

151 FERC ¶ 61,045  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket Nos. ER13-366-004  
ER13-366-005  
ER13-367-002

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued April 16, 2015)

1. On October 16, 2014, the Commission issued an order<sup>1</sup> conditionally accepting Southwest Power Pool, Inc.'s (SPP) second filing to comply with the local and regional transmission planning and cost allocation requirements of Order No. 1000<sup>2</sup> and the Commission's First Compliance Order.<sup>3</sup> The Commission accepted SPP's second compliance filing, effective March 30, 2014, subject to a further compliance.<sup>4</sup>
2. On November 17, 2014, LS Power Transmission, LLC and LSP Transmission Holdings, LLC (together, LS Power) submitted a timely request for rehearing of the Second Compliance Order.

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<sup>1</sup> *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,048 (2014) (Second Compliance Order).

<sup>2</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

<sup>3</sup> *Sw. Power Pool, Inc.*, 144 FERC ¶ 61,059 (2013) (First Compliance Order).

<sup>4</sup> Second Compliance Order, 149 FERC ¶ 61,048 at PP 5, 24.

3. On December 15, 2014, in Docket No. ER13-366-005, SPP submitted revisions to Attachments O and Y of the SPP Open Access Transmission Tariff (Tariff)<sup>5</sup> to comply with the Second Compliance Order (Third Compliance Filing). SPP requests that all of the proposed revisions, except those removing provisions to incorporate Service Upgrades<sup>6</sup> into SPP's competitive bidding process, be made effective March 30, 2014, consistent with the First Compliance Order and Second Compliance Order. SPP requests that the revisions removing provisions to incorporate Service Upgrades into SPP's competitive bidding process be made effective January 1, 2015.

4. As discussed below, we conditionally accept SPP's compliance filing, and deny the request for rehearing.

### **I. Background**

5. In Order No. 1000, the Commission adopted a package of reforms addressing transmission planning and cost allocation that, taken together, are designed to ensure that Commission-jurisdictional services are provided at just and reasonable rates and on a basis that is just and reasonable and not unduly discriminatory or preferential. In particular, regarding regional transmission planning, Order No. 1000 amended the transmission planning requirements of Order No. 890<sup>7</sup> to require that each public utility transmission provider: (1) participate in a regional transmission planning process that produces a regional transmission plan; (2) amend its tariff to describe procedures for the consideration of transmission needs driven by public policy requirements established by local, state, or federal laws or regulations in the local and regional transmission planning processes; and (3) remove federal rights of first refusal from Commission-jurisdictional tariffs and agreements for certain new transmission facilities.

6. The regional cost allocation reforms in Order No. 1000 also required each public utility transmission provider to set forth in its tariff a method, or set of methods, for allocating the costs of new regional transmission facilities selected in a regional

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<sup>5</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment O and Y.

<sup>6</sup> Service Upgrades are network upgrades that result from requests for transmission service. *See* SPP, OATT, Sixth Revised Volume No. 1, § 1 (S - Definitions).

<sup>7</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

transmission plan for purposes of cost allocation. Order No. 1000 also required that each cost allocation method adhere to six cost allocation principles.

## **II. Notice of Filing and Responsive Pleadings**

7. Notice of SPP's December 15, 2014 Third Compliance Filing was published in the *Federal Register*, 79 Fed. Reg. 76,314 (2014), with interventions and protests due on or before January 5, 2015. On January 5, 2015, South Central MCN, LLC (South Central) filed a timely protest and comment to SPP's Third Compliance Filing. On January 20, 2015, ITC Great Plains, LLC (ITC Great Plains) filed an answer in response to the protest and comment. On February 2, 2015, SPP filed an answer in response to the protest and comment.

## **III. Discussion**

### **A. Procedural Matters**

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept ITC Great Plains' answer and SPP's answer because they have provided information that assisted us in our decision-making process.

### **B. Substantive Matters**

9. As discussed below, we deny LS Power's request for rehearing. We also find that SPP's December 15, 2014 compliance filing partially complies with the directives of the Second Compliance Order. We thus conditionally accept SPP's proposed revisions to the Tariff, subject to a further compliance filing within 30 days of the date of issuance of this order, as discussed below.

#### **1. References to State Law and Rights-of-Way**

##### **a. Second Compliance Order**

10. In the Second Compliance Order, the Commission granted rehearing and reversed its earlier finding that SPP must remove tariff provisions that require SPP to consider state law and rights-of-way at two early stages of the competitive bidding process.<sup>8</sup> The Commission found, upon further consideration, that the provisions SPP proposed simply refer to the practical impact that state laws and regulations may have on the siting, permitting, and construction of transmission facilities, and are thus consistent with Order

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<sup>8</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 143.

No. 1000.<sup>9</sup> Those provisions provide that SPP will follow its competitive bidding process for transmission facilities selected in its regional transmission plan for purposes of cost allocation if the transmission facilities “do not use rights of way where facilities exist”<sup>10</sup> and are “located where the selection of a Transmission Owner pursuant to [the competitive bidding process in the Tariff] does not violate relevant law where the transmission facility is to be built.”<sup>11</sup>

11. The Commission continued to require the elimination of federal rights of first refusal from Commission-jurisdictional tariffs or agreements. However, the Commission found that the issue was “whether it is appropriate for the Commission to prohibit SPP from recognizing state and local laws and regulations as a threshold matter when deciding whether SPP will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation.”<sup>12</sup> The Commission concluded that, on balance, the Commission should not prohibit SPP from recognizing state and local laws and regulations as a threshold issue. The Commission explained that, regardless of whether state or local laws or regulations are expressly referenced in the SPP Tariff, some such laws or regulations may independently prohibit a nonincumbent transmission developer from developing a particular transmission project in a particular state, even if the nonincumbent transmission developer would otherwise be designated to develop the transmission project under SPP’s regional transmission planning process.<sup>13</sup>

12. The Commission acknowledged that categorically excluding nonincumbent transmission developers from being designated to build these two categories of transmission projects may undermine the ability of SPP’s regional transmission planning process to identify the more efficient or cost-effective transmission solutions to regional transmission needs and could deny state and local policymakers important information to inform their siting and permitting processes. However, the Commission also acknowledged the concerns expressed on rehearing regarding the potential for inefficiencies and delays in the absence of these provisions. Therefore, the Commission

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<sup>9</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 146 (citing SPP Tariff, Attachment Y, §§ I.1.c and I.1.d).

<sup>10</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.1.c.

<sup>11</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.1.d.

<sup>12</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 145.

<sup>13</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 145.

granted SPP's request for rehearing and found that SPP will not be required to delete the provisions in sections I.1.c and I.1.d of Attachment Y of its Tariff.<sup>14</sup>

**b. Request for Rehearing**

13. LS Power requests rehearing of the Commission's decision to allow SPP to recognize state and local laws and regulations when deciding whether SPP will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation.<sup>15</sup> According to LS Power, the Commission should reinstate the First Compliance Order's findings and prohibit SPP from using state or local laws or regulations to categorically exclude transmission projects from competitive solicitation for a transmission project whose costs will be allocated in accordance with the regional cost allocation method.

