

**Southwest Power Pool
BOARD OF DIRECTORS MEETING
Embassy Suites Outdoor World – Grapevine, Texas
August 13, 2001**

- Summary of Action Items -

1. Approved minutes of the July 17, 2001 Board of Directors meeting as presented.
2. Approved good faith negotiation with the Midwest ISO based on a proposed merger term sheet but with equity in governance.
3. Directed Staff to collect member comments on draft merger term sheet, analyze, and report to Board of Directors by end of September 2001.

**Southwest Power Pool
BOARD OF DIRECTORS MEETING
Embassy Suites Outdoor World – Grapevine, Texas
August 13, 2001**

Agenda Item 1 - Administrative Items

SPP Chair Mr. Gary Voigt called the meeting to order at 11:03 a.m. The following directors were in attendance or represented by proxy:

Mr. Gene Argo, Midwest Energy, Inc.;

Ms. Betsy Carr, proxy for Ms. Kim Casey, Dynegy Marketing and Trade;

Mr. David Christiano, City Utilities of Springfield, MO;

Mr. Harry Dawson, OK Municipal Power Authority;

Mr. Michael Deihl, Southwestern Power Administration;

Mr. Jim Eckelberger, non-stakeholder director;

Mr. Tom Grennan, Western Resources;

Ms. Trudy Harper, Tenaska Power Services;

Mr. John Marschewski, Southwest Power Pool, Inc.;

Mr. Tom McDaniel, non-stakeholder director;

Mr. John Oxendine, non-stakeholder director;

Mr. Stephen Parr, KS Electric Power Cooperative;

Mr. J. M. Shafer, Western Farmers Electric Cooperative;

Mr. Harry Skilton, and proxy for Mr. Quentin Jackson, non-stakeholder directors;

Mr. Richard Spring, Kansas City Power & Light;

Mr. Al Strecker, OG+E;

Mr. Larry Sur, non-stakeholder director;

Mr. Richard Verret, American Electric Power; and

Mr. Gary Voigt, Chair, Arkansas Electric Cooperative Corp.

There were 49 persons in attendance representing 26 members, 1 guest and 3 regulatory agencies (Attendance List – Attachment 1). The Secretary received 2 proxy statements (Proxies – Attachment 2). Mr. Voigt referred to the brief but significant agenda (Agenda – Attachment 3) and asked for any modifications to draft minutes of the July 17, 2001 meeting or a motion for approval (7/17/01 Meeting Minutes – Attachment 4). Mr. Shafer moved that the minutes be approved as presented. Mr. Deihl seconded this motion, which passed unopposed.

Agenda Item 2 – Secretary’s Report

Mr. Voigt called on Mr. Nick Brown (SPP) to give the Secretary’s Report. Mr. Brown informed the Board of Directors of current SPP activities, including: southeast RTO mediation proceedings, rehearing requests on SPP dockets, and the market settlement project. Mr. Brown stated that SPP and many member representatives have been involved in FERC’s southeast RTO mediation process in Washington D.C. Mr. Brown stated that these meetings are subject to confidentiality requirements set forth in Rule 606 of the Commission’s Rules of Practice and Procedure and that information cannot be disclosed without permission of all participants. Due to this gag order, Mr. Brown

asked that those not a party to the related dockets please leave the room. He then explained the mediation process and actions to date.

Mr. Brown informed the Board of Directors that a rehearing request as per direction at the July 17, 2001 meeting had been filed August 8, 2001 (Request for Rehearing – Attachment 5) with a request to expedite the hearing. He then pointed out key issues in the request as:

- Decision contradicts previous direction to SPP;
- Decision does not follow Commission precedent regarding RTOs; and
- Decision represents a policy change without following administrative law procedures.

SPP's General Counsel, Mr. Mike Small (Wright and Talisman), was present to make comments and answer questions.

Mr. Brown concluded his report by giving a status report on the market settlement project stating it was on schedule for December 15, 2001 and the integration test has commenced. There have been 19 change orders to date, 6 being with minimal cost impact. A full report is available at www.spp.org.

Agenda Item 3 – Southwest Power Pool/Midwest ISO Merger

Mr. John Marschewski informed the Board of Directors of activities in parallel to the southeast mediation proceedings occurring with MISO concerning a SPP/MISO merger. After Mr. Marschewski visited with SPP chair and vice-chair as well as non-stakeholder directors, Mr. Marschewski, Mr. Jim Torgerson (MISO CEO) and Mr. Mike Small crafted the term sheet distributed to the Board with the meeting background materials (Term Sheet – Attachment 6). Mr. Marschewski stated that both organizations had similar RTO models, systems and tariffs, and both lack scope and configuration to meet FERC's current expectations. Mr. Marschewski noted that the biggest challenge concerns equity in governance and much discussion ensued on this topic.

Mr. Harry Dawson moved to accept the general terms sheet as proposed with inclusion of two-thirds majority vote for action of new board of directors, and with comments from members due in one week for inclusion in negotiating final documents. Mr. John Oxendine seconded this motion, which failed with 10 votes for and 7 opposed. Following additional discussion, Ms. Trudy Harper moved to continue good faith negotiation to definitive terms based on this terms sheet as a basis for agreement until the end of September; without agreement, SPP would request that FERC order mediation between SPP and MISO - again, with comments from members due in one week for inclusion in negotiating final documents. Mr. Steve Parr seconded this motion. After lengthy discussion, the motion failed with 9 votes for and 9 opposed.

Following a short break, Mr. Jim Eckelberger moved that the Board authorize the continued good faith negotiation with MISO based on the proposed term sheet but with equity in governance and that the resulting due diligence review and the best possible terms be offered to the Board of Directors for approval by the end of September. Mr. Richard Verret seconded this motion, which passed unopposed. Mr. Eckelberger

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further moved that in the event that negotiation is unsuccessful, the Board would anticipate that SPP ask FERC to order mediation at the end of September. Mr. Harry Dawson seconded this motion, which failed with 5 votes for and 12 opposed. Mr. Voigt encouraged everyone to submit comments to Staff within the next week and directed Staff to collect, analyze for conflict, and where possible to resolve issues. A next meeting of the Board of Directors was contemplated in the first half of September.

Several directors asked that Staff continue to consider other options.

Adjournment

At 2:40 p.m., Mr. Voigt thanked everyone for their participation and following a short break, reconvened in executive session to discuss personnel matters.

Nicholas A. Brown, Corporate Secretary

Southwest Power Pool
 BOARD OF DIRECTORS MEETING
 Embassy Suites Outdoor World, Grapevine, Texas
 August 13, 2001

ATTENDANCE LIST

Name	System
RICK TYLER	NORTHEAST TX E.C.
Todd Connell	PG&E National Energy Group
GERRY BURROWS	KEPL
DOUG STERBENZ	WRI
SHAH HOSSAIN	WRI
MIKE APRILL	UtiliCorp United.
JOHN MARSCHOWSKI	SPP
RICHARD VERRET	AEP
JOE CAYO	Midwest Energy, Inc.
JOHN J. McLENNAN	Ind. Nuclear
MIKE DEIBEL	SWPA
STEPHEN PARR	KEPCO
JOHN OXENDINE	INDEPENDENT DIRECTOR
AL STRECKER	OG&E Electric Services
BETSY CARR	DYNEX
BILL WYLIE	OG&E
JANA PHILLIPS	CALPINE
MICHAEL DESSALLE	American Electric Power
MIKE SMALL	SPP-General Counsel (Wright & Tolman)
MARY McALLISTER	Exelon Power Team
RICKY BITTLE	AEC

Southwest Power Pool
BOARD OF DIRECTORS MEETING
Embassy Suites Outdoor World, Grapevine, Texas
August 13, 2001

ATTENDANCE LIST

Name	System
Brent Hebert	Entergy Solution Supply Ltd.
Bob Bradley	Mirant
BILL WYLLIE	OG&E
Jim Sibelbiger	Independent Director
McPerrins	OG&E
Mike Brown	SPI
DAVE CHRISTIANO	SPRINGFIELD
Richard House	Ark. PSC
Melvin Bower	OG&E
Harry Daws	OMM
Tom Hunter	PUC of Texas
Larry Wells	Cleco
Rick Riley	Entergy
Steve Owens	Entergy
Henry Johnson	XCEL/SPJ
Doug Bazu	WFEC
Tommy Lugo	Midwest Energy
James Loeb	WFEC
Mikel Kline	KEPCo
Christine Ryan	BBRS / East Tx Coops

SOUTHWEST POWER POOL

BOARD OF DIRECTORS

PROXY

Quentin Jackson hereby appoints HARRY SKILTON to be his proxy to vote on his behalf at the meeting of the Southwest Power Pool Board of Directors to be held on Monday, August 13th, 2001 or at any adjournment thereof.

