

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Southwest Power Pool, Inc.)

Docket No. ER10-1069-000

**ANSWER TO REQUESTS FOR REHEARING OF
SOUTHWEST POWER POOL, INC.**

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.213, Southwest Power Pool, Inc. ("SPP") files this answer¹ to the requests for rehearing submitted in this proceeding.² The requests for rehearing provide no basis for the Commission to grant

¹ SPP acknowledges that Commission Rules 213(a)(2) and 713(d)(1) do not permit answers to requests for rehearing. 18 C.F.R. §§ 385.213(a)(2), 385.713(d)(1). SPP seeks leave to submit this answer to assist the Commission's decision-making process and clarify the issues. The Commission regularly allows answers for such purposes. *See, e.g., ANR Pipeline Co.*, 131 FERC ¶ 61,293, at P 9 (2010) (accepting answers to requests for rehearing that provided information that assisted the Commission in its decision-making process); *Tex. E. Transmission, LP*, 131 FERC ¶ 61,164, at P 1 n.3 (2010) (accepting answer to a request for rehearing that aided the Commission's decision-making); *see also Sw. Power Pool, Inc.*, 128 FERC ¶ 61,018, at P 15 (2009) (accepting answers that aided the Commission's decision-making); *Sw. Power Pool, Inc.*, 126 FERC ¶ 61,153, at P 18 (2009) (accepting answers that aided the Commission's decision-making).

² Request for Rehearing by The Empire District Electric Company, Omaha Public Power District, Nebraska Public Power District, City Utilities of Springfield, Missouri, and Lincoln Electric System (collectively, "Joint Protestors"), Docket No. ER10-1069-001 (July 19, 2010) ("Joint Protestors Rehearing Request"); Supplemental Request for Rehearing of Lincoln Electric System ("LES"), Docket No. ER10-1069-001 (July 19, 2010) ("LES Rehearing Request"); Request for Rehearing of Nebraska Public Power District ("NPPD"), Docket No. ER10-1069-001 (July 9, 2010) ("NPPD Rehearing Request"). NPPD submitted its rehearing request prior to LES and the Joint Protestors. To the extent necessary, SPP requests leave to respond to the NPPD Rehearing Request in this filing, rather than burden the Commission with two separate responses to rehearing requests. For the purposes of this answer, the parties filing requests for rehearing are collectively referred to as the "protestors."

rehearing of its June 17, 2010³ order unconditionally accepting SPP’s “Highway/Byway” cost allocation methodology.⁴ In the June 17 Order, the Commission fulfilled its obligations under the Federal Power Act (“FPA”)⁵ and Commission and judicial precedent to evaluate SPP’s cost allocation methodology to determine the justness and reasonableness of SPP’s proposal. The requests for rehearing submitted in this proceeding mischaracterize Commission and judicial precedent regarding cost allocation and the Commission’s FPA section 205⁶ review, ignore the existence of substantial evidence in the record justifying the Commission’s decision, confuse the Commission’s determination on the merits with a summary judgment, and restate arguments previously rejected by the Commission. Accordingly, the requests for rehearing provide nothing new that would compel the Commission to disturb its earlier unconditional acceptance of the SPP Highway/Byway Filing, and therefore should be denied.⁷

I. BACKGROUND

On April 19, 2010, after an extensive, open, and inclusive 15-month stakeholder process, SPP submitted its revisions to its Open Access Transmission Tariff (“Tariff”) to implement its new Highway/Byway regional cost allocation methodology and supporting

³ *Sw. Power Pool, Inc.*, 131 FERC ¶ 61,252 (2010) (“June 17 Order”).

⁴ Submission of Tariff Revisions to Modify Transmission Cost Allocation Methodology of Southwest Power Pool, Inc., Docket No. ER10-1069-000 (Apr. 19, 2010) (“Highway/Byway Filing”).

⁵ 16 U.S.C. § 824d.

⁶ *Id.*

⁷ *See, e.g., Bluegrass Generation Co.*, 121 FERC ¶ 61,018, at P 11 (2007) (denying rehearing where party requesting rehearing “has advanced no new arguments” and “has merely repeated its previous claims”).

testimony from Mr. Leslie E. Dillahunty, SPP Senior Vice President, Engineering and Regulatory Policy.⁸ By May 17, 2010, over 20 parties filed comments supporting SPP’s proposed Highway/Byway methodology, including five of the seven state commissions represented on SPP’s Regional State Committee (“RSC”), and six protests and one limited protest (expressing general support for the Highway/Byway Filing) were filed.⁹

On June 17, 2010, after weighing the record evidence and pleadings, the Commission issued its order unconditionally accepting the Highway/Byway proposal as just and reasonable.¹⁰ The Commission determined that SPP submitted substantial evidence¹¹ to demonstrate that the Highway/Byway methodology complies with the Commission’s cost causation principle,¹² and that the Highway/Byway methodology complies with the Commission’s cost allocation principles articulated in Order No. 890.¹³

⁸ See Highway/Byway Filing, Exhibit No. SPP-1.

