficient or cost-effective transmission solutions to regional transmission needs, it is not necessarily impermissible to consider rights-of-way at appropriate points in the regional transmission planning process. *It would be appropriate for SPP to consider whether an entity has existing rights-of-way as well as whether the entity has experience or ability to acquire rights-of-way as part of the process for evaluating* whether to select a proposed transmission facility in the regional transmission plan for purposes of cost allocation."	Does SPP want to modify language to the TO selection process to reflect ROW? ROW is already listed in both the project management and rate impact categories of the TO selection process. ***RECOMMENDATION: YES – Add ROW to the TOSP*** ***Staff will DRAFT a Straw Proposal.***

I. ROFR Related Issues - (4 Sub-Topics)

		Compliance	"SPP's proposal goes beyond mere reference to state or local laws or regulations; it references relevant law and then uses that reference to create a federal right of first refusal. Order No. 1000 does not permit a public utility transmission provider to add a federal right of first refusal for a new transmission facility based on state law. Accordingly, ***we direct SPP to file . . . a further compliance filing revising its OATT to remove the proposed language referencing relevant laws in section I.1.d of Attachment Y to its OATT***."	***Draft Sent to RTWG*** [See proposed revisions] Delete Attachment Y § I.1(d) to eliminate exception for "applicable law."
3	**Nonincumbents** [Applicable Law] **Order Cite** 178 - 180	**DECISION POINT**	"[I]t may be permissible to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process. . . . [Order 1000] does not preclude public utility transmission providers in regional transmission planning processes from taking into consideration the particular strengths of either an incumbent transmission provider or a nonincumbent transmission developer during its evaluation. . . . An incumbent transmission provider may have unique knowledge of its own transmission systems, familiarity with the communities they serve, economies of scale, experience in building and maintaining transmission facilities, and access to funds needed to maintain reliability, and the Commission does not believe removing the federal right of first refusal diminishes the importance of these factors."	Does SPP want to modify language to the TO selection process to reflect State ROFR Laws? ***RECOMMENDATION: YES – Add State ROFR Laws to the TOSP*** ***Staff will DRAFT a Straw Proposal.***
		Information	"The Commission has also identified other points at which such consideration might be appropriate. In Order No. 1000-A, the Commission stated that public utility transmission providers are required to describe the circumstances and procedures under which they will reevaluate the regional transmission plan to determine if delays . . . require evaluation of alternative solutions, including those proposed by the incumbent transmission provider, to ensure the incumbent transmission provider can meet its reliability needs or service obligations."	Attachment Y § III.2.g already states that SPP will use the TO selection process if "sufficient time" exists; otherwise, SPP will assign the project to the incumbent. FERC accepted this language.
8	**Nonincumbents** [Local Projects] **Order Cite** 180	**Further Internal Work**	"[C]onsistent with our finding in the Byway section above, we direct SPP to revise its definition of Competitive Upgrades to clarify that for a transmission facility to be classified as a local project: (a) it must be located solely within a public utility transmission provider's retail distribution service territory or footprint, and (b) it must not be selected in a regional transmission plan for purposes of cost allocation. Accordingly, ***we direct SPP to . . . revise its OATT to provide a definition of Competitive Upgrade that reflects the definition of local transmission project in Order No. 1000***."	This compliance requirement merits further discussion. How does the requirement to define "local" projects square with FERC's decision to allow multi-owner zonal projects to be considered "local"? ***STAFF will DRAFT a Straw Proposal.***

II. Defining What Constitutes a Rebuild - (2 Sub-Topics)

4	**Nonincumbents** [Rebuild] **Order Cite** 184	**Compliance**	"In its answer, SPP states that the term "rebuild" is used in SPP's regional transmission planning process to distinguish between a change to an existing facility (a rebuild) and a new facility, and that a rebuild does not refer to entirely new transmission facilities. However, SPP's OATT does not reflect the clarification SPP provides in its answer. Accordingly, ***we direct SPP to submit, within 120 days of the date of this order, a further compliance filing to revise its OATT to provide a definition of "rebuild" that is consistent with the clarification in SPP's answer***."	SPP will need to develop a definition for "Rebuild." ***STAFF will DRAFT a Straw Proposal.***
5	**Nonincumbents** [Rebuild] **Order Cite** 184	**Compliance**	"For example, SPP has not explained how it will classify a transmission project that includes both an entirely new section of transmission line and a rebuild of an existing transmission substation to support the new transmission line. Accordingly, ***we direct SPP to clarify . . . how it will classify projects that contain both upgrades to existing facilities and new transmission facilities.***"	SPP will need to clarify how SPP will classify projects containing both upgrades and new facilities. ***STAFF will DRAFT a Straw Proposal.***

III. Defining Reliability Projects for ROFR Purposes - (1 Sub-Topic)

6	**Nonincumbents** [Reliability Exception] **Order Cite** 195-199	**Compliance & DECISION POINT**	"If SPP seeks to maintain such a time-limited federal right of first refusal, the following criteria must be part of any such proposal: (1) The category of projects must be *needed within 3 years or less* to solve reliability criteria violations; (2) *Before* SPP can assign a short-term transmission project to an incumbent transmission developer, SPP must *separately identify and then post an explanation on the reliability violations* and system conditions for which there is a time-sensitive need. The explanation must be in sufficient detail to allow stakeholders to understand the need and why it is time sensitive; (3) The process that SPP uses to decide whether a short-term project is assigned to an incumbent transmission owner must be *clearly outlined in SPP's OATT and must be open, transparent, and not unduly discriminatory*. SPP must *provide to stakeholders and post on its website a full and supported written description explaining*: (a) the decision to designate an incumbent transmission owner as the entity responsible for construction and ownership of the project, including an explanation of other transmission or non-transmission options that the region considered but concluded would not sufficiently address the immediate reliability need; and (b) the circumstances that generated the immediate reliability need and an explanation of why that immediate reliability need was not identified earlier; (4) SPP must permit stakeholders sufficient time to provide comments in response to the description in criterion three and such comments must be made publicly available; (5) SPP must maintain and post a list of prior year designations of all projects in the limited category of transmission projects for which the incumbent transmission owner was designated as the entity responsible for construction and ownership of the project. The list must include the project's need-by date and the date the incumbent transmission owner actually energized the project. Such list must be *filed with the Commission as an informational filing in January* of each calendar year covering the designations of the prior calendar year."	Is SPP willing to accept the five criteria, in addition to the criteria that SPP has already imposed: (i.e., (i) the transmission facility is needed for the reliability of the grid; (ii) the transmission facility has a need date that cannot be met if the Transmission Owner Selection Process in Section III of this Attachment Y is followed; and (iii) no other transmission or non-transmission mitigation options are available to relieve the reliability issue to allow sufficient time for the Transmission Owner Selection Process to proceed)? ***RECOMMENDATION: Replace SPP's criteria with FERC's 5 Criteria.*** ***Staff will DRAFT a Straw Proposal.***

IV. *Aggregate Study Issues - (1 Sub-Topic)*

7	**Nonincumbents** [Ag. Study] **Order Cite** 201-205	**Compliance**	"Service Upgrades: (1) are selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for inclusion in a regional plan; (2) are selected in the plan for purposes of cost allocation; and (3) are selected in the plan because they are the more efficient and cost-effective transmission solutions to regional transmission needs. . . . Accordingly, we find that SPP's exclusion of Service Upgrades that result from requests for transmission service from the proposed definition of Competitive Upgrades does not comply with Order No. 1000. A Service Upgrade that is selected in the STEP and has its costs allocated pursuant to SPP's regional cost allocation method is subject to the requirement of Order No. 1000 to eliminate federal rights of first refusal for transmission projects selected in the regional transmission plan for purposes of cost allocation. . . . For these reasons, ***we direct SPP to submit a further compliance filing . . . revising the definition of Competitive Upgrades to include Service Upgrades whose costs are allocated regionally***."	***DRAFT SENT TO RTWG.*** *[See proposed revisions] Revise Attachment Y § I.1.a to change "ITP Upgrades" to "Base Plan Upgrades" and clarify that high priority studies that are Balanced Portfolios are included.* ***RECOMMENDATION: Seek a 12-Month Extension.***

V. Managerial Qualification Issues - (3 Sub-Topics)

9	**Nonincumbents** [Managerial Qualification Criteria] **Order Cite** 227	**Compliance & DECISION POINT**	"We agree with LS Power, however, that it is premature at the qualification stage to require a potential transmission developer to enter into executed contracts with any entity the transmission developer may rely on to meet the managerial qualification criteria. . . . Requiring executed contracts to qualify to submit a bid creates an impermissible barrier to entry and does not comply with the requirement that qualification criteria be fair and not unreasonably stringent when applied to either the incumbent transmission provider or nonincumbent transmission developers. . . . Accordingly, ***we direct SPP to . . . remove[] the requirement for a prospective transmission developer to enter into executed contracts to meet the managerial qualification criteria in order to be eligible to submit a bid***."	There are two options for compliance: (1) replace the executed contract requirement with a requirement that the applicant "demonstrate that has the ability to hire contractors" to satisfy the managerial requirements; **or** (2) keep the executed contract as an option and add an option to "demonstrate that has the ability to hire contractors" to satisfy the managerial requirements. ***RECOMMENDATION: Option 2. Staff will DRAFT a Straw Proposal.***
10	**Nonincumbents** [Managerial Qualification Criteria] **Order Cite** 228	**Compliance**	"In response to LS Power's assertion that the qualification criterion requiring a potential transmission developer to demonstrate the 'ability to comply with . . . NERC Reliability Standards' is inconsistent with Order No. 1000-A, SPP clarified that this requirement merely requires an entity to demonstrate 'how it plans to be able to comply' with NERC Standards. With this clarification, we find that SPP's proposal is consistent with the Commission's finding in Order No. 1000-A. However, SPP has not included this clarification in its OATT. Accordingly, ***we direct SPP to . . . revise[] its OATT to state that the requirement is for a potential transmission developer to demonstrate 'how it plans to be able to comply' with NERC requirements***."	***Draft Sent to RTWG*** [See proposed revisions] Revise Attachment Y § III.1.b.5 to remove the requirement that the Applicant demonstrate its "ability to comply" with NERC Reliability Standards. ***RECOMMENDATION: Prescriptive no Recommendation.***

V. Managerial Qualification Issues - (3 Sub-Topics)

11	**Nonincumbents** [Managerial Qualification Criteria] **Order Cite** 229	**Compliance**	"The Commission clarified in Order No. 1000-A that it would be an impermissible barrier to entry to require, as part of the qualification criteria, that a transmission developer demonstrate that it either has, or can obtain, state approvals necessary to operate in a state, including state public utility status and the right to eminent domain, to be eligible to propose a transmission facility. ***Accordingly, we direct SPP to remove[] this requirement from the qualification criteria***."	***Draft Sent to RTWG*** [See proposed revisions] Revise Attachment Y § III.1.b.iii.5 to remove the requirement that the Applicant demonstrate its "ability to comply" with applicable local, state, and federal requirements. ***RECOMMENDATION – Add to the TOSP.*** ***Staff will DRAFT a Straw Proposal.***
		DECISION POINT	"*We note, however, that it would be appropriate for SPP to consider whether an entity has the ability to comply with applicable local, state, and federal requirements as part of its process for evaluating bids*."	See Decision Point in Item #3 above.

VI. Fees & Deposit Issues - (4 Sub-Topics)

12	**Nonincumbents** [Qualification Criteria – Application Fee] **Order Cite** 230	**DECISION POINT Further Justify**	"Finally, according to section III.1.a.i of SPP's OATT, a nonincumbent transmission developer must submit an application fee, which SPP states will be used to offset the cost of the application process to become qualified to submit a bid. . . . Because SPP must process applications submitted by both nonincumbent transmission developers and incumbent transmission owners to determine if they qualify to submit a bid, we find that it may be unduly discriminatory to require only nonincumbent transmission developers to pay the application fee. Accordingly, ***we direct SPP to revise[] its OATT to state that the application fee for the qualification process must be paid by both nonincumbent transmission developers and incumbent transmission owners. Alternatively, SPP may further explain in its next compliance filing why it is not unduly discriminatory to require nonincumbent transmission developers to pay the application fee . . . while incumbent transmission developers are not required to pay such fee***."	Does SPP want to justify the requirement further, or modify the tariff to require both nonincumbents and incumbents to pay the application fee? ***RECOMMENDATION: Further Justification.***
13	**Nonincumbents** [Proposal Submission] **Order Cite** 243-244	**Compliance & DECISION POINT**	"SPP has not specified the precise dollar amount, or a formula for establishing that dollar amount, of the initial fee that a prospective transmission developer must submit with its bid, information that is necessary for a transmission developer to determine whether to submit such a bid. . . . ***[W]e direct SPP to file, within 120 days of the date of this order, a further compliance filing with OATT revisions that: (1) establish a precise dollar amount, or a formula for establishing that dollar amount, of the initial fee that a prospective transmission developer must submit with its bid*** . . . "	Does SPP want to establish a stated dollar amount or a formula for the RFP proposal fee? ***RECOMMENDATION: Staff will DRAFT a Straw Proposal.***

VI. Fees & Deposit Issues - (4 Sub-Topics)

14	**Nonincumbents** [Proposal Submission] **Order Cite** 243-244	**Compliance & DECISION POINT**	"SPP must provide more clarity with regard to how it will calculate the actual costs associated with the Request for Proposals process to determine whether each Request for Proposals respondent must make additional payments or will receive refunds based on the initial fee collected. . . . ***[We direct SPP to file, within 120 days of the date of this order, a further compliance filing with OATT revisions that . . . (2) clarify how it will calculate the actual costs associated with the Request for Proposals process for purposes of determining whether each Request for Proposals respondent must make additional payments or will receive refunds*** . . . "	How does SPP plan to calculate the actual costs associated with the RFP process? ***RECOMMENDATION: Staff will DRAFT a Straw Proposal.***
15	**Nonincumbents** [Proposal Submission] **Order Cite** 243-244	**Compliance**	"[C]onsistent with the Commission's policy to require payment of interest on deposits or study costs that are refunded to a generator interconnection customer, we direct SPP to revise its OATT so that interest will be paid on any refunded portion of the fee that a transmission developer submitted with its bid. . . . ***[W]e direct SPP to file, within 120 days of the date of this order, a further compliance filing with OATT revisions that . . . (3) provide interest on any bid fees that are refunded to a transmission developer.***"	***RECOMMENDATION: Staff will DRAFT a Straw Proposal.***

VII. Incumbent/Non-Incumbent Financial Strength - (1 Sub-Topic)

16	**Nonincumbents** [Proposal Submission] **Order Cite** 245	**Compliance**	"We also find that SPP's proposal to allow a Qualified Request for Proposals Participant to demonstrate its financial strength in its bid by showing that it is the incumbent transmission owner that would otherwise be obligated to build the Competitive Upgrade pursuant to Attachment Y, section IV of the SPP OATT is unduly discriminatory and thus does not comply with Order No. 1000. . . . Accordingly, ***we direct SPP to . . . remove the unduly discriminatory financial strength provision that applies only to incumbent transmission developers and allows them to demonstrate their financial strength simply by being the incumbent utility***."	***Draft Sent to RTWG*** [See proposed revisions] Revise Attachment Y § III.2.c.vi.4 to remove language allowing incumbents to demonstrate financial strength by showing that they are the incumbent for the project. ***RECOMMENDATION: Prescriptive no Recommendation.***

VIII. TOSP Scoring Issues - (2 Sub-Topics)

17	**Nonincumbents** [Evaluation and Selection] **Order Cite** 282, 289 & 284-286	**DECISION POINT Further Justify**	"We find that SPP has not provided sufficient justification for the point system in its proposed Transmission Owner Selection Process, and has not described how it will result in a regional transmission plan that selects the more efficient or cost-effective transmission solutions to regional transmission needs. Accordingly, ***we direct SPP to make a further compliance filing, as discussed below, to revise its evaluation process to reflect greater weighting of costs in evaluating transmission developer bids in order to reflect 'the relative efficiency and cost-effectiveness of [any proposed transmission] solution,' or to further explain and justify why its proposed weighting of costs in the evaluation process complies with the requirements of Order No. 1000***."	Does SPP want to try to justify the current weighting of the "Rate Impact" portion of the points (currently 225 points out of 1,000) or modify the points to provide greater weight for Rate Impact? ***RECOMMENDATION: Further Justify.***
18	**Nonincumbents** [Evaluation and Selection] **Order Cite** 287, 289 & 287n.597	**DECISION POINT Further Justify** **Possible Compliance**	"We also find that SPP has not provided a sufficiently clear and objective description of what basis the industry expert panel would use if it were to not recommend to the Board the bid with the highest score or if it were to eliminate from consideration a bid due to a low score in any individual evaluation category. Accordingly, ***we direct SPP . . . to either explain what basis the industry expert panel would use if it were to not to recommend to the Board a bid with the highest score, including how such a decision will be made in a transparent manner, or to remove any OATT language that allows the point system to be disregarded by the industry expert panel when it makes its recommendation***." "Additionally, if SPP allows for the industry expert panel to not recommend the bid with the highest score, ***SPP will need to describe which entity will build the project in case all of the bids for a Competitive Upgrade are eliminated from consideration due to a low score in the evaluation criteria***."	Does SPP want to provide further explanation regarding the basis on which the IEP would not recommend the RFP proposal with the highest score to the Board? ***RECOMMENDATION: Further Justify.*** If SPP decides to allow the IEP not to recommend the highest scoring bid, SPP will need further Tariff revisions.

IX. *Finance Committee Issue - (1 Sub-Topic)*

19	**Nonincumbents** [Evaluation and Selection] **Order Cite** 288-289	**Compliance**	"[W]e agree with SPP that the firm capital commitment is necessary to ensure that the selected Designated Transmission Owner has the financial capability to finish the project . . . However, contrary to SPP's position, we find that the details regarding what is sufficient to meet the firm capital commitment requirement are properly included in the OATT, not the business practice manuals. ***Accordingly, we direct SPP to clarify in its OATT what is expected, in terms of demonstration of access to capital, when a transmission developer is accepting responsibilities as a Designated Transmission Owner, and to further describe why such requirements are just and reasonable and not unduly discriminatory***."	Should the Finance Committee determine the specific financial capability requirements? ***RECOMMENDATION: Send to the Finance Committee to determine.***

X. Post-TOSP Issues [Delays & Project Costs] - (2 Sub-Topics)

20	**Nonincumbents** [Reevaluation] **Order Cite** 307	**Compliance & Possible DECISION POINT**	"[W]e agree with SPP that what constitutes a significant construction delay does not lend itself to a generic threshold. Therefore, we disagree with Duke-American and will not require SPP to specify a time period that would constitute a significant delay. However, SPP lists, in its answer, factors that it will consider in determining what constitutes a significant delay (e.g., need date, construction time, necessity for long-lead equipment, and permitting schedules). We find it reasonable for SPP to include these factors in its OATT to provide transparency. Accordingly, ***we direct SPP to revise its OATT to include this list (and any other factors SPP may consider) so that stakeholders are aware of the factors SPP will consider in determining whether a transmission project selected in the regional transmission plan for purposes of cost allocation is significantly delayed***."	***RECOMMENDATION: Add Factors to the OATT.*** ***DRAFT SENT TO RTWG.*** [See proposed revisions] Revise Attachment Y § VI.4 to list the factors. ***Does SPP want to add any other factors to the list set forth in SPP's answer?***
21	**Nonincumbents** [Reevaluation] **Order Cite** 308	**Compliance**	"[W]e accept SPP's proposal to include consideration of cost in its reevaluation criteria, and reject requests by protestors to require SPP to include more detailed provisions relating to the reevaluation process, in the case of cost changes, given that the Commission in Order No. 1000 explicitly declined to require a cost containment component in compliance filings. However, SPP clarifies that it has established a cost bandwidth for projects and that reevaluation will be triggered if the cost of a transmission project exceeds the bandwidth, but SPP's OATT does not reflect this clarification. Accordingly, ***we direct SPP to revise its OATT, as discussed below, to reflect its clarification concerning the bandwidth. We note that SPP does not need to include an exact bandwidth number; it may cite to the current bandwidth in its Business Practice Manuals by reference***."	***DRAFT SENT TO RTWG.*** [See proposed revisions] Revise Attachment Y § VI.3 to clarify that "significantly exceeds" means that costs fall outside of a predetermined bandwidth. ***RECOMMENDATION: Prescriptive no Recommendation.***

XI. *RSC Issue: Cost Allocation - (1 Sub-Topic)*

22	**Cost Allocation** [Impacts] **Order Cite** 355	**Compliance**	"SPP does not comply with the Regional Cost Allocation Principle 4 requirement that the regional transmission planning process identify the consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation for other transmission planning regions, such as upgrades that may be required in another region. . . . Accordingly, ***we direct SPP to file a further compliance filing . . . revising its OATT to provide for identification of the consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation for other planning regions***."	Revisions to Attachment O will be required to address this compliance requirement. ***RECOMMENDATION: Send to the RSC with the recommendation to keep current Policy.***
		DECISION POINT	"SPP also does not address whether the SPP region has agreed to bear the costs associated with any required upgrades in another transmission planning region or, if so, how such costs will be allocated within the SPP transmission planning region. ***SPP must also address in the further compliance filing whether the SPP region has agreed to bear the costs associated with any required upgrades in another transmission planning region and, if so, how such costs will be allocated within the SPP transmission planning region***."	SPP must decide whether it will bear the costs of upgrades on neighboring systems necessitated by projects approved in SPP's regional planning process.