14. LS Power contends that the issue here is not about whether the state or local authorities have the right to limit who builds in their jurisdiction, but rather whether: (1) those jurisdictions can dictate to the Commission which public utility transmission developers are eligible for regional cost allocation; and (2) SPP, and the Commission if SPP's determination is challenged, are in a position to determine whether such state or local laws actually prohibit nonincumbent transmission development.<sup>16</sup> LS Power argues that the answer to both of these issues is no. LS Power notes that it is the Commission's responsibility to ensure that the rates, terms and conditions of service provided by public utility transmission providers are just and reasonable and not unduly discriminatory or preferential, but LS Power argues that the Commission's finding that allows SPP to exclude transmission projects from competitive solicitation based on state and local laws or regulations would abdicate the Commission's responsibility to state or local authorities.<sup>17</sup> LS Power argues that state and local authorities would dictate which entities get access to the regional cost allocation method, regardless of whether that entity is the more efficient or cost-effective transmission developer, and that state and local authorities have no obligation to ensure just and reasonable rates beyond their own jurisdictions or to address transmission rates in interstate commerce.<sup>18</sup> LS Power

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<sup>14</sup> Second Compliance Order at P 146.

<sup>15</sup> LS Power Request for Rehearing at 1-7, 9; *see* Second Compliance Order, 149 FERC ¶ 61,048 at P 145.

<sup>16</sup> LS Power Request for Rehearing at 12-13.

<sup>17</sup> LS Power Request for Rehearing at 9, 12 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 330).

<sup>18</sup> LS Power Request for Rehearing at 13.

contends that the Order No. 1000 process determines the more efficient or cost-effective transmission project and transmission developer, irrespective of state laws or regulations, and to the extent that those laws or regulations call into question the outcome of that process, the place to enforce those laws or regulations is in the state or local jurisdiction implementing them, not through a Commission-approved tariff.<sup>19</sup>

15. LS Power agrees that Order No. 1000 does not require removal from Commission-jurisdictional tariffs or agreements of references to state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities, but LS Power argues that there is a difference between “references to state or local law” and SPP’s proposed provision that categorically excludes transmission projects from competitive solicitation based on SPP’s determination that state or local law would mandate a specific outcome or prohibit a nonincumbent transmission developer from developing the transmission project.<sup>20</sup> LS Power contends that the Commission in the First Compliance Order recognized this distinction, but ignored this distinction in the Second Compliance Order by finding that “some such laws or regulations may independently prohibit a nonincumbent transmission developer from developing a particular transmission project in a particular state, even if a nonincumbent transmission developer would otherwise be designated to develop the transmission project under SPP’s regional transmission planning process.”<sup>21</sup> According to LS Power, the Commission’s finding in the Second Compliance Order would permit SPP to categorically exclude a transmission project from the competitive bidding process, which determines the more efficient or cost-effective transmission developer, based on state or local laws or regulations that SPP determines through some as yet unidentified manner, thus preventing any nonincumbent transmission developer from developing the transmission project.<sup>22</sup>

16. LS Power also argues that neither SPP nor the Commission is in a position to make the determination as to whether state or local laws prohibit independent transmission development. LS Power points to SPP’s identification of Nebraska and Oklahoma as states providing a state right of first refusal for incumbent transmission owners,<sup>23</sup> but argues that both of those states’ laws were passed after Order No. 1000 was

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<sup>19</sup> LS Power Request for Rehearing at 13-14.

<sup>20</sup> LS Power Request for Rehearing at 10-11.

<sup>21</sup> LS Power Request for Rehearing at 11 (quoting First Compliance Order, 144 FERC ¶ 61,059 at P 179; Second Compliance Order, 149 FERC ¶ 61,048 at P 145).

<sup>22</sup> LS Power Request for Rehearing at 11-12.

<sup>23</sup> LS Power Request for Rehearing at 14 (citing SPP Request for Rehearing at 67).

implemented, which could be considered a direct attempt to circumvent the Commission's authority to determine which transmission projects and transmission developers are eligible for regional cost allocation. Further, LS Power argues that SPP has not demonstrated that either of those states' laws have been judicially tested or otherwise reviewed to confirm a prohibition on development by nonincumbent transmission developers. According to LS Power, SPP has not discussed in its stakeholder process how it intends to establish the capability to interpret state laws within the SPP region.<sup>24</sup>

17. LS Power argues that the Commission recognized in the First Compliance Order that the Commission should not be in the business of incorporating those state laws into a federal tariff for purposes of determining the exclusively federal issue of which transmission projects and transmission developers are entitled access to regional cost allocation.<sup>25</sup> According to LS Power, if SPP were to exclude transmission projects from competitive solicitation, SPP's interpretation of the state law would be challenged and the Commission would end up placed in the position of interpreting that state law, not for the purposes of applying it in the manner the state would, but for purposes of applying it to federal rules relating to regional cost allocation. Further, LS Power argues that the Commission's finding regarding state or local laws or regulations encourages anti-competitive state or local legislation intended to undermine Order No. 1000.<sup>26</sup>

18. LS Power also claims that the Commission failed to appropriately balance the harm from categorically excluding transmission projects from competition with the concerns expressed regarding the potential for inefficiencies and delays in the absence of the provisions referencing state or local laws or regulations. LS Power argues that the Commission failed to make a finding regarding the actual impact of any claimed inefficiencies or a balancing of those inefficiencies with the harm that arises to regional ratepayers from state or local rights of first refusal.<sup>27</sup> LS Power also contends that the Commission ignored balancing alleged inefficiencies of the categorical exclusion

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<sup>24</sup> LS Power Request for Rehearing at 14.

<sup>25</sup> LS Power Request for Rehearing at 15-16.

<sup>26</sup> LS Power Request for Rehearing at 17 and Ex. B. For example, LS Power describes Southwestern Public Service Company's presentation before the New Mexico Public Regulation Commission on November 5, 2014, as well as its claims that proposed legislation implementing a state right of first refusal was necessary so that the New Mexico Public Regulation Commission could control costs for transmission projects rather than leaving that issue to the Commission.

<sup>27</sup> LS Power Request for Rehearing at 15, 19.

provision with SPP's proposed alternative compliance language. According to LS Power, if the Commission had done so, it would have determined that alternatives exist to a categorical exclusion that would still result in a competitive determination, but would also account for assertions of state or local law in the evaluation process.<sup>28</sup>

19. LS Power also argues that the Second Compliance Order failed to make any finding regarding the provision on rights-of-way where facilities exist. LS Power states that the determination in the Second Compliance Order did not make a single finding related to why it is appropriate to permit competitive solicitation only for transmission projects that do not use rights-of-way where facilities exist.<sup>29</sup> LS Power agrees instead with the Commission's determination in the First Compliance Order that Order No. 1000 "did not find that a public utility transmission provider, as part of its compliance filing, may add a federal right of first refusal for a new transmission facility built on an existing right-of-way."<sup>30</sup> Moreover, LS Power argues that the Second Compliance Order offers neither an explanation for reversing this conclusion nor an explanation why the arguments raised against section I.1.c were unavailing.