⁹ See Answer of Southwest Power Pool, Inc., Docket No. ER10-1069-000, at 3-4 (June 1, 2010) (“SPP Answer”). Answers supporting the Highway/Byway Filing were submitted by other intervenors, and the protestors and one other party submitted answers to the SPP Answer and other answers.

¹⁰ June 17 Order at P 62.

¹¹ *Id.* at PP 73-74, 94 (characterizing SPP’s evidence as “compelling,” “sufficient,” and “substantial”).

¹² *Id.* at PP 70-85.

¹³ See generally *id.* at PP 68-89 (summarizing the factors comprising the Commission’s Order No. 890 cost allocation principles and detailing how the Highway/Byway Filing complies with each factor in the analysis). In Order No. 890, the Commission indicated that, when reviewing transmission cost allocation methodologies, would consider several factors, including: (1) whether the proposal fairly assigns costs among participants, including those who cause the costs to be incurred and those who otherwise benefit; (2) whether the cost allocation proposal provides adequate incentives to construct new transmission; and (3) whether the proposal is generally supported by state authorities and participants across the region. *Preventing Undue Discrimination and Preference* (continued. . .)

II. ANSWER

As the Commission determined in the June 17 Order, SPP's Highway/Byway is an Order No. 890-compliant, stakeholder-supported¹⁴ cost allocation methodology that allocates costs to SPP customers in a manner at least roughly commensurate with the benefits expected to accrue to such customers. Despite their myriad attacks on both the substance of the Commission's decision and the process it used to reach its decision, the requests for rehearing provide no basis for the Commission to set aside the findings of its June 17 Order. Moreover, the Commission fulfilled its obligations under the Federal Power Act¹⁵ and Commission and judicial precedent to determine whether the Highway/Byway Filing is just and reasonable and to reach a reasoned decision based on substantial evidence.

A. The Commission Correctly Applied Its Cost Causation Analysis in Accord with Relevant Statutes and Judicial Precedent

As the June 17 Order correctly summarizes, the Commission reviews cost allocation proposals to ensure that they satisfy the "cost causation" principle, meaning that costs allocated to a customer "reflect to some degree the costs actually caused by the

(... continued)

in Transmission Service, Order No. 890, 2006-2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,241, at P 559, *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 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009). As the June 17 Order indicates, the Highway/Byway methodology satisfies all three of these principles. June 17 Order at PP 68-89.

¹⁴ June 17 Order at P 89.

¹⁵ 16 U.S.C. § 824d.

customer who must pay them.”¹⁶ The cost causation principle is satisfied when a cost allocation methodology allocates costs to beneficiaries in a manner “at least roughly commensurate with the benefits that are expected to accrue to that entity.”¹⁷ Under this maxim, the Commission is not required to “reject any rate mechanism that tracks the cost-causation principle less than perfectly”¹⁸ or to accept only those cost allocation mechanisms that “allocate costs with exacting precision.”¹⁹ In unconditionally accepting the Highway/Byway Filing, the Commission correctly found that it comports with the cost causation principle.

The rehearing requests go to great lengths to argue that the June 17 Order violates the cost causation principle on the basis that the Commission did not provide a detailed comparison of the costs and benefits allocated to each customer under the Highway/Byway methodology.²⁰ Notably, to make this case, protestors rely primarily upon one sentence in the recent *Illinois Commerce Commission v. FERC*²¹ opinion to justify their call for the Commission to engage in a precise matching of costs and benefits

¹⁶ June 17 Order at P 66 (citing *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992)).

¹⁷ *Id.* at P 67 (citing *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 476-77 (7th Cir. 2009)).

¹⁸ *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1369 (D.C. Cir. 2004) (citing *Sithe/Independence Power Partners, L.P. v. FERC*, 285 F.3d 1, 5 (D.C. Cir. 2002)).

¹⁹ *Id.*

²⁰ *See, e.g.*, Joint Protestors Rehearing Request at 21, 23; NPPD Rehearing Request at 9, 10, 11, 16, 19.

²¹ 576 F.3d 470 (7th Cir. 2009) (“*ICC v. FERC*”).

to every customer. This interpretation, however, reads too much into the *ICC v. FERC* court's holding.

