

149 FERC ¶ 61,048  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

Southwest Power Pool, Inc.	Docket Nos. ER13-366-001 ER13-366-002 ER13-366-003 ER13-367-001
Public Service Company of Colorado	ER13-75-002 ER13-75-004
Kansas City Power & Light Company	ER13-100-001

ORDER ON REHEARING AND COMPLIANCE

(Issued October 16, 2014)

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1. On July 18, 2013, the Commission issued an order accepting, subject to modifications,<sup>1</sup> compliance filings that Southwest Power Pool, Inc. (SPP) made in Docket Nos. ER13-366-000 and ER13-367-000 to comply with the local and regional transmission planning and cost allocation requirements of Order No. 1000.<sup>2</sup> The Commission also accepted, subject to a further compliance filing, a filing by Xcel Energy Services, Inc. (Xcel), on behalf of its affiliate, Southwestern Public Service Company (Southwestern Public Service), in Docket No. ER13-75-000, that revised the Xcel Open Access Transmission Tariff (OATT) related to Southwestern Public Service’s local transmission planning process to comply with Order No. 1000.

2. On August 19, 2013, in Docket Nos. ER13-366-001 and ER13-367-001, SPP, LS Power Transmission, LLC and LSP Transmission Holdings, LLC (LS Power), and Oklahoma Gas and Electric Company (OG&E)<sup>3</sup> filed requests for rehearing of the First Compliance Order.

3. On November 15, 2013, SPP submitted, pursuant to section 206 of the Federal Power Act (FPA),<sup>4</sup> in Docket No. ER13-366-002, revisions to Attachments O and Y of its OATT (Second Compliance Filing) to comply with the First Compliance Order.<sup>5</sup>

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<sup>1</sup> See Southwest Power Pool, Inc. Nov. 13, 2012 Filing (First Compliance Filing); *Sw. Power Pool, Inc.*, 144 FERC ¶ 61,059 (2013) (First Compliance Order).

<sup>2</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, No. 12-1232, 2014 WL 3973116 (D.C. Cir. Aug. 15, 2014).

<sup>3</sup> OG&E also filed its rehearing request in Docket Nos. ER13-75-002 and ER13-100-001.

<sup>4</sup> 16 U.S.C. § 824e (2012).

4. Separately, on November 15, 2013, in Docket No. ER13-75-004, Xcel submitted, on behalf of its affiliate, Southwestern Public Service, a compliance filing informing the Commission that it intended to remove Attachment R-SPS related to Southwestern Public Service's local transmission planning process from the Xcel OATT and arguing that SPP's compliance filing should satisfy Southwestern Public Service's individual filing obligation under Order No. 1000 once the Commission accepted the removal of the attachment.

5. For the reasons discussed below, we grant in part and deny in part the requests for rehearing. We also accept in part Filing Parties' proposed OATT revisions, subject to conditions, and direct Filing Parties to submit further revisions to their respective OATTs in further compliance filings due within 60 days of the date of issuance of this order.<sup>6</sup>

### **I. Background**

6. In Order No. 1000, the Commission adopted a package of reforms addressing transmission planning and cost allocation that, taken together, are designed to ensure that Commission-jurisdictional services are provided at just and reasonable rates and on a basis that is just and reasonable and not unduly discriminatory or preferential. In particular, regarding regional transmission planning, Order No. 1000 amended the transmission planning requirements of Order No. 890<sup>7</sup> to require that each public utility

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<sup>5</sup> As discussed below, the Commission granted SPP an extension of time until August 15, 2014 to comply with the Commission's directive to remove a federal right of first refusal for upgrades associated with a transmission service request whose costs are allocated regionally. On August 15, 2014, SPP submitted, pursuant to section 206 of the FPA,<sup>5</sup> in Docket No. ER13-366-003 (Service Upgrades Filing), revisions to Attachment Y of its OATT to comply with the Commission's directive.

<sup>6</sup> We note that the same or similar issues are addressed in the following orders that have been issued: *Cal. Indep. Sys. Operator Corp.*, 146 FERC ¶ 61,198 (2014); *PacifiCorp*, 147 FERC ¶ 61,057 (2014); *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128 (2014); *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127 (2014); *S.C. Elec. & Gas Co.*, 147 FERC ¶ 61,126 (2014); *Maine Pub. Serv. Co.*, 147 FERC ¶ 61,129 (2014); *Louisville Gas & Elec. Co.*, 147 FERC ¶ 61,241 (2014); *N.Y. Indep. Sys. Operator, Inc.*; 148 FERC ¶ 61,044 (2014). *Tampa Elec. Co.*, 148 FERC ¶ 61,172 (2014); *Public Serv. Co. of Colorado*, 148 FERC ¶ 61,213 (2014); *Avista Corp.*, 148 FERC ¶ 61,212 (2014).

<sup>7</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (*continued ...*)

transmission provider: (1) participate in a regional transmission planning process that produces a regional transmission plan; (2) amend its OATT to describe procedures for the consideration of transmission needs driven by public policy requirements established by local, state, or federal laws or regulations in the local and regional transmission planning processes; and (3) remove federal rights of first refusal from Commission-jurisdictional tariffs and agreements for certain new transmission facilities.

7. The regional cost allocation reforms in Order No. 1000 also required each public utility transmission provider to set forth in its OATT a method, or set of methods, for allocating the costs of new regional transmission facilities selected in a regional transmission plan for purposes of cost allocation. Order No. 1000 also required that each cost allocation method adhere to six cost allocation principles.

8. On November 13, 2012, in Docket Nos. ER13-366-000 and ER13-367-000, SPP filed a new Attachment Y (Transmission Owner Designation Process) in its OATT, revised SPP's existing transmission planning process as outlined in Attachment O (Transmission Planning Process), and revised SPP's Membership Agreement to comply with the local and regional transmission planning and cost allocation requirements of Order No. 1000. On July 18, 2013, in the First Compliance Order, the Commission accepted SPP's compliance filings, subject to further modifications.

9. Separately, in Docket No. ER13-75-000, Xcel submitted, on behalf of its affiliate, Southwestern Public Service, revisions to the Xcel OATT related to Southwestern Public Service's local transmission planning process to comply with Order No. 1000.<sup>8</sup> In the First Compliance Order, the Commission accepted those proposed OATT revisions, subject to a further compliance filing. In Docket No. ER13-100-000, KCP&L Companies submitted a compliance filing arguing that SPP's compliance filing should satisfy KCP&L Companies' individual filing obligations under Order No. 1000. In the First Compliance Order, the Commission found that SPP's compliance filing satisfied the KCP&L Companies' Order No. 1000 filing obligation.

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(2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

<sup>8</sup> Xcel also filed in Docket No. ER13-75-000 on behalf of another affiliate, Public Service Company of Colorado. The Public Service Company of Colorado-related portion of this filing was addressed in a different proceeding. *See Pub. Serv. Co. of Colo.*, 142 FERC ¶ 61,206, at P 1 n.1 (2013).

**II. Requests for Rehearing or Clarification – Docket Nos. ER13-366-001, ER13-367-001, ER13-75-002 and ER13-100-001**

10. SPP and OG&E filed timely requests for rehearing of Commission determinations in the First Compliance Order related to nonincumbent transmission developer reforms. LS Power filed a timely request for rehearing of Commission determinations related to regional transmission planning requirements and a request for clarification of a Commission determination related to nonincumbent transmission developer reforms.

**III. Compliance Filings – Docket Nos. ER13-366-002, ER13-366-003, and ER13-75-004**

11. In response to the First Compliance Order, in Docket No. ER13-366-002, SPP has submitted further revisions to its local and regional transmission planning processes to comply with the Commission's requirements in the First Compliance Order, including modifications to its OATT relating to the regional transmission planning requirements, consideration of transmission needs driven by public policy requirements, nonincumbent transmission developer reforms, and cost allocation. SPP states that these revisions were vetted through the SPP stakeholder process. Specifically, SPP explains that its Strategic Planning Committee<sup>9</sup> Task Force on Order No. 1000 Compliance (Task Force)<sup>10</sup> developed policy recommendations for complying with the First Compliance Order. SPP states that the SPP Regional Tariff Working Group<sup>11</sup> developed and approved OATT revisions to implement the Task Force policy recommendations and the Transmission Working Group<sup>12</sup> reviewed revisions related to merchant transmission developer

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<sup>9</sup> SPP states that the Strategic Planning Committee is responsible for, among other things, developing and recommending to the SPP Board of Directors organizational mission and vision statements and accompanying goals and objectives, as well as formulating strategies and modifications to SPP processes to ensure achievement of SPP's mission statement, goals, objectives, and responsibilities. SPP Transmittal at 5 n.22.

<sup>10</sup> SPP states that the Task Force is comprised of representatives from both the transmission-owning and transmission-using sectors of SPP's membership. *Id.* at 5 n.23.

<sup>11</sup> SPP states that the Regional Tariff Working Group is responsible for development, recommendation, overall implementation, and oversight of SPP's OATT. SPP adds that this working group advises SPP staff on regulatory and implementation issues that are not specifically covered by the OATT or issues related to conflicts or differing interpretations of the OATT. *Id.* at 5 n.25.

<sup>12</sup> SPP states that the Transmission Working Group is responsible for policy recommendations and implementation of regional transmission planning efforts, review  
(*continued ...*)

interconnections. SPP states that, then, the SPP Markets and Operations Policy Committee<sup>13</sup> reviewed and approved the OATT revisions proposed here and the Regional State Committee's Cost Allocation Working Group<sup>14</sup> reviewed and voted to recommend the proposed cost allocation policy in this filing. SPP explains that, finally, the Members Committee<sup>15</sup> and the SPP Board of Directors (Board) approved the proposed revisions in this filing.<sup>16</sup>

12. SPP's proposed revisions submitted in the instant compliance filing are included in Attachments O and Y of its OATT. SPP requests that the proposed OATT revisions become effective March 30, 2014, consistent with the First Compliance Order, and that the revisions apply to transmission projects approved by the SPP Board after January 1, 2015.

13. Notice of SPP's Second Compliance Filing was published in the *Federal Register*, 78 Fed. Reg. 70,548 (2013), with interventions and protests due on or before December 16, 2013.

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of transmission interconnections, and coordination with interregional transmission planning activities. *Id.* at 6 n.26.

<sup>13</sup> SPP states that the Markets and Operations Policy Committee consists of a representative officer or employee from each SPP member and reports to the SPP Board. SPP explains that this committee's responsibilities include recommending modifications to the OATT. *Id.* at 6 n.28.

<sup>14</sup> SPP states that its bylaws delegate to the Regional State Committee the responsibility and authority to develop cost allocation methods for transmission facilities under the OATT. *Id.* at 6 n.31 (citing Southwest Power Pool, Inc., Bylaws, First Revised Volume No. 4 Bylaws § 7.2). The Regional State Committee provides state regulatory agency input on regional matters related to the development and operation of bulk electric transmission and includes one designated commissioner from each state regulatory commission having jurisdiction over an SPP member. Southwest Power Pool, Inc., Bylaws, First Revised Volume No. 4 Bylaws § 7.2.

<sup>15</sup> SPP states that the Members Committee consists of up to 19 representatives of the transmission-owning and transmission-using sectors of SPP's membership. SPP states that this committee provides input to and assists the SPP Board with the management and direction of SPP's general business. SPP Transmittal at 7 n.32 (citing Southwest Power Pool, Inc., Bylaws, First Revised Volume No. 4 Bylaws § 5.1).

<sup>16</sup> *Id.* at 6-7.

14. Sunflower Electric Power Corporation and Mid-Kansas Electric Company, LLC, jointly, and Xcel, on behalf of itself and its public utility operating company affiliate Southwestern Public Service, filed timely motions to intervene. LS Power, NextEra Energy Resources, LLC (NextEra), ITC Great Plains, LLC (ITC Great Plains), Xcel, on behalf of itself and Southwestern Public Service,<sup>17</sup> and Duke American Transmission Co. (Duke-ATC) filed protests. On February 7, 2014, in Docket No. ER13-366-001, LS Power filed a motion to lodge several SPP PowerPoint presentations regarding SPP's high priority transmission studies. SPP, Xcel and ITC Great Plains filed answers opposing the motion to lodge, and LS Power filed an answer in response. On February 19, 2014, in Docket No. ER13-366-002, SPP filed an answer to the protests to its Second Compliance Filing. In addition, on March 4, 2014, LS Power submitted supplemental comments asking the Commission to consider additional information as it evaluates SPP's Second Compliance Filing.

15. In SPP's Service Upgrade filing, SPP proposes further revisions to Attachment Y to comply with the Commission's directive to remove a federal right of first refusal for upgrades associated with a transmission service request whose costs are allocated regionally. SPP requests an effective date of January 1, 2015, and waiver of the Commission's prior notice requirements in section 35.3 of the Commission's regulations,<sup>18</sup> to submit this filing more than 120 days prior to the proposed effective date.

16. Notice of SPP's Service Upgrade Filing was published in the *Federal Register*, 79 Fed. Reg. 50,642 (2014) with interventions and protests due on or before September 5, 2014. On September 5, 2014, in Docket No. ER13-366-003, South Central Municipal-Cooperative Network, LLC filed a timely motion to intervene.

17. Separately, on November 15, 2013, in Docket No. ER13-75-004, Xcel submitted, on behalf of its affiliate, Southwestern Public Service, a compliance filing requesting that the Commission find that Southwestern Public Service has complied with the First Compliance Order and requirements under Order No. 1000 effective as of January 14, 2014, when the removal of Attachment R-SPS from the Xcel OATT is effective.

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<sup>17</sup> Xcel filed a limited protest as well as comments supporting certain aspects of SPP's filing. Xcel supports SPP's proposals to (1) retain a right of first refusal for "rebuild" facilities and short-term reliability projects; (2) charge a qualified Request for Proposals Participant an application fee; (3) institute a tiered application fee for proposed transmission projects; and (4) not pay the costs of upgrades in other transmission planning regions. *See* Xcel December 16, 2013 Protest at 4-11.

<sup>18</sup> 18 C.F.R. § 35.3 (2014).

18. Notice of Xcel's compliance filing was published in the *Federal Register*, 78 Fed. Reg. 70,548 (2013), with interventions and protests due on or before December 16, 2013. None were filed.

#### **IV. Discussion**

##### **A. Procedural Matters**

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept SPP's answer filed in this proceeding because it has provided information that assisted us in our decision-making process.

21. We deny LS Power's motion to lodge and reject LS Power's supplemental comments. The motion to lodge addresses an SPP presentation regarding its high priority transmission studies pursuant to SPP's pre-Order No. 1000 transmission planning process. LS Power's supplemental comments relate to actions taken by Alberta Independent System Operator in its solicitation for transmission sponsors. As such, we conclude that both the motion to lodge and the supplemental comments are beyond the scope of this proceeding, which addresses SPP's compliance with the First Compliance Order. Moreover, we note that several of the issues raised by LS Power in the motion to lodge and its supplemental comments have already been raised in its request for rehearing of the First Compliance Order and/or its protest of SPP's Second Compliance Filing. Thus, these arguments are merely repetitive and will not aid the Commission in its decision making process. For these reasons, LS Power's motion to lodge and supplemental comments are rejected. Because we are denying LS Power's motion to lodge, we also reject the answers to the motion to lodge filed by SPP, Xcel and ITC Great Plains and LS Power's response.

22. We note that the tariff records SPP submitted here in response to the First Compliance Order also include tariff provisions pending in tariff records that SPP separately filed on July 10, 2013 to comply with the interregional transmission coordination and cost allocation requirements of Order No. 1000. The tariff records SPP submitted in its interregional compliance filings are pending before the Commission and will be addressed in a separate order. Therefore, any acceptance of the tariff records in the instant filings that include OATT provisions submitted to comply with the interregional transmission coordination and cost allocation requirements of Order No. 1000 is made subject to the outcome of the Commission order addressing SPP's interregional compliance filing in Docket No. ER13-1939-000.

**B. Substantive Matters**

23. As discussed further below, we deny in part and grant in part the requests for rehearing.

24. We also find that SPP's compliance filing partially complies with the directives in the First Compliance Order. Accordingly, we accept SPP's Second Compliance Filing to be effective March 30, 2014, subject to a further compliance filing, as discussed below. We direct SPP to submit the compliance filing within 60 days of the date of issuance of this order.

25. In addition, as discussed further below, we find that, because Attachment R-SPS related to Southwestern Public Service's local transmission planning process has been removed from the Xcel OATT, SPP's compliance filing satisfies Southwestern Public Service's Order No. 1000 filing obligation.

**1. Overview of the SPP Process**

26. SPP conducts its transmission planning according to its Integrated Transmission Planning process, which is a three-year planning process that includes 20-year, 10-year, and near-term assessments designed to identify transmission solutions that address both near-term and long-term transmission needs. The Integrated Transmission Planning process focuses on identifying cost-effective regional transmission solutions, which are identified in the annual SPP Transmission Expansion Plan report.<sup>19</sup>

27. At the beginning of each calendar year, SPP notifies stakeholders as to which part(s) of the integrated transmission planning cycle will take place during that year and the approximate timing of activities required to develop the SPP Transmission Expansion Plan. SPP provides notice of commencement of the process on the SPP website and via email distribution lists.<sup>20</sup> SPP holds transmission planning forums, which include planning summits and sub-regional planning meetings, at least semi-annually and annually, respectively. The purpose of the planning summits is for SPP and stakeholders to share current transmission network issues; develop the 20-year, 10-year, and near-term assessment study scopes; provide solution alternatives; and review study findings.<sup>21</sup> The

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<sup>19</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § V.3.j.

<sup>20</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § III.1.

<sup>21</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § III.2.a.i.

purpose of the sub-regional planning meetings is to identify unresolved local stakeholder issues and transmission solutions at a more granular level.<sup>22</sup>

28. Specifically, SPP develops the 20-year, 10-year, and near-term assessment study scopes, which specify the methodology, criteria, assumptions, and data to be used, with input from stakeholders<sup>23</sup> and the consideration of specified input requirements.<sup>24</sup> After the study scope has been approved, SPP's process to analyze transmission alternatives for each assessment requires that SPP notify stakeholders of identified transmission needs and provide a transmission planning response window of 30 days during which any stakeholder may propose a detailed project proposal. SPP tracks each detailed project proposal and retains the information submitted pursuant to SPP's OATT.<sup>25</sup> If the project described in a detailed project proposal is included in the Integrated Transmission Plan, the submitting stakeholder may qualify for incentive points, as discussed further below.

29. SPP then assesses the cost-effectiveness of proposed solutions in accordance with the Integrated Transmission Planning Manual that SPP develops in consultation with stakeholders, and the Markets and Operations Policy Committee approves.<sup>26</sup> SPP then makes a comprehensive presentation of the preferred potential solutions, solicits feedback from stakeholder working groups, and prepares a draft list of projects for review and approval.<sup>27</sup>

30. SPP then posts the draft project list on the SPP website and identifies the assessment process with which they are associated.<sup>28</sup> Once the draft project list is posted, SPP invites written comments and reviews the list with the stakeholder working groups and the Regional State Committee.<sup>29</sup> After considering stakeholder input, SPP prepares a

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<sup>22</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § III.2.b.ii.

<sup>23</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, §§ III.3.d, III.4.d, III.5.d.

<sup>24</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § III.6.

<sup>25</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § III.8.b.

<sup>26</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § III.8.e.

<sup>27</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § III.8.g-i.

<sup>28</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § V.1.a.

<sup>29</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § V.1.b-c.

recommended list of proposed Integrated Transmission Plan Upgrades, upgrades within proposed Balance Portfolios, and proposed high priority upgrades for review and approval.<sup>30</sup> SPP then posts on its website this information as well as related study results, criteria, assumptions, analysis results, and data underlying the studies used to develop the list of proposals.

31. For all proposed solutions, including reliability upgrades that transmission owners propose to address violations of their company-specific planning criteria, SPP is required to determine if there is a more comprehensive regional solution to address multiple reliability needs and economic issues identified in the Integrated Transmission Plan assessment. Additionally, SPP is required to assess the cost-effectiveness of all proposed solutions.<sup>31</sup>

32. The Markets and Operations Policy Committee makes a recommendation regarding the approval of Integrated Transmission Plan Upgrades. Approval by the SPP Board is required for the inclusion of Integrated Transmission Plan Upgrades in the SPP Transmission Expansion Plan.<sup>32</sup> The list of projects are posted on SPP's website, and once approved in accordance with SPP's OATT, the list is included in the SPP Transmission Expansion Plan accordingly.<sup>33</sup> Finally, SPP shall track the status of planned system upgrades to ensure that the projects are built in time or that acceptable mitigation plans are in place to meet customer and system needs.<sup>34</sup>

33. Transmission facilities approved for construction or endorsed by the SPP Board with a notification to construct issued after January 1, 2015 and that meet the criteria of a Competitive Upgrade<sup>35</sup> are subject to SPP's competitive bidding process, the Transmission Owner Selection Process. Any entity that desires to bid on a Competitive Upgrade must submit an application to SPP no later than June 30 of the year prior to the

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<sup>30</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § V.1.d.

<sup>31</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § III.8.

<sup>32</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § V.3.a.

<sup>33</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § V.3.f-i.

<sup>34</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § V.6.a.

<sup>35</sup> Transmission facilities identified through the Integrated Transmission Planning process or through high priority studies, which are required by Order No. 890, are Competitive Upgrades. For a definition of Competitive Upgrades, *see* the Competitive Upgrades Definition section of this order.

calendar year in which the applicant wishes to begin participation in the Transmission Owner Selection Process.<sup>36</sup> Upon receipt of the application, SPP determines whether the applicant satisfies certain qualification criteria and notifies the applicant no later than September 30 of the year in which the application was submitted.<sup>37</sup> If the applicant satisfies the qualification criteria, it can participate in the Transmission Owner Selection Process effective January 1 of the following calendar year.<sup>38</sup>

## 2. **Regional Transmission Planning Requirements**

34. Order No. 1000 required each public utility transmission provider to participate in a regional transmission planning process that produces a regional transmission plan and that complies with the identified transmission planning principles of Order No. 890.<sup>39</sup> The regional transmission planning reforms required public utility transmission providers to consider and select, in consultation with stakeholders, transmission facilities that meet the region's reliability, economic, and Public Policy Requirements-related transmission needs more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning processes.<sup>40</sup>

### a. **Transmission Planning Region**

35. Order No. 1000 required each public utility transmission provider to participate in a transmission planning region, which is a region in which public utility transmission providers, in consultation with stakeholders and affected states, agree to participate for purposes of regional transmission planning.<sup>41</sup> The scope of a transmission planning region should be governed by the integrated nature of the regional power grid and the

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<sup>36</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.1.a.i.

<sup>37</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.1.c.i.

<sup>38</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.1.c.iii.

<sup>39</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 6, 11, 146.

<sup>40</sup> *Id.* PP 11, 148.

<sup>41</sup> *Id.* P 160.

particular reliability and resource issues affecting individual regions.<sup>42</sup> However, an individual public utility transmission provider cannot, by itself, satisfy Order No. 1000.<sup>43</sup>

36. In addition, Order No. 1000 required public utility transmission providers to explain how they will determine which transmission facilities are subject to the requirements of Order No. 1000.<sup>44</sup> Order No. 1000 also required public utility transmission providers in each transmission planning region to have a clear enrollment process that defines how entities, including non-public utility transmission providers, make the choice to become part of the transmission planning region<sup>45</sup> and, thus, become eligible to be allocated costs under the regional cost allocation method.<sup>46</sup> Order No. 1000 also required that each public utility transmission provider include in its OATT a list of all the public utility and non-public utility transmission providers enrolled as transmission providers in the transmission planning region.<sup>47</sup>

**i. First Compliance Order**

37. In the First Compliance Order, the Commission granted SPP's request that its OATT revisions be effective on the March 30 following the Commission's order in this proceeding. The Commission issued the First Compliance Order on July 18, 2013 and thus accepted SPP's proposed revisions to become effective on March 30, 2014, as requested.<sup>48</sup> SPP explained that it requested a March 30 effective date because, under its revised transmission planning process, any entity that desires to bid on a transmission facility approved by the SPP Board in January must have submitted an application to become a qualified bidder by the previous June 30. SPP stated that, in order to ensure that the SPP transmission planning and the Transmission Owner Selection Process can operate as filed, the effective date must be before the date that entities apply to participate (i.e., before June 30) and also provide sufficient time prior to the June 30 submission deadline for SPP and potential participating entities to prepare for the Transmission

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<sup>42</sup> *Id.* (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 527).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* PP 65, 162.

<sup>45</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 275.

<sup>46</sup> *Id.* PP 276-277.

<sup>47</sup> *Id.* P 275.

<sup>48</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 32.

Owner Selection Process.<sup>49</sup> As such, the transmission facilities subject to the requirements of Order No. 1000 would be Competitive Upgrades approved by the SPP Board on or after January 1, 2015.<sup>50</sup> The Commission noted that SPP had explained that making the proposed revisions effective on the March 30 following issuance of the Commission's order would provide SPP with sufficient lead time to ensure proper implementation of the new qualification process and Transmission Owner Selection Process and, therefore, found it reasonable to make the requirements of Order No. 1000 apply to Competitive Upgrades approved by the SPP Board in January 2015.<sup>51</sup>

**ii. Requests for Rehearing or Clarification**

38. LS Power contends that the Commission erred by establishing a March 30, 2014 effective date for SPP's Order No. 1000 tariff revisions. LS Power notes that the March 30, 2014 effective date means that the requirements of Order No. 1000 apply to Competitive Upgrades approved for construction by the SPP Board in January 2015, which is nine months after the effective date and seventeen months after the Commission issued the First Compliance Order.<sup>52</sup> LS Power argues that SPP failed to provide substantial evidence that it could not implement its Order No. 1000 tariff provisions to coincide with the beginning of its next transmission planning cycle that starts on January 1, 2014.<sup>53</sup> LS Power contends that the sole basis for the seventeen-month delay in implementation was SPP's assertion that the delay would provide SPP with sufficient lead time to ensure proper implementation of its qualification process and Transmission Owner Selection Process.<sup>54</sup> But LS Power notes that SPP supported its request by explaining that, in order to ensure that the SPP transmission planning process and selection process can operate as filed, the effective date must provide sufficient time prior

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<sup>49</sup> *Id.* P 26.

<sup>50</sup> To reflect this effective date, in the Second Compliance Filing, SPP made a minor revision to section I.1 of Attachment Y to the OATT to specify that Competitive Upgrades include only those projects for which a Notification to Construct has been issued after January 1, 2015. A Notification to Construct a project is issued upon the SPP Board's approval to construct the project.

<sup>51</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 32.

<sup>52</sup> LS Power Rehearing Request at 5.

<sup>53</sup> *Id.* at 4, 11.

<sup>54</sup> *Id.* at 5.

to the June 30 deadline for potential bidders to submit their qualification application to SPP and potential bidders to prepare for the competitive bidding process.

39. Furthermore, LS Power claims that the June 30 date is arbitrary and nothing prevented SPP from soliciting or accepting qualification applications while its compliance filing was pending.<sup>55</sup> LS Power adds that its affiliate, Southwestern Transmission Development, complied with the June 30, 2013 deadline to submit qualification materials for a January 2014 start date but now must wait an entire year before SPP will be ready to receive and review qualification materials. LS Power points out that actions in PJM Interconnection, L.L.C. (PJM) show that it is feasible to move toward implementation of Order No. 1000 even before SPP has finalized all aspects of compliance.<sup>56</sup>

40. In addition, LS Power argues that the Commission's decision to give SPP until March 30, 2014 to make its OATT provisions effective conflicts with the Commission's directives to the public utility transmission providers in other transmission planning regions to establish an effective date that coincides with the beginning of the next transmission planning cycle after issuance of the Commission's initial orders. LS Power states that, for example, the Commission rejected an effort by ISO-New England, similar to SPP's request, to delay compliance due to the significant time required to implement the revisions to the OATT.<sup>57</sup> In addition, LS Power states that the Commission's decision to give SPP until March 30, 2014 appears to conflict with its directive for New York Independent System Operator, Inc. to establish in its compliance filing an appropriate effective date, which the Commission anticipated would coincide with the beginning of the next reliability transmission planning cycle following the NYISO order.<sup>58</sup> Therefore, LS Power asks the Commission to adjust the effective date so that SPP's Order No. 1000 compliance process applies to transmission projects identified by the SPP Board beginning on January 1, 2014, which would coincide with the beginning of the next transmission planning cycle.<sup>59</sup> LS Power adds that the earlier effective date is important because it will allow SPP's High Priority Study Plan Process, which is focused

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<sup>55</sup> *Id.* at 9.

<sup>56</sup> *Id.* at 10 (citing PJM, Supplemental Compliance Filing, Docket No. ER13-198-002, at 3-4 (filed July 22, 2013)).

<sup>57</sup> *Id.* at 6 (citing *ISO New England Inc.*, 143 FERC ¶ 61,150, at P 26 (2013)).

<sup>58</sup> *Id.* at 5-6 (citing *New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059, at P 26 (2013)).

<sup>59</sup> *Id.* at 3-4, 12.

on transmission expansions largely in SPP Texas and SPP New Mexico (two states without state right of first refusal laws), to be included in SPP's Order No. 1000 competitive bidding process.<sup>60</sup>

**iii. Summary of Compliance Filing**

41. SPP proposes to revise its OATT to specify that competitive bidding process will apply to Competitive Upgrades that are approved for construction or endorsed by the SPP Board for which SPP issues a Notification to Construct after January 1, 2015.<sup>61</sup>

**iv. Commission Determination**

42. We deny LS Power's request for rehearing. We affirm the finding in the First Compliance Order granting SPP's request that its proposed OATT revisions be effective on March 30 following the Commission's order in this proceeding (i.e., March 30, 2014). The Commission explicitly stated that it understood that this effective date meant that the requirements of Order No. 1000 would apply to Competitive Upgrades approved by the SPP Board on and after January 1, 2015.<sup>62</sup> Under SPP's proposed Transmission Owner Selection process, and pursuant to the requirements of Order No. 1000, SPP's qualification process must take place in advance of the issuance of requests for proposals for Competitive Upgrades. Before SPP can implement its qualification process, SPP must have adequate time to recruit, hire, and train the additional staff that will be necessary to implement the qualification process. Given that SPP will typically issue its requests for proposals for Competitive Upgrades in January following the issuance of the annual SPP Transmission Expansion Plan, we continue to find that the March 30, 2014 effective date will provide SPP with a reasonable amount of time to ensure the proper implementation of its Transmission Owner Section Process under its existing transmission planning process.<sup>63</sup> Because LS Power has failed to convince us otherwise, we deny rehearing.

43. We accept SPP's proposed changes to its OATT that make the competitive bidding process apply to Competitive Upgrades that are approved for construction or endorsed by the SPP Board for which SPP issues a Notification to Construct after

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<sup>60</sup> *Id.* at 11-12. LS Power states that the High Priority Study Plan projects could be pending before the SPP Board as early as April 2014. *Id.* at 12.

<sup>61</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.1.

<sup>62</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 32.

<sup>63</sup> *See id.* P 32.

January 1, 2015. This change is consistent with the Commission's finding in the First Compliance Order that it is reasonable to make the requirements of Order No. 1000 apply to Competitive Upgrades approved for construction by the SPP Board in January 2015.<sup>64</sup>

**b. Order No. 890 and Other Regional Transmission Planning Process General Requirements**

44. Order No. 1000 required that the regional transmission planning process result in a regional transmission plan<sup>65</sup> and satisfy the Order No. 890 transmission planning principles of (1) coordination, (2) openness, (3) transparency, (4) information exchange, (5) comparability, (6) dispute resolution, and (7) economic planning.<sup>66</sup>

**i. First Compliance Order**

45. In the First Compliance Order, the Commission noted that it had previously found that the SPP Integrated Transmission Plan process satisfied each of Order No. 890's transmission planning principles. The Commission therefore focused on any incremental changes to the SPP regional transmission planning process developed to comply with the requirements of Order No. 1000. The Commission found that SPP had not proposed any incremental changes to the current Integrated Transmission Plan process because that Commission-approved process already evaluates, in consultation with stakeholders, alternative transmission solutions that might meet the needs of the transmission planning region more efficiently or cost-effectively than transmission solutions identified by individual public utility transmission providers in their local transmission planning process. The Commission thus found that SPP's existing regional transmission planning process complies with all the transmission planning principles.<sup>67</sup>

46. In regard to concerns raised by Clean Line about access to models and data used during the Integrated Transmission Plan 20-year assessment process, the Commission determined that Clean Line's concerns related to details of SPP's regional transmission planning process that SPP did not need to include in its OATT in order to comply with

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<sup>64</sup> SPP Transmittal at 4 n.17 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 32).

<sup>65</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 147.

<sup>66</sup> *Id.* PP 146, 151. These transmission planning principles are explained more fully in Order No. 890.