XII. Public Policy Related Issues - (2 Sub-Topics)

23	Public Policy --- Order Cite 75	Compliance & DECISION POINT	"We recognize that SPP's ITP process, as described in Attachment O of SPP's OATT, offers opportunities for stakeholders to provide input on the scope of SPP's planning studies through transmission planning forums. . . . However, we find that SPP's OATT does not explicitly state at what point(s) in the process stakeholders can offer proposals regarding the transmission needs they believe are driven by public policy requirements. To the extent that SPP plans to use its existing procedures that already allow for stakeholder input, it has to explicitly include or accommodate transmission needs driven by public policy requirements. Accordingly, ***we direct SPP to . . . revise its OATT to include clear, transparent procedures for identifying transmission needs driven by public policy requirements in its regional transmission planning process that allow stakeholders an opportunity to provide input and offer proposals regarding the transmission needs driven by public policy requirements***."	Revisions to Attachment O will be required to address this compliance requirement. At what point in the planning process will SPP allow stakeholders to offer proposals regarding the transmission needs they believe are driven by public policy requirements? ***RECOMMENDATION: Staff will DRAFT a Straw Proposal.*** ***Planning Department Input Needed.*** In the original filing, SPP added "and needs" in the discussion of the Subregional Planning Meetings (Attachment O § III.2.b), which suggests that this is the step in the process where proposals for transmission needs driven by PPR will be made.

XII. Public Policy Related Issues - (2 Sub-Topics)

24	Public Policy ------- Order Cite 76	Compliance & DECISION POINT	"In addition, Order No. 1000 requires that public utility transmission providers, in consultation with their stakeholders, establish a just and reasonable and not unduly discriminatory process through which the public utility transmission provider will identify those transmission needs driven by public policy requirements for which transmission solutions will be evaluated. We understand SPP's proposal to incorporate its identification of transmission needs driven by public policy requirements into its overall regional transmission planning process. ***However, SPP is required to explain in its OATT the process it will use to identify, out of the larger set of transmission needs driven by public policy requirements that stakeholders may propose, those needs for which transmission solutions will be evaluated. Thus, we direct SPP to . . . to include such a process in its OATT and, consistent with the requirements of Order No. 1000, to explain in its compliance filing the just and reasonable and not unduly discriminatory process.***"	Revisions to Attachment O will be required to address this compliance requirement. ***RECOMMENDATION: Staff will DRAFT a Straw Proposal.*** ***Planning Department Input Needed*** SPP needs to specify the process for how SPP will determine, out of the larger set of proposed PPR needs, those needs for which transmission solutions will be evaluated.

XIII. Merchant Transmission Developer Issues - (1 Sub-Topic)

25	**Regional Planning** [Merchants] ------- **Order Cite** 57 & n. 114	**Compliance**	"We also agree with SPP that Appendix 11 of its SPP Criteria enables SPP to assess the potential reliability and operational impacts of the merchant transmission developer's proposed transmission facilities on other systems in the region. . . . While SPP includes in Appendix 11 the information a merchant transmission developer must submit to enable SPP to assess the potential reliability and operational impacts of the merchant transmission developer's proposed transmission facilities on other systems in the region, SPP must include the information requirements in its OATT in order to comply with the merchant information requirement of Order No. 1000. ***Accordingly, we direct SPP to file, within 120 days of the date of this order, a further compliance filing to include in its OATT the information requirements for merchant transmission developers that are currently listed in Appendix 11 of the SPP Criteria***. . . . Specifically, SPP must include language in its OATT that merchant transmission developers must provide the information in the Transmission Interconnection Review Data Checklist of Appendix 11 of SPP's Criteria, which includes, but is not limited to, estimated or proposed in-service dates; a detailed description of the proposed interconnection; details of any required mitigation plans; interconnection design information and rating; maps; and one-line diagrams.	SPP must incorporate SPP Criteria Appendix 11 requirements into Attachment O. ***DRAFT SENT TO RTWG.*** [See proposed revisions] New Addendum 5 to Attachment O Merchant Transmission Interconnection ***RECOMMENDATION: Prescriptive no Recommendation.***

SPP Staff is Seeking Guidance from the SPCTF on:

Whether to send the following items to other SPP Groups:

- **IV. *Aggregate Study Issues - (1 Sub-Topic)* - BPWG**
- **IX. *Finance Committee Issue - (1 Sub-Topic)***
- **XI. RSC Issue: Cost Allocation for Impacts on Other Regions - (1 Sub-Topic)**

Whether the SPCTF supports the RTWG beginning work in the Draft TRR?

Whether the SPCTF supports seeking a 1 year extension for AG studies?

QUESTIONS

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.	)	Docket Nos. ER13-366-___
	)	ER13-367-___

REQUEST FOR REHEARING
OF SOUTHWEST POWER POOL, INC.

Wendy N. Reed
Carrie L. Bumgarner
Matthew J. Binette
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
Phone: (202) 393-1200
Facsimile: (202) 393-1240
reed@wrightlaw.com
bumgarner@wrightlaw.com
binette@wrightlaw.com

Attorneys for
Southwest Power Pool, Inc.

August 19, 2013

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REQUEST FOR REHEARING
OF SOUTHWEST POWER POOL, INC.

Pursuant to section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*, and Rule 713 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure, 18 C.F.R. § 385.713, Southwest Power Pool, Inc. ("SPP") submits this request for rehearing of the Commission's July 18, 2013 Order[1] addressing SPP's compliance with the regional transmission planning and cost allocation requirements of Order No. 1000.[2] Despite correctly finding that most of SPP's regional planning and cost allocation processes[3] comply with the various requirements of Order

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1 *Sw. Power Pool, Inc.*, 144 FERC ¶ 61,059 (2013) ("July 18 Order").

2 *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, III FERC Stats. & Regs., Regs. Preambles ¶ 31,323 (2011) ("Order No. 1000"), *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 ("Order No. 1000-A"), *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012) ("Order No. 1000-B").

3 SPP submitted two filings to comply with Order No. 1000, which included both revisions to the SPP Open Access Transmission Tariff, Southwest Power Pool, Inc., Open Access Transmission Tariff, Sixth Revised Volume No. 1 ("Tariff") and conditional revisions to the Tariff and the SPP Membership Agreement Southwest Power Pool, Inc., Membership Agreement, First Revised Volume No. 3 ("Membership Agreement"). The Tariff revisions and conditional Tariff revisions were submitted in Docket No. ER13-366-000, and the conditional Membership Agreement revisions were submitted in Docket No. ER13-367-000. *See* Order No. 1000 Compliance Filing of Southwest Power Pool (Part 1 of 2), Docket No. ER13-366-000 (Nov. 13, 2012) ("Compliance Filing"); Order No. 1000 Compliance Filing of Southwest Power Pool (Part 2 of 2), Docket No.

(continued . . .)

No. 1000, the Commission erred in several respects, including: (1) determining that the construction rights and obligations provisions set forth in Section 3.3 of the SPP Membership Agreement are not subject to protection under the *Mobile-Sierra*[4] doctrine; (2) rejecting SPP's definition of "Competitive Upgrades" that excluded transmission facilities that the Commission previously determined to be local transmission facilities; (3) finding that SPP's Aggregate Transmission Service Study ("Aggregate Study") process is subject to the requirements of Order No. 1000; and (4) directing SPP to remove from its Tariff provisions that reference relevant law including laws granting rights of first refusal and rights of way. The Commission should grant rehearing of these holdings to reverse its errors.

I. SUMMARY AND BACKGROUND

Order No. 1000

Order No. 1000 built upon the regional transmission planning and cost allocation principles of Order No. 890[5] and imposed several requirements on public utility

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(. . . continued)

ER13-367-000 (Nov. 13, 2012) ("Membership Agreement Filing"). The filings were submitted in different dockets due to the design of SPP's eTariff system, but SPP intended the two filings to be considered as a single package. The Commission denied SPP's request to consolidate the two dockets.

4 *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) ("*Mobile*"); *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) ("*Sierra*").

5 *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 2006-2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,241, *order on reh'g*, Order No. 890-A, 2006-2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,261 (2007), *order on reh'g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

transmission providers with respect to regional transmission planning and cost allocation. Among its many rulings in Order No. 1000, the Commission required public utility transmission providers to remove from their Commission-jurisdictional tariffs and agreements provisions that grant a federal right of first refusal for transmission facilities selected in the regional transmission plan for purposes of cost allocation,[6] which the Commission defined as "transmission facilities that have been selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for inclusion in a regional transmission plan for purposes of cost allocation *because* they are more efficient or cost-effective solutions to *regional transmission needs*."[7] It also proclaimed that "nothing in [Order No. 1000] is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities,"[8] and that Order No. 1000 is not intended "to alter an incumbent transmission provider's use and control of its existing rights-of-way."[9]

In addition, in response to comments asserting that the Commission could not require removal of federal rights of first refusal from Commission-jurisdictional contracts that are protected by the *Mobile-Sierra* doctrine, the Commission declined to make a generic determination as to whether any specific jurisdictional agreements are protected

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6 Order No. 1000 at PP 7, 253, 260.

7 *Id.* at P 63 (emphasis added).

8 *E.g.*, *id.* at P 227.

9 *E.g.*, *id.* at P 226. The Commission stated that "the retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way." *Id.* at P 319.

by the *Mobile-Sierra* public interest standard of review.[10] Instead, in Order No. 1000-A, the Commission directed transmission providers to include in their Order No. 1000 compliance filings revisions to any Commission-jurisdictional tariffs and agreements necessary to comply with Order No. 1000, as well as any arguments addressing the applicability of the *Mobile-Sierra* doctrine to the agreement at issue.[11]

Mobile-Sierra

In its Compliance Filing and answer,[12] SPP argued and presented evidence that the Membership Agreement is protected by the *Mobile-Sierra* doctrine, which establishes a presumption that a contract is just and reasonable, a presumption that "may be overcome *only* if FERC concludes that the contract *seriously harms the public interest*."[13] SPP also demonstrated that, under established court and Commission precedent, the *Mobile-Sierra* public interest standard is "the default rule"[14] that is presumed to apply to freely negotiated contracts absent language to the contrary, and, accordingly, the Membership Agreement is protected by the *Mobile-Sierra* presumption. SPP further showed that both the courts and the Commission have found that the heightened *Mobile-*

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10 *Id.* at P 292; *see also* Order No. 1000-A at P 388; July 18 Order at P 124. Indeed, the Commission held that the generic rulemaking record was insufficient for it to make such a determination, and directed transmission providers to address this issue in their Order No. 1000 compliance filings. *See* Order No. 1000 at P 292; *see also* Order No. 1000-A at P 388.

11 Order No. 1000-A at P 389; *see also* July 18 Order at P 124.

12 Answer of Southwest Power Pool, Inc., Docket Nos. ER13-366-000 and ER13-367-000 (Feb. 19, 2013) ("SPP Answer").

13 *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530 (2008) (emphasis added) ("*Morgan Stanley*").

14 *Id.* at 534.

Sierra standard of review can apply to non-rate terms and conditions, and that the Commission has frequently applied the *Mobile-Sierra* doctrine to agreements among members of regional transmission organizations ("RTOs"), as well as agreements between an RTO and its members. SPP presented unrefuted evidence (the only record evidence presented in this proceeding) that demonstrated that new, cost-effective transmission is being built in SPP to the benefit, rather than harm, of the public interest.[15]

Despite SPP's strong showing that the Membership Agreement is protected by *Mobile-Sierra*, in the July 18 Order, the Commission found that the Membership Agreement does not possess certain characteristics that the Commission argued are necessary to "justify the presumption" of justness and reasonableness under the *Mobile-Sierra* doctrine.[16] In making this finding, the Commission failed to address directly SPP's arguments and evidence. Rather, it simply stated that it has not previously addressed the standard of review applicable to the Membership Agreement and that arguments addressing the applicability of the *Mobile-Sierra* presumption to other RTO agreements would be addressed on a case-by-case basis in other proceedings. The Commission's refusal to address SPP's evidence and arguments does not constitute reasoned decisionmaking, and the Commission should grant rehearing to reverse its decision.

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15 *See, e.g.,* Compliance Filing, Exhibit No. SPP-1 (Prepared Direct Testimony of Carl A. Monroe) at 22-26.

16 July 18 Order at PP 126-27.

Byway Facilities

In the July 18 Order, the Commission also arbitrarily and capriciously rejected SPP's proposal to exclude "Byway" facilities from the definition of "Competitive Upgrades." In Order No. 1000, the Commission stated that its "nonincumbent transmission developer" reforms, including the requirement to eliminate federal rights of first refusal from Commission-jurisdictional tariffs and agreements, was limited to "transmission facilities that are selected in a regional transmission plan for purposes of cost allocation."[17] The Commission clarified that such facilities are "transmission facilities that have been selected . . . because they are more efficient or cost-effective solutions to *regional transmission needs*."[18] It also noted that not all transmission facilities would meet the definition. In its previous order accepting SPP's "Highway/Byway" cost allocation methodology, the Commission found that SPP had demonstrated that extra high voltage ("EHV") transmission facilities (i.e., facilities operating at 300 kV and above) "tend to support regional power flows among SPP zones and that lower voltage facilities tend to support local power flows within a single SPP zone,"[19] and therefore "are used more locally."[20] Given those findings, the Commission approved the Highway/Byway methodology because it "reasonably. . . align[s] the costs

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17 Order No. 1000 at PP 7; *accord, id.* at P 313.

18 *Id.* at P 63 (emphasis added).

19 *Sw. Power Pool, Inc.*, 131 FERC ¶ 61,252, at P 73 (2010) ("Highway/Byway Order"), *reh'g denied*, 137 FERC ¶ 61,075 (2011) ("Highway/Byway Rehearing Order").

20 Highway/Byway Order at P 78 ("EHV facilities that are used more regionally will be allocated on a regional basis, and lower voltage facilities that are used more locally will be allocated on a local basis.").

associated with transmission expansions with the usage of the system"[21] and that, "by *distinguishing between the types of facilities that are used on a regional and zonal basis,* the Highway/Byway Methodology will ensure that allocations of costs are roughly commensurate with associated benefits."[22]

Its previous precedent in the Highway/Byway Order notwithstanding, the Commission rejected SPP's proposal, mandating that SPP treat "Byway" facilities as regional by including them in the definition of "Competitive Upgrade."[23] In so doing, the Commission exceeded the language of Order No. 1000, departed from the Highway/Byway precedent without explanation, contravened Order No. 1000's mandate that regional planning processes consider the role of state regulatory commissions and public policy in regional planning, and failed to respond meaningfully to evidence and argument.

Service Upgrades

Similarly, the Commission's finding in the July 18 Order that Service Upgrades resulting from the Aggregate Study process that are eligible for Highway/Byway funding are "subject to the requirement of Order No. 1000 to eliminate federal rights of first refusal"[24] is erroneous and arbitrary and capricious. Contrary to the Commission's characterization otherwise, SPP's Aggregate Study process is not a Commission-approved regional planning process designed to identify and address broad regional

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21 Highway/Byway Order at P 76.

22 *Id.* at P 78 (emphasis added).

23 July 18 Order at PP 150-53.

24 *Id.* at P 202.

needs, but instead is used to process and study individual transmission service requests on an aggregated basis and to identify the system upgrades necessary to accommodate the requests. Unlike the SPP Integrated Transmission Plan ("ITP") process, the Aggregate Study process has not been evaluated to determine if it meets all nine Order No. 890 planning principles and thus does not meet the criteria for being a Commission-approved regional transmission planning process. In addition, despite the Commission's finding to the contrary, because Service Upgrades determined in the Aggregate Study process are *not* identified as more efficient and cost-effective solutions to broader regional needs (but are identified as the most economical upgrades to provide service to the parties in a study group), they are *not* included in the SPP regional plan for the purposes of cost allocation. Rather, as permitted by Order No. 1000, they are included only for informational purposes to ensure that the models and base cases that SPP uses to conduct its regional transmission planning are accurate.

Moreover, to comply with the Commission's ruling, SPP would need to apply a competitive process to the Aggregate Study process, which would have significant practical impacts on SPP customers and stakeholders. A competitive process would add at least six months to the process, thus likely resulting in increased transmission service delays or deferrals, increasing the need for potential redispatch to accommodate the requested service, and unnecessarily raising costs for transmission customers and stakeholders. In addition, having to add a competitive process to the Aggregate Study process would undermine SPP's ongoing efforts, both short-term and long-term, to

reform the Aggregate Study process to clear its current backlog and prevent future backlogs.[25]

State Laws and Regulations and Rights of Way

Contrary to its pronouncements that Order No. 1000 was not intended to affect state law or regulation, in the July 18 Order, the Commission directed SPP to remove from its Tariff references to state and local laws governing selection of transmission developers[26] and language prohibiting SPP from identifying Designated Transmission Owners in a way that would interfere with an incumbent transmission owner's existing rights of way.[27] Effectively, the Commission's dual directives would require SPP to engage in its competitive Transmission Owner Selection Process even where state or local law dictates the identification of the Designated Transmission Owner, resulting in *less* efficient and *more* costly transmission development, contrary to the express goal of Order No. 1000 to promote "more efficient or cost-effective" transmission planning and development.[28] At the same time, in addressing SPP's compliance with the Order

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25 SPP recently filed interim procedures to address the current backlog in the Aggregate Study process. Revisions to Modify the Aggregate Transmission Service Study Process of Southwest Power Pool, Inc., Docket No. ER13-2164-000 (Aug. 15, 2013).

26 July 18 Order at P 178 (stating that SPP's language "create[s] a federal right of first refusal" based on relevant law and directing SPP to remove the reference to relevant law from its Tariff).

27 *Id.* at P 170 (directing SPP to "remove the proposed language related to rights-of-way").

28 *See, e.g.*, Order No. 1000 at P 11 (stating that the "core" of the Order No. 1000 reforms is the development of processes that will result in a regional transmission plan that "will identify transmission facilities that *more efficiently or cost-effectively* meet the region's reliability, economic, and Public Policy Requirements") (emphasis added).

No. 1000 requirement to consider transmission needs driven by public policy in regional planning processes, the Commission went to great lengths to require SPP to enhance its process for considering state and local laws and regulations in the regional transmission planning process.[29] Moreover, the Commission's requirement to consider state and local laws and regulations in the planning process on one issue and completely ignore them on another indicates that the July 18 Order is internally inconsistent and not the result of reasoned decisionmaking.

II. SPECIFICATION OF ERRORS AND STATEMENT OF ISSUES

In accordance with Order No. 663-A[30] and Commission Rule 713(c),[31] SPP provides the following statement of issues and specification of errors:

1. In determining that Section 3.3 of the Membership Agreement is a "prescription of general applicability," the Commission erred by misinterpreting precedent and relying on inapplicable precedent. July 18 Order at PP 123-35. 5 U.S.C. § 706(2)(A); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010) ("*NRG*"); *Morgan Stanley*, 554 U.S. 527; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*,

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29 *See* July 18 Order at PP 73 ("SPP must submit a further compliance filing to address in greater detail the requirement in Order No. 1000 to establish procedures for identifying transmission needs driven by public policy requirements in its regional transmission planning process."), 75 (requiring SPP "to revise its [Open Access Transmission Tariff ("OATT")] to include clear, transparent procedures for identifying transmission needs driven by public policy requirements in its regional transmission planning process that allow stakeholders an opportunity to provide input and offer proposals regarding the transmission needs driven by public policy requirements"), 76 (requiring SPP "to explain in its OATT the process it will use to identify, out of the larger set of transmission needs driven by public policy requirements that stakeholders may propose, those needs for which transmission solutions will be evaluated").

30 *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, 2006-2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,211 (2006).

31 18 C.F.R. §§ 385.713(c)(1)-(2).

463 U.S. 29 (1983) ("*Motor Vehicle Mfrs.*"); *Mobile*, 350 U.S. 332; *Sierra*, 350 U.S. 348; *New Eng. Power Generators Ass'n v. FERC*, 707 F.3d 364 (D.C. Cir. 2013) ("*NEPGA*"); *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636 (D.C. Cir. 2010) ("*Florida Gas*"); *Am. Gas Ass'n v. FERC*, 593 F.3d 14 (D.C. Cir. 2010) ("*American Gas*"); *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006) ("*Williams*"); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005) ("*PPL Wallingford*"); *Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315 (D.C. Cir. 2004) ("*Pacific Gas & Electric*"); *PG&E Gas Transmission v. FERC*, 315 F.3d 383 (D.C. Cir. 2003) ("*PG&E Gas*"); *E. Tex. Elec. Coop., Inc. v. FERC*, 218 F.3d 750 (D.C. Cir. 2000) ("*E. Tex. Elec. Coop.*"); *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944 (D.C. Cir. 1999) ("*Sithe/Independence*"); *Northern States Power Co. v. FERC*, 30 F.3d 177 (D.C. Cir. 1994) ("*Northern States Power Co.*"); *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246 (D.C. Cir. 1994) ("*Horsehead*"); *K N Energy, Inc. v. FERC*, 968 F.2d 1295 (D.C. Cir. 1992) ("*K N Energy*"); *Sw. Power Pool, Inc.*, 125 FERC ¶ 61,239 (2008).

2. The Commission's determination that contracts that "delimit, qualify, or restrict the ability of any other potential competitor to engage in the subject activity" is unsupported by precedent, contrary to Commission precedent, and contrary to fact, and therefore fails the test of reasoned decisionmaking. July 18 Order at PP 123-35. 5 U.S.C. § 706(2)(A); *NRG*, 558 U.S. 165; *Morgan Stanley*, 554 U.S. 527; *Motor Vehicle Mfrs.*, 463 U.S. 29; *Mobile*, 350 U.S. 332; *Sierra*, 350 U.S. 348; *Florida Gas*, 604 F.3d 636; *American Gas*, 593 F.3d 14; *PPL Wallingford*, 419 F.3d 1194; *Pacific Gas & Electric*, 373 F.3d 1315; *E. Tex. Elec. Coop.*, 218 F.3d 750; *Sithe/Independence*, 165 F.3d 944; *Northern States Power Co.*, 30 F.3d 177; *Horsehead*, 16 F.3d 1246; *K N Energy*, 968 F.2d 1295; *N. Va. Elec. Coop., Inc. v. Old Dominion Elec. Coop.*, 116 FERC ¶ 61,173 (2006).

