

138 FERC ¶ 61,055
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Midwest Independent Transmission
System Operator, Inc.

Docket No. EL11-34-001

ORDER ON REHEARING

(Issued January 26, 2012)

1. In this order, we deny requests for rehearing or clarification of the Commission's July 1, 2011 order¹ in this proceeding that have been filed by Southwest Power Pool, Inc. (SPP), Nebraska Public Power District (NPPD), the East Texas Cooperatives,² Omaha Public Power District (OPPD), Kansas City Power & Light Company, and KCP&L Greater Missouri Operations Company (together, KCP&L), Sunflower Electric Power Corporation and Mid-Kansas Electric Company, LLC (together, Sunflower), and Xcel Energy Services, Inc. (Xcel Energy).³

I. Background

2. In the July 1 Order, the Commission granted a petition for declaratory order (Petition) filed by Midwest Independent Transmission System Operator, Inc. (MISO). As requested by MISO, the Commission confirmed that the terms of the Joint Operating

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 136 FERC ¶ 61,010 (2011) (July 1 Order).

² The East Texas Cooperatives are comprised of East Texas Electric Cooperative, Inc., Northeast Texas Electric Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc.

³ Xcel Energy Services Inc. filed on behalf of itself and on behalf of its utility operating company affiliates Northern States Power Company, a Minnesota corporation, Northern States Power Company, a Wisconsin corporation, and Southwestern Public Service Company.

Agreement in effect between SPP and MISO (SPP JOA), regarding the sharing of transmission capacity on a common path, as set forth in section 5.2 of the SPP JOA, will remain in effect and applicable to Entergy Arkansas, Inc. (Entergy Arkansas), an operating utility subsidiary of Entergy Corporation (Entergy), in the event Entergy Arkansas becomes a transmission-owning member of MISO.⁴

3. In 2005, Entergy Arkansas filed a notice to terminate its participation in the Entergy System Agreement (ESA) effective December 2013, and in February 2010, the Arkansas Public Service Commission (Arkansas Commission) initiated a proceeding to manage the process of choosing a successor arrangement to the ESA for Entergy Arkansas.⁵ On May 12, 2011, Entergy Arkansas filed with the Arkansas Commission a report evaluating the available options and recommending participation in MISO as the preferred option.

4. During discussions among SPP, MISO, Entergy and Entergy's retail regulators of the various options,⁶ an issue arose involving the SPP JOA.⁷ Specifically, MISO was asked to confirm the availability of transmission path sharing under section 5.2 of the SPP JOA in the event that Entergy Arkansas chooses, or is directed by the Arkansas Commission, to join MISO. MISO's counsel prepared a legal analysis of section 5.2 of the SPP JOA which concluded, *ceteris paribus*, that "the transmission-sharing provisions

⁴ Section 5.2 of the SPP JOA states as follows:

Sharing Contract Path Capacity. If the Parties have contract paths to the same entity, the combined contract path capacity will be made available for use by both Parties. This will not create new contract paths for either Party that did not previously exist. SPP will not be able to deal directly with companies with which it does not physically or contractually interconnect and the [MISO] will not be able to deal directly with companies with which it does not physically or contractually interconnect.

⁵ July 1 Order, 136 FERC ¶ 61,010 at P 2.

⁶ In December 2009, Entergy's retail regulators formed the Entergy Regional State Committee.

⁷ SPP and MISO entered into the SPP JOA as part of SPP's application to become a Regional Transmission Organization (RTO). See *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110, at P 63 (2004) (requiring SPP to have on file with the Commission a seams agreement with MISO and to participate in the Joint and Common Market with MISO and PJM Interconnection, LLC (PJM)).

of [s]ection 5.2 would be applicable to the Entergy interconnection after Entergy becomes a [MISO] Transmission Owner and should be interpreted to allow [MISO] to utilize the combined transmission capacity of the existing SPP interconnections with Entergy and [MISO].”⁸

5. SPP challenged MISO’s interpretation of section 5.2 and concluded that, in the event Entergy Arkansas becomes a MISO Transmission Owner, MISO would not be able to rely on the contract path sharing provisions of section 5.2 to use capacity on the SPP transmission system in order to integrate Entergy Arkansas into MISO. Among other objections, SPP asserted that expiration of the interconnection agreement in 2013 would eliminate the only high voltage ties between MISO and Entergy,⁹ and that MISO is limited to transmission capacity on flowgates based on its use of the regional systems as of April 1, 2004.