<sup>67</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 46 (citing *Sw. Power Pool, Inc.*, 132 FERC ¶ 61,042, at PP 52-63 (2010)).

the transmission planning principles of Order No. 890. The Commission also found that Clean Line had not demonstrated that its concerns indicated that the Integrated Transmission Plan process was unjust, unreasonable, unduly discriminatory or preferential. Further, the Commission agreed with SPP that the appropriate venue for Clean Line to raise its concerns was, in the first instance, in the Integrated Transmission Plan process.<sup>68</sup>

**ii. Requests for Rehearing or Clarification**

47. LS Power requests clarification of the Commission's response to Clean Line's concerns regarding access to models and data. LS Power states that, while Clean Line's concern that the Commission addressed in the First Compliance Order may not mandate a finding that the SPP transmission planning process is unjust and unreasonable, those same concerns could be a significant issue if SPP is providing "incentive" points in the Transmission Owner Selection Process to transmission developers that submit potential Competitive Upgrades that can only be created with access to appropriate information. LS Power states that, because SPP chose a competitive bid model for transmission projects selected for construction by the SPP Board, it is understandable that SPP sought another way to reward participation through the use of incentive points. But LS Power claims that it has had similar challenges as those raised by Clean Line with regard to obtaining SPP models and, thus, SPP's proposal raises critical questions regarding nondiscrimination in the availability of the information that transmission developers can use to develop proposals.<sup>69</sup> Therefore, LS Power requests that the Commission require SPP to establish a process that ensures that modeling and other relevant data is equally available to all participants in the transmission planning process sufficiently prior to the deadline for transmission project submittal.<sup>70</sup>

**iii. Commission Determination**

48. We deny LS Power's request for rehearing. The transparency principle requires transmission providers to reduce to writing and make available the basic methodology, criteria, and processes used to develop transmission plans to ensure that standards are consistently applied.<sup>71</sup> As noted in the First Compliance Order, the Commission

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<sup>68</sup> *Id.* PP 46-47.

<sup>69</sup> LS Power Rehearing Request at 17-18. LS Power points to the description of the challenges Clean Line faced. *Id.* at 17 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 40).

<sup>70</sup> *Id.* at 18.

<sup>71</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 471.

previously found that that SPP's regional transmission planning process complies with the transparency principle and that SPP had not proposed any changes to its Commission-accepted Integrated Transmission Plan process.<sup>72</sup> Therefore, we find that LS Power's argument is a collateral attack on the Commission's prior finding that the Integrated Transmission Plan process complied with the transparency principle. Accordingly, we deny rehearing. In addition, we note that, other than the alleging that it has had "challenges" in obtaining SPP models, LS Power has not identified any provisions in SPP's current Integrated Transmission Plan process that create such unspecified challenges or that preclude the availability of models and other relevant data to all participants in the transmission planning process. If LS Power has specific concerns, it is also able to raise them by using the dispute resolution procedures.

c. **Requirement to Plan on a Regional Basis to Identify More Efficient or Cost-Effective Transmission Solutions**

49. Through the regional transmission planning process, public utility transmission providers must evaluate, in consultation with stakeholders, alternative transmission solutions that might meet the needs of the transmission planning region more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning process.<sup>73</sup> Public utility transmission providers have the flexibility to develop, in consultation with stakeholders, procedures by which the public utility transmission providers in the transmission planning region identify and evaluate the set of potential solutions that may meet the region's needs more efficiently or cost-effectively.<sup>74</sup> In addition, whether or not public utility transmission providers within a transmission planning region select a transmission facility in the regional transmission plan for purposes of cost allocation will depend in part on their combined view of whether the transmission facility is a more efficient or cost-effective solution to their needs.<sup>75</sup>

50. Public utility transmission providers in each transmission planning region, in consultation with stakeholders, must propose what information and data a merchant transmission developer<sup>76</sup> must provide to the regional transmission planning process to

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<sup>72</sup> First Compliance Order, 144 FERC ¶ 61,059 at PP 46-48.

<sup>73</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 148.

<sup>74</sup> *Id.* P 149.

<sup>75</sup> *Id.* P 331.

<sup>76</sup> Order No. 1000 defines merchant transmission projects as projects "for which the costs of constructing the proposed transmission facilities will be recovered through (*continued ...*)

allow the public utility transmission providers in the transmission planning region to assess the potential reliability and operational impacts of the merchant transmission developer's proposed transmission facilities on other systems in the region.<sup>77</sup>

51. Finally, the regional transmission planning process developed by public utility transmission providers, in consultation with stakeholders, must result in a regional transmission plan that reflects the determination of the set of transmission facilities that more efficiently or cost-effectively meet the region's transmission needs.<sup>78</sup> Order No. 1000 does not require that the resulting regional transmission plan be filed with the Commission.

**i. First Compliance Order**

52. In the First Compliance Order, the Commission found that SPP's Integrated Transmission Plan process complied with the requirements of Order No. 1000 because it outlined the process by which SPP evaluates, in consultation with stakeholders, alternative transmission solutions that meet the needs of the transmission planning region more efficiently or cost-effectively than transmission solutions identified by public utility transmission providers in the local transmission planning processes.<sup>79</sup> With regard to the information merchant transmission developers must submit, the Commission found that Appendix 11 of SPP's Criteria, which is posted on the SPP website, enables SPP to assess the potential reliability and operational impacts of a merchant transmission developer's proposed transmission facilities on other systems in the region. The Commission found, however, that, while SPP includes in Appendix 11 of the SPP Criteria the information a merchant transmission developer must submit to enable SPP to assess the potential reliability and operational impacts of the merchant transmission developer's proposed transmission facilities on other systems in the region, SPP must include the information requirements in its OATT in order to comply with Order No. 1000. Therefore, the Commission directed SPP to include in its OATT the information requirements for merchant transmission developers that are currently listed in Appendix 11 of the SPP Criteria.<sup>80</sup> The Commission stated that, specifically, SPP must include language in its OATT that merchant transmission developers must provide the

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negotiated rates instead of cost-based rates." *Id.* P 119.

<sup>77</sup> *Id.* P 164; Order No. 1000-A, 139 FERC ¶ 61,132 at PP 297-298.

<sup>78</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 147.

<sup>79</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 56.

<sup>80</sup> *Id.* P 57.

information in the Transmission Interconnection Review Data Checklist of Appendix 11 of SPP's Criteria, which includes, but is not limited to, (1) estimated or proposed in-service dates, (2) a detailed description of the proposed interconnection, (3) details of any required mitigation plans, (4) interconnection design information and rating, (5) maps, and (6) one-line diagrams.<sup>81</sup>

## ii. Summary of Compliance Filing

53. SPP proposes a new Addendum 5 to Attachment O of its OATT, which incorporates the Transmission Interconnection Review Data Check list from Appendix 11 of the SPP Criteria.<sup>82</sup> Specifically, Addendum 5 requires that Merchant Transmission Developers comply with all the requirements set forth in the SPP Criteria, including, but not limited to, providing the following information to SPP: (1) primary contact and all affected parties' contact information; (2) overview of the proposed interconnection and its need; (3) estimated or proposed in-service date; (4) list of all studies run by season; (5) affected parties planning criteria, if applicable; (6) a detailed description of the proposed interconnection; (7) appropriate program files and program automation files to allow SPP staff to reproduce the studies performed; (8) details of any required mitigation plans including identification of the affected parties responsible for mitigation; and (9) comments of affected parties concerning points of agreement or disagreement of the proposed interconnection, if any. Moreover, Addendum 5 provides that additional studies may be required for direct current interconnection. SPP also proposes language in its OATT specifying that Addendum 5 applies to any Merchant Transmission Developer seeking to interconnect to the SPP transmission system, as well as language defining a Merchant Transmission Developer as:

an entity that assumes all financial responsibility for the development, construction, and operation of the transmission facilities it seeks to interconnect to the Transmission System, does not seek regional cost allocation or cost recovery for such facilities under this Tariff, and does not intend to transfer functional control over such facilities to the Transmission Provider.<sup>83</sup>

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<sup>81</sup> *Id.* P 57 n.114.

<sup>82</sup> *See* SPP, OATT, Sixth Revised Volume No. 1, Attachment O, Addendum 5.

<sup>83</sup> *See id.*

54. SPP asserts that its proposed definition is consistent with Order No. 1000 and Order No. 1000-A.<sup>84</sup> Finally, SPP proposes OATT language to clarify that a Merchant Transmission Developer's compliance with the requirements in Addendum 5 does not automatically confer SPP's approval of the interconnection.<sup>85</sup>

**iii. Protests/Comments**

55. ITC Great Plains states that it generally supports the proposed content of the Transmission Interconnection Review Data Checklist, conditioned on two additional types of information that must be included to permit SPP and its transmission owners to satisfactorily assess the reliability and operational impacts of proposed merchant transmission projects. First, ITC Great Plains asserts that a merchant transmission developer should be required to submit study reports to SPP documenting that all minimum requirements are met in the power flow studies, short circuit studies, and dynamics studies that were performed. According to ITC Great Plains, this requirement will ensure that the studies are accurate and usable within SPP's larger system modeling framework.<sup>86</sup>

56. Second, ITC Great Plains contends that merchant transmission developers should be required to demonstrate that all financial costs resulting from the mitigation plans will be borne by the merchant transmission developer, not by other interconnected transmission owners or their customers.<sup>87</sup> ITC Great Plains asserts that this requirement is consistent with the Commission's recognition in Order No. 1000 that "a merchant transmission developer assumes all financial risk for developing its transmission project and constructing the proposed transmission facilities" and will ensure that other SPP transmission owners and market participants are not required to pay for any required transmission upgrades needed due to a merchant transmission developer's project.<sup>88</sup>

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<sup>84</sup> SPP Transmittal at 9 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 143, 163, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at PP 297, 299).

<sup>85</sup> *See* SPP, OATT, Sixth Revised Volume No. 1, Attachment O, Addendum 5.

<sup>86</sup> ITC Great Plains Protest at 9-10.

<sup>87</sup> *Id.* at 10.

<sup>88</sup> *Id.* at 10 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 163).

#### iv. Commission Determination

57. We find that SPP has complied with the directive to include in its OATT the information requirements for merchant transmission developers that are currently listed in Appendix 11 of the SPP Criteria. However, we find that SPP's proposed definition of merchant transmission developer is inconsistent with Order No. 1000. Specifically, the provision that the entity "does not intend to transfer functional control over such facilities to the Transmission Provider" could be interpreted as prohibiting a merchant transmission developer from transferring functional control of a merchant transmission project to SPP and thus prevent the owner of a merchant transmission project from ever becoming a transmission-owning member of SPP. Order No. 1000 defines merchant transmission projects as those for which the costs of constructing the proposed transmission facilities will be recovered through negotiated rates instead of cost-based rates.<sup>89</sup> Order No. 1000 does not prohibit a merchant transmission developer from turning over functional control of its merchant transmission project to another transmission provider, as SPP proposes to do in its definition of merchant transmission developer.<sup>90</sup> Accordingly, we direct SPP to submit, within 60 days of the date of issuance of this order, a further compliance filing to revise the definition of merchant transmission developer to remove the provision requiring that a merchant transmission developer not intend to transfer functional control over its transmission facilities to the transmission provider.

58. We will not require SPP to include the additional merchant information requirements requested by ITC Great Plains because it goes beyond the compliance revisions that the Commission directed in the First Compliance Order.<sup>91</sup> In the First Compliance Order, the Commission found that the merchant information requirements in Appendix 11 of SPP's Criteria enable SPP to assess the potential reliability and operational impacts of a merchant transmission developer's proposed transmission facilities on other systems in the region and required SPP to include the requirements

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<sup>89</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 119.

<sup>90</sup> Similarly, Order No. 1000 does not require a transmission developer to turn over functional control of a transmission project to another transmission provider. *See, e.g., S.C. Elec. & Gas Co.*, 143 FERC ¶ 61,058, at P 90 (2013) (directing South Carolina Electric & Gas Company to remove or justify its proposal to require that a nonincumbent transmission developer turn over functional control in order for a transmission project to qualify as a regional transmission facility eligible for selection in the regional transmission plan for purposes of cost allocation).

<sup>91</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 57.

from Appendix 11 in its OATT. We find that SPP's proposed revisions comply with that requirement. ITC Great Plains' request to revise the provisions that the Commission directed SPP to include in its OATT therefore goes beyond the scope of this compliance proceeding.

**d. Consideration of Transmission Needs Driven by Public Policy Requirements**

59. Order No. 1000 required public utility transmission providers to amend their OATTs to include procedures for the consideration of transmission needs driven by Public Policy Requirements in both the local and regional transmission planning processes.<sup>92</sup> Public Policy Requirements are requirements established by local, state or federal laws or regulations (i.e., enacted statutes passed by the legislature and signed by the executive and regulations promulgated by a relevant jurisdiction, whether within a state or at the federal level).<sup>93</sup>

60. The Commission in Order No. 1000 explained that, to consider transmission needs driven by Public Policy Requirements, public utility transmission providers must adopt procedures to (1) identify transmission needs driven by Public Policy Requirements and (2) evaluate potential solutions to meet those identified needs.<sup>94</sup> More specifically, public utility transmission providers must adopt procedures in their local and regional transmission planning processes for identifying transmission needs driven by Public Policy Requirements that give all stakeholders a meaningful opportunity to provide input and to offer proposals regarding what they believe are transmission needs driven by Public Policy Requirements.<sup>95</sup> Each public utility transmission provider must explain how it will determine at both the local and regional level, the transmission needs driven by Public Policy Requirements for which solutions will be evaluated<sup>96</sup> and must post on its website an explanation of: (1) those transmission needs driven by Public Policy Requirements that were identified for evaluation for potential solutions in the local and

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<sup>92</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 203.

<sup>93</sup> *Id.* P 2. Order No. 1000-A clarified that Public Policy Requirements included local laws and regulations passed by a local governmental entity, such as a municipal or county government. Order No. 1000-A, 139 FERC ¶ 61,132 at P 319.

<sup>94</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 205.

<sup>95</sup> *Id.* PP 206-209; Order No. 1000-A, 139 FERC ¶ 61,132 at P 335.

<sup>96</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 208-209.

regional transmission planning processes and (2) why other proposed transmission needs driven by Public Policy Requirements were not selected for further evaluation.<sup>97</sup>

61. Order No. 1000 also required public utility transmission providers, in consultation with stakeholders, to evaluate at the local and regional level potential solutions to identified transmission needs driven by Public Policy Requirements, including transmission facilities proposed by stakeholders.<sup>98</sup> The evaluation procedures must give stakeholders the opportunity to provide input and enable the Commission and stakeholders to review the record created by the process.<sup>99</sup>

**i. Incorporating Consideration of Transmission Needs Driven by Public Policy Requirements in the Regional Transmission Planning Process**

**(a) First Compliance Order**

62. In the First Compliance Order, the Commission found that that SPP's Integrated Transmission Plan process, in conjunction with the revisions SPP proposed in the First Compliance Filing, partially complied with the provisions of Order No. 1000 addressing transmission needs driven by public policy requirements. Specifically, the Commission found that SPP's proposed definition of public policy requirements is consistent with the definition in Order Nos. 1000 and 1000-A.<sup>100</sup> In addition, the Commission found that SPP's proposal complied with the requirement to post on its website an explanation of those transmission needs driven by public policy requirements that have been identified for further evaluation and why other suggested transmission needs driven by public policy requirements will not be evaluated.<sup>101</sup> The Commission also found that SPP complied with the requirement to establish procedures in its OATT to evaluate at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements.<sup>102</sup>

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<sup>97</sup> *Id.* P 209; *see also* Order No. 1000-A, 139 FERC ¶ 61,132 at P 325.

<sup>98</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 211 & n.191.

<sup>99</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at PP 320-321.

<sup>100</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 74.

<sup>101</sup> *Id.* P 77.

<sup>102</sup> *Id.* P 78.

63. The Commission recognized that SPP's Integrated Transmission Plan process offers opportunities for stakeholders to provide input on the scope of SPP's planning studies through transmission planning forums. However, the Commission found that SPP's OATT did not explicitly state at what point(s) in the process stakeholders could offer proposals regarding the transmission needs they believe are driven by public policy requirements. The Commission stated that, to the extent that SPP plans to use its existing procedures that already allow for stakeholder input, SPP had to explicitly include or accommodate transmission needs driven by public policy requirements. Therefore, the Commission directed SPP to revise its OATT to include clear, transparent procedures for identifying transmission needs driven by public policy requirements in its regional transmission planning process that allow stakeholders an opportunity to provide input and offer proposals regarding transmission needs driven by public policy requirements.<sup>103</sup> In addition, the Commission required SPP to explain in its OATT the just and reasonable and not unduly discriminatory process it will use to identify, out of the larger set of transmission needs driven by public policy requirements that stakeholders may propose, those needs for which transmission solutions will be evaluated.<sup>104</sup>

**(b) Summary of Compliance Filing**

64. SPP proposes several revisions to Attachment O in response to the Commission's directives in the First Compliance Order. First, SPP proposes to add language that requires SPP to provide a notice to stakeholders at the beginning of each calendar year that includes a timeline indicating when stakeholders are able to submit transmission needs, including transmission needs driven by public policy requirements, and solutions to such needs.<sup>105</sup> SPP also proposes to revise its OATT to specify that it will incorporate into its planning studies those transmission needs driven by public policy requirements identified through a survey of stakeholders to identify public policy requirements and additional public policy requirements as determined by the transmission provider and stakeholders during the study scope development.<sup>106</sup> Second, SPP proposes revisions stating that SPP, in consultation with the stakeholder working groups, shall finalize the assessment study scope, including the identification of those transmission needs that will

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<sup>103</sup> *Id.* P 75.

<sup>104</sup> *Id.* P 76.

<sup>105</sup> *See* SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § III.1.

<sup>106</sup> *Id.* § III.6.o.

be studied, such as transmission needs driven by public policy requirements, and as further described in the Integrated Transmission Planning Manual.<sup>107</sup>

(c) **Commission Determination**

65. We find that SPP's proposed revisions to its regional transmission planning process comply with the directives in the First Compliance Order. SPP will notify stakeholders about when they are able to submit transmission needs, including transmission needs driven by public policy requirements, and solutions to such needs in the Integrated Transmission Plan process. In addition, SPP's revisions explain that SPP will solicit stakeholder input to determine which transmission needs driven by public policy requirements it will incorporate into its planning studies. SPP will also solicit stakeholder input through surveys and consultations with stakeholder working groups. We find these revisions comply with the requirement for SPP to allow stakeholders an opportunity to provide input and offer proposals regarding transmission needs driven by public policy requirements. We also find that SPP has complied with the requirement to explain in its OATT the just and reasonable and not unduly discriminatory process it will use to identify, out of the larger set of transmission needs driven by public policy requirements that stakeholders may propose, those needs for which transmission solutions will be evaluated. In particular, the proposed revisions provide that SPP, in consultation with the stakeholder working groups, shall finalize the assessment study scope, including the identification of those transmission needs that will be studied, such as transmission needs driven by public policy requirements. Accordingly, we accept these proposed revisions.

ii. **Incorporating Consideration of Transmission Needs Driven by Public Policy Requirements in the Local Transmission Planning Process**

(a) **First Compliance Order**

66. In the First Compliance Order, the Commission addressed Docket No. ER13-75-000, in which Xcel, on behalf of Southwestern Public Service, filed proposed changes to the Southwestern Public Service local transmission planning process in Attachment R-SPS of the Xcel OATT. Southwestern Public Service is a transmission-owning member of SPP and is subject to the SPP Order No. 1000 compliance filing for the Southwestern Public Service high voltage (69 kV and above) transmission system. However, Xcel explained that Southwestern Public Service performed local transmission planning for lower voltage facilities pursuant to Attachment R-SPS of the Xcel OATT, and this local transmission planning process was then incorporated into the SPP regional transmission

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<sup>107</sup> *Id.* §§ III.3.f, III.4.f, & III.5.d.

planning process.<sup>108</sup> The Commission found that Xcel partially complied with the requirement to describe procedures that provide for the consideration of transmission needs driven by public policy requirements in the Southwestern Public Service local transmission planning process.

**(b) Southwestern Public Service's Filing**

67. On November 15, 2013, Xcel submitted a compliance filing on behalf of Southwestern Public Service in Docket No. ER13-75-004. In that filing, Xcel states that in a separate filing, Southwestern Public Service proposed to remove Attachment R-SPS (Transmission Planning Process of Southwestern Public Service Company) from the Xcel Energy OATT. Xcel explains that deleting Attachment R-SPS from the Xcel OATT would make Southwestern Public Service more consistent with the other SPP transmission owners. Xcel states that a separate SPP local transmission planning process is unnecessary because the SPP transmission planning process provides for sub-regional transmission planning in the Southwestern Public Service region. Xcel contends that, after the cancellation of Attachment R-SPS, Southwestern Public Service will satisfy its Order No. 1000 compliance obligations by relying on the provisions of SPP's transmission planning process, consistent with the treatment of other transmission owners in SPP.<sup>109</sup>

68. On that same date, in Docket No. ER14-411-000, pursuant to FPA section 205, Public Service Company of Colorado (PSCo), on behalf of Southwestern Public Service, submitted the filing to revise the Xcel OATT to cancel Attachment R-SPS.<sup>110</sup> PSCo also explained that, with the cancellation, the Southwestern Public Service local transmission planning process would be incorporated into the SPP regional transmission planning process, consistent with all other SPP member transmission owners. PSCo requested that the cancellation of Attachment R-SPS become effective on January 14, 2014.<sup>111</sup>

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<sup>108</sup> See First Compliance Order, 144 FERC ¶ 61,059 at P 81; Xcel October 11, 2012 Transmittal at 19.

<sup>109</sup> Xcel November 15, 2013 Transmittal at 1-2.

<sup>110</sup> Public Service Company of Colorado has been designated as the Xcel operating company responsible for submitting Xcel OATT changes pursuant to the Commission's eTariff rules and, therefore, the filing is captioned as a Public Service Company of Colorado filing. *Id.* at 1 n.3.

<sup>111</sup> PSCo, Transmittal, Docket No. ER14-411-000, at 1-5 (filed Nov. 15, 2013).

(c) **Commission Determination**

69. On January 10, 2014, the Commission accepted the cancellation of Attachment R-SPS to become effective January 14, 2014, as requested.<sup>112</sup> As a result, we find that Southwestern Public Service may rely on SPP to satisfy its obligation to consider local transmission needs driven by public policy requirements under Order No. 1000. Because Southwestern Public Service has deleted its local transmission planning process from the Xcel OATT and will now rely on SPP for both its local and regional transmission planning, we find that SPP's compliance filing satisfies the requirements in the First Compliance Order related to Southwestern Public Service's Order No. 1000 local transmission planning obligations. Our finding here is consistent with the First Compliance Order, in which the Commission found that because the transmission owners that belong to SPP (with the exception of Southwestern Public Service) did not have local transmission planning processes separate from the regional transmission planning process, Order No. 1000's requirements with regard to the consideration of transmission needs driven by public policy requirements apply only to the regional transmission planning process.<sup>113</sup>

**3. Nonincumbent Transmission Developer Reforms**

70. In Order No. 1000, the Commission adopted a framework of reforms to ensure that nonincumbent transmission developers have the opportunity to participate in the transmission development process. In particular, public utility transmission providers must eliminate federal rights of first refusal from Commission-jurisdictional tariffs and agreements and develop not unduly discriminatory qualification criteria and processes governing the submission and evaluation of proposals for new transmission facilities.

**a. Federal Rights of First Refusal**

71. Order No. 1000 required each public utility transmission provider to remove provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.<sup>114</sup> The

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<sup>112</sup> *Pub. Serv. Co. of Colo.*, Docket No. ER14-411-000 (Jan. 10, 2014) (delegated letter order).

<sup>113</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 80.

<sup>114</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 313. In Order No. 1000-A, the Commission clarified that the phrase "a federal right of first refusal" refers only to rights of first refusal that are created by provisions in Commission-jurisdictional tariffs or agreements. Order No. 1000-A, 139 FERC ¶ 61,132 at P 415.

requirement to eliminate a federal right of first refusal does not apply to local transmission facilities,<sup>115</sup> or to the right of an incumbent transmission provider to build, own, and recover costs for upgrades to its own transmission facilities, regardless of whether an upgrade has been selected in the regional transmission plan for purposes of cost allocation.<sup>116</sup> In addition, the requirement does not remove, alter, or limit an incumbent transmission provider's use and control of its existing rights-of-way under state law.<sup>117</sup>

72. The Commission determined in Order No. 1000 that issues concerning the applicability of the *Mobile-Sierra* doctrine<sup>118</sup> to transmission owners' rights to build found in Commission-jurisdictional agreements are better addressed as part of the

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<sup>115</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 226, 258, 318. Order No. 1000 defined local transmission facilities as transmission facilities located solely within a public utility transmission provider's retail distribution service territory or footprint that are not selected in the regional transmission plan for purposes of cost allocation. *Id.* P 63. The Commission clarified in Order No. 1000-A that a local transmission facility is one that is located within the geographical boundaries of a public utility transmission provider's retail distribution service territory, if it has one; otherwise the area is defined by the public utility transmission provider's footprint. In the case of an RTO or ISO whose footprint covers the entire region, local transmission facilities are defined by reference to the retail distribution service territories or footprints of its underlying transmission owning members. Order No. 1000-A, 139 FERC ¶ 61,132 at P 429.

<sup>116</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 226, 319, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 426. The Commission stated in Order No. 1000 that upgrades to transmission facilities included such things as tower change outs or reconductoring, regardless of whether or not an upgrade has been selected in the regional transmission plan for purposes of cost allocation. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319. The Commission clarified in Order No. 1000-A that the term "upgrade" means an improvement to, addition to, or replacement of a part of, an existing transmission facility. The term does not refer to an entirely new transmission facility. Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

<sup>117</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319.

<sup>118</sup> The *Mobile-Sierra* doctrine originated in the Supreme Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*), and *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

proceedings on Order No. 1000 compliance, where interested parties may provide additional information.<sup>119</sup>

**i. Mobile-Sierra**

**(a) First Compliance Order**

73. The Commission stated in the First Compliance Order that a *Mobile-Sierra* presumption applies to a contract only if the contract has certain characteristics that justify the presumption. The Commission found that the right of first refusal provision in section 3.3 of the Membership Agreement lacks the characteristics necessary to justify a *Mobile-Sierra* presumption.<sup>120</sup>

74. The Commission stated that in ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the instrument at issue embodies either (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. The former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption; the latter constitute tariff rates, terms, or conditions to which the *Mobile-Sierra* presumption does not apply, although the Commission may exercise its discretion to apply the heightened *Mobile-Sierra* standard.<sup>121</sup>

75. The Commission noted that, in some instances, the jurisdictional provisions of a contract may be classified in their entirety as including either contract rates, terms, and conditions that are subject to a *Mobile-Sierra* presumption or tariff rates, terms, and conditions to which the *Mobile-Sierra* presumption does not apply. The Commission stated that, on the one hand, all such provisions in bilateral power sales contracts freely negotiated at arm's length between sophisticated parties generally would establish contract rates and would come within the presumption.<sup>122</sup> The Commission stated that, on the other hand, where the terms of an agreement would, if approved, be incorporated

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<sup>119</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 292.

<sup>120</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 126.

<sup>121</sup> *Id.* P 127.

<sup>122</sup> *Id.* P 128 (citing *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008) (*Morgan Stanley*)).

into the service agreements of all present and future customers, those terms are properly classified as tariff rates and the *Mobile-Sierra* presumption would not apply.<sup>123</sup>

76. The Commission stated that, by contrast, the Membership Agreement cannot be classified in its entirety as containing contract rates or tariff rates. The Commission found that for two separate but reinforcing reasons, section 3.3 of the Membership Agreement, which includes a federal right of first refusal, lacks the characteristics that justify the *Mobile-Sierra* presumption.<sup>124</sup> The Commission noted that other provisions of the Membership Agreement not at issue in this proceeding may have those characteristics. Given the breadth and complexity of the Membership Agreement, the Commission found that it is neither practical nor necessary to evaluate whether the preponderance of the Membership Agreement's provisions include tariff rates or contract rates. Rather, the Commission found that determining the standard of review that should apply to specific provisions of the Membership Agreement is an appropriate way to recognize the distinctions among its provisions.<sup>125</sup>

77. The Commission found that the construction rights and obligations in section 3.3 of the Membership Agreement are prescriptions of general applicability rather than a negotiated rate provision that is necessarily entitled to a *Mobile-Sierra* presumption. The

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<sup>123</sup> *Id.* P 128 (citing *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014, at P 17 (2011); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at P 19 (2011); *Petal Gas Storage, L.L.C.*, 135 FERC ¶ 61,152, at P 12 (2011); *Southern LNG Co., LLC*, 135 FERC ¶ 61,153, at P 19 (2011)).

<sup>124</sup> The Commission noted that it had not previously addressed the standard of review applicable to this provision of the Membership Agreement. The Commission stated that, where arguments are presented in Order No. 1000 compliance filing proceedings with respect to previous Commission statements as to the standard of review applicable to provisions in another RTO's or ISO's transmission owners agreement, the Commission will address those arguments on a case-by-case basis.

For example, the Commission stated that, while SPP maintains that the Commission has found that "a similar RTO agreement," that of the MISO, "impose[s] a *Mobile-Sierra* standard of review," the Commission has determined in an order on Order No. 1000 compliance that the statement that SPP cites "does not demonstrate that the right of first refusal provision of the [MISO] Transmission Owners Agreement is protected by *Mobile-Sierra*." *Id.* P 129 n.291 (quoting SPP First Compliance Filing at 42-43; *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215, at P 191 (2013) (MISO Compliance Order)).

<sup>125</sup> *Id.* P 129.

Commission noted that, in its most recent statement on the *Mobile-Sierra* doctrine, the U.S. Supreme Court acknowledged the potential distinction between “prescriptions of generally applicability” and “contractually negotiated rates.”<sup>126</sup> The Commission stated that where the language of an agreement establishes rules that delimit, qualify, or restrict the ability of any other potential competitor to engage in the subject activity, that language creates generally applicable requirements.<sup>127</sup> The Commission stated that this conclusion was bolstered by the fact that any new SPP Transmission Owner would have to accept these provisions as-is, with limited room for negotiation. The Commission noted that amending the Membership Agreement required an affirmative vote of at least five of the seven directors of the SPP Board, which substantially inhibited the ability of a new SPP Transmission Owner to negotiate a change to this provision.<sup>128</sup> The Commission found that, as a result, new SPP Transmission Owners are placed in a position that differs fundamentally from that of parties who are able to negotiate freely like buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption.<sup>129</sup>

78. The Commission also found “that the *Mobile-Sierra* presumption does not apply to the federal right of first refusal in section 3.3 of the Membership Agreement because that provision arose in circumstances that do not provide the assurance of justness and reasonableness on which the *Mobile-Sierra* presumption rests.”<sup>130</sup> The Commission explained that that provision arose in a negotiation aimed at protecting a common interest among competing transmission owners. The Commission stated that, unlike circumstances in which the Commission can presume that the resulting rate is the product of negotiations between parties with competing interests, the negotiations that led to the provision at issue here were among parties with the same interest, namely, protecting themselves from competition in transmission development. The Commission found that, while the SPP Transmission Owners may have engaged in extensive negotiations, because of the common interests here, the negotiations do not bear the hallmarks necessary for the *Mobile-Sierra* presumption.<sup>131</sup> The Commission noted that it has

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<sup>126</sup> *Id.* P 130 (citing *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 558 U.S. 165, 176 (2010) (*NRG*)).

<sup>127</sup> *Id.* P 130.

<sup>128</sup> *Id.* P 131 (citing Membership Agreement, § 8.12 (Amendment); Southwest Power Pool, Inc., Bylaws, First Revised Volume No. 4 Bylaws § 4.2.1 (Composition)).

<sup>129</sup> *Id.* P 131.

<sup>130</sup> *Id.* P 132.

<sup>131</sup> *Id.* P 133.

recognized a similar point in other contexts that are relevant here, such as in the Commission observation that the self-interest of two merger partners converge sufficiently, even prior to the merger, to compromise the market discipline inherent in arm's-length bargaining, and in the Commission's policy on market-based rates, which incorporate similar principles.<sup>132</sup>

79. The Commission found that, for these two separate but reinforcing reasons, the federal right of first refusal in section 3.3 of the Membership Agreement lacks the characteristics that justify the *Mobile-Sierra* presumption. Based on that finding, the Commission also disagreed with SPP's argument that its Membership Agreement is protected by the *Mobile-Sierra* doctrine because the agreement is silent on the standard of review. The Commission stated that a necessary premise of SPP's argument is that the Membership Agreement is covered by the *Mobile-Sierra* presumption. The Commission stated that, because it found that the *Mobile-Sierra* presumption was not applicable here, the precedent that SPP cited on *Mobile-Sierra* implications of an agreement's silence was not on point.<sup>133</sup>

**(b) Requests for Rehearing or Clarification**

80. OG&E argues that the Commission improperly shifted the burden of showing the applicability of *Mobile-Sierra* to SPP because the Commission has the burden under FPA section 206 to demonstrate that it has met the appropriate standard for ordering revisions to a contract.<sup>134</sup> OG&E states that the Commission recognized this burden in Order No. 1000-B when it stated that the Commission "will first decide, based on a more complete record, including the viewpoints of other interested parties, whether an agreement is protected by the *Mobile-Sierra* doctrine, and if so, whether the Commission has met the applicable standard of review."<sup>135</sup>

81. SPP challenges the Commission's finding that section 3.3 of the Membership Agreement does not possess the characteristics that are necessary to "justify the

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<sup>132</sup> *Id.* P 134 (citing *Delmarva Power & Light Co.*, 76 FERC ¶ 61,331, at 62,583 (1996); 18 C.F.R. § 35.36(a)(9)(iii) (2012); *Cent. Me. Power Co.*, 85 FERC ¶ 61,272 (1998)).

<sup>133</sup> *Id.* P 135.

<sup>134</sup> OG&E Rehearing Request at 5, 18-19 (citing *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002)).