Specifically, protestors stress that the cost causation principle requires the Commission to “compar[e] the costs assessed against a party to the burdens imposed or benefits drawn by that party.”²² However, the *ICC v. FERC* court's rejection of the Commission's order approving a PJM Interconnection, L.L.C.'s (“PJM”) proposed cost allocation methodology was based on the fact that the Commission provided “not even the roughest estimate of likely benefits” and that the Commission's two orders cited to “no data” to support its decision.²³ The protestors completely ignore this fact, along with the fact that the *ICC v. FERC* court correctly recognized that the cost causation principle does not require the Commission “to calculate benefits to the last penny, or for that matter to the last million or ten million or perhaps hundred million dollars.”²⁴ The *ICC v. FERC* decision does not mandate that the Commission engage in a customer-by-customer, or even a zone-by-zone analysis of the costs and benefits allocated under a proposed cost allocation methodology,²⁵ as the rehearing requests argue.

SPP's various quantitative and qualitative analyses provide the Commission with ample support for its conclusion that the Highway/Byway methodology allocates costs in a manner roughly commensurate with the benefits. SPP's quantitative studies

²² See, e.g., Joint Protestors Rehearing Request at 21, 23; NPPD Rehearing Request at 9, 10, 11, 16, 19.

²³ *ICC v FERC*, 576 F.3d at 474-75.

²⁴ *Id.* at 477.

demonstrated significant regional use of extra high voltage (“EHV”) transmission facilities and predominantly local use of low voltage facilities.²⁶ This evidence alone is sufficient to demonstrate that costs and benefits are “roughly commensurate,” particularly given that the cost causation principle does not require “exacting precision.” However, SPP supplemented its quantitative showing of the relative regional and zonal use of transmission facilities with additional analyses demonstrating that qualitative benefits of EHV transmission development accrue broadly to customers across the SPP Region.²⁷ Even on its remand of the Commission’s PJM order, the *ICC v. FERC* court acknowledged that the Commission can take such inherent qualitative benefits of EHV transmission into account when considering a cost allocation methodology.²⁸ The fact that the Commission cannot “avoid the duty” of comparing costs and benefits²⁹ does not mean that the Commission cannot take these “less tangible benefits” into account, as the protestors argue.³⁰ Additionally, the Commission also considered SPP’s modifications to its cost allocation unintended consequences review, which the Commission described as “an added measure to ensure that benefits are at least roughly commensurate with costs

(. . . continued)

²⁵ See *Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945) (“Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science.”).

²⁶ See June 17 Order at PP 72-74 (citing SPP analyses demonstrating up to 98% inter-zonal flows on EHV transmission facilities).

²⁷ *Id.* at PP 27, 75.

²⁸ *ICC v. FERC*, 576 F.3d at 475-76.

²⁹ *Id.* at 476-77.

³⁰ See Joint Protestors Rehearing Request at 20-23; LES Rehearing Request at 4.

under the Highway/Byway Methodology.”³¹

Protestors also incorrectly argue that the June 17 Order violates the cost causation principle by taking policy considerations into account. For example, Joint Protestors criticize the June 17 Order’s partial reliance on the Highway/Byway’s effect on promoting transmission construction, arguing that “promoting transmission construction is not, *standing alone*, an objective that has equal priority with the [FPA section] 205 standards.”³² However, nowhere in the June 17 Order does the Commission indicate that its decision was based on the effect on construction incentives alone. Instead, the June 17 Order first discussed the many quantitative and qualitative analyses presented by SPP to demonstrate the correlation of costs and benefits under the Highway/Byway methodology, and then supplemented its findings with additional policy justifications. Joint Protestors and NPPD also devote several pages of their respective rehearing requests to red herring arguments that the June 17 Order somehow violates the FPA requirements for transmission rate incentives,³³ wholly ignoring the fact that the Highway/Byway methodology is not the type of rate incentive subject to section 219 of the FPA and the Commission’s regulations promulgated thereunder. Such arguments provide no basis for a grant of rehearing.

³¹ June 17 Order at P 83.

³² Joint Protestors Rehearing Request at 39 (emphasis added). This argument also amounts to a collateral attack on the Order No. 890 cost allocation principle, which expressly requires the Commission to assess a proposed cost allocation methodology in part on the basis of whether it provides incentives to construction. *See* Order No. 890 at P 559.

³³ *See* Joint Protestors Rehearing Request at 37-42; NPPD Rehearing Request at 32.

Additionally, protestors' reliance on SPP's Priority Projects and Balanced Portfolio Reports in an attempt to undermine SPP's proposed cost causation methodology are misplaced. As SPP explained³⁴ and the Commission agreed,³⁵ the Priority Projects and Balanced Portfolio Reports assessed various costs and benefits resulting from discrete sets of transmission projects without accounting for the relative costs and benefits of future transmission additions that would also affect the cost and benefit balance among the SPP Zones. SPP does not dispute the results of the studies on their face; however, SPP disputes the Joint Protestors' witnesses' opinions that these studies contradict the justness and reasonableness of the Highway/Byway methodology.³⁶

B. The Commission Based Its Decision on Substantial Evidence and Exhibited Reasoned Decision-Making

To survive judicial scrutiny under the Administrative Procedure Act,³⁷ a Commission decision must not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.³⁸ The Commission must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection

³⁴ SPP Answer at 33-36.