3. The Commission's determination that Section 3.3 of the Membership Agreement is not an agreement subject to *Mobile-Sierra* public interest protection because it was formed to protect transmission owners from competing transmission developers and because it is an agreement between parties with "common interests" rather than a contract between sophisticated parties with diverse interests lacks any evidentiary basis or support, is contrary to evidence and Commission precedent, and thus is arbitrary, capricious, and contrary to reasoned decisionmaking. The Commission also erred by relying on irrelevant precedent and regulations in attempting to supports its findings. July 18 Order at PP 123-35. 5 U.S.C. § 706(2)(A); 18 C.F.R. § 35.36(a)(9)(iii); *NRG*, 558 U.S. 165; *Morgan Stanley*, 554 U.S. 527; *Motor Vehicle Mfrs.*, 463 U.S. 29; *Mobile*, 350 U.S. 332; *Sierra*, 350 U.S. 348; *Florida Gas*, 604 F.3d 636; *American Gas*, 593 F.3d 14; *N.C. v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) ("*North*

Carolina"); *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir 2006) ("*National Fuel*"); *PPL Wallingford*, 419 F.3d 1194; *Pacific Gas & Electric*, 373 F.3d 1315; *Northern States Power Co.*, 30 F.3d 177; *Horsehead*, 16 F.3d 1246; *Sw. Power Pool, Inc.*, 89 FERC ¶ 61,284 (1999); *Central Maine Power Co.*, 85 FERC ¶ 61,272 (1998) ("*Central Maine Power*"); *Delmarva Power & Light Co.*, 76 FERC ¶ 61,331 (1996) ("*Delmarva*").

4. In determining that the Membership Agreement is not subject to protection under the heightened *Mobile-Sierra* public interest standard of review, the Commission failed to provide a meaningful response to SPP's arguments that the Membership Agreement is subject to protection under the *Mobile-Sierra* public interest standard and is similar to other agreements that the Commission has previously found to be entitled to *Mobile-Sierra* protection. This further renders the Commission's determination arbitrary, capricious, contrary to reasoned decisionmaking, and an unexplained departure from precedent. July 18 Order at PP 123-35. 5 U.S.C. § 706(2)(A); *NRG*, 558 U.S. 165; *Morgan Stanley*, 554 U.S. 527; *Motor Vehicle Mfrs.*, 463 U.S. 29; *Mobile*, 350 U.S. 332; *Sierra*, 350 U.S. 348; *Florida Gas*, 604 F.3d 636; *American Gas*, 593 F.3d 14; *Keyspan-Ravenswood v. FERC*, 474 F.3d 804 (D.C. Cir. 2007) ("*Keyspan*"); *PPL Wallingford*, 419 F.3d 1194; *Pacific Gas & Electric*, 373 F.3d 1315; *Mo. Pub. Serv. Comm'n v. FERC*, 234 F.3d 36 (D.C. Cir. 2000) ("*Missouri PSC*"); *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403 (D.C. Cir. 2000); *NorAm Gas Transmission Services v. FERC*, 148 F.3d 1158 (D.C. Cir. 1998) ("*NorAm*"); *Northern States Power Co.*, 30 F.3d 177; *Horsehead*, 16 F.3d 1246; *Pub. Utils. with Existing Contracts in the Cal. Indep. Sys. Operator Corp. Region*, 125 FERC ¶ 61,228 (2008) ("*Pub. Utils. with Existing Contracts*"); *Midwest Indep. Transmission Sys, Operator, Inc.*, 122 FERC ¶ 61,090 (2008), *reh'g denied*, 136 FERC ¶ 61,099 (2011); *Vt. Transco LLC*, 118 FERC ¶ 61,244, *order on clarification and reh'g sub nom. Lamoille County Sys. v. Vt. Transco LLC*, 120 FERC ¶ 61,010 (2007); *Sw. Power Pool, Inc.*, 117 FERC ¶ 61,207, *order on reh'g*, 119 FERC ¶ 61,021 (2007); *ISO New Eng. Inc.*, 109 FERC ¶ 61,147 (2004).

5. In determining that the Membership Agreement is not subject to *Mobile-Sierra* protection more than a decade after it was accepted by the Commission, the Commission's decision is inconsistent with court decisions that have drawn a distinction between the Commission's authority to reject a *Mobile-Sierra* provision upon its initial review of a contract and later reviews of that agreement. July 18 Order at PP 123-35. 5 U.S.C. § 706(2)(A); *NRG*, 558 U.S. 165; *Morgan Stanley*, 554 U.S. 527; *Motor Vehicle Mfrs.*, 463 U.S. 29; *Mobile*, 350 U.S. 332; *Sierra*, 350 U.S. 348; *Florida Gas*, 604 F.3d 636; *American Gas*, 593 F.3d 14; *PPL Keyspan*, 474 F.3d 804; *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006) ("*Maine Public*"); *Wallingford*, 419 F.3d 1194; *Pacific*

Gas & Electric, 373 F.3d 1315; *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) ("*Atlantic City*"); *Boston Edison Co. v. FERC*, 233 F.3d 60 (1st Cir. 2000) ("*Boston Edison*"); *E. Tex. Elec. Coop.*, 218 F.3d 750; *Potomac Elec. Power Co.*, 210 F.3d 403; *Sithe/Independence*, 165 F.3d 944; *NorAm*, 148 F.3d 1158; *Texaco, Inc. v. FERC*, 148 F.3d 1091 (D.C. Cir. 1998); *Northern States Power Co.*, 30 F.3d 177; *Horsehead*, 16 F.3d 1246; *K N Energy*, 968 F.2d 1295; *Sw. Power Pool, Inc.*, 89 FERC ¶ 61,284.

6. Given the failings of the Commission's analysis regarding the applicability of the *Mobile-Sierra* doctrine to the Membership Agreement, the Commission's disregard for SPP's evidence that its existing processes are benefitting, rather than harming, the public interest is arbitrary and capricious. July 18 Order at PP 123-35. 5 U.S.C. § 706(2)(A); *NRG*, 558 U.S. 165; *Morgan Stanley*, 554 U.S. 527; *Mobile*, 350 U.S. 332; *Sierra*, 350 U.S. 348; *Florida Gas*, 604 F.3d 636; *American Gas*, 593 F.3d 14; *Keyspan*, 474 F.3d 804; *NorAm*, 148 F.3d 1158; *Sw. Power Pool, Inc.*, 132 FERC ¶ 61,042 (2010), *reh'g denied*, 136 FERC ¶ 61,050 (2011).

7. The Commission's directive that SPP revise the definition of Competitive Upgrade to include Byway facilities is contrary to Order No. 1000's limitation that it applies only to "transmission facilities that have been selected pursuant to a transmission planning region's Commission approved regional transmission planning process for inclusion in a regional transmission plan for purposes of cost allocation because they are more efficient or cost-effective solutions to regional transmission needs" and Commission precedent defining "regional" and "local" transmission facilities in SPP. The Commission's failure to provide a reasoned explanation for why it failed to adhere to Order No. 1000 and the Highway/Byway precedent renders the July 18 Order arbitrary and capricious. July 18 Order at PP 150-53. Order No. 1000 at PP 7, 63-64, 253, 313; Order No. 1000-A at PP 3, 424; 5 U.S.C. § 706(2)(A); *Williams*, 475 F.3d 319; *Consolidated Edison*, 347 F.3d 964; *PG&E Gas*, 315 F.3d 383; *Idaho Power Co. v. FERC*, 312 F.3d 454 (D.C. Cir. 2002) ("*Idaho Power*"); Highway/Byway Order; Highway/Byway Rehearing Order.

8. In mandating that SPP revise the definition of Competitive Upgrade to include Byway facilities, the Commission ignored the express public policy preferences and laws in the SPP region, resulting in an order that is contrary to Order No. 1000 and Commission precedent and is internally inconsistent. Accordingly, the July 18 Order violates the Administrative Procedure Act's arbitrary and capricious standard. July 18 Order at PP 150-53. Order No. 1000 at PP 6, 82, 107, 203-04, 216 n.193, 227, 402; 5 U.S.C. § 706(2)(A); *Williams*, 475 F.3d 319; *Consolidated Edison*, 347 F.3d 964; *PG&E Gas*, 315 F.3d 383; *Process Gas*, 177 F.3d 995 (D.C. Cir. 1999) ("*Process Gas*"); *United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) ("*United Distribution*"); *Gen. Chem. Corp.*, 817

F.2d 844 (D.C. Cir. 1987) ("*Gen. Chem. Corp.*"); *Sw. Power Pool, Inc.*, 106 FERC ¶ 61,110, *order on reh'g*, 109 FERC ¶ 61,010 (2004).

9. Because SPP's Aggregate Study process is not a part of SPP's Commission-approved Order No. 890-compliant regional planning process (i.e., the ITP), has not been evaluated to determine whether it meets all of the nine Order No. 890 principles, and does not address broad regional needs, public policy requirements, or congestion, the Commission erred in finding that SPP's Aggregate Study process is a Commission-approved regional transmission planning process, failed to engage in reasoned decisionmaking based on substantial evidence, and therefore acted in an arbitrary and capricious manner. July 18 Order at PP 201-05. Order No. 1000 at PP 5, 63, 68, 147-48, 760; 5 U.S.C. § 706(2)(A); *E. Tex. Elec. Coop.*, 218 F.3d 750; *Process Gas*, 177 F.3d 995; *Sithe/Independence*, 165 F.3d 944; *United Distribution*, 88 F.3d 1105; *K N Energy*, 968 F.2d 1295; *Gen. Chem. Corp.*, 817 F.2d 844; *Sw. Power Pool, Inc.*, 110 FERC ¶ 61,028 (2005).

10. Because SPP's Aggregate Study process does not qualify as a Commission-approved regional planning process, the Commission erred in finding that Service Upgrades are selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for selection in a regional transmission plan, failed to engage in reasoned decisionmaking based on substantial evidence, and therefore acted in an arbitrary and capricious manner. July 18 Order at PP 201-05. Order No. 1000 at PP 5, 63, 68, 147-48, 760; 5 U.S.C. § 706(2)(A); *E. Tex. Elec. Coop.*, 218 F.3d 750; *Process Gas*, 177 F.3d 995; *Sithe/Independence*, 165 F.3d 944; *United Distribution*, 88 F.3d 1105; *K N Energy*, 968 F.2d 1295; *Gen. Chem. Corp.*, 817 F.2d 844; *Sw. Power Pool, Inc.*, 110 FERC ¶ 61,028 (2005).

11. Because Service Upgrades are not selected pursuant to a Commission-approved regional transmission planning process as the more efficient or cost effective solutions to *regional* needs, but rather are designed to facilitate individual requests for service on an aggregate basis, the Commission erred in finding that Service Upgrades that receive Highway/Byway funding are in the SPP regional transmission plan for purposes of cost allocation, and thus failed to engage in reasoned decisionmaking based on substantial evidence, rendering the July 18 Order arbitrary and capricious. July 18 Order at PP 201-05. Order No. 1000 at PP 63-64; 5 U.S.C. § 706(2)(A); *Williams*, 475 F.3d 319; *Consolidated Edison*, 347 F.3d 964; *PG&E Gas*, 315 F.3d 383; *Idaho Power*, 312 F.3d 454.

12. Because the Aggregate Study process does not qualify as a Commission-approved regional transmission planning process, Service Upgrades are not included in SPP regional transmission plan as more efficient or cost-effective solutions to regional needs and thus are not included in the plan

for the purposes of cost allocation, the Commission erred in finding that (i) SPP's exclusion of Service Upgrades from the proposed definition of Competitive Upgrades does not comply with Order No. 1000, and (ii) Service Upgrades selected in SPP's regional transmission plan that are subject to Highway/Byway funding are subject to the Order No. 1000 requirement to eliminate federal rights of first refusal for transmission projects selected in a regional transmission plan for purposes of cost allocation. It therefore failed to engage in reasoned decisionmaking based on substantial evidence and acted in an arbitrary and capricious manner. July 18 Order at PP 201-05. Order No. 1000 at PP 63-64; 5 U.S.C. § 706(2)(A); *Williams*, 475 F.3d 319; *Consolidated Edison*, 347 F.3d 964; *PG&E Gas*, 315 F.3d 383; *Idaho Power*, 312 F.3d 454; *E. Tex. Elec. Coop.*, 218 F.3d 750; *Process Gas*, 177 F.3d 995; *Sithe/Independence*, 165 F.3d 944; *United Distribution*, 88 F.3d 1105; *K N Energy*, 968 F.2d 1295; *Gen. Chem. Corp.*, 817 F.2d 844; *Sw. Power Pool, Inc.*, 110 FERC ¶ 61,028 (2005).

13. In requiring that SPP include Service Upgrades in the definition of "Competitive Upgrade," the Commission erred by failing to consider the significant impact such a mandate would have on SPP, its customers and stakeholders. Incorporating a competitive component into the Aggregate Study Process will add at least another six months to an already over-stressed process as well as add complexity and increase costs that SPP customers and stakeholders will have to bear. July 18 Order at PP 201-05.

14. The Commission's rejection of proposed Tariff language referencing rights of first refusal and right of way laws under relevant law, resulting in less efficient and cost-effective transmission planning, is contrary to Order No. 1000 and therefore is arbitrary and capricious and demonstrates a lack of reasoned decisionmaking. July 18 Order at PP 170, 178-80. Order No. 1000 at PP 4, 11, 63-64, 68, 226-27, 319; 5 U.S.C. § 706(2)(A); *Williams*, 475 F.3d 319; *Keyspan*, 474 F.3d 636; *E. Tex. Elec. Coop.*, 218 F.3d 750; *Sithe/Independence*, 165 F.3d 944; *K N Energy*, 968 F.2d 1295; *Gen. Chem. Corp.*, 817 F.2d 844; L.B. 388, 103rd Leg., First Reg. Sess. (Neb. 2013), 2013 Neb. ALS 388; H.B. 1932, 2013 Leg., 54th Sess. (Okla. 2013), 2013 OK. ALS 355.

15. The Commission's directive that SPP remove language referring to state and local right of first refusal laws and language ensuring that SPP's Transmission Owner Selection Process will not alter an incumbent transmission owner's use and control of its existing rights of way contravenes the holding in Order No. 1000 that the final rule is not intended to preempt, limit, or infringe on state jurisdiction over matters such as siting, permitting and construction of transmission facilities or to alter use and control of existing rights of way, resulting in an arbitrary and capricious decision. Likewise, the July 18 Order demonstrates an internal inconsistency because the Commission's decision requires SPP to

disregard state and local laws related to rights of first refusal and rights of way while also requiring close consideration of state and local requirements in other sections of the order. July 18 Order at PP 170, 178-80. Order No. 1000 at PP 2, 11, 107, 206-07, 209, 226-27, 253 n.231, 287, 319; Order No. 1000-A at PP 204, 206, 208-11, 317-19; 5 U.S.C. § 706(2)(A); *Business Roundtable*, 647 F.3d 1144; *Williams*, 475 F.3d 319; *Consolidated Edison*, 347 F.3d 964; *PG&E Gas*, 315 F.3d 383; *Idaho Power*, 312 F.3d 454; *Process Gas*, 177 F.3d 995; *Gen. Chem. Corp.*, 817 F.2d 844.

16. In improperly finding that SPP's proposed language adds new federal rights of first refusal for new transmission facilities based on state law and adopts an impermissible federal right of first refusal for a new transmission facility built on an existing right of way, the Commission's rationale for requiring removal of language reflecting relevant law and existing rights of way departs from Order No. 1000 without explanation, resulting in an arbitrary and capricious order. July 18 Order at PP 170, 178-80. Order No. 1000 at PP 11, 226-27, 253 n.231, 319; Order No. 1000-A at P 381; 5 U.S.C. § 706(2)(A); *Williams*, 475 F.3d 319; *Consolidated Edison*, 347 F.3d 964; *PG&E Gas*, 315 F.3d 383; *Idaho Power*, 312 F.3d 454.

17. The Commission exceeded its statutory authority in requiring SPP to ignore state and local laws governing construction of transmission facilities and rights of way. July 18 Order at PP 170, 178-80. 5 U.S.C. § 706(2)(C); 16 U.S.C. § 824(a); 16 U.S.C. § 824e; 16 U.S.C. § 824p(b) *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) ("*La. Pub. Serv. Comm'n*"); *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009) ("*Piedmont Envtl. Council*"); *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004) ("*CAISO*"); *Atlantic City*, 295 F.3d 1; *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001) ("*Michigan*"); *PacifiCorp*, 72 FERC ¶ 61,087 (1995) ("*PacifiCorp*").

III. REHEARING REQUEST

The Administrative Procedure Act[32] and judicial precedent require that Commission decisions and orders not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[33] The Commission must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection

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32 5 U.S.C. § 706.

33 *Id.* § 706(2)(A); *see also Motor Vehicle Mfrs.*, 463 U.S. at 41.

between the facts found and the choice made.[34] The Commission must demonstrate through its order that it made a reasoned decision based on substantial evidence in the record,[35] and Commission orders that are internally inconsistent or contradictory are arbitrary and capricious in violation of the Administrative Procedure Act.[36] To survive judicial scrutiny under the arbitrary and capricious standard, a reviewing court must be able to "discern a reasoned path . . . to the decision [the Commission] reached."[37] Under

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[34] *See, e.g., Keyspan*, 474 F.3d at 809 (citing *Motor Vehicle Mfrs.*, 463 U.S. at 41); *PPL Wallingford*, 419 F.3d at 1198 ("To survive review under the arbitrary and capricious standard, an agency must examine the relevant data and articulate a rational connection between the facts found and the choice made.") (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43) (internal quotations omitted).

[35] *Florida Gas*, 604 F.3d at 639 ("Under [the arbitrary and capricious] standard, the Commission must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record.") (quoting *Pacific Gas & Electric*, 373 F.3d at 1319) (internal quotations omitted); *American Gas*, 593 F.3d at 19 (indicating that the Commission's orders must be based on substantial evidence to be upheld under the arbitrary and capricious standard); *Pacific Gas & Electric*, 373 F.3d at 1319 ("FERC must be able to demonstrate that it has made a reasoned decision based on substantial evidence in the record.") (quoting *Northern States Power Co.*, 30 F.3d at 180) (internal quotations omitted); *see also, e.g., Horsehead*, 16 F.3d at 1269 (indicating that "speculation is an inadequate replacement for the agency's duty to undertake an examination of the relevant data and reasoned analysis").

[36] *Process Gas*, 177 F.3d at 1003-05 (remanding decision where the Commission's statements appear to be contradictory); *United Distribution*, 88 F.3d at 1188-89 (remanding aspects of a Commission order that were internally inconsistent); *see also Gen. Chem. Corp.*, 817 F.2d at 857 (finding that an agency decision lacked substantial evidence because it was internally inconsistent and inadequately explained).

[37] *E. Tex. Elec. Coop.*, 218 F.3d at 755 (remanding a Commission decision on the basis that "the Commission failed to offer anything from which the court can 'discern a reasoned path . . . to the decision [the Commission] reached.'") (quoting *K N Energy*, 968 F.2d at 1303-04); *Sithe/Independence*, 165 F.3d at 948 (indicating that, to survive judicial scrutiny, the Commission must be able to demonstrate that it made a reasoned decision based on substantial evidence and its path of reasoning must be clear) (citations omitted).

established judicial precedent, the Commission lacks discretion to ignore relevant factors,[38] and is obligated to provide a meaningful response to the arguments raised by parties in a proceeding.[39] In addition, when the Commission has already addressed an issue, a subsequent Commission decision must either be consistent with the Commission's prior orders, or else the Commission must provide a reasoned explanation for any departure from its established precedent, and the failure to do so constitutes reversible error.[40] The courts have remanded Commission decisions that contradict prior Commission orders without adequate explanation.[41]

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38 *See American Gas*, 593 F.3d at 19 (finding that the Commission's discretion is bound by the requirements of reasoned decisionmaking and where parties raise reasonable alternatives to the Commission's position, the Commission must consider those alternatives); *NorAm*, 148 F.3d at 1165 (stating that to avoid being arbitrary and capricious, an agency must consider and address the material arguments made by those appearing before it).

39 *See Florida Gas*, 604 F.3d at 639 (stating that Commission must show it made a reasoned decision based on the record evidence and remanding the decision where the Commission did not respond adequately to petitioner's objections; also finding that the Commission failed to provide a reasoned explanation for its adoption of new standards); *Keyspan*, 474 F.3d at 812 (remanding decisions where the Commission provided only a brief explanation for its findings).

40 *See Williams*, 475 F.3d at 326, 330 (remanding decision that was inconsistent with prior findings and stating that "[r]easoned decisionmaking necessarily requires consideration of relevant precedent"); *Consolidated Edison*, 347 F.3d at 971-73 (remanding decision as contrary to Commission policy and stating that the Commission must follow its general policy or explain the reason for its departure); *Idaho Power*, 312 F.3d at 461-65 (rejecting and vacating Commission interpretation of tariff that is contrary to prior Commission orders and the Commission's own prior interpretations of the subject tariff provisions); *see also PG&E Gas*, 315 F.3d at 388-90 (vacating and remanding Commission orders where the Commission "utterly failed to confront" and distinguish prior precedent, and the Commission's attempts to distinguish its precedents "were alternately nonexistent, misleading, and irrelevant").

41 *See Williams*, 475 F.3d at 327 (rejecting change in jurisdictional treatment of pipeline facilities when Commission's "rationale could hardly be more

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The July 18 Order violates these requirements in several respects, and the Commission should grant rehearing to correct its errors, as discussed in more detail below.