<sup>135</sup> *Id.* at 18 (citing Order No. 1000-B, 141 FERC ¶ 61,044 at P 40).

presumption” of justness and reasonableness under the *Mobile-Sierra* doctrine.<sup>136</sup> SPP claims that the Commission’s analysis is flawed and lacks substantial evidence because the reasons that the Commission relied upon do not apply to the Membership Agreement.<sup>137</sup>

82. SPP claims that the Commission determination that section 3.3 of the Membership Agreement is a “prescription of general applicability” is based upon a misinterpretation of precedent and reliance on inapplicable precedent.<sup>138</sup> SPP argues that the Commission did not cite any precedent that directly addressed whether contract terms such as those in the Membership Agreement are “prescriptions of general applicability” and, if so, whether such provisions are disqualified *per se* from the *Mobile-Sierra* presumption.<sup>139</sup> SPP also argues that the precedent that the Commission relied upon – *NRG Power Marketing, LLC. v. Maine Public Utilities Commission (NRG)* and *New England Power Generators Ass’n v. FERC (NEPGA)* – does not support the Commission’s finding that the Membership Agreement provisions at issue are generally applicable prescriptions or that the provisions are excluded from *Mobile-Sierra* protection.<sup>140</sup> SPP distinguishes *NRG*, arguing that the issue there was whether the *Mobile-Sierra* public interest presumption applied when a contract rate is challenged by an entity that was not a party to the contract, not whether the rates at issue were prescriptions of general applicability and, if so, whether the *Mobile-Sierra* presumption would apply.<sup>141</sup> OG&E agrees that *NRG* does not apply because the issue of construction rights and obligations were contractually negotiated provisions and these provisions are not of general applicability nor will they be incorporated into any service agreement related to the provisions of Commission-jurisdictional service. OG&E states that these provisions apply only to those transmission owners who agree to them and who voluntarily become signatories to the Membership Agreement.<sup>142</sup> SPP claims that the Commission’s reliance on *NEPGA* is

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<sup>136</sup> SPP Rehearing Request at 7, 22.

<sup>137</sup> *Id.* at 22 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 129, 135).

<sup>138</sup> *Id.* at 12-13 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 123-135).

<sup>139</sup> *Id.* at 23-24.

<sup>140</sup> *Id.* at 23 (citing *NRG*, 558 U.S. 165; *New Eng. Power Generators Ass’n v. FERC*, 707 F.3d 364 (D.C. Cir. 2013)).

<sup>141</sup> *Id.* at 23-24.

<sup>142</sup> OG&E Rehearing Request at 17.

misplaced because there the disputed rates were to be derived in a capacity auction that was adopted as part of a settlement agreement that included a *Mobile-Sierra* clause, not provisions (like the Membership Agreement) that are specified in the contract at issue.<sup>143</sup> SPP states that *NEPGA* does not authorize the Commission to remove the *Mobile-Sierra* presumption from an agreement (like the Membership Agreement) that the Commission previously found just and reasonable.<sup>144</sup> SPP adds that, unlike the settlement agreements in the orders that the Commission references, the Membership Agreement does not establish rates that are “incorporated into the service agreements of all present and future customers.”<sup>145</sup> SPP states that an entity may take service under the SPP OATT without executing the Membership Agreement and the Membership Agreement does not dictate the rates charged under the OATT and is not incorporated by reference in any service agreement.<sup>146</sup>

83. SPP asserts that the Commission’s determination that contracts that “delimit, qualify, or restrict the ability of any other potential competitor to engage in the subject activity” is not reasoned decision-making because it is unsupported by precedent and contrary to Commission precedent and fact.<sup>147</sup> SPP claims that none of the case law cited by the Commission supports its finding. SPP contends that, by their nature, contracts “delimit, qualify, or restrict” the ability of the parties to a contract to engage in “the subject activity” with “any other potential competitor,” which delimits, qualifies, or restricts the ability of potential competitors to engage in the activity with the contracting parties.<sup>148</sup> SPP argues that the Commission has found that these types of contracts, such as full and partial requirements contracts that restrict the ability of potential competitors to sell power to the buyer, are covered by the *Mobile-Sierra* doctrine.<sup>149</sup>

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<sup>143</sup> SPP Rehearing Request at 24.

<sup>144</sup> *Id.* at 24.

<sup>145</sup> *Id.* at 24 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 128; SPP Membership Agreement, Preamble, §§ 2.0 (Rights, Powers and Obligations of SPP), 3.0 (Commitments, Rights, Powers, and Obligations of Member)).

<sup>146</sup> *Id.* at 25.

<sup>147</sup> *Id.* at 13 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 123-135), 25-26.

<sup>148</sup> *Id.* at 25.

<sup>149</sup> *Id.* at 25 (citing *N. Va. Elec. Coop. v. Old Dominion Elec. Coop.*, 116 FERC ¶ 61,173, at PP 10-11 (2006)).

84. SPP adds that the Commission’s claim that its analysis is “bolstered by the fact that any new SPP Transmission Owner would have to accept these provisions as-is, with limited room for negotiations,” ignores Commission precedent.<sup>150</sup> SPP notes that, when several transmission owning members decided to join SPP in 2008, SPP and the prospective members engaged in extensive negotiations and developed company-specific versions of the Membership Agreement to accommodate their membership needs.<sup>151</sup> SPP asserts that, while these negotiations did not involve changes to section 3.3 of the Membership Agreement, they belie the Commission’s assertion that “new SPP Transmission Owners are placed in a position that differs fundamentally from that of parties who are able to negotiate freely like buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption.”<sup>152</sup> SPP adds that because SPP membership is voluntary and is not a prerequisite to receiving service, prospective members have the sole discretion to execute the Membership Agreement and accept its provisions.<sup>153</sup> SPP argues that, due to its voluntary nature, the Membership Agreement is not the type of generally-applicable tariff that the Commission claims is not entitled to the *Mobile-Sierra* presumption.<sup>154</sup>

85. OG&E argues that, without support or explanation, the Commission found that a new SPP transmission owner would have to accept provisions of the Membership Agreement regarding construction rights with limited room for negotiation.<sup>155</sup> OG&E states that the only support provided for this conclusion was that revisions to the Membership Agreement must be approved by the SPP Board.<sup>156</sup> OG&E claims that, rather than support the Commission’s finding, the fact that the Membership Agreement

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<sup>150</sup> *Id.* at 26 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 131; *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 327 (D.C. Cir. 2006); *PG&E Gas Transmission v. FERC*, 315 F.3d 383, 388-90 (D.C. Cir. 2003)).

<sup>151</sup> *Id.* at 26 (citing *Sw. Power Pool, Inc.*, 125 FERC ¶ 61,239 (2008)).

<sup>152</sup> *Id.* at 26 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 131).

<sup>153</sup> *Id.* at 26 n.62.

<sup>154</sup> *Id.* at P 26 n.62.

<sup>155</sup> OG&E Rehearing Request at 17 n.38.

<sup>156</sup> *Id.* at 17 n.38 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 131 (citing SPP Membership Agreement, § 8.12)).

contemplates revisions and provides a process for revising the agreement underscores the fallacy in the Commission's logic.<sup>157</sup>

86. OG&E claims that the Commission created the "common interest" test from whole cloth.<sup>158</sup> OG&E argues that no court has ever analyzed an agreement for *Mobile-Sierra* purposes to determine if the parties' interests were so closely aligned that the agreement could not be presumed to be reasonable. Rather, OG&E contends that large, sophisticated, unaffiliated companies that enter into contracts are presumed to do so carefully and at arm's-length, particularly when the agreement involves large stakes (like the financial and operational stakes associated with the SPP Membership Agreement). OG&E adds that, by inventing a new analysis of whether a contract is entitled to *Mobile-Sierra* protection, the Commission denied OG&E and other Membership Agreement signatories the opportunity to present evidence to rebut the Commission's finding that the Membership Agreement is not entitled to *Mobile-Sierra* protection.<sup>159</sup>

87. OG&E and SPP argue that the parties to the Membership Agreement do not have common interests.<sup>160</sup> SPP claims that the Commission ignores that the Membership Agreement is negotiated among and executed by both SPP and its members, which include investor-owned utilities, municipal systems, generation and transmission cooperatives, state agencies, independent power producers, power marketers and independent transmission companies.<sup>161</sup> SPP contends that, contrary to the Commission's claim, section 3.3 of the Membership Agreement did not arise in a negotiation aimed at protecting a common interest among competing transmission owners.<sup>162</sup> SPP states that the ISO Task Force that developed the Membership Agreement and the SPP Board approved the Membership Agreement without dissension.<sup>163</sup> SPP notes that, at the time, the SPP Board included representatives of both

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<sup>157</sup> *Id.* at 17 n.38.

<sup>158</sup> *Id.* at 11.

<sup>159</sup> *Id.* at 12.

<sup>160</sup> *Id.* at 12-15; SPP Rehearing Request at 13-14 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 123-135), 27-31.

<sup>161</sup> SPP Rehearing Request at 27-28 (citing First Compliance Filing at 6-7).

<sup>162</sup> *Id.* at 28 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 133).

<sup>163</sup> *Id.* at 28-29 (citing SPP, OATT Amendment, Volume I, Transmittal Letter, Docket No. ER99-4392-000, at 3-4 (filed Sept. 7, 1999) (SPP 1999 Filing)).

transmission owners and non-transmission owning stakeholders and that the Commission found that the Membership Agreement enjoyed unanimous stakeholder support.<sup>164</sup> OG&E argues that the transmission owners who negotiated and executed the Membership Agreement have differing interests with respect to the scope and level of state regulation to which they are subject and represent various corporate structures, which create differing interests with respect to transmission construction requirements and numerous other issues.<sup>165</sup> OG&E adds that the construction provisions of the Membership Agreement were negotiated as a whole and include obligations imposed on transmission owners to construct facilities at the direction of SPP.<sup>166</sup> OG&E states that these obligations extend to transmission projects that take into account the needs of the entire SPP region. OG&E asserts that some transmission owners sought to protect their ability and obligation to ensure the safe and reliable operation of their systems and existing ability to construct and be reimbursed for transmission facilities in their own service territories because they recognized the regional nature of transmission planning and expansion inherent in a Regional Transmission Organization (RTO) formation and faced the prospect of turning over operational control of their transmission system to SPP.<sup>167</sup> OG&E states that a natural quid pro quo for agreeing to become subject to a regional transmission planning and expansion process is the ability to protect existing rights with respect to construction and expansion within a utility's own service territory.<sup>168</sup>

88. OG&E argues that the Commission's reliance on its policies with respect to merger partners under its market-based rate regime is inapposite to establish common interests in this context.<sup>169</sup> OG&E disagrees with the Commission's reliance on *Delmarva Power & Light Co.* and *Cenergy, Inc.* because in those cases, the Commission's prohibition applied only after the relevant entities announced plans to merge and had entered into definitive merger agreements.<sup>170</sup> OG&E argues that here,

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<sup>164</sup> *Id.* at 29 & n.69 (citing SPP 1999 Filing at 3 n.4; *Sw. Power Pool, Inc.*, 89 FERC ¶ 61,284, at 61,895 (1999)).

<sup>165</sup> OG&E Rehearing Request at 10-13.

<sup>166</sup> *Id.* at 13.

<sup>167</sup> *Id.* at 10-11, 13.

<sup>168</sup> *Id.* at 13.

<sup>169</sup> *Id.* at 13-14.

<sup>170</sup> *Id.* at 14 (citing *Delmarva Power & Light Co.*, 76 FERC at 62,583; *Cenergy, Inc.*, 74 FERC ¶ 61,281, at 61,900-01 (1996)).

instead of acting after those events, the Commission attempts to support a commonality of interest finding prior to the execution of a definitive merger agreement. OG&E claims that, prior to the execution of a definitive merger agreement, like the Membership Agreement, the parties to a merger agreement have differing interests. OG&E states that the parties' separate interests prior to the execution of such an agreement ensured that the negotiation of the Membership Agreement was at arm's-length. OG&E argues that the Commission's reliance on 18 C.F.R. § 35.36(a)(9)(iii)<sup>171</sup> is also misplaced because here there is no record upon which the Commission can draw conclusions about the absence of arm's-length bargaining. OG&E notes that, under the regulations cited, signatories to the Membership Agreement are not affiliates. OG&E adds that the Commission has held that its precedent related to affiliate analyses under the market-based rate regime is not applicable in other contexts.<sup>172</sup>

89. SPP adds that section 3.3 of the Membership Agreement establishes the rights, powers and obligations of the transmission and non-transmission owners, including the requirement that each transmission owner construct facilities as directed by SPP.<sup>173</sup> SPP contends that its right to direct the construction of facilities ensures that transmission owners cannot disregard SPP's direction to construct facilities that SPP independently determines through its regional transmission planning process should be built.<sup>174</sup> SPP claims that the Commission's logic would result in no agreement, not even a bilateral wholesale energy sales rate contract, being entitled to *Mobile-Sierra* protection because adverse parties to a contract inherently must have some common interest in the formation of the contract.<sup>175</sup> SPP states that, when it filed its Membership Agreement in 1999, the only "common interest" among the signatories to the Membership Agreement was their

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<sup>171</sup> This section of the Commission's regulations states that an affiliate of a specified company means, among other things, "[a]ny person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate."

<sup>172</sup> OG&E Rehearing Request at 14-15 (citing *Entergy Louisiana, Inc.*, 110 FERC ¶ 61,300, at P 21 (2005)).

<sup>173</sup> SPP Rehearing Request at 29 (citing SPP 1999 Filing at 13).

<sup>174</sup> *Id.* at 30 (citing *Sw. Power Pool, Inc.*, 106 FERC ¶ 61,110, at PP 176, 188, *order on reh'g*, 109 FERC ¶ 61,010 (2004)).

<sup>175</sup> *Id.* at 30.

interest in establishing a region-wide SPP OATT to provide network service.<sup>176</sup> SPP adds that, when SPP sought and obtained RTO status in 2004, the “common interest” of the Membership Agreement signatories was the formation of the SPP RTO.<sup>177</sup>

90. SPP contends that, when the Commission determined in the First Compliance Order that the Membership Agreement is not subject to protection under the heightened *Mobile-Sierra* public interest presumption, it failed to provide a meaningful response to SPP’s arguments that the Membership Agreement is subject to protection under the *Mobile-Sierra* presumption.<sup>178</sup> SPP claims that the Commission failed to address SPP’s showing that the Membership Agreement is similar to other agreements that the Commission has found were entitled to *Mobile-Sierra* protection.<sup>179</sup> SPP refers to agreements among transmission-owning members of RTOs and agreements between an RTO and its transmission owners, including the non-rate terms and conditions of such agreements.<sup>180</sup> SPP argues that it demonstrated that the Membership Agreement was a contract among multiple “sophisticated entities” with different interests and was part of the bargained-for exchange that led first to SPP providing open access transmission service under a regional tariff and then to SPP becoming a Commission-approved RTO.<sup>181</sup> SPP claims that, as a result, the Commission’s determination is arbitrary, capricious, contrary to reasoned decision-making and an unexplained departure from precedent.<sup>182</sup>

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<sup>176</sup> *Id.* at 30.

<sup>177</sup> *Id.* at 30-31.

<sup>178</sup> *Id.* at 14 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 123-135), 31.

<sup>179</sup> *Id.* at 33.

<sup>180</sup> *Id.* at 33 (citing SPP February 19, 2013 Answer at 5-8 & n.13; *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,090, at P 47 n.41 (2008), *reh’g denied*, 136 FERC ¶ 61,099 (2011); *ISO New Eng. Inc.*, 109 FERC ¶ 61,147, at PP 77-78 (2004); *Pub. Utils. with Existing Contracts in the Cal. Indep. Sys. Operator Corp. Region*, 125 FERC ¶ 61,228, at PP 6, 15 (2008); *Sw. Power Pool, Inc.*, 117 FERC ¶ 61,207, at PP 27-28, *order on reh’g*, 119 FERC ¶ 61,021, at P 11 (2007); *Vt. Transco LLC*, 118 FERC ¶ 61,244, at P 50, *order on clarification and reh’g sub nom. Lamoille County Sys. v. Vt. Transco LLC*, 120 FERC ¶ 61,010 (2007)).

<sup>181</sup> *Id.* at 34 (citing SPP February 19, 2013 Answer at 6).

<sup>182</sup> *Id.* at 14 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 123-135), (continued ...)

91. SPP asserts that the Commission's determination that the Membership Agreement is not subject to *Mobile-Sierra* protection more than a decade after the agreement was accepted by the Commission is inconsistent with court decisions drawing a distinction between the Commission's authority to reject a *Mobile-Sierra* provision upon its initial review of a contract and later reviews of that agreement.<sup>183</sup> SPP states that, when the Commission accepted the Membership Agreement provisions regarding the construction and ownership of transmission facilities in 1999, it did not require challenges to the Membership Agreement to be reviewed under the ordinary just and reasonable standard, rather than the heightened just and reasonable standard with a *Mobile-Sierra* presumption.<sup>184</sup> SPP also notes that it did not explicitly or implicitly waive *Mobile-Sierra* protection for the Membership Agreement in its filing in 1999.<sup>185</sup> SPP argues that, without such a reservation by the Commission or waiver by the signatories to the Membership Agreement, the *Mobile-Sierra* doctrine is the "default rule."<sup>186</sup> SPP contends that interpreting the *Mobile-Sierra* doctrine to permit the Commission to engage in an *ex post facto* revocation of the *Mobile-Sierra* presumption would undermine the basis for the doctrine: preserving the stability and sanctity of contracts and the benefit of bargains struck by sophisticated parties negotiating at arm's-length.<sup>187</sup>

92. OG&E argues that the Commission decision to apply different presumptions to various provisions of the Membership Agreement is flawed.<sup>188</sup> First, OG&E argues that the Commission did not and cannot explain how some provisions of the Membership Agreement were negotiated freely among sophisticated parties while other provisions of the same agreement were not.<sup>189</sup> Second, OG&E contends that the Commission did not

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31, 34-35.

<sup>183</sup> *Id.* at 14-15 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 123-135), 35-36.

<sup>184</sup> *Id.* at 35 (citing *Sw. Power Pool, Inc.*, 89 FERC at 61,895).

<sup>185</sup> *Id.* at 35.

<sup>186</sup> *Id.* at 35-36 (citing *Morgan Stanley*, 554 U.S. at 534; *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998)).

<sup>187</sup> *Id.* at 36 (citing *Atlantic City*, 295 F.3d at 14; *Boston Edison Co. v. FERC*, 233 F.3d 60, 64-65 (1st Cir. 2000); *NRG*, 558 U.S. at 173).

<sup>188</sup> OG&E Rehearing Request at 15-18.

<sup>189</sup> *Id.* at 15.

and cannot explain which “customers” are subject to having their service agreements encumbered with this provision or what Commission-jurisdictional service would be provided under such a service agreement.<sup>190</sup> OG&E states that the Membership Agreement represents a negotiated package of provisions and that, when one provision of the agreement is modified, SPP and the other signatories have an obligation to “endeavor in good faith to negotiate such amendment or amendments to this Agreement as will restore the relative benefits and obligations of the signatories under this Agreement.”<sup>191</sup> OG&E argues that this provision underscores the integrated nature of the Membership Agreement and demonstrates that the Commission was incorrect to conclude that certain provisions of the agreement were not negotiated at arm’s-length. Third, OG&E claims that the Commission’s reasoning is flawed because it finds that certain provisions of the Membership Agreement would be incorporated into the service agreements of all present and future customers or constitute generally applicable requirements.<sup>192</sup> OG&E argues that, if analyzed on a stand-alone basis, the provisions of the Membership Agreement related to construction and ownership are not jurisdictional and will not be incorporated into service agreements because they do not establish the terms and conditions of jurisdictional service nor are they provisions that apply generally to jurisdictional service.<sup>193</sup>

93. Finally, SPP argues that the Commission’s disregard for SPP’s evidence that its existing processes are benefiting, rather than harming, the public interest is arbitrary and capricious.<sup>194</sup> SPP contends that it demonstrated that its existing, pre-Order No. 1000 processes are creating a robust and cost-effective expansion of the SPP transmission grid, which will provide SPP stakeholders and ratepayers billions of dollars in net benefits.<sup>195</sup> SPP states that it pointed to several provisions in the Membership Agreement and OATT that require SPP to conduct its transmission planning in a cost-effective manner, and the Commission’s finding that SPP’s Integrated Transmission Plan is a proactive, comprehensive transmission planning approach that encourages the development of integrated solutions to address both reliability and economic needs across the SPP

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<sup>190</sup> *Id.* at 15-16.

<sup>191</sup> *Id.* at 16 (citing SPP Membership Agreement, § 8.5).

<sup>192</sup> *Id.* at 17 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 130).

<sup>193</sup> *Id.* at 17.

<sup>194</sup> SPP Rehearing Request at 7, 15 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 123-135), 36-38.

<sup>195</sup> *Id.* at 37-38.

transmission system in a non-discriminatory manner.<sup>196</sup> SPP claims that the benefits of its existing, pre-Order No. 1000 transmission planning and cost allocation processes include: (1) over \$3 billion in net benefits over forty years from SPP's "Priority Projects" (the first round of transmission projects approved under the Highway/Byway method); (2) net benefits of \$1.6 billion over ten years from SPP's Balanced Portfolio projects; and (3) nearly \$600 million in net benefits from other approved transmission facilities.<sup>197</sup> SPP states that no party refuted this evidence.<sup>198</sup>

**(c) Commission Determination**

94. We deny rehearing. As the Commission stated in the First Compliance Order, in determining whether a *Mobile-Sierra* presumption applies in a specific instance, the Commission must determine whether the instrument or provision at issue embodies either (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. The former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption; that presumption does not necessarily apply to the latter, although the U.S. Court of Appeals for the District of Columbia Circuit has determined that the Commission is legally authorized to impose a more rigorous application of the statutory "just and reasonable" standard of review on future changes to agreements that do not present contract rates.<sup>199</sup>

95. The Supreme Court has stated that "the premise on which the *Mobile-Sierra* presumption rests" is "that the contract rates are the product of fair, arms-length negotiations."<sup>200</sup> For this reason, we must first address the issue of arm's-length bargaining and its importance for the *Mobile-Sierra* doctrine.

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<sup>196</sup> *Id.* at 37 (citing First Compliance Filing at 46 (citing SPP Membership Agreement, § 2.1.5(a); SPP, OATT, Sixth Revised Volume No. 1, Attachment O, §§ III.3.c, III.4.c, III.8.b, III.8.d; *Sw. Power Pool, Inc.*, 132 FERC ¶ 61,042, at P 52 (2010))).

<sup>197</sup> *Id.* at 37-38 (citing First Compliance Filing at 46-49 and Ex. No. SPP-1 (Monroe Testimony) at 23-26).

<sup>198</sup> *Id.* at 38.

<sup>199</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 127 (citing *New Eng. Power Generators Ass'n v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. 2013)).

<sup>200</sup> *Morgan Stanley*, 554 U.S. at 554.

96. Courts have found that “arm’s length negotiations or transactions are characterized as adversarial negotiations between parties that are each pursuing independent interests.”<sup>201</sup> A “typical arm’s length transaction involves an adversarial negotiation in which the parties have independent interests and each tries to obtain the best deal for itself.”<sup>202</sup> Courts have characterized arm’s-length transactions as transactions in which “adversarial parties,” i.e., “business adversaries in the commercial sense,” seek “to further their own economic interests.”<sup>203</sup> Courts have described “the hallmark characteristics of arm’s-length bargaining” as bargaining that is “negotiated rigorously, selfishly and with an adequate concern for price.”<sup>204</sup>

97. The Commission has taken a similar position. In one instance involving gas sales, it found that “the test for arm’s-length bargaining” is whether the purchaser and seller have sufficiently distinct economic interests that the buyer’s interests in the negotiations are aligned with those to whom it resells the gas, and not with the interests of the seller. If the negotiating parties have a common economic interest in the outcome of the negotiations, they cannot bargain at arm’s length. If the purchaser has an economic incentive to pay a higher price or agree to other terms more favorable than necessary to provide a reasonable incentive to the seller for the production of the gas, there can be no arm’s-length bargaining.<sup>205</sup>

98. In short, arm’s-length bargaining is a process in which each party pursues its individual interests.<sup>206</sup> Such pursuit of self-interest in competitive markets promotes

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<sup>201</sup> See *Santomenno v. Transamerica Life Ins. Co.*, No. CV 12-02782, DDP (MANx), 2013 WL 603901, at \*6 (C.D. Cal.).

<sup>202</sup> *Id.* at 6 n.3 (citing Black’s Law Dictionary 109 (6th ed. 1991) (defining an arm’s length transaction as “a transaction negotiated by unrelated parties, each acting in his or her own self interest . . . . A transaction in good faith in the ordinary course of business by parties with independent interests”)).

<sup>203</sup> *A.T. Kearney, Inc. v. Int’l Bus. Machines Corp.*, 73 F.3d 238, 242 (9th Cir. 1995).

<sup>204</sup> *Jeanes Hosp. v. Sec’y of Health & Human Servs.*, 448 F. App’x202, 206 (3d Cir. 2011).

<sup>205</sup> *Nw. Cent. Pipeline Corp.*, 44 FERC ¶ 61,200, at 61,719 (1988).

<sup>206</sup> We note that in certain situations, a transaction may be deemed to be an arm’s-length transaction when parties cannot be assumed to be pursuing individual, adverse interests. For example, Black’s Law Dictionary defines an arm’s-length transaction, in part, as:

(*continued ...*)

economic efficiency, and it is for reasons such as this that the Commission “must presume that the rate set out in a freely negotiated wholesale-energy contract meets the ‘just and reasonable’ requirement imposed by law.”<sup>207</sup> By contrast, OG&E asserts that “[w]hen large, sophisticated, unaffiliated companies enter into contracts, the parties are presumed to do so carefully and at arms-length.”<sup>208</sup> We disagree with that assertion for two related reasons. First, OG&E argues that the Commission must presume the presence of arm’s-length bargaining. The *Mobile-Sierra* doctrine instead allows the Commission to consider whether arm’s-length bargaining occurred and then requires the Commission to presume that contract rates that are the product of fair, arms-length negotiations are just and reasonable. Second, OG&E’s assertion inappropriately assumes that all contracts between “large, sophisticated, unaffiliated companies” are entitled to *Mobile-Sierra* protection, regardless of the characteristics of those contracts. As the Commission has previously found, that view is overbroad, as it would sweep in even a situation where the terms of an agreement, if approved, would be incorporated into the service agreements of all present and future customers.<sup>209</sup>

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The standard under which unrelated parties, each acting in his or her own best interest *would carry out* a particular transaction. For example, if a corporation sells property to its sole shareholder for \$10,000, in testing whether \$10,000 is an “arm’s length” price it must be ascertained for how much the corporation could have sold to property to a disinterested third party in a bargained transaction. (Emphasis supplied)

Black’s Law Dictionary 100 (5th ed. 1978). The Commission has taken a similar approach. *See, e.g., Ind. & Mich. Mun. Distribs. Ass’n v. Ind. Mich. Power Co.*, Opinion No. 382, 62 FERC ¶ 61,189, at 62,238 (1993) (stating that in assessing whether rates are just and reasonable, the Commission “cannot presume prudence or assume . . . an arm’s-length relationship” if costs are incurred through an affiliate transaction, and the Commission will instead look to a range of market prices for comparable transactions during the same time period).

Nevertheless, the Commission is not dealing with a price term that can be compared to prices in competitive markets or with a transaction that otherwise can be presumed to have a certain outcome when negotiated among parties that do not share common interests with respect to the substance of the transaction.

<sup>207</sup> *Morgan Stanley*, 554 U.S. at 530.

<sup>208</sup> OG&E Rehearing Request at 12.

<sup>209</sup> PJM Interconnection, L.L.C., 147 FERC ¶ 61,128 at P 105 (2014).

99. The Commission has consistently taken this approach. It noted in the First Compliance Order that it had done so in its merger orders, citing to *Delmarva Power & Light Co. and Cenergy, Inc.*, and in its market-based rate regulations referencing to 18 C.F.R. § 35.36(a)(9)(iii), which authorizes the Commission to treat as affiliates persons or classes of persons that the Commission determines stand in such a relation to a specified company that there is likely to be an absence of arm's-length bargaining in transactions between them.<sup>210</sup> OG&E objects to these references and argues that those cases and regulations deal with very different situations. That, however, is the essential point. The Commission has applied the concept of arm's-length bargaining, as elaborated by the courts, in a broad range of situations, and its actions in this proceeding are consistent with its actions elsewhere.

100. In response to OG&E and SPP's argument that the parties to the Membership Agreement do not have common interests, we clarify that from the standpoint of *Mobile-Sierra* analysis, the essential feature of the Membership Agreement is that it is a product of a tariff development process, not contract negotiations. The Membership Agreement is, as SPP points out, the result of ISO Task Force deliberations that produced a standardized form contract that was submitted to the Commission for approval. As an actual contract that creates binding contractual obligations, the Membership Agreement is executed on an individual basis between SPP and a specific entity seeking SPP membership status. SPP is not a commercial entity that acts solely in its own self-interest, and the contract created in these individual circumstances cannot be characterized as one in which each party has sought to promote its individual economic interest, a central feature of arm's-length bargaining. For these reasons we further clarify in response to OG&E that we need not apply different presumptions to different provisions of the Membership Agreement. As a form contract, the Membership Agreement must be viewed in its entirety as containing rates, terms, or conditions that are generally applicable to all entities seeking SPP membership. As a result, the agreement is not subject to a *Mobile-Sierra* presumption.

101. More specifically, these facts confirm that section 3.3 of the Membership Agreement itself qualifies as a provision of general applicability. Prospective SPP members must accept this provision with limited room for negotiation. SPP disputes this point by citing to a 2008 Commission order dealing with an instance where SPP and prospective transmission owning members negotiated to develop company-specific versions of the Membership Agreement to accommodate their special needs. SPP concedes that these negotiations did not involve changes to section 3.3 of the Membership Agreement, but in fact the amendments did not involve any changes to the generally applicable form Membership Agreement. Instead, the negotiations produced

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<sup>210</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 134.

addenda to the Membership Agreement containing provisions deemed necessary to accommodate certain issues specific to a new class of members.

102. In that case, SPP proposed to amend its Membership Agreement by appending additional provisions that allowed certain public power entities to become members of SPP while preserving their tax exempt status and the authority of their governing boards, fulfilling the obligations they have under state and municipal laws and regulations, and retaining their non-jurisdictional status.<sup>211</sup> These amendments simply served to recognize the special legal requirements of the public power entities in question. Since they did not modify any existing provision of the Membership Agreement, they in no way demonstrate that new SPP members are not required to accept these provisions as-is, with limited room for negotiation.

103. OG&E maintains that the Commission has not demonstrated that a new SPP transmission owner would have to accept the provisions of the Membership Agreement as is. It states that the only support that the Commission has provided for this position is that revisions to the Membership Agreement require SPP Board approval, and OG&E maintains that the fact that the Membership Agreement contains a revision process underscores that fallacy of the Commission's argument. This, however, overlooks the situation that a prospective SPP member would face if it sought a revision to the provision in question, section 3.3. A proposal to eliminate this provision would apply to all the existing signatories to the Membership Agreement. Simply eliminating the provision from a single Membership Agreement between SPP and the prospective new member would not eliminate the right of first refusal in practice. The existence of a revision process does not eliminate this very significant hurdle. As SPP itself notes, any modification to the Membership Agreement must be negotiated with all other parties that have entered into the Membership Agreement with SPP. This fact creates very substantial barriers to any proposal that the Membership Agreement be amended to eliminate section 3.3, and thus, for all practical purposes, prospective new SPP members are required to accept that section as is.

104. SPP argues that section 3.3 of the Membership Agreement should not be considered a provision of general applicability because SPP membership is voluntary and not a prerequisite to receiving service. However, provisions of general applicability simply establish the terms and conditions under which a transaction will occur, and their voluntary acceptance does not alter their character. The fact that an entity has the option of either voluntarily accepting those terms and conditions or not transacting at all demonstrates that they constitute a provision of general applicability. Moreover, that fact

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<sup>211</sup> *Sw. Power Pool, Inc.*, 125 FERC ¶ 61,239 at P 10; *see* Southwest Power Pool, Inc., Revisions to Bylaws, Tariff, and Membership Agreement, Docket No. ER08-1601-000, at 7-10 (filed Sept. 30, 2008).

that SPP membership is not a prerequisite to receiving service does not affect whether a provision of the Membership Agreement is or is not a provision of general applicability.

105. We disagree with SPP that the Commission has not provided legal support for the conclusion that section 3.3 of the Membership Agreement is a provision of general applicability that is not entitled to a *Mobile-Sierra* presumption. When the Supreme Court referred to “contract rates” in *NRG*, it was referring to rates to which the Commission was required to apply a *Mobile-Sierra* presumption. Specifically, the Court acknowledged the Commission’s use of the term “contract rates” in this way, and it went on to say that, on remand, the court of appeals could consider whether rates that did not qualify as contract rates could nevertheless be treated analogously.<sup>212</sup> The court of appeals then remanded this issue back to the Commission as part of a general requirement that the Commission explain whether it had the discretion to treat rates that were not contract rates as analogous to contract rates.<sup>213</sup>

106. In addressing this matter in *Devon Power*, the Commission justified the distinction between contract rates and tariff rates by noting that the Supreme Court observed in *NRG* that the FPA differentiates between rates set “unilaterally by tariff” and rates set “by contract” between seller and buyer.<sup>214</sup> The Commission’s use of the term “tariff rates” as generally applicable rates is justified by the definition of the term “tariff” set forth in the Commission’s regulations under the FPA, which state, in part, that a tariff is “a statement of . . . electric service . . . offered on a generally applicable basis. . . .”<sup>215</sup> These points fully justify the distinction between “contract rates,” i.e., rates in a contract that qualifies for a *Mobile-Sierra* presumption, and “tariff rates,” i.e., rates, terms, or conditions in an agreement that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations.

107. We reject SPP’s argument that the Commission is preempted from finding at this time that *Mobile-Sierra* does not apply to section 3.3 of the Membership Agreement because the Commission did not premise its acceptance of this agreement for filing in 1999 on a requirement that future challenges would be reviewed under the ordinary just and reasonable standard rather than the heightened *Mobile-Sierra* public or because the SPP 1999 filing neither expressly nor impliedly waived *Mobile-Sierra* protection for the

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<sup>212</sup> *NRG*, 558 U.S. at 176.