6. To resolve the dispute about the interpretation of the JOA, MISO filed the Petition with the Commission. In the July 1 Order, the Commission granted the Petition, finding that section 5.2 of the SPP JOA allows for the sharing of available transmission capacity between MISO and Entergy Arkansas and SPP and Entergy Arkansas in the event that Entergy Arkansas becomes a transmission-owning member of MISO.¹⁰

7. The Commission rejected SPP’s and other protesters’ argument that the term “entity” in section 5.2 applies only to entities that are not members of either SPP or MISO (that is, third-party entities). Agreeing with MISO, the Commission found that the use of the term “entity” in section 5.2 of the SPP JOA is sufficiently broad to encompass

⁸ The Entergy transmission system has 41 direct interconnections with the SPP transmission system capable of transferring up to 14,100 MW of power. The SPP transmission system is also interconnected with the transmission facilities of two MISO transmission owners with a total interconnection capacity of approximately 6,900 MW. Petition at 8.

⁹ Entergy Arkansas, Ameren Corporation (Ameren), and Associated Electric Cooperative, Inc. are parties to an interconnection agreement under which they share the capacity of the 500/345 kV transformers on a high-voltage interconnection (Interchange Agreement). The direct contiguous tie capability between Entergy Arkansas and Ameren is approximately 1,000 MW of the 1,500 MW total capability of the interconnection.

¹⁰ The Commission rejected various arguments raised by intervenors as beyond the scope of the proceeding, including the potential impacts of Entergy joining MISO and hypothetical scenarios that may or may not occur at any given time (i.e., the termination of the Interchange Agreement, or Ameren’s withdrawal from MISO).

Entergy Arkansas, regardless of whether it is a member of MISO, SPP, or neither. In this regard, the Commission noted that, although the term “entity” is not defined in the SPP JOA, certain defined terms in the SPP JOA use the word “entity” to refer to companies that are members of SPP or MISO. Therefore, the Commission found that SPP’s and other protesters’ interpretation of the term “entity” in section 5.2 is unsupported by the terms of the SPP JOA.¹¹

8. The Commission also rejected SPP’s argument that MISO cannot have a “contract path” with one of its own members. The Commission stated that there was no reason why MISO could not have a “contract path” with Entergy Arkansas if Entergy Arkansas becomes a transmission-owning member of MISO, or why SPP would no longer have “contract paths” with Entergy Arkansas simply by virtue of Entergy Arkansas joining MISO. The Commission noted that the term “contract path” is not defined in the SPP JOA; however, the Commission determined that the context of section 5.2 and how it has been used by MISO and SPP suggests that the term was intended to encompass transmission capacity on physical or contractual interconnections – not just the narrow “point-to-point” transmission service definition advanced by SPP.¹²

9. The Commission also agreed with MISO’s argument that the language in section 5.2 provides for the use of available transmission capacity on common paths, when the entities using that capacity are transmission-owning members of either RTO, is consistent with the course of performance of the parties to the SPP JOA.¹³ The Commission explained that, in 2009, section 5.2 was used by MISO to share capacity with SPP in order to serve Ameren’s load located radially off the Entergy transmission system.¹⁴ Since both MISO and SPP have interconnections with Ameren, a transmission-owning member of MISO, the Commission determined that section 5.2 applied and MISO was

¹¹ July 1 Order, 136 FERC ¶ 61,010 at P 61.

¹² *Id.* P 62.

¹³ The Commission also observed that MISO’s interpretation is consistent with the course of performance of the parties to the PJM Joint Operating Agreement (PJM JOA), noting, in this regard, MISO’s statements concerning the course of performance under section 6.5 of the PJM JOA, which was the basis for section 5.2 of the SPP JOA. *See id.* P 63, n.112.