A. The Commission Erred in Rejecting SPP's *Mobile-Sierra* Arguments

In the July 18 Order, the Commission determined that the SPP Membership Agreement is not entitled to protection under the *Mobile-Sierra* doctrine and its presumption that freely-negotiated contracts are just and reasonable, a presumption that "may be overcome *only* if FERC concludes that the contract *seriously harms the public interest*."[42] Because the Commission's analysis of the Membership Agreement is fundamentally flawed and factually incorrect, the Commission's holding that the Membership Agreement is not entitled to the *Mobile-Sierra* presumption is contrary to substantial evidence, and the July 18 Order fails to demonstrate reasoned decisionmaking, rendering it arbitrary and capricious.[43]

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inconsistent with precedent" and where rationale was not supported by a reasoned analysis in the orders themselves); *Consolidated Edison*, 347 F.3d at 971 (rejecting purported limitation in tariff provisions when the Commission's earlier order had a broad interpretation of the RTO's emergency authority).

[42] *Morgan Stanley*, 554 U.S. at 530 (emphasis added); *see also NRG*, 558 U.S. at 167; *Mobile*, 350 U.S. at 339-44; *Sierra*, 350 U.S. at 355.

[43] *Florida Gas*, 604 F.3d at 639 ("Under [the arbitrary and capricious] standard, the Commission must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record.") (quoting *Pacific Gas & Electric*, 373 F.3d at 1319) (internal quotations omitted); *American Gas*, 593 F.3d at 19 (indicating that the Commission's orders must be based on substantial evidence to be upheld under the arbitrary and capricious standard); *PPL Wallingford*, 419 F.3d at 1198 ("To survive review under the arbitrary and capricious standard, an agency must examine the relevant data and articulate a rational connection between the facts found and the choice made.") (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43) (internal quotations omitted); *Pacific Gas & Electric*, 373 F.3d at

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1. The Commission's Analysis of the Membership Agreement Is Flawed

In the July 18 Order, the Commission asserted that "[t]he *Mobile-Sierra* presumption applies to a contract only if the contract has certain characteristics that justify the presumption," and stated that Section 3.3 of the Membership Agreement "lacks the characteristics necessary to justify a *Mobile-Sierra* presumption."[44] The Commission based its determination on "two separate but reinforcing reasons,"[45] neither of which actually applies to the Membership Agreement, rendering the Commission's analysis fatally flawed and lacking in substantial evidence.

a. The Commission's Characterization of the Construction and Ownership Provisions of the Membership Agreement as "Prescriptions of Generally Applicability" Is Unavailing

The Commission asserts that the construction rights and obligations provisions of the Membership Agreement "are prescriptions of general applicability rather than negotiated rate provisions that are necessarily entitled to a *Mobile-Sierra* presumption."[46] The Commission claims that "[t]his conclusion is bolstered by the fact that any new SPP

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1319 ("FERC must be able to demonstrate that it has made a reasoned decision based on substantial evidence in the record.") (quoting *Northern States Power Co.*, 30 F.3d at 180) (internal quotations omitted); *see also, e.g.*, *Horsehead*, 16 F.3d at 1269 (indicating that "speculation is an inadequate replacement for the agency's duty to undertake an examination of the relevant data and reasoned analysis").

44 July 18 Order at P 126.

45 *Id.* at PP 129, 135.

46 *Id.* at P 130.

Transmission Owner would have to accept these provisions as-is, with limited room for negotiation."[47] The Commission's conclusion is wrong both legally and factually.

Notably, the Commission cites no precedent that directly addresses whether contract terms such as those at issue in the Membership Agreement are "prescriptions of general applicability" and, if so, whether such provisions are *per se* disqualified from the *Mobile-Sierra* presumption. Instead, the Commission relies on *NRG Power Marketing, LLC v. Maine Public Utilities. Commission*[48] and on *New England Power Generators Ass'n v. FERC*,[49] neither of which supports the Commission's broad pronouncement that the Membership Agreement provisions at issue are generally applicable "prescriptions" or that such provisions are excluded from protection under the *Mobile-Sierra* doctrine. First, in *NRG*, the question before the U.S. Supreme Court was whether "*Mobile-Sierra*'s public interest standard appl[ies] when a contract rate is challenged by an entity that was not a party to the contract,"[50] not whether the rates at issue were prescriptions of general applicability, and, if so, whether the *Mobile-Sierra* presumption would apply.[51] The *NRG* decision does not stand for the proposition that "prescriptions of general applicability"

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47 *Id.* at P 131.

48 558 U.S. 165 (2010).

49 707 F.3d 364 (D.C. Cir. 2013).

50 *NRG*, 558 U.S. at 171.

51 *Id.* at 176. The Commission admits that *NRG* does not go as far as the Commission may wish, stating that the *NRG* Court merely "acknowledged the *potential* distinction between 'prescriptions of general applicability' and 'contractually negotiated rates.'" July 18 Order at 130 (emphasis added) (citing *NRG*, 558 U.S. at 176).

are *per se* ineligible for the *Mobile-Sierra* presumption or that the Membership Agreement provisions at issue are such "prescriptions."

Likewise, the Commission's reliance on *NEGPA* to deny *Mobile-Sierra* protection to the Membership Agreement is an overreach. The D.C. Circuit Court in *NEGPA* "[a]ssume[d], *without deciding*, that the [capacity] auction rates are not contract rates,"[52] and stated that, "[w]hether the auction results are contract rates or not, FERC's determination that the logic of *Mobile-Sierra* still applied is a 'reasonable choice.'"[53] The disputed rates at issue in *NEPGA* were rates that would be derived in a capacity auction that was adopted as part of a settlement agreement that included a *Mobile-Sierra* clause, not provisions, like those in the Membership Agreement, that are set forth directly in the contract at issue. Nothing in *NEGPA* authorizes the Commission to remove the *Mobile-Sierra* presumption from an agreement, like the Membership Agreement, that the Commission previously approved as just and reasonable.

Additionally, the Commission's citation to various orders in which it approved settlement agreements[54] is inapposite. Unlike the settlement agreements at issue in those orders, the Membership Agreement does not establish rates that are "incorporated into the service agreements of all present and future customers."[55] The Membership Agreement binds SPP and its member signatories, and sets forth the rights and obligations of each.[56]

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52 *NEPGA*, 707 F.3d at 370 (emphasis added).

53 *Id.* at 371.

54 July 18 Order at P 128 n.290.

55 *Id.* at P 128.

56 *See, e.g.*, Membership Agreement, Preamble ("This Agreement is made between the Member and SPP, as defined herein."), §§ 2.0 (Rights, Powers and (continued . . .)

An entity may take service under the SPP Tariff without executing the Membership Agreement, and the Membership Agreement does not dictate the rates charged under the SPP Tariff, nor is it incorporated by reference in any service agreement.

Aside from the Commission's citation to irrelevant precedent, the Commission's assertion that contract language that "establishes rules that delimit, qualify, or restrict the ability of any other potential competitor to engage in the subject activity" creates "generally applicable requirements"[57] is unsupported and mistaken. None of the cases cited by the Commission stand for this proposition. Moreover, the Commission's own precedent refutes this contention, for, if the Commission's statement were true, no agreement could ever be subject to the *Mobile-Sierra* doctrine. By their very nature, contracts "delimit, qualify, or restrict" the ability of the parties to a contract to engage in "the subject activity" with "any other potential competitor," which in turn delimits, qualifies, or restricts the ability of potential competitors to engage in the activity with the contracting parties. For example, full and partial requirements contracts restrict the ability of potential competitors to sell power to the buyer under the contract, but this fact has not previously stopped the Commission from finding such contracts to be covered by the *Mobile-Sierra* doctrine.[58]

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Obligations of SPP), 3.0 (Commitments, Rights, Powers, and Obligations of Member).

57 July 18 Order at P 130.

58 *See, e.g., N. Va. Elec. Coop., Inc. v. Old Dominion Elec. Coop.*, 116 FERC ¶ 61,173 at 10-11 (2006) (upholding an earlier Commission decision and finding that the *Mobile-Sierra* presumption applies to a requirements contract).

In addition to being incorrect from a legal perspective, the Commission's analysis of the Membership Agreement as a "prescription of general applicability" is factually erroneous and thus lacks substantial evidence. The Commission claims that its analysis is "bolstered by the fact that any new SPP Transmission Owner would have to accept these provisions as-is, with limited room for negotiation."[59] This assertion improperly ignores the Commission's own precedent.[60] For instance, when several transmission owning members elected to join SPP in 2008, SPP and the prospective members engaged in extensive negotiations and developed company-specific versions of the Membership Agreement to accommodate the prospective members' membership needs in SPP.[61] While these negotiations did not involve changes to Section 3.3 of the Membership Agreement, the experience of these new SPP members belies the Commission's assertion that "new SPP Transmission Owners are placed in a position that differs fundamentally from that of parties who are able to negotiate freely like buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption."[62]

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59 July 18 Order at P 131.

60 *See Williams*, 475 F.3d at 327 (rejecting change in jurisdictional treatment of pipeline facilities when Commission's "rationale could hardly be more inconsistent with precedent" and where rationale was not supported by a reasoned analysis in the orders themselves); *PG&E Gas*, 315 F.3d at 388-90 (vacating and remanding Commission orders where the Commission "utterly failed to confront" and distinguish prior precedent, and the Commission's attempts to distinguish its precedents "were alternately nonexistent, misleading, and irrelevant").

61 *Sw. Power Pool, Inc.*, 125 FERC ¶ 61,239 (accepting revisions to the Membership Agreement and accepting company-specific Membership Agreement provisions negotiated among SPP and prospective members).

62 July 18 Order at P 131. Additionally, because membership in SPP is voluntary and is not a prerequisite to receiving service, prospective members have the sole discretion of whether to execute the Membership Agreement and accept the (continued . . .)

The Commission's analysis thus lacks a factual basis, resulting in a decision that fails the test of reasoned decisionmaking.[63]

b. The Commission's "Common Interest" Analysis Is Erroneous

The Commission's second "reinforcing reason" for determining that the *Mobile-Sierra* doctrine does not apply to the Membership Agreement is equally flawed. The Commission's claim that "[u]nlike circumstances in which the Commission can presume that the resulting rate is the product of negotiations between parties with competing interests, the negotiation that led to the provisions at issue here were among parties with the same interest, namely, protecting themselves from competition in transmission development"[64] is mistaken.

The Commission conveniently ignores the fact that the Membership Agreement is an agreement negotiated among and executed by both *SPP* and its *members*, which, as the Compliance Filing points out, include investor-owned utilities, municipal systems,

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provisions contained within. Thus, the Membership Agreement is not the type of generally-applicable tariff that the Commission claims is not entitled to the *Mobile-Sierra* presumption.

63 *Florida Gas*, 604 F.3d at 639 ("Under [the arbitrary and capricious] standard, the Commission must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record.") (quoting *Pacific Gas & Electric*, 373 F.3d at 1319) (internal quotations omitted); *E. Tex. Elec. Coop.*, 218 F.3d at 755 (remanding a Commission decision on the basis that "the Commission failed to offer anything from which the court can 'discern a reasoned path . . . to the decision [the Commission] reached.'") (quoting *K N Energy*, 968 F.2d at 1303-04); *Sithe/Independence*, 165 F.3d at 948 (indicating that, to survive judicial scrutiny, the Commission must be able to demonstrate that it made a reasoned decision based on substantial evidence and its path of reasoning must be clear) (citations omitted).

64 July 18 Order at P 133.

generation and transmission cooperatives, state agencies, independent power producers, power marketers, and, independent transmission companies.[65] Each of these members is a signatory to the Membership Agreement, as is SPP, which, pursuant to Commission regulations and orders, is an *independent* entity. The Commission's reasons for holding that "section 3.3 of the Membership Agreement . . . arose in circumstances that do not provide the assurance of justness and reasonableness on which the *Mobile-Sierra* presumption rests"[66] is thus devoid of any factual support, and consequently is not based on substantial evidence.[67]

Contrary to the Commission's claim, Section 3.3 of the Membership Agreement did not "ar[i]se in a negotiation aimed at protecting a common interest among competing transmission owners."[68] As SPP stated in its initial filing of the Membership Agreement in 1999, the "Membership Agreement was developed by SPP's ISO Task Force, which consists of 10 members . . . split between Transmission Owners and *Non-Transmission Owners.* The ISO Task Force *without dissention* approved the Membership Agreement.

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65 *See* Compliance Filing at 6-7.

66 July 18 Order at P 132.

67 *Florida Gas*, 604 F.3d at 639 ("Under [the arbitrary and capricious] standard, the Commission must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record.") (quoting *Pacific Gas & Electric*, 373 F.3d at 1319) (internal quotations omitted); *American Gas*, 593 F.3d at 19 (indicating that the Commission's orders must be based on substantial evidence to be upheld under the arbitrary and capricious standard); *Pacific Gas & Electric*, 373 F.3d at 1319 ("FERC must be able to demonstrate that it has made a reasoned decision based on substantial evidence in the record.") (quoting *Northern States Power Co.*, 30 F.3d at 180) (internal quotations omitted); *see also, e.g.*, *Horsehead*, 16 F.3d at 1269 (indicating that "speculation is an inadequate replacement for the agency's duty to undertake an examination of the relevant data and reasoned analysis").

68 July 18 Order at P 133.

The SPP Board of Directors, *also without dissention*, approved the Membership Agreement."[69] The current language of Section 3.3(b), which contains the so-called right of first refusal language, remains largely unchanged from the language adopted in the SPP 1999 Filing. In its order on the SPP 1999 Filing, the Commission "note[d] that the revised [M]embership [A]greement enjoys unanimous stakeholder support, we find that it is reasonable, and will accept it."[70] For the Commission now to claim that Section 3.3 was negotiated by the SPP transmission owners to further their common interest of "protecting themselves from competition in transmission development"[71] defies both fact and Commission precedent.

In fact, the Membership Agreement provisions at issue resulted from negotiations among multiple diverse parties, including SPP, transmission owners, and non-transmission owning SPP stakeholders, and were not aimed at "protecting a common interest among competing transmission owners."[72] As the SPP 1999 Filing states, the purpose of Section 3.3 of the Membership Agreement is to "establish[] the rights, powers, and obligations of the Transmission Owners and Non-Transmission Owners," including requiring "[e]ach Transmission Owner [to] construct facilities as directed by SPP."[73] In

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69 Amendment to Open Access Transmission Tariff of Southwest Power Pool, Inc., Docket No. ER99-4392-000, Volume I, Transmittal Letter at 3-4 (Sept. 7, 1999) (emphasis added) ("SPP 1999 Filing"). At the time, the SPP Board of Directors included representatives of both transmission owners and non-transmission owning stakeholders. *See id.*, Volume I, Transmittal Letter at 3 n.4.

70 *Sw. Power Pool, Inc.*, 89 FERC ¶ 61,284, at 61,895 (1999).

71 July 18 Order at P 133.

72 *Id.*

73 SPP 1999 Filing, Volume I, Transmittal Letter at 13.

exchange for this obligation, the transmission owners retained certain rights to construct transmission facilities interconnecting with their systems. The right of SPP to direct the construction of facilities ensures that transmission owners cannot disregard SPP's direction to construct facilities that SPP independently determines through its regional planning process should be built.[74] The Commission's conclusion that Section 3.3 of the Membership Agreement is intended to protect the "common interests" of the SPP transmission owners from competing transmission developers lacks any evidentiary basis and must be rejected.[75]

Following the Commission's logic to its conclusion, no agreement would ever be entitled to *Mobile-Sierra* protection because adverse parties to a contract inherently must have some common interest in the formation of the contract itself. For example, even the seller and buyer in a purely bilateral wholesale energy sales rate contract have a "common interest" in the transaction itself, otherwise they would not enter into the contract. At the time of the SPP 1999 Filing, the only "common interest" among the signatories to the Membership Agreement was their interest establishing a region-wide SPP OATT for providing network service. Likewise, at the time SPP sought and

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74 In its order conditionally granting SPP RTO status, the Commission specifically cited the construction and ownership provisions of Section 3.3 of the membership agreement and stressed the importance of SPP's independent role in transmission planning. *See Sw. Power Pool, Inc.*, 106 FERC ¶ 61,110, at PP 176, 188, *order on reh'g*, 109 FERC ¶ 61,010 (2004).

75 *See Florida Gas*, 604 F.3d at 641 (remanding decision as unsupported where there was a complete lack of evidence to support the Commission's findings); *National Fuel*, 468 F.3d at 841 (remanding decision when there was a lack of record evidence to support the Commission's conclusions); *see also Horsehead*, 16 F.3d at 1269 (stating "speculation is an inadequate replacement for the agency's duty to undertake an examination of the relevant data and reasoned analysis").

obtained RTO status in 2004, the "common interest" of the Membership Agreement signatories was the formation of the SPP RTO. The Commission's "common interest" rationale is flawed, illogical, and fails the test of reasoned decisionmaking.[76]

2. The Commission Failed to Provide a Meaningful Response to SPP's Arguments and Evidence

Given the Commission's flawed analysis of the Membership Agreement and its eligibility for the *Mobile-Sierra* presumption as discussed above, the Commission was obligated to provide a meaningful response to SPP's arguments and evidence regarding the *Mobile-Sierra* doctrine. The Commission's failure to so respond renders the July 18 Order arbitrary and capricious.[77]

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[76] The Commission also improperly relies on irrelevant factors to support its faulty determination that the Membership Agreement resulted from negotiations involving parties with "common interests," which renders its decision arbitrary and capricious. *See Motor Vehicle Mfrs.*, 463 U.S. at 42 (stating that an agency's decision must be based on examination of the *relevant* factors and is arbitrary and capricious if it is contrary to the record evidence) (emphasis added); *North Carolina*, 531 F.3d at 930 (remanding an EPA trading program and regionwide caps as "entirely arbitrary, since EPA based them on irrelevant factors."). Specifically, the Commission cited certain merger decisions and its market-based rate regulations as a basis to justify its determination that the construction rights and obligations set forth in Section 3.3 of the Membership Agreement are intended to protect transmission owners against competition. July 18 Order at P 134 (citing *Delmarva*, 76 FERC ¶ 61,331, at 62,582; 18 C.F.R. § 35.36(a)(9)(iii) and *Central Maine Power*, 85 FERC ¶ 61,272). None of these cases or regulations, however, has any bearing on the Membership Agreement, nor do the Commission's limitations on merger partners and affiliate restrictions change the fact that the Membership Agreement was negotiated by parties with differing interests, including transmission owners, non-transmission owners, and SPP, the independent regional transmission provider.

[77] *See Florida Gas*, 604 F.3d at 639 (stating that the Commission must show that it made a reasoned decision based on the record evidence, and remanding the decision where the Commission did not respond adequately to petitioner's objections; also finding that the Commission failed to provide a reasoned explanation for its adoption of new standards); *American Gas*, 593 F.3d at 19 (finding that the Commission's discretion is bound by the requirements of (continued . . .)

a. The Commission Failed to Respond to SPP's Arguments

As SPP pointed out,[78] "[u]nder the *Mobile-Sierra* doctrine, the [Commission] must presume that the rate set out in a freely negotiated wholesale energy contract meets the 'just and reasonable' requirement [imposed by law]. The presumption may be overcome *only* if FERC concludes that the contract *seriously harms the public interest.*"[79] SPP also reminded the Commission[80] that "the regulatory system created by the [FPA] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of *unequivocal public necessity*,"[81] and "while parties 'can contract out of the *Mobile-Sierra* presumption [in whole or in part] . . . the *Mobile-Sierra* presumption *remains the default rule.*"[82] Thus, the Commission "may abrogate a valid contract *only* if it harms the public interest;"[83]

(. . . continued)

reasoned decisionmaking and where parties raise reasonable alternatives to the Commission's position, the Commission must consider those alternatives); *Keyspan*, 474 F.3d at 812 (remanding decisions where the Commission provided only a brief explanation for its findings); *NorAm*, 148 F.3d at 1165 (stating that to avoid being arbitrary and capricious, an agency must consider and address the material arguments made by those appearing before it).

78 Compliance Filing at 39.

79 *Morgan Stanley*, 554 U.S. at 530 (emphasis added); *see also NRG*, 558 U.S. at 167; *Mobile*, 350 U.S. at 339-44; *Sierra*, 350 U.S. at 355.

80 Compliance Filing at 39.

81 *Morgan Stanley*, 554 U.S. at 562 n.2.

82 *Id.* at 534.

83 Compliance Filing at 39-40 (quoting *Morgan Stanley*, 554 U.S. at 548); *see also Morgan Stanley*, 554 U.S. at 545-546 ("Therefore, only when the mutually agreed-upon contract rate seriously harms the consuming public may the Commission declare it not to be just and reasonable.").

however, a finding sufficient to satisfy the standard requires "unequivocal public necessity" due to "extraordinary circumstances,"[84] a burden that is "practically insurmountable."[85] In the July 18 Order, the Commission ignored SPP's *Mobile-Sierra* arguments because it "disagree[d] with SPP's claims that the right of first refusal provision in the [sic] section 3.3 of the Membership Agreement is subject to a *Mobile-Sierra* presumption."[86] Because the Commission erroneously reached this conclusion, it had a duty to respond to SPP's *Mobile-Sierra* arguments,[87] which it failed to do.

More importantly, the Commission failed to address SPP's showing that the Membership Agreement is similar to other agreements that the Commission previously has found are entitled to the *Mobile-Sierra* presumption, such as agreements among transmission-owning members of RTOs and agreements between an RTO and its transmission owners, including the non-rate terms and conditions of such agreements.[88]

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84 Compliance Filing at 40 (quoting *Morgan Stanley*, 554 U.S. at 550); *see also Morgan Stanley*, 554 U.S. at 551 ("We think that the FPA intended to reserve the Commission's contract-abrogation power for those extraordinary circumstances where the public will be severely harmed.").

85 *Potomac Elec. Power Co.*, 210 F.3d at 407-08.