SIGNED this 8th day of August, 2001.

A handwritten signature in cursive script, reading "Quentin Jackson", written over a horizontal line.

Quentin Jackson

Robertson, Cheryl

From: Brown, Nick
Sent: Sunday, August 12, 2001 1:09 PM
To: Robertson, Cheryl
Subject: FW: Proxy for August 13, 2001 Board Meeting

-----Original Message-----

From: Kim.Casey@dynegy.com [mailto:Kim.Casey@dynegy.com]
Sent: Friday, August 10, 2001 4:21 PM
To: Brown, Nick
Subject: Proxy for August 13, 2001 Board Meeting

Betsy Carr, of Dynegy, has my proxy for the referenced meeting. I am sorry that I cannot be in attendance, but the ERCOT market is requiring a great amount of my time.

Take Care,
Kim

**Southwest Power Pool
BOARD OF DIRECTORS MEETING**

Monday, August 13, 2001

Embassy Suites Outdoor World, Grapevine, Texas

- A G E N D A -

11 a.m. – Call to Order

1. Administrative Items
2. Southeast Mediation
3. Southwest Power Pool/Midwest ISO Merger

Executive Session

4. Personnel Issues

3 p.m. – Adjournment

**Southwest Power Pool
BOARD OF DIRECTORS MEETING
D/FW Airport Hyatt Hotel – Dallas, Texas
July 17, 2001**

- Summary of Action Items -

1. Approved minutes of the February 20, 2001 Board of Directors meeting as presented.
2. Approved the addition of a Staff position of Vice President, Finance for immediate filling.
3. Approved 2001 funding of \$500,000 for the SPP Retirement Plan and \$237,986 for the retiree medical coverage of SPP employees retiring at the Normal Retirement Date.
4. Approved seeking rehearing of the July 12, 2001 FERC Order on Dockets RT01-34-000 and RT01-34-002 for the purpose of protecting legal rights.
5. Supported an effort to form a super-regional RTO including both the Midwest and the Southeast and that this idea be pursued in parallel fashion in FERC's Southeast mediation and separately with entities in the Midwest.
6. Approved completion of the design/build phase of the market settlement project with Accenture to provide market based ancillary services under the SPP regional tariff.
7. Approved delay of market readiness classes until the next Board of Directors meeting.
8. Agreed to a next meeting on August 13, 2001 in Dallas.

**Southwest Power Pool
BOARD OF DIRECTORS MEETING
D/FW Airport Hyatt Hotel – Dallas, Texas
July 17, 2001**

Agenda Item 1 - Administrative Items

SPP Chair Mr. Gary Voigt called the meeting to order at 11:00 a.m. and called for a round of introductions. The following directors were in attendance or represented by proxy:

- Mr. Gene Argo, Midwest Energy, Inc.;
- Ms. Betsy Carr, proxy for Ms. Kim Casey, Dynegy Marketing and Trade;
- Mr. David Christiano, City Utilities of Springfield, MO;
- Mr. Harry Dawson, OK Municipal Power Authority;
- Mr. Michael Deihl, Southwestern Power Administration;
- Mr. Jim Eckelberger, non-stakeholder director;
- Mr. Tom Grennan, Western Resources;
- Mr. Greg Geisler, proxy for Ms. Trudy Harper, Tenaska Power Services;
- Mr. Quentin Jackson, non-stakeholder director;
- Mr. John Marschewski, Southwest Power Pool, Inc.;
- Mr. Tom McDaniel, non-stakeholder director;
- Mr. Stephen Parr, KS Electric Power Cooperative;
- Mr. J. M. Shafer, Western Farmers Electric Cooperative;
- Mr. Harry Skilton, non-stakeholder director;
- Mr. Richard Spring, Kansas City Power & Light;
- Mr. Larry Sur, non-stakeholder director;
- Mr. Mel Perkins, proxy for Mr. Al Strecker, OG+E;
- Mr. Michael Desselle, proxy for Mr. Richard Verret, American Electric Power; and
- Mr. Gary Voigt, Chair, Arkansas Electric Cooperative Corp.

There were 39 persons in attendance representing 24 members, 14 guests and 1 regulatory agency (Attendance List – Attachment 1). The Secretary received 3 proxy statements (Proxies – Attachment 2). Mr. Voigt referred to the agenda (Agenda – Attachment 3) and announced a change in order as well as deletion of some items due to recent developments. Mr. Voigt asked for any modifications to draft minutes of the February 20, 2001 meeting or a motion for approval (2/20/01 Meeting Minutes – Attachment 4). Mr. Dawson moved that the minutes be approved as presented. Mr. Jackson seconded this motion, which passed unopposed.

Agenda Item 2 – Secretary's Report

Mr. Voigt called on Mr. Brown (SPP) to give the Secretary's Report. Mr. Brown informed the Board of Directors of two e-mail votes taken at the request of the Commercial Practices Committee with concurrence by Mr. Voigt. Motions were made by Ms. Harper and seconded by Mr. Voigt. A vote was sent out on April 12, 2001 with a due date of April 19, 2001 concerning tariff changes for AEP's zone rate relative to implementation of retail access in Texas. The vote was 15 in favor and 0 against. Another e-mail vote was requested on May 1, 2001 with a due date of May 4, 2001

concerning tariff changes recommended by the Regional Tariff Working Group necessary to establish general business practices for implementation of retail access in Texas. The vote was 17 in favor and 0 against. A third e-mail vote was taken May 17, 2001 to certify Duke Energy North America McClain Generation Facility as a SPP Control Area with the concurrence of and motion by Mr. Voigt and second by Mr. Marschewski. The vote was 18 in favor and 0 against.

Agenda Item 3 – Strategic Planning Actions

Mr. Voigt asked Mr. Marschewski to report on strategic planning actions. Mr. Marschewski and Mr. Brown, SPP officers, recommend the Board of Directors approve addition of a Staff position of Vice President, Finance for immediate filling (Staff Position Recommendation – Attachment 5). Mr. Marschewski said election of this incumbent as an officer would be delayed at this time due to certain constraints in the articles of incorporation. This person along with himself, Mr. Brown, and Mr. Monroe would form an executive team with a consolidated management approach. Mr. McDaniel moved to approve this recommendation. Mr. Grennan seconded and the motion passed with one vote in opposition from Ms. Carr.

Agenda Item 5 – Employee Benefits Working Group Report

Mr. Marschewski presented a recommendation from the Employee Benefits Working Group concerning SPP's Retirement Plan and Retiree Medical Coverage (EBWG Recommendation – Attachment 6). The EBWG recommends the Board of Directors approve 2001 funding of \$500,000 for the SPP Retirement Plan for 2001 and \$237,986 for the retiree medical coverage of SPP employees retiring at the Normal Retirement Date. Mr. Shafer moved to approve the recommendation as presented. Mr. Spring seconded. The motion passed with Ms. Carr voting in opposition and stating that she would have preferred approving the minimum funding computed by the actuary for 2001 of \$337,671.

Agenda Item 2 – Secretary's Report - Continued

Mr. Voigt called on Mr. Brown to present a report on the July 12, 2001 FERC order on SPP's RTO filing (FERC Order on SPP's RTO Filing – Attachment 7). Mr. Brown stated that FERC had issued two orders specifically related to SPP: RTO1-100 order initiating Southeast mediation and RTO1-34 order rejecting the RTO filings. Mr. Brown said SPP was ordered into mediation for 45 days beginning today, July 17, 2001 with the goal of establishing a single Southeastern RTO. Mr. Brown continued by outlining a decision making tree consisting of 6 questions to be considered:

- Seek rehearing?
- Stand fast or change?
- With or without Entergy?
- Southeast or Midwest?
- Organizational structure?
- Maintain current projects?

Mr. Brown addressed each question and then presented three organizational options that may satisfy FERC's scope and configuration requirements.

