

144 FERC ¶ 61,133
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwestern Public Service Company

Docket No. ER06-274-007

ORDER ON INITIAL DECISION

(Issued August 15, 2013)

1. On December 1, 2005, Southwestern Public Service Company (SPS) filed, pursuant to section 205 of the Federal Power Act (FPA),¹ revisions to the rates and rate design applicable to SPS's full and partial requirements customers. On August 29, 2008, the presiding Administrative Law Judge (Presiding Judge) issued an Initial Decision granting SPS's motion for summary disposition on the sole remaining issue in the proceeding: the appropriate demand cost allocation methodology for the SPS system during the period from July 1, 2006 to June 30, 2008 (Locked-In Period).² Golden Spread Electric Cooperative, Inc. (Golden Spread) filed a brief on exceptions, and SPS, Cap Rock Energy Corporation (Cap Rock), Commission Trial Staff (Trial Staff), and the New Mexico Cooperatives³ opposed Golden Spread's exceptions. In this order, we reverse the Initial Decision and determine the appropriate demand cost allocation methodology for the Locked-In Period.⁴

¹ 16 U.S.C. § 824d (2006).

² *Southwestern Pub. Serv. Co.*, 124 FERC ¶ 63,015 (2008) (Initial Decision).

³ For the purposes of this order, the New Mexico Cooperatives are Farmers Electric Cooperative, Inc.; Lea County Electric Cooperative, Inc.; Central Valley Electric Cooperative, Inc.; and Roosevelt County Electric Cooperative, Inc.

⁴ Our determination on SPS's demand cost allocator in this order will apply beyond the Locked-In Period for Golden Spread. Unlike other parties in this proceeding, Golden Spread's rates are not at issue in SPS's subsequent rate case, Docket No. ER08-749-000. Therefore, the demand allocator established for SPS in the instant proceeding will apply to SPS's partial requirements customers, including Golden Spread, until SPS
(continued...)

I. Background

2. Demand cost allocation, or demand allocation, refers to the method by which a utility apportions fixed capacity costs among customer classes. The Commission typically allocates demand costs using a coincident peak method, through which demand costs are allocated based on each customer class's load at the time of (or coincident with) the system peak load. The coincident peak may be based, for example, on a single peak month (1 CP), the average of three peak months (3 CP), or the average of peaks in 12 months (12 CP). Typically, a company that has a relatively flat load profile throughout the year would allocate demand costs on a 12 CP basis, which assumes that a utility's load is relatively constant throughout all 12 months of the year. A summer (or winter) peaking company would allocate demand costs more typically on a 3 CP basis, which assumes the load profile peaks during three peak usage months.

3. The Initial Decision's analysis of the appropriate demand cost allocator for the SPS system depends not just on the instant rate case, but also on SPS's rate cases immediately preceding and following the instant rate case. The background on each of these three closely related SPS proceedings is presented in the following order: Docket No. ER06-274-000 (the instant rate case), the Opinion No. 501 proceeding (the SPS rate case preceding this one),⁵ and Docket No. ER08-749-000 (the SPS rate case subsequent to this one).⁶

A. ER06-274-000 Proceeding

4. On December 1, 2005, SPS filed revisions to its wholesale full and partial requirements customers' rates and rate design.⁷ On January 31, 2006, the Commission conditionally accepted SPS's proposed revisions for filing, suspended the rates to become effective on July 1, 2006, subject to refund, and set the matter for hearing in Docket

seeks to change the demand cost allocator for its partial requirements customers. Nonetheless, for the sake of simplicity, we will refer to the refund period in the instant proceeding as the Locked-In Period.

⁵ See generally *Golden Spread Elec. Coop. v. Southwestern Pub. Serv. Co.*, Opinion No. 501, 123 FERC ¶ 61,047, at 61,249 (2008).

⁶ See generally *Southwestern Pub. Serv. Co.*, 123 FERC ¶ 61,225 (2008) (Docket No. ER08-749-000 Hearing Order).

⁷ SPS Dec. 1, 2005 Rate Filing.

No. ER06-274-000.⁸ The Commission held the hearing in abeyance pending the outcome of settlement judge procedures.⁹

5. Settlement negotiations were conducted throughout the first half of 2006 and ultimately yielded two settlement agreements: (1) a partial settlement among SPS and its full requirements customers, i.e., the New Mexico Cooperatives and Cap Rock, (Full Requirements Settlement Agreement),¹⁰ and (2) a partial settlement between SPS and the Public Service Company of New Mexico (PNM) (PNM Settlement Agreement).¹¹ The Full Requirements Settlement Agreement was approved by the Commission on September 20, 2007.¹² The PNM Settlement Agreement was approved by the Commission on September 8, 2008.¹³

6. The Full Requirements Settlement Agreement resolved all issues in Docket No. ER06-274 among SPS, the New Mexico Cooperatives, and Cap Rock, but it reserved those parties' rights to continue litigating the demand allocation issue.¹⁴ The PNM Settlement Agreement resolved, going forward, all issues in Docket No. ER06-274-007 regarding rates charged by SPS to PNM pursuant to their interruptible power service agreement.¹⁵ Under the PNM Settlement Agreement, the rates SPS charged PNM from

⁸ *Southwestern Pub. Serv. Co.*, 114 FERC ¶ 61,091 (2006) (Hearing Order).

⁹ *Id.* P 20.

¹⁰ SPS Sept. 7, 2006 Offer of Settlement, *approved in Southwestern Pub. Serv. Co.*, 120 FERC ¶ 61,243 (2007).

¹¹ SPS Sept. 19, 2006 Offer of Settlement, *approved in Southwestern Pub. Serv. Co.*, 124 FERC ¶ 61,232 (2008).

¹² *Southwestern Pub. Serv. Co.*, 120 FERC ¶ 61,243 (2007).

¹³ *Southwestern Pub. Serv. Co.*, 124 FERC ¶ 61,232 (2008).

¹⁴ *Southwestern Pub. Serv. Co.*, 120 FERC ¶ 61,243 at P 18.

¹⁵ *Id.* P 33. The PNM Settlement Agreement also resolved all issues in Docket No. EL05-151-000 except the issues pertaining to SPS's fuel cost adjustment clause. *Id.*

July 1, 2006 until the wholesale partial requirements rates are determined in Docket No. ER06-274-007 are subject to refund.¹⁶

7. SPS was initially unable to reach a negotiated settlement with one of its partial requirements customers, Golden Spread, and one of its retail customers, Occidental Permian, Ltd. (Occidental). Accordingly, on August 2, 2006, Golden Spread and Occidental were severed from the settlement proceeding in Docket No. ER06-274-000, and hearing procedures were initiated in Docket No. ER06-274-003. The parties submitted testimony in the proceeding; however, the hearing procedures were again suspended on March 29, 2007 to allow the participants to resume settlement negotiations. On December 3, 2007, that round of settlement negotiations resulted in a settlement (December 2007 Settlement Agreement) among SPS, Golden Spread, and Occidental that resolved all issues among those three parties except for the appropriate demand cost allocator methodology for the SPS system.¹⁷ Accordingly, on February 5, 2008, hearing procedures were reinitiated in Docket No. ER06-274-007 to determine the appropriate demand cost allocator for the Locked-In Period.