86 July 18 Order at P 123.

87 *See Florida Gas*, 604 F.3d at 639 (stating that Commission must show it made a reasoned decision based on the record evidence and remanding the decision where the Commission did not respond adequately to petitioner's objections; also finding that the Commission failed to provide a reasoned explanation for its adoption of new standards); *Keyspan*, 474 F.3d at 812 (remanding decisions where the Commission provided only a brief explanation for its findings).

88 *See* SPP Answer at 5-8 & n.13; *see also Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,090, at P 47 n.41 (2008) (stating that the Midwest Independent Transmission System Operator Inc.'s ("MISO") Transmission Owners Agreement "impose[]s a *Mobile Sierra* standard of review. Accordingly, the Commission may modify [that] agreement[] only if it 'adversely affect[s] the public interest.'") (quoting *Sierra*, 350 U.S. at 355), *reh'g denied*, 136 FERC (continued . . .)

SPP demonstrated that the Membership Agreement was a contract among multiple "sophisticated entities" with different interests, and was part of the bargained-for exchange that led first to SPP providing open access transmission service under a regional tariff and subsequently becoming a Commission-approved RTO.[89]

In the July 18 Order, the Commission made no attempt to respond to these arguments and evidence, to distinguish the previous decisions cited by SPP, or to explain why these cases do not dictate that application of the *Mobile-Sierra* public interest standard to the Membership Agreement is appropriate and consistent with Commission precedent. Instead, the Commission merely acknowledged that it has not previously addressed which standard of review applies to the construction and ownership provisions of the Membership Agreement, and stated that it would address other RTOs' arguments regarding the applicability of the *Mobile-Sierra* doctrine to their organizational

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(. . . continued)

¶ 61,099 (2011); *ISO New Eng. Inc.*, 109 FERC ¶ 61,147, at PP 77-78 (finding that *Mobile-Sierra* protection is warranted for provisions of the ISO New England's Transmission Owners Agreement that delineate the transmission owners' obligation to build facilities); *Pub. Utils. with Existing Contracts*, 125 FERC ¶ 61,228, at PP 6, 15 (granting rehearing of prior findings to determine that non-rate terms and conditions of transmission contracts are subject to the *Mobile-Sierra* public interest standard of review); *Sw. Power Pool, Inc.*, 117 FERC ¶ 61,207, at PP 27-28 (approving provisions of SPP's Balancing Authority Agreement incorporating *Mobile-Sierra* public interest standard), *order on reh'g*, 119 FERC ¶ 61,021, at P 11 (affirming prior finding and stating that the public interest standard should apply "because it provides SPP and the signatories the needed certainty" and maintains "the sanctity of contracts"); *see also Vt. Transco*, 118 FERC ¶ 61,244, at P 50 (addressing rejected argument that the *Mobile-Sierra* public interest standard did not apply to the withdrawal provision of multi-party transmission agreement, and stating "[t]he Commission views proposed changes to non-rate terms and conditions of an existing contract as governed by the same rules applicable to proposed changes to rates in that contract").

89 SPP Answer at 6.

agreements on a case-by-case basis.[90] This non-sequitur response to SPP's arguments provides no meaningful response at all, rendering the July 18 Order inconsistent with reasoned decisionmaking.[91]

Additionally, the July 18 Order also failed to address meaningfully SPP's argument that judicial precedent draws a distinction between the Commission's authority to reject a *Mobile-Sierra* provision upon its initial review of a contract and subsequent challenges of the agreement.[92] As discussed above, the Membership Agreement provisions addressing construction and ownership of transmission facilities were first submitted to the Commission in the SPP 1999 Filing and accepted by the Commission in an order issued on December 17, 1999.[93] The Commission's acceptance was not premised on requiring that future challenges would be reviewed under the ordinary just and reasonable standard rather than the *Mobile-Sierra* public interest standard, nor did any language in the SPP 1999 Filing expressly or impliedly waive *Mobile-Sierra* protection for the Membership Agreement. Thus, as SPP pointed out, absent any such

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90 July 18 Order at P 129 n.291.

91 *See Florida Gas*, 604 F.3d at 639; *Keyspan*, 474 F.3d at 812 (remanding decision when FERC failed to provide a reasoned path to the decision reached); *Missouri PSC*, 234 F.3d at 41.

92 *See* SPP Answer at 7 n.15 (citing *Maine Public*, 454 F.3d at 283-85 (distinguishing between the Commission's initial review of a contract when "there is no expectation of contract stability," and later reviews, where the contract has gone into effect)); *see also Boston Edison*, 233 F.3d at 68 (stating that if the Commission wants to eliminate uncertainty, prescribing prospectively the terms that it prefers to have used to invoke *Mobile-Sierra* would be "a more winning approach than efforts to impose such requirements *ad hoc* . . . after contracts have been drafted, signed, accepted for filings by FERC, and implemented" and opining that "FERC should stop trying to rewrite contracts that parties have already made under the aegis of *Mobile-Sierra*").

93 *Sw. Power Pool, Inc.*, 89 FERC ¶ 61,284, at 61,895.

waiver by the signatories to the Membership Agreement or reservation by the Commission in its approval of the Membership Agreement, the *Mobile-Sierra* doctrine is the "default rule."[94] If the *Mobile-Sierra* doctrine were interpreted to permit the Commission to engage in an *ex post facto* revocation of the *Mobile-Sierra* presumption, such action would undermine the very basis on which the *Mobile-Sierra* doctrine rests – i.e., preserving the stability and sanctity of contracts and the benefit of bargains struck by sophisticated parties negotiating at arm's length.[95] The Commission's conclusion, therefore, fails to demonstrate reasoned decisionmaking and should be reversed.[96]

b. The Commission's Disregard for SPP's Evidence Renders the July 18 Order Arbitrary and Capricious

The Commission, in violation of the Administrative Procedure Act and relevant judicial precedent, wholly disregarded SPP's evidence that the existing construction and ownership provisions of the Membership Agreement are benefitting, rather than causing

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94 *Morgan Stanley*, 554 U.S. at 534; *see also Texaco, Inc.*, 148 F.3d at 1096 (stating that absent contract language to the contrary, the *Mobile-Sierra* standard applies).

95 *See Atlantic City*, 295 F.3d at 14 (stating that the purpose of the *Mobile-Sierra* doctrine is to protect the benefits of the parties' bargain); *Boston Edison*, 233 F.3d at 64-65 (indicating that the *Mobile-Sierra* doctrine recognizes that "customers in interstate sales of electricity and natural gas sales have tended to be big companies, and negotiated contracts formed a useful means of allocating risk"); *see also NRG*, 558 U.S. at 173 (stating that the premise underlying the *Mobile-Sierra* doctrine is "that contract rates freely negotiated between sophisticated parties meet the just-and-reasonable standard").

96 *E. Tex. Elec. Coop.*, 218 F.3d at 755 (remanding a Commission decision on the basis that "the Commission failed to offer anything from which the court can 'discern a reasoned path . . . to the decision [the Commission] reached.'") (quoting *K N Energy*, 968 F.2d at 1303-04); *Sithe/Independence*, 165 F.3d at 948 (indicating that, to survive judicial scrutiny, the Commission must be able to demonstrate that it made a reasoned decision based on substantial evidence and its path of reasoning must be clear) (citations omitted).

serious harm to, the public interest. By failing to provide a meaningful response and rendering a decision that is contrary to the record evidence, the July 18 Order fails the test of reasoned decisionmaking and therefore is arbitrary and capricious.[97]

SPP was the only party to submit any evidence in this proceeding. As SPP demonstrated in the Compliance Filing, SPP's existing, pre-Order No. 1000 processes are resulting in robust and cost-effective expansion of the SPP transmission grid, providing substantial net benefits to consumers in the SPP region. SPP pointed to several provisions of its Membership Agreement and Tariff that require SPP to conduct its regional planning in a cost-effective manner[98] and cited Commission precedent noting that SPP's ITP is a "proactive, comprehensive transmission planning approach that encourages the development of integrated solutions to address both reliability and economic needs across the SPP transmission system in a non-discriminatory manner."[99] SPP also presented detailed evidence demonstrating that, under its current, Commission-approved transmission planning and cost allocation processes, including the construction and ownership provisions of the Membership Agreement, SPP's transmission expansion efforts are expected to result in billions of dollars of net benefits to stakeholders and ratepayers in the SPP region, including: (1) over $3 billion in net benefits over forty years

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97 *See Florida Gas*, 604 F.3d at 643 (remanding the Commission's decision where the Commission did not respond adequately to petitioner's objections); *NorAm*, 148 F.3d at 1165 (stating that to avoid being arbitrary and capricious, an agency must consider and address the material arguments made by those appearing before it).

98 Compliance Filing at 46 (citing Membership Agreement § 2.1.5(a) and Tariff at Attachment O §§ III.3.c, III.4.c, III.8.b, III.8.d).

99 *See id.* (citing *Sw. Power Pool, Inc.*, 132 FERC ¶ 61,042, at P 52 (2010)).

from SPP's "Priority Projects" (the first round of projects approved under the Highway/Byway methodology); (2) net benefits of $1.6 billion over ten years from SPP's Balanced Portfolio projects; and (3) nearly $600 million in net benefits from other approved transmission facilities.[100] No party refuted this evidence of significant public benefit from SPP's existing transmission expansion efforts.

The Commission's total disregard for this evidence, coupled with its flawed analysis of the Membership Agreement and its eligibility for a *Mobile-Sierra* presumption, render the July 18 Order arbitrary and capricious.

B. The Commission Erred in Ordering SPP to Eliminate Existing Rights of First Refusal for Byway Facilities

The Commission's directive that SPP "revis[e] the definition of Competitive Upgrades to include Byway facilities"[101] is contrary to Commission precedent, inconsistent with other findings in the July 18 Order, and therefore is arbitrary and capricious. The Commission should grant rehearing to correct its errors.

1. The July 18 Order Fails to Reconcile the Commission's Directives with the Express Language of Order No. 1000 and Commission Precedent

In the Compliance Filing, SPP proposed to adopt a new category of transmission facilities, called "Competitive Upgrades," for which SPP would designate an entity to construct and own using SPP's proposed competitive Transmission Owner Selection Process.[102] As SPP explained, its definition of Competitive Upgrade was designed to reconcile the requirements of Order No. 1000 with Commission precedent governing the

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100 *Id.* at 46-49 and Exhibit No. SPP-1 (Monroe Testimony) at 23-26.

101 July 18 Order at P 153.

102 Compliance Filing at 71-73 and Proposed Tariff at Attachment Y § I.1.

designation of projects as "regional" or "local" in the SPP region.[103] In the July 18 Order, the Commission disclaimed any obligation to comply with its earlier precedent, stating that "the Highway/Byway order is not determinative of whether SPP has complied with [] Order No. 1000."[104] The Commission's cursory explanation of its departure from precedent is arbitrary, capricious, and contrary to reasoned decisionmaking.[105]

In Order No. 1000, the Commission directed all public utility transmission providers to remove from their Commission-jurisdictional tariffs and agreements provisions that grant an incumbent transmission provider a federal right of first refusal to construct "transmission facilities selected in a regional transmission plan for purposes of cost allocation."[106] Order No. 1000 expressly limited this requirement to "transmission facilities that have been selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for inclusion in a regional transmission plan for purposes of cost allocation because they are more efficient or cost-effective solutions to *regional transmission needs*."[107]

The Commission elaborated that transmission facilities selected in the regional transmission plan for purposes of cost allocation "often will not comprise all of the transmission facilities in the regional transmission plan; rather, such transmission facilities *may be a subset of the transmission facilities in the regional transmission*

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103 *Id.* at 57-61, 72.

104 July 18 Order at P 151.

105 *See Williams*, 475 F.3d at 326, 329; *Consolidated Edison*, 347 F.3d at 971.

106 Order No. 1000 at PP 253, 313; *accord id.* at P 7.

107 *Id.* at P 63 (emphasis added).

plan,"[108] and that regional plans may include other transmission facilities, "*such as a local transmission facility* or a merchant transmission facility."[109] The Commission further expounded, stating that, "[i]n distinguishing between transmission facilities selected in a regional transmission plan for purposes of cost allocation and other transmission facilities that also may be in the regional transmission plan, *we seek to recognize that different regions of the country may have different practices*," and that a project's inclusion in a regional transmission plan "*does not necessarily indicate an evaluation of whether such transmission facilities are more efficient or cost-effective solutions to a regional transmission need, as is the case for transmission facilities selected in a regional transmission plan for purposes of cost allocation.*"[110]

In accordance with this purported "recognition" of regional differences, SPP adopted a definition for "Competitive Upgrade" that embodied the distinction in Order No. 1000 between transmission facilities selected for purposes of cost allocation because they are more efficient and cost-effective solutions to regional transmission needs versus other transmission facilities that, while included in the regional plan, are designed to address local transmission issues. SPP based its definition on the Commission's own definition of "regional" and "local" transmission facilities in SPP, as articulated in the Commission's Highway/Byway Order. In that order, the Commission determined that SPP's Highway/Byway cost allocation methodology and project definitions properly distinguish between transmission facilities that provide *regional* benefits (i.e., "Highway"

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108 *Id.* (emphasis added).

109 *Id.* (emphasis added).

110 *Id.* at P 64 (emphasis added).

facilities – those operating at 300 kV and above) and facilities that provide primarily *local* benefits (*i.e.*, Byway and zonal facilities – those operating below 300 kV), and allocate costs on a roughly commensurate basis[111] consistent with judicial and Commission precedent.[112] The Commission expressly found that SPP had presented "significant evidence"[113] that EHV facilities "tend to support *regional* power flows among SPP zones" while lower voltage facilities (e.g., 115-138 kV and 69 kV) "tend to support *local* power flows within a single SPP zone"[114] and "are used more locally."[115] According to the Commission, the Highway/Byway classification of projects and associated cost allocation "reasonably . . . align the costs associated with transmission expansions with the usage of the system"[116] and "fairly assign[] costs among SPP members"[117] "by distinguishing between the types of facilities that are used on a regional

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111 Highway/Byway Order at P 78 ("Moreover, by distinguishing between the types of facilities that are used on a regional and zonal basis, the Highway/Byway Methodology will ensure that allocations of costs are roughly commensurate with associated benefits.").

112 *Id.* at P 66 (citing *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009)).

113 *Id.* at P 111 ("SPP has provided significant evidence that the voltage level of a proposed transmission facility is a reasonable indicator of whether it will support primarily regional power flows or serve local needs."); *see also id.* at P 116 ("SPP has provided significant quantitative and qualitative evidence that the voltage level of a proposed transmission facility is a reasonable indicator of whether it will support primarily regional power flows or serve local needs.").

114 *Id.* at P 73 (emphasis added).

115 *Id.* at P 78 ("EHV facilities that are used more regionally will be allocated on a regional basis, and lower voltage facilities that are used more locally will be allocated on a local basis.").

116 *Id.* at P 76.

117 *Id.*

and zonal basis."[118] In its order denying rehearing of SPP's Highway/Byway methodology, the Commission stated that "the voltage level of a proposed transmission facility is a reasonable indicator of whether it will support primarily *regional* power flows or serve *local* needs, and thus, provide benefits based on this usage."[119]

Given this strong and recent precedent, SPP defined Competitive Upgrades to include Highway projects, which are those upgrades that are selected by SPP to address regional needs and thus are selected in SPP's regional transmission plan for purposes of cost allocation "because they are more efficient or cost-effective solutions to *regional* transmission needs."[120] Byway facilities and zonal facilities, on the other hand, "tend to support *local* power flows within a single SPP zone"[121] and "are used more locally."[122] Thus, SPP excluded them from the definition of Competitive Upgrade.

In stark contrast to the Highway/Byway precedent, the Commission in the July 18 Order directed SPP to treat Byway projects as *regional*, mandating that SPP include them in the definition of Competitive Upgrades.[123] Rather than articulate any rationale to explain why its earlier findings in the Highway/Byway Order are no longer valid, the Commission summarily dismissed its earlier precedent, stating that the Highway/Byway

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118 *Id.* at P 78.

119 Highway/Byway Rehearing Order at P 48 (emphasis added).

120 Order No. 1000 at P 63 (emphasis added).

121 Highway/Byway Order at P 73 (emphasis added).

122 *Id.* at P 78.

123 July 18 Order at PP 150-53.

Order is "not determinative."[124] Furthermore, the Commission did not identify any changed circumstance in SPP to demonstrate why Byway facilities no longer exhibit the local characteristics that the Commission noted in the Highway/Byway Order. The Commission is bound by its precedent, and is obligated to provide a reasoned explanation for any departure from it. The Commission's failure to do so in the July 18 Order renders the order arbitrary and capricious.[125]

The Commission's passing reference in the July 18 Order to the "inter-zonal power flow changes" experienced by Byway facilities that it observed in the Highway/Byway Order[126] fails to rectify its error. The fact that a facility may experience a modest level of inter-zonal flow sufficient to justify the roughly commensurate allocation of a modest portion of the costs on a broader basis is not *per se* an indication that the facility was selected in the regional plan because it is a more efficient or cost-effective solutions to *regional* transmission needs.

Likewise, the language in Order No. 1000-A that states "*[i]n general*, any regional allocation of the cost of a new transmission facility outside a single transmission provider's retail distribution service territory or footprint . . . is an application of the

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124 *Id.* at P 151.

125 *See Williams*, 475 F.3d at 326, 330 (remanding decision that was inconsistent with prior findings and stating that "[r]easoned decisionmaking necessarily requires consideration of relevant precedent"); *Idaho Power*, 312 F.3d at 461-65 (rejecting and vacating Commission interpretation of tariff that is contrary to prior Commission orders); *see also PG&E Gas*, 315 F.3d at 388-90 (vacating and remanding Commission orders where the Commission "utterly failed to confront" and distinguish prior precedent, and the Commission's attempts to distinguish its precedents "were alternately nonexistent, misleading, and irrelevant").

126 July 18 Order at P 151 n.325.

regional cost allocation method and that new transmission facility is not a local transmission facility,"[127] does not negate the precedent established in the Highway/Byway Order. The Commission already has determined in the Highway/Byway Order that Highway facilities provide regional benefits, while zonal and Byway projects are local facilities that provide local benefits. That the Commission qualified its clarification in Order No. 1000-A by saying "in general" suggests that regional differences may be justifiable. As the Commission found in the Highway/Byway Order, Highway projects are facilities included in the regional plan because they are the more efficient or cost-effective solutions to regional transmission needs, while Byway projects meet local needs. Therefore, Byway projects are appropriately excluded from the definition of Competitive Upgrades, contrary to the July 18 Order.[128]

Moreover, as discussed above, Order No. 1000 limited its mandates to "transmission facilities that have been selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for inclusion in a regional transmission plan for purposes of cost allocation because they are more efficient or cost-effective solutions to regional transmission needs."[129] Order No. 1000-A purported not to disrupt, but to "clarify,"[130] the requirements of Order No. 1000. Thus,

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127 Order No. 1000-A at P 424 (emphasis added).

128 *See* cases cited *supra* note 125.

129 Order No. 1000 at P 63 (emphasis added).

130 Order No. 1000-A at P 3 ("The Commission therefore rejects requests to eliminate, or substantially modify, the various reforms adopted in Order No. 1000; however, we do make a number of clarifications.").

the Commission's clarification that, "in general, any regional allocation of the cost of a new transmission facility outside a single transmission provider's retail distribution service territory or footprint . . . is an application of the regional cost allocation method"[131] cannot be read to supersede the requirement that rights of first refusal be eliminated *only* for those projects that are approved by a regional planning process *because* they are more efficient or cost-effective solutions to regional needs. SPP's proposal to balance the Order No. 1000 mandates with the Highway/Byway precedent was entirely reasonable, the Commission's myopic focus on its Order No. 1000-A clarification to the exclusion of the limitations expressed in Order No. 1000 render the July 18 Order infirm.[132]

2. By Rejecting the Clear Preferences of the States in the SPP Region, the July 18 Order Conflicts with Order No. 1000 and Precedent and Is Internally Inconsistent

In Order No. 1000, the Commission "acknowledge[d] that there is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction."[133] The Commission also stated that Order No. 1000 is not intended "to limit, preempt, or otherwise affect state or local laws or regulations with respect to the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."[134] The Commission also purported to "acknowledge the vital

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131 *Id.* at P 424.

132 *See* cases cited *supra* note 125.

133 Order No. 1000 at P 107.

134 *See, e.g., id.* at P 227.

role that state agencies play in transmission planning and their authority to site transmission facilities."[135] However, in the July 18 Order, the Commission rejected the "unanimous and adamant" preferences of the states in the SPP region by mandating that SPP treat Byway facilities as Competitive Upgrades. The Commission's directive does not square with the sentiments expressed in Order No. 1000.

In the Compliance Filing, SPP submitted a letter from the SPP Regional State Committee ("RSC")[136] and letters from various state regulatory commissions[137] expressing unanimous state support for SPP's proposed definition of Competitive Upgrades and the exclusion of Byway facilities from the competitive Transmission Owner Selection Process. In the face of this uncontroverted evidence, the Commission nonetheless decided to disregard "the vital role that state agencies play" by mandating that SPP ignore the wishes of its state commissions and broaden the definition of Competitive Upgrades to include Byway facilities.

The Commission's directive also contravenes the Commission's own mandate to consider public policy in the planning process. In Order No. 1000, the Commission directed public utility transmission providers to develop detailed procedures for the consideration and evaluation of "transmission needs driven by Public Policy Requirements,"[138] which include local, state, and federal laws and regulations and may

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135 *Id.* at P 402.

136 Compliance Filing at Exhibit No. SPP-2.

137 *Id.* at Exhibit No. SPP-3.