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•Option 1 – Seams Agreement

- 1-stop shopping @ non-pancaked rates with ATC and congestion coordination
- Most expedient
- Maintains most autonomy
- MISO/ARTO agreement already available
- FERC has accepted MISO/ARTO
- Probably would not satisfy Massey

•Option 2 – Super-regional RTO

- Umbrella RTO for security coordination, ATC oversight and market rule consistency
- 1-stop shopping @ non-pancaked rates
- Discussed in FERC collaborative meetings
- Maintains individual organizations
- Preserves tariff agreements
- Creates platform for evolutionary combination

•Option 3 – Single organization

- Moves immediately to end-state, but not necessarily quickest
- Tough debate on ownership and profit structure
- Destroys settled issues among non-jurisdictional members
- Theoretically, most cost efficient
- Largest potential for stranded cost and disruption

Mr. Brown presented a two fold recommendation: 1) to seek rehearing for the purpose of protecting legal rights and 2) to pursue Option 2, the formation of a Super-regional RTO including both the Midwest and the Southeast. Mr. Brown stated that SPP needed direction from the Board of Directors today to take to the mediation session. After discussion, Mr. Dawson moved that SPP Staff and its legal counsel be directed to file a request for rehearing on the July 12 orders in dockets RTO1-34-000 and RTO1-34-002. Mr. Shafer seconded and the motion passed unopposed. Mr. Brown stated that the Commission's actions, if intended to minimize seams problems, did exactly the opposite with respect to the SPP region by creating a seam right in the heart of the region. Mr. Brown then asked for consensus to proceed in the direction of Option 2, a Super-regional RTO including both the Midwest and the Southeast and that this idea be pursued in parallel fashion in the Southeast mediation and separately with entities in the Midwest. The Board of Directors supported this direction.

Mr. Brown continued with his presentation addressing whether to maintain current efforts related to the market settlement project. He reported 90% completion of SPP's project with Accenture and estimated costs involved if delayed or terminated. After discussion, Mr. Dawson moved that SPP complete the design/build project for \$1.75 million with Accenture. Mr. Perkins seconded and the motion passed unopposed with Mr. Desselle and Mr. Dawson abstaining. Mr. Dawson moved to delay market readiness classes and discussions until the next Board of Directors meeting. Mr. Desselle seconded and the motion passed with Mr. Jackson and Mr. Eckelberger voting in opposition, both stating their preference that SPP continue action on this project

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July 17, 2001

without delays in order to have a product ready when needed. Staff was directed to provide more information regarding product ownership and other legalities of this project.

The Board of Directors agreed to the next meeting on August 13, 2001 at the DFW Hyatt Hotel to discuss progress on the negotiations.

Agenda Item 6 – Crescent Moon Report

Mr. Voigt called on Mr. Waggoner to present a report from the Crescent Moon RTO (Crescent Moon Report – Attachment 8). Mr. Waggoner referred to the report distributed with meeting background materials laying out consolidation and coordination approaches for SPP and Crescent Moon. Mr. Waggoner suggested SPP and Crescent Moon have similar approaches and would interact well together. Mr. Waggoner encouraged everyone to read the report and to express any concerns to his organization about the consolidation strawman documents. Mr. Marschewski stated that Staff will continue negotiations and a report will be provided to the Board of Directors at the next meeting.

Adjournment

With no further business, Mr. Voigt thanked everyone for their participation and adjourned the meeting at 3:04 p.m.

Nicholas A. Brown, Corporate Secretary

encouraged the voluntary formation of RTOs to be in operation by December 15, 2001.² In Order No. 2000, the Commission also rejected requests by various parties to set boundaries and instead directed parties to voluntarily put together RTOs.³ Following that direction, SPP and its membership through an open and collaborative process encouraged by the Commission⁴ developed an RTO proposal. SPP and its members devoted tens of thousands of person-hours and many millions of dollars to that effort. The Commission's Staff was invited to attend these meetings, and did attend a number of them. SPP met separately with the Commission's Staff and with Commissioners on numerous occasions and was encouraged to continue. Not once did anyone tell SPP to stop or that its intentions were misdirected. The Commission encouraged SPP to talk to its former members⁵ and SPP did so with the result being an agreement with Entergy Services, Inc. ("Entergy") and other former members to rejoin SPP. The Staff and Commissioners stated that they found Entergy rejoining SPP to be a very positive step. The Commission directed SPP to submit or have submitted applications under section 203 of the Federal Power Act ("FPA"), 16 U.S.C. § 824b, by its transmission owners. SPP and its transmission owners submitted such applications. The Commission

² Order No. 2000, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,089, at 31,033-34, 31,229 (1999), order on reh'g, Order No. 2000-A, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000).

³ Order No. 2000 at 31,033-34.

⁴ Order No. 2000 at 31,221; Southwest Power Pool, Inc., 94 FERC ¶ 61,359, at 62,296 (2001); see also Southwest Power Pool, Inc., 91 FERC ¶ 61,137, at 61,526 (2001).

⁵ Southwest Power Pool, Inc., 94 FERC at 62,296.

encouraged SPP to have an open collaborative process. SPP did so and facilitated the most open processes possible.

The July 12 Order totally ignored this past history, and in cursory language unsupported by substantial evidence, in violation of reasoned decision-making standards, and contrary to orders in other proceedings, rejected SPP's RTO filing. Even though SPP was encouraged to develop an RTO with Entergy, the July 12 Order now questions whether Entergy and SPP should be together in the same RTO. The Commission also had directed SPP to submit or have submitted section 203 applications, but the July 12 Order dismissed those same applications as premature. When viewed in light of other RTO proposals that the Commission approved, which involved much smaller RTOs, the only possible way of reconciling Commission approval of those filings with Commission rejection of the SPP RTO proposal is the fact that those proposals were approved by a different Commission than the one which acted on SPP's filing. The Commission, however, is tasked by statute and by the courts to follow a rule of law. The Commission cannot treat one group differently than another one or dramatically change its policy simply because of a change in its own membership. As the Commission recognized a few weeks ago, "litigants in similar situations should be treated the same."⁶

Clearly, the Commission's July 12 Order represents an abrupt change in policy as stated by Commissioner Breathitt in her dissenting opinion and as indicated by Commissioner Massey in his concurring opinion. The Commission is now drawing

⁶ San Diego Gas & Elec. Co., 96 FERC ¶ 61,120, slip op. at 27 (2001) (quoting National Fuel Gas Supply Corp. v. FERC, 59 F.3d 1281, 1289 (D.C. Cir. 1995)).

boundaries, a major change from Order No. 2000's call for voluntary formation without specific boundaries. However, the Commission is required under longstanding caselaw to provide for additional notice and comment before making such a major change to its rules. Further, the Commission must support its actions by substantial evidence. It clearly failed to do so in the July 12 Order. SPP submitted evidence showing that the markets and transmission flows are largely encompassed by an SPP-Entergy combination and that the trades with adjoining regions (except for ERCOT) are not significant, thereby showing that SPP-Entergy was the pertinent market. While acknowledging that this may be correct today, the Commission's sole response was that in the future this may change. This speculation was supported by not one shred of evidence. In addition, if the Commission's true goal is to promote competition and limit seams issues, its suggestion that SPP and Entergy should be broken apart makes no sense whatsoever as the evidence demonstrates that breaking the two apart will not be the best action for reliability and will split a market that developed over a 60-year history. In fact, the Commission's difficulty in placing SPP in one of its arbitrarily drawn regions shows that SPP-Entergy, perhaps with ERCOT, is the appropriate region. In any event, the Commission's statements are not supported by substantial evidence.

The Commission also is required to consider alternatives. Rather than creating market and reliability issues by taking actions that may result in the splitting of SPP and Entergy, the Commission should have considered joint structures involving the Midwest and the South, or at least the Midwest, SPP and Entergy. SPP's Board of Directors certainly believes that such an approach would be more prudent. The Commission also should have considered the possibility of SPP agreeing to a contract with the Midwest entities similar to the settlement agreement between members of the Alliance Regional

Transmission Organization (“ARTO”) and the Midwest Independent Transmission System, Inc. (“MISO”). SPP had been working on resolving many of those same issues prior to the order and would accept such a contract. Given the fact that the Commission a mere few months ago approved such a structure, it would be reasonable and consistent with its policy to allow SPP to satisfy scope and configuration requirements by entering into such a contract.