20. LS Power further argues that the categorical exclusion of transmission projects involving rights-of-way was specifically argued and rejected in Order No. 1000-A.<sup>31</sup> LS Power argues that, in Order No. 1000-A, the Commission clarified that an "upgrade" does not refer to an entirely new transmission facility and noted that the issue was not whether the upgrade would be located in an existing right-of-way, but whether the new transmission facility is an upgrade to an incumbent transmission provider's own facilities. As such, LS Power claims that the Commission improperly allowed SPP to circumvent the finding in Order No. 1000-A in its compliance filing.<sup>32</sup>

21. LS Power contends that the rights-of-way referenced in the proposed provision are not usually based on any specific state or local law or regulation, but rather on the application of state case law precedent to individual property rights. According to

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<sup>28</sup> LS Power Request for Rehearing at 19.

<sup>29</sup> LS Power Request for Rehearing at 20 (citing Second Compliance Order, 149 FERC ¶ 61,048 at P 145).

<sup>30</sup> LS Power Request for Rehearing at 21 (quoting First Compliance Order, 144 FERC ¶ 61,059 at P 170).

<sup>31</sup> LS Power Request for Rehearing at 22 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at PP 426-427).

<sup>32</sup> LS Power Request for Rehearing at 22.

LS Power, there could be various individual parcels included in a single segment of rights-of-way where facilities exist. LS Power argues that SPP does not offer, and the Commission did not find, that it is feasible or appropriate for SPP, rather than a state court or commission, to determine the relative property interests as a threshold matter.<sup>33</sup> LS Power requests that the Commission clarify to SPP that incumbent transmission owner claims of existing rights-of-way need to be verifiable with legal descriptions and legally recorded instruments.<sup>34</sup> Further, LS Power argues that, unless SPP is determining specific routes of every transmission project, SPP cannot determine whether or not existing rights-of-way are implicated, and, therefore, the potential use of “rights-of-way where facilities exist” to exclude transmission projects from competition is misplaced.

**c. Compliance Filing**

22. SPP proposes to restore sections I.1.c and I.1.d of Attachment Y of its Tariff as proposed in the first compliance filing.<sup>35</sup>

**d. Protest**

23. South Central argues that SPP’s revised criteria stating that a Competitive Upgrade transmission project “do[es] not use rights-of-way where facilities exist”<sup>36</sup> creates confusion as to which entity can interpret relevant state and local laws with respect to utility ownership, licensing, siting, and permitting.<sup>37</sup> South Central states that the restored language lacks clarity and can create issues when interpreting a rights-of-way exclusion.

24. South Central argues that SPP’s stakeholders have diverse and widely-differing interpretations of the “rights-of-way where facilities exist” language. Further, South Central asserts that an interpretation of this provision could exclude transmission projects from Competitive Upgrade eligibility if the construction occurred inside an existing substation, even for facilities owned by multiple parties. South Central notes that a number of transmission facilities in SPP already involve construction inside an existing substation, including ITC Great Plains’ construction of a two line terminal inside

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<sup>33</sup> LS Power Request for Rehearing at 22-23.

<sup>34</sup> LS Power Request for Rehearing at 23 n.41.

<sup>35</sup> SPP Transmittal at 5.

<sup>36</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, Section I.1.c.

<sup>37</sup> South Central Protest at 5.

Sunflower Electric Power Corporation's (Sunflower) existing Spearville substation.<sup>38</sup> South Central states that, absent clarification, there is the risk that no transmission upgrade resulting from a regional approved transmission plan would be a Competitive Upgrade if it involves a line crossing a parcel with existing transmission facilities (whether or not those existing facilities are impaired), a connection to the existing substation, or a connection to an expansion of the existing substation.<sup>39</sup>

25. South Central states that these types of issues exist in some form in all of the Regional Transmission Organizations (RTOs) and need to be addressed by the Commission and in Commission-jurisdictional tariffs to ensure that the resulting policies and processes are just and reasonable, not unduly discriminatory and, where possible, consistent.<sup>40</sup> Thus, South Central submits that a technical conference to address the issues raised herein and the concerns of other stakeholders and RTOs as to similar areas of uncertainty would help the Commission develop a more complete record with respect to how it might guide the various RTOs and their stakeholders on implementing Order No. 1000 competitive rules.<sup>41</sup>

e. Answers

26. ITC Great Plains states that, while South Central's explanation accurately describes the physical configuration of the interconnection of ITC Great Plains' Kansas V-Plan project with Sunflower's substation, it omits mention of the pre-existing Co-Development Agreement and pre-existing easements between ITC Great Plains and Sunflower which enabled the construction of these facilities inside Sunflower's substation. Thus, ITC Great Plains states that, absent the extensive, codified, pre-existing relationship between ITC Great Plains and Sunflower, which is not common among SPP members, the successful construction of the portion of the Kansas V-Plan facilities within Sunflower's Spearville substation would not have been feasible.<sup>42</sup> ITC Great Plains asserts that an existing substation is a "right-of-way where facilities exist," and as such, transmission projects constructed therein, including upgrades necessary to facilitate the

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<sup>38</sup> South Central Protest at 4 n.10.

<sup>39</sup> South Central Protest at 4.

<sup>40</sup> South Central Protest at 6.

<sup>41</sup> South Central Protest at 7.

<sup>42</sup> ITC Great Plains Answer at 3-4.

interconnection of competitively-assigned transmission lines, are not competitive under SPP's Tariff.<sup>43</sup>

27. According to SPP, South Central raises issues that are outside the scope of this compliance proceeding and should be rejected. SPP asserts that South Central's comments do not address a narrow compliance issue, so the Commission should reject South Central's comments and request for a technical conference.<sup>44</sup> SPP states that neither South Central's arguments regarding SPP's reinsertion of language that would limit the definition of Competitive Upgrades nor South Central's examples address the issue of whether SPP complied with the Commission's directives as set forth in the Second Compliance Order.<sup>45</sup> SPP asserts that South Central even acknowledges that SPP complied with the Commission's directive in the Second Compliance Order.<sup>46</sup> SPP asserts that South Central should have addressed these issues by filing a request for rehearing of the Second Compliance Order, since South Central was party to the SPP compliance proceeding at the time the Second Compliance Order was issued.<sup>47</sup>

#### **f. Commission Determination**

28. On rehearing, LS Power argues that the Commission erred in allowing SPP to retain the language stating that "[t]ransmission facilities [must be] located where the selection of a Transmission Owner pursuant to [the competitive bidding process] does not violate the relevant law where the transmission facility is to be built."<sup>48</sup> For the reasons discussed below, we deny LS Power's request for rehearing.

29. In denying rehearing, we confirm the Commission's finding in the Second Compliance Order that it is appropriate for SPP to recognize state or local laws or

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<sup>43</sup> ITC Great Plains Answer at 4 (citing *Cal. Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,057, at P 237 (2013)).

<sup>44</sup> SPP Answer at 3-4, 10-11.

<sup>45</sup> SPP Answer at 4.

<sup>46</sup> SPP Answer at 4.

<sup>47</sup> SPP Answer at 8.