¹⁴ *Id.* P 63.

able to use SPP's available transmission capacity through SPP's transmission system and Entergy's transmission system to serve Ameren's load.¹⁵

10. However, while the Commission found that section 5.2 permitted the shared use of available transmission capacity, the Commission also acknowledged SPP's statement that the SPP JOA should be renegotiated pursuant to section 3.1 of the SPP JOA. The Commission noted that MISO and SPP have an obligation to negotiate in good faith in response to revisions (including deleting, adding, or revising requirements or protocols) either MISO or SPP may propose.¹⁶ The Commission also made other findings not challenged on rehearing.

II. Requests for Rehearing

11. Requests for rehearing and/or clarification were filed by SPP, NPPD, the East Texas Cooperatives, OPPD, KCP&L, Sunflower, and Xcel Energy. MISO filed a limited answer to requests for clarification and Entergy filed an answer to requests for clarification.

III. Discussion

A. Procedural Matters

12. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2011) prohibits answers to requests for rehearing. Although parties have styled their pleadings as requests for clarification, we find them to be requests for rehearing and, on that basis, reject the answers pursuant to Rule 713(d).

B. Substantive Matters

13. Certain of the intervenors in the proceeding below have requested rehearing or, alternatively, clarification of the July 1 Order. As discussed below, we deny rehearing or clarification of the July 1 Order.

¹⁵ *Id.*

¹⁶ *Id.* P 64.

1. Interpretation of Section 5.2

a. Requests for Rehearing

14. SPP, OPPD, East Texas Cooperatives, and Sunflower argue that the Commission erred by failing to interpret the term “contract path” in section 5.2 of the SPP JOA in a manner consistent with common industry usage of words. SPP and OPPD argue that recent precedent indicates that the Commission should have relied on the common industry usage of “contract path.”¹⁷ East Texas Cooperatives argue that the term “contract path” has the well-understood and universal meaning within the electric industry as the conceptual path electricity takes flowing from a specified point of delivery to the specified point of receipt and that the Commission has previously utilized this meaning in its orders.¹⁸ East Texas Cooperatives note that the Commission has previously stated that “point-to-point service consists of a contract-path with a designated point of receipt and point of delivery.”¹⁹ East Texas Cooperatives argue that, in contrast to point-to-point service to which the term “contract path” is typically applied, MISO will rely on network service to coordinate the dispatch of power to MISO’s members and to Entergy Arkansas should it join MISO.²⁰ Similarly, SPP, OPPD, and NPPD argue that the Commission has found that network service “has no identified contract path” and MISO cannot have a contract path to itself.²¹ NPPD also argues that the Commission’s

¹⁷ OPPD Rehearing Request at 3 (citing *Colorado Interstate Gas Co. v. FERC*, 599 F.3d 698 (D.C. Cir. 2010)).

¹⁸ East Texas Cooperatives Rehearing Request at 3.

¹⁹ *Id.* at 3-4 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 1612, *order on reh’g*, Order No 890-A, FERC Stats. & Regs., Regs. ¶ 31,261 (2007), *order on reh’g and clarifications*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)).

²⁰ *Id.* at 4.

²¹ NPPD Rehearing Request at 3; OPPD Rehearing Request at 2-3 and SPP Rehearing Request at 5-6 (both citing Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 1612, *order on reh’g*, Order No 890-A, 2006-2007 FERC Stats. & Regs., Regs. ¶ 31,261, *order on reh’g and clarifications*, Order No. 890-B, 123 FERC ¶ 61,299, *order on reh’g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126).

holding that MISO can have a contract path to one of its own transmission owning-members is contrary to the common meaning of the term “contract path” as used in section 5.2 of the SPP JOA, and that the context of section 5 of the SPP JOA supports the conclusion that the sharing of contract path capacity, by its terms, refers to point-to-point transmission service.²² SPP argues that, once Entergy Arkansas joins MISO, SPP and MISO will not have contract paths to Entergy Arkansas because all of SPP’s existing paths to Entergy Arkansas will become paths “to” MISO and there will be no SPP contract path capacity to Entergy Arkansas for SPP to share under section 5.2. SPP argues that “[t]he Commission must consider ‘all relevant course of dealing and usage [of trade] evidence’ before determining whether an agreement contains ambiguities, because ‘evidence of course of dealing and usage of trade is admissible to permit analysis of the written agreement in the proper commercial setting.’”²³ SPP argues that “[e]ven when a contract is unambiguous, it may be appropriate to turn to one common form of extrinsic evidence of trade practice and custom.”²⁴