Finally, SPP would note that the Commission’s action may well endanger markets and reliability in the Southwest. SPP would have been up and running as a large RTO (much larger than GridSouth or GridFlorida, assuming that Entergy was part of the SPP RTO) by sometime this year if the Commission had provided its approval. The Commission’s action certainly has derailed that effort with the likely result that there will not be an operating RTO in the Southwest this year. The Commission also must recognize that putting together the SPP RTO was a very delicate process. Any assumption that all of the transmission owners who agreed to participate in the SPP RTO will participate in any other RTO may not prove to be true. SPP also administers regional transmission service in the Southwest today. If some SPP transmission owners jump to another RTO or decide that they no longer want to be part of SPP because of the Commission’s actions, that regional transmission service may be endangered or limited which undoubtedly would hurt the market.

In sum, the Commission should grant rehearing.

II. STATEMENT OF FACTS

1. SPP has been in business for over 60 years. It currently has 50 members, serving more than 6.5 million customers in all or part of eight states. Its membership is diverse, split between transmission owners, municipal and cooperative customers, power

marketers, an independent power producer (“IPP”), a federal power marketing agency, and state authorities. SPP has been a regional reliability council since 1968.

2. Today, SPP provides most of the functions required by an RTO under Order No. 2000. SPP has been the regional security coordinator since 1997 and began administering transmission service under a regional open access transmission tariff (“Tariff”) on June 1, 1998. This first Tariff was the result of a nearly three-year effort and only covered short-term services. Subsequently, SPP expanded its Tariff to include all transmission services required by Order No. 888. SPP also operates the OASIS for the SPP area, schedules transactions and administers transmission services, calculates ATC for the region, administers generation interconnections pursuant to standardized procedures, has a centralized planning process, coordinates transmission system maintenance, and facilitates the provision of ancillary services under the Tariff. Today, SPP is governed by a Board of Directors that is not controlled by any one entity. That 21-member Board of Directors is made up of four investor-owned transmission providers, three publicly-owned transmission providers, four cooperatives, two power marketers/independent power producers, one member of SPP’s staff, and seven independent members. Much of the work within SPP is done by committees or working groups, with those committees and working groups having diverse membership including transmission owners, customers, and marketers. Like the Board of Directors, no one segment controls SPP committees or working groups.

3. In January 1997, SPP’s ISO Task Force began work on developing a structure to comply with Order No. 888. Ultimately, this effort resulted in SPP’s submission of a filing on December 30, 1999 in Docket No. EL00-39-000, ten days after

the issuance of Order No. 2000, requesting ISO/RTO recognition. SPP's Board of Directors voted unanimously to make this filing.

4. On May 17, 2000, the Commission denied this petition without prejudice and provided guidance.⁷ One of the main points addressed by the Commission was the need for section 203 applications to be submitted. On scope and configuration (the issue here), the Commission stated that SPP "should expand its regional configuration to comply with Order No. 2000".⁸ The Commission went on to say that any new proposal should address:

(1) the extent to which SPP's operations will be impacted by the absence of its former members, especially those situated at SPP's regional boundaries . . . ; (2) whether it is feasible-or even possible-for SPP to include its former members in the proposed SPP RTO; (3) what specific procedures and rate structures SPP will implement when coordinating its operations with adjacent utilities and regional entities; and (4) whether it is feasible for SPP to join with other groups engaged in forming RTOs in the region.

Southwest Power Pool, Inc., 91 FERC at 61,530.

5. SPP's October 13, 2000 filing ("October 13 Filing") addressed every one of these questions, as well as demonstrating SPP's compliance with each of the RTO requirements. Most significantly, that filing included a Memorandum of Understanding ("MOU") negotiated with Entergy, a former member. As explained in the filing, the SPP-Entergy combination was larger in scope than every operating ISO at that time. Exh. No. SPP-1 at 8. Testimony submitted by SPP demonstrated that power flows supported the conclusion that with Entergy, SPP would satisfy scope and configuration

⁷ Southwest Power Pool, Inc., 91 FERC ¶ 61,137 ("May 17 Order").

⁸ Id. at 61,530.

requirements in that “[w]ith the inclusion of Entergy, most power flows are internalized within SPP’s footprint” and that SPP, therefore, will be of sufficient size for reliability and tariff administration purposes. Exh. No. SPP-1 at 9. SPP also provided testimony showing that it was actively working on seams solutions with various parties (Exh. Nos. SPP-1 at 12, SPP-21 at 3-8), and that SPP was of sufficient size and scope to support efficient and non-discriminatory power markets (Exh. Nos. SPP-1 at 8-10; SPP-23 at 2-3). SPP’s testimony described its efforts with other former members, some of whom came back to SPP, and its discussions with other regions. Exh. No. SPP-1 at 13-14. In this filing, SPP recognized that section 203 applications were not submitted with the filing and asked that the Commission conditionally accept the filing subject to the section 203 filings being submitted.

6. On March 28, 2001, the Commission issued another order on scope and configuration relating to SPP.⁹ In that order, the Commission stated that:

The proposed RTO would serve a fairly large, contiguous geographic region. The region is highly interconnected and has a long history of cooperation as a NERC reliability council and as a power pool before that. The SPP RTO will not serve as a barrier, in any significant way, between two or more natural markets.

March 28 Order at 62,295.

The Commission further stated its belief that data showed that natural markets extend beyond the SPP-Entergy region and relied on data which allegedly showed significant sales with the Southeast and “to a lesser extent, companies in the Midwest.”

Id. The Commission stated that “while the proposed SPP RTO Partnership, with its inclusion of Entergy, represents progress made in response to the May 17 Order, it does

⁹ Southwest Power Pool, Inc., 94 FERC ¶ 61,359 (2001) (“March 28 Order”).

not completely accommodate the full markets we know to exist”.¹⁰ The Commission thus directed that there be further negotiations by SPP and Entergy with their neighbors regarding the formation of a larger RTO, and to submit a report no later than May 25, 2001, on those negotiations. The Commission also stated that section 203 applications from SPP members would need to be submitted before it would consider the proposal. The Commission indicated that the SPP-Entergy RTO proposal, if it came to fruition, might “marginally” satisfy the requirements of Order No. 2000, but that it would need to see section 203 applications and the documents describing how the SPP-Entergy partnership would operate before it could make a decision. Id.

7. As a result of this order, as explained in the filing submitted on May 25, 2001, SPP diligently pursued obtaining section 203 applications from its transmission owners and succeeded in doing so. In addition, one former transmission owner, Cleco Power LLC (“CLECO”), submitted a section 203 application. SPP and Entergy also finalized and submitted extensive detailed procedures showing how the Entergy Transco and SPP will operate together, as required by the March 28 Order. Finally, SPP devoted very substantial resources to further negotiations with adjoining entities. SPP’s president, in fact, was directly involved in many of those negotiations. SPP and Entergy entered into discussions with Southeast entities, in particular the Southern Companies (“Southern”) and the Tennessee Valley Authority (“TVA”). As explained in the filing, though SPP offered several approaches and options for their participation, neither was interested in having any substantial discussions with SPP and Entergy.¹¹ They had their

¹⁰ Id. at 62,296.

¹¹ May 25 Filing, Transmittal Letter at 8.

own RTO projects under way. SPP also had discussions with other entities and met with some success, such as obtaining CLECO's agreement to place their transmission facilities under the SPP Tariff. Prior to the July 12 Order, SPP was continuing to work on agreements with other entities in the Midwest and was making some progress.

8. In support of its filing, SPP submitted the affidavit of Dr. David Patton, the expert who testified in support of the Alliance RTO's scope and configuration.¹² Dr. Patton analyzed the data which showed that SPP-Entergy was the market and that the only area in which there were substantial transactions with SPP-Entergy was ERCOT. Exh. No. SPP-24 at 7. He also analyzed SPP against approved RTOs and found that SPP was larger and had fewer transactions on a percentage basis with adjoining regions than the approved RTOs, further showing that under Commission policy SPP qualified as an RTO. Id. at 11-12. His data also demonstrated that the data relied upon by the Commission in its order was in error as the transactions between SPP's members and companies within SERC except for transactions with Entergy were not all that substantial. Dr. Patton conducted two other analyses examining the extent of price convergence and arbitrage involving SPP and Entergy, consistent with standard antitrust analysis for establishing relevant markets. This analysis demonstrated that the power markets in SPP-Entergy are well arbitrated and price convergence is high. Exh. No. SPP-24 at 16. This further supported the conclusion that SPP-Entergy represents a natural trading area.

