

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

Southwest Power Pool, Inc.

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Docket No. ER10-1069-001

**ANSWER 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 answer to the motion for official notice submitted in this proceeding.<sup>1</sup> The Commission should reject the Joint Protestors' Motion as an improper attempt to introduce additional non-probative evidence into a record that has been closed for several months and to supplement the Joint Protestors' request for rehearing of the Commission's June 17, 2010 order in this proceeding,<sup>2</sup> despite substantial Commission precedent prohibiting such untimely evidentiary submissions.

**I. BACKGROUND**

On April 19, 2010, SPP submitted revisions to its Open Access Transmission Tariff ("Tariff") to implement its new Highway/Byway regional cost allocation methodology.<sup>3</sup> On May 17, 2010, Joint Protestors submitted a protest and motion for

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<sup>1</sup> Motion by Joint Protestors for Official Notice, Docket No. ER10-1069-001 (Nov. 18, 2010) ("Joint Protestors' Motion").

<sup>2</sup> *Sw. Power Pool, Inc.*, 131 FERC ¶ 61,252 (2010) ("Highway/Byway Order").

<sup>3</sup> See 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"). The Highway/Byway cost allocation methodology allocates the costs of new Base Plan Upgrades on a regional and zonal basis, depending upon the voltage level of the facility and its resulting benefits to customers.

rejection of the Highway/Byway Filing.<sup>4</sup> On May 28, 2010, Joint Protestors submitted a supplement to their Joint Protest,<sup>5</sup> and on June 11, 2010, Joint Protestors filed an answer<sup>6</sup> to SPP's answer submitted in response to the comments and protests filed in this proceeding.

On June 17, 2010, after weighing the extensive record evidence and pleadings, the Commission issued its order unconditionally accepting the Highway/Byway proposal as just and reasonable,<sup>7</sup> determining that SPP submitted substantial evidence<sup>8</sup> to demonstrate that the Highway/Byway methodology complies with the Commission's cost causation principle<sup>9</sup> and Order No. 890.<sup>10</sup> Joint protestors submitted a request for

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<sup>4</sup> Motion for Rejection of Filing or, in the Alternative, to Hold Proceeding in Abeyance, Protest, and Conditional Motions for Suspension and Hearing on behalf of City Utilities of Springfield, Missouri, the Empire District Electric Company, Lincoln Electric System, Nebraska Public Power District, and Omaha Public Power District, Docket No. ER10-1069-000 (May 17, 2010) ("Joint Protest").

<sup>5</sup> Supplement to Joint Protestors' Motion to Reject Filing, Docket No. ER10-1069-000 (May 28, 2010).

<sup>6</sup> Joint Protestors' Motion to File Limited Reply and Limited Reply to Answers, Docket No. ER10-1069-000 (June 11, 2010).

<sup>7</sup> Highway/Byway Order at P 62.

<sup>8</sup> *Id.* at PP 73-74, 94 (characterizing SPP's evidence as "compelling," "sufficient," and "substantial").

<sup>9</sup> *Id.* at PP 70-85.

<sup>10</sup> *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). *See Preventing Undue Discrimination and Preference 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* (continued. . .)

rehearing on July 19, 2010,<sup>11</sup> as well as an answer to SPP's answer to rehearing requests on August 18, 2010.<sup>12</sup>

## **II. ANSWER**

The Commission should reject the Joint Protestors' Motion as a thinly-veiled attempt to re-open the record in this proceeding, supplement the Joint Protestors' request for rehearing, and clutter the record with evidence that provides no basis for the Commission to grant rehearing of the Commission's June 17, 2010 order in this proceeding.

### **A. The Commission Should Reject the Joint Protestors' Motion and Untimely Submission of Additional Evidence**

As indicated above, the Commission issued the Highway/Byway Order on June 17, 2010, meaning that, pursuant to the Federal Power Act ("FPA")<sup>13</sup> and Rule 713 of the Commission's Rules of Practice and Procedure,<sup>14</sup> the deadline to submit a request for

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*clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009). As the Highway/Byway Order indicates, the Highway/Byway methodology satisfies all three of these principles. Highway/Byway Order at PP 68-89.

<sup>11</sup> 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, Docket No. ER10-1069-001 (July 19, 2010).

<sup>12</sup> Answer by the Empire District Electric Company, Omaha Public Power District, City Utilities of Springfield, Missouri, and Lincoln Electric System in Opposition to Southwest Power Pool's Motion for Leave to Answer Pending Requests for Rehearing, Docket No. ER10-1069-001 (Aug. 18, 2010).

