

136 FERC ¶ 61,010
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc.	Docket No. EL11-34-000
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ORDER ON PETITION FOR DECLARATORY ORDER

(Issued July 1, 2011)

On April 8, 2011, Midwest Independent Transmission System Operator, Inc. (MISO) filed a petition for declaratory order (Petition) seeking Commission confirmation that the terms of the Joint Operating Agreement in effect between Southwest Power Pool, Inc. (SPP) and MISO (SPP JOA), regarding the sharing of transmission capacity on a common path, as set forth in section 5.2 of the SPP JOA, will remain in effect and applicable to Entergy Arkansas, Inc. (Entergy Arkansas), an operating utility subsidiary of Entergy Corporation (Entergy), in the event Entergy Arkansas becomes a transmission-owning member of MISO. In this order, we grant the Petition, as discussed below.

Background

The relationship among Entergy Arkansas and the other Entergy Operating Companies in the Entergy system has been governed by the Entergy System Agreement (ESA), the purpose of which is to jointly plan and operate the Entergy Operating Companies' production resources and transmission system to serve the Entergy Operating Companies' load across the entire Entergy transmission system. In 2005, Entergy Arkansas filed a notice to terminate its participation in the ESA effective December 2013. In February 2010, the Arkansas Public Service Commission (Arkansas Commission) initiated a proceeding to manage the process of choosing a successor arrangement to the ESA for Entergy Arkansas.

The Entergy transmission system has a high-voltage interconnection with the

MISO transmission system via Entergy Arkansas' transmission facilities. The interconnection is located in New Madrid, Missouri, where Ameren Corporation (Ameren), Associated Electric Cooperative, Inc. (Associated Cooperative), and Entergy Arkansas share the capacity of the 500/345 kV transformers. The direct contiguous tie capability between Entergy Arkansas and Ameren is approximately 1,000 MW of the 1,500 MW total capability of the interconnection. The tie is governed by a 1977 Interchange Agreement, which was amended in 1996 in compliance with Order No. 888, to ensure that open access is provided over the entire interconnection and to remove all contractual restrictions on third-party use.

Additionally, the Entergy transmission system has 41 direct interconnections with the SPP transmission system capable of transferring up to 14,100 MW of power. The SPP transmission system is also interconnected with the transmission facilities of two MISO transmission owners. The interconnection with MidAmerican Energy Company (MidAmerican) has a combined transfer capability of approximately 5,100 MW and the interconnection with Ameren has a combined transfer capability of approximately 1,800 MW for a total interconnection between MISO and SPP of approximately 6,900 MW.

The Arkansas Commission initiated a proceeding in 2008 to, among other things, inquire into electric transmission issues within the areas served by the SPP Regional Transmission Organization (RTO) and Entergy Arkansas. The Arkansas Commission issued subsequent orders requesting information from SPP and Entergy, as well as comments from stakeholders and other interested parties regarding the state of the Entergy Arkansas transmission system and the performance of the Independent Coordinator of Transmission (ICT) to date. The Arkansas Commission also initiated a hearing to review the latest ICT Annual Performance Report and subsequently found that the ICT arrangement did not deliver significant benefits to Entergy Arkansas' customers. The Arkansas Commission also ordered SPP to perform a cost-benefit study to evaluate the costs and benefits of Entergy Arkansas' – as well as Entergy's – full membership in SPP versus the *status quo* arrangement of the ICT.

Coinciding with the Arkansas Commission's findings concerning the ICT arrangement, Entergy's federal and retail regulators held a conference to discuss the status of the Entergy transmission system and the performance of the ICT. One of the primary outcomes of this meeting was the Commission's offer to fund the cost-benefit study that would evaluate the possibility of Entergy joining the SPP RTO. During the process of performing that study, several stakeholders suggested additional addendum studies that would expand the

scope of the original cost-benefit analysis. One such addendum was to examine the costs and benefits of Entergy joining MISO. Entergy agreed to fund this portion of the study. Entergy Arkansas also included an examination of the costs and benefits of joining MISO as a stand-alone company.

Under the Arkansas Commission's procedural schedule, Entergy Arkansas was required to file with the Arkansas Commission by May 12, 2011, declaring whether Entergy Arkansas believes that the SPP option, the MISO option, or a new stand-alone arrangement, would offer the greatest benefit to its customers. On May 12, 2011, in accordance with the Arkansas Commission procedural schedule, Entergy Arkansas filed its report titled "Evaluation Report filed by Entergy Arkansas, Inc. Pursuant to Order Nos. 20, 27 and 29" evaluating its strategic operations and providing its initial recommendation of joining MISO as its preferred option.

During discussions among SPP, MISO, Entergy and Entergy's retail regulators of the various options, an issue involving the SPP JOA was raised. Specifically, MISO was asked to confirm the availability of transmission path sharing under section 5.2 of the SPP JOA in the event that Entergy Arkansas chooses, or is directed by the Arkansas Commission, to join MISO. MISO's counsel prepared a legal analysis of section 5.2 of the SPP JOA which concluded, *ceteris paribus*, that "the transmission-sharing provisions of [s]ection 5.2 would be applicable to the Entergy interconnection after Entergy becomes a [MISO] Transmission Owner and should be interpreted to allow [MISO] to utilize the combined transmission capacity of the existing SPP interconnections with Entergy and [MISO]."

On January 11, 2011, SPP distributed a Memorandum regarding "Limitations on [MISO] use of SPP Transmission Capacity to Integrate Entergy into the [MISO] System" (SPP White Paper). As discussed more fully below, in the SPP White Paper, SPP challenged MISO's analysis of section 5.2 and concluded that, in the event Entergy Arkansas decides to become a MISO transmission owner, MISO would not be able to rely on the contract path sharing provisions of section 5.2 to use capacity on the SPP transmission system. Among other things, SPP asserted that expiration of the Interchange Agreement in 2013 would eliminate high voltage ties between MISO and Entergy, and that MISO is limited to transmission capacity on flowgates based on its use of the regional systems as of April 1, 2004.

Petition

MISO states that it initiated a dispute resolution process with SPP under section 14.2 of the SPP JOA to resolve the differences in interpretation. MISO states that it requested that the parties proceed directly to the Commission's Office of Dispute Resolution pursuant to section 14.2.3. MISO states that SPP continually opposed commencement of the formal dispute resolution process, preferring instead an informal discussion. While MISO states that it did meet informally with SPP on two occasions, SPP was unwilling to change its interpretation of section 5.2 of the SPP JOA. Accordingly, MISO states that filing the Petition was the only practicable course of action to ensure the definitive and expeditious resolution of any uncertainty created by the parties' irreconcilable interpretations of section 5.2 of the SPP JOA.

MISO states that it has provided a straightforward interpretation of section 5.2 of the SPP JOA which states as follows:

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

MISO states that section 5.2 applies when SPP and MISO have contract paths to the same entity and that, in such a case, the combined contract path capacity will be made available for use by both. Because both SPP and MISO have contract paths to Entergy Arkansas, MISO states that these paths are subject to the sharing provisions of section 5.2. MISO asserts that SPP does not dispute that both SPP and MISO have contract paths to Entergy Arkansas or that these contract paths are currently subject to sharing under section 5.2. Rather, according to MISO, SPP contends that if Entergy Arkansas becomes a transmission owner of MISO, section 5.2 would no longer apply because Entergy Arkansas would no longer be a "same entity" within the meaning of section 5.2 because it would, in such case, be part of MISO as a whole. In other words, according to MISO, SPP argues that section 5.2 applies only when MISO and SPP have contract paths to the same third-party entity.

MISO states that SPP's interpretation applying section 5.2 only in the context of third-party entities is incorrect because the term "same entity" may include third-party entities, but is not limited to third-party entities. Moreover, MISO

states that “Third Party” is a defined term in the SPP JOA that would have been used if that was the intended purpose.

MISO further states that its interpretation of section 5.2 is consistent with the two RTOs’ application of the provision on at least one prior occasion unrelated to the Entergy Arkansas RTO membership issue. When the Ameren-Energy interface is out of service, Ameren needs an alternative to serve its load located radially off of the Energy transmission system. MISO states that SPP did not contest the use of SPP’s system to serve Ameren’s load located radially off of Energy’s system, but only wanted to make sure that Energy would recognize section 5.2 of the SPP JOA and implement the schedules.