9. In another proceeding involving GridSouth, the Commission was faced with arguments challenging its acceptance of GridSouth's scope when it was half the size

¹² Dr. Patton's affidavit was submitted as Exhibit No. SPP-24, with his supporting material included as Exhibit Nos. SPP-25 through SPP-27.

of SPP-Entergy. In that order, the Commission distinguished the GridSouth and SPP proposals by stating that it was “the failure of any SPP transmission owner to commit to file an application under Section 203 of the Federal Power Act that led to the Commission’s decision not to approve SPP’s proposal on scope and configuration.”¹³

10. On July 12, 2001, the Commission issued its order rejecting SPP’s RTO filing, which SPP here challenges. The Commission stated that the filings did not describe real negotiations with other entities and only describe “a lack of interest on the part of other proposed RTOs.” July 12 Order, slip op. at 9. While giving credit to SPP and Entergy for their efforts, FERC stated that “it does not do enough.” *Id.* at 10. With regard to evidence, the Commission acknowledged and agreed with SPP’s analysis showing that “wholesale activities within the proposed RTO will outweigh sales to other regions.” *Id.* at 9. The Commission, however, without any evidence other than an allegation in a protest, asserts that future trading patterns would be different. *Id.* The Commission also did not directly address SPP’s analyses, which using well-established antitrust analyses, showed that SPP-Entergy formed a natural market. The Commission (*id.* at 10) essentially drew boundaries to establish four RTOs, one in the Northeast, one in Southeast, one in the Midwest, and one in the West, again without any evidence supporting the drawing of these lines. The Commission then stated that SPP and Entergy may move in different directions, without any discussion of the evidence submitted by SPP showing that this is not the best solution for reliability or markets in the Southwest. *Id.* at 11. The Commission also directed SPP to participate in the Southeast negotiations, though it also suggested that SPP may want to consider joining with others to form a

¹³ Carolina Power & Light Co., 95 FERC ¶ 61,282, at 61,990 (2001).

region-wide RTO in the Midwest. Id. Finally, the Commission did not address any of the arguments or evidence showing that its rejection of the SPP RTO was contrary to its precedent. The Commission's decision does not by any stretch of the imagination constitute reasoned agency action.

III. THE COMMISSION SHOULD GRANT REHEARING OF ITS REJECTION OF THE SPP RTO.

As shown below, the Commission committed error in rejecting the SPP RTO because:

- It has imposed a major change to Order No. 2000 without notice and comment.
- The Commission's rejection of the SPP RTO is directly inconsistent with its prior orders.
- The Commission's finding that the natural market may exceed SPP-Entergy is contrary to the evidence and is not the product of reasoned decision-making.
- The Commission failed to address other evidence showing that an SPP-Entergy combination is important for reliability and market reasons.
- The Commission has retroactively and substantively changed its rules and precedents thereby harming those that have relied on those rules and precedents, in contravention of basic administrative law principles.
- The Commission's rejection violates its policies on rejection of filings.
- The Commission erroneously failed to consider other alternatives including the formation of a structure which encompasses the Midwest and Southeast or adoption of the ARTO-MISO Settlement.

A. The Commission’s Rejection Of The SPP RTO Is Directly Inconsistent With Its Prior Orders.

Perhaps the most glaring example of the arbitrariness of the Commission’s rejection of the SPP-Entergy RTO proposal is its blatant inconsistency with other Commission orders. The Commission approved the scope and configuration of the GridSouth RTO.¹⁴ Yet, when GridSouth’s scope and transactions with adjoining regions are compared to the SPP-Entergy RTO, it is clear that the Commission has acted arbitrarily here. The following table, which clearly shows that the SPP-Entergy RTO is substantially larger than GridSouth in all material respects, was presented to the Commission as Exh. No. SPP-24 at 5:

**Table 1
Comparison of SPP RTO and Other RTOs**

	SPP ^a	GridSouth ^b	CA ISO ^a	ISO-NE ^a	NYISO ^a	PJM ^a
Generation Capacity (MW)	64,400	41,800 ^f	44,500 ^e	27,000	36,300	56,000
Control Area Peak Load (MW)	61,300	34,000	45,500	21,400	28,700	51,650
Square Miles Service Area	396,000	65,000	124,000	48,000	49,000	52,000
Miles of Transmission	50,400	22,000	21,000	8,000 ^c	19,000	8,000 ^d

- a. See Direct Testimony of Nicholas Brown, Exh. No. SPP-1.
- b. GridSouth RTO filing, Docket No. RT01-74-000.
- c. 115 kV and above.
- d. 230 kV and above.
- e. Does not include 6,600 MW of other available resources.
- f. Includes utility and non-utility owned generation.

Significantly, in approving GridSouth the Commission relied on the following: control area peak load, square miles of the service area, and miles of transmission. Carolina, 94 FERC at 61,993. Yet, when presented with much larger numbers by the

¹⁴ Carolina Power & Light Co., 94 FERC ¶ 61,273, at 61,993, reh’g denied, 95 FERC ¶ 61,282 (2001).

SPP RTO filing, it ignored the same type of data that it found to be persuasive in GridSouth.

Elsewhere in that Exhibit No. SPP-24 (at 11), SPP showed that GridSouth had far greater seams problems than SPP-Entergy to the Southeast, which is the area that the Commission in its March 28 SPP order concluded was its area of most concern:

Table 2
Wholesale Energy Transactions With
Uncommitted SERC Areas*

Transactions With	1998 (MW)	1999 (MW)
SPP RTO	1,392,609	1,057,253
Alliance RTO/Midwest ISO	7,832,076	10,090,052
GridSouth	4,875,388	3,368,097
GridFlorida	11,676,062	11,013,711

* Not including Entergy or portions of SERC included in GridSouth or the Alliance RTO.

Notwithstanding this fact, the Commission did not find GridSouth's transactions with adjoining regions to be of relevance. In contrast, the Commission found the much smaller SPP transactions to be a concern.

Moreover, the SPP RTO filing included 13 transmission owners, including five public entities. The SPP filing was approved by a Board of Directors not controlled by any industry segment, and developed through a collaborative process with industry participants from diverse segments having a vote on what was contained in the filing. In contrast, GridSouth consists of, and was filed by, three investor-owned utilities who filed what they chose to file and which filing received significant protest from public entities.

Further in requests for rehearing of the first GridSouth order, parties argued that the Commission's acceptance of GridSouth's scope and configuration was inconsistent with the March 28 SPP order. In response, the Commission stated that its real reason for

its action in the March 28 SPP Order was the failure of SPP or its transmission owners to submit section 203 applications.¹⁵ Yet, after those section 203 applications were submitted, the Commission in its July 12 Order still found the SPP-Entergy RTO proposal to be lacking in scope. This is directly contrary to the words of that second GridSouth order.

Nor can the Commission's action here be reconciled with its acceptance of Grid Florida as being of sufficient scope and configuration.¹⁶ GridFlorida also is substantially smaller than the SPP-Entergy RTO.¹⁷ While Florida is a peninsula, the data in Table II shown above, demonstrates that Grid Florida has very substantial transactions with SERC. On a percentage basis, those transactions are much greater than the transactions that SPP-Entergy has with any region. Thus, it makes no sense that the Commission would find (based upon speculation as to the future) that SPP-Entergy may not encompass the natural market when the out-of-region transactions are relatively much greater for GridFlorida, thereby showing that its natural market extends beyond Florida.

Further, in GridFlorida the Commission relied on the RTO encompassing a region which is a NERC reliability council, being a continuous geographic region, and being highly integrated. GridFlorida, LLC, 94 FERC at 62,336. These are all facts present in the SPP-Entergy RTO, in addition to it being a much larger region.¹⁸ Yet, the

¹⁵ Carolina Power & Light Co., 95 FERC at 61,990.

¹⁶ GridFlorida, LLC, 94 FERC ¶ 61,363, at 62,336 (2001).

¹⁷ See Carolina, 94 FERC at 61,993 (stating GridSouth RTO will manage an interconnected peak load of 34,000 MWs).