15. SPP further argues that the Commission’s interpretation of “contract path” also lacks foundation because the Commission only relies on the context of section 5.2 and how it has been used.²⁵ SPP contends that the Commission “erroneously cited language designed to limit the scope of section 5.2 to expand its scope to include never-before contemplated uses of SPP’s system.”²⁶ SPP states that the Commission quoted language from section 5.2 that restricts its usage by requiring that section 5.2 “will not create new contract paths for either Party that did not previously exist” and that SPP and MISO “will not be able to deal directly with companies with which it does not physically or contractually interconnect.”²⁷ SPP argues that it is clear that the purpose of these two clauses is to narrow the application of section 5.2. SPP also argues that the Commission ignored the fact that section 5.2 of the SPP JOA is located in Article 5, Available Flowgate Capability Calculations, which provides for the coordinated exchange of data

²² NPPD Rehearing Request at 3.

²³ SPP Rehearing Request at 13 (citing *Chase Manhattan Bank v. First Marion Bank*, 437 F.2d 1040, 1047 (5th Cir. 1971)).

²⁴ *Id.* (citing *TEG-Paradigm Envtl., Inc. v. US*, 465 F.3d 1329, 1338 (Fed. Cir. 2006) (citing *Hunt Constr. Group, Inc. v. US*, 281 F.3d 1369, 1373 (Fed. Cir. 2002))).

²⁵ *Id.* at 7.

²⁶ *Id.*

²⁷ *Id.* (citing SPP JOA § 5.2; July 1 Order, 136 FERC ¶ 61,010 at P 62).

that enables MISO and SPP to know how much capacity is available for selling point-to-point transmission service.²⁸ Finally, SPP argues that the Commission found SPP's position "unsupported," despite an affidavit describing SPP's intent regarding section 5.2²⁹ and SPP's detailed discussion of the common industry usage of the term "contract path" as used by the North American Electric Reliability Council, the North American Energy Standards Board, MISO and the Commission. SPP argues that none of this evidence was addressed by the Commission.³⁰

16. SPP, OPPD and Sunflower also argue that the Commission erred by misstating and miscomprehending the single past use of section 5.2 of the SPP JOA, thereby erroneously finding that MISO's interpretation of the SPP JOA is consistent with the course of performance of the parties. OPPD states that the Commission's description of the historical instance mistakenly implies that SPP allowed MISO to use SPP's contract path to Ameren, an internal MISO operating entity. SPP and OPPD argue that, to the contrary, SPP allowed MISO to use SPP's contract path to Entergy Arkansas, a third party that was not part of the MISO operating system. OPPD argues that section 5.2 of the SPP JOA was not and has never been used to deliver MISO energy to an internal MISO load. SPP argues that it did not have "interconnections with" the Ameren load. SPP argues that the lone application of section 5.2 supports SPP's interpretation of the SPP JOA – that it was intended for use in reaching third party systems – and that it provides no support to MISO and the Commission's interpretation.³¹

²⁸ *Id.* at 8.

²⁹ SPP Rehearing Request at 10, 13 (citing SPP Protest, Exhibit A, Affidavit of Carl A. Monroe at PP 12-19 ("At the time, we had internal discussion at SPP about the words used in section 5.2, and we believed that its reference to "contract paths" from MISO and SPP to other entities was a reference to the ability to conduct point-to-point transmission transactions to and from third party systems that were not a part of either MISO or SPP."); *id.* P 17 "SPP does not recall any conversations with MISO that indicated that MISO intended this provision to enable a party's market to use the other party's transmission capacity to reach the internal loads of a distant member that lacked adequate interconnections with the market.")).

³⁰ *Id.* at 10.

³¹ *Id.* at 9.

17. Finally, SPP argues that, if the Commission cannot interpret the plain language of the SPP JOA to be consistent with common industry usage of “contract path,” it should set for hearing the parties’ intentions regarding their use of the term “contract path.”³²

b. Commission Determination

18. As we stated in the July 1 Order, we find that the context of section 5.2 and how the provision has been used provide a reasonable basis for the Commission’s determination that “contract path,” in this context, is sufficiently broad to encompass a physical or contractual interconnection capacity.