³⁵ June 17 Order at PP 75-77.

³⁶ Additionally, as discussed above, *supra* note 31 and accompanying text, SPP's unintended consequences provisions are an added measure to ensure that benefits and costs balance over time. The protestors' myopic focus on the Balanced Portfolio and Priority Projects Reports as indicative of all future cost/benefit allocations under the Highway/Byway is misplaced, particularly given the additional protections provided by the strengthened unintended consequences review process.

³⁷ 5 U.S.C. § 706.

³⁸ *Id.* § 706(2)(A); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).

between the facts found and the choice made,³⁹ and courts are bound to affirm the Commission on appeal if its decision “path may be easily discerned.”⁴⁰ The Commission must demonstrate through its order that it has made a reasoned decision based on substantial evidence in the record,⁴¹ and courts afford the Commission considerable deference in reviewing the Commission’s decision, particularly on matters of rate design and other technical matters within the Commission’s expertise.⁴²

1. The Commission’s Decision Was Based on Substantial Evidence

The June 17 Order represents a model of reasoned decision-making based upon substantial evidence. That the protestors are dissatisfied with the Commission’s decision to accept the Highway/Byway unconditionally over their objections is of no consequence. As discussed above, SPP presented a series of studies to demonstrate the predominant

³⁹ *Sacramento Mun. Util. Dist. v. FERC*, No. 07-1208, 2010 U.S. App. LEXIS 15179, at *18-19 (D.C. Cir. July 23, 2010); *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1307 (D.C. Cir. 2007) (“We need only inquire whether FERC has examined the relevant data and articulated a rational connection between the facts found and the choice made.”); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1422 (10th Cir. 1992) (“We must uphold the Commission’s determination if it is based on consideration of the relevant facts and articulates a rational connection between the facts found and the choice made.”) (citing *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42-43).

⁴⁰ *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

⁴¹ *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010).

⁴² *Sacramento Mun. Util. Dist.*, 2010 U.S. App. LEXIS 15179, at *19; *Fla. Gas Transmission*, 604 F.3d at 645 (when considering FERC’s evaluation of matters within its technical expertise, courts afford the Commission “an extreme degree of deference”) (citations and quotations omitted); *E. Ky. Power Coop.*, 489 F.3d at 1307 (affording the Commission “particular deference” in upholding the Commission’s determination); *Pac. Gas and Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002) (citing *PUC v. FERC*, 254 F.3d 250, 253-54 (D.C. Cir. 2001)).

regional usage of EHV transmission facilities⁴³ and the many benefits that accrue to customers across the SPP Region from such facilities.⁴⁴ SPP also provided testimony of actual experience in SPP involving a flowgate constraint and the significant price impacts felt in a wide area within the SPP Region, and how the addition of certain identified EHV transmission facilities would have alleviated the constraint for the benefit of customers throughout the SPP Region.⁴⁵ Joint Protestors, in turn, submitted a series of studies conducted by SPP and expert witness opinion⁴⁶ analysis of such studies (among other things). The June 17 Order provided detailed summaries of the evidence presented by both SPP⁴⁷ and the Joint Protestors,⁴⁸ demonstrating that there was substantial evidence in the record on which the Commission could make its decision.

To meet the substantial evidence requirement, the Commission must develop a record that includes “such relevant evidence as a reasonable mind might accept as

⁴³ June 17 Order at PP 72-75 (discussing SPP’s quantitative evidence of regional usage of EHV transmission facilities).

⁴⁴ *Id.* at P 27 (summarizing a study SPP commissioned to assess the economic and employment impact of wind power integration and transmission system development in the SPP Region).

⁴⁵ *Id.* at P 79 (*citing* Highway/Byway Filing, Exhibit No. SPP-1 at 34-35).

⁴⁶ The protestors’ constant characterizations of their witnesses’ testimony as “fact” is unavailing. The statements and observations of their expert witnesses do not constitute “facts” but rather are opinions of experts that, while possibly probative, are not dispositive on any issue. *See, e.g., Bureau of Land Mgmt., 70 FERC ¶ 61,165 (1995) (finding an expert witness’s analysis of data “not a material fact because it is not basic information, i.e. raw data. It is an opinion of an expert.”)*.

⁴⁷ June 17 Order at PP 23-27 (summarizing SPP’s evidentiary presentation).