<sup>213</sup> *Me. Pub. Comm’n v. FERC*, 625 F.3d 754, 759-60 (D.C. Cir. 2010).

<sup>214</sup> *Devon Power LLC*, 134 FERC ¶ 61,208 at P 13 n.24 (citing *NRG*, 130 S. Ct. at 698).

<sup>215</sup> 18 C.F.R. § 35.2(c)(1) (2013).

Membership Agreement. SPP bases its argument on the claim that the *Mobile-Sierra* presumption is the default rule. However, SPP misconstrues what the Supreme Court said when it referred to the *Mobile-Sierra* presumption as the “default rule.”<sup>216</sup> The Supreme Court stated that “the *Mobile-Sierra* presumption rests” on the fact “that the contract rates are the product of fair, arms-length negotiations.”<sup>217</sup> The *Mobile-Sierra* presumption is thus the default rule only if the presumption’s necessary factual preconditions were present at the time of contract formation. If they were not present, the presumption does not apply, and as a consequence the Commission is not preempted from finding at a later date that this is the case. The same point applies to waivers of *Mobile-Sierra* protection. One cannot presume that the presumption applies to a contract unless the parties waive it, as the presumption does not apply to all contracts, but rather only to those contracts that possess the necessary factual preconditions for the presumption.

108. These points also apply to SPP’s argument that we erred in failing to consider its evidence that SPP’s pre-Order No. 1000 processes are benefiting the public interest. The effects of a contract provision on the public interest are a relevant consideration for *Mobile-Sierra* analysis only in cases where a *Mobile-Sierra* presumption applies. If the presumption applies, we must find that the contract adversely affects the public interest before we can overcome the presumption. On the other hand, we are not required to engage in *Mobile-Sierra* public interest analysis where we have established that the presumption does not apply. Because we have found that the presumption does not apply here, it is not necessary to consider SPP’s arguments and evidence regarding benefits to the public interest.

109. SPP’s contention that all contracts limit the ability of potential competitors to engage in a certain activity has no relevance here. As an example of such limitations on competition, SPP points to wholesale requirements contracts, which are entitled to a *Mobile-Sierra* presumption, but which restrict the ability of potential competitors to sell power to the buyer under the contract. However, there is a fundamental difference between such contracts and contracts that by their terms specify who may or may not engage in a certain activity. In the case of wholesale requirements contracts, the exclusion of third-party sellers is simply incidental to the fact the seller found the contract price sufficiently high, the buyer found the price sufficiently low, and both parties found the other terms and conditions of the contract to be sufficiently satisfactory to reach an agreement. We see no parallels between this situation and one where the parties to a contract agree to prevent other parties from entering their line of business. SPP thus fails to distinguish between contracts that are the product of competitive conditions, i.e.,

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<sup>216</sup> *Morgan Stanley*, 554 U.S. at 534.

<sup>217</sup> *Id.* at 554.

contracts that are freely negotiated at arm's-length and thus are subject to a *Mobile-Sierra* presumption, and contracts that by their terms restrict competition by preventing entry into the market.

110. SPP states that section 3.3 includes a requirement that each transmission owner construct facilities as directed by SPP, and it contends that this right to direct the construction of facilities ensures that transmission owners cannot disregard SPP's direction to construct facilities that SPP independently determines through its regional transmission planning process should be built. However, the First Compliance Order does not deprive SPP of the right to direct an entity to construct facilities. The First Compliance Order only requires that the process for identifying the entity that is to construct the facilities not be based on a federal right of first refusal.

111. We disagree with SPP that the Membership Agreement is similar to other agreements that the Commission has found are entitled to *Mobile-Sierra* protection. The question presented here is whether the right of first refusal provision in the Membership Agreement represents an instance of contract rates that the Commission is required to acknowledge is subject to a *Mobile-Sierra* presumption. None of the cases that SPP cites address this issue. Only one of these cases concerns a right of first refusal provision. That is a 2004 order in which the Commission exercised its discretion to apply a *Mobile-Sierra* standard of review to some provisions of the ISO-NE Transmission Operating Agreement, including a right of first refusal provision, but not others.<sup>218</sup> Such discretionary Commission action occurs in instances where an agreement is not subject to a *Mobile-Sierra* presumption as a matter of law, and for that reason the ISO-NE order in question does not speak to the issue presented here, i.e. whether the right of first refusal provision of the Membership Agreement has the characteristics that require the Commission to apply a *Mobile-Sierra* presumption to it. None of the other cases that SPP cites deal with agreements that are similar to the Membership Agreement,<sup>219</sup> and they thus do not the argument that we have failed to distinguish the Membership Agreement from similar agreements that are subject to a *Mobile-Sierra* standard of review.

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<sup>218</sup> *ISO New England Inc., et al.*, 109 FERC ¶ 61,147 (2004).

<sup>219</sup> See *Pub. Utils. with Existing Contracts in the Cal. Indep. Sys. Operator Corp. Region*, 125 FERC ¶ 61,228 at PP 6, 15 (finding that certain transmission service agreements were subject to a "mixed" standard of review); *Sw. Power Pool, Inc.*, 117 FERC ¶ 61,207 at PP 27-28 (accepting a *Mobile-Sierra* clause in a balancing agreement), *order on reh'g*, 119 FERC ¶ 61,021 at P 11 (affirming that a *Mobile-Sierra* standard should apply to a balancing agreement); *Vt. Transco LLC*, 118 FERC ¶ 61,244 at P 50 (finding that a *Mobile-Sierra* standard applies to the withdrawal provisions of a multi-party transmission services agreement)).

112. Finally, we disagree with OG&E that we shifted to SPP the burden of showing that *Mobile Sierra* does not apply here. OG&E states that the Commission based its finding that *Mobile-Sierra* does not apply on “what [the Commission] determined was an inadequate showing by SPP.”<sup>220</sup> However, OG&E does not cite to anything in the First Compliance Order that states or implies that the Commission based its conclusions on an inadequate showing by SPP. On the contrary, the Commission demonstrated that *Mobile-Sierra* does not apply to section 3.3 of the Membership Agreement based on its own analysis of the *Mobile-Sierra* doctrine and section 3.3 of the Membership Agreement, and it specifically stated that its decision in this instance was based on its own reasoning.<sup>221</sup> While the Commission disagreed with SPP on a number of points, it did not conclude that *Mobile-Sierra* does not apply because SPP had failed to demonstrate the contrary.

ii. **Competitive Upgrades Definition**

(a) **Byway Facilities**

(1) **First Compliance Order**

113. In the First Compliance Order, the Commission accepted SPP’s proposal to eliminate federal rights of first refusal for transmission facilities that are allocated under the “Highway” portion of SPP’s Highway/Byway Cost allocation method (i.e., Integrated Transmission Plan upgrades and high priority upgrades with a nominal operative voltage of 300 kV or above and whose costs are allocated on a 100 percent regional postage-stamp basis) as consistent with the requirements of Order No. 1000. However, the Commission found that SPP’s proposal to maintain a federal right of first refusal for transmission facilities that are allocated under the “Byway” portion of the Highway/Byway Cost allocation method (i.e., Integrated Transmission Plan upgrades and high priority upgrades with a nominal operative voltage of 100-300 kV and whose costs are allocated 1/3 on a regional postage-stamp basis and 2/3 zonally) did not comply with the requirements of Order No. 1000.<sup>222</sup>

114. The Commission pointed to the finding in Order No. 1000-A that, “[in] general, any regional allocation of the cost of a new transmission facility outside a single transmission provider’s retail distribution service territory or footprint . . . is an application of the regional cost allocation method and that new transmission facility is

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<sup>220</sup> OG&E Rehearing Request at 18.

<sup>221</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 135.

<sup>222</sup> *Id.* P 150.

not a local transmission facility.”<sup>223</sup> The Commission also noted it had clarified in Order No. 1000-A that “if any of the costs of a new transmission facility are allocated regionally or outside of a public utility transmission provider’s retail distribution service territory or footprint, then there can be no federal right of first refusal associated with such transmission facility.”<sup>224</sup> Therefore, the Commission reasoned that a new transmission facility that is selected in the regional transmission plan for purposes of cost allocation is no longer a local transmission facility that is exempt from the requirements of Order No. 1000 regarding the removal of federal rights of first refusal.<sup>225</sup> The Commission noted these findings were upheld in Order No. 1000-B.<sup>226</sup> The Commission determined that Byway facilities are selected as part of SPP’s regional transmission planning process and a portion of the cost of Byway facilities is allocated regionally. Therefore, in order to comply with Order No. 1000, the Commission directed SPP to eliminate any federal right of first refusal for Byway facilities.<sup>227</sup>

115. The Commission acknowledged that, in the Highway/Byway Order, it distinguished between Highway facilities, for which 100 percent of the costs are allocated on a regional basis, and Byway facilities, for which only 1/3 of the costs are allocated regionally.<sup>228</sup> However, the Commission stated that the finding in the Highway/Byway Order that extra-high voltage transmission facilities tend to support regional flows and that lower voltage transmission facilities tend to support local flows within a zone does not mean that the Commission must consider Byway facilities to be “local” transmission facilities in the context of Order No. 1000.<sup>229</sup> The Commission found that Order No. 1000 was issued after the Highway/Byway Order and placed new requirements on SPP, one of which was that SPP remove federal rights of first refusal for transmission facilities selected in the regional transmission plan for purposes of cost allocation that receive regional cost sharing.<sup>230</sup> Therefore, the Commission stated that its finding in the

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<sup>223</sup> *Id.* P 150 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 424).

<sup>224</sup> *Id.* P 150 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 430).

<sup>225</sup> *Id.* P 150 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 430).

<sup>226</sup> *Id.* P 150 (citing Order No. 1000-B, 141 FERC ¶ 61,044 at P 52).

<sup>227</sup> *Id.* P 150.

<sup>228</sup> *Id.* P 151 (citing *Sw. Power Pool, Inc.*, 131 FERC ¶ 61,252 (2010) (Highway/Byway Order), *order on reh’g*, 137 FERC ¶ 61,075 (2011)).

<sup>229</sup> *Id.* P 151.

<sup>230</sup> *Id.* P 151.

Highway/Byway Order was not determinative of whether SPP had complied with the Order No. 1000 requirement to eliminate a federal right of first refusal with respect to the Byway transmission facilities.<sup>231</sup>

116. Further, the Commission rejected SPP's alternative request for waiver that would have allowed SPP to maintain its proposed definition of Competitive Upgrades, which excluded Byway facilities and thereby retained a federal right of first refusal for such facilities.<sup>232</sup> The Commission disagreed with SPP's claim that good cause existed to grant waiver due to the SPP Regional State Committee's unanimous support of its proposal and the desire of SPP's stakeholders to maintain the cooperation that resulted in the Highway/Byway method.<sup>233</sup> The Commission found that SPP's proposed definition of Competitive Upgrades did not comply with the requirements of Order No. 1000.<sup>234</sup> The Commission stated that its final rules apply equally to all jurisdictional entities unless those entities can make a case that they deserve disparate treatment, and SPP had not made that case.<sup>235</sup> Therefore, the Commission directed SPP to revise the definition of Competitive Upgrades to include Byway facilities.<sup>236</sup>

(2) **Requests for Rehearing or Clarification**

(i) **Summary**

117. According to SPP and OG&E, the Commission's directive that SPP revise its definition of Competitive Upgrades to include Byway facilities is contrary to Commission precedent established in the Highway/Byway Order and therefore is arbitrary and capricious.<sup>237</sup> SPP states that, in Order No. 1000, the Commission explained that transmission facilities selected in the regional transmission plan for

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<sup>231</sup> *Id.* P 151 & n.325.

<sup>232</sup> *Id.* P 152.

<sup>233</sup> *Id.* P 152.

<sup>234</sup> *Id.* P 152.

<sup>235</sup> *Id.* P 152.

<sup>236</sup> *Id.* P 153.

<sup>237</sup> SPP Rehearing Request at 8, 38; *see* OG&E Rehearing Request at 19 (citing Highway/Byway Order, 131 FERC ¶ 61,252).

purposes of cost allocation may be a subset of transmission facilities in the regional transmission plan and that regional transmission plans may include local or merchant transmission facilities.<sup>238</sup> SPP further states that the Commission recognized that different regions of the country may have different practices and that a transmission project's inclusion in a regional transmission plan did not necessarily indicate an evaluation of whether such transmission facilities are more efficient or cost-effective solutions to a regional transmission need, as is the case for transmission facilities selected in a regional transmission plan for purposes of cost allocation.<sup>239</sup>

118. SPP asserts that excluding Byway facilities from the definition of Competitive Upgrades is consistent with the Commission's recognition of regional differences. SPP argues that its proposed definition embodies Order No. 1000's distinction between transmission facilities selected for purposes of cost allocation because they are more efficient and cost-effective solutions to regional transmission needs versus other transmission facilities that, while included in the regional transmission plan, are designed to address local issues. SPP contends that it based its definition on the Commission's definition of "regional" and "local" transmission facilities in the Highway/Byway Order.<sup>240</sup> According to SPP and OG&E, in that order, the Commission found that lower voltage facilities, such as the Byway facilities, tend to support local power flows within a single SPP zone and are used more locally.<sup>241</sup>

119. SPP and OG&E assert that, rather than articulate a rationale for determining that the Commission's findings in the Highway/Byway Order were no longer valid, the Commission merely stated that the Highway/Byway Order was not determinative.<sup>242</sup> SPP and OG&E argue that the Commission cannot deviate from its prior precedent without providing a reasoned explanation for doing so.<sup>243</sup>

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<sup>238</sup> SPP Rehearing Request at 39-40 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 63).

<sup>239</sup> *Id.* at 40 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 64).

<sup>240</sup> *Id.* at 8, 40-41 (citing Highway/Byway Order, 131 FERC ¶ 61,252 at P 78).

<sup>241</sup> *Id.* at 8, 41 (citing Highway/Byway Order, 131 FERC ¶ 61,252 at PP 73, 78); OG&E Rehearing Request at 19 n.44.

<sup>242</sup> SPP Rehearing Request at 42-43 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 151); OG&E Rehearing Request at 19.

<sup>243</sup> *See* SPP Rehearing Request at 9, 43; OG&E Rehearing Request at 19.

120. SPP notes that, in the First Compliance Order, the Commission makes reference to “inter-zonal power flow changes” experienced by Byway facilities that it observed in the Highway/Byway Order.<sup>244</sup> However, SPP claims that the fact that a transmission facility may experience a modest level of inter-zonal flow sufficient to justify the roughly commensurate allocation of a modest portion of the costs on a broader basis is not *per se* an indication that SPP selected the facility in the regional transmission plan because it is a more efficient or cost-effective solution to regional needs. Likewise, SPP asserts that the language in Order No. 1000-A, which states, “[i]n general, any regional allocation of cost of a new transmission facility outside a single transmission provider’s retail distribution service territory or footprint . . . is an application of the regional cost allocation method and that new transmission facility is not a local transmission facility,” does not negate the precedent established in the Highway/Byway Order.<sup>245</sup> SPP contends that, by qualifying its clarification with “in general,” the Commission suggested that regional differences may be justifiable. SPP argues that, therefore, it is appropriate to exclude Byway facilities from the definition of Competitive Upgrades because the Highway/Byway Order found that Byway facilities are local transmission facilities that provide local benefits.<sup>246</sup> SPP adds that Order No. 1000-A purported not to disrupt, but to clarify, the requirements of Order No. 1000.<sup>247</sup> Thus, SPP asserts that the Commission’s statement in Order No. 1000-A cannot be read to supersede the requirement that public utility transmission providers eliminate rights of first refusal only for those transmission projects that a regional transmission planning process selected because they are more efficient or cost-effective solutions to regional needs.

121. SPP asserts the Commission’s mandate that SPP treat Byway facilities as Competitive Upgrades is counter to the Commission’s statement that Order No. 1000 was not intended “to limit, preempt, or otherwise affect state or local laws or regulations with respect to the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.”<sup>248</sup> SPP also notes that, in Order No. 1000, the Commission acknowledged “the vital role that state agencies play in transmission planning and their authority to site transmission facilities.”<sup>249</sup> SPP claims

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<sup>244</sup> SPP Rehearing Request at 43 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 151 n.325).

<sup>245</sup> *Id.* at 43-44 (quoting Order No. 1000-A, 139 FERC ¶ 61,132 at P 424).

<sup>246</sup> *Id.* at 44.

<sup>247</sup> *Id.* at 44 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 3).

<sup>248</sup> *Id.* at 17, 45 (quoting Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 227).

<sup>249</sup> *Id.* at 45-46 (quoting Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 402).

that, in the First Compliance Order, the Commission disregarded the unanimous preference of the states in the SPP region, as expressed in letters from the SPP Regional State Committee and from various state regulatory commissions, to exclude Byway facilities from the definition of Competitive Upgrades.<sup>250</sup>

122. SPP also argues that the Commission's directive regarding Byway facilities contravenes the Commission's mandate to consider public policy in the transmission planning process. SPP states that, in Order No. 1000, the Commission directed public utility transmission providers to develop detailed procedures for the consideration and evaluation of transmission needs driven by public policy requirements, which include local, state, and federal laws and regulations and may include policy goals as well as laws.<sup>251</sup> SPP contends that the Regional State Committee and state commission letters demonstrate that the "unanimous and adamant" public policy in the SPP region is that Byway facilities should be excluded from the definition of Competitive Upgrades.<sup>252</sup> SPP adds that at least two states in the SPP region have enacted legislation that would preserve a right of first refusal for Byway facilities.<sup>253</sup> SPP contends that the Commission's failure to reconcile its mandate to consider public policy in the transmission planning process with its directive to disregard public policies governing which transmission facilities are eligible for the Transmission Owner Selection Process renders the First Compliance Order arbitrary and capricious.<sup>254</sup>

123. In addition, SPP asserts that the First Compliance Order is arbitrary and capricious because it ignores that, in the orders granting SPP's request for RTO status, the Commission expressly delegated to the Regional State Committee the responsibility to

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<sup>250</sup> *Id.* at 46 (citing First Compliance Filing, Ex. Nos. SPP-2 and SPP-3).

<sup>251</sup> *Id.* at 46-47 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 6, 82, 203-204, 216 n.193).

<sup>252</sup> *Id.* at 46.

<sup>253</sup> *Id.* at 47. SPP notes that the Nebraska legislature enacted a statutory right of first refusal for transmission facilities with voltage levels of 100 kV or greater. *Id.* at 67 & n.187 (citing L.B. 388, 103rd Leg., First Reg. Sess. (Neb. 2013), 2013 Neb. ALS 388). In addition, SPP states that Oklahoma enacted a law in 2013 that grants incumbent transmission owners in the state a right of first refusal for a high-voltage transmission line or high-voltage associated transmission facilities with a rating of greater than 69 kV and less than 300 kV. *Id.* at 67 & n.189 (citing H.B. 1932, 2013 Leg., 54th Sess. (Okla. 2013) at § 1.3, 2013 OK. ALS 355 at \*1).

<sup>254</sup> *Id.* at 47.

determine and approve cost allocation methods for the SPP region.<sup>255</sup> According to SPP, the consensus support of the Highway/Byway cost allocation method is potentially in jeopardy if the Commission denies rehearing of its directive to include Byway facilities as Competitive Upgrades. SPP asserts that rehearing is warranted to ensure that the Commission does not contravene its earlier orders delegating cost allocation responsibility to the Regional State Committee.<sup>256</sup>

(ii) **Commission Determination**

124. We deny SPP's and OG&E's requests for rehearing. SPP and OG&E have raised the same arguments on rehearing that the Commission addressed in the First Compliance Order, and we are not persuaded to revisit the decision. Accordingly, we affirm the finding in the First Compliance Order that, because Byway facilities are selected as part of SPP's regional transmission planning process and a portion of the cost of Byway facilities is allocated regionally, SPP must eliminate the federal right of first refusal for Byway facilities to comply with Order No. 1000. We note that SPP and OG&E recognize the Commission's findings in Order No. 1000-A that, "[in] general, any regional allocation of the cost of a new transmission facility outside a single transmission provider's retail distribution service territory or footprint . . . is an application of the regional cost allocation method and that new transmission facility is not a local transmission facility,"<sup>257</sup> and "if any of the costs of a new transmission facility are allocated regionally or outside of a public utility transmission provider's retail distribution service territory or footprint, then there can be no federal right of first refusal associated with such transmission facility."<sup>258</sup> Regardless of how the Commission characterized Byway facilities in any previous order, Order No. 1000 is a final rule with which SPP must comply, and the record shows that, pursuant to Order No. 1000, Byway facilities are selected as part of SPP's regional transmission planning process and a portion of the cost of Byway facilities is allocated regionally. Therefore, to comply with the Order No. 1000 requirement to eliminate provisions in Commission-jurisdictional tariffs and agreement that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in the regional

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<sup>255</sup> *Id.* at 47 (citing First Compliance Filing at 4, 6, 60-61; SPP February 19, 2013 Answer at 19-20; Southwest Power Pool, Inc., Bylaws, First Revised Volume No. 4 § 7.2; *Sw. Power Pool, Inc.*, 106 FERC ¶ 61,110 at PP 218-220).

<sup>256</sup> *Id.* at 48 & n.143.

<sup>257</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 424.

<sup>258</sup> *Id.* P 430.

transmission plan for purposes of cost allocation, SPP must eliminate any federal right of first refusal for Byway facilities.<sup>259</sup>

(3) **Compliance**

(i) **Summary of Compliance Filing**

125. SPP proposes to revise the definition of Competitive Upgrades to include “[t]ransmission facilities with a nominal operating voltage of 100 kV or greater.”<sup>260</sup> SPP explains that the prior definition excluded Byway facilities because it only included transmission facilities with a nominal operating voltage of 300 kV or greater. SPP states that, because the revised definition includes facilities operating at or above 100 kV, it now encompasses Byway facilities, as directed by the Commission.<sup>261</sup>

(ii) **Protests/Comments**

126. NextEra notes that, on November 20, 2013, five days after submitting the Second Compliance Filing, SPP held a meeting at which it discussed the competitive Transmission Owner Selection Process and indicated that it will consider transmission projects through separate, non-competitive processes if they are requested or identified through additional studies outside the Integrated Transmission Plan.<sup>262</sup> NextEra states that, while it generally supports SPP’s Transmission Owner Selection Process, NextEra is concerned that SPP is potentially creating a new category of transmission projects that may be considered outside the competitive process. NextEra asserts that if all that is required to remove a transmission project from the competitive process is to request that SPP undertake an additional study outside of the Transmission Owner Selection Process, many projects may be moved to this new category.<sup>263</sup> Therefore, NextEra requests that the Commission direct SPP to make a further compliance filing to apply its detailed

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<sup>259</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 150. We note that SPP must eliminate any federal right of first refusal for Byway facilities unless it falls within an exception accepted by the Commission.

<sup>260</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.1.b.

<sup>261</sup> SPP Transmittal at 11.

<sup>262</sup> NextEra Protest at 8 & Attachment A.

<sup>263</sup> *Id.* at 8-9.

transmission project proposal process to all transmission projects that were derived from any interregional study.<sup>264</sup>

(iii) **Answer**

127. SPP asserts that NextEra misinterprets SPP's presentation and its Order No. 1000 proposal. SPP states that the presentation NextEra points to contains projects approved to be considered in the Integrated Transmission Plan process and projects identified through a high priority study. SPP explains that these projects will not be included in the Transmission Owner Selection Process because that process will not be effective until January 2015. SPP further explains that, beginning in January 2015, projects identified in the Integrated Transmission Plan process and projects resulting from future high priority studies that qualify as Competitive Upgrades will be subject to the Transmission Owner Selection Process. SPP states that the Transmission Owner Selection Process occurs outside of the Integrated Transmission Plan process after Competitive Upgrades have been approved for construction. SPP argues that NextEra fails to explain how SPP can undertake studies outside of the Transmission Owner Selection Process to remove a project from the competitive process.

(iv) **Commission Determination**

128. We find that SPP has complied with the directive in the First Compliance Order to revise the definition of Competitive Upgrades to include transmission facilities with a nominal operating voltage of 100 kV or greater.

129. We will not require SPP to make a further compliance filing in response to NextEra's requests. SPP has not proposed in its compliance filing, and NextEra has not identified in SPP's OATT, any provision that creates a category of transmission projects that could qualify as Competitive Upgrades but which SPP would consider outside of the competitive Transmission Owner Selection Process. We note, however, that if SPP intends to create such a separate, non-competitive process, SPP would need to make a filing under section 205 of the FPA to add that process to its OATT and would have to demonstrate that its proposal complies with the requirements of Order No. 1000.

(b) **Rights-of-Way and State Law**

(1) **First Compliance Order**

130. In the First Compliance Order, the Commission found that Order No. 1000 does not permit SPP to have an exception to the requirement to eliminate a federal right of first refusal that would allow an incumbent transmission owner to retain a federal right of first

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<sup>264</sup> *Id.* at 9.

refusal associated with an existing right-of-way.<sup>265</sup> In its First Compliance Filing, SPP proposed to allow an incumbent transmission owner to maintain a federal right of first refusal for any new transmission facility built on a right-of-way with existing transmission facilities.<sup>266</sup> The Commission noted that, in Order No. 1000, it acknowledged that its reforms “are not intended to alter an incumbent transmission provider’s use and control of its existing rights-of-way[,]” that Order No. 1000 does not “grant or deny transmission developers the ability to use rights-of-way held by other entities, even if transmission facilities associated with such upgrades or uses of existing rights-of-way are selected in the regional transmission plan for purposes of cost allocation[,]” and that the “retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way.”<sup>267</sup> The Commission stated, however, that it did not find that, as part of its compliance filing, a public utility transmission provider may add a federal right of first refusal for a “new transmission facility” built on an existing right-of-way.<sup>268</sup>

131. In addition, the Commission directed SPP to remove from the definition of Competitive Upgrades language stating that “[t]ransmission facilities [must be] located where the selection of a Transmission Owner pursuant to [the competitive bidding process] does not violate the relevant law where the transmission facility is to be built.”<sup>269</sup> The Commission stated that Order No. 1000 does not require removal from Commission-jurisdictional tariffs or agreements references to state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.<sup>270</sup> However, the Commission found

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<sup>265</sup> See First Compliance Order, 144 FERC ¶ 61,059 at P 170.

<sup>266</sup> See *id.* P 170.

<sup>267</sup> See *id.* P 170.

<sup>268</sup> See *id.* P 170.

<sup>269</sup> See *id.* PP 172, 178 (quoting SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.1.d).

<sup>270</sup> *Id.* P 178 (citing Order No. 1000, FERC Stats. & Regs ¶ 31,323 at P 253 n.231 (“Nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities. This Final Rule does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements.”); Order No. 1000-A, FERC Stats. & Regs ¶ 31,132 at P 381).

that SPP's proposal went beyond mere reference to state or local laws or regulations; it referenced relevant state and local laws and then used that reference to create a federal right of first refusal.<sup>271</sup> The Commission explained that Order No. 1000 did not permit a public utility transmission provider to add a federal right of first refusal for a "new transmission facility"<sup>272</sup> based on state law.<sup>273</sup> The Commission found that, while state laws and regulations may not be used to automatically exclude from consideration proposals for transmission facilities to be selected in the regional transmission plan for purposes of cost allocation as the more efficient or cost-effective transmission solutions to regional transmission needs, it may be permissible to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process.<sup>274</sup> Therefore, the Commission directed SPP to revise Attachment Y of its OATT to remove the proposed language referencing relevant laws.<sup>275</sup>

(2) **Requests for Rehearing or Clarification**

132. SPP and OG&E disagree with the Commission's determinations directing SPP to remove OATT provisions taking state law into account at two early stages of the transmission planning process and argue that the Commission should grant rehearing. OG&E argues that, by requiring SPP to remove from its OATT language that acknowledges the authority of states regarding matters related to siting, permitting, and construction of transmission facilities, the First Compliance Order exceeded the scope of the Commission's authority and contravened Order No. 1000.<sup>276</sup>

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<sup>271</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 178 (citing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.1).

<sup>272</sup> Order No. 1000 defines new transmission facilities as transmission facilities that are subject to evaluation, or reevaluation, within a public utility transmission provider's local or regional transmission planning process after the effective date of the public utility transmission provider's filing adopting the relevant requirements of Order No. 1000. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 65.

<sup>273</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 178.

<sup>274</sup> *Id.* P 179.

<sup>275</sup> *Id.* P 178.

<sup>276</sup> *See* SPP Rehearing Request at 17, 61-77; OG&E Rehearing Request at 6-10.

133. Specifically, SPP and OG&E argue that the Commission erred in requiring SPP to remove language indicating that SPP will utilize its competitive Transmission Owner Selection Process (1) for transmission facilities that are not a rebuild of an existing facility and do not use rights-of-way where facilities exist and (2) when the use of the Transmission Owner Selection Process does not violate relevant law where the transmission facility will be built.<sup>277</sup> Both SPP and OG&E disagree with the Commission's characterization that the language in SPP's definition of Competitive Upgrades references relevant law and then uses that reference to create a federal right of first refusal.<sup>278</sup> SPP admits that the language at issue is new, but both SPP and OG&E argue that the language does not actually "create" any new federal right of first refusal that does not already exist in the SPP governing documents.<sup>279</sup> SPP states that it is implicit in Attachment O of its OATT and section 3.3. of the Membership Agreement (both of which existed prior to SPP's compliance filing) that a state certified utility would build facilities connected to its system consistent with state law, which would include any relevant law granting a right of first refusal. However, SPP argues that, with Order No. 1000's mandate to remove rights of first refusal for transmission facilities selected in the regional transmission plan for purposes of cost allocation, additional language referencing such laws is now necessary. Therefore, SPP claims that it is not creating a new right but merely recognizing the possibility that a state or local law may create such a right, consistent with Order No. 1000.<sup>280</sup>

134. SPP and OG&E assert that the Commission's directive in the First Compliance Order to remove language from the SPP OATT that acknowledges the authority of states regarding matters related to siting, permitting, and construction of transmission facilities contradicts the Commission's statements in Order No. 1000 and, therefore, cannot be reasoned decision-making.<sup>281</sup> In addition, SPP states that the Commission's mandate to remove language regarding rights-of-way where transmission facilities already exist will force SPP to potentially select a transmission developer for a transmission project whose

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<sup>277</sup> See SPP Rehearing Request at 64-65 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 178); OG&E Rehearing Request at 7-8.

<sup>278</sup> See SPP Rehearing Request at 64-66 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 170, 178); OG&E Rehearing Request at 9.

<sup>279</sup> SPP Rehearing Request at 73.

<sup>280</sup> *Id.* at 74 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 253 n.231).

<sup>281</sup> *Id.* at 69 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 107); OG&E Rehearing Request at 8-10.

development of that project would infringe on an incumbent transmission owner's existing rights-of-way granted under applicable state law, contradicting the Commission's statements in Order No. 1000.<sup>282</sup>

135. Further, SPP argues that it is inconsistent to require SPP to remove OATT references to state and local laws regarding the selection of transmission developers as well as language related to rights-of-way while requiring SPP to enhance its process for considering state and local laws and regulations when it considers transmission needs driven by public policy requirements in the regional transmission planning process.<sup>283</sup>

136. SPP contends that requiring it to consider compliance obligations under state and local laws in one area of transmission planning (i.e., transmission needs driven by public policy requirements), but requiring the removal of language from the SPP OATT considering state and local laws in another area of the same process (i.e., transmission developer identification), represents internally inconsistent reasoning that courts have determined to be arbitrary and capricious under the Administrative Procedure Act.<sup>284</sup> OG&E claims that, pursuant to the Commission's logic in the First Compliance Order, any reference to an outside standard, such as the requirement that transmission projects be constructed pursuant to Good Utility Practice, would create a federal right of first refusal. OG&E contends that the requirement to comply with state law is no different than the requirements to be creditworthy or possess requisite expertise to complete the transmission project, which ensure that the proposals can be completed.<sup>285</sup>

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<sup>282</sup> SPP Rehearing Request at 75 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319 (stating that its "reforms are not intended to alter an incumbent transmission provider's use and control of its existing rights-of-way" and that [Order No. 1000] does not remove or limit any right an incumbent may have to build, own and recover costs for upgrades to the facilities owned by an incumbent . . . . The retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way"))).

<sup>283</sup> *Id.* at 11-12 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 73, 75-76), 70-73 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 59 (referencing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 2, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 319)).

<sup>284</sup> *Id.* at 71 (citing *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011)).

<sup>285</sup> OG&E Rehearing Request at 9.

137. Moreover, SPP argues that, by requiring SPP to remove language that references relevant law and rights-of-way, the Commission will place the SPP transmission planning process on a collision course between state and federal laws, which will further frustrate efficient and cost-effective transmission expansion in the SPP region. SPP argues that, if this language is omitted, whenever SPP's Transmission Owner Selection Process results in the selection of a transmission developer other than the incumbent transmission owner and the transmission project is located in a state with a right of first refusal law or on the incumbent transmission owner's rights-of-way, the nonincumbent transmission developer and the incumbent transmission owner will have competing federal and state law claims to the right to construct the project, resulting in expensive and possibly duplicative litigation in multiple forums.<sup>286</sup> Therefore, SPP argues that the Commission's requirements will eviscerate the current cooperative, efficient, and cost-effective transmission planning process in SPP.<sup>287</sup>

138. SPP further asserts that requiring removal of OATT language recognizing state and local right of first refusal laws and rights-of-way is outside the scope of the Commission's statutory authority and is within the exclusive authority of the states.<sup>288</sup> SPP asserts that the Commission has not pointed to any authority in the FPA that authorizes it to preempt state jurisdiction or direct a public utility transmission provider to ignore state laws governing construction, siting, and permitting of transmission facilities. SPP claims that the Commission is not authorized under section 206 of the FPA or elsewhere to dictate matters involving who may build transmission within a state or where.<sup>289</sup> SPP asserts that the FPA bars the Commission from asserting authority

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<sup>286</sup> SPP notes that it is aware of at least two states in the SPP region that have enacted laws restricting eligibility to construct transmission facilities in the state. SPP states that Nebraska has enacted a statutory right of first refusal for incumbent transmission owners in the state for transmission facilities with voltage levels of 100 kV or greater. Additionally, Oklahoma enacted a law that grants incumbent transmission owners in the state a right of first refusal for any "local electric transmission facility," which the act defines as "a high-voltage transmission line or high-voltage associated transmission facilities with a rating of greater than sixty-nine (69) kilovolts and less than three hundred (300) kilovolts." *See above* n.253.