19. As the July 1 Order notes, the term “contract path” is not defined in the SPP JOA.³³ Therefore, the Commission looked to the context of the provision and how it had been used by the parties to the SPP JOA to arrive at the conclusion that section 5.2 could apply to Entergy Arkansas if Entergy Arkansas joins MISO.³⁴ We further note that section 5.2 uses the term “contract path,” as distinguished from the term “contract.” Section 5.2 does not require that either MISO or SPP have a transmission service agreement in place in order for section 5.2 to apply, but merely that there be a “contract path.” This distinction is notable, when read in context with the last two sentences of section 5.2. Although, as SPP suggests, those sentences arguably aim to limit application of the provision, they also specifically contemplate SPP or MISO dealing with companies with which they either physically or contractually interconnect. If section 5.2 were only to apply to companies with which both SPP and MISO have point-to-point contract paths, there would be no need to refer to “physical” interconnection in section 5.2. Therefore, we affirm that the context of section 5.2 supports our interpretation here.

20. In addition to the context of section 5.2, the Commission relied on how that section has been used, i.e., the course of performance under section 5.2. Although SPP, OPPD, and Sunflower argue that the Commission mischaracterized the parties’ prior use of section 5.2,³⁵ it has not been refuted that MISO used section 5.2 in order to serve

³² SPP Rehearing Request at 4, 12.

³³ July 1 Order, 136 FERC ¶ 61,010 at P 62.

³⁴ *Id.* P 62-63.

³⁵ Although SPP argues that it does not have interconnections with Ameren’s radial load off the Entergy Arkansas system, we note that KCP&L, a member of SPP, has a 345 kV interconnection with Ameren at Sibley-Ameren Overton line, two 161 kV interconnections with Ameren at the Excelsior Springs-Carrollton line, and the Moberly-Salisbury line, and a 69 kV interconnection with Ameren at Lafrenz substation.

Ameren's network load. Although the use of section 5.2 in that instance required use of SPP's path to Ameren through SPP and across Entergy Arkansas, it was still used to provide transmission service to Ameren, an internal MISO operating member. We further note that the circumstances surrounding this application of section 5.2, to aid in transmission service to a MISO member, is not surprising given that the bulk of transmission service over RTOs is network service to RTO members. It is reasonable to infer that a contract provision between two RTOs would serve to benefit the members of the RTOs, and not only to benefit non-member third parties as SPP suggests.

21. Several parties argue that the Commission should have looked to other extrinsic evidence in interpreting the meaning of "contract path," such as past Commission uses of the term, MISO usage of the term, or industry manuals. Although usage of trade is one form of evidence that the Commission may consider when interpreting a contract or tariff, we decline to do so here. Unlike *Colorado Interstate Gas Company*,³⁶ which OPPD cited in its rehearing request, where the tariff language did not help resolve an ambiguity, here, the context of the contract provision and course of performance of the parties were available to aid in the Commission's interpretation. In interpreting contract or tariff language, the law generally favors examination of express terms of a contract and course of performance, over usage of trade.³⁷ The law applicable to the SPP JOA also favors examination of express terms and course of performance over usage of trade evidence. Section 18.9 of the SPP JOA provides that the SPP JOA shall be interpreted, construed and governed by the applicable federal law and the laws of the state of Delaware without giving effect to its conflict of law principles.³⁸ We note that the Delaware Code is consistent with the order of preference in the Restatement (Second) of

³⁶ *Colorado Interstate Gas Co. v. Federal Energy Regulatory Comm'n*, 599 F.3d 698 (D.C. Cir. 2010).

³⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981). The Restatement (Second) of Contracts provides a generally applicable order of preference for evidence reviewed in interpreting contracts. Section 203(b) of the Restatement (Second) of Contracts provides that express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given great weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade. *Id.* § 203(b).

³⁸ In construing an agreement, the Commission must apply the choice of law selected by the parties, in this case, Delaware law. See *So. Cal. Edison Co. v. Federal Energy Regulatory Commission*, 502 F.3d 176, 182 (2007) (directing the Commission to apply California law, as selected by the parties in the choice of law provision, to govern the construction of terms of an agreement).