<sup>48</sup> LS Power Request for Rehearing at 1-7, 9 (referencing SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § I.1.d); *see* Second Compliance Order, 149 FERC ¶ 61,048 at PP 145-146.

regulations as a threshold matter in the regional transmission planning process.<sup>49</sup> As the Commission stated in the Second Compliance Order and we reiterate here, Order No. 1000's focus is on federal right of first refusal provisions in Commission-jurisdictional tariffs, and Order No. 1000 does not require removal from Commission-jurisdictional tariffs or agreements of references to state or local laws or regulations with respect to construction of transmission facilities, including but not limited to, authority over siting or permitting of transmission facilities.<sup>50</sup> In the Second Compliance Order, the Commission found that the language stating that transmission facilities must be located where the selection of a transmission owner pursuant to the competitive bidding process does not violate the relevant law where the transmission facility is to be built "simply refer[s] to the practical impact that state laws and regulations may have on the siting, permitting, and construction of transmission facilities, and [is] thus consistent with Order No. 1000."<sup>51</sup> The Commission explained that "[n]othing has changed the Commission's view that Order No. 1000's requirement to remove federal rights of first refusal is in the public interest" and stated that it continues "to require the elimination of federal rights of first refusal from Commission-jurisdictional tariffs or agreements."<sup>52</sup> The Commission also explained that Order No. 1000 was not intended to "limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities."<sup>53</sup> Therefore, Order No. 1000 "does not require removal of

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<sup>49</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 145.

<sup>50</sup> *Id.* P 131; *see* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 253 & n.231.

<sup>51</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 146.

<sup>52</sup> *Id.* at PP 144-145.

<sup>53</sup> *Id.* P 145; *see also* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 253 n.231, 319 (finding that "[n]othing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities. This Final Rule does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements. . . ." and ". . . our reforms are not intended to alter an incumbent transmission provider's use and control of its existing rights-of-way. . . . The retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way.").

references to such state or local laws or regulations from Commission-approved tariffs or agreements.”<sup>54</sup>

30. We disagree with LS Power that the Commission erred by basing its decision in the Second Compliance Order on arguments about inefficiencies and delays that may occur if SPP competitively bids the transmission project, while failing to consider the harm that may arise to regional ratepayers from state or local rights of first refusal.<sup>55</sup> While the Commission considered these arguments persuasive, the rationale for its decision in the Second Compliance Order was its finding that SPP’s proposed provision was not a federal right of first refusal and that, regardless of whether state or local laws or regulations are expressly referenced in the SPP Tariff, some such laws or regulations may independently prohibit a nonincumbent transmission developer from developing a particular transmission project in a particular state as a threshold matter, even if the nonincumbent transmission developer would otherwise be designated to develop the transmission project under SPP’s regional transmission planning process.<sup>56</sup> The Commission explained that it would not prohibit SPP from recognizing state and local laws and regulations when deciding whether SPP will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation, as Order No. 1000 was not intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.<sup>57</sup>

31. In Order No. 1000, the Commission found that removing federal rights of first refusal from Commission-jurisdictional tariffs and agreements would provide nonincumbent transmission providers with the opportunity to propose and construct transmission projects, consistent with state and local laws and regulations.<sup>58</sup> In this way, the Commission struck an important balance between removing barriers to participation by potential transmission providers in the regional transmission planning process and ensuring the nonincumbent transmission developer reforms do not result in the regulation

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<sup>54</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 253 & n.231, 319; *see also* Order No. 1000-A, 139 FERC ¶ 61,132 at P 427.

<sup>55</sup> LS Power Request for Rehearing at 15-18.

<sup>56</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 145 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 381).

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

<sup>58</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 259.

of matters reserved to the states.<sup>59</sup> In the Second Compliance Order, the Commission explained that its “decision to focus on *federal* (not state) right of first refusal provisions in Commission-jurisdictional tariffs was an exercise of remedial discretion designed to ensure that its nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states.”<sup>60</sup>

32. The Commission found that, in evaluating SPP’s tariff provision, the issue is whether it is appropriate for the Commission to prohibit SPP from recognizing state and local laws and regulations when deciding whether SPP will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation.<sup>61</sup> The Commission was called on to consider whether the provision creates a federal right of first refusal or merely references existing state or local laws or regulations with respect to construction, siting, or permitting of transmission facilities, in determining whether SPP must continue excluding the provision from its Commission-jurisdictional tariffs and agreements. The Commission carefully considered petitioners’ arguments in determining “whether it is appropriate for the Commission to prohibit SPP from recognizing state and local laws and regulations when deciding whether SPP will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation.”<sup>62</sup> The Commission found that it should not prohibit SPP from recognizing state and local laws and regulations as a threshold issue.<sup>63</sup>

33. LS Power’s request for rehearing, by contrast, seeks to expand the reach of Order No. 1000’s reforms by prohibiting SPP from recognizing state or local laws or regulations when deciding whether SPP will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation. Order No. 1000 defines the phrase “federal right of first refusal” to refer to rights of first refusal that are created by provisions in Commission-jurisdictional tariffs or agreements.<sup>64</sup> In particular, Order No. 1000 explained that a federal right of first refusal

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<sup>59</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 188; *see* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 43-47, 107.

<sup>60</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 188 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 107).

<sup>61</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 145.

<sup>62</sup> *Id.*

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

<sup>64</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 415.

in a region's Commission-jurisdictional tariffs or agreements would operate, at the federal level, to "prevent [nonincumbent] entities from constructing and owning new transmission facilities located in that region."<sup>65</sup> In contrast, state and local laws and regulations providing an incumbent transmission owner with a right of first refusal to develop a transmission project located within the state are created at the state and local level.<sup>66</sup> LS Power has not demonstrated how SPP's provision goes beyond what the Commission found as permissible references to state and local laws and regulations.

34. We disagree with LS Power that the Second Compliance Order "abdicates" the Commission's statutory responsibility to determine which transmission solutions and transmission developers are eligible for regional cost allocation and to ensure that the rates for that transmission project are just and reasonable and that it allows states to dictate to the Commission which transmission developers are eligible for regional cost allocation.<sup>67</sup> As noted above, a right of first refusal "based on a state or local law or regulation would still exist under state or local law even if removed from the Commission-jurisdictional tariff or agreement and nothing in Order No. 1000 changes that law or regulation."<sup>68</sup> Order No. 1000 is clear that nothing therein is "intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities."<sup>69</sup> With respect to LS Power's argument that the Commission will not be in a position to determine if the rates are in fact just and

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<sup>65</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 261.

<sup>66</sup> *See* Second Compliance Order, 149 FERC ¶ 61,048 at P 145 ("Regardless of whether state or local laws or regulations are expressly referenced in the SPP OATT, some such laws or regulations may independently prohibit a nonincumbent transmission developer from developing a particular transmission project in a particular state, even if the nonincumbent transmission developer would otherwise be designated to develop the transmission project under SPP's regional transmission planning process."); Order No. 1000-A, 139 FERC ¶ 61,132 at P 381 ("[A right of first refusal] based on a state or local law or regulation would still exist under state or local law even if removed from the Commission-jurisdictional tariff or agreement and nothing in Order No. 1000 changes that law or regulation, for Order No. 1000 is clear that nothing therein is 'intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.'").