Additionally, MISO states that its interpretation of section 5.2 is consistent with the history of the provision, which originated in the Joint Operating Agreement between MISO and PJM Interconnection L.L.C. (PJM) (PJM JOA), which became the template for the subsequent SPP JOA. MISO explains that the contract path sharing provisions in the PJM JOA were created in direct response to the Commission’s recognition of the “partial electrical stranding of Wisconsin and Michigan given the RTO participation choices conditionally accepted.” MISO quotes the Commission’s order directing the Alliance Companies, MISO, and PJM to

propose a solution which will effectively hold harmless utilities in Wisconsin and Michigan from any loop flows or congestion that results from the proposed configuration. Such a solution is to be part of an overall joint operational plan to be filed by [MISO] and PJM under which both organization [sic] will manage seams and any reliability or operational issues there under.

MISO states that the resulting solution was section 6.5 of the PJM JOA, providing for the sharing of capacity across the seam. PJM and MISO stated in their joint transmittal letter in Docket No. ER04-375-000 their expectation that the joint and common market between the two RTOs would yield a higher degree of flowgate coordination because it will eliminate distinct contract paths. MISO states that while there has been some contract path sharing between PJM and MISO under section 6.5 of the PJM JOA for reliability purposes, this provision also has been consistently utilized to serve MISO’s load in Michigan, which is dependent on section 6.5. MISO adds that under certain operating circumstances, PJM relies on section 6.5 of the PJM JOA to meet its contract path obligations. Consequently, PJM and MISO have not

limited the scope of this provision to “third-party entities” but applied it to their own transmission-owning members. MISO argues that because section 5.2 of the SPP JOA was patterned on section 6.5 of the PJM JOA, the same interpretation should be given to the SPP JOA.

Additionally, MISO claims that its interpretation of section 5.2 of the SPP JOA is consistent with the Commission’s RTO policy, which is to encourage voluntary development and participation in RTOs. MISO states that the purpose of the RTO is to efficiently utilize transmission capacity based upon open and nondiscriminatory access principles. MISO adds that RTOs are required to work together to avoid “seams” and efficiently allocate inter-RTO capacity. MISO states that RTOs are tasked with adopting mechanisms to address transmission congestion at the borders and minimize inter-RTO loop flows. Consequently, RTOs are called upon to share capacity without distinction of whether an entity, with existing paths to both of the adjoining RTOs, is an RTO transmission-owning-member or an unaffiliated vertically integrated utility.

MISO continues that the capacity sharing requirement also has the added benefit of encouraging closer regional planning between interconnected transmission owners, consistent with Order No. 890, to reach mutually agreeable transmission improvements to reduce or eliminate the instances when sharing is necessary, particularly in congested parts of the system. MISO notes that the Commission recently emphasized that the lack of coordinated transmission planning across seams could be increasing costs to customers.

MISO also contests SPP’s objection in the SPP White Paper that the status of the Interchange Agreement could affect the Commission’s interpretation of section 5.2. MISO states that the status of the Interchange Agreement is immaterial to the interpretative task at hand. MISO states that any determination of section 5.2 based on a future modification or replacement of the Interchange Agreement is speculative. MISO also notes that the Interchange Agreement also grandfathered existing transactions preserving the arrangement in the event the Interchange Agreement is cancelled or substantially modified, at least as long as such transactions remain effective.

MISO also rejects SPP’s objection in the SPP White Paper that MISO was limited to transmission capacity on flowgates based on its use of the regional systems as of April 1, 2004. MISO claims that SPP’s assessment that MISO does not have significant firm rights to provide the allocations needed to reliably serve the loads of MISO and Entergy Arkansas using the SPP flowgates

is immaterial to the Petition. MISO argues that contract path sharing does not override the obligation in the SPP JOA to manage congestion and the SPP JOA was designed to accommodate the parties' expansion, including the integration of new transmission owners and withdrawal of transmission owners.

Notice of Filing and Responsive Pleadings

Notice of the Petition was published in the *Federal Register*, 76 Fed. Reg. 22,697 (2011), with interventions and protests due no later than May 9, 2011.

Timely motions to intervene were filed by Arkansas Cities, Arkansas Electric Cooperative Corporation, Basin Electric Power Cooperative (Basin), Calpine Corporation, Cleco Power LLC, PJM, Coalition of Midwest Transmission Customers, Consumers Energy Company, DC Energy Midwest, LLC, Detroit Edison Company, Duke Energy Corporation, Edison Mission Energy, Exelon Corporation, FirstEnergy Service Company, ITC Holdings Corporation, Lincoln Electric System, Louisville Gas & Electric Company, Lafayette Utilities System, Louisiana Energy and Power Authority, Municipal Energy Agency of Mississippi, Mississippi Delta Energy Agency, Public Service Commission Yazoo City, MS, Clarksdale Public Utilities Commission, MS, Missouri Joint Municipal Electric Utility Commission, NRG Companies, South Mississippi Electric Power Association, Southwestern Power Resources Association, Tennessee Valley Authority (TVA), Union Power Partners, L.P., Western Farmers Electric Cooperative, and Wisconsin Electric Power Company.

Timely motions to intervene and comments were filed by American Electric Power Service Corporation (AEP), Associated Cooperative, Council of the City of New Orleans (Council), East Texas Cooperatives, Electric Power Supply Association (EPSA), The Empire District Electric Company (Empire), Entergy Services, Inc., Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company (collectively, KCP&L), Midwest ISO Transmission Owners (MISO TOs), Nebraska Public Power District (NPPD), Oklahoma Gas and Electric Company (OG&E), Omaha Public Power District (OPPD), Southwestern Power Administration, SPP, Sunflower Electric Power Corporation and Mid-Kansas Electric Company (Sunflower), Westar Energy, Inc. (Westar), and Xcel Energy Services, Inc. (Xcel). A motion to intervene out-of-time was filed by Genon Power Midwest, LP and motions to intervene out-of-time and comments were filed by Public Utility Commission of Texas (Texas Commission) and the Mississippi Public Service Commission (Mississippi Commission). Notices of intervention and comments were filed by the Arkansas Commission, Louisiana Public Service Commission (Louisiana Commission),

and the Illinois Commerce Commission.

MISO, Entergy Operating Companies, and Basin, Western Area Power Administration and Heartland Consumers Power District filed motions for leave to answer and answers.

Section 5.2 Interpretation

SPP and other protesters argue that, if the Commission does not dismiss the Petition on the basis that it is premature or will not resolve uncertainty, the Commission should interpret section 5.2 based on its plain language without resorting to extrinsic evidence of other agreements to which SPP is not a party and reject the Petition. They argue that the language in section 5.2 is clear and unambiguous, and applies only if the two parties, MISO and SPP, have “contract paths to the same entity.” They state that if Entergy Arkansas joins MISO, then neither MISO nor SPP would have a contract path to the same entity; instead, as a result, SPP’s contract path would be with MISO, not Entergy Arkansas, and MISO could not have a contract path with itself.

SPP and other protesters state that the plain and ordinary usage of the term “contract path” is to refer to a designated path over which parties engage in point-to-point transmission service. They note that the Commission in Order No. 890 confirms this description by stating, “[p]oint-to-point service consists of a contact-path with a designated point of receipt and point of delivery.” SPP notes that the term “contract path” is defined similarly by other industry sources. For example, SPP provides the definitions of “contract path” from the North American Electric Reliability Council (NERC); the North American Energy Standards Board (NAESB); and MISO’s business practice manuals. SPP states that these sources essentially define “contract path” as a transfer of energy between balancing areas or transmission providers via a point-to-point transmission transaction. Accordingly, given these consistent descriptions of the term “contract path” from various industry sources, SPP states the industry has established the notion of a “contract path” to identify the route from the source to the sink of a particular transaction in order to conduct point-to-point transmission service transactions.