Contracts.³⁹ Consistent with Delaware law, the Commission properly examined the express terms of the contract and the course of performance of the parties.

22. Similarly, the Commission appropriately declines to consider course of dealing evidence in these circumstances. The Delaware Code defines “course of dealing” as “a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.”⁴⁰

23. The affidavit submitted by SPP is arguably course of dealing evidence. SPP’s affidavit avers that, at the time the SPP JOA was negotiated, SPP believed that the reference in section 5.2 to “contract paths” from MISO and SPP to other “entities” was intended only to apply to point-to-point transmission transactions to and from third-party systems, that is, entities that are not a part of either MISO or SPP. However, other evidence submitted by MISO refutes SPP’s affidavit, suggesting that at the time the SPP JOA was negotiated, both MISO and SPP knew that the capacity sharing provision in section 5.2 was identical to section 6.5 of the PJM JOA, which has been used to serve members of MISO and PJM, and not just third parties (i.e., non-members of MISO or PJM). Thus, even if we were to consider course of dealing evidence, which we decline to do, such evidence would, on balance, support our interpretation of section 5.2.

24. In light of the foregoing, we believe that our interpretation of section 5.2 was reasonable and based on substantial evidence.

2. Limitations on Section 5.2

a. Requests for Rehearing

25. SPP, NPPD, OPPD, East Texas Cooperatives, and Sunflower argue that, if the Commission does not reverse its interpretation of section 5.2 of the SPP JOA, it should clarify that section 5.2 provides only non-firm service. SPP and East Texas Cooperatives argue that this clarification would be consistent with the Commission’s holding in a recent case accepting inclusion in MISO’s tariff of a provision regarding seams service that is virtually identical to section 5.2 of the SPP JOA.⁴¹ Further, SPP and East Texas

³⁹ See DEL. CODE ANN. tit. 6, § 1-303 (2011).

⁴⁰ DEL. CODE ANN. tit. 6, § 1-303(b) (2011).

⁴¹ SPP Rehearing Request at 14 and East Texas Cooperatives Rehearing Request at 5 (both citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,205, at P 44 (2011)).

Cooperatives argue that applying this limitation is logical, as a holding to the contrary would create a disincentive for MISO and Entergy Arkansas to construct additional interconnection capacity. SPP and East Texas Cooperatives argue that the power dispatched from MISO's energy markets and provided to Entergy Arkansas over SPP facilities will not be from designated network resources and is delivered on an as-available basis, and thus, would not warrant firm transmission service.⁴² OPPD asserts that the Commission's determination, unless reversed, would result in MISO's utilization of large amounts of transmission capacity on the SPP system (which includes OPPD) and will significantly affect power flows on the OPPD system. NPPD requests clarification that "available capacity" under section 5.2 does not include capacity already allocated under the SPP/MISO Congestion Management Process.⁴³

26. SPP, East Texas Cooperatives and Sunflower also argue that the Commission should clarify that non-firm service is limited to the amount of interconnection capacity that MISO has with Entergy Arkansas, currently 1,000 MW. SPP argues that, to interpret section 5.2 as permitting MISO to share SPP's system up to the far greater amount of interconnection capacity that SPP has with Entergy Arkansas when MISO has only a much smaller interconnection with Entergy Arkansas would lead to absurd results – leaving all the transmission improvements to SPP, without sharing in the cost whatsoever. SPP also requests that the Commission clarify that MISO must remove its transactions from the SPP system during congestion and return to its historical firm flow as of April 1, 2004.

27. In its Rehearing Request, KCP&L asks the Commission to explain how the sharing of "contract paths" by MISO and SPP is to be accomplished and the significance of sharing "contract paths" that are only points of interconnection, and not actual physical point-to-point paths across SPP.⁴⁴ KCP&L states that it assumes – and asks the Commission to confirm or state otherwise – that the sharing approved by the July 1 Order will be accomplished by assignment among SPP and MISO of entitlements to portions of flowgates affecting the contract paths the July 1 Order gave MISO rights to share. Accordingly, KCP&L argues that, because the sharing of available transmission capacity is intended to facilitate integration of Entergy into MISO across SPP, and because substantial energy flows will result from market trade between Entergy and MISO, the flowgate portion entitlements predominantly will be assigned from SPP to MISO. In this

⁴² SPP Rehearing Request at 15 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1592).