8. On February 19, 2008, the Presiding Judge issued an Order Establishing Procedural Schedule (Scheduling Order).¹⁸ The Presiding Judge noted the parties' statement, in the December 2007 Settlement Agreement, that the case could be promptly litigated due to the posture of the case with respect to the demand cost allocation issue. The settlement offer stipulated that discovery had ended and that initial, answering, and rebuttal testimony had been filed on the issue of the proper demand cost allocator methodology prior to the suspension of the procedural schedule in that proceeding. Therefore, the Presiding Judge ordered the participants to resubmit the testimony proffered in Docket No. ER06-274-003, after redacting all testimony not dealing with the demand cost allocator issue.

¹⁶ *Southwestern Pub. Serv. Co.*, 124 FERC ¶ 61,232 at P 5. Under section II.B.3 of the PNM Settlement Agreement, SPS is required to submit a compliance filing within 30 days of the date on which the wholesale partial requirements rates are determined in the instant docket. *Id.* P 6.

¹⁷ The Commission approved the December 2007 Settlement Agreement on April 21, 2008. *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, 123 FERC ¶ 61,054 (2008).

¹⁸ *Southwestern Pub. Serv. Co.*, Docket No. ER06-274-007 (Feb. 19, 2008).

9. In total, the parties submitted testimony from five witnesses on the demand cost allocation issue and that testimony included detailed load data for the SPS system.¹⁹ Much of the testimony focused on the results of the three separate peak load tests, explained in detail below, that the Commission has traditionally used to determine the appropriate demand cost allocator for a utility. In short, the witnesses for SPS and the New Mexico Cooperatives testified that all three peak load tests indicate that a 12 CP demand allocator is appropriate, while Golden Spread's witness testified that one of the tests indicates that SPS is a 3 CP utility and the other two tests produce "borderline" 12 CP results but are very close to the results these tests produced in Opinion No. 162, the 1983 rate case in which the Commission initially found SPS to be a 3 CP utility.²⁰ A key difference between the witnesses' test results was the treatment of SPS's sales to El Paso Electric Company (EPE) and PNM. SPS's witnesses included the sales to EPE and PNM in their load calculations, whereas Golden Spread's witnesses excluded those sales.

10. On June 12, 2008, SPS filed a motion for summary disposition on the appropriate demand cost allocator methodology for the Locked-In Period.²¹ The Presiding Judge initially denied SPS's motion after erroneously construing it as a motion to dismiss.²² SPS filed a motion for reconsideration of that decision, which the Presiding Judge granted on June 18, 2008.

11. In the motion for summary disposition, SPS argued, in pertinent part, that the Commission had determined in the rate cases immediately before and after the Locked-In Period—Opinion No. 501 and Docket No. ER08-749-000, respectively—that SPS was a 12 CP utility, and that the three peak load tests support the same determination for the Locked-In Period.²³ SPS also replicated a table that the Commission used in Opinion

¹⁹ In analyzing SPS's load characteristics for the Locked-In Period, the witnesses used 2005-2006 data. However, the parties used actual data for certain months and projected data for the other months of the year. To compute the projected data, some of the parties used SPS's historical data from years 2000-2006. In analyzing demand allocation, the Commission typically uses data from more than one year to account for anomalous demand that may occur due to unseasonable weather or unusual system conditions.

²⁰ Ex. GSE-40 at 11.

²¹ SPS June 12, 2008 Motion for Summary Disposition.

²² *Southwestern Pub. Serv. Co.*, Docket No. ER06-274-007 (Jun. 13, 2008).

²³ SPS June 12, 2008 Motion for Summary Disposition at 4.

No. 501 to illustrate the results of the peak load tests, but SPS expanded upon that table by including the results of each witness in the instant proceeding.²⁴

12. Cap Rock, New Mexico Cooperatives, and Trial Staff all filed answers supporting SPS's motion for summary disposition. Golden Spread submitted an answer on July 3, 2008 opposing SPS's motion for summary disposition. Golden Spread's July 3, 2008 answer also included a cross-motion to hold the hearing in abeyance pending the outcome of rehearing requests on Opinion No. 501. SPS and Cap Rock filed answers opposing Golden Spread's motion to hold the case in abeyance on July 9, 2008 and July 18, 2008, respectively. As discussed below, the Presiding Judge issued the Initial Decision granting SPS's motion for summary disposition while Opinion No. 501 was still pending rehearing.²⁵ In granting the motion, the Presiding Judge relied, in part, on the Commission's determination in the immediately preceding SPS rate case, the Opinion No. 501 proceeding.

²⁴ The table from Opinion No. 501 and SPS's expanded version of that table are presented here:

Opinion No. 501 Chart	Lowest-To-Peak	On-Peak-Off-Peak	Average-To-Peak
Historical Commission Range for 12 CP	66% or higher	19% or less	81% or higher
Heintz, SPS-37 at 16	68%	19%	82%
Saffer FRC-2 Pro Forma	70%	18%	84%
Linxwiler, GSL – 1 at 9-1-10	67.55%	19%	82.05%
Diller, CRE-1 at 18	70%	18%	84%

Expanded Chart			
Hudson, SPS-4	68%	19%	83%
Heintz, SPS-63	69%	19%	83%
Saffer, NMC-2	70%	18%	84%
Linxwiler, GSE-50	68% - 69%	19% - 20%	82-83%

Id. at 6. As discussed in detail below, the data SPS presented from Mr. Linxwiler's testimony includes SPS's off-system sales to EPE and PNM, which Mr. Linxwiler argued should be excluded.

²⁵ Initial Decision, 124 FERC ¶ 63,015 (2008) (issued August 29, 2008).

B. Opinion No. 501 Proceeding

13. On November 2, 2004, just over one year before SPS commenced the instant proceeding, Golden Spread, Lyntegar Electric Cooperative, Inc. (Lyntegar), and the New Mexico Cooperatives, filed a complaint in Docket No. EL05-19-000 alleging that SPS was violating the Commission's fuel cost adjustment clause (FCAC) regulations and the FCAC provisions of its wholesale customers' rate schedules.²⁶ On the same day that the complaint was filed, SPS also filed, in Docket No. ER05-168-000, proposed revisions to its FCAC and power supply contracts, contending that such revisions were necessary to conform to the Commission's current fuel cost and purchased economic power adjustment clause regulations.²⁷ Docket Nos. EL05-19-000 and ER05-168-000 were subsequently consolidated and set for hearing.²⁸

14. A hearing was conducted in Docket Nos. EL05-19-002 and ER05-168-001 at which SPS argued that a 12 CP demand allocator was appropriate for the locked-in period from January 1, 2005 through June 30, 2006, despite the fact that SPS had historically used a 3 CP demand allocator. On May 24, 2006, the Administrative Law Judge in that proceeding issued an initial decision ordering SPS to continue using a 3 CP demand allocation methodology.²⁹ Between July and November of 2007 the parties filed three motions requesting that the Commission withhold action on the initial decision pending the outcome of settlement discussions. The Commission granted the motions.