<sup>67</sup> LS Power Request for Rehearing at 3, 12-13.

<sup>68</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 381.

<sup>69</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 287; Order No. 1000-A, 139 FERC ¶ 61,132 at P 381.

reasonable, we reiterate that Order No. 1000 “ensure[s] that the Commission’s transmission planning and cost allocation requirements are *adequate* to support more efficient and cost-effective investment decisions moving forward.”<sup>70</sup>

35. Regarding LS Power’s argument that SPP’s proposal places SPP and the Commission as the arbiters of state or local law, we acknowledge that while SPP will be responsible for selecting the transmission facility, we expect the states will provide input regarding their state or local laws or regulations. As the Commission stated in Order No. 1000-A, “our expectation is that state regulators should play a strong role and that public utility transmission providers will consult closely with state regulators to ensure that their respective transmission planning processes are consistent with state requirements.”<sup>71</sup> We anticipate that SPP will work closely with the states throughout the transmission planning process and that SPP’s procedures will provide transparency regarding any state or local laws or regulations it uses in its decision-making process. As such, we will not require SPP to require incumbent transmission owners to provide legal verification of existing rights-of-way. We note, however, that SPP’s rights-of-way provision is vague and not consistent with Order No. 1000. Therefore, as discussed below, we direct SPP to revise this provision.

36. After further consideration, we find that SPP’s specific provision providing that SPP will hold a competitive bidding process for a transmission facility selected in the regional transmission plan for purposes of cost allocation only if the transmission facility “do[es] not use rights-of-way where facilities exist”<sup>72</sup> is vague and not consistent with Order No. 1000. The Commission stated in Order No. 1000 that “the retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way.”<sup>73</sup> SPP’s proposed provision does not refer to the relevant laws or regulations granting the rights-of-way nor specifically to retention, modification or transfer of the rights-of-way. Thus, we direct SPP to submit, within 30 days of the date of issuance of this order, a further compliance filing to revise the provision in its Tariff that refers to “rights-of-way where facilities exist” to make it consistent with the Commission’s finding that retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way.

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<sup>70</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 44 (emphasis added).

<sup>71</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 338.

<sup>72</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y § I.1.c.

<sup>73</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319.

37. We disagree with LS Power's assertion that the Commission erred in granting rehearing and determining that SPP may retain the provision concerning the reference to rights-of-way under state law because the Commission failed to make any findings as to rights-of-way. As with state law, we find that the Commission "should not prohibit SPP from recognizing state and local laws and regulations as a threshold issue . . .when deciding whether SPP will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation."<sup>74</sup> Contrary to LS Power's argument, the arguments raised on rehearing of the First Compliance Order, which the Commission found persuasive, are sufficiently broad to encompass both of SPP's provisions, including those concerning rights-of-way under state laws, that would require SPP ultimately to designate an incumbent transmission owner to construct a transmission facility selected in the regional transmission plan for purposes of cost allocation in a particular state under the applicable state law governing such rights-of-way. Both of SPP's provisions concern laws enacted by states that govern the construction, siting, and permitting of transmission facilities. Therefore, the Commission's findings in the Second Compliance Order<sup>75</sup> and decision to grant rehearing properly also apply to a provision related to rights-of-way.

38. We find that our directive for SPP to revise the right-of-way provision largely addresses the concerns South Central raises in its protest about this provision. Thus, we deny South Central's request to convene a technical conference to present and discuss issues related to implementation of the competitive bidding processes across RTOs approved under Order No. 1000. In addition, South Central's protest and request to convene a technical conference raises issues that are outside the scope of this SPP compliance proceeding because they go beyond the compliance directives in the Second Compliance Order. South Central's protest does not pertain to whether SPP has complied with the directives in the Second Compliance Order, but rather how transmission planning regions should address rights-of-way issues in general.

## **2. Evaluation Process**

### **a. Second Compliance Order**

39. In the Second Compliance Order, the Commission found that SPP had justified its "points" system to evaluate potential transmission developers, and the point weightings

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<sup>74</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 145.

<sup>75</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 145.

assigned to each evaluation category, in the proposed competitive bidding process.<sup>76</sup> With regard to the assertion that SPP's proposed competitive bidding process considers cost as an inappropriately small proportion of the point system, the Commission found that SPP had shown that reliance on factors other than those referring explicitly to transmission project costs would reasonably allow SPP to select the appropriate transmission developer for each Competitive Upgrade.<sup>77</sup> The Commission noted that, in Order No. 1000, the Commission stated that the criteria that public utility transmission providers use to evaluate and select among competing transmission solutions and resources must consider "the relative efficiency and cost-effectiveness of [any proposed transmission] solution."<sup>78</sup> The Commission found that the same evaluation should occur when choosing a transmission developer to develop a specific transmission facility that SPP already selected in the regional transmission plan for purposes of cost allocation and found that SPP's proposal met that requirement.<sup>79</sup>

40. In the Second Compliance Order, the Commission agreed with SPP that its Integrated Transmission Planning process that identifies the transmission solutions to recommend to the SPP Board of Directors (SPP Board) for approval has as a central tenet the identification of the most cost-effective transmission projects.<sup>80</sup> The Commission found, therefore, that the process results in SPP identifying the more efficient or cost-effective solution to an identified need prior to SPP soliciting bids for the approved

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<sup>76</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 248. SPP's five evaluation criteria and maximum points for each criterion are as follows: (1) Engineering/ Reliability/ Quality/ General Design (up to 200 points); (2) Construction Project Management (up to 200 points); (3) Operations/ Maintenance/ Safety (up to 250 points); (4) Rate Analysis (Cost to Customers) (up to 225 points); and (5) Financial Viability and Creditworthiness (up to 125 points). SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.f.iii.

<sup>77</sup> The Commission also noted that SPP's Integrated Transmission Planning process has also been accepted by the Commission as a process that is designed to select Competitive Upgrades that are the more efficient or cost-effective transmission solutions to regional transmission needs. Second Compliance Order, 149 FERC ¶ 61,048 at n.530).

<sup>78</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 250 (quoting Order No. 1000, FERC Stats & Regs. ¶ 31,323 at P 331 n.307).

<sup>79</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 250.