⁴³ NPPD Rehearing Request at 5.

⁴⁴ KCP&L Rehearing Request at 5.

vein, KCP&L argues that transmission facilities consigned for operational purposes to SPP by KCP&L, and other SPP member transmission owners, potentially will be transferred to the operational control (or partial operational control) of MISO. KCP&L argues that the SPP transmission service rate no longer will compensate KCP&L for the use of portions of its facilities that would be dedicated to the service of MISO customers and SPP transmission customers will not be able to fully utilize assets for which they have paid. KCP&L argues that this undermines the ratemaking objective that costs should be allocated to those parties that benefit from the project – and the implicit corollary that those who pay for a regional transmission project should be entitled to benefit from using it.⁴⁵

28. KCP&L seeks clarification that there will be compensation for any transmission service granted by MISO over SPP transmission owners' facilities, or a clarification from the Commission that the July 1 Order is not a finding that no compensation is due. KCP&L argues that, if there is to be a large scale, permanent use of the SPP transmission system by MISO transmission customers taking service under the MISO tariff, as distinguished from the previous usage of the SPP JOA contract path sharing provision cited in the July 1 Order, then there should be a mechanism for MISO transmission customers to pay SPP transmission owners for use of their facilities.⁴⁶ KCP&L argues that a failure to compensate SPP transmission owners for such use would be unlawfully confiscatory and would unlawfully deprive SPP transmission owners of their rights under section 205 of the Federal Power Act (FPA)⁴⁷ to establish just and reasonable rates for use of their facilities.⁴⁸ Similarly, OPD argues that, in the past, the Commission has required transmission providers to hold harmless third-party systems when their RTO membership choices are likely to lead to adverse loop flow and congestion impacts, and that the Commission should do so here.⁴⁹

⁴⁵ *Id.* at 7 (citing *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009)).

⁴⁶ *Id.* at 2-4, 8-11 (citing *East Kentucky Power Cooperative*, 114 FERC ¶ 61,035, at P 33 (2006)).

⁴⁷ 16 U.S.C. § 824d (2006).

⁴⁸ KCP&L Rehearing Request at 4 (citing *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942), *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002)).

⁴⁹ OPD Rehearing Request at 5 (citing *Alliance Cos.*, 100 FERC ¶ 61,137, at P 35-57 (2002), *order on reh'g*, 103 FERC ¶ 61,274 at P 28, 43-47 (2003)).

29. NPPD argues that the Commission failed to address its argument that the interpretation urged by MISO would cause unjust and unreasonable results requiring abrogation of section 5.2 under section 206 of the FPA. NPPD argues that MISO would be able to flow power over SPP's existing transmission grid without compensation and SPP members would be subsidizing Entergy's access to the MISO market. NPPD also argues that NPPD demonstrated that the massive flows of power that would be created by Commission approval of MISO's Petition, and the related approval of Entergy becoming a member of MISO, would have an adverse impact on NPPD's ability to provide transmission service due to major loop flows.⁵⁰ NPPD argues that it is not beyond the scope of the Petition to argue that MISO's interpretation of section 5.2 would lead to an unjust and unreasonable result if Entergy Arkansas joined MISO, because MISO's Petition is to confirm the availability of transmission path sharing under section 5.2 in the event that Entergy Arkansas chooses to join MISO.⁵¹

b. Commission Determination

30. Parties request that the Commission confirm that service obtained pursuant to section 5.2 of the SPP JOA is non-firm, such service is limited to interconnection capacity MISO has with Entergy Arkansas, and that there will be compensation for such service, or at the very least, that the Commission has not held that no compensation is due.⁵² We decline to make any such findings.⁵³ The Petition sought only a

⁵⁰ NPPD Rehearing Request at 4.

⁵¹ *Id.* at 5.