15. As mentioned above, on December 3, 2007, SPS filed the December 2007 Settlement Agreement on behalf of itself, Golden Spread, Lyntegar, and Occidental in Docket Nos. EL05-19-000, ER05-168-000, and ER06-274-000. The December 2007 Settlement Agreement resolved, among those four parties, all issues except the appropriate demand cost allocator for the SPS system. The Commission approved the December 2007 Settlement Agreement on April 21, 2008.³⁰

²⁶ Complaint, Docket No. EL05-19-000 (filed Nov. 2, 2004).

²⁷ SPS Tariff Filing, Docket No. ER05-168-000 (filed Nov. 2, 2004).

²⁸ *Golden Spread Elec. Coop., Inc.*, 109 FERC ¶ 61,373 (2004) (Opinion No. 501 Hearing Order).

²⁹ *Golden Spread Elec. Coop. v. Southwestern Pub. Serv. Co.*, 115 FERC ¶ 63,043, at 65,174 (2006).

³⁰ *Golden Spread Elec. Coop. v. Southwestern Pub. Serv. Co.*, 123 FERC ¶ 61,054 (2008).

16. Also on April 21, 2008, the Commission issued its order on initial decision – Opinion No. 501– in which it overruled the Administrative Law Judge on the issue of the appropriate demand cost allocator.³¹ The Commission found that SPS demonstrated load profile changes warranting a determination that a 12 CP demand allocation methodology was appropriate for the locked-in period in that proceeding. Several parties filed requests for rehearing and clarification of Opinion No. 501.

17. Between June 2009 and June 2010, the parties submitted 10 motions requesting that the Commission defer action on the requests to accommodate the ongoing settlement negotiations in the Opinion No. 501 proceeding. Those settlement negotiations yielded two additional settlement agreements in January 2010 and July 2010 that resolved all issues in the Opinion No. 501 proceeding among SPS, Occidental, Cap Rock, and the New Mexico Cooperatives. Concurrent with the instant order, the Commission, in a separate order, grants in part and denies in part the remaining requests for rehearing and clarification of Opinion No. 501.³² However, as mentioned above, the Presiding Judge in the instant proceeding issued the Initial Decision while the rehearing requests were pending in the Opinion No. 501 proceeding.

C. ER08-749-000 Proceeding

18. In addition to the Opinion No. 501 proceeding, the Initial Decision also relied upon the Commission’s determination on the demand cost allocation issue in the SPS rate case immediately following the instant rate case. On March 31, 2008, almost five months before the Presiding Judge issued the Initial Decision in the instant proceeding, SPS filed additional changes to the rates and rate design applicable to its wholesale full requirements customers.³³ SPS filed the rates using a 3 CP demand cost allocator, but agreed to use a 12 CP demand cost allocator, instead, if the Commission suspended the rates for only a nominal period.³⁴ On May 30, 2008, the Commission conditionally accepted SPS’s proposed rates for filing using the 12 CP demand cost allocator, suspended the rates for a nominal period, to become effective June 1, 2008, subject to

³¹ *Golden Spread Elec. Coop. v. Southwestern Pub. Serv. Co.*, Opinion No. 501, 123 FERC ¶ 61,047, at 61,249 (2008).

³² *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, Opinion No. 501-A, 144 FERC ¶ 61,132 (2013).

³³ SPS, Transmittal, Docket No. ER08-749-000 (filed Mar. 31, 2008).

³⁴ *Id.* at 4-5.

refund, and established hearing and settlement judge procedures in Docket No. ER08-749-000.³⁵

II. Substantive Matters

A. Initial Decision

19. On August 29, 2008, the Presiding Judge granted SPS's motion for summary disposition in the instant proceeding, finding that there was no genuine issue of material fact in dispute. The Presiding Judge found that, based on the record as a whole, it was reasonable to conclude that a 12 CP demand allocation methodology was appropriate for the Locked-In Period.

20. The Presiding Judge explained that the Commission had found, "on essentially the same evidence in this case," that a 12 CP demand allocator was appropriate for the SPS system immediately before and after the Locked-In Period, in Opinion No. 501 and Docket No. ER08-749-000. The Presiding Judge explained that the doctrine of the law of the case precludes a lower decisional authority from reconsidering an issue already decided by a higher decisional authority and that the doctrine applied under these circumstances. Accordingly, the Presiding Judge concluded that the Commission had already found that the 12 CP demand cost allocator was appropriate for SPS.

21. The Presiding Judge found SPS's expanded version of the Opinion No. 501 peak load test table to be "an especially important piece of evidence in this case." The Presiding Judge explained that the Commission used the same analytical criteria for the table in Opinion No. 501 that it used in earlier proceedings – Opinion Nos. 162³⁶ and 337³⁷ – in which the Commission found a 3 CP demand allocator to be appropriate for SPS. The Presiding Judge explained that SPS's expanded table, which applied the same analytical criteria from Opinion No. 501 to the evidence submitted in this case, shows that SPS has continued to be a 12 CP utility since the locked-in period in Opinion No. 501.

22. The Presiding Judge rejected Golden Spread's argument that the relevance of Opinion No. 501 is lessened by the fact that it does not take into account evidence of

³⁵ Docket No. ER08-749-000 Hearing Order, 123 FERC ¶ 61,225.

³⁶ *Southwestern Pub. Serv. Co.*, Opinion No. 162, 22 FERC ¶ 61,341 (1983).

³⁷ *Southwestern Pub. Serv. Co.*, Opinion No. 337, 49 FERC ¶ 61,296 (1989), *reh'g denied*, Opinion No. 337-A, 51 FERC ¶ 61,341 (1990) (Opinion No. 337) (affirming the ALJ's decision that SPS remained a 3 CP utility).

recent changes on the SPS system. The Presiding Judge explained that, to the extent Golden Spread was referring to evidence more recent than the parties' written filings in this proceeding, Golden Spread's argument was unavailing. The Presiding Judge stated that, after Golden Spread had agreed in the December 2007 Settlement Agreement that discovery had ended, the written testimony had been re-filed and that testimony contained nothing that lessened the relevance of Opinion No. 501.

23. The Presiding Judge also rejected Golden Spread's argument that the elapsed time between the test periods in Opinion No. 501 and the instant proceeding supports denying SPS's motion for summary disposition. The Presiding Judge explained that unlike in *Illinois Power*,³⁸ where the test periods were four years apart, the test periods in Opinion No. 501 and the instant proceeding are closer in time – two years apart. The Presiding Judge explained further that Golden Spread had the opportunity to submit more recent data in this proceeding than it submitted in the Opinion No. 501 proceeding, and the new data does not show that anything “extraordinary” happened during the Locked-In Period that would render the determinations in Opinion No. 501 less controlling. The Presiding Judge concluded that no genuine issue of material fact existed and that the record, taken as a whole, led to the reasonable conclusion that SPS was a 12 CP utility for the Locked-In Period.