138 Order No. 1000 at PP 6, 82, 203-24.

include policy goals as well as laws.[139] As the RSC and state commission letters make clear, the "unanimous and adamant" public policy in the SPP region is that Byway facilities should be excluded from the definition of Competitive Upgrades. Moreover, as discussed in more detail in Section III.D.1 below, at least two states in the SPP region have enacted legislation that would preserve a right of first refusal for Byway facilities. The Commission failure to reconcile its mandate to consider public policy in the transmission planning process with its directive to disregard the clear public policy governing which facilities are eligible for the competitive Transmission Owner Selection Process renders the July 18 Order arbitrary and capricious.[140]

The July 18 Order also ignores the unique Commission-approved role that the RSC plays in establishing transmission facility cost allocation in SPP. As SPP explained in its Compliance Filing and Answer, in the orders granting SPP's request for RTO status, the Commission expressly delegated to the RSC the responsibility to determine and approve cost allocation methodologies for the SPP region.[141] The Commission's

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139 *See, e.g.*, Order No. 1000 at P 216 n.193.

140 *Process Gas*, 177 F.3d at 1003-05 (remanding decision where the Commission's statements appear to be contradictory); *United Distribution*, 88 F.3d at 1188-89 (remanding aspects of a Commission order that were internally inconsistent); *see also Gen. Chem. Corp.*, 817 F.2d at 857 (finding that an agency decision lacked substantial evidence because it was internally inconsistent and inadequately explained).

141 Compliance Filing at 4, 6, 60-61; SPP Answer at 19-20; *see also* Southwest Power Pool, Inc., Bylaws, First Revised Volume No. 4 § 7.2; *Sw. Power Pool, Inc.*, 106 FERC ¶ 61,110, at PP 218-20, *order on reh'g*, 109 FERC ¶ 61,010 (2004).

disregard for its own precedent renders the July 18 Order arbitrary and capricious.[142] The Highway/Byway methodology was the result of intense negotiation and compromise, and, as SPP pointed out, the continued consensus support of the Highway/Byway by state regulatory commissions and SPP stakeholders is potentially in jeopardy if the Commission denies rehearing of its mandate to include Byway projects as Competitive Upgrades. Rehearing is warranted to ensure that the Commission does not contravene its earlier orders delegating cost allocation responsibilities to the RSC.[143]

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142 *Williams*, 475 F.3d at 326, 330 (remanding decision that was inconsistent with prior findings and stating that "[r]easoned decisionmaking necessarily requires consideration of relevant precedent"); *Consolidated Edison*, 347 F.3d at 971-73 (remanding decision as contrary to Commission policy and stating that the Commission must follow its general policy or explain the reason for its departure); *PG&E Gas*, 315 F.3d at 388-90 (vacating and remanding Commission orders where the Commission "utterly failed to confront" and distinguish prior precedent, and the Commission's attempts to distinguish its precedents "were alternately nonexistent, misleading, and irrelevant").

143 Several Commissioners appear to recognize the potential threat to the viability of the Highway/Byway methodology given the prescriptive treatment of Byway facilities in the July 18 Order. For example, in his partial dissent to the July 18 Order, Commissioner Moeller stated that "this order changes the highway/byway plan in a manner that will discourage the prompt planning and construction of needed transmission assets." July 18 Order at dissenting op. (Commissioner Moeller). Commissioner Clark observed in his partial dissent to the July 18 Order, "[P]rojects that are primarily built to resolve local reliability problems now face a potentially lengthy, litigious bidding process. Today's order places SPP's Byway facilities in this position, even though the Commission just recently found that lower voltage facilities – including Byway facilities – tend to support local power flows." *Id.* at dissenting op. (Commissioner Clark). Commissioner Clark concluded, "[w]hen viewed in light of other Commission Order No. 1000 compliance decisions, one can see a particularly perverse set of outcomes developing . . . . [T]he Commission is too rigidly enforcing its previous decisions, without fully appreciating the potential real-world consequences of its actions," which, Commission Clark predicted, "may be the undoing of certain regional cost allocation plans." *Id.* at dissenting op. (Commissioner Clark).

C. The Commission Erred in Ordering SPP to Include Service Upgrades in the Definition of Competitive Upgrades

In the July 18 Order, the Commission directed SPP to revise "the definition of Competitive Upgrades to include Service Upgrades whose costs are allocated regionally."[144] Despite acknowledging that SPP's Aggregate Study process "simultaneously *evaluate[s]* all the *transmission service requests* submitted during the open season" to identify Service Upgrades,[145] the Commission stated that "in order for the Commission to find that the removal of federal rights of first refusal applies to Service Upgrades, we must determine that Service Upgrades: (1) are selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for inclusion in a regional plan; (2) are selected in the plan for purposes of cost allocation; and (3) are selected in the plan because they are the more efficient and cost-effective transmission solutions to regional transmission needs."[146] Using these criteria, the Commission found that Service Upgrades eligible for Highway/Byway funding are "subject to the requirement of Order No. 1000 to eliminate federal rights of first refusal."[147] It therefore required SPP to revise "the definition of Competitive Upgrades to include Service Upgrades whose costs are allocated regionally."[148]

The Commission's findings – that (i) the Aggregate Study process is a Commission-approved regional transmission planning process, (ii) Service Upgrades are

144 *Id.* at P 205.

145 *Id.* at P 200 (emphasis added).

146 *Id.* at P 201.

147 *Id.* at P 203.

148 *Id.* at P 205.

included in SPP's regional plan as the more efficient or cost-effective solution to regional transmission needs, and (iii) Service Upgrades are included in SPP's regional plan for the purposes of cost allocation[149] – are flawed, inconsistent with Order No. 1000, and do not support the directive that SPP include Service Upgrades that receive Highway/Byway funding in the definition of Competitive Upgrades. As such, these findings constitute arbitrary and capricious decisionmaking, and the Commission should grant rehearing to correct its error. [150] Moreover, the Commission's directive will place additional burdens on the already over-stressed Aggregate Study process and impose additional costs, to the detriment of transmission customers and stakeholders.

1. Service Upgrades Are Not Selected Pursuant to a Commission-Approved Regional Planning Process

In Order No. 1000, the Commission described the required elements of a regional transmission planning process. It required "that each public utility transmission provider participate in a regional transmission planning process that produces a regional transmission plan and *that complies with the transmission planning principles of Order*

149 *See id.* at P 202.

150 *See Williams*, 475 F.3d at 326, 330 (remanding decision that was inconsistent with prior findings and stating that "[r]easoned decisionmaking necessarily requires consideration of relevant precedent"); *PPL Wallingford*, 419 F.3d at 1198 ("To survive review under the arbitrary and capricious standard, an agency must examine the relevant data and articulate a rational connection between the facts found and the choice made.") (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43) (internal quotations omitted); *E. Tex. Elec. Coop.*, 218 F.3d at 755 (remanding a Commission decision on the basis that "the Commission failed to offer anything from which the court can 'discern a reasoned path . . . to the decision [the Commission] reached.'") (quoting *K N Energy*, 968 F.2d at 1303-04); *Sithe/Independence*, 165 F.3d at 948 (indicating that, to survive judicial scrutiny, the Commission must be able to demonstrate that it made a reasoned decision based on substantial evidence and its path of reasoning must be clear) (citations omitted).

No. 890."[151] It further explained that "[c]onsistent with the economic planning requirements of Order No. 890, regional transmission planning processes also must respond to requests by stakeholders to perform studies that evaluate potential upgrades or other investments that could reduce congestion or integrate new resources or loads on an aggregated or regional basis."[152] The Commission also described that through the regional transmission planning process:

> [P]ublic utility transmission providers will be required to evaluate, in consultation with stakeholders, alternative transmission solutions that might meet the needs of the transmission planning region more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning process. This could include transmission facilities needed to meet reliability requirements, address economic considerations, and/or meet transmission needs driven by Public Policy Requirements. . . . When evaluating the merits of such alternative transmission solutions, public utility transmission providers in the transmission planning region also must consider proposed non-transmission alternatives on a comparable basis.[153]

Contrary to the Commission's pronouncement in the July 18 Order that the Aggregate Study process is a Commission-approved regional transmission planning process,[154] the Aggregate Study does not fit any of these criteria. Therefore, it does not qualify as a regional transmission planning process. First, in SPP's Order No. 890 compliance proceeding, SPP submitted revisions to Attachment O (Transmission

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151 Order No. 1000 at P 146 (emphasis added); *see also id.* at P 148 ("We address these deficiencies in the requirements of Order No. 890 through this Final Rule, beginning with the requirement that public utility transmission providers participate in a regional transmission planning process that produces a regional transmission plan.").

152 *Id.* at P 147.

153 *Id.* at P 148.

154 *See* July 18 Order at P 202.

Planning Process) not the Aggregate Study process for compliance with all nine Order No. 890 principles.[155] Similarly, in the Compliance Filing, SPP did not hold out the Aggregate Study process for the Commission's review as part of its compliance with the Order Nos. 890 and 1000 principles and requirements. In the July 18 Order, the Commission also did not include the Aggregate Study process in its evaluation of whether SPP's regional transmission planning process satisfies the nine Order No. 890 principles or indicate that the Aggregate Study process is a part of SPP's Order No. 1000-compliant regional transmission planning process.[156] Simply put, the Commission has made no findings that the Aggregate Study process meets the nine Order No. 890 principles, which is a prerequisite to being a Commission-approved regional planning process.[157] Moreover, the Commission's pronouncement elsewhere in the July 18 Order, made without any further analysis, that the Aggregate Study process is a Commission-approved *regional* transmission planning process[158] is unsupported and produces an internal inconsistency in the order that demonstrates arbitrary and capricious decisionmaking.[159]

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155 *See Sw. Power Pool, Inc.*, 124 FERC ¶ 61,028, at P 10 ("We find that SPP's *Attachment O transmission planning process*, with certain modifications, complies with each of the nine planning principles and other planning requirements adopted in Order No. 890.") (emphasis added).

156 *See, e.g.*, July 18 Order at PP 46, 56.

157 Order No. 1000 at P 68 ("[T]his Final Rule requires each public utility transmission provider to participate in a regional transmission planning process that produces a regional transmission plan *and complies with existing Order No. 890 transmission planning principles*.") (emphasis added).

158 July 18 Order at P 202.

159 *Process Gas*, 177 F.3d at 1003-05 (remanding decision where the Commission's statements appear to be contradictory); *United Distribution*, 88 F,3d at 1188-89 (continued . . .)

Second, the purpose of the Aggregate Study process is to provide a mechanism for SPP to evaluate *individual requests for transmission service* on an aggregated basis, not to provide procedures for developing a plan for addressing transmission system needs on a broader regional basis (as is required for regional transmission planning). In the Aggregate Study process, SPP combines all individual long-term point-to-point and long-term designated network resource transmission service requests received during a sequential four-month open season into a single group to be evaluated in an aggregate study.[160] SPP then studies the transmission service requests in the group to determine the optimal set of transmission system modifications required to provide the requested service. This process was developed to permit SPP to study multiple requests in a single study, thereby promoting the efficient expansion of the transmission system to accommodate *the individual transmission service requests received during the open season at the minimum total costs.*[161] As a result, the Aggregate Study process ensures the optimal expansion of the transmission system necessary to grant such requests in a manner that is more economical for transmission customers than processing requests sequentially on an individual basis.[162]

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(remanding aspects of a Commission order that were internally inconsistent); *see also Gen. Chem. Corp.*, 817 F.2d at 857 (finding that an agency decision lacked substantial evidence because it was internally inconsistent and inadequately explained).

160 *Sw. Power Pool, Inc.*, 110 FERC ¶ 61,028, at P 3.

161 *Id.*

162 The Aggregate Study process is akin to SPP's Generator Interconnection Procedures pursuant to which SPP studies generator interconnection requests in clusters to identify upgrades necessary to accommodate the individual (continued . . .)

Unlike the studies associated with the ITP process in Attachment O of the SPP Tariff, the Aggregate Study process does not determine solutions to anticipate and address broader regional needs, consider transmission needs driven by public policy requirements, or alleviate congestion. Nor do the studies evaluate non-transmission alternatives. In short, SPP's Aggregate Study process lacks the essential elements to be considered a regional transmission planning process as outlined in Order No. 1000, and the Commission's holding to the contrary in the July 18 Order is arbitrary and capricious.[163]

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interconnection requests on an aggregated basis. The Commission has held such processes are outside the scope of Order No. 1000. *See* Order No. 1000 at P 760. The same should be true for the Aggregate Study process. In Order No. 1000, the Commission found that "regional cost allocation requirements were not intended to modify existing *pro forma* OATT transmission service mechanisms for individual transmission service requests." July 18 Order at P 204. In the July 18 Order, the Commission indicated that this ruling "should not be read broadly to mean that the requirement to eliminate a federal right of first refusal does not apply to a Service Upgrade, regardless of how the upgrade is identified and selected or how the cost of the upgrade is allocated." July 18 Order at P 204. Even with this seemingly more narrow reading of the ruling, Order No. 1000 requirements should not apply to Service Upgrades as they are not selected pursuant to a Commission-approved regional planning process, are not identified to meet regional needs, and are not included in a regional transmission plan for the purposes of cost allocation.

163 July 18 Order at P 202 ("Service Upgrades *are* selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for selection in a regional transmission plan."); *see also E. Tex. Elec. Coop.*, 218 F.3d at 755 (remanding a Commission decision on the basis that "the Commission failed to offer anything from which the court can 'discern a reasoned path . . . to the decision [the Commission] reached.'") (quoting *K N Energy*, 968 F.2d at 1303-04); *Sithe/Independence*, 165 F.3d at 948 (indicating that, to survive judicial scrutiny, the Commission must be able to demonstrate that it made a reasoned decision based on substantial evidence and its path of reasoning must be clear) (citations omitted).

2. Service Upgrades Are Not Included in SPP's Regional Plan as More Efficient or Cost-Effective Solutions to Regional Transmission Needs or for Purposes of Cost Allocation

As discussed above, in Order No. 1000, the Commission made a distinction between a transmission facility in a regional transmission plan and a transmission facility selected in a regional transmission plan for purposes of cost allocation. The Commission defined "transmission facilities selected in a regional transmission plan for purposes of cost allocation" as "transmission facilities that have been selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for inclusion in a regional transmission plan for purposes of cost allocation because they are more efficient or cost-effective solutions to regional transmission needs.[164] The Commission further explained that:

> In some regions, transmission facilities not selected for purposes of regional or interregional of cost allocation nonetheless may be in a regional transmission plan for informational purposes, and the presence of such transmission projects in the regional transmission plan does not necessarily indicate an evaluation of whether such transmission facilities are more efficient or cost-effective solutions to a regional transmission need, as is the case for transmission facilities selected in a regional transmission plan for purposes of cost allocation.[165]

As described above, SPP's Aggregate Study process does not determine more efficient or cost cost-effective solutions to *regional* transmission needs. Rather the Aggregate Study process is used to identify Service Upgrades that are necessary to accommodate a specific group of individual transmission service requests. As the Commission noted, Attachment Z1 of the SPP Tariff provides that, "'[u]sing this

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164 Order No. 1000 at P 63.

165 *Id.* at P 64.

Aggregate Transmission Service Study process, the Transmission Provider will combine all requests received during an open season to develop a *more efficient* expansion of the transmission system that provides the necessary [available transfer capability] to accommodate all such requests at the *minimum total cost.*'"[166] The Commission's apparent reliance on this statement to support its conclusion that Service Upgrades resulting from an Aggregate Study are "more efficient or cost-effective solutions to *regional transmission needs*, is misplaced."[167] The statement simply articulates that the Aggregate Study process will identify the Service Upgrades necessary to facilitate a certain group of transmission service requests (not address broader regional needs) in a more efficient and economical manner than would be possible if the requests were evaluated individually, not that they will meet regional needs. Because Service Upgrades are not identified to address broad regional transmission needs, they are not included in the SPP regional transmission plan for the purposes of cost allocation, as the Commission erroneously found.[168] As permitted by Order No. 1000,[169] they merely are included in the SPP regional transmission plan for informational purposes to ensure that the models and base cases that SPP uses to conduct its regional transmission planning are accurate.[170]

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166 July 18 Order at P 202 (quoting Tariff at Attachment Z1 § I).

167 *Id.* (emphasis added).

168 *Id.*

169 Order No. 1000 at P 64.

170 The SPP Transmission Expansion Plan ("STEP") is a comprehensive listing of upgrades identified in various SPP study processes. A project's listing in the STEP is not determinative of whether it is "selected in the regional plan for purposes of cost allocation." For example, generation interconnection upgrades, Sponsored Upgrades, and Service Upgrades are listed in the STEP, as are local Base Plan Upgrades that do not receive Highway/Byway cost allocation. (continued . . .)

Accordingly, the Commission's holdings that Service Upgrades are identified in the STEP as the more efficient and cost-effective solution to regional transmission needs and thus are included in the plan for purposes of cost allocation are contrary to Order No. 1000, arbitrary and capricious, and should be corrected on rehearing.

3. There Are Significant Practical Ramifications to Applying an Order No. 1000-Style Competitive Process to the Aggregate Study

a. <u>The Addition of a Competitive Process Will Exacerbate the Current Delay in Granting Transmission Service Due to the Backlog in the Aggregate Study Process</u>

The requirement to include Service Upgrades that receive Highway/Byway funding in the definition of Competitive Upgrades will require SPP to apply a competitive process to select entities to construct facilities that are identified in the Aggregate Study process. In addition to being inconsistent with Order No. 1000's definitions of regional planning process and transmission facilities selected for purposes of cost allocation (as discussed above), applying a competitive selection mechanism to the Aggregate Study would cause significant practical impacts on a process that is already over-burdened.

SPP and customers seeking new transmission service already are experiencing a substantial backlog in the Aggregate Study process. Currently, there are six active

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Generation interconnection upgrades, Service Upgrades, and Sponsored Upgrades do not result from the ITP planning process and SPP's evaluation of near-term and long-term regional transmission system needs. Rather, the need for generation interconnection upgrades, Service Upgrades, and Sponsored Upgrades result from the execution of service or sponsorship agreements with individual entities. In this manner, these projects are simply listed in the STEP for informational purposes, which is reflected in the fact that these projects are "endorsed" by the Board of Directors for inclusion, rather than "approved" by the Board of Directors as part of the regional ITP planning process.

studies, and 225 outstanding requests, with a total of 34 GW of transmission service in the Aggregate Study queue. The oldest request is from October 1, 2011. Given the iterative nature of the Aggregate Study process, the need to perform re-studies when customers change or withdraw their requests, and the fact that each Aggregate Study affects the studies of each subsequent group of service requests, stakeholders have expressed concern that the Aggregate Study process takes too long and that the delays are untenable. Requiring SPP to incorporate a competitive process into the Aggregate Study process only will exacerbate this backlog, by further inhibiting SPP's ability to grant service requests in a timely manner. Based on the timelines set forth in SPP's competitive Transmission Owner Selection Process, a competitive component would add approximately six months or more to the process of identifying and developing transmission facilities necessary to grant transmission service,[171] resulting in longer deferrals of transmission service and increased need for costly redispatch to provide service.

Additionally, SPP has been working with its stakeholders for several years to revamp the Aggregate Study process to clear the backlog. On August 15, 2013, SPP submitted for Commission review in Docket No. ER13-2164-000 proposed interim procedures for addressing the backlog.[172] The interim procedures are designed to

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171 As set forth in the Compliance Filing, SPP's Transmission Owner Selection Process requires a 90-day window for submission of request for proposal ("RFPs") proposals, plus an additional 60-90 days for the Industry Expert Panel ("IEP") to evaluate RFP proposals and make a recommendation to SPP. *See* Compliance Filing, Proposed Tariff at Attachment Y § III.2.d (setting forth the RFP process and timeline).

172 *See supra* 25.

streamline the study process, thus making it more efficient. If a competitive process has to be added, the efficiencies gained by the interim procedures will fail to realize their promise of decreasing the amount of time a customer must wait for transmission service, as additional time will be tacked onto the end of the Aggregate Study process to solicit and identify entities to construct the Service Upgrades identified by the study.

SPP and its stakeholders also are in the midst of a years-long process to develop a long-term solution to the Aggregate Study process designed to avoid backlogs in the future. Currently, this revised process does not contemplate inclusion of a competitive process to identify entities to construct Service Upgrades. Therefore, rather than being able to finalize a long-term Aggregate Study reform proposal in the coming months as planned, SPP and its stakeholders may need to "go back to the drawing board" and re-consider the revised Aggregate Study process in light of the Commission's directives. This re-consideration could take several months or longer. Moreover, as discussed above, even under the long-term Aggregate Study reform proposal currently under consideration, a competitive process would add at least six months to the process of identifying and developing Service Upgrades to accommodate transmission service requests in the Aggregate Study process, which would diminish the efficiency of the revised process and make it less effective. Furthermore, as discussed in more detail below, incorporating a competitive component into the Aggregate Study process would increase the cost of the process, which transmission customers or other stakeholders would have to bear.

Finally, to the extent that the Commission upholds its other directives in the July 18 Order, the delays in processing service requests and granting service could increase exponentially. For example, as discussed in more detail in Section III.D below, the

Commission's order to eliminate language reflecting state and local laws governing the selection of transmission developers will force SPP to engage in a competitive selection process even where relevant law dictates that the incumbent transmission owner possesses the unilateral right to build and own a project. If this situation is applied to the Aggregate Study process, the delay in granting requested service could expand significantly, as SPP will be required to conduct a competitive process, select a Designated Transmission Owner (who may not be the incumbent transmission owner), and await the resolution of a lengthy and costly dispute between the entity selected by SPP and the incumbent, before SPP is able to implement the transmission facilities needed to provide service to the transmission customers in an Aggregate Study group. Forcing a competitive process on an already-backlogged Aggregate Study process is anathema to the notion of "more efficient and cost-effective" transmission development, and the Commission should grant rehearing to rectify its error.

b. The Commission's Mandate Will Increase the Costs and Decrease the Accuracy of the Aggregate Study Process

Under SPP's current Aggregate Study process, SPP relies upon transmission owner cost estimates for Service Upgrades. SPP depends on estimates from transmission owners because they have the best information regarding their systems; therefore, they are able to provide the most accurate and reliable estimates regarding Service Upgrades. Moreover, given that they have the information and personnel to develop such estimates, relying on the transmission owners is more cost-effective than SPP replicating that experience and information internally. However, if the Commission's mandate stands, SPP will no longer be able to depend on transmission owners to provide cost estimates, because transmission owners would be competing with other potential bidders to

construct Service Upgrades. As a result, SPP anticipates that it would need to hire additional expertise (e.g., consultants) to develop the cost estimates, which not only would add more time and complexity to the process, but also would be more costly for transmission customers and stakeholders.[173] Moreover, as the transmission owners have the best knowledge regarding their systems, third-party cost estimates will be inherently less accurate. The Commission's directive, therefore, is contrary to the concept of promoting more efficient and cost-effective transmission development.