⁵² In addition, SPP seeks clarification that, pursuant to SPP JOA § 6.4, MISO must remove its transactions with Entergy Arkansas during congestion in order to return to its historical firm flow as of April 1, 2004 to avoid adverse effects on SPP's system. While arguably beyond the scope of the Petition, we note that this issue does not appear to be a point of contention between the parties. As MISO noted in its Petition "[t]he use of Reciprocal Coordinated Flowgates [] under the [SPP] JOA allows SPP and MISO to maximize transmission system utilization for all parties because it allows reciprocal use up until congestion occurs and then the parties return to their allocation based on historic use." Petition at 22-23.

⁵³ We also reject, as speculative, any arguments that the Commission has an obligation under section 206 of the Federal Power Act to modify the SPP JOA based on our interpretation in the July 1 Order. At this point, Entergy Arkansas has not joined MISO, and the SPP JOA may be subject to revision. If and when Entergy Arkansas joins MISO, and if and when MISO utilizes the provisions in the SPP JOA, whatever they might be at such time, then parties may file a complaint and under section 206 of the

(continued...)

determination as to whether the contract path sharing provision of section 5.2 would apply to Entergy Arkansas if it becomes a transmission-owning member of MISO. The Petition did not seek guidance as to how such provision would be implemented nor whether compensation is necessary. As we emphasized in the July 1 Order, section 3.1 of the SPP JOA provides a mechanism to revise the SPP JOA. The July 1 Order further noted that MISO and SPP have an obligation to negotiate in good faith in response to revisions either MISO or SPP may propose. We encourage the parties to work together to address these issues so that the objectives of the SPP JOA can be fulfilled efficiently and economically. We note that any revisions to the SPP JOA must be filed with the Commission pursuant to section 205 of the FPA, and the Commission would review any such filing pursuant to the just and reasonable standard.

3. Renegotiation of the JOA

a. Requests for Rehearing/Clarification

31. Xcel Energy argues that the Commission erred by failing to specify that stakeholders must be included in the SPP JOA renegotiation process. Similarly, KCP&L seeks clarification that the transmission owners and customers should have a material role in such negotiations and proceedings, consistent with their retained rights under FPA sections 205 and 206.

32. SPP, NPPD, OPPD and East Texas Cooperatives argue that, if the Commission does not grant rehearing, it should clarify that MISO must be willing to negotiate in good faith on all aspects of the SPP JOA, including potential changes to section 5.2. Specifically, OPPD argues that the Commission should confirm and clarify that renegotiation of the SPP JOA must address MISO's energy flows over SPP's transmission system during periods of congestion.⁵⁴ NPPD seeks clarification that the scope of renegotiation of the SPP JOA should include section 5.2, along with allowed usage by MISO of SPP's transmission system and compensation therefor, and provisions addressing the existing loops flows between MISO and SPP that NPPD argues would be exacerbated by Entergy Arkansas becoming a transmission-owning member of MISO.⁵⁵ NPPD argues that, if the requested clarification is not granted, the Commission should specify which filing will provide the appropriate forum for resolution of impact issues,

Federal Power Act if they believe the terms of the SPP JOA are unjust, unreasonable, unduly discriminatory or preferential.

⁵⁴ OPPD Rehearing Request at 5.

⁵⁵ NPPD Rehearing Request at 6-7.

such as loop flow issues (both existing and Entergy-related) on NPPD's system. Xcel Energy seeks Commission confirmation that congestion and transmission utilization, market settlement issues, transmission reliability margin, and transmission expansion including interregional coordination pursuant to Order No. 1000, are issues to be renegotiated under section 3.1 of the SPP JOA. SPP requests that, if the Commission does not clarify that section 5.2 is limited to non-firm service for all purposes up to the amount of interconnection capacity between MISO and Entergy Arkansas, then the Commission confirm that how section 5.2 will be applied may be properly addressed in the renegotiation of the SPP JOA.

b. Commission Determination

33. We find that the July 1 Order was appropriately limited to the issues raised in MISO's Petition. The process and scope of any potential renegotiation of the SPP JOA is beyond the scope of the Petition and the July 1 Order. In fact, to rule here on the issues raised in the rehearing requests would prejudice, without an adequate record, and without input from MISO or SPP or their respective stakeholders, issues that may be part of the renegotiation process. Further, as we have noted above, any revisions to the SPP JOA must be filed with the Commission. Therefore, we deny the requests for rehearing and/or clarification.

The Commission orders:

The requests for rehearing and/or clarification are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.