B. Briefs

1. Briefs on Exceptions

24. Golden Spread excepts to the Initial Decision based on four alleged legal errors and their associated policy considerations.³⁹

25. First, Golden Spread argues that the Initial Decision misapplies the doctrine of the law of the case. According to Golden Spread, that doctrine serves only to preclude reconsideration of “the *same issue* in the *same case* by the *same court*.”⁴⁰ Golden Spread argues that the Initial Decision improperly expands the doctrine by concluding that the resolution of the same issue in a different case must lead to the same result on that issue

³⁸ *Illinois Power Co.*, 59 FPC 2245 (1977), *reh'g denied*, 1 FERC ¶ 61,174 (1977).

³⁹ Golden Spread Sept. 29, 2008 Brief on Exceptions at 6.

⁴⁰ *Id.* at 11 (emphasis in original) (citing *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999); *Florida Gas Transmission Co.*, 41 FERC ¶ 61,122, at 61,302 n.10-11 (1987); *Storey Oil Co., Inc.*, 71 FERC ¶ 63,010, at 65,074 (1995), *errata*, 72 FERC ¶ 63,015 (1995)).

in the instant case. Golden Spread alleges that the Initial Decision's reliance on *FPL Energy*⁴¹ is misplaced because that decision concerned the impact of a "prior *final order*"⁴² in "the *same proceeding*."⁴³ Golden Spread explains that the Initial Decision circumvented the same case requirement by focusing on the similarity of the evidence presented in the instant proceeding and in the Opinion No. 501 proceeding. Golden Spread avers that this is improper because the same issue can be considered in a new rate proceeding, despite alleged factual similarities between the two proceedings. Golden Spread further explains that the Initial Decision's interpretation of the law of the case doctrine is at odds with the Commission's decision in Opinion No. 501 that the demand cost allocation methodology must be decided on a case-by-case basis.⁴⁴

26. Golden Spread also argues that, even if the law of the case doctrine could be used to preclude consideration of the same issue in a different proceeding, it cannot be used in this particular proceeding because the two cases relied on to establish the law of the case – Opinion No. 501 and the Docket No. ER08-749-000 Hearing Order – were both pending rehearing when the Presiding Judge invoked them. Golden Spread contends that orders pending rehearing cannot be used to establish the law of the case.⁴⁵ Furthermore, Golden Spread asserts that relying on the non-final Opinion No. 501 is inappropriate for the additional reason that the Commission's determination was based on incorrect references to record evidence. Golden Spread states that a proper consideration of the evidence on rehearing in that proceeding will justify a 3 CP demand cost allocator.

27. As to the second alleged legal error, Golden Spread contends that summary disposition was improper because the Initial Decision erroneously concluded that no genuine issues of fact exist. Golden Spread contends that it was not given the opportunity to present all the facts that could have produced a contrary result. Golden Spread asserts that the Initial Decision relies entirely on the expanded table in SPS's motion for summary disposition, which is improper because neither arguments advanced by counsel, nor tables prepared by counsel can be relied upon as evidence in a

⁴¹ *Electric Utilities – FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,289 (2008) (*FPL Energy*).

⁴² Golden Spread Sept. 29, 2008 Brief on Exceptions at 13 (emphasis in original).

⁴³ *Id.* at 14 (emphasis in original).

⁴⁴ *Id.* (citing Opinion No. 501, 123 FERC at 61,249).

⁴⁵ Golden Spread Sept. 29, 2008 Brief on Exceptions at 15 (citing *Tarpon Transmission Co.*, 42 FERC ¶ 61,188, at 61,665 (1988)).

proceeding.⁴⁶ Accordingly, Golden Spread asserts that the expanded table is not evidence in this proceeding, and the Presiding Judge in the Initial Decision erred by treating it as such. Further, Golden Spread states that SPS's expanded table omits data and studies presented by Mr. Linxwiler. Moreover, even if the chart was properly considered evidence, Golden Spread contends that it should have the right to make an objection, submit rebuttal evidence, and cross-examine the witness that presented the table.⁴⁷

28. Golden Spread contends that the Initial Decision erred in concluding that the evidence presented in the instant proceeding is essentially the same as the evidence presented in Opinion No. 501 and Docket No. ER08-749-000.⁴⁸ In addition, Golden Spread asserts that the perceived similarity of evidence in the three proceedings provided insufficient grounds for the Presiding Judge to conclude summarily that SPS was a 12 CP utility. Golden Spread states that, in actuality, the facts of the instant proceeding are significantly different from those in Opinion No. 501 and Docket No. ER08-749-000, and that the summary disposition improperly foreclosed Golden Spread's opportunity to present evidence of these changes on the SPS system.⁴⁹

29. As to the third alleged legal error, Golden Spread argues that the Initial Decision misconstrued the December 2007 Settlement Agreement by indicating that it precluded the introduction of additional evidence at hearing.⁵⁰ Golden Spread contends that the Initial Decision erroneously concluded, based on a misreading of the December 2007 Settlement Agreement, that no genuine issues of fact existed that would lessen the relevance of Opinion No. 501. Golden Spread states that such issues of fact do exist and the December 2007 Settlement Agreement merely referenced the fact that the prefiled testimony stage of the proceeding was complete, not that the parties agreed to a paper hearing based solely on that prefiled testimony.⁵¹ Golden Spread argues that the Presiding Judge's interpretation of the December 2007 Settlement Agreement deprived Golden Spread of its right to present necessary evidence and conduct cross-examination.

⁴⁶ *Id.* at 21.

⁴⁷ *Id.* at 21-22.

⁴⁸ *Id.* at 23.

⁴⁹ *Id.* at 26.

⁵⁰ *Id.* at 27.

⁵¹ *Id.* at 28.

30. As to the fourth alleged legal error, Golden Spread argues that the Initial Decision acknowledged the importance of establishing the demand cost allocator on a case-by-case basis but then erred by not doing so in this instance.⁵² Golden Spread contends that the Initial Decision ignored the Commission precedent from *Illinois Power*,⁵³ which precludes summary disposition when the underlying facts may differ due to a difference in test periods.⁵⁴ Golden Spread asserts that the difference in test periods for Opinion No. 501 and the instant proceeding might, by itself, warrant different demand cost allocators, but that the Initial Decision arbitrarily distinguished the instant proceeding from *Illinois Power* based on the elapsed time between the test periods in each case.⁵⁵

2. Briefs Opposing Exceptions

31. SPS, Cap Rock, Trial Staff, and the New Mexico Cooperatives (collectively, Respondents) all filed separate briefs opposing Golden Spread's exceptions to the Initial Decision. As an initial matter, the Respondents assert that Golden Spread has not raised any policy considerations that warrant Commission review of the Initial Decision.⁵⁶

32. The Respondents disagree with Golden Spread regarding the Presiding Judge's application of the law of the case doctrine to this proceeding. SPS argues that the policy behind the law of the case doctrine applies here, because the Commission has a policy against relitigation of issues absent a showing that circumstances have changed significantly.⁵⁷ SPS contends that this policy is applicable in the instant proceeding because the Commission decided the demand allocation issue in Opinion No. 501 based on virtually the same facts presented in the instant docket.⁵⁸ According to Cap Rock and the New Mexico Cooperatives, the Presiding Judge did not rely solely on the law of the case doctrine, but instead looked at the entire record and granted summary disposition

⁵² *Id.* at 29-30.