¹⁸ May 25 Filing, Transmittal Letter at 3, 5-7; Exh. No. SPP-24 at 4-6.

Commission inexplicably disregarded these facts for SPP while finding them to be of such importance in GridFlorida.

In its July 12 Order, the Commission did not address, much less acknowledge, and reconcile this inconsistency between its findings in the GridSouth and GridFlorida orders and its finding in the July 12 Order. This clearly fails the test of reasoned decision-making and is reversible error.¹⁹ As the Commission stated in an order issued on July 25, 2001, “litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally.”²⁰ There can be no clearer example of the Commission’s breach of these fundamental principles than here. The fact that the Commission has changed does not negate its obligation to follow the rule of law.

B. The Commission’s Rejection Of SPP’s Filing Is Not The Result Of Reasoned Decisionmaking, Nor Is It Supported By Substantial Evidence.

As set forth in the Administrative Procedure Act, an administrative agency’s decisions must be supported by substantial evidence and must not be “arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law.” 5 U.S.C. § 706(2). Under the substantial evidence test, the agency’s findings must be supported by “relevant evidence as a reasonable mind might accept as adequate to support a

¹⁹ See Williston Basin Interstate Pipeline Co. v. FERC, 165 F.3d 54, 65 (D.C. Cir. 1999) (“[R]easoned decisionmaking requires treating like cases alike.”); Gulf Power Co. v. FERC, 983 F.2d 1095, 1101 (D.C. Cir. 1993) (remanding decision for failure to explain why similarly situated utilities were being treated differently); State of New York v. FERC, 954 F.2d 56, 61 (2nd Cir. 1992) (“Commission cannot arbitrarily treat similar situations dissimilarly.”).

²⁰ San Diego Gas & Elec., *supra*, slip op. at 27 (quoting National Fuel Gas Supply Corp., 59 F.3d 1281, 1289) (D.C. Cir. 1995)).

conclusion.”²¹ The agency must do more than make conclusory statements; it must analyze the contrary evidence.²²

Putting aside the direct inconsistency with its past orders addressed above (which demonstrate the arbitrary nature of the Commission’s action), the Commission failed to support its decision by substantial evidence, or to analyze the contrary evidence and show why it should not be relied upon. In essence, the Commission’s rejection of the SPP RTO is based on one conclusion, with all other findings and requirements in the July 12 Order following from that conclusion. Specifically, the Commission stated that SPP-Entergy will not sufficiently encompass or correspond to natural markets in the future.²³ On this issue, the Commission apparently agreed with SPP’s evidence showing that the market today is within the SPP-Entergy area.²⁴ The Commission’s sole explanation for its decision not to rely on this evidence was set out in the following two sentences:

In establishing RTOs, however, we are looking beyond sales under today’s conditions. As Arkansas Cities points out, trading patterns would be different in the absence of rate pancaking and once retail competition occurs.

July 12 Order, slip op. at 9.

There is not one shred of evidence to support this speculation. The past certainly does not support this speculation as shown by the evidence submitted by SPP. See Exh. No. SPP-24. There is limited transmission both to the rest of the Southeast and to the

²¹ FTC v. Indiana Fed. of Dentists, 476 U.S. 447, 454 (1986) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)).

²² See Universal Camera, 340 U.S. at 474; Pennzoil Co. v. FERC, 789 F.2d 1128, 1135 (5th Cir. 1986).

²³ July 12 Order, slip op. at 9, 11.

²⁴ Id. at 9.

Midwest from SPP. With such limited transmission, it is unlikely that the historic trading patterns would change dramatically. The Commission's statement also ignores the fact that within SPP, there already are non-pancaked rates. Thus, this is not a case in which the formation of an RTO will result in the reduction from three, four or five wheeling charges to one. This is a case in which the reduction in rates only would be from two charges in some cases to one. Given the relatively small portion of overall rates relating to transmission, the Commission has no basis for concluding that the elimination of one wheeling charge will have a large impact on the future transactions.²⁵

In any event, the Commission on these very material issues has failed to support its conclusions as required by statute and judicial precedent. Significantly, prior to its July 12 orders, in the only three orders in which it approved a RTO's scope and configuration, the Commission relied on general historic information as to scope, did not offer speculation as to future markets, and did not rely on any discussion of natural markets. Therefore, to place such importance in the SPP order on future natural markets and to use that as the basis for rejecting SPP's scope and configuration, when that was not even considered in the three orders in which the Commission approved RTO scope and configuration or in other RTO orders, is the height of arbitrariness.

In its order, the Commission also ignored other significant evidence without even a mention. For example, an SPP official testified that the SPP-Entergy region would encompass the vast majority of power flows. Exh. No. SPP-1 at 9. These power flows provide support for the conclusion that SPP-Entergy encompasses the market.

²⁵ See Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States, 96 FERC ¶ 61,155, slip op. at 9, 17-18 (2001).

Further, SPP submitted an affidavit which analyzed price convergence and arbitrage in the SPP-Entergy region as Exh. No. SPP-24 at 12. This method is similar to the method used in defining relevant geographic markets in antitrust cases. This exhibit demonstrated that “[p]rices that are highly correlated and tend to converge indicate that the two locations should be included in the same relevant geographic market.” Id. This affidavit showed that SPP-Entergy was the relevant market because of high correlation between prices. Id. at 14. The arbitrage analysis similarly showed that the power markets in the SPP and Entergy regions are well-arbitraged, further supporting SPP-Entergy as the pertinent market. Id. at 16. Even though this analytical approach is commonly used in establishing relevant markets, there is not one word in the Commission’s July 12 Order discussing this analysis.

Similarly arbitrary was the Commission’s failure to specifically address SPP’s arguments that its filing complied with the express terms of its regulations on scope and configuration. Section 35.34(j)(2) of the Commission’s regulations promulgated by Order No. 2000, 18 C.F.R. § 35.23(j)(2) (2000), addressing scope and configuration, states the following:

The Regional Transmission Organization must serve an appropriate region. The region must be of sufficient scope and configuration to permit the Regional Transmission Organization to maintain reliability, effectively perform its required functions, and support efficient and non-discriminatory power markets.

SPP’s October 13 Filing contained testimony clearly demonstrating compliance with the standard as set forth in the Commission’s regulations and in Order No. 2000.²⁶ The Commission did not explicitly address that testimony or compliance with the words

²⁶ Exh. No. SPP-1 at 7-14; Exh. No. SPP-23 at 2-3.

of its regulations. As noted above, the Commission's sole response was based on its speculation as to future market. However, neither this regulation, nor the three cases applying (discussed above) mention or define natural markets.

Finally, one other aspect of the Commission's action shows clearly the arbitrary nature of the Commission's actions. In prior orders, the Commission directed the filing of section 203 applications by SPP transmission owners. While it took some time, SPP members ultimately effected the submission of section 203 applications. Yet, in the July 12 Order, the Commission rejected those very filings as "premature" which it was so anxious to have submitted in earlier orders.

C. The Commission Improperly Failed To Provide And Request Additional Notice And Comment On Its Major Change To Order No. 2000.

In its July 12 Order, the Commission adopted a dramatic change in policy from Order No. 2000. The Commission is now setting boundaries for RTOs. In Order No. 2000, the Commission expressly refused to set boundaries, even though parties asked it to do so.²⁷ The Commission's solution was to allow parties to voluntarily form RTOs.²⁸ Commissioner Breathitt in her dissent recognized in the July 12 Order (at 16-17) the Commission's radical change in policy stating:

When the Commission deliberated over how to attain our mutual objective of RTO formation, we decided to adopt an open collaborative process that relied on voluntary regional

²⁷ Order No. 2000 at 31,079-80.

²⁸ Order No. 2000 at 31,033-34 (concluding "on this record that it is in the public interest to provide for a voluntary approach to RTO formation"); Order No. 2000-A at 31,357-58 (denying rehearing of the decision not to mandate RTO participation, and stating that "the most effective and efficient" means of helping to establish workable RTOs is to provide clear standards and guidance, rather than "imposing strict mandates that could polarize people and generate resistance").

participation. . . . Today's order represents a dramatic departure from the approach we pursued in Order No. 2000 to the extent that it directs the formation of four specific RTOs. Just as some commenters to our RTO rulemaking feared, the Magic Markers have come out, and the boundaries are being drawn with little regard to the status and timing of RTO formation efforts in various regions of the country. This was not my intent at the time we issued Order No. 2000.