⁴⁸ *Id.* at PP 36-51 (summarizing the evidence, analysis, and argument presented by Joint Protestors).

adequate to support a conclusion.”⁴⁹ As the courts have observed, “the substantial evidence inquiry turns not on how many discrete pieces of evidence the Commission relies on, but whether that evidence adequately supports its ultimate decision.”⁵⁰ The courts also have indicated that, while the substantial evidence standard “requires more than a scintilla, [it] can be satisfied by something less than a preponderance of the evidence.”⁵¹ Therefore, the Commission is not bound to base its decision on the volume of evidence presented by one side, so long as the evidence upon which its decision is based meets the substantial evidence requirement. As the finder of fact, the Commission also is entitled to assign whatever persuasive weight it chooses to the evidence submitted by both sides.⁵²

The Joint Protestors’ opinion that its evidence was “stronger”⁵³ or more persuasive⁵⁴ than SPP’s or that, when compared “side by side” with SPP’s submission, was more voluminous,⁵⁵ does nothing to prove the weight of the evidence. Commission

⁴⁹ *Koch Gateway Pipeline Co.*, 75 FERC ¶ 61,132, at 61,457-58 (1996) (quoting *Wis. Gas Co. v. FERC*, 770 F.2d 1144, 1168 (D.C. Cir. 1985), *cert denied*, 476 U.S. 1114 (1986)).

⁵⁰ *Fla. Gas Transmission*, 604 F.3d at 645.

⁵¹ *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365-66 (D.C. Cir. 2003).

⁵² *See Williston Basin Interstate Pipeline Co.*, 68 FERC ¶ 61,357, at 62,432 (1994) (acknowledging that the Commission enjoys “wide discretion” in determining the probative weight to be given the opinion testimony of expert witnesses and may substitute its own expert opinion) (*citing Market Street Ry. Co. v. Railroad Comm’n of the State of Cal.*, 324 U.S. 548 (1945)).

⁵³ Joint Protestors Rehearing Request at 58.

⁵⁴ *Id.* at 57.

⁵⁵ *Id.* at 58-59.

decisions are guided by the substance, not the volume, of evidence presented. SPP provided evidence of several studies it conducted to support the Highway/Byway cost allocation methodology, including evidence both of the regional use of EHV lines and the predominant local use of lower-voltage facilities, testimony of SPP's actual experience with congestion and how EHV facilities can alleviate congestion and reduce price fluctuations in areas of the SPP Region removed from the constraint, and other evidence discussing other benefits of regional grid development that SPP has identified through commissioned studies. The Commission's order does not lack substantial evidence "simply because petitioners offered some contradictory evidence,"⁵⁶ and the Commission was fully justified in determining that SPP's evidentiary presentation provided the Commission substantial evidence upon which to base its decision.

Moreover, contrary to the requests for rehearing,⁵⁷ the Commission did not err in deciding this case on the basis of both expert witness opinion testimony and statements presented in pleadings. A complete record in a Commission proceeding consists of not only witness testimony (when submitted), but also supporting exhibits, pleadings, and other documents submitted to the Commission, and the Commission may base its decision both on the witness testimony and the pleadings.⁵⁸ Additionally, the Commission enjoys "wide discretion in determining the probative weight to be given the

⁵⁶ *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954-55; *see also Ind. Mun. Power Agency v. FERC*, 56 F.3d 247, 254 (D.C. Cir. 1995) ("Once assured the Commission has engaged in reasoned decisionmaking, it is not for us to reweigh the conflicting evidence or otherwise to substitute our judgment for that of the Commission.").

⁵⁷ *See* Joint Protestors Rehearing Request at 31.

⁵⁸ *See, e.g., Koch Gateway Pipeline Co.*, 75 FERC ¶ 61,132, at 61,458.

opinion testimony of expert witnesses and may substitute its own expert opinion.”⁵⁹ The fact that SPP provided an explanation in its answer to clarify incorrect assertions made by the Joint Protestors’ witnesses in their expert opinion testimony⁶⁰ does not bar the Commission from accepting SPP’s explanations.

2. *The Commission Engaged in Reasoned Decision-Making*

While the Commission must “respond meaningfully” to “objections that on their face seem legitimate,”⁶¹ the ultimate question is not whether the record evidence supports the Joint Protestors’ positions, but whether it supports the Commission’s decision.⁶² Commission orders are affirmed “so long as FERC ‘examined the relevant data and articulated a . . . rational connection between the facts found and the choice made,’” and “[w]hen FERC’s orders concern ratemaking, [the courts] are ‘particularly deferential to the Commission’s expertise.’”⁶³ In its June 17 Order, the Commission articulated several reasons for deciding, based on the record, that the Highway/Byway is a just and reasonable cost allocation methodology. The requests for rehearing provide no basis for the Commission to reconsider whether it fulfilled its obligation to engage in reasoned decision-making.

⁵⁹ *Williston Basin Interstate Pipeline Co.*, 68 FERC ¶ 61,357, at 62,432 (citing *Market Street Ry. Co.*, 324 U.S. 548).