⁵³ *Illinois Power Co.*, 59 FPC 2245, *reh'g denied*, 1 FERC ¶ 61,174.

⁵⁴ Golden Spread Sept. 29, 2008 Brief on Exceptions at 30.

⁵⁵ *Id.* at 31.

⁵⁶ New Mexico Cooperatives Oct. 20, 2008 Brief Opposing Exceptions at 4; Trial Staff Oct. 20, 2008 Brief Opposing Exceptions at 13-15; Cap Rock Oct. 20, 2008 Brief Opposing Exceptions at 11-12; SPS Oct. 20, 2008 Brief Opposing Exceptions at 4-5.

⁵⁷ SPS Oct. 20, 2008 Brief Opposing Exceptions at 5-6.

⁵⁸ *Id.* at 5.

pursuant to Rule 217 of the Commission's Rules of Practice and Procedure.⁵⁹ Trial Staff contends that the Presiding Judge appropriately applied the doctrine because the Commission is a "higher decisional authority" that has already resolved this issue in Opinion No. 501 and Docket No. ER08-749-000.⁶⁰ The New Mexico Cooperatives argue that Golden Spread has undermined its own arguments by conceding that the Commission's prior determination on the demand cost allocator should control absent subsequent facts showing a significant change in circumstances. According to the New Mexico Cooperatives, the Initial Decision properly concluded that the evidence does not reveal any such change.⁶¹

33. The Respondents assert that the Presiding Judge correctly found that no genuine issues of material fact exist and, therefore, appropriately granted summary disposition.⁶² The Respondents claim that Golden Spread had sufficient opportunity to present its arguments and factual support. SPS claims that Golden Spread has not been deprived of any procedural rights.⁶³ Cap Rock posits that Golden Spread's grievance that it was denied the chance to cross-examine witnesses does not, by itself, provide a right to a hearing.⁶⁴ Similarly, Trial Staff argues that Rule 505 of the Commission's Rules of Practice and Procedure does not provide an absolute right to cross-examination.⁶⁵ The New Mexico Cooperatives assert that Golden Spread was provided ample opportunity to rebut and cross-examine the evidence in SPS's expanded chart, and that Golden Spread's claim concerning its opportunity for cross-examination is irrelevant due to the limitations included in the Order Establishing Hearing Schedule and the Presiding Judge's Rules for Conduct of Hearings.⁶⁶ The New Mexico Cooperatives also reject Golden Spread's argument that it was deprived of the opportunity to present post-test year data, stating that

⁵⁹ Cap Rock Oct. 20, 2008 Brief Opposing Exceptions at 13; New Mexico Cooperatives Oct. 20, 2008 Brief Opposing Exceptions at 4-5.

⁶⁰ Trial Staff Oct. 20, 2008 Brief Opposing Exceptions at 18.

⁶¹ New Mexico Cooperatives Oct. 20, 2008 Brief Opposing Exceptions at 8.

⁶² *Id.* at 9; Trial Staff Oct. 20, 2008 Brief Opposing Exceptions at 25; Cap Rock Oct. 20, 2008 Brief Opposing Exceptions at 13; SPS Oct. 20, 2008 Brief Opposing Exceptions at 6.

⁶³ SPS Oct. 20, 2008 Brief Opposing Exceptions at 10.

⁶⁴ Cap Rock Oct. 20, 2008 Brief Opposing Exceptions at 16-17.

⁶⁵ Trial Staff Oct. 20, 2008 Brief Opposing Exceptions at 28.

⁶⁶ New Mexico Cooperatives Oct. 20, 2008 Brief Opposing Exceptions at 12-13.

this argument is contrary to Commission precedent and to Golden Spread's own arguments in the Opinion No. 501 proceeding.⁶⁷ The New Mexico Cooperatives contend that Golden Spread's view of cross-examination would be contrary to Commission policy and would nullify Rule 217.⁶⁸

34. With regard to the evidentiary record, the Respondents reject Golden Spread's characterization of SPS's expanded table as mere argumentation, rather than evidence.⁶⁹ SPS further contends that Golden Spread's characterization of the expanded table is inaccurate and misleading. SPS explains that all relevant pre-filed written testimony was submitted to the Presiding Judge and, because the 2006 test period has passed, there is no new evidence for Golden Spread to present at an evidentiary hearing.⁷⁰ SPS further contends that any differences in the data between the Opinion No. 501 test year and the test year in the instant case are non-material.⁷¹ SPS also disagrees with Golden Spread's argument that future changes to the SPS system necessitate a full evidentiary hearing. According to SPS, any such future changes are irrelevant because this case involves a locked-in period.⁷²

35. Cap Rock argues that Golden Spread has failed to show that summary disposition was inappropriate or that the Presiding Judge's determination regarding SPS's demand cost allocator was wrong. Cap Rock contends that the Presiding Judge correctly found that no genuine issue of material fact exists because the parties' evidence shows nearly identical peak load test ratios applicable to the SPS system, and those ratios support a 12 CP methodology.⁷³ Cap Rock asserts that, contrary to Golden Spread's claims, there is no indication that the Presiding Judge failed to view the evidence in the light most favorable to Golden Spread.⁷⁴ Cap Rock contends that Golden Spread has failed to show

⁶⁷ *Id.* at 13-14.

⁶⁸ *Id.* at 14-15.

⁶⁹ New Mexico Cooperatives Oct. 20, 2008 Brief Opposing Exceptions at 11; Trial Staff Oct. 20, 2008 Brief Opposing Exceptions at 26-28; Cap Rock Oct. 20, 2008 Brief Opposing Exceptions at 15-16; SPS Oct. 20, 2008 Brief Opposing Exceptions at 8-9.

⁷⁰ SPS Oct. 20, 2008 Brief Opposing Exceptions at 9.

⁷¹ *Id.*

⁷² *Id.* at 11.

⁷³ Cap Rock Oct. 20, 2008 Brief Opposing Exceptions at 14.