According to SPP, when MISO dispatches energy across the MISO transmission system for the use of MISO members, MISO does so using network service transmission capability of the MISO system. SPP notes that, in Order No. 890, the Commission stated that “network service has no identified contract path.” SPP argues that, if Entergy Arkansas were to join MISO, it would do so via

network transmission service internal to MISO, which “has no identified network contract path.” Moreover, SPP states that, after Entergy Arkansas joins MISO, there would be no “interchange transactions” to and from Entergy Arkansas, as Entergy Arkansas would be part of the single MISO balancing authority which was created in 2008. Thus, SPP and other protesters state that after Entergy Arkansas joins MISO, MISO will no longer have a contract path with Entergy Arkansas and section 5.2 is no longer applicable.

KCP&L states that SPP has a contractual obligation to administer transmission service on the systems owned by its members, but it does not have a right to use the system. Thus, according to KCP&L, SPP does not have a contract path in any sense that would have been understood by the parties to the SPP JOA. Even if MISO is somehow entitled to use SPP’s contract path, MISO is only entitled to what SPP has which is an obligation to administer service over those facilities. KCP&L states that it would be strange for the Commission to accommodate Entergy Arkansas’ choice of RTO, by denying the SPP members of the benefits of their choices to join SPP, by giving MISO control over SPP transmission facilities.

KCP&L also questions whether the interconnection agreements between the parties in question could even be said to establish “contract paths.” KCP&L states that MISO is not requesting the use of interconnections with SPP, but instead is seeking a path from the MISO interconnection with SPP across the SPP system to the SPP interconnection with Entergy Arkansas. KCP&L states that it is well established that interconnection contracts do not convey an entitlement to transmission service beyond the point of interconnection. In other words, KCP&L states that interconnection agreements do not create a “contract path” beyond the point of interconnection. KCP&L states that to reach the interconnection between Entergy Arkansas and SPP from the interconnection between MISO and SPP, a new contract path needs to be created across SPP for which MISO should pay. Thus, KCP&L argues that MISO is seeking a contract path through SPP which should be treated as a request for transmission service. KCP&L states that the logical result of MISO’s interpretation is that either RTO would have access to the other RTO’s system at no cost; thereby eliminating the rates between SPP and MISO. KCP&L states that the Commission cannot approve a rate that is confiscatory.

SPP and other protesters argue that, if the Commission finds the language in section 5.2 unclear, the Commission may rely on extrinsic evidence of the parties’ intentions (which may include the parties’ course of performance), but

that evidence must bear on the mutual intent of the parties to the actual contract at issue. They contend that SPP was not a party to the negotiations between MISO and PJM and the intent of the parties to the PJM JOA should not be considered the intent of the parties to the SPP JOA. SPP continues that the contract path sharing provisions in the PJM JOA were contained in the section of the PJM JOA dealing with the “reciprocal coordination” of the uses of each other’s system, but the contract path sharing provisions in the SPP JOA are contained in the section of the SPP JOA dealing with coordination of the parties’ sales of point-to-point transmission service, consistent with SPP’s interpretation of section 5.2.

SPP adds that, while MISO and PJM each had remote, weakly interconnected transmission owners integrating with their systems, the same is not true for MISO and SPP at the time they negotiated the SPP JOA. Moreover, with the addition of Entergy Arkansas, the situation still would be different from the circumstances faced by MISO and PJM because Entergy Arkansas’ large, remote system would benefit from sharing SPP’s capacity cost-free, but SPP would not benefit from SPP’s use of MISO’s system. Thus, only MISO would benefit from its interpretation of section 5.2 while both MISO and PJM benefitted from that interpretation under the PJM JOA.

SPP states that it would have no way to have known that section 5.2 of the SPP JOA would be interpreted in the way that MISO currently does. SPP notes that in the orders giving rise to the SPP JOA, the Commission required seams coordination, but it did not demand that parties allow uncompensated use of their transmission facilities. SPP states that, although SPP has seams agreements with neighboring systems, it does not have seams agreements that allow use of the transmission system without compensation.

Empire and Westar add that it is necessary to consider the understanding of the SPP JOA held by SPP’s members because the members voted on the SPP JOA. Empire states that if it had the same understanding of the SPP JOA as MISO, Empire would have voted against it. Similarly, Westar states that SPP transmission owners did not give up the right to recover a just and reasonable rate from other utilities and the Commission can not compel a utility to abandon rights when joining an RTO.

Procedural Objections

Irrespective of their interpretation of section 5.2 of the SPP JOA, SPP and other protesters argue that the Commission should not grant the Petition because

MISO has not met the standard for granting a declaratory order. SPP and other protesters explain that the Commission has previously dismissed a petition for a declaratory order as premature when granting the petition “would circumvent established procedures” approved by the Commission. SPP states that in *Lynch*, the Commission also stated that it would “not interject itself into a dispute... before the process we have approved has run its course.” SPP and other protesters explain that the Commission may issue a declaratory order if it would “terminate a controversy or remove uncertainty.” They further explain that whether to issue a declaratory order is within the Commission’s discretion.

SPP and other protesters further claim that the Petition is premature and should be dismissed because the Petition would inappropriately circumvent established dispute resolution procedures that have not run their course. SPP states that the Commission has dismissed petitions for declaratory orders as premature when a party fails to comply with the dispute resolution procedures to sharpen the issues ultimately submitted to the Commission for resolution. Moreover, SPP states that the Commission has found that

when the parties freely include a dispute resolution clause in their contract, the Commission is bound by the *Mobile-Sierra* doctrine to enforce it.

SPP explains that the dispute resolution process in the SPP JOA requires parties to attempt in good faith to resolve informally those disputes that could delay either party receiving the benefits of the SPP JOA before initiating a formal dispute. SPP continues that if the informal attempts to resolve the dispute fail, then the parties commence formal dispute resolution which has three steps: (1) meeting and negotiating through the coordinating committee; (2) meeting and negotiating by the parties' presidents; and (3) mediation through the Commission's Office of Dispute Resolution. SPP states that only upon a party's determination that mediation has failed to resolve the dispute may a party initiate a proceeding before the Commission.

SPP explains that MISO did not follow this approach because the coordinating committee had a single teleconference which should be considered the informal attempt to achieve consensus before invoking formal dispute resolution.

However, according to SPP, if the single teleconference is viewed as step one in the formal dispute resolution process, MISO still did not request that the presidents of MISO and SPP meet to discuss the matter, as required, and MISO simply skipped the third step. SPP states that, as a result of MISO's disregard for the dispute resolution process, interested parties are unable to provide their perspectives on the matters at issue and the parties are unable to narrow their disagreements as required by Commission precedent. Thus, the protesters request the Petition be dismissed so that the dispute resolution process can continue.

Renegotiation of the SPP JOA

Other protesters add that the Commission is required to evaluate the JOA as a whole. Westar explains that it is a "cardinal principle of contract construction that a document should be read to give effect to all its provisions and to render them consistent with each other... the Court must read 'the contract as a whole, interpreting all parts of the contract together,' and must 'give all provisions a reasonable, lawful, and/or effective meaning.'"

SPP and other protesters state that granting the Petition would be both premature and would not remove uncertainty when evaluating the SPP JOA as a whole since section 3.1 of the SPP JOA provides for renegotiation of the SPP JOA in certain circumstances. SPP states that, as a result of the renegotiation required under section 3.1, section 5.2 may be revised or deleted in its

entirety and any declaratory order would not be addressing the renegotiated SPP JOA. Similarly, SPP argues that the Commission should not prematurely declare that section 5.2 will remain in effect and applicable if Entergy Arkansas joins MISO, as MISO requests, before the parties renegotiate the agreement and regardless of the renegotiation outcome.

SPP argues that, while the integration of a distant, large system such as Entergy's was not contemplated when the SPP JOA was signed, the SPP JOA recognized the need for changes to address such matters. SPP explains that section 3.1 of the SPP JOA requires a good faith renegotiation of its provisions when the parties' systems change in the manner that MISO now proposes. SPP and OG&E note that MISO has previously told the Commission that "changes to a party's boundaries" would trigger the renegotiation provision but that MISO is being inconsistent because it now claims that the integration of the new transmission owners would not trigger a renegotiation.