<sup>287</sup> SPP Rehearing Request at 66-67.

<sup>288</sup> *See id.* at 75-76 (citing 5 U.S.C. § 706(2)(C) (2012); *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

<sup>289</sup> *Id.* at 76.

over such matters except in very limited circumstances.<sup>290</sup> Specifically, SPP states that section 201(a) of the FPA expressly limits the Commission's jurisdiction over transmission and wholesale power sales "only to those matters which are not subject to regulation by the States."<sup>291</sup> Further, SPP states that the FPA grants the Commission authority over siting of transmission facilities only in "national interest electric transmission corridors" and only when the relevant state regulatory authorities have failed to act on an application to construct a facility in such corridors.<sup>292</sup> SPP asserts that neither of these circumstances are currently present in SPP and therefore the FPA bars the Commission from asserting jurisdiction over matters subject to regulation by the states. Thus, SPP argues, the Commission's requirement that SPP remove OATT language recognizing state and local right of first refusal laws and rights-of-way violates the Administrative Procedure Act.<sup>293</sup>

139. OG&E claims that there is no rational basis to allow RTOs to take state law requirements into account only at the final stages of the transmission planning process (such as the evaluation of competitive bids) while barring consideration of those requirements at the early stages of the process (such as identification of qualified bidders). OG&E asserts that taking state law requirements into account at all relevant stages of the transmission planning process is the best way for the Commission to keep its commitment that Order No. 1000 is not intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to the construction of transmission facilities.<sup>294</sup> OG&E argues that, if state law prevents a particular company from legally siting, building, and owning a proposed transmission line, it is arbitrary and capricious to order SPP and its stakeholders to ignore that fact during the early stages of the transmission planning process.<sup>295</sup>

140. In addition, SPP argues that, in the First Compliance Order, the Commission did not demonstrate how its mandate to remove language that references state and local authority over construction, siting, and permitting of transmission facilities will lead to

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<sup>290</sup> *Id.* at 76-77.

<sup>291</sup> *Id.* at 76-77 (citing 16 U.S.C. § 824(a) (2012)).

<sup>292</sup> *Id.* at 77 (citing 16 U.S.C. § 824p(b) (2012)).

<sup>293</sup> *Id.* at 77.

<sup>294</sup> OG&E Rehearing Request at 8 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 227).

<sup>295</sup> *Id.* at 8-9.

more efficient and cost-effective transmission development.<sup>296</sup> SPP states that the First Compliance Order also fails to reconcile the Commission's requirement that SPP remove language that would ensure that SPP will not interfere with existing rights-of-way with the goal of more efficient and cost-effective transmission planning. Specifically, SPP argues that the Commission's directive would force SPP to engage in a costly and unnecessary competitive solicitation process to identify an entity to build a transmission project identified in the regional transmission plan for purposes of cost allocation when state law has already predetermined which entity is legally authorized to build the project,<sup>297</sup> which would cause higher rates for SPP ratepayers (including those in states with no right of first refusal law) and potential delays in the construction of much needed facilities, with no benefit.<sup>298</sup> SPP argues that this wasteful activity undermines efficiency and cost-effectiveness because SPP and bidding entities' resources and time will be squandered on a search for a transmission developer that will never be permitted to develop the transmission facility for which it was selected. SPP asserts that this kind of unexplained departure from Order No. 1000's focus on efficiency and cost-effectiveness renders the First Compliance Order arbitrary and capricious.<sup>299</sup>

141. SPP disagrees with the Commission finding that the appropriate time to consider the impact of state right of first refusal laws may be during the evaluation of requests for proposals in the competitive bidding process.<sup>300</sup> SPP argues that waiting until then will cause SPP to needlessly spend time and resources when the identification of the transmission developer is a foregone conclusion under state law. SPP states that, contrary to the Commission's suggestion, a state-granted right of first refusal or right-of-way is not a strength that an incumbent transmission owner can highlight in its bid; it is a matter of law.<sup>301</sup> SPP contends that the Commission's suggestion that SPP wait until the reevaluation process, which may be years after the selection of a transmission facility and possibly after the date that facility is needed, to consider the impact of relevant law eliminates any efficiency and cost-effectiveness.<sup>302</sup> Thus, SPP asserts, the Commission's

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<sup>296</sup> SPP Rehearing Request at 68.

<sup>297</sup> *Id.* at 63.

<sup>298</sup> *Id.* at 64.

<sup>299</sup> *Id.* at 66 (citing *Williams Gas Processing-Gulf Coast Co.*, 475 F.3d at 327).

<sup>300</sup> *Id.* at 72 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 171, 179).

<sup>301</sup> *Id.* at 72 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 179).

<sup>302</sup> *Id.* at 72 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 180).

identification of other points at which consideration of state right of first refusal laws might be appropriate does not cure the Commission's inconsistent reasoning and the conflict with Order No. 1000.<sup>303</sup>

### (3) Summary of Compliance Filing

142. SPP proposes to remove the proposed language related to the rights-of-way, as directed by the Commission.<sup>304</sup> SPP also proposes to remove the proposed language in the definition of Competitive Upgrades that referenced relevant law.<sup>305</sup>

### (4) Commission Determination

143. On rehearing, SPP and OG&E disagree with the Commission's finding that SPP must remove OATT provisions that require SPP to consider state law and rights-of-way at two early stages of the competitive solicitation process.<sup>306</sup> On reconsideration, we agree and grant the requests for rehearing with respect to these provisions. Order No. 1000 does not require removal from Commission-jurisdictional tariffs or agreements of references to state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.<sup>307</sup>

144. Noting that federal rights of first refusal create a barrier to entry that discourages nonincumbent transmission developers from proposing alternative transmission solutions for consideration at the regional level,<sup>308</sup> the Commission required public utility transmission providers to eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for

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<sup>303</sup> *Id.* at 72.

<sup>304</sup> SPP Transmittal at 12.

<sup>305</sup> *Id.* at 13.

<sup>306</sup> See First Compliance Order, 144 FERC ¶ 61,059 at P 170 (directing SPP to remove the proposed language related to rights-of-way in § I.1.c of Attachment Y of its OATT) and P 178 (directing SPP to remove the proposed language referencing relevant laws in § I.1.d of Attachment Y to its OATT).

<sup>307</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 253 n.231.

<sup>308</sup> See, e.g., Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 257.

purposes of cost allocation.<sup>309</sup> Order No. 1000 concluded that such reforms were necessary to eliminate practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective alternatives to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable, or otherwise result in undue discrimination by public utility transmission providers.<sup>310</sup> Nothing has changed the Commission's view that Order No. 1000's requirement to remove federal rights of first refusal is in the public interest. As the Commission made clear in several orders, Order No. 1000 requires that federal rights of first refusal must be eliminated from Commission-jurisdictional tariffs and agreements.<sup>311</sup>

145. We continue to require the elimination of federal rights of first refusal from Commission-jurisdictional tariffs or agreements, but that is not the issue here. Rather, the issue is whether it is appropriate for the Commission to prohibit SPP from recognizing state and local laws and regulations when deciding whether SPP will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation. On balance, we conclude that the Commission should not prohibit SPP from recognizing state and local laws and regulations as a threshold issue. Regardless of whether state or local laws or regulations are expressly referenced in the SPP OATT, some such laws or regulations may independently prohibit a nonincumbent transmission developer from developing a particular transmission project in a particular state, even if the nonincumbent transmission developer would otherwise be designated to develop the transmission project under SPP's regional transmission planning process. Indeed, in response to arguments about existing references to state-granted rights of first refusal in Commission-approved tariffs or agreements, the Commission explained that "such a right based on a state or local law or regulation would still exist under state or local law even if removed from the Commission-jurisdictional tariff or agreement and

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<sup>309</sup> See, e.g., Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 313.

<sup>310</sup> See, e.g., Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 226. See also, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 286 (stating that "Indeed, the Supreme Court has said that 'the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.' In requiring the elimination of federal rights of first refusal from Commission-jurisdictional tariffs and agreements, we are acting in accordance with our duty to maintain competition.").

<sup>311</sup> See, e.g., *Cal. Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,057 at P 118; *ISO New England Inc.*, 143 FERC ¶ 61,150 at P 227; *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 at P 200.

nothing in Order No. 1000 changes that law or regulation, for Order No. 1000 is clear that nothing therein is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.”<sup>312</sup>

146. We are persuaded on rehearing that the above-referenced provisions simply refer to the practical impact that state laws and regulations may have on the siting, permitting, and construction of transmission facilities, and are thus consistent with Order No. 1000. We acknowledge that categorically excluding nonincumbent transmission developers from being designated to build these two categories of transmission projects may undermine the ability of SPP’s regional transmission planning process to identify the more efficient or cost-effective transmission solutions to regional transmission needs, and could deny state and local policymakers important information to inform their siting and permitting processes. However, we also acknowledge the concerns expressed on rehearing regarding the potential for inefficiencies and delays in the absence of these provisions. We therefore grant rehearing and will not require SPP to delete these provisions. Accordingly, we find that SPP’s proposal to delete language that it previously proposed in sections I.1.c and I.1.d of Attachment Y to its OATT is moot.<sup>313</sup> We direct SPP to submit, within 60 days of the date of issuance of this order, a further compliance filing to restore these provisions as proposed in its First Compliance Filing.

**(c) Rebuilt Transmission Facilities**

**(1) First Compliance Order**

147. In the First Compliance Order, the Commission found that SPP’s proposal to maintain a federal right of first refusal for a rebuild of an existing transmission facility partially complied with Order No. 1000. However, the Commission found that the meaning of the term “rebuild” in SPP’s OATT was unclear and directed SPP to revise its OATT to provide a definition of “rebuild” that is consistent with a clarification SPP provided in its answer.<sup>314</sup> Additionally, the Commission directed SPP to clarify how it

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<sup>312</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 381.

<sup>313</sup> Section I.1.c of Attachment Y as proposed by SPP in its First Compliance Filing states, in relevant part, “and do not use rights of way where facilities exist.” Section I.1.d of Attachment Y as proposed by SPP in its First Compliance Filing states, in relevant part, “and Transmission facilities located where the selection of a Transmission Owner pursuant to Section III of this Attachment Y does not violate relevant law where the transmission facility is to be built.”

<sup>314</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 184. In its answer, SPP stated that the term “rebuild” is used in its regional transmission planning process to distinguish between a change to an existing facility (a rebuild) and a new facility, and that (*continued ...*)

will classify transmission projects that contain both upgrades to existing facilities and new transmission facilities.<sup>315</sup>

(2) **Summary of Compliance Filing**

148. In its Second Compliance Filing, SPP proposes to define “rebuild” as a transmission facility that is an improvement to, addition to, or replacement of all or part of, an existing transmission facility.<sup>316</sup>

149. To comply with the Commission’s directive to clarify how it will classify transmission projects that contain both upgrades to existing transmission facilities and new transmission facilities, SPP proposes to revise its OATT to specify that, for transmission projects that consist of both rebuild and new facility components, if 80 percent or more of the total cost of a project consists of the rebuild of existing transmission facilities, then SPP will designate the Transmission Owner that owns the rebuild portion as the designated transmission owner for the entire project. For transmission projects that do not meet the 80 percent threshold, SPP will divide the project into segments based on whether each portion of the project is a rebuild of an existing transmission facility or a new transmission facility. For those segments that are rebuilds, SPP will designate the Transmission Owners that own the transmission facilities comprising the rebuild portions to construct those portions. For those segments that are new transmission facilities, SPP will determine the designated transmission owner(s) in accordance with the Transmission Owner Selection Process for Competitive Upgrades.<sup>317</sup>

150. SPP asserts that the 80 percent threshold strikes an appropriate balance between expanding competition in transmission development in accordance with Order No. 1000 and promoting administrative, regulatory, and economic efficiency. SPP notes that most transmission projects that are classified as a rebuild will have portions that are considered new transmission facilities that could theoretically be subject to a competitive process. However, SPP argues that, if a transmission project is predominantly a rebuild, any possible benefit of competitively bidding the small portion of new transmission facilities associated with the rebuild would likely be outweighed by the additional costs, risks, inefficiencies, and complexities in the competitive bidding, regulatory permitting, project implementation, and operations and maintenance processes that would result from

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a rebuild does not refer to entirely new transmission facilities. *Id.*

<sup>315</sup> *Id.* P 184.

<sup>316</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § II.

<sup>317</sup> *Id.* § I.2.

splitting the project into multiple segments. SPP claims that, when a transmission project is overwhelmingly a rebuild, it is more efficient and cost-effective for the owner of the transmission facilities that comprise the rebuild to seek and obtain state approvals, vendor contracts, and rights-of-way for the entire project than to split the project, which would require duplicate efforts on the part of several entities for much smaller portions of the project. SPP contends that the 80 percent threshold ensures that transmission projects that are principally rebuilds will be constructed in a more efficient and cost-effective manner, consistent with the goals of Order No. 1000, while also permitting transmission projects that have a significant new facility component to be open to the competitive Transmission Owner Selection Process.

### (3) Protests/Comments

151. LS Power argues that SPP's proposed 80 percent test for determining how to classify projects that contain both upgrades to existing transmission facilities and new transmission facilities is unnecessary and should be rejected.<sup>318</sup> LS Power sees no benefit to an arbitrary dollar value threshold for determining whether the new portions of a transmission project will be competitively procured.<sup>319</sup> LS Power claims that, if the project is a relatively low cost project, then the threshold may strike the appropriate balance between expanding competition in transmission development in accordance with Order No. 1000 and promoting administrative, regulatory and economic efficiency, as SPP asserts.<sup>320</sup> However, LS Power asserts that the higher the cost of the project the more significant the potential savings from the competitively bid portion.<sup>321</sup> LS Power contends that the only just and reasonable approach is to divide every transmission project into two or more segments based upon whether that portion of the project is a rebuild of existing transmission facilities or new transmission facilities, and then apply the relevant provisions in the OATT to each segment.<sup>322</sup>

152. LS Power argues that it is speculative for SPP to contend that, if a transmission project is predominantly a rebuild, any possible benefit of competitively bidding the small portion of new transmission facilities associated with the rebuild would likely be outweighed by the additional costs, risks, inefficiencies and complexities in the

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<sup>318</sup> LS Power Protest at 3-5.

<sup>319</sup> *Id.* at 4.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

competitive bidding, regulatory permitting, project implementation and operation, and maintenance processes that would result from splitting the project into multiple segments.<sup>323</sup> LS Power asserts that, if SPP is correct, no harm will occur in seeking competitive solutions until SPP's hypothesis is established because the valuable resources and expertise that the incumbent transmission owner assigned the upgrade portion of the transmission project brings to the other portion of the project should be reflected in its bid price.<sup>324</sup>

153. ITC Great Plains supports the proposed 80 percent threshold for determining if rebuild transmission projects qualify as Competitive Upgrades.<sup>325</sup> However, ITC Great Plains argues that an additional threshold is needed to avoid creating very small, inefficient Competitive Upgrade projects.<sup>326</sup> ITC Great Plains is concerned about transmission projects that involve rebuilding and adding new transmission facilities to multiple, non-contiguous points on a transmission line, where the project's rebuild costs are less than 80 percent of the total costs, citing as an example a project that involves a 70/30 cost mix of rebuild and new transmission facilities but only ten miles of total transmission line.<sup>327</sup> ITC Great Plains asserts that, under SPP's proposal, each one mile section of three non-contiguous sections of new line that are one mile in length would qualify as a Competitive Upgrade.<sup>328</sup> ITC Great Plains argues that it should not be a Competitive Upgrade because the purpose of the Competitive Upgrade process is to identify more efficient or cost-effective solutions to regional transmission needs by soliciting competitive bids for new transmission projects, not to have two (or more) nonincumbent transmission developers building and owning piecemeal sections of a transmission line which fundamentally constitutes a rebuild of an existing transmission line.<sup>329</sup> ITC Great Plains contends that to do so would be inconsistent with Order No. 1000 and would fail to achieve SPP's stated goal of administrative, regulatory, and economic efficiency.<sup>330</sup> Therefore, ITC Great Plains asks the Commission to impose an

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<sup>323</sup> *Id.* at 4-5 (citing Second Compliance Filing at 15).

<sup>324</sup> *Id.* at 5.

<sup>325</sup> *See* ITC Great Plains Protest at 8.

<sup>326</sup> *Id.* at 8.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

additional requirement that at least 20 percent of the cost must be for contiguous new transmission facilities, or where less than 20 percent of total cost, when new facilities still comprise at least ten contiguous miles of new transmission line.<sup>331</sup>

154. ITC Great Plains adds that, under SPP's proposal, a large rebuild transmission project 150 miles in length with a large contiguous 20 mile segment of new construction that is less than 20 percent of the total project cost would not be open to competition even though it could constitute a viable competitive project.<sup>332</sup> ITC Great Plains argues that this situation could be avoided by including an additional threshold specifying that a contiguous segment of new transmission line construction ten miles or longer qualifies as a Competitive Upgrade.<sup>333</sup>

155. Duke-American argues that the proposed revision to the definition of Competitive Upgrades in SPP's OATT that states "Transmission projects that do not require both a rebuild of existing facilities and new transmission facilities" could be interpreted to mean that SPP has removed from the competitive process any facility that contains both a rebuild and a new transmission facility.<sup>334</sup> Duke-American asks the Commission to direct SPP to include a reference to the section of the OATT describing the 80 percent/20 percent formula by which an entire facility will be considered a rebuild if 80 percent or more is considered a change to an existing facility to prevent an overly broad reading of the new language.<sup>335</sup>

**(4) Answer**

156. SPP argues that LS Power's claim that the 80 percent threshold is unnecessary is without merit. SPP contends that it adopted a threshold that ensures that any projects that contain both a rebuild and new facilities will be open to competition, unless the portion of new facilities is insubstantial in comparison to the rebuild portion.<sup>336</sup> SPP contends that its 80 percent threshold ensures that the portions of most mixed projects that consist of

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<sup>331</sup> *Id.* at 7-8.

<sup>332</sup> *Id.* at 9.

<sup>333</sup> *Id.*

<sup>334</sup> Duke-American Protest at 7 (citing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.1.d).

<sup>335</sup> *Id.* at 7-8 (citing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.2).

<sup>336</sup> SPP Answer at 25-26.

new facilities will be subject to competition and serves as a bright-line test that is transparent to stakeholders.<sup>337</sup> SPP argues that LS Power's contention that the 80 percent threshold fails to account for potential savings from the competitively bid portion of a high cost project is unsupported and fails to acknowledge the benefit of such a bright-line test.<sup>338</sup>

157. SPP argues that Duke-American's request that SPP clarify the classification of projects that contain both a rebuild and a new facility is unnecessary. SPP contends that Duke-American incorrectly suggests that the definition of Competitive Upgrades could be interpreted to mean that SPP has removed from the competitive process any facility that contains both a rebuild and a new facility.<sup>339</sup> SPP notes that section I.1, which defines a Competitive Upgrade, is designed to be read in concert with the other parts of that section of the OATT.<sup>340</sup> SPP notes, for example, that, if a project does not meet the criteria in section I.1 because it is a project involving both a rebuild and new facilities, section I.2 sets forth the selection of the designated transmission owner(s). SPP contends that the fact that a project does not qualify for the Transmission Owner Selection Process under the factors set forth in the definition of Competitive Upgrades in section I.1 does not mean that it will not qualify for the Transmission Owner Selection Process under other subsections of that portion of the OATT.<sup>341</sup>

#### (5) Commission Determination

158. We find that SPP partially complies with the requirements in the First Compliance Order regarding upgrades. We find that SPP's proposal to define a rebuild as a transmission facility that is an improvement to, addition to, or replacement of all or part of, an existing transmission facility partially complies with Order No. 1000. Order No. 1000-A defines an upgrade as "an improvement to, addition to, or replacement of a part of, an existing transmission facility," and provides that the term "does not refer to an entirely new transmission facility."<sup>342</sup> SPP's proposed definition is inconsistent with the definition in Order No. 1000-A because it would include as an upgrade the replacement

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<sup>337</sup> *Id.* at 26.

<sup>338</sup> *Id.* (citing LS Power Protest at 4).

<sup>339</sup> *Id.* at 26-27 (citing Duke-American Protest at 7).

<sup>340</sup> *See id.* at 27.

<sup>341</sup> *Id.* at 27.

<sup>342</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

of an entire transmission facility rather than the replacement *of a part* of an existing transmission facility. We therefore direct SPP to submit, within 60 days of the date of issuance of this order, a further compliance filing that revises its OATT to modify the definition of upgrades so that only the replacement of part of an existing transmission facility can be considered an upgrade.

159. We find that SPP's proposal to classify an entire transmission project as an upgrade only if more than 80 percent of the total cost of the project consists of a rebuild of existing transmission facilities complies with the requirement to clarify how SPP will classify transmission projects that contain both upgrades to existing facilities and new transmission facilities. We find that this proposal strikes a reasonable balance between expanding competition in transmission development and promoting administrative, regulatory, and economic efficiency by excluding from the competitive bidding process transmission projects that, while they include some new transmission facilities, are primarily upgrades to existing transmission facilities.

160. We disagree with LS Power's view that SPP's proposal, on how it will classify transmission projects with both upgrades to existing facilities and new transmission facilities, should be rejected. LS Power would have us require SPP to divide each transmission project that has been selected in the regional transmission plan for purposes of cost allocation into portions based on whether the portion is a rebuild or new transmission facilities, regardless of how much of the costs of the transmission project are related to upgrades. This action is not necessary to comply with the Commission's requirement in the First Compliance Order that SPP clarify how it will classify transmission projects that contain both upgrades to existing facilities and new transmission facilities. We agree with SPP that it is reasonable, for the sake of administrative efficiency, to divide into portions only a transmission project where at least 20 percent of the cost of the transmission project are for new transmission facilities.

161. For the same reasons, we will not require SPP to specify that a contiguous segment of new transmission line that is less than 20 percent of the costs of a transmission project, but that is 10 miles or longer, qualifies as a Competitive Upgrade, as ITC Great Plains requests. We disagree with ITC Great Plain's view that SPP's instant proposal will not allow SPP to classify enough transmission projects as upgrades. We find unnecessary ITC Great Plains' proposal to add a secondary, contiguous mile threshold to expand the number of transmission projects that SPP can classify as an upgrade. On balance, we find the potential additional administrative efficiency related to further limiting the number of transmission projects that could be open to the competitive bidding process is outweighed by the benefits of allowing the competitive bidding process to apply to transmission facilities that ITC Great Plain's proposal would exempt.

162. However, we agree with Duke-American that, when taken alone, the subsection of SPP's definition of Competitive Upgrades that concerns transmission projects that

contain both a rebuild and a new facility<sup>343</sup> is potentially ambiguous and could be interpreted to mean that SPP has removed from the competitive process any facility that contains both a rebuild and a new transmission facility. While we acknowledge that SPP's argument that section I.1 of the OATT containing the definition of Competitive Upgrades is designed to be read in concert with the other parts of that section, we find that Duke-American's proposed revision minimizes the possible ambiguity regarding how a facility that contains both a rebuild and a new facility will be treated under the definition of a Competitive Upgrade. Accordingly, we direct SPP to submit, within 60 days of the date of issuance of this order, a further compliance filing revising its OATT to include the reference, "[a]s determined in accordance with Section I.2 of this Attachment Y," at the beginning of section I.1 of the OATT.

(d) **Exception for Transmission Projects Needed to Address Reliability Needs in a Shortened Time Frame**

(1) **First Compliance Order**

163. In SPP's First Compliance Filing, it proposed a federal right of first refusal for transmission projects needed to address reliability needs in a shortened time frame that are selected in the regional transmission plan for purposes of cost allocation and whose costs would be allocated pursuant to the SPP regional cost allocation method. The Commission found that SPP's proposal partially complied with Order No. 1000. Specifically, the Commission agreed that it may be acceptable, in limited circumstances, for SPP to assign a limited category of transmission projects to an incumbent transmission owner if such projects are needed to address an identified reliability violation and are shown to be time-sensitive.<sup>344</sup>

164. While the Commission approved the exception from the requirement to eliminate a federal right of first refusal, the Commission adopted the following five criteria, which it believed would place reasonable bounds on SPP's discretion to determine whether there is sufficient time to permit competition to develop transmission projects needed to address reliability needs in a shortened time frame and, as a result, would ensure that an exception from the requirement to eliminate a federal right of first refusal for reliability projects will be used in limited circumstances.<sup>345</sup> First, the transmission projects needed to address reliability needs in a shortened time frame must be needed in three years or

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<sup>343</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.1.d.

<sup>344</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 195.

<sup>345</sup> *Id.*

less to solve reliability criteria violations.<sup>346</sup> Second, SPP must separately identify and then post an explanation of the reliability violations and system conditions in advance for which there is a time-sensitive need. The explanation must be in sufficient detail to allow stakeholders to understand the need and why it is time-sensitive. Third, the process that SPP uses to decide whether a transmission project needed to address reliability needs in a shortened time frame is assigned to an incumbent transmission owner must be clearly outlined in SPP's OATT and must be open, transparent, and not unduly discriminatory. SPP must provide to stakeholders and post on its website a full and supported written description explaining: (1) the decision to designate an incumbent transmission owner as the entity responsible for construction and ownership of the project, including an explanation of other transmission or non-transmission options that the region considered but concluded would not sufficiently address the immediate reliability need; and (2) the circumstances that generated the immediate reliability need and an explanation of why that immediate reliability need was not identified earlier.<sup>347</sup> Fourth, stakeholders must be permitted time to provide comments in response to the description in criterion three and such comments must be made publicly available.<sup>348</sup> Finally, SPP must maintain and post a list of prior year designations of all projects in the limited category of transmission projects for which the incumbent transmission owner was designated as the entity responsible for construction and ownership of the project. The list must include the project's need-by date and the date the incumbent transmission owner actually energized the project, and must be filed with the Commission as an informational filing in January of each calendar year covering the designations of the prior calendar year.<sup>349</sup>

## (2) Summary of Compliance Filing

165. SPP proposes to revise its OATT to adopt the five criteria articulated in the First Compliance Order. In addition, SPP proposes an additional requirement that the SPP Board approve any designation of a Short-Term Reliability Project, which SPP states is consistent with SPP's customary stakeholder process.<sup>350</sup> Specifically, SPP proposes to revise the OATT to state:

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<sup>346</sup> *Id.* P 196.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> SPP Transmittal at 17 (citing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.3).

For any upgrade meeting the specifications listed in Section I.1 of this Attachment Y [to qualify as a Competitive Upgrade], the Transmission Provider may designate the Transmission Owner(s) in accordance with Section IV of this Attachment Y if such upgrade is required to be in service within 3 years or less to address an identified reliability violation (“Short-Term Reliability Project”). To have a transmission project approved as a Short-Term Reliability Project, the Transmission Provider shall:

- (a) Separately identify and post an explanation of the reliability violations and system conditions for which there is a time-sensitive need, in sufficient detail to allow stakeholders to understand the need and why it is time sensitive.
- (b) Provide to stakeholders and post on its website a full and supported written description explaining: (i) The decision to designate the Transmission Owner pursuant to Section IV of this Attachment Y, including an explanation of other transmission or non-transmission options that the Transmission Provider considered but concluded would not sufficiently address the immediate reliability need; and (ii) The circumstances that generated the immediate reliability need and an explanation of why that immediate reliability need was not identified earlier.
- (c) Permit stakeholders thirty (30) days to provide comments in response to the description required under Section I.3.b of this Attachment Y and make such comments publicly available.
- (d) Maintain and post a list of prior year designations of Short-Term Reliability Projects. The list must include the Short-Term Reliability Project’s need date and the date that the [Designated Transmission Owner] actually energized the project. Such list must be filed with the Commission as an informational filing in January of each calendar year covering the designations of the prior calendar year.

- (e) Obtain approval by the SPP Board of Directors.<sup>[351]</sup>

**(3) Commission Determination**

166. We find that SPP's proposal complies with the Commission's directive in the First Compliance Order to include the five criteria required to maintain a federal right of first refusal for transmission projects needed to address reliability needs in a shortened time frame. We also accept SPP's proposal to require that the SPP Board approve the designation of a Short-Term Reliability Project.

**(e) Transmission Service Request Upgrades**

**(1) First Compliance Order**

167. In the First Compliance Order, the Commission determined that SPP's exclusion of Service Upgrades (i.e., network upgrades that result from requests for transmission service) whose costs are allocated regionally from the proposed definition of Competitive Upgrades does not comply with Order No. 1000.<sup>352</sup> The Commission based its determination on three findings: (1) SPP's Aggregate Transmission Service Study (Aggregate Study) process, which SPP uses to identify Service Upgrades, is a Commission-approved regional transmission planning process; (2) Service Upgrades are selected in the regional transmission plan for purposes of cost allocation; and (3) Service Upgrades are selected in the regional transmission plan because they are the more efficient or cost-effective transmission solutions to regional transmission needs.<sup>353</sup> For these reasons, the Commission directed SPP to revise the definition of Competitive Upgrades to include Service Upgrades whose costs are allocated regionally.<sup>354</sup>

**(2) Requests for Rehearing or Clarification**

**(i) Summary**

168. SPP argues that the Commission's reasoning for directing SPP to include Service Upgrades whose costs are allocated regionally in the definition of Competitive Upgrades

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<sup>351</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.3.

<sup>352</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 203.

<sup>353</sup> *Id.* PP 201-202.

<sup>354</sup> *Id.* P 205.

is flawed.<sup>355</sup> First, SPP disputes the Commission's finding that the Aggregate Study process is a Commission-approved regional transmission planning process.<sup>356</sup> SPP states that, to comply with the transmission planning principles in Order No. 890, it submitted revisions to Attachment O (Transmission Planning Process) of its OATT, not the Aggregate Study process.<sup>357</sup> SPP adds that it did not present the Aggregate Study process for Commission review as part of its compliance with Order Nos. 890 and 1000.<sup>358</sup> SPP notes that, in the SPP First Compliance Order, the Commission did not evaluate or make any findings as to whether the Aggregate Study process satisfied the nine transmission planning principles of Order No. 890.<sup>359</sup> Therefore, SPP argues, the Commission's determination in the SPP First Compliance Order that the Aggregate Study process is a Commission-approved regional transmission planning process is unsupported.

169. Second, SPP states that the Aggregate Study process is used to evaluate individual requests for transmission service on an aggregated basis and not to address broader regional transmission needs as is required for regional transmission planning.<sup>360</sup> SPP notes that the Aggregate Study process was developed to permit SPP to study multiple transmission service requests in a single study, which promotes the efficient expansion of the transmission system to accommodate individual transmission service requests at the minimum total cost.<sup>361</sup> SPP adds that the Aggregate Study process is similar to SPP's generator interconnection procedures that the Commission held are outside the scope of Order No. 1000.<sup>362</sup> SPP contends that, unlike the integrated transmission planning process in Attachment O of the SPP OATT, the Aggregate Study process does not determine solutions to address broader regional needs, consider transmission needs driven by public policy requirements, or alleviate congestion.<sup>363</sup> Therefore, SPP argues,

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<sup>355</sup> SPP Rehearing Request at 49-50 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 200-203, 205).

<sup>356</sup> *Id.* at 50-52.

<sup>357</sup> *Id.* at 51-52 (citing *Sw. Power Pool, Inc.*, 124 FERC ¶ 61,028, at P 10 (2008)).

<sup>358</sup> *Id.* at 52.

<sup>359</sup> *Id.* (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 46, 56).

<sup>360</sup> *Id.* at 53.

<sup>361</sup> *Id.* (citing *Sw. Power Pool, Inc.*, 110 FERC ¶ 61,028, at P 3 (2005)).

<sup>362</sup> *Id.* at 53 n.162 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 760; First Compliance Order, 144 FERC ¶ 61,059 at P 204).

the Aggregate Study process lacks the elements necessary to consider it a regional transmission planning process under Order No. 1000 and the Commission's holding to the contrary is arbitrary and capricious.

170. Third, SPP claims that Service Upgrades are not included in SPP's regional transmission plan as more efficient or cost-effective solutions to regional transmission needs or for purposes of cost allocation.<sup>364</sup> Rather, SPP states that the Aggregate Study process is used to identify Service Upgrades necessary to accommodate a specific group of individual transmission service requests. SPP argues that the Commission's reliance on the description of the Aggregate Study process in SPP's OATT, which states that SPP will develop a more efficient expansion of the transmission system to accommodate transmission service requests in a study group at minimum total cost, is misplaced.<sup>365</sup> SPP states that this language simply articulates that the Aggregate Study process will identify the Service Upgrades necessary to facilitate a certain group of transmission service requests, not address broader regional needs, in a more efficient and economical manner than would be possible if the requests were evaluated individually.<sup>366</sup> SPP claims that, as permitted by Order No. 1000, these Service Upgrades are included in the SPP regional transmission plan for informational purposes only to ensure that the models and base cases that SPP uses to conduct its regional transmission planning are accurate.<sup>367</sup>

171. Fourth, SPP expresses concern about the ramifications of applying a competitive bidding process to the Aggregate Study process.<sup>368</sup> SPP notes that the Aggregate Study process is already experiencing a significant backlog of transmission service requests dating back to 2011.<sup>369</sup> SPP argues that, because of the iterative nature of the Aggregate Study process, the need to perform re-studies when customers change or withdraw their requests and the interaction between study groups, adding a competitive process will further exacerbate the problem and the ability of SPP to grant transmission service

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<sup>363</sup> *Id.* at 54.