⁷⁴ *Id.* at 15.

that the expanded table submitted by SPS contained any factual errors or that the Presiding Judge relied on it for anything but a summary of the parties' positions.⁷⁵

36. The New Mexico Cooperatives state that no genuine issue of fact exists regarding the ratios submitted in the witnesses' testimonies nor is there a genuine issue of fact that the ratios fall within the range that Opinion No. 501 determined was indicative of a 12 CP utility. The New Mexico Cooperatives argue that, under Golden Spread's approach, summary disposition would never be appropriate and a hearing, including cross-examination, would always be required regardless of whether genuine issues of fact exist.⁷⁶

37. Trial Staff contends that SPS's expanded table was properly considered as evidence and, even if that were not the case, all of the information in SPS's expanded table is still in the record as evidence in this proceeding.⁷⁷ Trial Staff asserts that the Initial Decision correctly concluded that Docket Nos. EL05-19 and ER08-749 are based on essentially the same evidence as the instant proceeding. Trial Staff explains that the new data that Golden Spread claims it was precluded from submitting are irrelevant to the locked-in period in this proceeding, even though these data might be relevant to the proceeding in Docket No. ER08-749.⁷⁸

38. Some of the parties disagree with Golden Spread regarding the impact of the December 2007 Settlement Agreement on the hearing, and the Initial Decision's treatment of that settlement.⁷⁹ The New Mexico Cooperatives argue that Golden Spread ignores the fact that the December 2007 Settlement Agreement precluded the submittal of additional evidence on the demand cost allocator issue in this proceeding. According to the New Mexico Cooperatives, the December 2007 Settlement Agreement preserved the settling parties' right to make legal arguments on the issue, but not to submit new facts and evidence into the record.⁸⁰ Trial Staff asserts that Golden Spread misconstrues the Initial Decision's interpretation of the December 2007 Settlement Agreement. According to Trial Staff, the Presiding Judge simply described the December 2007 Settlement

⁷⁵ *Id.* at 15-16.

⁷⁶ New Mexico Cooperatives Oct. 20, 2008 Brief Opposing Exceptions at 14.

⁷⁷ Trial Staff Oct. 20, 2008 Brief Opposing Exceptions at 27.

⁷⁸ *Id.* at 30.

⁷⁹ New Mexico Cooperatives Oct. 20, 2008 Brief Opposing Exceptions at 15-16; Trial Staff Oct. 20, 2008 Brief Opposing Exceptions at 31-32.

⁸⁰ New Mexico Cooperatives Oct. 20, 2008 Brief Opposing Exceptions at 16.

Agreement and its effect on the relevance of Opinion No. 501, but the Presiding Judge did not imply that the agreement had any effect on the parties' cross-examination rights in the instant proceeding.⁸¹

39. Some parties refute Golden Spread's argument that the Presiding Judge did not conduct a case-by-case analysis to determine SPS's demand cost allocator for the Locked-In Period.⁸² Cap Rock asserts that there is no Commission precedent requiring the Presiding Judge to ignore the Commission's orders immediately before and after the Locked-In Period.⁸³ Cap Rock points out that Golden Spread has argued that such decisions should be a factor in resolving the demand allocation methodology.⁸⁴ SPS contends that Golden Spread had the opportunity to present more recent data to inform the case-by-case analysis in this proceeding, but that Golden Spread presented no evidence showing a change in the relevant circumstances between the test period in Opinion No. 501 and the test period in the instant case. SPS concludes that the lack of evidence showing changed circumstances justified the summary disposition.⁸⁵

40. The Respondents disagree with Golden Spread's contention that Opinion No. 501 and the Docket No. ER08-749-000 Hearing Order are not final orders and thus cannot be relied upon as the basis for granting summary disposition.⁸⁶ The Respondents assert that the Commission and the Presiding Judge may rely on those orders despite the pending rehearing requests and possibility of appeal. Cap Rock, Trial Staff, and the New Mexico Cooperatives point out that, in Docket No. ER08-749, the Commission has already rejected Golden Spread's argument regarding the precedential effect of Opinion No. 501 and Docket No. ER08-749.⁸⁷ SPS asserts that the Commission has explained that it may

⁸¹ Trial Staff Oct. 20, 2008 Brief Opposing Exceptions at 31.

⁸² Cap Rock Oct. 20, 2008 Brief Opposing Exceptions at 17; SPS Oct. 20, 2008 Brief Opposing Exceptions at 12-13.

⁸³ Cap Rock Oct. 20, 2008 Brief Opposing Exceptions at 17.

⁸⁴ *Id.*

⁸⁵ *Id.* at 13.

⁸⁶ New Mexico Cooperatives Oct. 20, 2008 Brief Opposing Exceptions at 16-17; Trial Staff Oct. 20, 2008 Brief Opposing Exceptions at 33; Cap Rock Oct. 20, 2008 Brief Opposing Exceptions at 19-20; SPS Oct. 20, 2008 Brief Opposing Exceptions at 13.

⁸⁷ Trial Staff Oct. 20, 2008 Brief Opposing Exceptions at 33; Cap Rock Oct. 20, 2008 Brief Opposing Exceptions at 20; New Mexico Cooperatives Oct. 20, 2008 Brief Opposing Exceptions at 16-17.

rely on contested orders as final Commission orders, despite pending rehearing requests or appeals, unless they have been stayed.⁸⁸ Cap Rock contends that a Commission order becomes final when it “imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process[,]”⁸⁹ and that both Opinion No. 501 and the Docket No. ER08-749-000 Hearing Order qualify as final orders. Furthermore, Cap Rock contends that Golden Spread’s argument, if successful, would allow utilities to ignore a Commission order until it is no longer subject to judicial review.⁹⁰

41. Cap Rock disagrees with Golden Spread’s claim that the Initial Decision allowed SPS to avoid its obligation under FPA section 205 to show that the 12 CP demand allocation methodology is just and reasonable.⁹¹ Cap Rock states that SPS met this burden through its motion for summary disposition and witness testimony. Trial Staff argues that the Commission’s review of the Initial Decision must simply address whether the record would lead a reasonable trier of facts to find no material issues of disputed fact.⁹² Trial Staff contends that the Presiding Judge’s ruling was not arbitrary and was supported by Commission precedent. Trial Staff also argues that a difference in test periods between two proceedings could warrant different demand allocator determinations, but such a result is not automatic, and the Presiding Judge reasonably found that different determinations were not warranted in this instance.⁹³

C. Commission Determination

42. Because the Commission is reversing the demand cost allocator determination in Opinion No. 501 in an order being issued concurrently,⁹⁴ we will not rule on the Presiding Judge’s grant of summary disposition. However, in light of the outcome in Opinion No. 501-A, we will make a determination on the appropriate demand cost allocation methodology for the SPS system based on the record in this proceeding. In

⁸⁸ SPS Oct. 20, 2008 Brief Opposing Exceptions at 13-14.

⁸⁹ Cap Rock Oct. 20, 2008 Brief Opposing Exceptions at 19.

⁹⁰ *Id.* at 20.

⁹¹ *Id.* at 18.

⁹² Trial Staff Oct. 20, 2008 Brief Opposing Exceptions at 17.

⁹³ *Id.* at 32-33.