Given the new use of the SPP system now proposed by MISO, SPP has submitted a Memorandum of Understanding (MOU) to MISO to begin the negotiations. SPP and other protesters allege that MISO has refused to take part in the renegotiation. SPP states that the draft MOU acknowledged the parties disagreed on the interpretation of section 5.2, but that if other issues could be resolved, then an appropriate sharing of transmission capacity may be able to be negotiated.

SPP and other parties argue that negotiation is necessary because MISO is requesting the Commission to prematurely address one piece of the much larger set of issues in a piecemeal fashion pertaining to Entergy Arkansas' proposed integration into MISO. They state that instead the Commission should wait until the parties have had an opportunity to address all of the issues in a comprehensive fashion.

Similarly, Sunflower explains that renegotiation is necessary to preserve the fragile compromises accomplished within the SPP as it implements the integrated transmission planning and "highway/byway" cost allocation procedures for high voltage facilities. Sunflower questions how a project will ever meet the necessary cost/benefit analysis if no costs can be assessed against MISO and other RTOs, because the Petition raises a good example of the free rider issue which can only be resolved through renegotiation.

SPP and other protesters stated that, given these concerns about adverse conditions that would result from the integration of Entergy Arkansas into MISO, there are issues that need to be negotiated in addition to the interpretation of section 5.2. The first major issue raised by multiple protesters is the need for a hold harmless provision to protect SPP and its members from the effects of Entergy Arkansas' RTO choice including loop flows.

SPP and other protesters state that the Commission required a hold harmless

provision when ComEd and AEP chose to join PJM and a similar provision should be adopted if Entergy Arkansas joins MISO. OG&E explains that the Commission rejected a hold harmless proposal submitted by ComEd and AEP because they had failed to submit “the type of detailed analysis needed” to determine all adverse impacts associated with loop flow or congestion due to ComEd and AEP joining PJM. OG&E states that, among other things, ComEd and AEP were required to compensate the Wisconsin and Michigan utilities for the loss of transmission service revenues for transactions exiting the combined PJM-MISO region that remained after the elimination of the rate pancaking. OG&E argues that MISO acknowledges that the PJM JOA was created in response to the choice of ComEd and AEP to join PJM, but MISO then asks the Commission to interpret section 5.2 in a manner that would conflict with the Commission’s holding in the same proceeding because MISO has not been willing to negotiate a hold harmless provision.

KCP&L notes that when ComEd joined PJM before AEP, ComEd was not directly interconnected with PJM. ComEd created a contract path by purchasing transmission service from AEP until AEP joined PJM. KCP&L notes that MISO expressed concern about the indirect cost and market impacts that would result from islanding ComEd and linking its system to PJM through a contract path approach. KCP&L states that the Commission responded by conditioning the acceptance of the proposal so that operational and financial impacts from loop flows and congestion associated with the integration, notwithstanding the existence of the paid contract path, would be appropriately addressed, including hold harmless compensation. NPPD adds that the provision in the PJM JOA was expressly designed to hold certain MISO transmission owners harmless from power flows created by a boundary change within MISO and PJM. NPPD argues that, here, MISO is promoting an interpretation of section 5.2 that would facilitate a change to RTO membership that will create the type of harm the PJM JOA provision was designed to mitigate.

The second major issue raised by SPP and other protesters to be negotiated is MISO’s compensation to SPP and its members for use of the existing SPP transmission

system, the expected \$4 billion of new facilities to address the reliability and economics of the SPP system, and any new mutually beneficial regional transmission projects.

The third major issue raised by protesters to be negotiated is the effect of the potential loss of MISO's contract path with Entergy Arkansas in its interpretation of section 5.2. SPP and other protesters view the loss of the contract path as a real possibility if Ameren terminates its membership and withdraws from MISO or the Interchange Agreement terminates. The Council states that the loss of the contract path between MISO and Entergy Arkansas could put Entergy Arkansas' membership in MISO at risk and could subject Entergy Arkansas' customers to hundreds of millions of dollars in exit fees.

The fourth major issue raised by protesters to be negotiated is the need for more developed congestion management provisions in the SPP JOA to address the additional congestion that will be caused by the integration of Entergy Arkansas into MISO. SPP notes that MISO professes in its Petition that it will use SPP's system only "up until congestion occurs and then the parties return to their allocation based on historical use," but then later states that it disagrees that it is "constrained in the amount of firm energy flow they could place on SPP flowgates" based on their historical usage.

Harm to Other Systems

SPP and other protesters also state that renegotiation is necessary because of the harm to MISO's neighbors caused by the integration of Entergy Arkansas into MISO. While MISO has not performed any studies yet, the protesters argue that the current state of the operations in the region indicate that the integration of Entergy Arkansas into MISO will cause great harm to their systems and they request that MISO be required to do studies to determine the full extent of the harm that will be done. NPPD and OPPD state that it is already incurring substantial loop flows from MISO without compensation and that the integration of Entergy Arkansas into MISO will cause even more significant congestion over its interconnections. Similarly, Associated Cooperative states that if the Commission adopts MISO's interpretation, it will have a tremendous adverse impact in the region. Associated Cooperative states that MISO has limited usage of the facilities under the Interchange Agreement and will not be able to integrate Entergy Arkansas into MISO. Empire states that MISO's Petition is the antithesis of the Commission's RTO policies because the virtual lack of electrical contiguity between Entergy Arkansas and MISO means that Entergy Arkansas' participation in MISO unavoidably would create many

problems that other RTO participation options almost certainly would not. Westar explains that MISO's interpretation would take capacity on SPP's system that is already spoken for and that was relied upon when determining the benefits resulting from implementation of SPP's Day 2 Market.

Miscellaneous Issues

Protesters raise other miscellaneous issues. For example, Council and Texas Commission argue that the Commission's interpretation should consider all Entergy Operating Companies and CLECO, not just Entergy Arkansas. The Council states that a legal interpretation pertaining to just Entergy Arkansas may not be extrapolated to conclude that all of the Entergy Operating Companies and CLECO may integrate with MISO across SPP's system.

Empire states that granting the Petition would discourage RTOs from entering into Joint Operating Agreements in the future despite the benefits of coordination between and among RTOs.

Comments in Support of Petition

Entergy Operating Companies state that the Commission should issue a timely declaratory order to remove the uncertainty surrounding the potential benefits that might result if the Entergy Operating Companies join MISO.

MISO TOS agree with MISO's interpretation of section 5.2 as consistent with the plain language of the provision and of the SPP JOA as a whole, MISO's argument that its interpretation is consistent with the Commission's policy on voluntary RTO membership, and MISO's contention that the Commission should consider the manner in which the contract sharing provision of the PJM JOA was crafted in order to understand the same provision of the SPP JOA.

MISO TOS state that when certain Alliance Companies proposed to join PJM, the Commission agreed with their proposal as long as the proposal did not undermine the ability of both organizations to carry out their RTO functions. MISO TOS state that the Commission required PJM and MISO to devise a solution to manage the seams and any reliability or operational issues and the PJM JOA, including the contract sharing provisions, were part of that solution. MISO TOS state that the provisions were created to apply to the sharing of contract paths of a utility that was a member of one of the RTOs to solve the partial electrical isolation of MISO members.

EPSA adds that MISO's interpretation of section 5.2 is also consistent with

Order No. 2000, which identified addressing parallel loop flow and interregional coordination as two of the eight minimum functions of an RTO. Specifically, in Order No. 2000, the Commission stated that,

[W]e clarify that this rule does not prevent addressing parallel path flow issues on a larger-than-single-RTO basis. In fact, we require RTOs to develop and implement procedures for addressing parallel flow issues with other regions.

EPSA also faults SPP's interpretation for seeking to create transactional barriers to complicate Entergy Arkansas' choice to join MISO. By preventing Entergy Arkansas from joining MISO, the SPP interpretation would, according to EPSA, exacerbate seams issues, prevent greater pricing convergence, and potentially decrease reliability margins. EPSA notes that in a discussion of the 2010 ISO/RTO Metrics Report presented by the CEOs of each ISO/RTO to the Commission, it was noted that simply working to eliminate seams between New York and New England would save consumers almost \$800 million.