<sup>364</sup> *Id.* at 55.

<sup>365</sup> *Id.* at 55-56 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 202).

<sup>366</sup> *Id.* at 56.

<sup>367</sup> *Id.* at 56 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 64) & n.170.

<sup>368</sup> *Id.* at 57.

<sup>369</sup> *Id.* at 57-58.

requests in a timely manner.<sup>370</sup> SPP notes that its short-term and longer-term efforts to reform the Aggregate Study process and reduce the current backlog of requests do not contemplate the inclusion of a competitive solicitation process for the selection of transmission developers.<sup>371</sup> SPP contends that the Commission's directive in the First Compliance Order would significantly delay longer-term reforms to the Aggregate Study process because SPP would be required to conduct a competitive solicitation process, select a designated transmission owner, and then potentially face a lengthy and costly dispute between an incumbent transmission owner and a nonincumbent transmission developer before putting the required transmission facilities in place.<sup>372</sup>

172. Finally, SPP argues that the Commission's directive will increase the costs and decrease the accuracy of the Aggregate Study process. SPP states that it currently relies on transmission owners for the cost estimates for Service Upgrades, because the transmission owners have the most accurate and reliable information regarding their systems, making it more cost-effective than SPP replicating that experience and information internally. SPP points out that, if a competitive process is implemented, it will no longer be able to depend on these cost estimates because incumbent transmission owners would be potential bidders.<sup>373</sup> SPP contends that it would then need to hire additional expertise to develop cost estimates, which would increase the time and complexity of the process and the cost for transmission customers and stakeholders, and decrease the accuracy of the estimates. Therefore, SPP reiterates that the Commission's directive is contrary to the concept of promoting more efficient and cost-effective transmission development.<sup>374</sup>

(ii) **Commission Determination**

173. We grant SPP's request for rehearing and now find that the exclusion of Service Upgrades from the proposed definition of Competitive Upgrades is consistent with Order No. 1000. After considering the additional explanation in SPP's rehearing request, we agree with SPP that Service Upgrades should not be included in the definition of Competitive Upgrades. SPP demonstrates that the Aggregate Study process is a

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<sup>370</sup> *Id.* at 58.

<sup>371</sup> *Id.* at 58-59 (noting SPP's filing of interim procedures for addressing the backlog in Docket No. ER13-2164-000).

<sup>372</sup> *Id.* at 59-60.

<sup>373</sup> *Id.* at 60-61.

<sup>374</sup> *Id.* at 61.

mechanism for SPP to evaluate individual requests for transmission service on an aggregated basis. The Aggregate Study process does not address broader regional transmission needs, consider transmission needs driven by public policy requirements, or alleviate congestion as necessary to consider it a regional transmission planning process under Order No. 1000.<sup>375</sup> Furthermore, as SPP points out, it did not present Service Upgrades that qualify for Highway/Byway cost allocation as part of its Order No. 1000 compliance filing. Accordingly, we find that SPP's Aggregate Study process is not an Order No. 1000 regional transmission planning process.

174. In addition, based on SPP's explanation that it includes Service Upgrades in its regional transmission plan only for informational purposes to ensure that the models it uses to conduct its regional transmission planning are accurate, we find that Service Upgrades are not selected in the regional transmission plan for purposes of cost allocation.<sup>376</sup> Similarly, while the purpose of the Aggregate Study process is to evaluate individual requests for transmission service on an aggregated basis to determine the most efficient set of network upgrades at the minimum total cost, the process is limited to accommodating a discrete group of transmission service requests, not addressing broader regional transmission needs.<sup>377</sup> Therefore, Service Upgrades are not identified in a regional transmission planning process as the more efficient or cost-effective solution to regional transmission needs.

### (3) Compliance

#### (i) Summary of Compliance Filings

175. On October 15, 2013, SPP requested an extension of time until August 15, 2014, to comply with the Commission's directive to revise the definition of Competitive Upgrades to include Service Upgrades whose costs are allocated regionally. SPP asserted that compliance with this directive would require not only amending the definition of Competitive Upgrade, but also modifying the SPP Aggregate Study process, which, at the

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<sup>375</sup> *See id.* at 53.

<sup>376</sup> *Id.* at 56.

<sup>377</sup> *See* SPP, OATT, Sixth Revised Volume No. 1, Attachment Z1, § I.

time, was in the final stages of being reformed through the stakeholder process.<sup>378</sup> On October 24, 2013, the Commission granted SPP's extension request.<sup>379</sup>

176. In SPP's Service Upgrade Filing, SPP proposes to revise the definition of Competitive Upgrades to include Service Upgrades. SPP also proposes to include Service Upgrades needed within three years to the definition of short-term reliability project. Further, SPP states that it will not incorporate Service Upgrades into its detailed project proposal process because doing so is not required to comply with the Commission's directives in the First Compliance Order.<sup>380</sup>

(ii) **Commission Determination**

177. Because we grant rehearing of the Commission's finding that SPP must include Service Upgrades whose costs are allocated regionally in SPP's definition of Competitive Upgrades, we find that no further compliance is necessary, and therefore, SPP's Service Upgrade filing is rendered moot. Accordingly, we direct SPP to submit, within 60 days of the date of issuance of this order, a further compliance filing to revise its OATT to remove the proposed revisions to Attachment Y to incorporate Service Upgrades into SPP's Transmission Owner Selection Process.

(f) **Local Facilities**

(1) **First Compliance Order**

178. In the First Compliance Order, the Commission directed SPP to revise its OATT to provide a definition of Competitive Upgrade that reflects the definition of local transmission project in Order No. 1000. Specifically, the Commission instructed SPP to clarify that for a transmission facility to be classified as a local project, it must (1) be located solely within a public utility transmission provider's retail distribution service territory or footprint, and (2) not be selected in a regional transmission plan for purposes of cost allocation.<sup>381</sup>

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<sup>378</sup> SPP October 15, 2013 Motion for Extension of Time and Expedited Consideration.

<sup>379</sup> Notice of Extension of Time, Docket Nos. ER13-366-000, *et al.* (Oct. 24, 2013).

<sup>380</sup> SPP Service Upgrade Filing at 8.

<sup>381</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 208.

## (2) Summary of Compliance Filing

179. SPP proposes to amend its OATT to define a Local Transmission Facility as “[a] transmission facility that is located solely within a single Zone and has all of its costs allocated to such Zone.”<sup>382</sup> SPP states that this definition is consistent with the Commission’s determination in the First Compliance Order that transmission projects whose costs are allocated entirely to a single pricing zone are considered “local” whether they are located in a zone with only one transmission owner or with multiple transmission owners.<sup>383</sup> SPP also proposes to revise its OATT to state that Local Transmission Facilities do not qualify as Competitive Upgrades.<sup>384</sup> SPP claims that, together, these revisions clarify the definition of Competitive Upgrades, as directed by the Commission.<sup>385</sup>

## (3) Commission Determination

180. We find that SPP’s proposed definition of Local Transmission Facility is consistent with Order No. 1000. SPP proposes to revise its definition to state that a Local Transmission Facility is located solely within a single SPP pricing zone and has all of its costs allocated to such zone. SPP’s proposal to revise the definition to state that a Local Transmission Facility has all of its costs allocated to the zone where it is located is consistent with the Commission finding in Order No. 1000-A “that the term ‘selected in a regional transmission plan for purposes of cost allocation’ excludes a new transmission facility if the costs of that facility are borne entirely by the public utility transmission provider in whose retail distribution service territory or footprint that new transmission facility is to be located.”<sup>386</sup>

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<sup>382</sup> See SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § II.

<sup>383</sup> SPP Transmittal at 17-18 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 162, 208).

<sup>384</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.1.e.

<sup>385</sup> SPP Transmittal at 18 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 208).

<sup>386</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 423. We note that SPP’s proposed definition of a Local Transmission Facility is consistent with the Commission’s finding in the First Compliance Order that, with respect to SPP’s five existing multi-transmission owner pricing zones, a new transmission facility whose costs are allocated entirely to a single such pricing zone within SPP is not subject to the requirement to eliminate any federal right of first refusal because such cost allocation qualifies as a local cost  
(continued ...)

(g) **Cost Allocation for a Transmission Project with a State Right of First Refusal**

(1) **First Compliance Order**

181. In the First Compliance Order, the Commission found that SPP's OATT provisions addressing cost allocation for nonincumbent transmission developer projects complied with the requirements of Order No. 1000. The Commission did not address LS Power's comments asking the Commission to consider the recommendations the Illinois Commerce Commission (Illinois Commission) raised in the separate proceeding addressing Midcontinent Independent Transmission System Operator, Inc.'s (MISO) Order No. 1000 compliance filing, which related to cost allocation for transmission projects that retain a state right of first refusal.<sup>387</sup> Rather, the Commission deferred to its finding in the MISO proceeding in Docket No. ER13-187-000.<sup>388</sup>

(2) **Requests for Rehearing or Clarification**

182. LS Power argues that the Commission erred by not prohibiting regional cost allocation for transmission projects subject to a state right of first refusal.<sup>389</sup> LS Power argues that, if a state right of first refusal exists and SPP can take the state regulatory

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allocation. However, we reiterate the Commission's statement in the First Compliance Order that, if SPP establishes new multi-transmission owner pricing zones in the future, the Commission will review the proposed multi-transmission owner pricing zones on a case-by-case basis to determine whether the allocation of all of the costs of a new transmission facility located within a proposed multi-transmission owner pricing zone to that zone will qualify as a local cost allocation, consistent with Order No. 1000-A. *See* First Compliance Order, 144 FERC ¶ 61,059 at P 162 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 424).

<sup>387</sup> Illinois Commission argued that transmission projects that retain a state right of first refusal should not be subject to cost allocation outside the state in which the project is physically located to ensure that other states do not bear extra costs due to the host state's preference for an incumbent transmission developer over one selected through a competitive process. LS Power December 27, 2012 Protest at 35-36 (citing Illinois Commission, Comments, Docket No. ER13-187-000, at 32 (filed Dec. 10, 2012)).

<sup>388</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 323.

<sup>389</sup> LS Power Rehearing Request at 12-16.

environment into account in the evaluation of bid proposals, then nonincumbent transmission developers will not submit transmission projects related to those states. LS Power claims that nonincumbent transmission developers will be competitively disadvantaged in those areas and will not be eager to bid on such transmission projects, even if the opportunity to compete is theoretically open to them in the relevant competitive transmission developer selection process, due to the significant amount of time and money required to develop bids. LS Power contends that the likelihood of success for nonincumbent transmission developers who are paying the entire financial cost of their participation would be too low to make participation viable.<sup>390</sup> LS Power also notes that, when it first raised this concern in its protest to the compliance filing, no state within SPP had a state right of first refusal law, but now two states in SPP have implemented such laws.<sup>391</sup>

183. LS Power argues that the Commission will also err if it defers to its ruling on this issue in the order addressing MISO's Order No. 1000 compliance filing.<sup>392</sup> LS Power argues that in the MISO Compliance Order, the Commission erroneously concluded that, by prohibiting a transmission provider from automatically excluding bids to develop more efficient or cost-effective transmission solutions to regional transmission needs for states with a state right of first refusal, the Commission eliminated the concern that the costs of a transmission project developed in a state with a right of first refusal would be allocated to other states in the region. LS Power argues that, without nonincumbent transmission developer participation, the state right of refusal provisions have the same effect, whether the transmission provider can "automatically" exclude nonincumbent transmission developers or not.<sup>393</sup> LS Power adds that the Commission's finding that Order No. 1000 does not permit a public utility transmission provider to add a federal right of first refusal for a new transmission facility based on state law is unsatisfactory because it does not address the Commission's determination that it is not impermissible to consider the effect of state regulatory processes at appropriate points in the regional transmission planning process.<sup>394</sup>

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<sup>390</sup> *Id.* at 14.

<sup>391</sup> *Id.* at 12.

<sup>392</sup> *Id.* at 13 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 323 (declining to address the issue and citing to MISO Compliance Order, 142 FERC ¶ 61,215 at P 402)).

<sup>393</sup> *Id.* at 14.

<sup>394</sup> *Id.* (citing First Compliance Order, 144 FERC ¶ 61,059 at P 178; MISO Compliance Order, 142 FERC ¶ 61,215 at P 206).

184. LS Power recognizes that Order No. 1000 specifically states that it does not circumvent state law and that states have the authority to implement state rights of first refusal laws. However, LS Power argues that those states do not have the right to insist that the costs for transmission projects subject to a state right of first refusal be allocated regionally. LS Power argues that, in states with right of first refusal statutes, the Commission does not have a mechanism to ensure just and reasonable rates for those outside that state who must pay for the transmission projects that the incumbent transmission owner built.<sup>395</sup> Therefore, LS Power argues that the Commission erred in not requiring SPP to eliminate regional cost allocation for any transmission project located in a state with a state right of first refusal law. LS Power requests that the Commission require SPP to eliminate regional cost allocation for any transmission project assigned to an incumbent transmission owner in a state with a state right of first refusal.<sup>396</sup>

### (3) Commission Determination

185. We deny LS Power's request for rehearing concerning transmission projects subject to state rights of first refusal. In Order No. 1000, the Commission did not specifically address whether transmission solutions selected as more efficient or cost-effective in the regional transmission plan, and which are subject to *state* rights of first refusal, should be eligible for regional cost allocation.

186. With respect to *federal* rights of first refusal, the Commission found that granting incumbent transmission providers a federal right of first refusal "effectively restricts the universe of transmission developers offering potential solutions for consideration in the regional transmission planning process."<sup>397</sup> Highlighting the relationship between regional transmission planning and cost allocation, the Commission found that the removal of the federal right of first refusal, combined with cost allocation reforms, would "address disincentives that may be impeding participation by nonincumbent transmission developers in the regional transmission planning process."<sup>398</sup> In Order No. 1000-A, the Commission further emphasized this relationship by stating that "if any costs of a new transmission facility are allocated regionally or outside of a public utility transmission provider's retail distribution service territory or footprint, then there can be no federal

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<sup>395</sup> *Id.* at 15.

<sup>396</sup> *Id.* at 15-16.

<sup>397</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 284.

<sup>398</sup> *Id.* P 320.

right of first refusal associated with such transmission facility, except as provided in this order.”<sup>399</sup>

187. While Order No. 1000 addressed some disincentives that may deter nonincumbent transmission developers, the Commission recognized that the Order No. 1000 reforms did not address all disincentives to competition to develop transmission projects selected in the regional transmission plan for purposes of cost allocation. The Commission acknowledged that “there may be restrictions on the construction of transmission facilities by nonincumbent transmission providers under rules or regulations enforced by other jurisdictions.”<sup>400</sup>

188. Thus, while Order No. 1000 sought to remove barriers to competition in regional transmission planning processes, it did not purport to address every barrier to participation by nonincumbent transmission developers. The Commission’s decision to focus on *federal* (not state) right of first refusal provisions in Commission-jurisdictional tariffs was an exercise of remedial discretion designed to ensure that its nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states.<sup>401</sup> The Commission repeatedly emphasized that Order No. 1000 would not preempt those authorities vested in the states.<sup>402</sup>

189. Furthermore, while the competitive processes required in Order No. 1000 are a part of selecting the more efficient or cost-effective transmission solutions in the regional transmission plan for purposes of cost allocation, the regional transmission planning process is also an important tool for accomplishing this goal. We recognize that, even if a transmission project is subject to a state right of first refusal, the regional transmission planning process still results in the selection for planning and cost allocation purposes of transmission projects that are more efficient or cost-effective than would have been developed but for such processes. For all these reasons, we deny LS Power’s request for rehearing.<sup>403</sup>

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<sup>399</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 430.

<sup>400</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 287.

<sup>401</sup> *See, e.g., id.* P 107.

<sup>402</sup> *Id.*

<sup>403</sup> *See also, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127 at PP 153-157.

**b. Qualification Criteria**

190. Order No. 1000 required each public utility transmission provider to revise its OATT to establish appropriate qualification criteria for determining an entity's eligibility to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation.<sup>404</sup> These criteria must not be unduly discriminatory or preferential when applied to either an incumbent transmission provider or a nonincumbent transmission developer.<sup>405</sup> In addition, public utility transmission providers must adopt procedures for timely notifying transmission developers of whether they satisfy the region's qualification criteria and allowing them to remedy any deficiencies.<sup>406</sup>

191. Order No. 1000-A clarified that it would be an impermissible barrier to entry to require a transmission developer to demonstrate, as part of the qualification criteria, that it has, or can obtain, state approvals necessary to operate in a state to be eligible to propose a transmission facility.<sup>407</sup>

**i. First Compliance Order**

192. In the First Compliance Order, the Commission found that SPP partially complied with the requirement of Order No. 1000 to establish qualification criteria for entities to qualify to participate in SPP's proposed Transmission Owner Selection Process. The Commission directed SPP to make four changes to its qualification criteria: (1) remove the requirement for a prospective transmission developer to enter into executed contracts with any entity the developer may rely on to meet the managerial qualification criteria in order to be eligible to submit a bid;<sup>408</sup> (2) revise its OATT to state that the proposed requirement that a prospective transmission developer demonstrate its ability to comply with National Electric Reliability Corporation (NERC) Reliability Standards requires an entity to demonstrate "how it plans to be able to comply" with NERC standards;<sup>409</sup> (3) remove the requirement that a prospective transmission developer show an ability to

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<sup>404</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 225, 323.

<sup>405</sup> *Id.* P 323.

<sup>406</sup> *Id.* P 324.

<sup>407</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 441.

<sup>408</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 227.

<sup>409</sup> *Id.* P 228.

comply with applicable local, state, and federal requirements;<sup>410</sup> and (4) apply the application fee, which will be used to offset the costs of processing the application to become qualified to submit a bid, to both nonincumbent transmission developers and incumbent transmission owners. Alternatively, the Commission stated that SPP could further explain why it is not unduly discriminatory to require nonincumbent transmission developers to pay the application fee but not require incumbent transmission developers to pay such a fee.<sup>411</sup>

**ii. Summary of Compliance Filing**

193. SPP proposes to remove the provision in its OATT that requires a prospective transmission developer to enter into executed contracts with any entity the developer may rely on to meet the managerial qualification criteria.<sup>412</sup> SPP states that, because removing the contractual requirement leaves only corporate affiliation as an option for an applicant seeking to rely on an alternate qualifying entity for qualification, SPP will also remove the corporate affiliation provision. SPP asserts that, as modified, its OATT permits a prospective transmission developer to rely on an alternate qualifying entity to satisfy one or more of the managerial criteria without having to demonstrate a corporate or contractual relationship. Instead, the prospective transmission developer need only submit materials demonstrating to SPP's satisfaction that the alternate qualifying entities meet the managerial criteria for the functions for which the applicant is relying upon the alternate qualifying entity.<sup>413</sup>

194. SPP proposes to revise its OATT to move the requirement that a prospective transmission developer demonstrate the ability to comply with NERC standards to a new subsection and has added language to allow the criterion to be satisfied by a demonstration of how the developer plans to be able to comply with NERC reliability standards.<sup>414</sup> Additionally, SPP proposes to remove the requirement that a prospective transmission developer demonstrate its ability to comply with applicable local, state, and federal requirements from the qualification requirements section of its OATT.<sup>415</sup>

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<sup>410</sup> *Id.* P 229.

<sup>411</sup> *Id.* P 230.

<sup>412</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.1.b.iii.

<sup>413</sup> *Id.* § III.1.b.iii.

<sup>414</sup> *Id.* §§ III.1.b.iii.5-6.

<sup>415</sup> *Id.* § III.1.b.iii.5.

195. SPP proposes to retain its original proposal to charge a qualification application fee equal to the SPP annual membership fee only to nonincumbent transmission developers. In response to the Commission's alternative directive to further justify this proposal, SPP asserts that charging an application fee only to nonincumbent transmission developers that are not SPP members is just and reasonable and not unduly discriminatory.<sup>416</sup> SPP contends that SPP members and non-member nonincumbent transmission developers are not similarly situated when it comes to paying the costs of SPP services. SPP notes that the purpose of the application fee is to defray SPP's costs to administer the qualification process and that SPP members pay a yearly membership fee as well as administrative charges pursuant to Schedule 1-A of the SPP OATT, which are used to recover the costs of SPP services. Therefore, SPP argues that current SPP members are already paying the costs of SPP's administration of the qualification process. Further, SPP contends that it would be unduly discriminatory to existing SPP members for non-member nonincumbent transmission developers to benefit from SPP services without defraying the costs of such services, while members pay for services through the membership and administrative fees. SPP asserts that charging current SPP members an additional application fee, on top of the current membership fee and administrative charge, would result in SPP members paying more than non-member nonincumbent transmission developers for the administration of SPP's qualification process. SPP claims that by requiring an application fee of non-members that is equivalent to the membership fee, non-members and members will be treated comparably with regard to defraying the costs of SPP's administration of the qualification process.<sup>417</sup>

### iii. Commission Determination

196. We find that SPP's proposed qualification criteria provisions comply with the directives in the First Compliance Order. First, SPP has removed the provision in its OATT that required a prospective transmission developer to enter into executed contracts with any entity the developer may rely on to meet the managerial qualification criteria. Second, SPP revised its OATT to state that the proposed requirement that a prospective transmission developer demonstrate its ability to comply with NERC Reliability Standards requires an entity to demonstrate how it plans to be able to comply with NERC standards. Third, SPP has removed the requirement that a prospective transmission developer demonstrate its ability to comply with applicable local, state, and federal requirements. Finally, we agree with SPP's explanation of why it is not unduly discriminatory to require nonincumbent transmission developers to pay the application fee but not require incumbent transmission developers to pay such a fee, and therefore we

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<sup>416</sup> SPP Transmittal at 20.

<sup>417</sup> *Id.* at 20-21.

find reasonable SPP's proposal to require only nonincumbent transmission developers pay the application fee. We find that these proposed revisions comply with the Commission's directives in the First Compliance Order and, accordingly, accept them.

**c. Information Requirements**

197. Order No. 1000 required each public utility transmission provider to identify in its OATT the information that a prospective transmission developer must submit in support of a transmission project proposed in the regional transmission planning process.<sup>418</sup> The information requirements must be sufficiently detailed to allow a proposed transmission project to be evaluated comparably to other transmission facilities proposed in the regional transmission planning process. The information requirements must be fair and not be so cumbersome as to effectively prohibit transmission developers from proposing transmission facilities, yet not be so relaxed that they allow for relatively unsupported proposals.<sup>419</sup> Order No. 1000 also required each public utility transmission provider to identify in its OATT the date by which a transmission developer must submit information on a proposed transmission project to be considered in a given transmission planning cycle.<sup>420</sup>

**i. First Compliance Order**

198. In the First Compliance Order, the Commission found that SPP's proposed OATT language regarding the information requirements for submitting bids partially complied with the requirements of Order No. 1000. The Commission found that, for the most part, SPP's proposed information requirements are not so cumbersome that they effectively prohibit transmission developers from submitting bids, yet not so relaxed that they allow for relatively unsupported bids.<sup>421</sup> The Commission found, however, that SPP did not provide adequate information in its OATT regarding its proposal to collect a fee for each bid made in response to a Request for Proposals, which would be used to compensate SPP for the cost of administering the Request for Proposals process.<sup>422</sup> Therefore, the Commission directed SPP to make revisions to its OATT that: (1) establish a precise dollar amount, or a formula for establishing that dollar amount, of the initial fee that a

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<sup>418</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 325.

<sup>419</sup> *Id.* P 326.

<sup>420</sup> *Id.* P 325.

<sup>421</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 241.

<sup>422</sup> *Id.* P 243.

prospective transmission developer must submit with its bid; (2) clarify how SPP will calculate the actual costs associated with the Request for Proposals process for purposes of determining whether each Request for Proposals respondent must make additional payments or will receive refunds; and (3) provide interest on any bid fees that are refunded to a transmission developer.<sup>423</sup>

199. The Commission also found that SPP's proposal to allow a Qualified Request for Proposals Participant<sup>424</sup> to demonstrate its financial strength in its bid by showing that it is the incumbent transmission owner that would otherwise be obligated to build the Competitive Upgrade is unduly discriminatory and thus does not comply with Order No. 1000. Under SPP's proposal, a nonincumbent transmission developer would have to demonstrate its financial strength through its total capitalization, a performance bond from an insurance/surety company, or a letter of credit from a financial institution. However, an incumbent transmission owner must demonstrate only that it is the incumbent transmission owner that would otherwise be designated by the transmission provider as the transmission owner for the Competitive Upgrade. Therefore, the Commission directed SPP to revise its OATT to remove the provision that allows an incumbent transmission owner to demonstrate its financial strength simply by being the incumbent utility.<sup>425</sup>

## ii. Summary of Compliance Filing

200. SPP proposes several revisions to its OATT to address the Commission's directives regarding the Request for Proposals deposit and fee. First, SPP has added language to clarify that the initial fee that will be required with each bid made in response to a Request for Proposals is a deposit. SPP asserts that this clarification will facilitate SPP's tracking of such funds and payment of interest on any unspent amounts. The proposed revisions also require that the Request for Proposals respondent (1) pay an initial deposit for each submission designed to recover the costs of administering the Transmission Owner Selection Process; and (2) agree to pay any additional costs that are assessed.<sup>426</sup> SPP also proposes language to require that each Request for Proposals respondent provide its Internal Revenue Service Tax Identification Number in its bid.<sup>427</sup>

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<sup>423</sup> *Id.* P 244.

<sup>424</sup> A Qualified Request for Proposals Participant is an applicant that has qualified to submit a bid. *Id.* P 212.

<sup>425</sup> *Id.* P 245.

<sup>426</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.c.ix.

<sup>427</sup> *Id.* § III.2.c.xi.

SPP states that this will enable SPP to establish segregated interest bearing accounts for each bid, which will facilitate SPP's ability to pay interests on any refunds.

201. SPP proposes a three-tiered deposit structure for bid submissions, based on the estimated cost of the Competitive Upgrade at the time it is approved by the SPP Board. Competitive Upgrades that are estimated to cost less than \$10 million at the time they are approved by the SPP Board will require a deposit of \$10,000 per proposal submission. Competitive Upgrades that are estimated to cost between \$10 million and \$100 million at the time they are approved by the SPP Board will require a deposit of \$25,000 per proposal submission. Finally, Competitive Upgrades that are estimated to cost more than \$100 million at the time they are approved by the SPP Board will require a deposit of \$50,000 per proposal submission.<sup>428</sup>

202. SPP asserts that its proposed tiered deposit approach is just and reasonable and complies with the First Compliance Order. First, SPP contends that a tiered deposit is appropriate because evaluating bids for smaller Competitive Upgrades with more limited scope is less complex and, therefore, less expensive than evaluating bids for larger-scale Competitive Upgrades. Second, SPP explains that its proposed deposit amounts are based on its analysis of the anticipated cost of evaluating each bid, including the costs of administering the industry expert panel process, yet the costs are small in comparison to the expected cost of the project (e.g., approximately 0.1 percent for a project costing almost \$10 million). SPP notes that the deposit amounts are designed to recover SPP's costs without creating a barrier to entry. Third, SPP asserts that, consistent with cost causation, Request for Proposals respondents pay the costs of the Transmission Owner Selection Process rather than being subsidized by SPP's members and customers. Fourth, SPP states that the deposits are structured so that Request for Proposals respondents know the "up-front" costs of submitting a proposal, subject to any true-up. Finally, SPP contends that its proposal eases participation by smaller entities by establishing reasonable deposits based on the scope of the Competitive Upgrade, which avoids impairing the financial ability of smaller entities to submit proposals for smaller-scale Competitive Upgrades for which they are more likely to compete. SPP claims that this flexibility increases participation in the Transmission Owner Selection Process by reducing, for smaller parties, a potential barrier to entry that might exist if the deposit amount were the same regardless of the scope of the Competitive Upgrade.<sup>429</sup>

203. SPP proposes language stating that its Transmission Owner Selection Process costs shall include the cost of paying SPP's staff and administrative costs associated with

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<sup>428</sup> *Id.* § III.2.e.i.

<sup>429</sup> SPP Transmittal at 23.

administering the Transmission Owner Selection Process for the Competitive Upgrade and all costs associated with administering the industry expert panel process for the Competitive Upgrade, including the identification, recruiting, hiring, and retention of industry experts to serve on the industry expert panel(s).<sup>430</sup> SPP also proposes language clarifying that it will hold each deposit in a segregated interest-bearing account in the name of the Request for Proposals respondent, tied to the Request for Proposals respondent's Internal Revenue Service Tax Identification Number,<sup>431</sup> and that all unused deposit amounts will be refunded with interest earned.<sup>432</sup>

204. Finally, SPP proposes to delete, in their entirety, provisions that would allow a Qualified Request for Proposals Participant to demonstrate financial strength by showing that it is the incumbent transmission owner that SPP would otherwise designate as the Designated Transmission Owner for the Competitive Upgrade pursuant to the SPP OATT.<sup>433</sup>

### iii. Commission Determination

205. We find that the provisions in SPP's filing addressing information requirements for submitting a bid comply with the directives in the First Compliance Order. We find that SPP has established precise dollar amounts for the initial fee that a prospective transmission developer must submit with its bid by proposing a tiered deposit structure. Additionally, we find that SPP has clarified how it will calculate the actual costs associated with the Request for Proposal process and established a process for determining whether each bidder must make additional payments or will receive refunds. We also find that SPP has proposed a process for ensuring that interest is provided on any bid fees that are refunded to a transmission developer. Finally, we find that SPP has removed the provision that would have allowed a Request for Proposals Participant to demonstrate its financial strength in its bid by showing that it is the incumbent transmission owner that would otherwise be obligated to build the Competitive Upgrade.

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<sup>430</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.e.ii.

<sup>431</sup> *Id.* § III.2.e.i.

<sup>432</sup> *Id.* § III.2.e.ii.

<sup>433</sup> *Id.* § III.2.c.vi.4.

d. **Evaluation Process for Transmission Proposals Selection in the Regional Transmission Plan for Purposes of Cost Allocation**

206. Order No. 1000 required each public utility transmission provider to amend its OATT to describe a transparent and not unduly discriminatory process for evaluating whether to select a proposed transmission facility in the regional transmission plan for purposes of cost allocation.<sup>434</sup> The evaluation process must ensure transparency and provide the opportunity for stakeholder coordination.<sup>435</sup> In addition, the evaluation process must culminate in a determination that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation.<sup>436</sup>

i. **First Compliance Order**

207. In the First Compliance Order, the Commission found that as a general matter, it is appropriate for SPP to consider several factors in evaluating transmission developer bids. Among others, the Commission found it appropriate for SPP to consider whether an entity has existing rights-of-way, as well as whether the entity has experience or ability to acquire rights-of-way, as part of the process for evaluating whether a qualified transmission developer is selected to construct a transmission facility selected in the regional transmission plan for purposes of cost allocation.<sup>437</sup> However, the Commission found that SPP had not provided adequate support to demonstrate that the proposed point distribution for its evaluation criteria is not unduly discriminatory and would result in a regional transmission planning process that selects the more efficient or cost-effective transmission solutions to regional transmission needs.<sup>438</sup> The Commission found that

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<sup>434</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 452.

<sup>435</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 454.

<sup>436</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 267.

<sup>437</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 171 (referencing *S.C. Elec. & Gas Co.*, 143 FERC ¶ 61,058 at P 131).

<sup>438</sup> *Id.* P 284. SPP proposed the following five evaluation criteria and maximum points for each criteria: (1) Engineering/ Reliability/ Quality/ General Design (up to 200 points); (2) Construction Project Management (up to 200 points); (3) Operations/

(continued ...)

SPP had not justified or explained why it assigned a significantly higher number of points to non-cost-based criteria (up to 775 points) relative to the total for the single cost-based criterion (up to 225 points), nor did SPP explain how that assignment would result in a not unduly discriminatory evaluation process. The Commission stated that an evaluation process that weighs costs at only 22.5 percent of an overall bid does not properly measure the relative efficiency and cost-effectiveness of a proposed bid.<sup>439</sup> Therefore, the Commission directed SPP to revise its evaluation process to reflect greater weighting of costs in evaluating transmission developer bids in order to reflect the relative efficiency and cost-effectiveness of [any proposed transmission] solution or to further explain and justify why its proposed weighting of costs in the evaluation process complies with the requirements of Order No. 1000.<sup>440</sup>

208. Furthermore, the Commission found that certain elements of the Transmission Owner Selection Process were not sufficiently transparent and would not culminate in a determination that is sufficiently detailed for stakeholders to understand why a particular bid was selected or not selected. Specifically, the Commission found that SPP had not provided a sufficiently clear and objective description of what basis the industry expert panel would use if it did not recommend to the SPP Board the bid with the highest score, or if it eliminated from consideration a bid due to a low score in any individual evaluation category. Therefore, the Commission directed SPP either to revise its OATT so that the selection process complies with the transparency requirements of Order No. 1000, or to remove any OATT language that allows the point system to be disregarded by the industry expert panel when it makes its recommendation.<sup>441</sup>

209. The Commission also found that details regarding what is sufficient to meet the proposed requirement that a bidder provide firm capital commitment acceptable to SPP that is sufficient to complete the Competitive Upgrade are properly included in the OATT, not the business practice manuals. The Commission therefore directed SPP to clarify in its OATT what is expected, in terms of demonstration of access to capital, when a transmission developer is accepting responsibilities as a Designated Transmission

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Maintenance/ Safety (up to 250 points); (4) Rate Analysis (Cost to Customers) (up to 225 points); and (5) Financial Viability and Creditworthiness (up to 125 points). *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* P 282.