D. The Commission's Mandate That SPP Remove Language That References Relevant Law Is Arbitrary and Capricious

In Order No. 1000, the Commission expressed its goal of promoting "more efficient or cost-effective" transmission planning and development[174] and stated that nothing in Order No. 1000 "is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."[175] The Commission also stated that its Order No. 1000 reforms were not intended to alter an

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173 Similarly, in the Transmission Owner Selection Process, SPP will use IEPs to evaluate proposals and make recommendations regarding the entities that will construct upgrades. Using IEPs in the Aggregate Study Process would result in additional costs that stakeholders and customers would have bear. The costs would increase as the number of requests and Service Upgrades subject to the competitive process increases. The more proposals for Service Upgrades the IEPs have to evaluate, the more experts that SPP would have to engage for this purpose and the more costs that would have to be incurred.

174 *See, e.g.*, Order No. 1000 at P 11 (stating that the "core" of the Order No. 1000 reforms is the development of processes that will result in a regional transmission plan that "will identify transmission facilities that *more efficiently or cost-effectively* meet the region's reliability, economic, and Public Policy Requirements") (emphasis added).

175 *See, e.g., id.* at P 227.

incumbent transmission provider's use and control of an existing right of way.[176] In the July 18 Order, the Commission violated both of these premises by rejecting language in SPP's Compliance Filing that referenced relevant laws governing the construction and ownership of transmission facilities and ensured that SPP's competitive Transmission Owner Selection Process would not alter an incumbent transmission owner's use and control of its existing right of way. By contravening the language of Order No. 1000 and contradicting language within the July 18 Order itself, the Commission's action is arbitrary and capricious and contrary to law, and the Commission should grant rehearing to correct these errors.

1. The Commission Erred By Requiring SPP to Engage in a Competitive Transmission Owner Selection Process When State Law Mandates Which Entities Will Construct Transmission Facilities Within the State

In Order No. 1000, the Commission stressed that its focus was on encouraging more efficient and cost-effective transmission development.[177] However, by rejecting proposed language that simply stated that SPP would not employ its Transmission Owner Selection Process when doing so would violate relevant law or where it would infringe on an incumbent transmission owner's use and control of rights of way where facilities currently exist, the July 18 Order will result in *more* expensive and *less* efficient

176 *Id.* at PP 226, 319.

177 *See, e.g.*, *id.* at P 11 (stating that the "core" of the Order No. 1000 reforms is the development of processes that will result in a regional transmission plan that "will identify transmission facilities that *more efficiently or cost-effectively* meet the region's reliability, economic, and Public Policy Requirements") (emphasis added); *id.* at PP 63-64 (discussing Order No. 1000's focus on transmission facilities that are selected in a regional transmission planning process as a more efficient or cost-effective solution to regional needs).

transmission planning and expansion, contrary to the goals of Order No. 1000. The regime that the July 18 Order would put in place could hardly achieve the objective that the Commission claimed to encourage when issuing Order No. 1000, because SPP would be forced to engage in a costly and unnecessary competitive solicitation process to identify the entity to build a project identified in the regional plan for purposes of cost allocation when state law has already predetermined which entity is legally authorized to build the project. The Commission should remedy this error on rehearing.

The Commission's oft-repeated goal in Order No. 1000 was the promotion of "more efficient or cost-effective" transmission planning and development, which the Commission posited would be furthered by eliminating federal rights of first refusal.[178] For example, the Commission stated that the "core" of its Order No. 1000 reforms is the development of processes that will result in a regional transmission plan that "will identify transmission facilities that *more efficiently or cost-effectively* meet the region's reliability, economic, and Public Policy Requirements."[179] The Commission also espoused a "primary objective[]" of "ensur[ing] that transmission planning processes at

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178 *See, e.g.*, *id.* at PP 68 ("These reforms work together to ensure that public utility transmission providers in every transmission planning region, in consultation with stakeholders, evaluate proposed alternative solutions at the regional level that may resolve the region's needs more efficiently or cost-effectively than solutions identified in the local transmission plans of individual public utility transmission providers. This, in turn, will provide assurance that rates for transmission service on these systems will *reflect more efficient or cost-effective solutions* for the region.") (emphasis added) (footnote omitted), 226 ("We conclude these reforms are necessary in order to eliminate practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective alternatives to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable, or otherwise result in undue discrimination by public utility transmission providers.").

179 *Id.* at P 11 (emphasis added).

the regional level consider and evaluate, on a non-discriminatory basis, possible transmission alternatives and produce a transmission plan that can meet transmission needs *more efficiently and cost effectively.*"[180]

The July 18 Order thwarts SPP's ability to engage in more efficient and cost-effective transmission planning and development by requiring SPP to conduct its competitive Transmission Owner Selection Process even for transmission projects that are located in states that have laws dictating which entities are eligible to construct transmission facilities within the state and for transmission projects that are located along existing, state-granted rights of way. Mandating that SPP ignore controlling state law and undertake a timely and costly selection process, which may result in the selection of a transmission developer that can never obtain the legal right to construct the transmission facility, will result in inefficient and less cost-effective transmission development, causing higher rates for SPP ratepayers (including those in states with no right of first refusal law) and potential delays in the construction of needed facilities, with no benefit.

Specifically, the Commission directed[181] SPP to remove from Section I.1(d) of Attachment Y of the SPP Tariff language indicating that SPP will utilize its competitive Transmission Owner Selection Process for transmission facilities located where the use of the Transmission Owner Selection Process "does not violate relevant law where the transmission facility is to be built."[182] The Commission characterized this seemingly benign acknowledgement that SPP would not deliberately violate relevant law as

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180 *Id.* at P 4 (emphasis added).

181 July 18 Order at P 178.

182 Compliance Filing, Proposed Tariff at Attachment Y § I.1(d).

"referenc[ing] relevant law and then us[ing] that reference to create a federal right of first refusal."[183] Similarly, the Commission directed SPP to strike from its Tariff language that would ensure that SPP's competitive Transmission Owner Selection Process would not be used where doing so would interfere with an incumbent transmission owner's use and control of its rights of way.[184]

Setting aside the fact that the offending language merely reflects a truism that SPP is not authorized to violate state and local laws or trample state-granted rights of way, the Commission's directive that SPP remove this language from its Tariff does not square with the Commission's purported goal of promoting more efficient or cost-effective transmission. In situations where a state has adopted a right of first refusal law or has granted an exclusive right of way to an incumbent transmission owner, SPP's proposed language would have honored that state law and prohibited SPP from using its more time-consuming and costly Transmission Owner Selection Process to designate an entity to construct a project, when the entity to construct the upgrade is dictated by relevant law. On the other hand, the Commission's directive would require SPP to issue an RFP for such a project, encourage the incumbent transmission owner and interested non-incumbent transmission developers to expend the resources and effort to prepare proposals in response to the RFP, and then require SPP to engage its selection process, including the hiring of an IEP to evaluate the responses to RFPs and recommend a winning bidder, all the time knowing that any developer other than the incumbent

183 July 18 Order at P 178.

184 *Id.* at P 170 (stating that Order No. 1000 did not permit public utility transmission providers to "add a federal right of first refusal for a new transmission facility built on an existing right-of-way").

transmission owner will not be legally permitted to construct the transmission project once selected. This type of wasteful activity belies any notion of efficiency and cost-effectiveness, as the resources and time of both SPP and bidding entities will be squandered on a pointless search for a developer that will never be permitted to develop the facility for which it was selected. The Commission's decision lacks any sense of reasoned decisionmaking, and its unexplained departure from the focus in Order No. 1000 on efficiency and cost-effectiveness renders the July 18 Order arbitrary and capricious.[185]

Moreover, the July 18 Order places the SPP transmission planning process on a collision course between state and federal laws, which will further frustrate efficient and cost-effective transmission expansion in the SPP region. By forcing SPP to revise Sections I.1(c) and (d) of Attachment Y to remove references to relevant law and rights of way, the July 18 Order promises to unravel the cooperative and open transmission planning process that currently exists in SPP. Without these exceptions to the Transmission Owner Selection Process, whenever SPP's Transmission Owner Selection Process results in the selection of a developer other than the incumbent transmission owner and the project is located in a state with a right of first refusal law or on the incumbent transmission owner's rights of way, the nonincumbent developer and the incumbent transmission owner will have competing federal and state law claims to the right to construct the project, resulting in expensive and possibly duplicative litigation in

185 *See Williams*, 475 F.3d at 327 (rejecting change in jurisdictional treatment of pipeline facilities when Commission's "rationale could hardly be more inconsistent with precedent" and where rationale was not supported by a reasoned analysis in the orders themselves).

multiple forums. The Commission's action will eviscerate the current cooperative, efficient, and cost-effective transmission planning process in SPP, and replace it with an adversarial process that will inherently result in delay and additional expense.

Importantly, SPP is aware of at least two states in the SPP region that have enacted laws restricting eligibility to construct transmission facilities in the state. As demonstrated in Attachment I to this request for rehearing, the Nebraska Power Review Board ("NPRB") has informed SPP that the state of Nebraska has enacted a statutory right of first refusal for incumbent transmission owners in the state for transmission facilities with voltage levels of 100 kV or greater.[186] According to the NPRB letter, the Nebraska Legislature enacted during its 2013 session Legislative Bill 388,[187] which "expressly codif[ies] a right of first refusal for incumbent electric utilities when a regional transmission organization orders a Notice to Construct transmission facilities in the State of Nebraska."[188] Likewise, the state of Oklahoma enacted a law in 2013 that grants incumbent transmission owners in the state a right of first refusal for any "local electric transmission facility," which the act defines as "a high-voltage transmission line or high-voltage associated transmission facilities with a rating of greater than sixty-nine (69) kilovolts and less than three hundred (300) kilovolts."[189] The July 18 Order would require SPP to disregard these state statutes and conduct a wasteful and fruitless

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186 Attachment I at 1. Accordingly, this right of first refusal law would apply to any Highway or Byway facility.

187 L.B. 388, 103rd Leg., First Reg. Sess. (Neb. 2013), 2013 Neb. ALS 388.

188 Attachment I at 2.

189 H.B. 1932, 2013 Leg., 54th Sess. (Okla. 2013) at § 1.3, 2013 OK. ALS 355 at *1.

competitive process to select a builder that may be barred by state law from constructing the assigned facility.

Nowhere in the July 18 Order did the Commission demonstrate how exactly its mandate to remove language that merely references state and local authority over construction, siting, and permitting of transmission facilities will lead to more efficient and cost-effective transmission development. Likewise, the July 18 Order fails to reconcile the Commission's requirement that SPP remove language that would ensure that SPP will not interfere with existing rights of way with the goal of more efficient and cost-effective transmission planning. The Commission offered no justification as to why requiring SPP to conduct a pointless RFP process for a transmission facility in a state with a right of first refusal law (such as Nebraska or Oklahoma) or where an incumbent has obtained an exclusive right of way will translate into just and reasonable rates to SPP's customers. The record is devoid of any evidence that forcing SPP to entertain RFP responses from nonincumbent transmission developers when the identity of the developer is a foregone conclusion under state law will promote efficient and cost-effective transmission planning and development. For all of these reasons, the July 18 Order lacks reasoned decisionmaking based on substantial evidence, and the Commission should grant rehearing to correct this error.[190]

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[190] *Keyspan*, 474 F.3d at 812 (remanding decision when FERC failed to provide a reasoned path to the decision reached); *E. Tex. Elec. Coop.*, 218 F.3d at 755 (remanding a Commission decision on the basis that "the Commission failed to offer anything from which the court can 'discern a reasoned path . . . to the decision [the Commission] reached'") (quoting *K N Energy*, 968 F.2d at 1303-04); *Sithe/Independence*, 165 F.3d at 948 (indicating that, to survive judicial scrutiny, the Commission must be able to demonstrate that it made a reasoned decision based on substantial evidence and its path of reasoning must be clear) (citations omitted); *Gen. Chem. Corp.*, 817 F.2d at 857 (finding that an agency (continued . . .)

2. The July 18 Order Contravenes Order No. 1000 by Requiring SPP to Ignore State Authority

Throughout Order No. 1000, the Commission stated that the order does not intend to preempt, limit, or infringe on state jurisdiction over matters such as siting, permitting, and construction of transmission facilities.[191] In the July 18 Order, the Commission required SPP to do expressly that – ignore state law that dictates who may build transmission facilities and assign projects based on SPP's criteria. This arbitrary and capricious result must be reversed on rehearing.

In Order No. 1000, the Commission "acknowledge[d] that there is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction," but claimed that "nothing in [Order No. 1000] involves an exercise of siting, permitting, and construction authority."[192] In its July 18 Order, however, the Commission required SPP to remove from its Tariff language that acknowledges the authority of states regarding matters relating to siting, permitting, and construction of transmission facilities, making the Commission's statements in Order No. 1000 illusory within the SPP region. This contradiction between the Commission's actions and its words cannot possibly qualify as reasoned decisionmaking.[193]

(. . . continued)
decision lacked substantial evidence because it was internally inconsistent and inadequately explained).

191 *See, e.g.*, Order No. 1000 at PP 107, 227, 253 n.231, 287.

192 *Id.* at P 107.

193 *See Williams*, 475 F.3d at 327 (rejecting change in jurisdictional treatment of pipeline facilities when Commission's "rationale could hardly be more inconsistent with precedent" and where rationale was not supported by a reasoned
(continued . . .)

In Order No. 1000, the Commission also observed that "we see no reason why this Final Rule should create conflicts between state and federal requirements."[194] However, as demonstrated above, the July 18 Order does precisely that – it creates an environment in which parties will have conflicting claims to a state right and federal right to construct SPP-approved projects, which will result in litigation in possibly multiple jurisdictions. The Commission's actions in the July 18 Order conflict with its findings in Order No. 1000, representing an unexplained departure from Commission precedent.[195]

Additionally, the Commission's decision to force SPP to disregard relevant laws governing eligibility to construct transmission projects under state or local right of first refusal laws and rights of way is inconsistent with its directive that the same planning process consider state and local public policy requirements, which are "requirements established by local, state or federal laws or regulations (i.e., enacted statutes passed by the legislature and signed by the executive and regulations promulgated by a relevant

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(. . . continued)

analysis in the orders themselves); *see also Process Gas*, 177 F.3d at 1003-05 (remanding decision where the Commission's statements appear to be contradictory).

194 Order No. 1000 at P 107.

195 *See Williams*, 475 F.3d at 326, 330 (remanding decision that was inconsistent with prior findings and stating that "[r]easoned decisionmaking necessarily requires consideration of relevant precedent"); *Consolidated Edison*, 347 F.3d at 971-73 (remanding decision as contrary to Commission policy and stating that the Commission must follow its general policy or explain the reason for its departure); *Idaho Power*, 312 F.3d at 461-65 (rejecting and vacating Commission interpretation of tariff that is contrary to prior Commission orders); *see also PG&E Gas*, 315 F.3d at 388-90 (vacating and remanding Commission orders where the Commission "utterly failed to confront" and distinguish prior precedent, and the Commission's attempts to distinguish its precedents "were alternately nonexistent, misleading, and irrelevant").

jurisdiction, whether within a state or at the federal level)."[196] Public utility transmission providers are obligated to identify and consider public policy requirements in their local and regional planning,[197] and to provide significant transparency regarding their consideration of these public policy requirements.[198] Moreover, despite the fact that SPP currently considers public policy in its ITP process, the Commission directed SPP to revise its Tariff to provide even greater detail regarding its process for considering public policy.[199] However, although the Commission required close consideration of these state and local laws in this area, it has at the same time forbidden consideration of laws from the same state and local governments in the area of transmission developer identification, even though these state and local laws may ultimately determine which entity may develop a project. Requiring SPP to consider compliance obligations under state and local laws in one area of transmission planning (transmission needs driven by public policy requirements) but effectively forbidding the practical consideration of state and local laws in another area of the same process (transmission developer identification) represents the type of internally inconsistent reasoning that courts have determined to be arbitrary and capricious under the Administrative Procedure Act.[200]

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196 July 18 Order at P 59 (citing Order No. 1000 at P 2; Order No. 1000-A at P 319).

197 Order No. 1000 at PP 206, 207; Order No. 1000-A at PP 204, 206, 208-11, 317-19.

198 *Id.* at P 209.

199 July 18 Order at PP 75-76.

200 *Gen. Chem. Corp.*, 817 F.2d at 857 (concluding that an agency order was arbitrary and capricious because it was based on internally inconsistent reasoning); *see also Business Roundtable*, 647 F.3d at 1153.

The fact that "[t]he Commission has also identified other points at which such consideration might be appropriate"[201] does not rescue the July 18 Order from its internally inconsistent reasoning and conflict with Order No. 1000. First, the July 18 Order suggests that an appropriate time to consider the impact of state right of first refusal laws and rights of way may be during the evaluation of RFP proposals in the Transmission Owner Selection Process.[202] However, waiting until the evaluation stage to consider the impact of state laws and rights of way requires SPP to expend time and resources to engage in a wasteful competitive process when the identification of the developer is a foregone conclusion under state law, which stands the concept of more efficient and cost-effective transmission development on its head. Moreover, contrary to the Commission's suggestion, a state-granted right of first refusal or right of way is not a "strength" that an incumbent is "free to highlight" in its bid[203] – it is a matter of law. Finally, the Commission's suggestion of waiting until the reevaluation process (which can be years after the selection of a transmission facility and possibly after its need date) to consider the impact of relevant law[204] eviscerates any notion of efficiency and cost-effectiveness.

By denying SPP the ability to consider the public policy dictated by state and local rights of first refusal and rights of way, while at the same time mandating that SPP

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201 July 18 Order at P 180.

202 *See id.* at PP 171, 179 (suggesting that it may be permissible to consider rights of way and state laws "at appropriate points in the regional transmission planning process").

203 *Id.* at P 179.

204 *Id.* at P 180.

consider transmission needs driven by public policy requirements, the July 18 Order's directives are irreconcilable, rendering the July 18 Order internally inconsistent and arbitrary and capricious.

3. The Commission's Rationale for Requiring Removal of Language Preserving State and Local Authority Departs from Order No. 1000 Without Explanation

The Commission's rationale that SPP is "add[ing] a federal right of first refusal for a new transmission facility based on state law"[205] and adopting an impermissible "federal right of first refusal for a new transmission facility built on an existing right-of-way"[206] lacks merit. In Order No. 1000, the Commission expressly stated that it "does not require removal of references to such state or local laws from Commission-approved tariffs or agreements."[207] While the language at issue here is new language, it does not actually "create" any new "federal right of first refusal" that does not already exist in the SPP governing documents. Under Attachment O of the SPP Tariff and Section 3.3 of the Membership Agreement as they existed prior to SPP's Compliance Filing, incumbent transmission owners had the right and responsibility to construct transmission facilities connected to their systems, a right and responsibility that Order No. 1000 requires SPP to remove for transmission facilities selected in the regional transmission plan for purposes of cost allocation.[208] The proposed language in Section I.1 of Attachment Y only ensures that, in the event a relevant law dictates that a certain transmission owner possesses a

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205 *Id.* at P 178.

206 *Id.* at P 170.

207 Order No. 1000 at P 253 n.231.

208 *See id.* at P 253.

right of first refusal, SPP will honor that law. Prior to the issuance of Order No. 1000, this language was not necessary because the existing Membership Agreement and Tariff ensured that any state-adopted rights of first refusal would be respected. In other words, implicit in Tariff Attachment O and Section 3.3 of the Membership Agreement was that a state certificated utility would build facilities connected to its system, consistent with state law, which would include any relevant laws granting a right of first refusal. However, with the Order No. 1000 mandate to remove rights of first refusal for transmission facilities selected in the regional plan for purposes of cost allocation, additional language making reference to such laws is now necessary. SPP is not creating a new right; it simply reflects the possibility that a state or local law may create such a right, which is consistent with Order No. 1000.[209]

Furthermore, to the extent that state or local laws change, the applicability of the Tariff provisions regarding transmission projects constructed in that state would similarly change, without necessitating any filing at the Commission. Because the applicability of the language can change *without action by the Commission*, the Tariff provisions in question merely "reference" state or local laws and *do not* create a federal right of first refusal. The language in question does nothing more than recognize state and local rights of first refusal where they exist, and requiring its removal violates the exception in Order

[209] *Id.* at P 253 n.231 ("This Final Rule does not require removal of references to such state and local laws or regulations from Commission approved tariffs or agreements."); *see also* Order No. 1000-A at P 381.

No. 1000 allowing continued references to state and local right of first refusal laws. Such a violation constitutes an arbitrary and capricious departure from Order No. 1000.[210]

Moreover, in Order No. 1000, the Commission stated that its "reforms are not intended to alter an incumbent transmission provider's use and control of its existing rights-of-way" and that the "Final Rule does not remove or limit any right an incumbent may have to build, own and recover costs for upgrades to the facilities owned by an incumbent . . . . The retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way."[211] By mandating SPP's removal of language in Section I.1(c) of Attachment Y, the Commission will force SPP into the position of potentially selecting a transmission developer for a project whose development of that project would infringe on an incumbent transmission owner's existing rights of way granted under applicable state law, contrary to Order No. 1000.