Discussion

Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), the Commission will grant Genon Power Midwest, LP, the Mississippi Commission, and the Texas Commission's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed in this proceeding and will, therefore, reject them.

Substantive Matters

We grant MISO's Petition and find that section 5.2 of the SPP JOA would allow for the sharing of available transmission capacity between MISO and Entergy

Arkansas and SPP and Entergy Arkansas in the event that Entergy Arkansas becomes a transmission-owning member of MISO.

More specifically, we find that the term “entity” is sufficiently broad to encompass Entergy Arkansas, regardless of whether it is a member of MISO, SPP, or neither. Although the term “entity” is not defined in the SPP JOA, certain defined terms in the SPP JOA use the word “entity” to refer to companies which fall within membership of SPP or MISO. For example, “Operating Entity” is defined as “an *entity* that operates and controls a portion of the bulk transmission system with the goal of ensuring reliable energy interchange between generators, loads, and other operating entities.” (emphasis added) Thus, the defined term “Operating Entity” is a subset of the undefined term “entity” (i.e. Operating Entity is only one type of “entity”). Because this definition of “Operating Entity” could apply to any transmission-owning member of MISO or SPP, the undefined term “entity” must then also apply to any transmission-owning member of MISO or SPP, as argued by MISO. Therefore, we find that SPP’s and other protesters’ interpretation that the term “entity” in section 5.2 applies only to entities that are not members of MISO or SPP (i.e., third-party entities) is unsupported by the terms of the SPP JOA.

Further, SPP’s argument that MISO cannot have a contract path with one of its own members is unsupported. There is no reason why MISO cannot have a “contract path” with Entergy Arkansas if Entergy Arkansas becomes a transmission-owning member of MISO, or why SPP would no longer have contract paths with Entergy Arkansas simply by virtue of Entergy Arkansas joining MISO. Since the term “contract path” is not defined in the SPP JOA, the context of section 5.2 and how it has been used by MISO and SPP suggests that the term was intended to encompass transmission capacity on physical or contractual interconnections – not just the narrow “point-to-point” transmission service definition SPP argues for. Section 5.2 provides that the sharing provision “will not create new contract paths for either Party that did not previously exist” and neither SPP nor MISO will be able to “deal directly with companies with which it does not physically or contractually interconnect.” If Entergy Arkansas joins MISO as a transmission-owning member, both SPP and MISO would still be physically or contractually interconnected with Entergy Arkansas.

Finally, MISO’s statement that the language in section 5.2 provides for the sharing of available transmission capacity on common paths, when the entities using that capacity are transmission-owning members of either RTO, is consistent with the course of performance of the parties to the SPP JOA. In

2009, section 5.2 was used by MISO to share capacity with SPP in order to serve Ameren’s load located radially off the Entergy transmission system. Since both MISO and SPP have interconnections with Ameren, a transmission-owning member of MISO, section 5.2 applied and MISO was able to use SPP’s available transmission capacity through SPP’s transmission system and Entergy’s transmission system to serve Ameren’s load.

While we find that section 5.2 permits SPP and MISO’s shared use of available transmission capacity with Entergy Arkansas, we also recognize SPP’s statement that the SPP JOA should be renegotiated. Section 3.1 provides that the objectives of the SPP JOA “can be fulfilled efficiently and economically only if the Parties, from time to time, review and as appropriate revise the requirements as stated [therein] in response to such changes, including deleting, adding, or revising requirements or protocols.” MISO and SPP have an obligation to negotiate in good faith in response to revisions (including deleting, adding, or revising requirements or protocols) either MISO or SPP may propose.

Consistent with Rule 207 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.207 (2011), our decision to exercise our discretion to act on the Petition resolves a controversy and removes uncertainty between SPP and MISO over the meaning of section 5.2 of the SPP JOA. SPP and other commenters argue that acting on the Petition is premature because it will not resolve all the issues associated with Entergy Arkansas’ proposed membership in MISO and the SPP JOA may still need to be revised. In our view, the Petition is not premature, but rather of the essence, because the applicability of section 5.2 to the sharing of available contract path capacity with Entergy Arkansas is central to the resolution of any other issues that may need to be renegotiated as a result of Entergy Arkansas’ determination to join MISO. Regardless of whether there may be further disagreements among SPP, MISO, Entergy Arkansas and other interested parties surrounding Entergy Arkansas’ potential decision to join MISO as a transmission-owning member and whether the parties negotiate revisions to the SPP JOA in order to accommodate such a decision, we need not resolve all disputes that may exist between the parties, either presently or in the future, in order to act on the Petition, which is only focused on interpretation of one section of the SPP JOA.

SPP and other commenters also argue that acting on the Petition is premature because the parties have not exhausted the dispute resolution process set forth in section 14.2 of the SPP JOA. Here, the parties have engaged in communications over their differences in interpreting the contract with no progress towards achieving a common understanding of section 5.2. There is no

evidence that further efforts would benefit either party or the Commission, but to the contrary, evidence shows that SPP and MISO's efforts to date have not narrowed the scope of dispute. We do not believe in

these circumstances that the positions of the parties will be "refined" by further informal dispute mechanisms. For purposes of this matter and under the unique circumstances of this case, the dispute resolution procedure has been satisfied.

We reject other arguments raised by commenters as beyond the scope of the Petition or speculative. To the extent commenters are concerned with any potential impacts of Entergy Arkansas joining MISO, we anticipate that these issues would be raised and addressed in the filings required to implement any decision by Entergy Arkansas to join MISO as a transmission-owning member. Further, we decline to address any hypothetical scenarios that may or may not occur at any given time (i.e., the termination of the Interchange Agreement, or Ameren's withdrawal from MISO) as speculative and beyond the scope of the Petition.

The Commission orders:

The Petition is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

While the Petition requests interpretation of section 5.2 in the event that Entergy Arkansas becomes a transmission-owning member of MISO, if Entergy Arkansas joins MISO as a transmission-owning member, then one or more of the other Entergy Operating Companies may also join MISO as a transmission-owning member. The Entergy Operating Companies include, in addition to

Entergy Arkansas, Entergy Mississippi, Inc., Entergy Gulf States Louisiana, LLC, Entergy Louisiana, LLC, Entergy New Orleans Inc., and Entergy Texas, Inc. This order only addresses the application of section 5.2 to a scenario where Entergy Arkansas becomes a transmission-owning member of MISO.

Entergy Mississippi, Inc. filed notice to withdraw from the ESA effective November 2015.

See In the Matter of a Show Cause Order Directed to Entergy Arkansas, Inc., Regarding its Continued Membership in the Current Entergy System Agreement, or any Successor Agreement Thereto, and Regarding the Future Operation and Control of its Transmission Assets, Docket No. 10-011-U, Order No. 1 (Feb. 11, 2010).

The Interchange Agreement is titled “Interchange Agreement between Arkansas-

Missouri Power Company, Associated Electric Cooperative, Inc., and Union Electric Company for the Missouri-Arkansas EHV Interconnection.”

Entergy Services, Inc., Docket No. OA97-285-000 (Nov. 5, 1998) (unpublished letter order).

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

The initial term of the Interchange Agreement expires in June 2013, after which the agreement remains in effect on a yearly basis, subject to cancellation by any party upon 4-year notice. MISO states that it understands the parties to the Interchange Agreement are in negotiations concerning its extension beyond the initial term. Petition at 8, note 27.

Petition at 8.

Id.

See In the Matter of an Inquiry into Electric Transmission Issues within

the Areas Served by the Southwest Power Pool Regional Transmission Organization and the Entergy Corporation as Such Issues Affect Electric Service Within Arkansas, Docket No. 08-136-U, Order No. 1 (September 25, 2008).

Among other things, as the ICT for Entergy, SPP administers Entergy's Open Access Transmission Tariff, processes transmission service requests, and performs transmission planning functions. *See, e.g., Entergy Services, Inc.*, 115 FERC ¶ 61,095 (2006), *order on reh'g*, 116 FERC ¶ 61,275, *order on compliance*, 117 FERC ¶ 61,055, *order on clarification*, 119 FERC ¶ 61,013 (2007).