<sup>441</sup> *Id.* PP 283, 287.

Owner, and to further describe why such requirements are just and reasonable and not unduly discriminatory.<sup>442</sup>

**ii. Summary of Compliance Filing**

210. In its compliance filing, SPP maintains both its evaluation categories and point-based scoring system used to evaluate and rank respondents' proposals to build a Competitive Upgrade. SPP explains that the evaluation categories and relative scoring consider the relative efficiency and cost-effectiveness of each bid in the Request for Proposals process during each stage of the lifecycle of a Competitive Upgrade. SPP further explains that, in its Integrated Transmission Plan process, transmission projects (including Competitive Upgrades) are selected for inclusion in SPP's transmission expansion plan by the SPP Board prior to any determination of the entity that will ultimately contract the project. SPP states that, in this manner, the Integrated Transmission Plan process, which has as its central tenet the identification of the most cost-effective transmission projects, results "in a regional transmission planning process that selects more cost-effective transmission solutions, as required by Order No. 1000" long before the identity of the Designated Transmission Owner is determined.<sup>443</sup>

211. In addition, SPP contends that its proposed evaluation categories and their relative weights further the goal of promoting more efficient and cost-effective transmission development.<sup>444</sup> SPP notes that, under its proposed weighting, the rate impact category, which SPP claims is largely designed to evaluate a bid cost estimate, carries the second-highest point total. Moreover, SPP asserts that each of the proposed evaluation categories ensures efficiency and cost-effectiveness because each awards points based on an individual Request for Proposals respondent's capabilities in each stage of the lifecycle of the specific Competitive Upgrade. SPP explains that its point system is designed to analyze the project over its entire useful life: from the conceptual (design) and financing stage (financial), through development and construction (project management), and into operation (rate analysis and operation).<sup>445</sup>

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<sup>442</sup> *Id.* P 288.

<sup>443</sup> SPP Transmittal at 26 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 284).

<sup>444</sup> *Id.*

<sup>445</sup> Beyond the 1000 possible base points available in the Transmission Owner Selection Process, SPP maintains its proposal to award 100 incentive points to the Request for Proposals respondent whose detailed project proposal was approved by the SPP Board as a Competitive Upgrade when that Request for Proposals respondent places (*continued ...*)

212. SPP argues that a bid that contains the lowest cost estimate is not necessarily the more efficient and cost-effective solution because cost estimates are inherently inaccurate.<sup>446</sup> Thus, SPP contends that undue emphasis on the cost category during the Request for Proposals phase will not ensure that the more efficient or cost-effective bid is selected. According to SPP, other factors (such as ability of the bidder to operate, maintain, and restore the project in the event of failure) may be as important as its cost estimate to ensuring efficiency and cost-effectiveness. SPP adds that, because it develops cost estimates during the Integrated Transmission Plan process and bidders are likely to base their bids on SPP's cost estimate, other factors are necessary to distinguish among bidders to ensure efficiency and cost-effectiveness.<sup>447</sup>

213. Moreover, SPP disagrees with the Commission's characterization of the design, financial, project management, and operations categories as "non-cost-based." SPP claims that the Commission incorrectly determined that the rate impact category is the exclusive element that impacts the ultimate cost to the customer. SPP claims that each of its evaluation categories is essential to ensuring more efficient and cost-effective transmission plans because all of these metrics in some way evaluate the ultimate cost to the customer.<sup>448</sup> For example, SPP asserts that engineering design is a major factor driving the cost of a project.<sup>449</sup> According to SPP, weighting this category as proposed enables SPP to take account of the durability and reliability of the project design. SPP notes that facility outages, which can result from inferior design, lead to congestion on the grid, which can have a significant impact on the cost to customers and SPP's ability to provide service. Likewise, SPP points out that project management evaluates the ability of the bidder to manage the development and construction activities and procurement of the regulatory approvals that are necessary to ensure that the project meets the requirements identified by SPP and the required in-service date. SPP claims that delays in project implementation exacerbate the need for which the project was selected (e.g., addressing a reliability violation or alleviating congestion) and postpone

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a bid for that particular Competitive Upgrade. The OATT states that the additional 100 points provide an incentive for stakeholders to share their ideas and expertise to promote innovation and creativity in the transmission planning process. *See* SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, §§ III.2.f.ii, III.2.f.iv.

<sup>446</sup> SPP Transmittal at 26-27.

<sup>447</sup> *Id.* at 27.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

the relief that the facility is selected to provide, which leads to increased costs to customers regardless of the original cost estimate included in the bid.

214. In addition, SPP states that it is appropriate to place the greatest weight, 250 points, on the operations category because it evaluates whether the bidder is able to maintain continued safe and reliable operation of the transmission facility over its lifespan of 40 years or more. SPP asserts that, no matter how resilient an engineering design, it will always be at some risk for failure. SPP contends that the capability and availability of a bidder to operate, maintain, and timely restore the facility is critical to ensuring reliable service to customers at just and reasonable rates. Thus, SPP claims that a bidder's ability to restore service following an outage, storm, or accident is an appropriate and important factor for SPP to consider in its evaluation process. SPP states that, although the likelihood of outages and the ability of a developer to respond timely to such outages would not be reflected in the developer's cost estimate submitted in its bid, it could have a significant impact on the cost of the project.<sup>450</sup> Similarly, SPP notes that a bidder's inability to maintain a facility could lead to the need to replace the facility prematurely, leading to higher costs to consumers, which would also not be reflected in the bid's rate impact estimate at the time of evaluation.<sup>451</sup>

215. Finally, SPP avers that the finance category is also a cost-based criterion. SPP explains that the Request for Proposals respondent's ability to finance the project at favorable rates and terms has a direct bearing on the costs that customers will pay.<sup>452</sup> SPP asserts that the soundness of a Request for Proposals respondent's financial and business plans affects whether it will develop, own, operate, and maintain a project in an efficient and cost-effective manner. SPP claims that the rate impact analysis category alone will not assess the appropriateness of the Request for Proposals respondent's financial and business plans.<sup>453</sup> Because the different evaluation categories all allow SPP to select the more efficient or cost-effective transmission project, SPP concludes that the proposed evaluation category point weightings are just and reasonable as proposed and comply with the requirements of Order No. 1000.

216. SPP notes that, in the First Compliance Order, the Commission stated that SPP may "consider whether an entity has existing rights-of-way as well as whether the entity has experience or ability to acquire rights-of-way as part of the process for evaluating

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<sup>450</sup> *Id.* at 27-28.

<sup>451</sup> *Id.* at 28.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

whether to select a proposed transmission facility in the regional transmission plan for purposes of cost allocation.”<sup>454</sup> SPP asserts that the OATT provisions accepted in the First Compliance Order already state that the industry expert panel will consider rights-of-way when evaluating a Qualified Request for Proposals Participant’s project management expertise and the cost to construct a Competitive Upgrade. However, to provide more clarity with regard to the industry expert panel’s evaluation of rights-of-way in selecting a Competitive Upgrade, in accordance with the guidance provided by the Commission, SPP proposes to revise its OATT to state that the industry expert panel will consider “ownership, control, or acquisition” of rights-of-way in determining the points to be awarded for project management and rate analysis.<sup>455</sup> SPP contends that these revisions provide more detail regarding the consideration of rights-of-way issues in the evaluation process consistent with the Commission’s guidance in the First Compliance Order and Order No. 1000.<sup>456</sup>

217. SPP has also revised the project management category to include a consideration of “[Request for Proposals] respondent’s plan to obtain authorization to construct transmission facilities in the state(s) in which the Competitive Upgrade will be located”<sup>457</sup> and whether the “[Request for Proposals] respondent has a right of first refusal granted under relevant law for the Competitive Upgrade.”<sup>458</sup>

218. Additionally, SPP proposes further revisions to permit the industry expert panel, when awarding points for Project Management expertise, to consider the Request for proposals respondent’s plan to obtain authorization to construct transmission facilities in the state(s) in which the Competitive Upgrade will be located and whether the Request for Proposal respondent has a right of first refusal for the Competitive Upgrade under relevant law.<sup>459</sup> SPP contends that these changes are just and reasonable because they will enable the industry expert panel to take into consideration “the particular strengths of either an incumbent transmission provider or a nonincumbent transmission developer”<sup>460</sup>

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<sup>454</sup> *Id.* at 12 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 171).

<sup>455</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, §§ III.2.f.iii.2.b & III.2.f.iii.4.g.

<sup>456</sup> SPP Transmittal at 13.

<sup>457</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.f.iii.2.i.

<sup>458</sup> *Id.* § III.2.f.iii.2.j.

<sup>459</sup> *Id.* §§ III.2.f.iii.2.i & III.2.f.iii.2.j.

<sup>460</sup> SPP Transmittal at 14 (citing First Compliance Order, 144 FERC ¶ 61,059 at (continued ...))

related to the state regulatory process and state law during the evaluation stage, as permitted by the Commission. SPP explains that these revisions are consistent with the Commission's guidance in the First Compliance Order, which stated, "[w]hile state laws and regulations may not be used to automatically exclude bids to develop more efficient or cost-effective transmission solutions to regional transmission needs, it may be permissible to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process."<sup>461</sup>

219. SPP also responds to the requirement to provide further details regarding the basis on which SPP's industry expert panel would decide not to recommend to the SPP Board the bid with the highest score, including how such a decision will be made in a transparent manner. SPP explains that the industry expert panel may recommend that a bid be excluded from consideration due to a low score in one category. SPP states that such a situation could arise if a proposal is deficient in one particular evaluation category so that the industry expert panel questions whether the bidder would be able to achieve the functions for the specific project that the evaluation category is designed to address. SPP states that it has adopted detailed qualification criteria that each Qualified Request for Proposals Participant is required to satisfy but that does not mean that every Qualified Request for Proposals Participant will be financially and technically capable to design, construct, own, operate, and maintain every Competitive Upgrade that SPP puts out for bid. Thus, SPP contends, the informed discretion of the industry expert panel to reject bids that score low in one category helps protect consumers.<sup>462</sup>

220. SPP asserts that, by design, the industry expert panel is comprised of individuals with expertise in various areas relevant to evaluating bids. SPP contends that the industry expert panel's independence further ensures that its judgments will be rendered on a non-discriminatory basis and the industry expert panel is required to publish a report outlining its recommendations and reasoning, thus ensuring transparency in the selection process. In addition, SPP states that the industry expert panel's decision is only a recommendation; the SPP Board makes the final decision on each Competitive Upgrade and will have access to the information that the industry expert panel had (except for the identity of the Request for Proposals respondents) through the industry expert panel report. The SPP Board, also an independent entity, may then choose to reject the industry expert panel's recommendation to disqualify a bid that scores low in one category. SPP claims that these two levels of independent review ensure non-discriminatory decision-

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P 179 (quoting Order No. 1000-A, 139 FERC ¶ 61,132 at P 454)).

<sup>461</sup> *Id.* at 13-14 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 179).

<sup>462</sup> *Id.* at 28-29.

making and that the industry expert panel reports (publically available in redacted form) and the open meeting requirement for the SPP Board ensure transparency.<sup>463</sup>

221. Furthermore, SPP notes that it has proposed a process in its OATT for selecting a Designated Transmission Owner if all bids are disqualified.<sup>464</sup> Specifically, if the SPP Board accepts an industry expert panel recommendation that results in the disqualification of all bids from consideration, SPP proposes to reevaluate the transmission project to determine whether to resubmit it to a second Transmission Owner Selection Process, to modify and resubmit it to the Transmission Owner Selection Process, or to cancel it.<sup>465</sup> However, if the transmission project has become a “Short-Term Reliability Project” due to the delay resulting from the unsuccessful Transmission Owner Selection Process, SPP proposes to designate the project as a Short-Term Reliability Project and follow the process applicable to such projects.<sup>466</sup> If after resubmitting a transmission project for a second Transmission Owner Selection Process all bids have again been disqualified, SPP proposes to assign the project to the incumbent Transmission Owner, which SPP contends is consistent with Commission precedent.<sup>467</sup>

222. With respect to SPP’s proposed requirement that a transmission developer provide to SPP a firm capital commitment that is sufficient to complete the Competitive Upgrade for which it has accepted the responsibilities of being a Designated Transmission Owner, SPP proposes six alternative methods to provide the necessary sufficient firm capital commitment, including: (i) a binding commitment letter from lenders and/or equity providers; (ii) cash held in escrow; (iii) a performance and payment bond; (iv) a surety

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<sup>463</sup> *Id.* at 29.

<sup>464</sup> *Id.* (citing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.d.vii).

<sup>465</sup> *Id.* (citing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.d.vii.a.2).

<sup>466</sup> *Id.* (citing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.d.vii.a.1).

<sup>467</sup> *Id.* at 29-30 (citing *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 243 (2013) (finding that PJM’s proposal to assign a transmission project to an incumbent transmission owner after determining that none of the submitted proposals is a more efficient or cost-effective solution “complies with Order No. 1000 because, at that point, both incumbent and nonincumbent transmission developers will have had an opportunity to submit proposals to address the identified need”); *see also* SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.d.vii.b.

bond; (v) existing balance sheet liquidity; or (vi) demonstrated history of ability to obtain adequate capital to support the project.<sup>468</sup> SPP contends that its Finance Committee<sup>469</sup> has determined that each of these alternatives individually provides an adequate method for demonstrating that a winning bidder has access to sufficient capital to ensure it has the financial capability to finish the project without it being unduly onerous.<sup>470</sup> Furthermore, SPP contends that, by allowing several different reasonable alternatives for demonstrating capital commitment, each winning bidder is afforded flexibility in demonstrating its firm capital commitment in a way that best fits its circumstances. Finally, SPP notes that the requirement to demonstrate a capital commitment applies to all winning bidders, incumbents and nonincumbents alike.<sup>471</sup>

### iii. Protests/Comments

223. LS Power contends that SPP has neither revised its proposed scoring system nor explained and justified the scoring system proposed in SPP's initial compliance filing. LS Power states that SPP has failed to provide quantitative evidence to support its proposal and instead only repeats rhetorical assertions made in SPP's initial compliance filing.<sup>472</sup> Furthermore, LS Power asserts that, while SPP has claimed that each of the point categories have cost-related components, SPP does not respond to the Commission's direction to explain how it can quantify the cost impact of such components. LS Power maintains that, if there is no cost or savings associated with a selection criterion, "there is no connection between the [] evaluation of the selection criteria and tangible benefit to ratepayers from either an efficiency or cost perspective."<sup>473</sup> Rather, LS Power avers that, to the extent that costs may be quantified in any category, they should be evaluated as part of the rate impact criterion. LS Power concludes that SPP's proposal fails to appropriately focus on ratepayer costs, and that costs should be quantified as 75 percent of the total evaluation. Moreover, LS Power asserts that all other

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<sup>468</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.d.xii.2.

<sup>469</sup> SPP's Finance Committee is made up of two representatives from the SPP Board, two transmission owner representatives, and two non-transmission owner representatives. Southwest Power Pool, Inc., Bylaws, First Revised Volume No. 4 Bylaws § 6.5.

<sup>470</sup> SPP Transmittal at 30-31.

<sup>471</sup> *Id.* at 31.

<sup>472</sup> *See* LS Power Protest at 8-9.

<sup>473</sup> *Id.* at 9 (citing LS Power, Motion to Lodge Gates-Gregg Project Sponsor Selection Report, Docket No. ER13-103-003, at 19 (filed Dec. 10, 2013)).

criteria, which should be weighted at a combined 25 percent, should be awarded in full to qualified entities unless there is a deduction due to an articulated deficiency.<sup>474</sup>

224. NextEra states that SPP's proposed weighting of costs and other factors in the Transmission Owner Selection Process lacks detail, arguing that SPP has only provided a general explanation for each category. NextEra contends that compliance with the Commission's directive in the First Compliance Order requires further details of how the scoring within each metric is determined. NextEra avers that any consideration of cost in the categories other than rate analysis will be subjective, at best, because the metrics are not expressly cost-based.<sup>475</sup> Further, NextEra states that the key reason for Order No. 1000's elimination of the right of first refusal, and the subsequent creation of competitive solicitations for transmission development, was to obtain cost savings in transmission construction by eliminating practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective alternatives to regional transmission needs.<sup>476</sup> Thus, NextEra concludes that 225 points for cost is too low, and when implementing a competitive solicitation process, the objectives of Order No. 1000 suggest assigning greater weight to cost items than to other metrics. NextEra suggests that SPP give the rate analysis metric a 50 percent weight (500 points) in the overall evaluation and reduce the weighting of the other four metrics on a proportional basis.<sup>477</sup>

225. Xcel supports SPP's proposed 1000 "base points" because they will assist in identifying more efficient or cost-effective solutions to identified transmission needs in the SPP region in an objective manner.<sup>478</sup> Xcel contends that the point system will result in the most points awarded to the transmission project that contains the characteristics of more efficient and cost-effective transmission development, operation, and maintenance over the life of the project. Xcel states that the key advantage to the point system is that it assesses the characteristics of a Request for Proposal response that relate to the actual cost of a transmission project, including indirect costs that flow over the long life of a transmission asset, not only construction costs.<sup>479</sup> For example, Xcel states that such

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<sup>474</sup> *Id.* at 9-10.

<sup>475</sup> NextEra Protest at 4.

<sup>476</sup> *Id.* at 4-5 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 43, 226).

<sup>477</sup> *Id.* at 6.

<sup>478</sup> Xcel Protest at 12-13.

<sup>479</sup> *Id.* at 13.

indirect costs of a transmission asset may result from project development delays, from poor maintenance that leads to a lack of reliability, or from poor engineering design that reduces the life expectancy of an asset. Xcel concludes that the proposed point system is not overly weighted towards any one component and, thus, encourages Request for Proposals respondents to compete in every area of transmission system development.<sup>480</sup>

226. However, Xcel argues that the Commission should reject the possible 100 “incentive points” as not justified by SPP and inconsistent with the requirements of Order No. 1000.<sup>481</sup> Xcel contends that incentive points are not necessary to accomplish SPP’s goals of encouraging stakeholders to share their ideas and expertise and to promote innovation and creativity in the transmission planning process. Xcel states that SPP has no reason to believe that a potential transmission developer would be less likely to propose a transmission project without such points being available. Xcel believes that, if a transmission developer is seeking to develop a transmission project, the lack of incentive points will not prevent that developer from proposing the project or lead the developer to propose less innovative or creative projects.<sup>482</sup> Furthermore, Xcel is concerned that ratepayers could bear increased costs when the incentive points are awarded to a bid that ends up being selected over another bid that would otherwise have better characteristics according to the base points.<sup>483</sup> Finally, Xcel avers that the SPP’s proposed incentive points are contrary to the Commission’s determination in Order No. 1000, which rejects the concept of sponsorship rights for sponsors whose transmission projects are selected in the regional transmission plan for purposes of cost allocation.<sup>484</sup> While Xcel acknowledges that SPP’s proposal is not a strict sponsorship model because the Request for Proposals respondent that receives the incentive points is not granted a right to develop that transmission project, Xcel contends that the result is the same in that the incentive points provide a major advantage to respondents originally proposing a project. Xcel is concerned that the incentive points would be sufficient to allow a Request for Proposal respondent with the incentive points to be selected over a transmission project that is superior in all five base point criteria. Xcel states that SPP

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<sup>480</sup> *Id.* at 14-15.

<sup>481</sup> *Id.* at 15.

<sup>482</sup> *Id.* at 16.

<sup>483</sup> *Id.*

<sup>484</sup> *Id.* at 16-17 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 340; Order No. 1000-A, 139 FERC ¶ 61,132 at P 456).

has not explained how the Commission's determination with respect to sponsorship rights should be different here than it was in Order No. 1000.<sup>485</sup>

227. Duke-American contends that SPP has not adequately explained its proposal to retain the provision in its OATT that allows the industry expert panel to reject a transmission developer with the highest score in the Transmission Owner Selection Process and that the Commission should thus reject it. Duke-American first explains that SPP has not described how the points will be awarded within each point category. Thus, Duke-American believes there will not be sufficient transparency for stakeholders to understand how points are awarded in each category. Moreover, Duke-American and LS Power observe that SPP never explains whether there is any basis for the industry expert panel to choose not to accept a bid with the highest score other than if it has a low score in one category.<sup>486</sup> Duke-American concludes that, because any other basis for rejecting a highest scoring bid has not been established, the industry expert panel's decision will lack transparency and may discourage transmission developers from participating in the process.<sup>487</sup> Similarly, LS Power requests that SPP confirm that a single low-point category is the *only* instance in which the industry expert panel could fail to recommend the highest scoring bid.<sup>488</sup>

228. Even with the above clarification, LS Power is concerned that the provision allowing the industry expert panel to reject a high-scoring bid has the potential to be used improperly and should be rejected. LS Power contends that it is illogical to presume that, under the proposed scoring system, an entity that scores so low in one category as to warrant disqualification could have the overall highest point total. LS Power states that to make such an argument is to acknowledge that SPP's current proposal is flawed. Rather, LS Power states that SPP's arguments are availing only if the scoring system advocated by LS Power (75 percent cost weighting) is used. Moreover, LS Power argues that SPP's perceived need for a failsafe to avoid designating a transmission project to an incapable developer is alleviated by SPP's robust qualification process. LS Power requests that the Commission reject the industry expert panel's ability to disqualify bidders and, if necessary, allow such an action only by the SPP Board.<sup>489</sup>

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<sup>485</sup> *Id.* at 17.

<sup>486</sup> Duke-American Protest at 3-4; LS Power Protest at 14.

<sup>487</sup> Duke-American Protest at 3-4.

<sup>488</sup> LS Power Protest at 14.

<sup>489</sup> *Id.* at 14-15.

229. While NextEra recognizes that expertise in acquiring rights-of-way in a cost-effective manner is an important determinant in the evaluation process, NextEra believes it is duplicative and inappropriate for SPP to have included right-of-way ownership, control, or acquisition in two separate criteria of the Transmission Owner Selection Process. With regard to the project management category, NextEra contends that SPP has not justified how ownership or control of a right-of-way can measure expertise in implementing transmission projects. NextEra states that such an addition appears to advantage incumbent transmission owners by arbitrarily adding points to a proposal.<sup>490</sup> Moreover, NextEra and Duke-American both observe that the consideration of such factors appears to disadvantage nonincumbent transmission developers because such entities cannot own, control, or acquire rights-of-way without first being awarded a transmission project.<sup>491</sup> NextEra contends that, as a result, a nonincumbent transmission developer would likely never be awarded points in this sub-category.<sup>492</sup> Duke-American is further concerned that such circumstances could result in a low score in the project management category as a whole, which could allow the industry expert panel to disqualify a bid entirely, along with all other nonincumbent proposals for transmission projects wholly or partially located in a state with a right of first refusal. Duke-American, therefore, suggests that SPP either remove the new language relating to rights-of-way and state law or eliminate entirely the industry expert panel's ability to disqualify a proposal with a low score in one category.<sup>493</sup> NextEra concludes that consideration of rights-of-way should be removed from the project management category.<sup>494</sup>

230. With regard to the rate analysis metric, NextEra does not object to the consideration of right-of-way ownership, control, or acquisition. However, NextEra is concerned that, as drafted, the rate analysis metric could result in turning an objective metric into a subjective metric. Therefore, NextEra recommends that SPP modify the right-of-way sub-category in the rate analysis section to specify "costs of" material on hand, assets on hand, or rights-of-way ownership, control, or acquisition.<sup>495</sup>

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<sup>490</sup> NextEra Protest at 7.

<sup>491</sup> *Id.* at 7, Duke-American Protest at 6.

<sup>492</sup> NextEra Protest at 7.

<sup>493</sup> *See* Duke-American Protest at 6.

<sup>494</sup> NextEra Protest at 7.

<sup>495</sup> *Id.* at 8.

231. Duke-American is concerned that references to state law in the project management category are duplicative because they are covered by subsections that account for a Request for Proposals respondent's plan to obtain state authorization and whether it has a right of first refusal under relevant law for the Competitive Upgrade.<sup>496</sup> Duke-American argues that, by having repetitive subsections in this category, SPP will be able to award more points to an incumbent transmission owner in this category because it will qualify for points in two sub-categories on the same basis. Thus, Duke-American recommends that the Commission require SPP to combine these subsections or provide more detail on how points will be awarded in a nondiscriminatory manner.<sup>497</sup> Similarly, Duke-American contends that the language regarding "ownership, control" is redundant.<sup>498</sup> For example, Duke-American argues that an incumbent transmission owner would be advantaged if points are awarded for ownership, control, *and* acquired rights-of-way. Duke-American claims that an incumbent transmission owner might have already accomplished all three tasks, while a nonincumbent transmission developer might receive less points because it has only accomplished one or two tasks, even if those two are sufficient for transmission development purposes. Duke-American concludes that, at a minimum, SPP should be required to explain how points will be awarded in this category to avoid discrimination between incumbent transmission owners and nonincumbent transmission developers.<sup>499</sup>

232. LS Power contends that the criterion to consider a Request for Proposals respondent's plan to obtain state authorization to construct transmission facilities, which SPP intends to add to the project management category, is vague in how it will be implemented. LS Power asserts that the Commission should consider the inclusion of this criterion as an effort to exclude nonincumbent transmission developers' proposals. LS Power concludes that such state-related provisions have no place in a federal OATT

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<sup>496</sup> Duke-American Protest at 6 (citing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, §§ III.2.f.iii.2.i-j).

<sup>497</sup> *Id.*

<sup>498</sup> *Id.* (referencing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.f.iii.2.b (providing that the project management category includes consideration of "rights-of-way ownership, control, or acquisition") and § III.2.f.iii.4.g (providing that the rate analysis category will consider "material on hand, assets on hand, or, rights-of-way ownership, control, or acquisition"))).

<sup>499</sup> *Id.* at 6-7.

and argues that states should be required to exclude nonincumbent transmission developers in their own orders and not rely on SPP's evaluation process to do.<sup>500</sup>

233. LS Power is also concerned about the addition of a criterion to the project management category that allows consideration of whether a Request for Proposals respondent has a right of first refusal granted under the relevant law for a particular Competitive Upgrade. LS Power states that this criterion is outside the scope of a federal evaluation and will allow the industry expert panel to disqualify transmission developers based on their conclusions regarding the relevant state law. Moreover, LS Power contends that the relevant state laws should not be considered a "strength" and allowing such consideration inappropriately encourages states to institute rights of first refusal. Thus, LS Power argues that the existence of a state right of first refusal should not be part of the federal Transmission Owner Selection Process.<sup>501</sup>

234. LS Power also objects to SPP's proposal that the Designated Transmission Owner will forfeit its deposit and any accrued interest if it fails to reach the 50 percent completion milestone. LS Power argues that a deposit should not be lost when the Designated Transmission Owner fails to complete 50 percent of the transmission project due to circumstances outside the control of the Designated Transmission Owner. Therefore, LS Power suggests revisions to SPP's OATT to allow for the return of the deposit amount, plus accrued interest, if a transmission project is delayed due to circumstances outside the control of the Designated Transmission Owner, such as (1) the requirements and limitations of applicable law, government regulations, and orders (including, but not limited to, the inability to obtain any necessary federal, state, or local siting, construction, and operating permits), (2) the inability to acquire the necessary rights-of-way, and (3) the inability to recover pursuant to appropriate financing arrangements and tariffs or contracts all reasonably incurred costs and a reasonable rate of return.<sup>502</sup>

235. LS Power contends that the requirement that a Designated Transmission Owner, within seven calendar days of receiving notice, "sign any necessary agreements to assume all of the responsibilities of a Transmission Owner pursuant to the SPP Membership Agreement" is impermissibly vague. LS Power requests that SPP clarify which agreements must be signed and that SPP be required to file any such *pro forma* agreements if they are not already on file. Further, LS Power asks SPP to clarify that the

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<sup>500</sup> LS Power Protest at 10-11.

<sup>501</sup> *Id.* 11-12.

<sup>502</sup> *Id.* at 5-7.

execution of such agreements applies to incumbent transmission owners and nonincumbent transmission developers alike.<sup>503</sup>

**iv. Answer**

236. With regard to its proposed evaluation criteria point system weightings, SPP states that the First Compliance Order was clear that SPP could either revise its point system or further explain how its proposal is just and reasonable and complies with the requirements of Order No. 1000. SPP contends that, in its Second Compliance Filing, it explained how each of the proposed evaluation categories measures the relative efficiency and cost-effectiveness of a bid throughout the lifecycle of the Competitive Upgrade and demonstrated that the criteria weightings are just and reasonable. SPP states that it agrees that cost considerations are key to determining whether a proposal is more efficient or cost-effective and that such considerations are a part of both the Integrated Transmission Plan process and the Transmission Owner Selection Process. SPP states that cost considerations are considered across the lifecycle of the project in the Transmission Owner Selection Process through the different point criteria and all of the point categories are related to project cost. SPP avers that both efficiency and cost-effectiveness are the focus of the requirements of Order No. 1000 and that protestors inappropriately focus exclusively on whether the Transmission Owner Selection Process will select the lowest cost proposal, based on imprecise cost estimates, rather than taking a broader perspective.<sup>504</sup> SPP contends that neither LS Power nor NextEra offers a demonstration of how picking the lowest bid translates to picking the more efficient or cost-effective project.<sup>505</sup>

237. SPP contends that, contrary to LS Power's and NextEra's assertion that SPP has failed to justify its points system, it has provided detailed explanations and examples of how all five evaluation categories affect the ultimate cost to consumers and how each category addresses efficiency and cost-effectiveness. SPP argues that LS Power's focus on selecting the lowest cost bid addresses neither efficiency nor cost-effectiveness. SPP contends that a focus on only cost at the exclusion of other factors will only ensure that the lowest cost project will win regardless of whether it is actually the more efficient or cost-effective solution. SPP responds to NextEra's statement that cost only reflects 20 percent or 22.5 percent of the overall scoring by explaining that, in its Second Compliance Filing, it demonstrated that all of the categories evaluate the ultimate cost paid by consumer. SPP states that, specifically, the operations category is the most

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<sup>503</sup> *Id.* at 12-13.

<sup>504</sup> SPP Answer at 8-10.

<sup>505</sup> *Id.* at 13.

important for ensuring that a project is more efficient or cost-effective because it reflects the ability of the bidder to operate and maintain the completed facility in a reliable and efficient manner for the long life of the asset.<sup>506</sup>

238. SPP explains that the rate analysis category represents the bidders estimate of a project's cost over its lifespan. SPP states that, even assuming best efforts, such estimates are inherently inaccurate and subject to change, which may be caused by many factors, not all of which will be under the bidder's control. SPP states that uncertainty in cost estimates and cost increases over the course of a project are mitigated by the evaluation categories other than rate analysis, which, in addition to evaluating a cost estimate, assess the bidder's ability to design, develop, operate, and maintain the facility. SPP states that all of these factors are given roughly equal weight. SPP explains that costs related to a project other than the cost of construction and ownership are not captured by the rate analysis category. According to SPP, other significant costs, in the form of compromised reliability, increased congestion, greater and more frequent need for costly generation redispatch, and the need for replacement facilities, can result from a poorly designed, constructed, maintained, or operated project.<sup>507</sup> SPP argues that LS Power's and Next Era's approach would ignore this fuller consideration of lifecycle costs and lead to unjust and unreasonable rates. SPP contends that its proposal will appropriately consider both short-term and long-term costs of a Competitive Upgrade.<sup>508</sup>

239. SPP disagrees with Duke-American's assertion that the inclusion of state regulatory and right-of-way considerations in the evaluation process favors incumbents or poses a significant disadvantage to non-incumbent transmission developers. SPP explains that the criteria addressing rights-of-way and plans to obtain state regulatory approvals apply equally to incumbent transmission owners and nonincumbent transmission developers and that the criterion addressing rights of first refusal applies only in jurisdictions where such laws have been adopted. SPP concludes that, therefore, Duke-American's concerns that the addition of these criteria could significantly affect the 200 points that could be awarded for the project management category and that a new developer that is not an incumbent would always be at a disadvantage in this project management category are unfounded.<sup>509</sup>

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<sup>506</sup> *Id.* at 10-12.

<sup>507</sup> *Id.* at 13.

<sup>508</sup> *Id.* at 12-13.

<sup>509</sup> *Id.* at 16-17.

240. SPP argues that Duke-American also incorrectly characterizes subsections (i) (plan to obtain regulatory authorizations) and (j) (right of first refusal under relevant law) of the project management category as repetitive. SPP explains that these criteria assess different aspects of a Request for Proposal: one assesses the proponent's plan to obtain necessary regulatory authorizations; the other assesses whether the entity has a legal right of first refusal under relevant law. SPP contends that Duke-American's similar confusion with respect to the right-of-way criterion can be rectified. SPP states that, as drafted, the criterion assesses the bidder's right-of-way ownership, control, or acquisition, which means that an entity does not need to demonstrate that it actually owns or controls rights-of-way to receive points.<sup>510</sup>

241. SPP disagrees with LS Power's criticism of the criterion evaluating a Request for Proposal respondent's plan to obtain state authorization. SPP claims that LS Power fails to explain how ignoring state law, which Order No. 1000 recognizes is a relevant consideration in the regional planning process, will result in more efficient or cost-effective transmission planning and development.<sup>511</sup> SPP adds that, contrary to LS Power's suggestion, there is no basis in the plain language of the criterion for the industry expert panel to award points in a discriminatory manner. SPP explains that the industry expert panel will award points based on the "[Request for Proposal] respondent's *plan* to obtain authorizations to construction transmission facilities in the state(s) in which the Competitive Upgrade will be located."<sup>512</sup> SPP contends that LS Power's concern that the industry expert panel will lack the qualification to evaluate state laws is misplaced because the industry expert panel is not called upon to interpret state law; it will evaluate a respondent's plan to obtain state approvals. SPP states that, by definition, the industry expert panel must include an industry expert with electric transmission project management and construction expertise, which included experience in regulatory proceedings. SPP asserts that LS Power would like SPP to ignore the role of the state regulatory process, contrary to both Order No. 1000 and the First Compliance Order.<sup>513</sup>

242. SPP also argues that LS Power incorrectly opposes the evaluation criterion related to state right of first refusal statutes. SPP states that the Commission permitted SPP to

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<sup>510</sup> *Id.* at 17.