<sup>80</sup> See SPP, OATT, Sixth Revised Volume No. 1, Attachment O §§ III.3.c, III.4.c, III.8.d, & III.8.h.

transmission project. The Commission explained that, as such, by the time SPP evaluates the bids, SPP has already identified and the SPP Board has approved the transmission project while taking into account, among other things, the cost of proposed transmission solutions. The Commission noted that SPP solicits bids from transmission developers only after stakeholders have vetted, and the SPP Board has approved, the more efficient or cost-effective transmission project.<sup>81</sup>

41. The Commission also stated that, on balance, SPP had shown that, while the costs transmission developers include in their bids may vary based on, for example, the type of equipment used to build the selected transmission facility, equal emphasis on factors other than those referring explicitly to transmission project costs will allow SPP to select the appropriate transmission developer for each transmission facility that has been found to be the more efficient or cost-effective solution to regional transmission needs.<sup>82</sup>

42. In addition, the Commission stated that, while the rate analysis criterion itself is only given a 225 point percent weighting in SPP's evaluation, SPP's consideration of all five criteria together will allow SPP to select the most efficient or cost-effective bid. The Commission found that each of SPP's proposed evaluation criteria is designed to assess and ensure efficiency and cost-effectiveness.<sup>83</sup> The Commission also found that, as described, every evaluation category is directly related to determining whether a bid in the competitive bidding process is the more efficient or cost-effective option to developing a Competitive Upgrade. The Commission found that consideration of these factors will allow SPP to evaluate, for example, whether a transmission developer is likely to avoid major cost overruns during project implementation (as in the project management criterion) or to efficiently maintain the project over its lifetime (as in the operations criterion). Thus, the Commission found that SPP had supported the 225 point weighting of the rate impact evaluation criterion.<sup>84</sup>

43. However, in the Second Compliance Order, the Commission found that SPP's proposal as part of the rate analysis metric for the Industry Expert Panel to consider "material on hand, assets on hand, or, rights-of-way ownership, control, or acquisition" was not sufficiently specific because it did not specify that such consideration will be limited to the value of such assets. The Commission stated that, in the rate analysis metric, a quantitative consideration is appropriately made up of only cost-based,

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<sup>81</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 251.

<sup>82</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 252.

<sup>83</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 253.

<sup>84</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 253.

quantifiable metrics. Accordingly, the Commission directed SPP to revise its Tariff to specify that the Industry Expert Panel<sup>85</sup> will only consider the quantitative cost impact of material on hand, assets on hand, and rights-of-way ownership, control, or acquisition when evaluating a bid under the rate analysis evaluation criterion.<sup>86</sup>

**b. Request for Rehearing**

44. LS Power argues that the Commission erred in accepting SPP's claim that the Integrated Transmission Planning process results in a regional transmission planning process that selects more cost-effective transmission solutions, as required by Order No. 1000, long before the identity of the Designated Transmission Owner<sup>87</sup> is determined.<sup>88</sup> According to LS Power, there is no support for the notion that SPP solicits bids from transmission developers only after stakeholders have vetted, and the SPP Board has approved, the more efficient or cost-effective transmission project nor for the notion that such process was what Order No. 1000 intended.<sup>89</sup> Further, LS Power argues that selection in the Integrated Transmission Planning process does not result from an evaluation of the relative efficiency and cost-effectiveness of any proposed transmission solution.<sup>90</sup> In addition, LS Power contends that the finding that the more efficient or cost-effective transmission solution is determined before the competitive bidding process could suggest that the nonincumbent transmission developer reforms are largely irrelevant to selection of the more efficient or cost-effective solution, which is not consistent with Order No. 1000.<sup>91</sup>

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<sup>85</sup> The SPP Board establishes the Industry Expert Panel to review bids in SPP's competitive bidding process, and select the winning bid to recommend to the SPP Board. *See* SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § II.

<sup>86</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 249.

<sup>87</sup> The Designated Transmission Owner is a transmission owner that has been designated by SPP pursuant to Attachment Y of the SPP Tariff to construct a transmission project. SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § 1 (D – Definitions).

<sup>88</sup> LS Power Request for Rehearing at 23-24 (citing Second Compliance Order, 149 FERC ¶ 61,048 at P 210).

<sup>89</sup> LS Power Request for Rehearing at 25.

<sup>90</sup> LS Power Request for Rehearing at 25.

<sup>91</sup> LS Power Request for Rehearing at 26.

45. LS Power argues that Order No. 1000 does not support the finding in the Second Compliance Order that regardless of what happens in the competitive bidding process, the Integrated Transmission Planning process has ensured that the more efficient and cost-effective transmission project will be built.<sup>92</sup> LS Powers argues that opponents of Order No. 1000 asserted before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) that the determination of the transmission developer is irrelevant to determining the more efficient and cost-effective transmission solution.<sup>93</sup> LS Power argues that, given that the Commission strongly opposed this conclusion on appeal, and the Court of Appeals overwhelmingly rejected it, the Commission's finding in the Second Compliance Order cannot be supported because it is the nonincumbent transmission developer reforms and the competitive bidding process that determine those rates.<sup>94</sup>

46. LS Power asserts that the Commission has recognized that all the Order No. 1000 reforms are integrally related and should be understood as a package that is designed to reform processes and procedures that, if left in place, could result in Commission-jurisdictional services being provided at rates that are unjust and unreasonable and unduly discriminatory or preferential.<sup>95</sup> It also argues that Order No. 1000 held that the nonincumbent transmission developer reforms were necessary to ensure that the transmission planning process arrived at the right result by ensuring participation by nonincumbent transmission developers in not only the solution determination portion but in the right to build those transmission projects. LS Power argues, however, that, save for the addition of transmission projects designed to address transmission needs driven by public policy requirements, much of SPP's process for determining transmission solutions through its Integrated Transmission Planning process is largely no different than the process in place under Order No. 890.<sup>96</sup> LS Power asserts that Order No. 1000 was premised on the finding by the Commission that without the participation of nonincumbent transmission developers, which means a nondiscriminatory opportunity to be the developer and owner of a transmission project through a competitive bidding

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<sup>92</sup> LS Power Request for Rehearing at 27.

<sup>93</sup> LS Power Request for Rehearing at 27 (citing Joint Brief of Petitioners and Supporting Intervenors Concerning Rights Of First Refusal, filed in Case Nos. 12- 1232 *et al.*, United States Court of Appeals for the District of Columbia Circuit at 24-25).

<sup>94</sup> LS Power Request for Rehearing at 27.

<sup>95</sup> LS Power Request for Rehearing at 26 (citing Order No. 1000, FERC Stats. & Regs ¶ 31,323 at P 47).

<sup>96</sup> LS Power Request for Rehearing at 26.

process or sponsorship process, Order No. 1000 found that the more efficient and cost-effective transmission solution will not be available for selection.<sup>97</sup> LS Power claims that the Commission cannot eviscerate that conclusion in a supplemental compliance filing through findings inconsistent with Order No. 1000 itself. Therefore, according to LS Power, the Commission's conclusion that the more efficient or cost-effective transmission solution is determined for the regional transmission plan before competitive solicitation is arbitrary and capricious, not supported, and not reasoned decision-making.<sup>98</sup>

47. Further, LS Power argues that, because SPP's evaluation process does not quantitatively determine relative efficiency and cost-effectiveness, the Commission erred in determining that SPP has shown that reliance on factors other than those referring explicitly to transmission project costs will reasonably allow SPP to select the appropriate transmission developer for each Competitive Upgrade.<sup>99</sup> LS Power also argues that the Commission reversed its finding in the First Compliance Order that SPP's proposed evaluation process and point allocation were deficient but did not cite any new evidential support for this reversal.<sup>100</sup> Moreover, LS Power argues that the Commission offers no insights on how the relative differences in efficiency or cost-effectiveness will actually be measured by SPP's proposed evaluation criteria in a manner that is relevant to the impact on rates.<sup>101</sup> According to LS Power, if SPP cannot quantitatively measure the rate impact of such differences, then the Commission cannot consider the relative differences because the Commission's authority under section 206 of the Federal Power Act (FPA)<sup>102</sup> is "limited to those methods or ways of doing things on the part of the utility that directly affect the rate or are closely related to the rate, not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so."<sup>103</sup> Moreover, LS Power argues that unless the transmission provider can demonstrate that an identified

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<sup>97</sup> LS Power Request for Rehearing at 28.