<sup>13</sup> 16 U.S.C. § 8251.

<sup>14</sup> 18 C.F.R. § 385.713(b).

rehearing of the Highway/Byway Order was July 19, 2010.<sup>15</sup> The Joint Protestors appear to have met the strict statutory deadline governing rehearing requests by filing their initial rehearing request on July 19, 2010.<sup>16</sup> With the filing of their November 18 motion, however, the Joint Protestors ignore the statutorily-imposed deadline and seek yet another bite at the apple to oppose the Commission-accepted Highway/Byway cost allocation methodology.

The Joint Protestors' attempt to characterize their submission as a "Motion for Official Notice" is unavailing. While styled as a "motion," the Joint Protestors' filing is clearly intended to supplement their request for rehearing and other pleadings filed in this proceeding. Specifically, the Joint Protestors indicate that the documents submitted with the Joint Protestors' Motion "are relevant to several issues pending on rehearing."<sup>17</sup> The Joint Protestors then reiterate several of the issues raised in the Joint Protestors rehearing request,<sup>18</sup> with the obvious implication that the documents provide additional support to the arguments raised in their rehearing request.

Commission precedent supports rejection of the Joint Protestors' Motion. First, as the Joint Protestors' Motion acknowledges,<sup>19</sup> the Commission rejects amendments or supplements to rehearing requests that are styled in a manner to mask the true content of

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<sup>15</sup> Because the 30th day, July 17, 2010, fell on a Saturday, the deadline for filing a request for rehearing was Monday, July 19, 2010.

<sup>16</sup> See *supra* note 11 and accompanying text.

<sup>17</sup> Joint Protestors' Motion at 5.

<sup>18</sup> *Id.* at 6.

<sup>19</sup> *Id.* at 7 n.16 (citing *The Elec. Plant Bd. of the City of Paducah, Ky.*, 121 FERC ¶ 61,091, at P 6 (2007)).

the pleading.<sup>20</sup> As the Commission has indicated, “We do not permit supplements or amendments to requests for rehearing filed, as is the case here, more than 30 days after the date of the order at issue . . . [movant] cannot overcome our policy by styling its motion as, in the alternative, a motion for us to take official notice.”<sup>21</sup> While the Joint Protestors imply that their motion is not a supplement or amendment to their rehearing request,<sup>22</sup> the clear intent of the Joint Protestors’ Motion is to present the Commission with additional materials in an attempt to bolster the rehearing arguments cited by the Joint Protestors’ Motion.<sup>23</sup> The Commission should not entertain the Joint Protestors’ attempt to mask the character of their submission.

The Commission has repeatedly indicated that it lacks the authority to accept supplements to rehearing requests filed after the 30-day statutory deadline for rehearing, stating, for example that the Commission has “*no authority to accept materials in support of rehearing*” if such materials are filed after the 30-day statutory deadline for

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<sup>20</sup> *City of Paducah*, 121 FERC ¶ 61,091, at P 6 n.5 (“Giving the motion an alternative title does not make it proper.”); *see also CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,623 n.18 (1991) (“We recognize that the Intervenor has styled one of the Supplemental Filings as a ‘Motion to Lodge,’ which can be a proper, permissible motion, but, as we explain below, we are neither inclined nor obliged to accept a filing solely on the strength of its party-bestowed title.”).

<sup>21</sup> *City of Paducah*, 121 FERC ¶ 61,091, at P 6 & n.5.

<sup>22</sup> Joint Protestors’ Motion at 7 (“Joint Protestors have taken care not to include in this motion argument that is extraneous to the question of whether official notice is appropriate.”).

<sup>23</sup> The Commission also has indicated that it has “no authority to accept” late-filed pleadings, however styled, that “add to arguments that, by law, must have been made within the 30-day filing deadline for rehearings.” *CMS Midland*, 56 FERC at 61,625.

submitting materials in support of rehearing.”<sup>24</sup> Despite the fact that the Joint Protestors do not argue any new grounds or additional reasons for granting rehearing, the fact that the Joint Protestors argue that the proffered material bears directly on several of the issues raised in their rehearing request undermines their suggestion that such material is not supplemental to their rehearing request.