<sup>511</sup> *Id.* at 17-18.

<sup>512</sup> *Id.* at 18 (quoting SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.f.iii.2.i) (emphasis added by SPP).

<sup>513</sup> *Id.* at 18-19 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 171, 179, 229).

include criteria related to the state law regulatory process in its evaluation process.<sup>514</sup> SPP contends that LS Power's unsubstantiated beliefs that this criterion (1) is outside the scope of a federal evaluation and (2) should be outside the scope of a particular strength that an incumbent or nonincumbent transmission developer can highlight because it introduces an inappropriate matter are contrary to the plain words of the First Compliance Order and Order No. 1000.<sup>515</sup> SPP disagrees with LS Power's claim that the Commission should reject the state law criterion because parties lobbied for certain state laws when the Commission's mandate is to ensure just and reasonable rates, not encourage or discourage political behavior in the state legislative or regulatory arena.<sup>516</sup> SPP notes that, as an independent RTO, it is not authorized to dictate what positions its members or stakeholders may take in any legislative or regulatory environment.

243. SPP argues that NextEra's protest of the inclusion of rights-of-way considerations in the evaluation criteria misinterprets the First Compliance Order.<sup>517</sup> SPP indicates that the Commission accepted the rights-of-way criteria in the First Compliance Order. SPP explains that, in the Second Compliance Filing, it retained these criteria within these categories, merely providing clarifying edits that were designed to ensure that the industry expert panel could take into consideration an entity's ownership, control, or plan to acquire necessary rights-of-way. Therefore, SPP argues that NextEra's request to remove the rights-of-way criteria is a collateral attack on the First Compliance Order.<sup>518</sup>

244. With regard to the discretion afforded to the industry expert panel, SPP clarifies that the industry expert panel's ability to disqualify a bid refers to the process set forth in its OATT that allows the industry expert panel to choose not to recommend the highest scoring bid or to eliminate a project from consideration. SPP states that, in these instances, the industry expert panel will find that the low score in a certain category results in the bid not being more efficient or cost-effective. SPP states that it has addressed Duke-American's and LS Power's concerns by establishing that the only instance in which the industry expert panel could make such a determination is when there is a low score in any one category. SPP contends that this discretion is appropriate

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<sup>514</sup> *Id.* at 19 (citing First Compliance Order, 144 FERC ¶ 61,059 at PP 179, 229).

<sup>515</sup> SPP Answer at 19-20.

<sup>516</sup> *Id.* at 20 n.75.

<sup>517</sup> *Id.* at 20.

<sup>518</sup> *Id.* at 20-21.

and ensures that overall efficiency and cost-effectiveness are not compromised in service to an overly rigid application of the point system.<sup>519</sup>

245. SPP argues that LS Power's concerns that any rejection of the highest point total should be a result of action only by the SPP Board is unfounded because the SPP Board makes the ultimate decision to select a winning bid and an alternate. SPP adds that LS Power incorrectly suggest that the qualification criteria are sufficient to address concerns about project specific capabilities of bidders.<sup>520</sup> SPP notes that the Commission recognized that "repetition in the qualification and evaluation criteria is necessary because the qualification process allows a potential transmission developer to demonstrate in general that it has the financial and technical expertise to construct, own and operate transmission facilities while the evaluation process is geared toward the specific transmission facility."<sup>521</sup> SPP emphasizes that the qualification process, points system, and the industry expert panel's assessment work together to promote efficiency and cost-effectiveness.

246. SPP also argues that several of the protests to its Second Compliance Filing represent collateral attacks on the First Compliance Order.<sup>522</sup> Among others, SPP contends that Xcel incorrectly asserts that the 100 incentive points provide a bidder who proposed a project and receives the incentive points with sponsorship rights for that project. SPP clarifies that the incentive points encourage the submission of creative transmission proposals, consistent with the focus of Order No. 1000.<sup>523</sup> Moreover, SPP contends that Xcel incorrectly quotes Order No. 1000 as it relates to sponsorship rights and the sponsorship model.<sup>524</sup> SPP argues that, to the contrary, the Commission has accepted compliance proposals that include sponsorship rights.<sup>525</sup>

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<sup>519</sup> *Id.* at 23.

<sup>520</sup> *Id.* at 23-24.

<sup>521</sup> *Id.* at 24 (quoting First Compliance Order, 144 FERC ¶ 61,059 at P 286).

<sup>522</sup> *Id.* at 27-28.

<sup>523</sup> *Id.* at 29.

<sup>524</sup> *Id.* at 29-30 (citing Xcel Protest at 17; Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 338).

<sup>525</sup> *Id.* at 30 (citing *PJM Interconnection, LLC*, 142 FERC ¶ 61,214 at PP 21, 193 & n.348).

247. Similarly, SPP avers that LS Power collaterally attacks the First Compliance Order by challenging several aspects of SPP's Second Compliance Filing that were accepted in the First Compliance Order. For example, SPP points to LS Power's criticism of the cash deposit requirements for a Designated Transmission Owner, which SPP states was proposed in the First Compliance Filing and accepted in the First Compliance Order.<sup>526</sup> SPP argues that LS Power has also improperly taken issue with the requirement on a winning bidder to "sign any necessary agreements" to become the Designated Transmission Owner for a Competitive Upgrade.<sup>527</sup> SPP states that the language in question was also accepted in the First Compliance Order.<sup>528</sup> SPP adds that LS Power's concerns are unfounded because the provision applies equally to incumbent transmission owners and nonincumbent transmission developers.<sup>529</sup>

**v. Commission Determination**

248. We find that the provisions in SPP's Second Compliance Filing addressing the evaluation of proposed transmission facilities partially comply with the directives in the First Compliance Order. We find that SPP has justified the points system and the weightings of each evaluation category in the proposed Transmission Owner Selection Process. Furthermore, SPP has explained what basis the industry expert panel would use if it were not to recommend to the SPP Board a bid with the highest score, has detailed how such a decision will be made in a transparent manner, and has added to its OATT provisions that describe what happens should all bids be excluded on the basis of low scores in one or more categories. SPP has also clarified in its OATT what is expected, in terms of demonstration of access to capital, when a transmission developer is accepting responsibilities as a Designated Transmission Owner. These proposed revisions comply with the Commission's directives.

249. However, we agree with NextEra's concern that, as drafted, the rate analysis metric SPP proposed is not sufficiently specific. In particular, the rate analysis metric states that the Industry Expert Panel will consider "material on hand, assets on hand, or, rights-of-way ownership, control, or acquisition." However, SPP's proposed revisions do not specify that such consideration as part of the rate analysis will be limited to the value of such assets. We agree that, in the rate analysis metric, a quantitative consideration is

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<sup>526</sup> *Id.* at 30-31 (citing LS Power Protest at 5; First Compliance Order, 144 FERC ¶ 61,059 at PP 254 n.522, 296, 288, 297).

<sup>527</sup> *Id.* at 31 (quoting LS Power Protest at 12-13).

<sup>528</sup> *Id.* at 31-32 (citing First Compliance Order, 144 FERC ¶ 61,059 at P 254).

<sup>529</sup> *Id.* at 32.

appropriately made up of only cost-based, quantifiable metrics. Accordingly, we direct SPP to submit, within 60 days of the date of issuance of this order, a further compliance filing to revise its OATT to specify that the Industry Expert Panel will only consider the quantitative cost impact of material on hand, assets on hand, and rights-of-way ownership, control, or acquisition when evaluating a bid under the rate analysis category.

250. With regard to NextEra and LS Power's assertion that SPP's proposed Transmission Owner Selection Process considers cost as an inappropriately small proportion of the point system, we find that SPP has shown that reliance on factors other than those referring explicitly to transmission project costs will reasonably allow SPP to select the appropriate transmission developer for each Competitive Upgrade.<sup>530</sup> In Order No. 1000, the Commission stated that the criteria that public utility transmission providers use to evaluate and select among competing transmission solutions and resources must consider "the relative efficiency and cost-effectiveness of [any proposed transmission] solution."<sup>531</sup> The same evaluation should occur when choosing a transmission developer to develop a specific transmission facility that SPP already selected in the regional transmission plan for purposes of cost allocation. We find that SPP's proposal meets this requirement.

251. In its first Order No. 1000 compliance filing, SPP proposed a competitive bidding process that requires SPP to, collectively with stakeholders, identify transmission projects that are selected in the regional transmission plan for purposes of cost allocation prior to SPP selecting a transmission developer to build the transmission project. SPP's Integrated Transmission Planning Manual states that during the SPP Integrated Transmission Planning Process an analysis will be performed that will focus upon both cost-effectiveness and robustness. SPP states further that an evaluation of robustness involves a different perspective than does the cost-effectiveness analysis. Robustness includes an evaluation of changes to cost-effective transmission plans for flexibility as well as incremental costs and benefits.<sup>532</sup> Moreover, SPP reviews cost estimates of identified potential transmission projects with stakeholders as part of the process to identify and select the preferred transmission solution to an identified need. This is consistent with the process described in section 2.1.5 (Planning Activities) of the SPP

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<sup>530</sup> We note that SPP's Integrated Transmission Planning process has also been accepted by the Commission as a process that is designed to select Competitive Upgrades that are the more efficient or cost-effective transmission solutions to regional transmission needs.

<sup>531</sup> Order No. 1000, FERC Stats & Regs. ¶ 31,323 at P 331 n.307.

<sup>532</sup> SPP Integrated Transmission Planning Manual at 9, available at <http://www.spp.org/section.asp?pageID=129>.

Membership Agreement, which states that SPP's planning "shall seek to minimize costs, consistent with the reliability and other requirements set forth in this Agreement."<sup>533</sup> We agree with SPP that its Integrated Transmission Planning process that identifies the transmission solutions to recommend to the SPP Board for approval has as a central tenet the identification of the most cost-effective transmission projects.<sup>534</sup> Therefore the process results in SPP identifying the more efficient or cost-effective solution to an identified need prior to SPP soliciting bids for the approved transmission project. As such, by the time SPP evaluates the bids, SPP has already identified and the SPP Board has approved the transmission project while taking into account, among other things, the cost of proposed transmission solutions. Thus, SPP solicits bids from transmission developers only after stakeholders have vetted, and the SPP Board has approved, the more efficient or cost-effective transmission project.

252. On balance, we find that SPP has shown that, while the costs transmission developers include in their bids may vary based on, for example, the type of equipment used to build the selected transmission facility, equal emphasis on factors other than those referring explicitly to transmission project costs will allow SPP to select the appropriate transmission developer for each transmission facility that has been found to be the more efficient or cost-effective solution to regional transmission needs. In Order No. 1000, the Commission stated that the criteria that public utility transmission providers use to evaluate and select among competing transmission solutions and resources must consider "the relative efficiency and cost-effectiveness of [any proposed transmission] solution."<sup>535</sup> The same evaluation should occur when choosing a transmission developer to develop a specific transmission facility that SPP already selected in the regional transmission plan for purposes of cost allocation and we find that SPP's proposal meets this requirement.

253. While the rate analysis criterion itself is only given a 225 point percent weighting in SPP's evaluation, SPP's consideration of all five criteria together will allow SPP to select the most efficient or cost-effective bid. As SPP has explained in its filing, each of its proposed evaluation criteria are designed to assess and ensure efficiency and cost-effectiveness.<sup>536</sup> We agree with SPP that, as described, every evaluation category is directly related to determining whether a bid in the Transmission Owner Selection

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<sup>533</sup> SPP Membership Agreement, § 2.1.5.

<sup>534</sup> See SPP, OATT, Sixth Revised Volume No. 1, Attachment O §§ III.3.c, III.4.c, III.8.d, & III.8.h.

<sup>535</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 331 n.307.

<sup>536</sup> SPP Transmittal at 26-28.

Process is the more efficient or cost-effective option to developing a Competitive Upgrade. Consideration of these factors will allow SPP to evaluate, for example, whether a transmission developer is likely to avoid major cost overruns during project implementation (as in the project management criterion) or to efficiently maintain the project over its lifetime (as in the operations criterion). Thus, we find that, contrary to NextEra and LS Power's claim, SPP has supported the 225 point weighting of the rate impact evaluation criterion.

254. Regarding SPP's proposal to include 100 incentive points in addition to the 1000 base points, we disagree with Xcel that such points are inconsistent with the requirements of Order No. 1000. We agree with SPP that the additional 100 points provide an incentive for stakeholders to share their ideas and expertise to promote innovation and creativity in the transmission planning process.<sup>537</sup> Furthermore, we find that a potential transmission developer will be more likely to propose a transmission project if such points are available in the case that the proposed transmission project is selected in the regional transmission plan for purposes of cost allocation. We also disagree with Xcel that the availability of incentive points will necessarily increase costs to ratepayers. Though the awarding of 100 incentive points to Request for Proposals respondents who qualify for them may affect the entity ultimately selected as the Designated Transmission Owner, on balance, 100 points make up a relatively small fraction of the overall points available and provide the benefit of supporting a transmission planning process that is more innovative. Lastly, we disagree with Xcel that the incentive points creates *de facto* sponsorship rights. We find that the availability of incentive points establishes no guarantee that a Request for Proposals respondent that originally proposed a transmission project will be selected as the Designated Transmission Owner.

255. We disagree with the protests of LS Power and Duke-American regarding SPP's justification of the provisions that allow the Industry Expert Panel to reject a bid by a Request for Proposals respondent due to a low score in an evaluation category. We agree with SPP that there may be instances in which a bid should be excluded from consideration because that bid is so deficient in one or more categories that the Industry Expert Panel would appropriately determine that the Request for Proposals respondent would be technically or financially unable to construct, own, or operate the Competitive Upgrade in question. Thus, we find it unnecessary for SPP to define further the circumstances under which the Industry Expert Panel may reject a bid because doing so could impede the Industry Expert Panel's ability to exercise its judgment in the process of evaluating bids. Similarly, with regards to Duke-American's request that the Commission require SPP to describe how points will be awarded within each evaluation

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<sup>537</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.f.ii.

category, we find that such detail was not required by Order No. 1000. Furthermore, we find that establishing such prescriptive OATT language here could hamper the Industry Expert Panel's ability to exercise expert judgment in the process of establishing the number of points to be awarded to a bid in each evaluation category. Finally, as a whole and at this time, we find concerns about lack of transparency and potential for undue discrimination on the part of the Industry Expert Panel and its recommendations unfounded. Specifically, recommendations of the Industry Expert Panel will be both independent and transparent, reports will be issued and opportunities will be provided for stakeholder input, and these will be reviewed and acted upon by the SPP Board, which is an independent entity.

256. In response to the directives in the First Compliance Filing related to references to state laws and regulations and rights-of-way (and for which we grant rehearing), SPP proposes new or revised provisions that require the industry expert panel, during the evaluation process, to consider: (1) rights of way ownership and control;<sup>538</sup> (2) plans to obtain authorization in the state(s) in which the Competitive upgrade will be located;<sup>539</sup> and (3) any right of first refusal granted under relevant law for the Competitive Upgrade.<sup>540</sup> Given our decision to grant rehearing of the directives that prompted these proposed changes, we find that these revisions are moot. Accordingly, we direct SPP to submit, within 60 days of the date of issuance of this order, a further compliance filing to delete the proposed provisions in Attachment Y sections III.2.f.iii.2.b, III.2.f.iii.4.g, III.2.f.iii.2.i, and III.2.f.iii.2.j<sup>541</sup> and to restore the revised provision in Attachment Y section III.2.f.iii.4.g.<sup>542</sup> Furthermore, because these elements of SPP's proposal have been rendered moot, we will not address Duke-American's, NextEra's, and LS Power's protests related to these portions of the Second Compliance Filing.

257. With regard to LS Power's objection to SPP's proposal that the Designated Transmission Owner will forfeit its deposit and any accrued interest if it fails to reach the 50 percent completion milestone, we find that, in the First Compliance Order, the

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<sup>538</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, §§ III.2.f.iii.2.b. The existing provision would require the industry expert panel to consider only rights-of-way acquisition.

<sup>539</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.f.iii.2.i.

<sup>540</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.f.iii.2.j.

<sup>541</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, §§ III.2.f.iii.2.b, III.2.f.iii.4.g, III.2.f.iii.2.i, and III.2.f.iii.2.j.

<sup>542</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.f.iii.4.g.

Commission did not require any changes to this provision of SPP's OATT. Similarly, as for LS Power's request that SPP clarify which agreements a Designated Transmission Owner must sign to assume the responsibilities of a Transmission Owner pursuant to the SPP Membership Agreement, we also find that the Commission did not require any changes to this provision of SPP's OATT as part of the First Compliance Order. Thus, we find that LS Power's protests with regard to these provisions of SPP's OATT are outside the scope of this proceeding and, therefore, reject them.

e. **Reevaluation Process for Transmission Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation**

258. To ensure the incumbent transmission provider can meet its reliability needs or service obligations, Order No. 1000 required each public utility transmission provider to amend its OATT to describe the circumstances and procedures for reevaluating the regional transmission plan to determine if alternative transmission solutions must be evaluated as a result of delays in the development of a transmission facility selected in a regional transmission plan for purposes of cost allocation.<sup>543</sup> If an evaluation of alternatives is needed, the regional transmission planning process must allow the incumbent transmission provider to propose solutions that it would implement within its retail distribution service territory or footprint, and if that solution is a transmission facility, then the proposed transmission facility should be evaluated for possible selection in the regional transmission plan for purposes of cost allocation.<sup>544</sup>

i. **First Compliance Order**

259. In the First Compliance Order, the Commission found SPP's proposal to reevaluate transmission projects partially complied with the requirements of Order No. 1000. With regard to the evaluation of alternatives, the Commission found that the provisions in SPP's filing reasonably established the circumstances and procedures under which SPP will designate a new transmission developer for a reevaluated transmission project. The Commission found it reasonable that, time permitting, this reevaluation process allows the incumbent transmission owner to bid to construct the transmission project in a new Transmission Owner Selection Process.<sup>545</sup> Furthermore, noting that Order No. 1000 allows, but does not require, a public utility transmission provider to

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<sup>543</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 263, 329, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 477.

<sup>544</sup> *Id.* P 329.

<sup>545</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 306.

include cost containment provisions in its compliance filing, the Commission accepted SPP's proposal to include consideration of cost in its reevaluation criteria and rejected requests by protestors to require SPP to include more detailed provisions relating to the reevaluation process.<sup>546</sup>

260. However, to fully comply with the requirements of Order No. 1000, the Commission found that SPP's OATT must list the circumstances and procedures under which reevaluation will take place. Therefore, the Commission directed SPP to revise its OATT to include a list of the factors that SPP will consider in determining whether a transmission project selected in the regional transmission plan for purposes of cost allocation is significantly delayed to provide transparency and ensure that stakeholders are aware of these factors.<sup>547</sup> Additionally, the Commission found that, although SPP clarified that a project reevaluation will be triggered if the cost of a transmission project exceeds an established bandwidth, SPP's OATT does not reflect this clarification. Thus, the Commission directed SPP to revise its OATT to reflect its clarification concerning the bandwidth, though SPP could retain flexibility by citing to the current bandwidth in its Business Practice Manuals by reference rather than establishing an exact bandwidth in its OATT.<sup>548</sup>

**ii. Summary of Compliance Filing**

261. SPP proposes to add language to its OATT to set forth the factors that SPP will consider in determining whether a transmission project selected in the regional transmission plan for purposes of cost allocation is significantly delayed.<sup>549</sup> Specifically, SPP proposes language stating that SPP will consider factors including, but not limited to, the need date, construction time, necessity for long-lead equipment, and permitting schedules. SPP contends that, by including this language, it complies with the Commission's directive in the First Compliance Order.<sup>550</sup>

262. In addition, SPP proposes language in its OATT that states that, if at any time the cost projection for a transmission project varies from the estimated baseline cost by more

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<sup>546</sup> *Id.* P 308.

<sup>547</sup> *Id.* P 307.

<sup>548</sup> *Id.* P 308.

<sup>549</sup> SPP Transmittal at 31-32 (citing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § VI.4).

<sup>550</sup> *Id.*

than the bandwidth defined by SPP in its business practices, then SPP will investigate the reason for the change in cost. SPP states that its proposed language indicates that SPP will then report its findings to the SPP Board along with its recommendation whether or not to accept the change in cost and reset the baseline cost.<sup>551</sup> SPP avers that, by including in its OATT a reference to the bandwidth defined in its business practices, it has complied with the Commission's directive in the First Compliance Order.<sup>552</sup>

### iii. Commission Determination

263. We find that SPP's proposal concerning the reevaluation of the regional transmission plan complies with the directives in the First Compliance Order. We find that SPP has revised its OATT to list the circumstances and procedures under which reevaluation will take place, as directed. Furthermore, SPP has revised its OATT to reflect its clarification that it has established a cost bandwidth for projects and that reevaluation will be triggered if the cost of a transmission project exceeds the bandwidth, as directed.

## 4. Cost Allocation

264. Order No. 1000 required each public utility transmission provider to have in its OATT a method, or set of methods, for allocating the costs of any new transmission facility selected in the regional transmission plan for purposes of cost allocation.<sup>553</sup> Each public utility transmission provider must demonstrate that its cost allocation method satisfies six regional cost allocation principles.<sup>554</sup> In addition, while Order No. 1000 permitted participant funding, participant funding cannot be the regional cost allocation method.<sup>555</sup>

265. Regional Cost Allocation Principle 1 requires that the cost of transmission facilities be allocated to those within the transmission planning region that benefit from those facilities in a manner that is at least roughly commensurate with estimated benefits. The cost allocation methods must clearly and definitively specify identifiable benefits

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<sup>551</sup> *Id.* at 32 (citing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § VI.3).

<sup>552</sup> *Id.* at 32.

<sup>553</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 558, 690.

<sup>554</sup> *Id.* P 603.

<sup>555</sup> *Id.* P 723.

and the class of beneficiaries, and the transmission facility costs allocated must be roughly commensurate with that benefit.<sup>556</sup>

266. Regional Cost Allocation Principle 2 requires that those that receive no benefit from transmission facilities, either at present or in a likely future scenario, not be involuntarily allocated any of the costs of those transmission facilities.<sup>557</sup>

267. Regional Cost Allocation Principle 3 specifies that, if a benefit to cost threshold is used to determine which transmission facilities have sufficient net benefits to be selected in a regional transmission plan for the purpose of cost allocation, the threshold must not be so high that transmission facilities with significant positive net benefits are excluded from cost allocation. Such a threshold may not include a ratio of benefits to costs that exceeds 1.25 unless the transmission planning region or public utility transmission provider justifies, and the Commission approves, a higher ratio.<sup>558</sup>

268. Regional Cost Allocation Principle 4 specifies that the regional cost allocation methods must allocate costs solely within that transmission planning region unless another entity outside the region or another transmission planning region voluntarily agrees to assume a portion of those costs. In addition, each regional transmission planning process must identify consequences for other transmission planning regions, such as upgrades that may be required in another region and, if the original region agrees to bear costs associated with such upgrades, then the original region's cost allocation method or methods must include provisions for allocating the costs of the upgrades among the beneficiaries in the original region.<sup>559</sup>

269. Regional Cost Allocation Principle 5 specifies that the cost allocation method and data requirements for determining benefits and identifying beneficiaries for a transmission facility must be transparent with adequate documentation to allow a stakeholder to determine how they were applied to a proposed transmission facility.<sup>560</sup>

270. Regional Cost Allocation Principle 6 specifies that a transmission planning region may choose to use a different cost allocation method for different types of transmission

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<sup>556</sup> *Id.* PP 625; Order No. 1000-A, 139 FERC ¶ 61,132 at P 678.

<sup>557</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 637.

<sup>558</sup> *Id.* P 646.

<sup>559</sup> *Id.* P 657.

<sup>560</sup> *Id.* P 668.

facilities in the regional transmission plan, but there can be only one cost allocation method for each type of transmission facility.<sup>561</sup> If a transmission planning region chooses to use a different cost allocation method for different types of transmission facilities, each cost allocation method must be determined in advance for each type of facility.<sup>562</sup> A regional cost allocation method may include voting requirements for identified beneficiaries to vote on proposed transmission facilities.<sup>563</sup>

**i. First Compliance Order**

271. In the First Compliance Order, the Commission found that SPP's Balanced Portfolio<sup>564</sup> and Highway/Byway<sup>565</sup> regional cost allocation methods, which the Commission has previously approved, partially complied with the six regional cost allocation principles of Order No. 1000. Specifically, the Commission stated that these methods: (1) allocate costs in a manner that is at least roughly commensurate with estimated benefits; (2) do not involuntarily allocate costs to those who receive no benefits; (3) include clearly defined benefit-to-cost thresholds that do not exceed 1.25; (4) allocate costs solely within the affected transmission planning region; (5) provide for

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<sup>561</sup> *Id.* PP 685-686.

<sup>562</sup> *Id.* P 560.

<sup>563</sup> *Id.* P 689.

<sup>564</sup> A Balanced Portfolio is a group or portfolio of extra-high voltage transmission upgrades that provides economic benefits across the SPP region; the costs of the upgrades included in a Balanced Portfolio are allocated on a 100 percent region-wide postage stamp basis. *See generally Sw. Power Pool, Inc.*, 125 FERC ¶ 61,054 (2008), *order on reh'g*, 127 FERC ¶ 61,271 (2009), *order on reh'g*, 137 FERC ¶ 61,227 (2011).

<sup>565</sup> Under SPP's Highway/Byway cost allocation method, the cost of Base Plan Upgrades are allocated as follows: (1) projects at or above 300 kV: 100 percent on a regional postage-stamp basis (Highway facilities); (2) projects 100-300 kV: 1/3 on a regional post-stamp basis, 2/3 zonally (Byway facilities); and (3) projects at or below 100 kV: 100 percent to the zone in which the project is located. For Base Plan Upgrades that are associated with designated resources that are wind generation resources where the upgrade is located in a different zone than the point of delivery, the Highway/Byway cost allocation method prescribes: (1) projects at or above 300 kV: 100 percent on a regional postage-stamp basis; and (2) projects operating at less than 300 kV (including those operating at or below 100 kV): 2/3 on a regional post-stamp basis, 1/3 directly to the transmission customer. *See Highway/Byway Order*, 131 FERC ¶ 61,252, *order on reh'g*, 137 FERC ¶ 61,075.

methods for determining benefits and beneficiaries that are transparent with adequate documentation to allow a stakeholder to determine how they were applied to a proposed transmission facility; and (6) represent different cost allocation methods for different types of facilities that are set out clearly and explained in detail.<sup>566</sup>

272. However, the Commission found that SPP's OATT did not provide for identification of the consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation for other transmission planning regions, such as upgrades that may be required in another region, as required by Cost Allocation Principle 4. The Commission also found that SPP did not address whether the SPP region agreed to bear the costs associated with any required upgrades in another transmission planning region or, if so, how such costs would be allocated within the SPP transmission planning region. Therefore, the Commission directed SPP to file a further compliance filing to (1) revise its OATT to provide for identification of the consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation for other planning regions; and (2) address whether the SPP region has agreed to bear the costs associated with any required upgrades in another transmission planning region and, if so, how such costs will be allocated within the SPP transmission planning region.<sup>567</sup>

## ii. Summary of Compliance Filing

273. In the Second Compliance Filing, SPP proposes several revisions to Attachment O of the OATT to address the Commission's directives. First, SPP proposes to add language to clarify that SPP's transmission expansion plan will identify whether any approved Competitive Upgrades (i.e., transmission facilities selected in the regional transmission plan for purposes of cost allocation) cause reliability violations on adjacent neighboring transmission systems.<sup>568</sup>

274. Second, SPP proposes a new section in its OATT to further clarify that SPP "will determine, based on its planning model, whether a proposed Competitive Upgrade causes any reliability violations on the transmission system of an adjacent transmission planning

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<sup>566</sup> First Compliance Order, 144 FERC ¶ 61,059 at P 347.

<sup>567</sup> *Id.* P 355.

<sup>568</sup> See SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § V (introductory paragraph).

region” and that SPP will “identify any such violations as part of the transmission planning process that identified the Competitive Upgrade.”<sup>569</sup>

275. Finally, the proposed section also provides that, where SPP has identified through its planning models reliability violations on transmission systems in adjacent transmission planning regions caused by a proposed Competitive Upgrade, SPP shall not pay any cost for any upgrade or system modification necessary to mitigate or resolve any such violation on an adjacent transmission system, unless otherwise provided for in the OATT or in an agreement between SPP and the adjacent transmission system.<sup>570</sup> SPP notes that the “unless otherwise provided” language is intended to address situations in which SPP and a neighboring region have agreed to approve an interregional transmission facility pursuant to SPP’s Order No. 1000 interregional compliance requirement or in which SPP and a neighbor have executed a joint operating agreement or other agreement to share the costs of transmission facilities.<sup>571</sup> In addition, SPP’s proposed section provides that a listing of any reliability violations on a transmission system of an adjacent transmission planning region in the SPP transmission expansion plan does not constitute any agreement on the part of SPP or its stakeholders to pay any such cost.<sup>572</sup>

### iii. Commission Determination

276. We find that SPP’s proposed revisions to its regional cost allocation provisions comply with the Commission’s directives in the First Compliance Order. SPP’s revisions clarify that its transmission expansion plan will identify whether any approved Competitive Upgrades (i.e., transmission facilities selected in the regional transmission plan for purposes of cost allocation) cause reliability violations on adjacent neighboring transmission systems and that SPP will not pay any upgrade costs necessary to mitigate or resolve such a violation. SPP has added language stipulating that it will not pay for any such upgrades on neighboring systems unless otherwise provided for in the OATT or in an agreement between SPP and the adjacent system. Further, SPP proposes language that a listing of any reliability violations on a transmission system of an adjacent transmission planning region in the SPP transmission expansion plan does not constitute any agreement on the part of SPP or its stakeholders to pay any such costs. We find that this language complies with the Commission’s directive in the First Compliance Order

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<sup>569</sup> *See id.* § V.7.

<sup>570</sup> *See id.*

<sup>571</sup> SPP Transmittal at 33 n.155.

<sup>572</sup> *See* SPP, OATT, Sixth Revised Volume No. 1, Attachment O, § V.7.

that SPP revise its OATT to provide for identification of the consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation for other planning regions and address whether the SPP region has agreed to bear the costs associated with any required upgrades in another transmission planning region.

The Commission orders:

(A) The requests for rehearing are hereby granted in part and denied in part, as discussed in the body of this order.

(B) SPP's compliance filings are hereby accepted in part, subject to further compliance filings, as discussed in the body of this order.

(C) Xcel's compliance filing is hereby accepted, as discussed in the body of this order.

(D) SPP is hereby directed to submit a further compliance filing, within 60 days of the date of issuance of this order, as discussed in the body of this order.

By the Commission. Commissioner Clark is dissenting in part with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.	Docket Nos.	ER13-366-001 ER13-366-002 ER13-366-003 ER13-367-001
Public Service Company of Colorado		ER13-75-002 ER13-75-004
Kansas City Power & Light Company		ER13-100-001

(Issued October 16, 2014)

CLARK, Commissioner, *dissenting in part*:

I support the decision in today's order to allow SPP to recognize state and local laws and regulations, but dissent from the finding requiring SPP to eliminate its federal right of first refusal (ROFR) for Byway facilities (operating above 100 kV and below 300 kV). As stated previously,<sup>1</sup> I do not believe transmission providers should be forced to remove federal ROFRs in every instance where regional cost allocation is applied.

In the 2010 order accepting the Highway/Byway cost allocation methodology, the Commission evaluated a power flow analysis of the SPP region and found compelling evidence that Highway facilities (300 kV and above) provide significantly greater support to regional power flows than lower voltage facilities, including Byway facilities.<sup>2</sup> The Commission used this analysis, including the assessment that Byway facilities are used "more locally," to approve SPP's cost allocation methodology.<sup>3</sup>

While the Commission continues to uphold SPP's Highway/Byway cost allocation

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<sup>1</sup> See *Southwest Power Pool, Inc.*, 144 FERC ¶ 61,059 (2013) (Clark, Comm'r, dissenting in part).

<sup>2</sup> *Southwest Power Pool, Inc.*, 131 FERC ¶ 61,252 (2010) at P 73.

<sup>3</sup> *Id.* at P 78 ("[B]y 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. [Highway] facilities that are used more regionally will be allocated on a regional basis, and lower voltage facilities that are used more locally will be allocated on a local basis.").

methodology, it refuses to acknowledge the local nature of Byway facilities in a way that allows for flexibility on the federal ROFR. This approach oversimplifies transmission planning and creates perverse incentives<sup>4</sup> for RTOs trying to capture the efficiencies that Order No. 1000 once promised.<sup>5</sup>

For these reasons, I respectfully dissent in part from this order.

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Tony Clark  
Commissioner

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<sup>4</sup> *See Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215, at P 518 (2013). *See also Southwest Power Pool, Inc.*, 144 FERC ¶ 61,059 (2013) (Clark, Comm'r, dissenting in part, noting MISO's elimination of regional cost allocation for Baseline Reliability Projects so as to retain a federal ROFR for such projects).

<sup>5</sup> *See* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 2.