⁶⁰ Joint Protestors Rehearing Request at 31.

⁶¹ *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001).

⁶² *Fla. Mun. Power Agency*, 315 F.3d at 368; see also *Ariz. Corp. Comm’n*, 397 F.3d at 954.

⁶³ *Midwest ISO Transmission Owners*, 373 F.3d at 1368 (citing *Ass’n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996)).

Protestor claims that the Commission’s acceptance of the Highway/Byway Filing is “entirely unsupported,”⁶⁴ and that “there is no basis on the record” for the Commission to resolve this proceeding in SPP’s favor⁶⁵ are flatly untrue. The Commission provided substantial discussion in the June 17 Order both in summarizing SPP’s quantitative and qualitative analyses⁶⁶ and its reasoning for finding SPP’s demonstration sufficient to meet its burden of proving the justness and reasonableness of the Highway/Byway methodology.⁶⁷

Likewise, protestor suggestions that the Commission used the presumption of system-wide benefits to avoid the duty of comparing costs and benefits⁶⁸ are equally unavailing. While the Commission did consider the significant benefits that accrue to all SPP customers from the development of a robust, integrated transmission network,⁶⁹ as the *ICC v. FERC* opinion expressly indicates it may,⁷⁰ the Commission also engaged in a detailed review of the quantitative analyses provided by SPP regarding the predominant use of a variety of transmission facilities operating at various voltages and, using those

⁶⁴ See NPPD Rehearing Request at 10, 12.

⁶⁵ See *id.* at 13.

⁶⁶ June 17 Order at PP 23-27 (summarizing SPP’s evidentiary presentation).

⁶⁷ *Id.* at PP 72-89.

⁶⁸ See Joint Protestors Rehearing Request at 21.

⁶⁹ June 17 Order at P 80 (*quoting S. Co. Servs., Inc.*, 116 FERC ¶ 61,247 (2006)).

⁷⁰ *ICC v. FERC*, 576 F.3d at 477 (indicating that the Commission can presume that new transmission lines benefit the entire network and factor the benefits into its analysis); see also *W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999) (“When a system is integrated, all system enhancements are presumed to benefit the entire network.”).

analyses, articulated the reasons for its decision.⁷¹ The June 17 Order provides a clear path from SPP’s evidence regarding transmission facility usage—which demonstrated predominant regional use and responsiveness of EHV facilities, moderate regional use and responsiveness of mid-level facilities, and predominant local use of low voltage facilities—to the Commission’s decision to accept the Highway/Byway Filing.⁷²

Protestors mischaracterizations of the June 17 Order as failing to respond to protestor arguments and witness testimony criticizing SPP’s evidentiary showing⁷³ equally provide no basis to grant rehearing. The Commission directly addressed the Joint Protestors’ and their witnesses’ major objections to SPP’s evidence, such as the use of a 0.1% threshold in SPP’s Transmission Distribution Analysis,⁷⁴ the conclusions to be drawn from SPP’s Priority Projects and Balanced Portfolio Reports,⁷⁵ SPP’s showing of qualitative system benefits,⁷⁶ the impact of SPP’s modified unintended consequences review,⁷⁷ concerns regarding the Highway/Byway methodology’s impact on generation siting decisions,⁷⁸ and potential for over-building and cost containment.⁷⁹ The

⁷¹ June 17 Order at PP 72-75.

⁷² *Id.*

⁷³ Joint Protestors Rehearing Request at 25-32; NPPD Rehearing Request at 20-28, 38-44.

⁷⁴ June 17 Order at P 74.

⁷⁵ *Id.* at PP 75-77.

⁷⁶ *Id.* at PP 78-81.

⁷⁷ *Id.* at PP 82-85.

⁷⁸ *Id.* at P 87.

⁷⁹ *Id.* at P 88.

Commission simply cannot be expected to refute every single allegation made in expert witness opinion testimony in order to demonstrate reasoned decision-making.⁸⁰

3. *The June 17 Order Does Not Represent an Unexplained Departure from Prior Commission Precedent*

Protestor allegations that the Commission failed to demonstrate reasoned decision-making because the June 17 Order departs from Commission precedent also lack merit. For example, the Joint Protestors suggest that the Commission's acceptance of a 40-year study period for SPP's unintended consequences review departs from prior Commission orders.⁸¹ This assertion, however, misreads the Commission's earlier order. In SPP's Balanced Portfolio proceeding, the Commission did not reject a 40-year study horizon out-of-hand. Instead, the Commission found SPP's proposed 10-year horizon in that proceeding "reflect[ed] a reasonable balance between the horizon for estimating benefits and the accuracy of those benefits" and that "there is a trade-off between the horizon for estimating benefits and the accuracy of those estimates."⁸² The Commission did not abandon its prior findings on SPP's planning horizon by accepting SPP's proposal in the June 17 Order, and is not obligated to demonstrate that the existing planning

⁸⁰ See *Colo. Interstate Gas Co.*, 324 U.S. at 589 ("Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science."). Cf. *Duke Power Co. v. FERC*, 864 F.2d 823, 828 (D.C. Cir. 1989) ("To be sure, our task of reviewing the Commission's decisions would be made easier if the Commission thoroughly disposed of every contrary argument, but such meticulousness is neither required nor expected of the Commission.").