⁹⁴ Opinion No. 501-A, 144 FERC ¶ 61,132.

doing so, we find that a 3 CP demand cost allocation methodology is appropriate for the SPS system during the Locked-In Period.

43. The Commission has stated that in selecting the proper demand cost allocation methodology, the full range of a utility's operating realities should be considered, including system demand and off-system sales commitments.⁹⁵ In the instant proceeding, the parties submitted their initial, rebuttal, and answering testimony on the demand allocation issue, and no party sought reconsideration of the Presiding Judge's Scheduling Order requiring the parties to re-submit that same testimony more than two years after the 2005-2006 test year. Therefore, we conclude that the record contains sufficient information for us to resolve the demand cost allocation issue.

44. We agree with Golden Spread that SPS's sales to EPE and PNM were off-system opportunity sales that should be excluded from the load ratio calculations for the SPS system. The sales at issue in the instant case are very similar to those the Commission found to be off-system opportunity sales in Opinion No. 501.⁹⁶ As with the off-system sales in Opinion No. 501, the record in this proceeding does not indicate that SPS planned for and constructed its system, or made purchases, to facilitate the sales to EPE and PNM. SPS's sales to EPE and PNM were market-based opportunity sales to customers outside SPS's control area that have a lower curtailment priority than SPS's native load customers.⁹⁷ Further, the PNM sale at issue was transacted at a time when SPS had surplus capacity.⁹⁸ Including these off-system opportunity sales in the peak load tests would impermissibly skew the test results. Therefore, we find that SPS's sales to EPE and PNM should be excluded from SPS's load calculations when determining the appropriate demand cost allocator for the Locked-In Period. As explained below, analyzing SPS's system demand, after excluding the off-system sales to EPE and PNM, indicates that SPS remains a 3 CP utility.

⁹⁵ *Carolina Power*, 4 FERC ¶ 61,107, at 61,230 (1978); *Illinois Power Co.*, 11 FERC ¶ 63,040, at 65,248-49 (1980) (*Illinois Power Initial Decision*), *aff'd*, 15 FERC ¶ 61,050 (1981). *See also* Opinion No. 501-A, 144 FERC ¶ 61,132 at P 52 (explaining that excluding off-system opportunity sales for which SPS does not plan its system is consistent with the principle of cost-causation, which requires that the parties who cause the costs should bear the costs (citing *Cincinnati Gas & Electric Co.*, 71 FERC ¶ 61,380, at 62,478 n.30 (1995))).

⁹⁶ Ex. GSE-1 at 26.

⁹⁷ Ex. SPS-47 at 9-12.

⁹⁸ Ex. GSE-1 at 25.

45. The Commission has stated that substantive ratemaking principles, such as demand allocation, once established for a particular company, should continue to be applied in subsequent cases unless there is a supervening change in circumstances or Commission policy requiring a different conclusion.⁹⁹ In each of SPS's last three rate cases—Opinion No. 162, in 1983;¹⁰⁰ Opinion No. 337, in 1989;¹⁰¹ and Opinion No. 501-A, issued concurrently with this order¹⁰²—the Commission determined that SPS was a summer peaking utility for which a 3 CP demand cost allocation methodology was appropriate. Conducting a comparable analysis in the instant proceeding indicates there has been no supervening change in circumstances or Commission policy that warrants a change in SPS's demand cost allocator for the Locked-In Period.

46. The Commission has historically focused on three separate peak load tests when analyzing the demand cost allocation methodology appropriate for a given utility. The first test is the On and Off Peak Test, whereby the Commission compares the average of the system peaks during the purported peak period, as a percentage of the annual peak, to the average of the system peaks during the off-peak months, as a percentage of the annual peak.¹⁰³ The second test is the Low to Annual Peak Test, in which the Commission calculates the lowest monthly peak as a percentage of the annual peak.¹⁰⁴ The third test is

⁹⁹ *Louisiana Power & Light Company*, Opinion No. 110, 14 FERC ¶ 61,075, at 61,128 (1981).

¹⁰⁰ Opinion No. 162, 22 FERC ¶ 61,341 (1983).

¹⁰¹ *Southwestern Pub. Serv. Co.*, Opinion No. 337, 49 FERC ¶ 61,296 (1989).

¹⁰² Opinion No. 501-A, 144 FERC ¶ 61,132.

¹⁰³ Under this test, the Commission has held that, in general, a 19 percentage point or less difference between these two figures indicates using the 12 CP demand allocation methodology is appropriate. *See Illinois Power Initial Decision*, 11 FERC at 65,248-49 (comparing average summer peak of 94 percent of annual peak to eight-month average peak of 75 percent of annual peak, a difference of 19 percentage points).

¹⁰⁴ Under this test, the Commission has held that a range of 66 percent or higher is indicative of a 12 CP system. *See id.* (approving 12 CP where lowest monthly peak as percentage of annual peak was 66 percent); *Delmarva Power & Light Co.*, 17 FERC ¶ 63,044, at 65,201 (1981) (*Delmarva Initial Decision*), *aff'd*, Opinion No. 185, 24 FERC ¶ 61,199 (1983), *reh'g denied*, Opinion No. 185-A, 24 FERC ¶ 61,380 (1983) (stating that for the Low to Annual Peak test, a low percentage indicates a load curve with a clearly defined peak, while a high percentage indicates a flatter load curve).

the Average to Annual Peak Test, whereby the Commission computes the average of the 12 monthly peaks as a percentage of the annual peak.¹⁰⁵ Commission precedent has set certain benchmarks against which the results of these tests are compared to help determine the appropriate demand allocation for a particular utility.¹⁰⁶

47. When comparing the results of the three peak load tests in this proceeding (calculated without SPS's sales to EPE and PNM) to the benchmarks established by the Commission in prior cases, one test – the On and Off Peak Test – indicates that SPS is a 3 CP utility; one test – the Low to Annual Peak Test – indicates that SPS is a 12 CP utility; and one test – the Average to Annual Peak Test – barely leans toward a 12 CP demand allocator. The table below reflects the results of these peak load tests calculated using SPS's load data for 2001 through 2006, excluding the off-system sales.¹⁰⁷

	Low to Annual Peak	On and Off Peak	Average to Annual Peak
Historical Commission Minimum for 12 CP	66% or higher	19% or less	81% or higher
2001	69.07	22.14	80.22
2002	67.14	21.36	81.2
2003	65.56	19.43	79.59

¹⁰⁵ Under this test, the Commission has held that the range indicating whether a utility is to be considered a 12 CP system is 81 percent or higher. *See Illinois Power Initial Decision*, 11 FERC at 65,249 (approving 12 CP where average monthly peak for five-year period was 81 percent); *Lockhart Power Co.*, Opinion No. 29, 4 FERC ¶ 61,337, at 61,807 (1978) (approving 12 CP where average monthly demand was 84 percent of annual system peak); *El Paso Elec. Co.*, Opinion No. 109, 14 FERC ¶ 61,082, at 61,147 (1981) (approving 12 CP where twelve-month average was 84 percent of maximum peak).