In addition, the Commission has rejected so-called requests for official notice or motions to lodge when the deadline for rehearing has passed and rehearing is pending. For example, in responding to a motion for official notice filed two months after the deadline for requesting rehearing in a proceeding, the Commission rejected a request that it officially notice changes in interest rates that occurred after the issuance of the order.<sup>25</sup> The Commission also has expressly rejected motions for official notice of events that have occurred after the close of the record, recognizing that a “gap” naturally exists “between the time the record is closed and the time the administrative decision is promulgated,” and that, at some point, “there must be an end to litigation.”<sup>26</sup>

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<sup>24</sup> *Houlton Water Co. v. Me. Pub. Serv. Co.*, 60 FERC ¶ 61,141, at 61,511 (1992) (emphasis added); *accord Mich. Elec. Transmission Co., LLC*, 116 FERC ¶ 61,164, at P 6 (2006) (“[T]he Commission does not permit supplements or amendments to requests for rehearing filed more than 30 days after the date of the order.”); *Commonwealth Edison Co.*, 115 FERC ¶ 61,133, at P 22 (2006) (“[W]e note that the Commission does not permit supplements or amendments to requests for rehearing filed more than 30 days after the date of the order.”); *La. Pub. Serv. Comm’n v. Entergy Servs. Inc.*, 112 FERC ¶ 61,184, at P 7 (2005) (“Because parties seeking rehearing are not permitted to file later, supplemental pleadings to their requests for rehearing, we will reject the Retail Regulators’ notice and the Louisiana Commission’s response.”).

<sup>25</sup> *Consumer Advocate Div. of W. Va. Pub. Serv. Comm’n v. Allegheny Generating Co.*, 42 FERC ¶ 61,248 (1988).

<sup>26</sup> *Mun. Elec. Utils. Ass’n of N.Y. v. Power Auth. of the State of N.Y.*, 49 FERC ¶ 61,068, at 61,267 & n.6 (1989) (finding that continued litigation by parties after  
(continued. . .)

Finally, it is significant to note that, had the Joint Protestors included the materials attached to their motion in their initial request for rehearing, Commission precedent would compel the rejection of such material. The Commission's long-standing policy is to reject extra-record evidence that is submitted as part of a rehearing request,<sup>27</sup> and the Commission should not permit the Joint Protestors to circumvent the Commission's prohibition on the untimely submission of evidence in a rehearing request by filing a subsequent motion for official notice more than four months hence. The Commission has held that

“[s]ubmission of additional factual information in a request for rehearing is not appropriate. A request for rehearing provides the parties with a final opportunity to present arguments to the Commission, *based on the evidence in the record at the time*, in light of the Commission's order in the proceeding. *It is a final step in the processing of a case before the Commission.*”<sup>28</sup>

Accordingly, “the Commission generally does not permit parties to introduce new evidence for the first time on rehearing,”<sup>29</sup> and therefore should reject the attempt by

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the close of the record “because some new circumstance has arisen, some new trend has been observed, or some new fact discovered” would prevent the administrative process from ever being concluded); *see also supra* note 23.

<sup>27</sup> *See, e.g., Transcon. Gas Pipeline Corp.*, 94 FERC ¶ 61,066, at 61,278 (2001) (“The Commission has consistently held the submission of additional factual information in a request for rehearing is not appropriate.”) (*citing Iroquois Gas Transmission Sys.*, 86 FERC ¶ 61,261, at 61,949 (1999)); *Koch Gateway Pipeline Co.*, 75 FERC ¶ 61,132, at 61,456 (1996), *aff'd in relevant part, Exxon Corp. v. FERC*, 114 F.3d 1252, 1264 (D.C. Cir. 1997).

<sup>28</sup> *Koch Gateway*, 75 FERC at 61,456 (emphasis added).

<sup>29</sup> *Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152, at P 15 (2010) (*citing Ocean State Power II*, 69 FERC ¶ 61,146, at 61,548 & n.64 (1994)); *see also FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,171, at P 12 (2004), *aff'd in part and remanded in part on other* (continued. . .)

Joint Protestors to force the Commission to “chase a moving target”<sup>30</sup> by entertaining the Joint Protestors’ new evidence at this late stage of the proceeding, particularly several months after the period for filing a request for rehearing has closed.