Commissioner Massey agreed that the Commission changed its policy. July 12 Order at 14 (“[We] at long last provide much needed guidance to the industry” and “[t]his guidance is long overdue.”) (Massey, Comm’r concurring).

Similarly, the courts have generally required that administrative agencies provide additional notice and comment when they make substantial changes to rules.²⁹ Clearly, the changes made by the Commission here go to the heart of the rule and represent a very fundamental change. As shown by the Commission’s emphasis on scope and configuration in its recent orders, the Commission considers the issue to be quite significant. Thus, Commissioner Breathitt’s statement that new notice and comment was necessary is correct and the full Commission should have adopted her suggestion.

D. The Commission May Not Selectively And Retroactively Change Its Rules Which Detrimentially Affect Those That Have Relied On Those Rules.

As discussed above, SPP relied on the Commission’s prior RTO policy as detailed in Order No. 2000 and in orders applying that rulemaking. In evaluating SPP’s RTO filing, the Commission should have applied the rules in effect when the filings were developed, rather than new rules. Effectively, the Commission is retrospectively and

²⁹ See Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 752-755 (D.C. Cir. 2001); Michigan v. EPA, 213 F.3d 663, 692-93 (D.C. Cir. 2000), cert. denied, 121 S.Ct. 1225 (2001).

selectively applying new rules. After all, other RTO filings were approved under the old rules, which had they been applied fairly to SPP would have caused the Commission similarly to find that SPP was of sufficient scope and configuration. That is not permissible.³⁰

In San Diego Gas & Elec. Co., the Commission discussed the issue of retroactive application of decisions and referred to “a five-part test for deciding if retroactivity is inappropriate” even aside from the change being selectively administered. Slip op. at 27. (citing Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1553-55 (D.C. Cir. 1993)). The tests as stated in that decision are the following:

- (1) whether the particular case is one of first impression,
- (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of the law,
- (3) the extent to which the party against whom the new rule is applied relied on the former rule,
- (4) the degree of the burden which is retroactive order imposes on a party, and
- (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Williams Natural Gas Co., 3 F.3d at 1553-54.

Application of these tests shows that the Commission could not retroactively change its policies on scope and configuration with regard to SPP. First, this case is not one of first impression. As discussed above, had the Commission applied its precedent to the SPP filing, it would have found that the SPP-Entergy RTO satisfied scope and configuration. Thus, in this case, “it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.” Williams Natural Gas Co., 3 F.3d 1554.

³⁰ See Southwestern Pub. Serv. Co., 842 F.2d 1204, 1208-09 (10th Cir. 1988); San Diego Gas & Elec. Co., at 27.

Second, as also shown above, the new rule represents an abrupt departure from settled practice. Compare id. (“Retroactivity is appropriate when the agency’s ruling represents ‘a new policy for a new situation,’ rather than being ‘a departure from a clear prior policy.’”).

Third, SPP and its members relied on the existing rule and orders and expended many millions of dollars and person-hours of which the Commission was aware.

Fourth, the burden on SPP of application of the new policy may be so great that it could force SPP to largely go out of existence or to merge. There can be no doubt that this is a very great burden on a 60 year old entity.

Finally, as to the statutory interest, SPP has demonstrated that the July 12 Order may well hurt the markets and reliability in the Southwest and create problems that would have been resolved by the SPP-Entergy combination.

Therefore, the Commission cannot apply its new rules retroactively to SPP under longstanding legal principles.

E. The Commission Has Violated Its Policies On The Rejection Of Filings.

Under longstanding case law, the Commission may reject a filing without a hearing only if the filing “patently is either deficient in form or a substantive nullity.”³¹ The SPP filing was neither deficient in form nor a substantive nullity. It was a serious filing, encouraged by the Commission, which complied with the regulations promulgated by Order No. 2000 and which contained the section 203 applications required by the Commission’s orders. See October 13 Filing for description as to how it complied with

³¹ Municipal Light Bds. v. FPC, 450 F.2d 1341, 1345 (D.C. Cir. 1971).

Order 2000 requirements. Therefore, the Commission acted improperly in rejecting the filing.

F. The Commission Should Have Considered Alternatives To Rejection.

“It is well established that an agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.” Farmers Union Cent. Exchange, Inc. v. FERC, 734 F.2d 1486, 1511 (D.C. Cir. 1984). There were responsible alternatives to rejection of the filing, which was the product of an enormous amount of work by participants in the SPP region.

For example, if the Commission had considered the evidence submitted by SPP on markets and reliability, it would have seen that the better solution (if the Commission is going to be drawing boundaries) is to have a structure which encompasses both the Midwest and the South (or at least SPP and Entergy together with the Midwest). As shown by that evidence separating SPP from Entergy creates substantial seams issues.

Also, the Commission should have considered ordering SPP to participate in the ARTO-MISO settlement if it believed that SPP should be in the Midwest. SPP already is involved in many aspects of that settlement, and Commission consideration of that alternative would have been a reasonable step. After all, this is a settlement which the Commission approved a mere three months ago.³² Moreover, in an Alliance order, the Commission stated that “in Order No. 2000, the Commission found that an RTO could potentially meet the scope and configuration requirements through a contract that eliminates the effect of seams.”³³

³² Illinois Power Co., 95 FERC ¶ 61,183 (May 8, 2001) (approving ARTO-MISO settlement subject to clarifications and modifications).

³³ Alliance Cos., 94 FERC ¶ 61,070, at 61,307 (2001).

IV. THE COMMISSION MUST ACT EXPEDITIOUSLY ON THIS REQUEST

This request details very major flaws in the July 12 Order. It also refers to potential market and reliability issues that may result from the order. Of even greater concern is that the July 12 Order may cause SPP into actions which will substantially change its form, with some of those potential actions being irreversible. The Commission must respond quickly to provide certainty and also to allow SPP and its members to pursue judicial review at the earliest possible time if they choose to do so. Moreover, as shown by this document and by SPP's filings, the Commission should reverse itself and approve the SPP-Entergy scope and configuration as being compliant with Order No. 2000 without a hearing.

V. CONCLUSION

As shown above, the Commission's findings in the July 12 Order are inconsistent with price rulings, statements and standards. Accordingly, the Commission should grant rehearing of that order, and find that SPP satisfies the Commission's requirements for RTO scope and configuration.

Respectfully submitted,

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August 8, 2001
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CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 8th day of August, 2001.

David S. Berman
Wright & Talisman, P.C.

Attorney for
Southwest Power Pool, Inc.

Draft Term Sheet

Whereas, the Midwest Independent Transmission System Operator, Inc. (“MISO”) and the Southwest Power Pool, Inc. (“SPP”) (individually each a party and collectively the parties) each are engaged in the business of providing open access transmission service over facilities committed to their control by transmission owning members; and

Whereas, the parties are desirous of exploring the basis upon which a possible combination or other business transaction involving the parties might take place,

Based on the mutual premises presented below, the parties agree as follows:

1. NATURE OF PROPOSED COMBINATION

Assets and Liabilities of the MISO and SPP would be contributed, transferred to or assumed by Newco at book value. The specific form of the transfer will be determined with regard to tax and accounting matters. The remaining MISO and SPP transmission-owning members would be transmission-owning members in Newco. Any Memoranda of understanding, contracts or coordination agreement with transmission owners or ITC arrangements would be assigned by SPP or the MISO to Newco, with consents as required. SPP as a regional Reliability Council would continue in existence unchanged by the transaction. Non-transmission owner members of the MISO and SPP would become non-transmission-owning members of NEWCO without additional cost to them.

2. FORM OF NEWCO

Delaware non-stock, not-for-profit corporation, with possible for-profit subsidiaries.

3. BUSINESS OF NEWCO

Newco would be in the business of providing RTO/FERC Order 2000 services on a bundled and on an unbundled or menu basis and would be the RTO covering the MISO and SPP regions. As the one RTO over the combined region, Newco would be responsible for all FERC Order 2000 attributes and functions. Customers would be able to take differing levels of service depending upon FERC approval of such customer as an ITC or Transco within the footprint. Transmission service within the footprint would be offered under a single tariff. Newco would also offer services on a commercial contract basis. Newco would act as security coordinator for the footprint of its transmission owning members and to the degree successful for the area of its contract customers. The current MISO Appendix I, the proposed SPP/Entergy MOU or an appropriate substitute sufficient to accommodate the business needs of Transcos or ITCs, would be available to forming Transcos or ITCs.