See In the Matter of an Inquiry Into Electric Transmission Issues Within the Areas Served by the Southwest Power Pool Regional Transmission Organization and the Entergy Corporation as Such Issues Affect Electric Service Within Arkansas, Docket No. 08-136-U, Order No. 10 (May 29, 2009).

See June 24, 2009 Meeting Transcript at p. 225; July 31, 2009 Letter from Jon Wellinghoff to Paul Suskie, the Chairman of the Arkansas Commission. The study also included the costs and benefits of Cleco Corporation, another transmission owner in the Entergy region, also joining SPP.

See In the Matter of a Show Cause Order Directed to Entergy Arkansas, Inc., Regarding its Continued Membership in the Current Entergy System Agreement, or any Successor Agreement Thereto, and Regarding the Future Operation and Control of its Transmission Assets, Docket No. 10-011-U, Order No. 29 (January 3, 2011).

See In the Matter of a Show Cause Order Directed to Entergy Arkansas, Inc., Regarding its Continued Membership in the Current Entergy System Agreement, or any Successor Agreement Thereto, and Regarding the Future Operation and Control of its Transmission Assets, Docket No. 10-011-U, (May 12, 2011).

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

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

PJM).

Petition Ex. E at 2. *See* text of section 5.2 of the SPP JOA *infra* P 9.

Petition Ex. F.

Id. at 10.

“Third-Party” is defined in section 2.2.53 of the SPP JOA as “any entity other than a Party to [the SPP JOA].”

MISO states that when SPP was approved by the Commission as an RTO in 2004, the Commission required SPP to join the joint and common market with MISO and PJM and address seams issues with MISO with an agreement based on the PJM JOA. MISO cites the Commission’s conclusion that “the substantive components of the PJM JOA . . . are appropriate for use in the market-to-non-market circumstances under which SPP and MISO will operate.” Petition at 19 (citing *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,008, at P 32 (2004)).

Petition at 14 (citing *Alliance Cos.*, 100 FERC ¶ 61,137, at P 53 (2002)).

The Alliance Companies are a group of Midwestern utilities that proposed forming the Alliance RTO.

Petition at 14 (citing *Alliance Cos.*, 100 FERC ¶ 61,137 at P 53).

As originally filed with the Commission in Docket No. ER04-375-000 in 2003, section 6.5 of the PJM JOA read as follows:

Sharing Contract Path Capacity. In recognition that the Joint and Common Market is expected to eliminate distinct [MISO] contract path limits versus PJM contract path limits and in recognition that the sharing of flowgate capacity on a historical usage basis is the first step toward the elimination of distinct contract path limits, [MISO] and PJM have agreed to the following phased approach to the elimination of such contract path limits:

When PJM expands its market to include Commonwealth Edison, there will be a sharing of contract path capacity that existed on a historical basis (i.e., a sharing of the combined contract path capacity where both RTOs have contract paths to the same entity). The combined contract path capacity will be made available for use by both Parties. This will not open up new paths that have not existed previously. PJM will not be able to deal directly with

companies with which it does not physically interconnect and [MISO] will not be able to deal directly with companies with which it does not physically interconnect.

When [MISO] commences operation of the energy markets, the sharing of contract path capacity where [MISO] and PJM have existing contract path capacity to the same entity will continue to exist. [MISO] and PJM may need to resolve any coordination issues such that the combined contract capacity is not exceeded by the operation of the two markets. This phase will still not open up any new paths for the Parties.

When a Joint and Common Market exists between [MISO] and PJM as is expected, the sharing of contract path capacity between [MISO] and PJM will occur on a complete basis. All physical connections to the combined [MISO] and PJM RTOs will be available for use by the market. Whether the physical path connections are within [MISO] and PJM will not affect a customer's participation in the market. Only actual physical limitations will impact how the customer is able to use these connections to the market.

MISO states that under SPP's interpretation of the contract path sharing provision, Michigan and Wisconsin would not have been able to use the shared capacity.

Petition at 19-21.

Because the Commission's RTO policy is that membership is voluntary, MISO states that the transmission owners' preferences of RTO membership should be accommodated to the extent reasonably possible and its interpretation of the contract path sharing provisions at issue will help accommodate Entergy Arkansas' preference.

Petition at 22 (citing, e.g., *Alliance Cos.*, 100 FERC ¶ 61,137 at P 53).

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 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

Petition at 22 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed

Rulemaking, Docket No. RM10-23-000, at P 113 (June 17, 2010)).

Id. at 24.

MISO notes that no changes were made to the SPP JOA to accommodate the integration of new transmission owners in SPP or MISO nor were changes made to accommodate the withdrawal of transmission owners from MISO. Petition at 25.

Arkansas Cities are the Conway Corporation, the West Memphis Utilities Commission, the City of Osceola, and the City of Prescott.

FirstEnergy Service Company filed on behalf of its affiliates American Transmission Systems, Inc., FirstEnergy Solutions Corp., Ohio Edison, Toledo Edison, The Illuminating Company, and Pennsylvania Power Company.

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

Entergy Services Inc. filed on behalf of the Entergy Operating Companies.

For purposes of this filing, MISO TOs are: Ameren Services Company; American Transmission Company LLC; Big Rivers Electric Corporation; City Water, Light & Power; Dairyland Power Cooperative; Duke Energy Corporation; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; Manitoba Hydro; MidAmerican; Michigan Public Power Agency; Minnesota Power; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Minnesota Municipal Power Agency; Vectren Energy Delivery; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

Western Area Power Administration and Heartland Consumers Power District did not move to intervene in this proceeding.

SPP Protest at 33; OG&E Protest at 4; East Texas Cooperatives Protest at 9; Associated Cooperative Protest at 4; and Westar Protest at 12.

SPP Protest at 34; East Texas Cooperatives Protest at 9; Westar Protest at

12; Associated Cooperative Protest at 4; and OG&E Protest at 4.

SPP Protest at 34 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1612, *order on reh'g*, Order No. 890-A, FERC Stats & Regs. ¶ 31,261, *order on reh'g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299) and East Texas Cooperatives Protest at 9.

SPP Protest at 35 (citing *Glossary of Terms Used in NERC Reliability Standards*, updated March 15, 2011) (“agreed upon electrical path for the continuous flow of electric power between the parties of an Interchange Transaction” which, in turn, is defined as “[a]n agreement to transfer energy from a seller to buyer that crosses one or more Balancing Authority Area Boundaries.”).

SPP Protest at 36 (citing NAESB Wholesale Electric Quadrant Business Practices Standards Version 002.1, Definition of Terms section (booklet dated March 11, 2009 with minor corrections applied through December 14, 2009): 008-010) (“electric path between contiguous Transmission Service Providers . . . that represents the continuous flow of electrical energy between the parties to a transaction.” SPP explains that if Entergy joins MISO, there will only be one transmission provider (i.e., MISO) and there will be no “transactions” between MISO and Entergy because Entergy will be part of MISO’s single system dispatch resulting in no contract path with Entergy after integration).

SPP contends that MISO’s business practice manuals indicate that contract path services are only in the context of transactions involving “non-[MISO], External BA Areas that are first-tier BA Areas with physical connections to the [MISO].” SPP states that when Entergy joins MISO, Entergy will no longer be a “non-MISO, External BA Area” resulting in no contract path between Entergy and MISO after integration.

SPP states that these descriptions of the term “contract path” are further supported by the fact that the parties to the SPP JOA placed the language at issue within section 5 of the SPP JOA (Available Flowgate Capability Calculations). SPP states that section 5 “is entirely about coordinated exchanges of data to enable the parties to know how much capacity is available for selling point-to-point transmission service.” SPP Protest at 34-35. *See also*, East Texas Cooperatives Protest at 8.

SPP Protest at 35 (citing Order No. 890 FERC Stats. & Regs. ¶ 31,241 at P 1,612) and East Texas Cooperatives Protest at 9.

SPP Protest at 35.

SPP Protest at 36 (citing *Midwest Independ. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172, at P 471 (2008)).

SPP Protest at 34; East Texas Cooperatives Protest at 9; NPPD Protest at 6; and Associated Cooperative Protest at 4.