¹⁰⁶ *See supra* n.103, n.104, n.105.

¹⁰⁷ The Commission excluded from the chart load data from 2000 because that was an anomalous year on the SPS system. During that year, Golden Spread converted from full requirements to partial requirements service. Thus, a portion of the load data for 2000 reflects Golden Spread's full requirements service and is not representative of the demands placed on SPS's system during the locked-in period.

2004	67.13	22.89	80.47
2005	70.75	19.54	83.61
2006	68.99	20.98	82.31
Average 2001 - 2006	68.11	21.22	81.23

48. When the above results are compared to the results of the same peak load tests in Opinion Nos. 162 and 501-A, the numbers are not especially different—ranging less than two percentage points in each test. In all three cases, the test results are split, with at least one test indicating that a 3 CP demand cost allocator is appropriate and at least one test indicating that a 12 CP demand cost allocator is appropriate.

	Low to Annual Peak	On and Off Peak	Average to Annual Peak
Historical Commission Minimum for 12 CP	66% or higher	19% or less	81% or higher
Opinion No. 162	66.98	22.9	80.1
Opinion No. 501-A	66.2	21.7	79.9
Average 2001 -2006	68.11	21.22	81.23

49. The load ratios in the above tables indicate that SPS's system demand during the Locked-In Period is not significantly different from the system demand in SPS's past rate cases. In each of the rate cases, the results of the peak load tests are split, and all of them are close to the thresholds the Commission has historically used in applying these tests.

50. Because the results of the three primary peak load tests are not the only indicators of a change on SPS's system, we will also consider the two additional tests that the Commission conducted in Opinion No. 501-A. The first test measures the number of times the non-summer monthly peak demand exceeds the summer monthly peak

demand.¹⁰⁸ For SPS, the non-summer monthly peak demand was greater than the lowest summer peak month only one time during the period from 2001 to 2006.¹⁰⁹ The second test computes the number of times the non-summer monthly peak demand exceeds the summer monthly peak demand in the preceding year.¹¹⁰ For SPS, the non-summer peak demand only twice exceeded the summer peak demand of a prior year over the period from 2001 to 2006.¹¹¹ Thus, the results of these two additional peak load tests tend to support the use of a 3 CP demand allocator for SPS. Notably, the results of these two tests point even more strongly towards a 3 CP demand allocator for the Locked-In Period than the same tests did in Opinion No. 501-A. The following table compares the results of these additional load tests in each proceeding.

	# of non-peak months greater than peak months	non-peak months exceeding prior year peak months
Opinion No. 501-A (Average of 2001 - 2004)	0.5 per year (3 CP)	1 per year (3 CP)
Docket No. ER06-274-000 (Average of 2001 - 2006)	0.17 per year (3 CP)	0.6 per year (3 CP)

51. As we explained above, the standard for changing a substantive ratemaking principle, such as the proper demand allocator, is that there must be a supervening change in circumstances or Commission policy to warrant a change. Here, we do not find a change in SPS's system demand significant enough to warrant changing to a 12 CP demand cost allocator. While the results of the peak load tests here have moved slightly toward a 12 CP demand allocator, one test still clearly supports a 3 CP demand allocator and the results of all three load tests are close to the results from Opinion Nos. 162 and 501-A, in each of which the Commission determined SPS was a 3 CP utility. In addition,

¹⁰⁸ Opinion No. 501-A, 144 FERC ¶ 61,132 at P 57; *Carolina Power & Light*, 4 FERC ¶ 61,107 (1978), *reh'g granted on other grounds*, 5 FERC ¶ 61,081 (1978)).

¹⁰⁹ See Ex. GSE-51.

¹¹⁰ Opinion No. 501-A, 144 FERC ¶ 61,132 at P 57; *Consumers Energy Co.*, 86 FERC ¶ 63,004 (1999), *aff'd*, 98 FERC ¶ 61,333 (2002)).

¹¹¹ See Ex. GSE-51.

the two additional peak load tests we conducted both indicate, even more strongly than they did in Opinion No. 501-A, that SPS is a 3 CP utility.

52. We conclude that the corrected load data and the peak load tests, taken together, indicate that SPS is a 3 CP utility. However, system demand is only one of the operating realities the Commission must consider. We will also look at the other evidence the parties submitted concerning SPS's system, specifically SPS's scheduled maintenance and operating reserves during the test year.¹¹²

53. With regard to scheduled maintenance, the record demonstrates that during the 2005-2006 test year, SPS conducted no scheduled maintenance during June, July, and August; and between 2001-2006, SPS only once conducted scheduled maintenance in those three months.¹¹³ While not conclusive, this is certainly more indicative of a 3 CP utility than a 12 CP utility. If summer were not a critical time for peak load, SPS would spread its system maintenance activities more evenly throughout the year. Similarly, with regard to operating reserves, the record shows that SPS's operating reserves, as a percentage of peak load, were consistently lower in the peak summer months than in the non-summer months.¹¹⁴ During the 2001-2006 period, there were very few non-summer months in which the operating reserves dropped below the reserve level of a peak summer month.¹¹⁵ The existence of lower operating reserves in the peak summer months indicates that SPS is generally more concerned with meeting its reserve margins in summer months than in non-summer months. Thus, as with the data concerning SPS's

¹¹² The Commission has, in the past, considered other operating realities; specifically, a utility's unscheduled outages and diversity. *E.g.*, Opinion No. 501-A, 144 FERC ¶ 61,132 at PP 60-61. We do not address unscheduled outages and diversity in the instant order because the record contains limited data on these considerations.

¹¹³ Ex. GSE-51 at 1-6. The one instance of scheduled maintenance occurring in June, July, or August was in July of 2002.

¹¹⁴ *Id.*

¹¹⁵ In 2003, the reserve margins in May and September were lower than the reserve margin in June. *Id.* at 3. In 2005, the reserve margin in September was lower than the reserve margin in all three of the peak summer months. *Id.* at 5; *see also* Ex. SPS-64 at 2. In addition, the record contains conflicting data entries for 2006—the entry in Exhibit GSE-51 shows that the three peak summer months have the lowest reserve margins for that year, while the entry in Exhibit SPS-64 shows that the reserve margin in May was lower than the reserve margins in June and August. *Compare* Ex. GSE-51 at 6 *with* Exhibit SPS-64 at 3.

scheduled maintenance, the data on SPS's operating reserves are more indicative of a 3 CP utility than a 12 CP utility.

54. These operational realities, combined with the load ratio tests, demonstrate that SPS's load profile has not changed sufficiently to justify a change to a 12 CP demand cost allocator. Accordingly, we find that a 3 CP demand cost allocation methodology is appropriate for SPS during the Locked-In Period.

The Commission orders:

(A) The Initial Decision is hereby reversed, as discussed in the body of this order.

(B) SPS is hereby directed to file, within 30 days of the date of this order, a compliance filing quantifying refunds relating to cost of service rates from July 1, 2006 through June 30, 2008.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.