<sup>98</sup> LS Power Request for Rehearing at 28.

<sup>99</sup> LS Power Request for Rehearing at 29 (citing Second Compliance Order, 149 FERC ¶ 61,048 at P 250).

<sup>100</sup> LS Power Request for Rehearing at 29.

<sup>101</sup> LS Power Request for Rehearing at 30.

<sup>102</sup> 16 U.S.C. § 824e (2012).

<sup>103</sup> LS Power Request for Rehearing at 31 (quoting *Cal. Indep. Sys. Operator, Corp.*, 372 F.3d 395, 403 (D.C. Cir. 2004)).

“efficiency” directly affects rates, it should not and cannot be relevant to the Commission’s section 206 authority to determine a more efficient or cost-effective transmission solution or bidder.<sup>104</sup>

48. LS Power also argues that it is not reasoned decision making for the Commission to state in the Second Compliance Order that, in the rate analysis metric, a quantitative consideration is appropriately made up of only cost-based, quantifiable metrics, but to then permit non-rate factors that have no cost-based, quantifiable metrics to carry more weight.<sup>105</sup>

### c. Commission Determination

49. We deny LS Power’s request for rehearing and affirm the finding in the Second Compliance Order that SPP has sufficiently demonstrated that the proposed weighting of its evaluation criteria is not unduly discriminatory and will result in a regional transmission planning process that selects more efficient or cost-effective transmission solutions.

50. We disagree with LS Power that the Commission’s acknowledgement that SPP solicits bids from transmission developers only after stakeholders have vetted, and the SPP Board has approved, the more efficient and cost-effective transmission project suggests that nonincumbent transmission developer reforms are irrelevant to the selection of more efficient or cost-effective transmission solutions. As the Commission stated in the Second Compliance Order, the criteria used to evaluate and select among competing transmission solutions must consider the relative efficiency and cost-effectiveness of any proposed solution and this same evaluation should occur when choosing a transmission developer to develop a specific transmission facility that SPP already selected in the regional transmission plan for purposes of cost allocation.<sup>106</sup> With respect to LS Power’s argument that SPP’s transmission solution determination process is largely no different than the process in place prior to Order No. 1000, we note that the D.C. Circuit acknowledged that the Commission had not ignored that ““some current practices in some

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<sup>104</sup> LS Power Request for Rehearing at 32 (citing *Cal. Indep. Sys. Operator, Corp.*, 372 F.3d at 403). As an example, LS Power points to PJM’s Artificial Island request for proposals to demonstrate that SPP’s non-cost criteria could result in the selection of an incumbent transmission developer despite that it would cost ratepayers up to \$100 million more than selecting the nonincumbent transmission developer. *Id.* at 33.

<sup>105</sup> LS Power Request for Rehearing at 31 (citing Second Compliance Order, 149 FERC ¶ 61,048 at P 249).

<sup>106</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 252.

regions' may have already been satisfying a 'minimum set of requirements that must be met' under the Final Rule."<sup>107</sup> Further, as the Commission stated in Order No. 1000, to the extent existing transmission planning processes satisfy the Order No. 1000 requirements, public utility transmission providers need not revise their OATTs and instead can describe in their compliance filings how the relevant requirements are satisfied under their existing process.<sup>108</sup> Neither interests of efficiency nor the requirements of Order No. 1000 compel SPP to create an entirely new regional transmission planning process if many aspects of SPP's existing process comply with Order No. 1000. In addition, the Commission's recognition in the Second Compliance Order that SPP's Integrated Transmission Planning process results in SPP identifying the more efficient or cost-effective solution to an identified need prior to SPP soliciting bids for the approved transmission project does not undermine the benefits to efficiency or cost-effectiveness provided by SPP's competitive bidding process.

51. If the Commission were to accept LS Power's arguments on the weighting of the evaluation criteria, we would essentially be directing SPP to place the majority emphasis in the evaluation on costs and cost-based factors;<sup>109</sup> however, Order No. 1000 does not include such a requirement. Rather, as the Commission explained in the Second Compliance Order, Order No. 1000 requires SPP to consider the relative efficiency and cost-effectiveness of proposed bids.<sup>110</sup> LS Power's argument on rehearing that the Commission should change this requirement is a collateral attack on Order No. 1000. There, the Commission declined a similar request from LS Power to impose a requirement to select the bidder that is willing to guarantee the lowest net present value of its annual revenue requirement and held that, other than to require that these selection criteria be transparent and not unduly discriminatory, the Commission would allow the selection criteria to vary in different transmission planning regions.<sup>111</sup>

52. We also reject, as a collateral attack on Order No. 1000, LS Power's argument that, unless the transmission provider can demonstrate on compliance that any "efficiency" factors it will use in the evaluation process directly affect rates, the Commission lacks jurisdiction under section 206 of the FPA over the evaluation factors used in the regional transmission planning process. In Order No. 1000, the Commission

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<sup>107</sup> *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 67.

<sup>108</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at n.71 & n.139.

<sup>109</sup> LS Power Request for Rehearing at 24.

<sup>110</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 250.

<sup>111</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at PP 450, 455.

found that “transmission planning activities have a direct and discernable [e]ffect on rates,” explaining that “[i]t is through the transmission planning process that public utility transmission providers determine which transmission facilities will more efficiently or cost-effectively meet the needs of the region, the development of which directly impacts the rates, terms and conditions of jurisdictional service.”<sup>112</sup> The Commission also found that, based on its review of the record, existing transmission planning processes were unjust and unreasonable or unduly discriminatory or preferential,<sup>113</sup> and that part of the remedy is for public utility transmission providers to establish a transparent and not unduly discriminatory process for evaluating whether to select a transmission facility in the regional transmission plan for purposes of cost allocation.<sup>114</sup> The D.C. Circuit held that “the Commission reasonably interpreted [s]ection 206 to authorize [Order No. 1000’s] planning mandate.”<sup>115</sup> Thus, LS Power’s argument that the Commission and SPP are now required to demonstrate how the evaluation criteria, which are part of the transmission planning reforms the Commission required in Order No. 1000, are within the Commission’s jurisdiction is a collateral attack on Order No. 1000.