⁸¹ See Joint Protestors Rehearing Request at 51-53.

⁸² *Sw. Power Pool, Inc.*, 125 FERC ¶ 61,054, at P 36 (2008) ("Balanced Portfolio Order").

horizon is unjust and unreasonable⁸³ before accepting SPP's proposal to utilize a study horizon for its unintended consequences review that tracks the useful life of transmission upgrades on the system.⁸⁴

Likewise, NPPD's assertion that the Commission departed from its order issued in the remanded PJM cost allocation proceeding⁸⁵ is off the mark. The PJM orders cited by NPPD are not dispositive on the issue of the justness and reasonableness of the Highway/Byway cost allocation methodology. Nor do the PJM orders serve as precedent governing the showing required by the Commission to meet the just and reasonable standard. The PJM orders are limited to the Commission's development of a record in that proceeding, and have no bearing on whether SPP presented sufficient evidence in this proceeding. As the June 17 Order recognizes, "the Commission has not established a specific requirement regarding the analyses or tests a party must undertake to justify a particular cost allocation proposal."⁸⁶

⁸³ Compare *Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,193, at P 106 (2007) (summarizing that the Commission's obligation under section 205 of the FPA is to determine whether a rate proposal is just and reasonable) (citations omitted), with *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, at P 20 (2006) (indicating that under section 206 of the FPA, the Commission must both find that an existing rate is unjust and unreasonable and must establish a just and reasonable rate to be thereafter observed).

⁸⁴ See, e.g. *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,185, at P 25 (2010) ("[T]he mere fact that the methodology can be refined does not undercut our conclusion that the overall method affords a just and reasonable rate for transmission customers. As the court noted . . . 'reasonableness is a zone, not a pinpoint.'").

⁸⁵ NPPD Rehearing Request at 33-37.

⁸⁶ June 17 Order at P 75.

Finally, NPPD’s claim that the June 17 Order cannot be squared with the Commission’s concurrent Notice of Proposed Rulemaking on transmission planning and cost allocation⁸⁷ is easily rejected. As an initial matter, while informative of the Commission’s emerging policies governing transmission planning and cost allocation, no final rule has been issued on the Transmission NOPR to date and therefore the Transmission NOPR provides no basis to grant rehearing of the June 17 Order. Additionally, under the Highway/Byway methodology as developed by the SPP RSC, supported by SPP’s stakeholders, and approved by SPP’s Board of Directors, facilities developed through SPP’s transmission planning process for regional purposes and to facilitate regional uses will receive regional cost allocation, while facilities planned and built primarily for local use will be allocated zonally, which is exactly the type of “link” between transmission planning and cost allocation the Transmission NOPR seeks to achieve.⁸⁸ Tellingly, despite NPPD’s suggestion to the contrary, the Transmission NOPR expressly endorses a Highway/Byway-type approach to transmission facility cost allocation.⁸⁹

⁸⁷ NPPD Rehearing Request at 14 n.6 (*citing Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 131 FERC ¶ 61,253 (2010) (“Transmission NOPR”).

⁸⁸ *See id.* at PP 5, 156.

⁸⁹ *Id.* at P 167. The Transmission NOPR observes

[A] postage stamp cost allocation method may be appropriate where all customers within a specified transmission planning region are found to benefit from the use or availability of a facility or class or group of facilities (e.g., all transmission facilities at 345 kV or higher), especially if the distribution of benefits associated with a class or group of facilities is likely to vary considerably over the long depreciation life of the facilities amid changing power
(continued. . .)

C. The Commission Was Not Required to Conduct a Trial-Type Evidentiary Hearing

Contrary to the arguments raised in the requests for rehearing,⁹⁰ the June 17 Order is not procedurally flawed because it is based on a paper record, nor are protestors entitled to a full, trial-type evidentiary hearing. While, as discussed above, the Commission is required to articulate a reasoned decision based upon substantial evidence in the record in making its ruling,⁹¹ the Commission is not required to compile its record by conducting an in-person hearing, nor is it procedurally deficient for the Commission to deny a full trial-type evidentiary hearing.