KCP&L Protest at 15-16 and Associated Cooperative Protest at 8.

Recognizing the threshold for payment for loop flows is different from payment for transmission service, KCP&L argues that even if the flows are treated as loop flows, KCP&L should be compensated. KCP&L states that the Commission determined that when loop flows exist, proper compensation can be ordered when a demonstrated burden exists; however, the Commission distinguished between deliberate flows and inadvertent flows. KCP&L argues that MISO in its study relies upon a path through SPP to facilitate integration even more than it relies upon MISO's direct connection to Entergy. KCP&L concludes that this indicates the flows are deliberate necessitating payment to SPP transmission owning members.

KCP&L Protest at 17.

SPP Protest at 39 (citing *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229, at 61,755 (2000)). Westar adds that the courts have found that a contract provision is not ambiguous merely because the parties later disagree on its meaning and is ambiguous only if it is reasonably susceptible of different constructions. Westar Protest at 13.

SPP Protest at 40 (citing *Penzoil Co. v. FERC*, 645 F.2d 360, 386 (5th Cir. 1981) (contract clause's meaning "depends on the contracting parties' intentions, which in turn depends on the circumstances of its execution, identical language in different contracts could be interpreted to have different meanings."); East Texas Cooperatives Protest at 9-10; Westar Protest at 14; Associated Cooperative Protest at 5; Empire Protest at 11; and NPPD Protest at 10.

SPP Protest at 40 and East Texas Cooperatives Protest at 8.

SPP Protest at 40-41; East Texas Cooperatives Protest at 10; OG&E Protest at 7; Westar Protest at 14; Council Protest at 89; Texas Commission Protest at 2-3; and AEP Protest at 5.

SPP notes that in any event, in the filing of the PJM JOA, MISO stated “[t]he JOA does not address whether the transmission owners should compensate one another for any transmission line use related to loop flows.” Thus, SPP contends that the breadth of the sharing of capacity that MISO attributes to this provision did not address all aspects of compensation, even in the PJM case.

SPP Protest at 42-43.

SPP notes that it is not the only neighboring system to disagree with MISO over MISO’s expansive view of section 5.2. SPP Protest at 44. TVA states that section 6.5 of the Joint Reliability Coordination Agreement (JRCA), a seams agreement among MISO, PJM and TVA, contains a provision similar to section 5.2 of the SPP JOA. TVA states that it disputed MISO’s interpretation of section 6.5 that required a sharing of contract path capacity and stated that TVA would need to be compensated for MISO’s use of TVA’s transmission system. After discussions failed to resolve the issue, MISO gave notice to terminate its participation under the JRCA. TVA and MISO have negotiated a new agreement, to become effective June 15, 2011, that, according to TVA, does not contain a provision similar to section 6.5 of the JRCA and contains no provisions to address the management of the market-to-non-market interface between MISO and TVA. TVA Motion to Intervene at 2.

Empire Protest at 11.

Westar Protest at 15.

SPP Protest at 15-17; East Texas Cooperatives Protest at 5 (citing 18 C.F.R. § 207(a)(2)); and Westar Protest at 4 and 7.

SPP Protest at 15 (citing *Lynch v. ISO New England, Inc.*, 107 FERC ¶ 61,242, at P 15 (2004) (*Lynch*)) and East Texas Cooperatives at 5.

SPP Protest at 16 (citing *Lynch*, 107 FERC ¶ 61,242 at P 15).

SPP Protest at 15 (citing 5 U.S.C. §554(e) (2006); 18 C.F.R. § 385.207(a)(2) (2011); and *USGen New England, Inc.*, 118 FERC ¶ 61,172, at P 18 (2007)) and East Texas Cooperatives Protest at 5 (citing *Phillips Petroleum Co.*, 58

FERC ¶ 61,290 (1992)).

SPP Protest at 15 (citing *Morgan Stanley Capital Group, Inc.*, 119 FERC ¶ 61,298, at P 17 (2007)); East Texas Cooperatives Protest at 5 (citing *Stowers Oil and Gas*, 27 FERC ¶ 61,001 (1984)); and Westar Protest at 4.

SPP Protest at 28-31; Westar Protest at 8 (citing *Strategic Energy L.L.C. v. Cal. Indep. Sys. Operator Corp.*, 95 FERC ¶ 61,312, at 62,069-62,070 (2001)); Sunflower Protest at 11-2 (citing *Alternative Dispute Resolution*, Order No. 578, 18 C.F.R. Parts 343 and 385, 60 Fed. Reg. 19494 [31,0180 (April 19, 1995)]; and KCP&L Protest at 19 (citing *Pacific Gas & Electric Co.*, 81 FERC ¶ 61,122 at 61,489 (1997)).

SPP Protest at 29 (citing *Ind. Mich. Power Co.*, 64 FERC ¶ 61,184, at 62,553 (1993); *American Municipal Power–Ohio, Inc. v. Toledo Edison Co.*, 47 FERC ¶ 61,284, at 62,004 (1989)).

SPP Protest at 29, note 68 (citing *S. Cal. Edison Co.*, 115 FERC ¶ 61,100, at P 8 (2006) (“[The parties] were free to make any contractual arrangement they chose, file the contract under section 205 and once the contract was accepted, expect the Commission to respect and enforce the agreed-to deal. This is the clear teaching of the Supreme Court’s decisions in the *Sierra* and *Mobile* cases.” (citing *United Case Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (jointly, *Mobile-Sierra*))).

SPP Protest at 29 (citing *Marathon LNG Marketing, LLC*, 109 FERC ¶ 61,031, at P 21 (2004)).

Westar Protest at 5 and OG&E Protest at 2.

Westar Protest at 5 (citing *Segar v. Mukasey*, 508 F.3d 16, at 22 (D.C. Cir. 2007) (quoting *Kass v. William Norwitz Co.*, 509 F.Supp. 618, 624 (D.D.C. 1980))).

SPP Protest at 16; East Texas Cooperatives Protest at 5; and AEP Protest at 8.

Section 3.1 of the SPP JOA states:

The Parties have agreed to the coordination and exchange of data and information under this Agreement to ensure system reliability

and efficient market operations as systems exist and are contemplated as of the Effective Date. The Parties expect that these systems and technology applicable to these systems and to the collection and exchange of data will change from time to time throughout the term of this Agreement. The Parties agree that the objectives of this Agreement can be fulfilled efficiently and economically only if the Parties, from time to time, review and as appropriate revise the requirements stated herein in response to such changes, including deleting, adding, or revising requirements and protocols. Each Party will negotiate in good faith in response to such revisions the other Party may propose from time to time.

SPP Protest at 17; Xcel Protest at 5-6; and AEP Protest at 6.

SPP states that when the JOA was signed, MISO had only approximately 1,600 MW of interconnection capacity with SPP and now with the addition of MidAmerican to MISO, MISO has 6,500 MW of interconnection capacity with SPP. SPP states that MISO never revealed to the Commission how much flow it plans to put on the SPP system in order to integrate Entergy, MISO has admitted elsewhere that it intends to use at least 4,000 MW of capacity between MISO and Entergy with most of the flows occurring over SPP's system. Moreover, SPP states that whenever the single, actual physical interconnection between MISO and Entergy is out of service, all of the flow of energy between MISO and Entergy will be over SPP's and other systems. SPP Protest at 4.

SPP states that such renegotiation was not required when NPPD joined SPP and MidAmerican joined MISO because no party proposed any revisions to the JOA then and MISO was not proposing the massive new use of the SPP system that it now plans.

SPP Protest at 18 and OG&E Protest at 6, note 11 (citing Midwest Independent Transmission System Operator, Inc., and PJM Interconnection, L.L.C. Filing Letter, Docket No. ER04-375-000 at 9 (filed Dec. 31, 2003)).

SPP Protest at 18-19 (citing Petition at 25).

SPP states the draft MOU committed the parties to meet within 30 days and establish milestones for the negotiation.

Westar states that MISO's Petition is evidence of MISO's attitude towards its neighbors and its claim of entitlement to utilize the transmission systems of others without paying compensation to the owners. Westar further

states that, especially in light of MISO’s filing in Docket No. ER11-3281 in which it proposed similar language in its

tariff for seams service, MISO has demonstrated an unwillingness to cooperate with its neighbors.