4. TARIFF

The Newco will maintain and administer individual tariffs for the SPP and MISO regions for a period necessary to provide for a smooth transition to a single tariff, though there will be one-stop shopping for the customers throughout the transition. Each of the two regions, as specified in their existing agreements, will control pricing and other transitional issues such as what load is under the tariff and grandfathering. The other terms such as generation interconnection procedures, scheduling and response times, and penalties will be standardized so that they are the same under both tariffs unless differences can be justified. Also, the regional tariffs will need to maintain certain differences with regard to retail service as these types of provisions will vary from state to state. Aside from pricing, load under tariff, grandfathering, retail issues and other issues that affect recovery of transmission revenue requirements, any tariff changes shall be subject to the ultimate approval of Newco. Revenue distribution methods involving recovery of transmission revenue requirements will not be changed by this new structure. The other ancillary services schedules and loss schedules will be standardized. As to cost adders to recover the costs of Newco operations, there will be only one cost adder. It will be collected at the Newco level to allow full recovery of costs for all Newco operations including the administration of two tariffs during the transition. The Newco cost adder will be similar to the MISO cost adder that contains a 15-cent cap and a deferral mechanism as in the MISO Open Access Transmission Tariff ("OATT") schedule 10. If FERC finds in the pending MISO case concerning application of Schedule 10 that all load, including bundled load should pay the adder, then the Newco adder shall be charged on all load within MISO/SPP. Rate pancaking between the former SPP and former MISO will be eliminated. Newco may use a rate charge like the one outlined in the MISO-ARTO settlement to govern transmission pricing over SPP-MISO and to limit losses from the elimination of rate pancaking. Newco will file a single tariff by December 31, 2002.

5. LOCATIONS

Indianapolis/Carmel, Little Rock, Minneapolis/St.Paul

6. FUNCTIONS PER LOCATION

Recommendations to the Board of Directors regarding facilities, locations, placement of functions, and numbers of personnel would need to be made based upon the development and analysis of alternatives. We would suggest the formation of a team (or teams) to develop these.

7. BOARD AND GOVERNANCE STRUCTURES

An independent Board will govern Newco and will consist of eight independent members of the MISO board, including the President of the MISO as one of the eight, and five independent board members from SPP, including the President of SPP as one of the five. [If the load of either SPP or MISO significantly changes prior to closing of the combination, then the number of board positions taken from each SPP and MISO will be re-addressed.] It is the intent of the parties that the size of the Newco board be reduced to less than ten members over the ensuing five years. The non-officer board members will be assigned to three groups, of approximately equal size, and the terms of each group will be staggered with the first group serving a term of two years, group two serving a term of three years and group three serving a term of four years.

A Stakeholder Advisory Committee (similar to the MISO Advisory Committee) designed with a balanced sector voting process to ensure no undue influence by any one sector, will make recommendations (including majority and minority reports) directly to the Board. The Stakeholder Advisory Committee will have strong meaningful input that reflects the interests of all stakeholders into the decisions of the Board on matters particularly related to the safe and reliable operation of the interconnection (technical matters), facilitate a robust non-discriminatory energy market, budgets, insuring that no member of groups of members is able to exercise undue influence and incorporates the regions of the original MISO, Mid-continent Area Power Pool (“MAPP”) and SPP.

Each category will have three representatives, one each from the original MISO, SPP and MAPP regions. The representatives will be elected by their constituent groups and each representative will be entitled to one vote on matters the Stakeholder Committee requires votes, should certain constituent groups desire non-voting status that shall be allowed at their discretion. The Stakeholder Committee will have a permanent place on the agenda of the Board of Directors meeting to address the Board at all of its meetings. At least two members of the Board and the President shall attend all Stakeholder Committee meetings. A committee of the Stakeholder Committee will review with Newco management budgets and major capital projects and expenditures prior to submission to the Board for approval. The Stakeholder Committee may form other committees to address other areas of interest to the participants, which may include but not be limited to policy, markets, system operations, billing and settlements, congestion management or any other broad areas that affect Newco.

Board meetings of Newco will be open to any participants. Newco’s Board will only meet in executive session to address certain items, such as (a) personnel-related information; (b) information subject to a legal privilege; (c) information that is confidential to third parties; (d) business transactions or combinations; (e) consideration of the sale or purchase of securities, investments, or investment contracts; (f) strategy and negotiation

sessions in connection with a collective bargaining agreement; (g) discussion of emergency and security procedures; (h) consideration of matters classified as confidential by federal or state law; (i) protection of intellectual property; and (j) discussion of proceedings by any Alternate Dispute Resolution Committee, each as described in the By-laws of the Midwest ISO.

A Transmission Owners Committee will also be formed.

8. ASSETS AND LIABILITIES

Valuation of assets and liabilities will be at book value.

9. UTILIZATION OF FACILITIES AND EMPLOYEES

It is the intent of the MISO and of SPP that all existing facilities and employees of the two entities be fully utilized and that efforts be made to reduce the number of needed new employees or systems to recognize the efficiencies of this combination. The MISO and SPP intend that the Newco be staffed initially by employees of the MISO and SPP who then become employees of Newco, unless sufficient qualified employees are not available for transfer, in which case Newco may hire others. Severance, if any, for employees of MISO or SPP not employed with Newco shall be per the terms of MISO and SPP severance policies.

10. PERSONNEL

The current officers' contracts will remain in effect. The Board of Newco will determine actual appointment of individuals to specific officer positions.

11. REGULATORY ACTIONS

The MISO and SPP agree to consider the joint submittal and support of a petition for declaratory order to the FERC seeking an order stating that this combination satisfies the scope and configuration and governance requirements of Order No. 2000. The MISO and SPP agree to share the costs of the filing fee. This petition, if a joint decision is made to file, shall be submitted within twenty-one days after the approval of both Boards of Directors of MISO and SPP.

12. FOR PROFIT CONVERSION

Both the MISO and SPP agree that if the Newco Board determines that Newco should become a for profit entity, then Newco may become such an entity.

13. INCENTIVES

The MISO and SPP agree that incentives must be developed for employees and officers of Newco based on reliability, cost control and general performance.

14. CONDITIONS REQUIRED TO BE SATISFIED

In order for any transaction to occur, the following conditions must be satisfied:

- The current Boards of Directors of both the MISO and SPP must approve a term sheet setting forth all material provisions for such a transaction and bearing the designation “Final Draft – Subject To Board Approval” on or before September 1, 2001;
- Appropriate definitive documentation agreed to by _____, 2001; and
- FERC approval is obtained.

15. MISCELLANEOUS

Definitive documents for the individual transactions necessary to accomplish the combination will include provisions typical for transactions of this type including but not limited to the following:

- Representations and warranties as to
 - organization and good standing, ability to enter into the transaction, etc.;
 - financial matters;
 - tax matters;
 - litigation, pending claims and compliance with laws;
 - contracts and commitments;
 - real property and other assets;
 - patents, trademarks, licenses and other intangibles;
 - insurance;
 - environmental matters, and
 - ERISA and employee benefit/HR matters;
- Indemnifications;
- Continuing conduct of business;
- Mutual cooperation and assurance;
- Regulatory approvals; and

- Choice of law

Time is of the essence for the matters discussed in this term sheet. Should we be in agreement to pursue a business combination between our organizations, due diligence would have to be scheduled and completed promptly and conformance of the proposal with both the MISO's and SPP's third party contractual obligations would have to be assured. Definitive documents would have to be created, executed and filed with the appropriate regulatory agencies by September 30, 2001.

This "Draft Term Sheet" is not an offer. It is intended to provide a basis for discussion among the parties. By executing the "Draft Term Sheet" in the spaces provided below, the Parties are committing only to continued discussions. Execution of the "Draft Term Sheet" does not represent an obligation upon the parties to enter into a combination or other business transaction.

The laws of the State of Indiana, other than as to choice of law, shall control the construction and enforcement of this "Draft Term Sheet."

Midwest Independent Transmission
System Operator, Inc.

Southwest Power Pool