**d. Compliance Filing**

53. In the Third Compliance Filing, SPP proposes to revise the rate analysis criterion to include only “[t]he quantitative cost impact of material on hand, rights-of-way approval, [and] assets on hand.”<sup>116</sup>

**e. Commission Determination**

54. We find that SPP has failed to comply with the Commission’s directive in the Second Compliance Order. SPP’s proposal to use rights-of-way approval as a descriptor as part of the rate analysis evaluation criterion is insufficient because it is not clear that the costs of rights-of-way approval include the costs of rights-of-way ownership, control, and acquisition. Further, SPP has not explained why it proposed to revise the language in the Tariff to state “rights-of-way approval” instead of “rights-of-way ownership, control, or acquisition,” which is the language the Commission directed it to include in its Tariff. Accordingly, we direct SPP to submit, within 30 days of the date of issuance of this

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<sup>112</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 112.

<sup>113</sup> *Id.* P 116.

<sup>114</sup> *Id.* P 328.

<sup>115</sup> *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 58-59 (D.C. Cir. 2014).

<sup>116</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.f.iii.4.g.

order, a further compliance filing to revise its Tariff to include “rights-of-way ownership, control, or acquisition” under the rate analysis evaluation criterion rather than “rights-of-way approval.”

#### **IV. Other Compliance Directives**

55. In the Second Compliance Order, the Commission directed SPP to revise the definition of merchant transmission developer to remove the provision requiring that a merchant transmission developer not intend to transfer functional control over its transmission facilities to the transmission provider.<sup>117</sup> In the Third Compliance Filing, SPP proposes to revise the definition of merchant transmission developer to provide that “a Merchant Transmission Developer is an entity that assumes all financial responsibility for the development, construction, and operation of the transmission facilities it seeks to interconnect to the Transmission System and does not seek regional cost allocation or cost recovery for such facilities under this Tariff.”<sup>118</sup>

56. In the Second Compliance Order, the Commission directed SPP to modify the definition of a “rebuild” so that only the replacement of part of an existing transmission facility can be considered an upgrade.<sup>119</sup> In the Third Compliance Filing, SPP proposes to revise the definition to provide that a rebuild is a transmission facility that is an improvement to, addition to, or replacement of part of an existing transmission facility.<sup>120</sup>

57. In the Second Compliance Order, the Commission directed SPP to reduce the possible ambiguity regarding how a facility that contains both a rebuild and a new transmission facility will be treated under the definition of a Competitive Upgrade by including the reference, “[a]s determined in accordance with Section I.2 of this Attachment Y,” at the beginning of section I.1 of the Tariff.<sup>121</sup> In the Third Compliance Filing, SPP included this reference.<sup>122</sup>

58. In the Second Compliance Order, the Commission directed SPP to remove the proposed revisions to Attachment Y that incorporate Service Upgrades into SPP’s

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<sup>117</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 57.

<sup>118</sup> SPP Transmittal at 4; SPP Tariff Attachment O, Addendum 5.

<sup>119</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 158.

<sup>120</sup> SPP Transmittal at 6; SPP Tariff Attachment Y, § II.

<sup>121</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 162.

<sup>122</sup> SPP Transmittal at 6; SPP Tariff, Attachment Y, § I.1.

competitive bidding process.<sup>123</sup> In the Third Compliance Filing, SPP proposes to remove the revisions to Attachment Y that incorporated Service Upgrades into SPP's competitive bidding process.<sup>124</sup>

59. In the Second Compliance Order, given its decision to grant rehearing with regard to SPP's proposal to consider state law and rights-of-way as a threshold matter in the SPP competitive bidding process,<sup>125</sup> the Commission found moot SPP's proposed revisions to require the Industry Expert Panel, during the evaluation process, to consider: (1) rights-of-way ownership and control;<sup>126</sup> (2) plans to obtain authorization in the state(s) in which the Competitive Upgrade will be located;<sup>127</sup> and (3) any right of first refusal granted under relevant law for the Competitive Upgrade.<sup>128</sup> Accordingly, the Commission directed SPP to delete the proposed provisions in Attachment Y sections III.2.f.iii.2.b, III.2.f.iii.4.g, III.2.f.iii.2.i, and III.2.f.iii.2.j<sup>129</sup> and to restore the revised provision in Attachment Y section III.2.f.iii.4.g.<sup>130</sup> In the Third Compliance Filing, SPP proposes to modify the referenced sections to remove revisions proposed in the second compliance filing and to restore language proposed in the first compliance filing.<sup>131</sup>

60. We find that SPP's proposals, described above, comply with the directives of the Second Compliance Order.

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<sup>123</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 177.

<sup>124</sup> SPP Transmittal at 6.

<sup>125</sup> *See supra* PP 10-12.

<sup>126</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, §§ III.2.f.iii.2.b. The existing provision would require the Industry Expert Panel to consider only rights-of-way acquisition.

<sup>127</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.f.iii.2.i.

<sup>128</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 256.

<sup>129</sup> SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, §§ III.2.f.iii.2.b, III.2.f.iii.4.g, III.2.f.iii.2.i, and III.2.f.iii.2.j.

<sup>130</sup> Second Compliance Order, 149 FERC ¶ 61,048 at P 256. SPP, OATT, Sixth Revised Volume No. 1, Attachment Y, § III.2.f.iii.4.g.

<sup>131</sup> SPP Transmittal at 5.

The Commission orders:

(A) The request for rehearing is hereby denied, as discussed in the body of this order.

(B) SPP's compliance filing is hereby conditionally accepted, effective March 30, 2014, with the exception of revisions to remove provisions to incorporate Service Upgrades into the competitive bidding process, which are accepted effective January 1, 2015, as discussed in the body of this order.

(C) SPP is hereby directed to submit a further compliance filing, within 30 days of the date of issuance of this order, as discussed in the body of this order.

By the Commission. Chairman Bay is concurring with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket Nos. ER13-366-004  
ER13-366-005  
ER13-367-002

(Issued April 16, 2015)

BAY, Chairman, *concurring*:

In Order No. 1000, the Commission determined that “federal rights of first refusal in favor of incumbent transmission providers deprive customers of the benefits of competition in transmission development, and associated potential savings” and therefore ordered that they be removed from Commission-approved tariffs.<sup>1</sup> The Commission noted, however, that Order No. 1000 was not “intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.”<sup>2</sup>

In this order, the Commission affirms on rehearing that Order No. 1000 does not compel the removal of tariff provisions that permit, in the transmission planning process, the recognition of state laws and regulations that grant a right of first refusal with respect to the construction of transmission facilities or the use of existing rights of way. While I concur in the result of this order, I again write separately to note that the Constitution limits the ability of states to erect barriers to interstate commerce.<sup>3</sup> State laws that discriminate against interstate commerce – that protect or favor in-state enterprise at the expense of out-of-state competition – may run afoul of the dormant commerce clause.<sup>4</sup> The

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<sup>1</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 285.

<sup>2</sup> *Id.* at P 287.

<sup>3</sup> *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) (the Commerce Clause “has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce”).

<sup>4</sup> *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (“State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities.”); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (“The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states.”); *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 352 (1977) (invalidating a state law that “offers the . . . [in-state] industry the very sort of

Commission's order today does not determine the constitutionality of any particular state right-of-first-refusal law. That determination, if it is made, lies with a different forum, whether state or federal court.

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Norman C. Bay  
Chairman

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protection against competing out-of-state products that the Commerce Clause was designed to prohibit”).

Document Content(s)

ER13-366-004.DOCX.....1-30