**B. The Untimely Evidence Provides No Basis for the Commission to Grant Rehearing**

While the Joint Protestors’ Motion is wholly improper under Commission precedent, Joint Protestors’ arguments regarding the relevance of the materials submitted in their motion are likewise inapposite. Joint Protestors miss the point of both SPP’s Highway/Byway Filing and the Highway/Byway Order, which address the justness and reasonableness of a generally-applicable cost allocation methodology for all new Base Plan Upgrades in the SPP Region. Contrary to the Joint Protestors’ suggestion,<sup>31</sup> the relevant issue in this proceeding is whether the Highway/Byway cost allocation methodology appropriately allocates costs to customers in the SPP Region in a manner at least roughly commensurate to the benefits realized by customers.<sup>32</sup> Issues related to the individualized costs of specific facilities or cost overruns are simply outside the scope of a proceeding addressing a general cost allocation methodology.

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*grounds sub nom. FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441 (D.C. Cir. 2005).

<sup>30</sup> *Ocean State Power II*, 69 FERC at 61,548 (1994) (“The Commission generally will not consider new evidence on rehearing, as we cannot resolve the issues finally and with any efficiency if parties attempt to have us chase a moving target.”); *see also CMS Midland*, 56 FERC at 61,625 (“There must be an end to litigation.”).

<sup>31</sup> Joint Protestors’ Motion at 2.

<sup>32</sup> *See* Highway/Byway Order at PP 75-78.

In accepting the Highway/Byway Filing, the Commission specifically found that the evidence submitted by SPP “demonstrates that EHV facilities tend to support regional power flows among SPP zones and that lower voltage facilities tend to support local power flows within a single SPP zone,” and found the Highway/Byway cost allocation methodology to be just and reasonable without reference to specific costs of specific facilities.<sup>33</sup> The Commission also expressly rejected Joint Protestors’ arguments that SPP must provide specific cost-benefit analyses for specific projects, including costs associated with the very Priority Projects that Joint Protestors again seek to introduce in their untimely motion.<sup>34</sup> The Commission’s determinations in the Highway/Byway Order were not dependent upon the costs associated with specific projects or sets of transmission projects,<sup>35</sup> but instead were based on the regional or local benefits provided by new transmission facilities of various voltage levels.<sup>36</sup> Despite the Joint Protestors’ mischaracterization that specific costs were “before the Commission when it accepted SPP’s revised cost allocation proposal,”<sup>37</sup> the Highway/Byway Order did not address

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<sup>33</sup> *Id.* at P 73; *see also id.* at P 74 (“SPP has provided sufficient information to support a finding that EHV facilities in the SPP region are used more for regional purposes relative to lower voltage facilities that are more local in nature.”).

<sup>34</sup> *Id.* at P 75.

<sup>35</sup> *Id.* at P 76 (indicating that “[R]elying solely on the costs and benefits identified in a quantitative study at a single point in time may not accurately reflect the true beneficiaries of a given transmission facility, particularly because such tests do not consider any of the qualitative, (i.e., less tangible) regional benefits” that EHV transmission facilities provide to all users of the network).

<sup>36</sup> *Id.* at P 78 (“Moreover, by distinguishing between the types of facilities that are used on a regional and zonal basis, the Highway/Byway Methodology will ensure that allocations of costs are roughly commensurate with associated benefits.”).

<sup>37</sup> Joint Protestors’ Motion at 2.

specific facility costs, nor was the Commission's determination of the justness and reasonableness of the Highway/Byway methodology dependent or made conditional upon cost estimates for the Priority Projects or any other transmission upgrades.

Moreover, the specific documents attached to the Joint Protestors' Motion provide no basis for granting rehearing and are irrelevant to the issues pending rehearing, and therefore should be rejected. First, as discussed above, the documents related to specific facility costs or design (Attachments 2, 3, and 6 to the Joint Protestors' Motion) are inapposite because the Highway/Byway Order findings were not based on the costs or design of specific projects. Likewise, Attachment 3 should be rejected because it is an unsworn and unauthenticated letter from the Joint Protestors to state commissions advocating the Joint Protestors' opinions on issues related to the Priority Projects and therefore does not constitute credible evidence of the justness and reasonableness of SPP's Highway/Byway Filing. Finally, Attachments 1 and 5 actually support the Commission's findings in the Highway/Byway Order that SPP has a proven track record of considering and addressing stakeholder concerns regarding cost allocation through its stakeholder process,<sup>38</sup> and therefore provide no support for the Joint Protestors' request for rehearing.

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<sup>38</sup> Highway/Byway Order at P 83.

### III. CONCLUSION

For the foregoing reasons, the Commission should deny the motion for official notice and reject the Joint Protestors' untimely evidence.

Respectfully submitted,

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December 3, 2010

**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 December, 2010.

*/s/ Matthew J. Binette*

Matthew J. Binette

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