The courts have specifically determined that the Commission “may properly deny an evidentiary hearing if the issues, even disputed issues, may be adequately resolved on the written record, at least where there is no issue of motive, intent, or credibility.”⁹² The courts also have indicated that “it does not follow that a trial-type evidentiary hearing is required in each case . . . common sense dictates that the Commission be given some flexibility in deciding how it will use its resources to achieve the purposes of the hearing,”⁹³ and that a “full presentation of facts” necessary for the Commission to reach

(. . . continued)

flows, fuel prices, population patterns, and local economic developments.

Id.

⁹⁰ See Joint Protestors Rehearing Request at 55-59; see also e.g., NPPD Rehearing Request at 11-12, 20.

⁹¹ See *supra* Section II.B.

⁹² *Pac. Gas and Elec. Co.*, 306 F.3d at 1119 (citing *Texaco Inc. v. FERC*, 148 F.3d 1091, 1100 (D.C. Cir. 1998)).

⁹³ *Cascade Natural Gas Corp.*, 955 F.2d at 1425 (citations omitted).

its decision may be achieved solely through the submission of written evidence.⁹⁴ Even when disputed issues exist, the Commission is not required to conduct a full evidentiary hearing if the issues can be adequately resolved on the record, and the courts review the Commission's decision not to hold a hearing only under the stringent "abuse of discretion" standard.⁹⁵

Despite the Joint Protestors' claim that it is "well settled" that the Commission is required to conduct a full, trial-type evidentiary hearing whenever a genuine issue of material fact exists,⁹⁶ the Commission was completely within its discretion to determine the justness and reasonableness of the Highway/Byway Filing based on the voluminous written record submitted. As discussed above, SPP submitted substantial evidence of the myriad quantitative and qualitative benefits of EHV transmission facilities that accrue to customers throughout the region, as well as the nexus between the regional use of EHV transmission facilities and the cost allocation for such facilities under the Highway/Byway methodology, and the corresponding predominant local usage of low voltage facilities justifying the Highway/Byway methodology's zonal cost allocation.⁹⁷ Additionally, the protestors submitted pleadings, witness testimony, and exhibits. It can hardly be argued that the Commission lacked an adequate record to resolve the issues in

⁹⁴ *Id.* at 1426 ("[T]here is no guarantee that a party will be allowed to present evidence orally or to cross-examine witnesses.") (citations omitted).

⁹⁵ *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1992) (holding that the Commission did not abuse its discretion in denying petitioners' request for a trial-type hearing); *see also Ala. Power Co. v. FERC*, 993 F.2d 1557, 1565 (D.C. Cir. 1993) (indicating that absent evidence of an abuse of discretion, the court will defer to the Commission regarding whether to conduct an evidentiary hearing).

⁹⁶ Joint Protestors Rehearing Request at 55.

this proceeding without resorting to a full evidentiary hearing that would take months if not years and would consume Commission resources⁹⁸ and deny SPP and its stakeholders certainty with respect to cost allocation. The Commission properly reviewed the record submitted and made a reasoned decision based upon its review.

Moreover, protestors' attempts to equate the Commission's resolution of this proceeding with summary disposition⁹⁹ miss the mark. As an initial matter, SPP never requested that the Commission determine the justness and reasonableness of the Highway/Byway Filing through summary disposition.¹⁰⁰ Instead, SPP proffered substantial evidence in support of its Highway/Byway cost allocation proposal and responded to evidence and argument submitted by other parties. As is obvious from the June 17 Order, the Commission reviewed the record as a whole, weighed the evidence and argument, and made its decision articulating the evidentiary basis for its conclusions.¹⁰¹ Neither did SPP request that the Commission review, nor did the Commission resolve, this proceeding under the summary disposition procedures outlined in Rule 217. The Commission exercised its discretion in deciding this matter on the paper record, and the protestors' assertions regarding the burdens imposed under the

(. . . continued)

⁹⁷ See *supra* Section II.B.1.

⁹⁸ *Cascade Natural Gas Corp.*, 955 F.2d at 1425 (“[C]ommon sense dictates that the Commission be given some flexibility in deciding how it will use its resources to achieve the purposes of the hearing.”).

⁹⁹ See Joint Protestors Rehearing Request at 55-59.

¹⁰⁰ 18 C.F.R. § 217(c).

¹⁰¹ See *supra* Section II.B.2.

summary disposition rules, as well as their detailed discussion of the judicial standard for summary judgment,¹⁰² are wholly irrelevant.

III. CONCLUSION

For the foregoing reasons and the reasons articulated in the June 17 Order, the Commission should deny the requests for rehearing submitted in this proceeding.

Respectfully submitted,

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August 3, 2010

¹⁰² See Joint Protestors Rehearing Request at 55-59.

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 3rd day of August, 2010.

/s/ Matthew J. Binette

Matthew J. Binette

**Attorney for
Southwest Power Pool, Inc.**