4. The Commission's Directive That SPP Disregard State and Local Laws in Its Planning Process Exceeds the Commission's Statutory Authority

By requiring SPP to remove language from its Tariff that would recognize state and local right of first refusal laws and rights of way, the Commission effectively has

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210 *See Williams*, 475 F.3d at 326, 330 (remanding decision that was inconsistent with prior findings and stating that "[r]easoned decisionmaking necessarily requires consideration of relevant precedent"); *Consolidated Edison*, 347 F.3d at 971-73 (remanding decision as contrary to Commission policy and stating that the Commission must follow its general policy or explain the reason for its departure); *Idaho Power*, 312 F.3d at 461-65 (rejecting and vacating Commission interpretation of tariff that is contrary to prior Commission orders); *see also PG&E Gas*, 315 F.3d at 388-90 (vacating and remanding Commission orders where the Commission "utterly failed to confront" and distinguish prior precedent, and the Commission's attempts to distinguish its precedents "were alternately nonexistent, misleading, and irrelevant").

211 Order No. 1000 at P 319.

required SPP to disregard state and local laws governing matters that are outside of the scope of the Commission's statutory authority and exclusively within the authority of the states, in effect preempting state authority without the statutory authorization to do so. The Commission should grant rehearing to correct this violation of the Administrative Procedure Act.[212]

As a "creature of statute," the Commission "has no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress," and, "if there is no statute conferring authority, [the Commission] has none."[213] Despite purportedly relying on its authority to review rates for transmission service under FPA section 206,[214] the Commission pointed to no authority in the FPA that authorizes it to preempt state jurisdiction or direct a public utility transmission provider to ignore state laws governing construction, siting, and permitting of transmission facilities. The Commission is not authorized by FPA section 206 or elsewhere to dictate matters involving who may build transmission within a state or where.

In fact, the FPA actually bars the Commission from asserting authority over such matters, except in very limited circumstances. Section 201(a) of the FPA expressly limits the Commission's jurisdiction over transmission and wholesale power sales "only to

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212 5 U.S.C. § 706(2)(C) (requiring reviewing courts to hold unlawful an agency's action, findings, and conclusions found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

213 *See, e.g.*, *CAISO*, 372 F.3d at 398 (quoting *Atlantic City*, 295 F.3d at 8); *see also La. Pub. Serv. Comm'n*, 476 U.S. at 374; *Michigan*, 268 F.3d at 1081.

214 16 U.S.C. § 824e.

those matters which are not subject to regulation by the States."[215] The FPA grants the Commission limited authority over siting of transmission facilities only in "national interest electric transmission corridors" and only when the relevant state regulatory authorities have failed to act on an application to construct a facility in such corridors.[216] Neither of these requirements necessary to invoke the Commission's limited "backstop" siting authority are currently present in SPP, and the Commission otherwise lacks the authority under the FPA to dictate construction and siting decisions within the SPP region. As the courts have stated, and the Commission has recognized, "[t]he states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities."[217]

Thus, because transmission construction and siting are matters "subject to regulation by the states," the FPA bars the Commission from asserting jurisdiction over such matters, and the Commission's requirement that SPP essentially ignore state jurisdiction violates the Administrative Procedure Act. The Commission should grant rehearing to correct this violation.

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215 *Id.* § 824(a).

216 *Id.* § 824p(b).

217 *Piedmont Envtl. Council*, 558 F.3d at 310; *see also PacifiCorp*, 72 FERC ¶ 61,087, at 61,488 (acknowledging that "[i]t is well-settled that the Commission does not have authority over the siting and construction of electric transmission facilities that are not part of licensed hydroelectric projects") (citations omitted).

IV. CONCLUSION

For the foregoing reasons, SPP requests that the Commission grant rehearing of its July 18 Order's findings addressing the application of the *Mobile-Sierra* doctrine to the Membership Agreement, its holding regarding the applicability of rights of first refusal to Byway facilities, its directive that SPP include Service Upgrades in the definition of Competitive Upgrades, and its mandate to remove language referencing relevant laws and rights of way.

Respectfully submitted,

/s/ Matthew J. Binette
Wendy N. Reed
Carrie L. Bumgarner
Matthew J. Binette
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
Phone: (202) 393-1200
Facsimile: (202) 393-1240
reed@wrightlaw.com
bumgarner@wrightlaw.com
binette@wrightlaw.com

Attorneys for
Southwest Power Pool, Inc.

August 19, 2013

Attachment I

STATE OF NEBRASKA

POWER REVIEW BOARD

Dave Heineman
Governor

Timothy J. Texel
Executive Director
and General Counsel
301 Centennial Mall South
P.O. Box 94713
Lincoln, Nebraska 68509-4713
Phone: (402) 471-2301
Fax: (402) 471-3715
www.powerreview.nebraska.gov

June 14, 2013

Mr. Jim Eckelberger
Chairman of the Board of Directors
Southwest Power Pool
201 Worthen Drive
Little Rock, Arkansas 72223

Mr. Nick Brown
President and Chief Executive Officer
Southwest Power Pool
201 Worthen Drive
Little Rock, Arkansas 72223

Dear Chairman Eckelberger and President Brown:

The purpose of this letter is for the Nebraska Power Review Board (NPRB) to officially inform the Southwest Power Pool of the passage of legislation in Nebraska explicitly establishing a right of first refusal for incumbent electric transmission owners when a regional transmission organization has determined that transmission facilities with a voltage of 100 kilovolts or greater must be constructed.

As you are well aware, the Federal Energy Regulatory Commission (FERC) issued Order No. 1000 on July 21, 2011, dealing with transmission planning and cost allocation issues. Then on May 17, 2012 FERC issued Order No. 1000-A, clarifying certain issues covered in Order No. 1000. Among the rulings in FERC Order No. 1000 was the elimination of a federal right of first refusal in Commission-jurisdictional tariffs and agreements. As a result, if the cost of a transmission line for which the Southwest Power Pool issues a Notice to Construct will be allocated to the SPP members, then the incumbent utility serving the area in question cannot be given a right of first refusal to construct the proposed transmission facilities, but rather a competitive open bidding process must be used.

Of considerable significance is the fact that FERC explicitly stated in its orders that the aforementioned rule does not limit or preempt state laws pertaining to the construction of transmission facilities. Thus, if a state has a law providing that the incumbent electric utility serving the area where proposed transmission facilities will be located has the right of first refusal to construct the facilities, such state law is controlling. Since it is not important for the purposes of this letter, citations to the pertinent sections of the FERC orders have been omitted.

In the 2013 session, the Nebraska Unicameral's Natural Resources Committee introduced Legislative Bill 388 (LB 388) to expressly codify a right of first refusal for incumbent electric utilities when a regional transmission organization orders a Notice to Construct transmission facilities in the State of Nebraska. The Nebraska Legislature enacted LB 388 by a vote of 44 to 0 on April 18, 2013. Governor Heineman signed the bill into law on April 24, 2013. The statute will become effective on September 6, 2013.[1] For your convenience, a copy of the slip law setting out the language in LB 388 is enclosed with this letter. An electronic copy of the slip law is also available on the Nebraska Legislature's website at www.nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB388.pdf.

Although Chairman Siedschlag pointed out the passage of LB 388 during the Regional State Committee and SPP Board of Directors quarterly meetings in Kansas City on April 29 and 30, 2013, due to the potentially significant impact of LB 388 the Board directed me to provide SPP with this formal notification of the bill's passage. If you or your staff have any questions about this legislation, please do not hesitate to contact me.

Sincerely,

Timothy J. Texel
Executive Director and General Counsel

[1] Unless legislation contains an emergency clause, new legislation shall take effect three calendar months after the adjournment of the session during which a bill passed. Nebraska Constitution, Article III, Section 27. The Nebraska Legislature adjourned *sine die* on June 5, 2013.

LEGISLATIVE BILL 388

Approved by the Governor April 24, 2013

Introduced by Natural Resources Committee: Carlson, 38, Chairperson; Dubas, 34; Johnson, 23; Kolowski, 31; Schilz, 47.

FOR AN ACT relating to electricity; to provide powers and duties relating to electric transmission lines; and to define terms.

Be it enacted by the people of the State of Nebraska,

Section 1. (1) If an electric transmission line has been approved for construction in a regional transmission organization transmission plan, the incumbent electric transmission owner of the existing electric transmission facilities to which the electric transmission line will connect shall give notice to the Nebraska Power Review Board, in writing, within ninety days after such approval, if it intends to construct, own, and maintain the electric transmission line. If no notice is provided, the incumbent electric transmission owner shall surrender its first right to construct, own, and maintain the electric transmission line and any other incumbent electric transmission owner may file an application for the electric transmission line under section 70-1012. Within twenty-four months after such notice, the incumbent electric transmission owner shall file an application with the board pursuant to section 70-1012.

(2) For purposes of this section: (a) Electric transmission line means any line and related facilities connecting to existing electric transmission facilities for transmitting electric energy at a voltage of one hundred kilovolts or greater, other than a line solely for connecting an electric generation facility to facilities owned by an electric supplier; (b) incumbent electric transmission owner means an entity that: (i) Is an electric supplier; (ii) is a member of a regional transmission organization; and (iii) owns and operates electric transmission lines at a voltage of one hundred kilovolts or greater; and (c) regional transmission organization has the meaning provided in section 70-1001.01.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated at Washington, D.C., this 19th day of August, 2013.

/s/ Matthew J. Binette
Matthew J. Binette
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005

Attorney for
Southwest Power Pool, Inc.

Tariff Revision Request (TRR)

TRR Number	**104**	**TRR Title**	**Order 1000 Compliance Revisions (Round 1)**
Cross Reference #	**MPRR BRR Other *(Specify)* _ _____**		
Sponsor			
Name	Matt Binette		
E-mail Address	binette@wrightlaw.com		
Company	Wright & Talisman		
Phone Number	202-393-1200		
Date	8/15/13		
Tariff Section(s) Requiring Revision	Section No. Titles Tariff Version (effective date)		
Requested Resolution	☒ Normal ☐ Urgent (provided justification below for urgent request)		
Revision Description	Revisions to Attachment Y §§ I.1, III.1.b.iii, III.2.c.vi, VI.3, and VI.4 and addition of Addendum 5 to Attachment O to address Order 1000 regional compliance.		
Reason for Revision	On July 18, 2013, FERC issued its order addressing SPP's compliance with the regional aspects of Order 1000. *Sw. Power Pool, Inc.*, 144 FERC ¶ 61,059 (2013). This TRR is the first of several that will address various requirements from the July 18 Order. These revisions address several compliance requirements that do not involve policy decisions by the Strategic Planning Committee Task Force on Order 1000.		
Stakeholder Approval Required (specify date and record outcome of vote; n/a for those stakeholders not required)	MWG (n/a) BPWG (n/a) TWG (n/a) ORWG (n/a) Other (specify) (n/a) RTWG MOPC Board of Directors		

Tariff Revision Request (TRR)

Legal Review Completed	☒ Yes *(Include any comments resulting from the review)* ☐ No
Market Protocol Implications or Changes	☐ Yes *(Include a summary of impact and/or specific changes & PRR #)* ☒ No
Business Practice Implications or Changes	☐ Yes *(Include a summary of impact and/or specific changes & BPR #)* ☒ No
Criteria Implications or Changes	☒ Yes *(Include a summary of impact and/or specific changes)* This TRR does not require any changes to the Criteria, but the TRR incorporates language from Appendix 11 of the Criteria into Attachment O of the Tariff. ☐ No
Other Corporate Documents Implications ***(i.e., SPP By-Laws, Membership Agreement, etc.)***	☐ Yes *(Include which corporate documents)* ☒ No
Credit Implications	☐ Yes *(Include a summary of impact and/or specific changes)* ☒ No
Impact Analysis Required	☐ Yes ☒ No

Proposed Tariff Language Revisions (Redlined)

ATTACHMENT O

ADDENDUM 5 TO ATTACHMENT O

MERCHANT TRANSMISSION INTERCONNECTION

A party seeking to interconnect with the Transmission System must provide the following information to the Transmission Provider, as further specified in the SPP Criteria:

Transmission Interconnection Review Data Checklist

1. Primary contact and all affected parties' contact information.
2. Overview of the proposed interconnection and its need.
3. Estimated or proposed in-service date.
4. List of all studies run by season.
    a. Power flow studies minimum requirements met.
    b. Short circuit studies minimum requirements met.
    c. Dynamics studies minimum requirements met.
5. Affected parties planning criteria, if applicable.
6. A detailed description of the proposed interconnection.
    a. In-service date
    b. Design information
    c. Ratings of the interconnection
    d. A geographic map of the interconnection area
    e. Electrical one-line diagrams of the facilities being connected.
7. Appropriate program files and program automation files to allow SPP staff to reproduce the studies performed.

8. Details of any required mitigation plans including identification of the affected parties responsible for mitigation.
   a. In-service date
   b. Design information
   c. Ratings of the facilities
   d. A geographic map of the facility area
   e. Electrical one-line diagrams of the facilities being connected.
9. Comments of affected parties covering agreement or points of disagreement of the proposed interconnection, if any.

* * *

ATTACHMENT Y

I. OVERVIEW OF TRANSMISSION OWNER DESIGNATION PROCESS

1) The Transmission Provider shall designate a Transmission Owner in accordance with the process set forth in Section III of this Attachment Y for transmission facilities approved for construction by the SPP Board of Directors that meet all of the following criteria:

   a) Transmission facilities that are ~~ITP~~ Base Plan Upgrades or high priority upgrades included in a Balanced Portfolio;[A2]

   b) Transmission facilities with a nominal operating voltage of ~~300~~ 100 [A3]kV or greater; and

   c) Transmission facilities that are not a rebuild of an existing facility~~ and do not use rights-of-way where facilities exist; and~~ [A4]

   ~~d) Transmission facilities located where the selection of a Transmission Owner pursuant to Section III of this Attachment Y does not violate relevant law where the transmission facility is to be built.~~[A5]

2) For any upgrade meeting the specifications listed in Section I.1 of this Attachment Y, the Transmission Provider may, subject to approval by the SPP Board of Directors, designate the Transmission Owner(s) in accordance with Section IV of this Attachment Y if the following conditions are met: (i) the transmission facility is needed for the reliability of the grid; (ii) the transmission facility has a need date that cannot be met if the Transmission Owner Selection Process in Section III of this Attachment Y is followed; and (iii) no other

transmission or non-transmission mitigation options are available to relieve the reliability issue to allow sufficient time for the Transmission Owner Selection Process to proceed.

3) For any upgrade not defined in Section I.1 of this Attachment Y, the Transmission Provider shall designate the Transmission Owner(s) in accordance with the process set forth in Section IV of this Attachment Y.

4) The designation from the Transmission Provider shall be provided pursuant to Section V of this Attachment Y.

5) The Transmission Provider shall track all projects that are approved for construction in accordance with Section VI of this Attachment Y.

III. TRANSMISSION OWNER SELECTION PROCESS FOR COMPETITIVE UPGRADES

1) Application and Qualification Process

b) Qualification Criteria

An Applicant must demonstrate that it meets the following qualification criteria:

iii) Managerial Criteria

An application must show that the Applicant has requisite expertise by describing its capability, experience, and process to address the following areas:

(1) Transmission Project Development

(a) engineering, permitting, environmental, equipment and material procurement, project management (including cost control, scope, and schedule management), construction, commissioning of new facilities, new or emerging technologies; and

(b) routing, surveying, rights-of-way, eminent domain, and real estate acquisition, including process for obtaining easements.

(2) Internal safety program, contractor safety program, safety performance record and program execution.

(3) Transmission Operations: control center operations, NERC

compliance process and compliance history, registration or the ability to register for compliance with applicable NERC Reliability Standards, storm/outage response and restoration plan, record of past reliability performance, statement of which entity will be operating completed transmission facilities, staffing, equipment, and crew training.

(4) Transmission Maintenance: staffing and crew training, transmission facility and equipment maintenance, record of past maintenance performance, NERC compliance process and history, statement of which entity will be performing maintenance on completed transmission facilities.

(5) Ability to comply with Good Utility Practice, SPP Criteria, ~~NERC Reliability Standards,~~ and industry standards~~, and applicable local, state, and federal requirements~~[A6].

(6) Ability to comply with or demonstration of how the Applicant plans to be able to comply with NERC Reliability Standards.[A7]

(~~6~~7) Any other relevant project development experience that the Applicant believes may demonstrate its expertise in the above areas.

An Applicant can demonstrate that it meets the managerial criteria either on its own or by relying on an entity or entities with whom it has a corporate affiliation or contractual relationship ("Alternate Qualifying Entity (ies)"). If the Applicant seeks to satisfy the managerial criteria in whole or in part by relying on one or more Alternate Qualifying Entity(ies), the Applicant must submit: (1) materials demonstrating to the Transmission Provider's satisfaction that the Alternate Qualifying Entity(ies) meet(s) the managerial criteria for which the Applicant is relying upon the Alternate Qualifying Entity(ies) to satisfy; and (2) an executed agreement that contractually obligates the Alternate Qualifying Entity(ies) to perform the function(s) for which the Applicant is relying upon the Alternate Qualifying Entity(ies) to satisfy.

2) Transmission Owner Selection Process

c) Request for Proposals

The Transmission Provider shall issue an RFP for each Competitive Upgrade, which shall contain information including, but not limited to:

i) An overview of the purpose for the RFP including the need for the Competitive Upgrade, regulatory context and authority, and other necessary information.

ii) A deadline for all RFP proposal submissions and minimum RFP proposal submission requirements.

iii) Minimum design specifications.

iv) The date regulatory approvals are required to be completed as determined by the Transmission Provider.

v) A requirement that the QRP provide the following information specific to the Competitive Upgrade for which it submits a proposal:

(1) financial information, including but not limited to demonstration of financing (including a reasonable contingency), detailed engineering and construction cost estimate, itemized revenue requirement calculations, and financial and business plans, including the nature of any FERC incentives the QRP intends to request;

(2) engineering information, including but not limited to engineering design of the project and technical requirements;

(3) construction information, including but not limited to anticipated project timeline including timeline for all necessary regulatory approvals, equipment acquisition, description of applicable rights-of-way and real estate acquisition, description of routing, description of permitting, description of outage clearance(s), and identification of the party responsible for construction;

(4) operations and maintenance information, including but not limited to demonstration of operations, statement of which entity will be operating and maintaining the transmission facility, storm and outage response plan, maintenance plan, staffing, equipment, crew training, and record of past maintenance and outage restoration performance;

(5) safety information, including but not limited to identification of the internal safety program, contractor safety program, and safety performance record; and

(6) identification of information in the RFP proposal that the RFP respondent considers to be confidential.

vi) A requirement that the QRP demonstrate its financial strength by providing one of the following:

(1) demonstration that the QRP continues to satisfy the financial criteria set forth in Section III.1(b)(ii)(1) or (2) of this Attachment Y and that the Competitive Upgrade does not exceed 30% of the total capitalization of the QRP or its parent Guarantor;

(2) a performance bond from an insurance/surety company acceptable to the Transmission Provider in an amount equal to the total cost of the Competitive Upgrade, including financing costs, and a 30% contingency; or

(3) a letter of credit from a financial institution acceptable to the Transmission Provider in an amount equal to the total cost of the Competitive Upgrade, including financing costs, and a 30% contingency~~; or~~

~~(4) a demonstration that the QRP would otherwise be designated by the Transmission Provider as a DTO for the Competitive Upgrade pursuant to Section IV of this Attachment Y~~[A8].

vii) Information exchange requirements including but not limited to, identification of data required to be provided to the Transmission Provider in accordance with NERC reliability standards and CEII requirements.

viii) A description of the proposal evaluation procedure, including the statement of proposal evaluation methodology and criteria for acceptable proposals.

ix) A requirement that the QRP agrees to pay the RFP fee for each RFP proposal submitted, as outlined in Section III.2(e) of this Attachment Y, including the initial deposit at the time of submission of the RFP proposal.

x) A requirement that the QRP disclose any credit rating changes, bankruptcies, dissolutions, mergers, or acquisitions within the past five (5) years of the QTO or its parent, controlling shareholder, or entity providing a Guaranty pursuant to Section III.1(b)(ii)(2) of this Attachment Y.

VI. PROJECT TRACKING PROCESS

Costs and schedules related to all projects approved for construction under the Tariff shall be tracked by the Transmission Provider

1) Upon the acceptance of an NTC by a DTO, other than an NTC issued for refined cost estimation, the baseline cost of the project will be set. The baseline cost shall be the estimated cost of the project as agreed to between the DTO and the Transmission Provider at the time such NTC was accepted.

2) The DTO shall submit updates of the estimated costs and schedules to the Transmission Provider on at least a quarterly basis in a standard format and method defined by the Transmission Provider.

3) If at any time the cost projection ~~significantly~~ exceeds the estimated baseline cost by a predetermined bandwidth set forth in the Transmission Provider's business practices[A9], the Transmission Provider shall investigate the reason for the change in cost and report to the SPP Board of Directors the reason for the change in cost and its recommendation on whether to accept the change in cost and reset the baseline cost. The SPP Board of Directors shall make the final determination as to the action that will be taken up to and including the cancellation of the project and withdrawal of the NTC.

4) If at any time the project schedule significantly changes, the Transmission Provider shall investigate the reason for the change and may take action in accordance with Section V.4 of this Attachment Y. Factors that the Transmission Provider shall consider in determining whether a project schedule delay is significant shall include, but not be limited to, the need date, construction time, necessity for long-lead equipment, and permitting schedules.[A10]

Proposed Market Protocol Language Revision (Redlined)

n/a

Proposed Business Practices Language Revision (Redlined)
n/a

Proposed Criteria Language Revision (Redlined)
n/a

Revisions to Other Corporate Documents (Redlined)
n/a