SPP Protest at 27.

SPP Protest at 19 (citing *Cal. Independ. Sys. Operator Corp.*, 98 FERC ¶ 61,327, at 62,382 (2002)) and East Texas Cooperatives at 7. Additionally, because Entergy already chose an RTO, SPP argues that the interpretation of section 5.2 is not “highly significant” with regard to Entergy Arkansas’ ability to join an RTO and Xcel states the Petition is moot. SPP Protest at note 38 and Xcel Protest at 4-5.

Other protesters raise similar concerns about the Commission acting without all the issues before it. AEP recommends a technical conference for stakeholders to review SPP and MISO studies before any further negotiation or interpretation of the JOA. AEP Protest at 5; NPPD Protest at 5; and KCP&L Protest at 5. Conversely, the Louisiana Commission requests prompt action from the Commission on MISO’s Petition because it will assist in the review of Entergy’s informational filing regarding its RTO options.

KCP&L states that the case is not about Entergy’s right to join an RTO which will be determined when Entergy files an application requesting permission to join an RTO. Instead, this case is about defending transmission customers and transmission owners from the loss of transmission service rights, and the substantial loss of control of transmission facilities by the RTO chosen by the owners to operate their transmission, due to the actions of another RTO of which those customers and owners are not members, all without payment.

SPP Protest at 24-25; Empire Protest at 5-6; OG&E Protest at 10; Westar Protest at 9-10; AEP Protest at 7; and OPPD Protest at 4-5. AEP states that SPP staff performed an analysis using the NERC IDC tool to calculate the impact of a 100 MW transaction from MISO to Entergy. AEP states that the analysis indicates 9 percent of the transaction will flow on the contract path between MISO and Entergy and the remaining 91 percent will flow on other transmission facilities, causing undesired parallel flows on the other transmission systems. AEP Protest at 4.

SPP Protest at 21 (citing *Commonwealth Edison Co.*, 106 FERC ¶

61,250, at P 52 (2004) (“purpose of the hold harmless condition is to protect [MISO] utilities from the financial impacts associated with loop flows and congestion created by ComEd’s and AEP’s RTO choice, essentially making [MISO] utilities whole for those impacts”); *Alliance Cos.*, 103 FERC ¶ 61,274, at P 21, *reh’g denied*, 105 FERC ¶ 61,215 (2003) (“outright acceptance of their RTO choices, without any conditions, would not have been just and reasonable”)).

OG&E Protest at 9 (citing *Commonwealth Edison Co.*, 106 FERC ¶ 61,250 at P 53).

OG&E Protest at 9 (citing *Alliance Cos.*, 100 FERC 61,137 at P 54).

KCP&L Protest at 10-11 (citing *PJM Interconnection, L.L.C.*, 106 FERC ¶ 61,253, at P 9 (2004)).

NPPD Protest at 10. NPPD states that it is located on the northeast seam of SPP and MISO and will bear the brunt of the power flows stemming from Entergy Arkansas’ integration with MISO. NPPD states that it is already experiencing major loop flows from MISO without compensation. NPPD states that allowing Entergy Arkansas to join MISO under the interpretation of section 5.2 of the SPP JOA urged by MISO would increase such loop flows without compensation and at the expense of compromising reliability on the NPPD system. NPPD states that MISO’s interpretation of section 5.2 would be unjust and unreasonable and contrary to the public interest, and on that basis, should be abrogated.

Empire states that without a mechanism to compensate SPP members for any new facilities to relieve congestion that will result from Entergy Arkansas joining MISO, SPP members will be involuntarily subsidizing MISO and Entergy Arkansas.

SPP Protest at 25-6; OG&E Protest at 10; Westar Protest at 10; Empire Protest at 9-10; and AEP Protest at 4.

SPP Protest at 23-4; Council Protest at 6-7; and Texas Commission Protest at 2. The Council states that Ameren has previously given conditional one-year notices of its intent to withdraw from MISO but there is now a proceeding before the Missouri Commission in which Ameren requests permission to remain a member of MISO until 2013. Counsel Protest at 6.

SPP Protest at 23-24; Council Protest at 6-7; and Texas Commission

Protest at 2. The Council recognizes that the Interchange Agreement may be extended or renegotiated, but such extension may not occur. Council Protest at 7. Associated Cooperative adds that MISO mischaracterizes the continued viability of its sole contract path with Entergy Arkansas under the Interchange Agreement. While Associated Cooperative expresses a preference for renegotiating the Interchange Agreement, no agreement has yet been reached. Further, contrary to the assertions of MISO, third-party transactions will not be able to continue after the termination of the Interchange Agreement. Associated Cooperative Protest at 11-14.

Other issues raised by protesters include, but are not limited to the following: given the limitation of flows across reciprocally coordinated flowgates to historic 2004 levels, the impacts of a transmission reliability margin withholding requirement (Xcel Protest at 7-8); arrangement for delivery of Empire's entitlement in the Plum Point power plant (Empire Protest at 7-8); and the effect of Entergy Arkansas' withdrawal from the SPP Reserve Sharing Group on the other members of the group (Empire Protest at 8).

Associated Cooperative Protest at 9; OG&E Protest at 10; Westar Protest at 2, 9-10; and Southwestern Power Administration Protest at 6.

OPPD states that it has been meeting with MISO, PJM, and SPP for over a year to resolve loop flow which has been reported to be as high as 30 percent of the flowgate capacity on the Cooper South flowgate, a reciprocally coordinated flowgate under the SPP/MISO JOA Congestion Management Process (CMP). OPPD Protest at 4-5.

NPPD states that of the 5,100 MW of combined transfer capability between SPP and MidAmerican, approximately 4,900 MW of that capacity is between MidAmerican and Nebraska utilities and is already fully allocated and utilized.

Associated Cooperative states that 550 MW of the 1,000 MW of transfer capability available is already reserved for point-to-point transmission service with a

point of delivery of Southern Company and can not be used to integrate Entergy Arkansas and MISO. Associated Cooperative Protest at 8.

Additionally, LES, a member of the SPP RTO, states that it owns approximately 284 circuit-miles of networked transmission facilities which were financed using tax-exempt debt, and are therefore subject to restrictions on

“private use.”

MISO TOs Comments at 5; EPSA Comments at 6; and Entergy Operating Companies Comments at 13-14. MISO TOs state that an entity can be a company that is a member of an RTO and there is no evidence of any intent by SPP, MISO or the Commission to limit the applicability of section 5.2 to non-members of SPP or MISO.

MISO TOs Comments at 10; EPSA Comments at 10; and Entergy Operating Companies Comments at 14.

MISO TOs Comments at 6; EPSA Comments at 7; and Entergy Operating Companies Comments at 14.

Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

EPSA Comments at 9 (citing January 20, 2011 Open FERC Meeting Transcript) and Entergy Operating Companies Comments at 15.

Our findings are limited to the application of section 5.2 to Entergy Arkansas in the event that Entergy Arkansas becomes a transmission-owning member of MISO. The Petition lacks the necessary factual foundation to make a determination as to whether section 5.2 would apply to affiliates of Entergy Arkansas in the event that one or more of them join MISO as a transmission-owning member, and nor does the Petition seek such a determination.

SPP JOA, section 2.2.39.

As discussed above, “entity” could also apply to other types of transmission-owning companies including third-party types of transmission-owning members.

We observe that MISO’s interpretation is also consistent with the course of performance of the PJM JOA. MISO has stated that section 6.5 of the PJM JOA, from which section 5.2 of the SPP JOA was derived, has been consistently used to serve MISO’s load in Michigan; and that PJM has used the provision when PJM is making large exports from ComEd simultaneous with the Wilton Center-Dumont 765 kV line being out of service. In each of the circumstances where section 6.5 of the PJM JOA has been used, the common entity was a

transmission-owning member of either MISO or PJM.

The Commission notes that RTOs do not reserve or take transmission service, but take control of transmission facilities through their membership agreements.

See In the Matter of a Show Cause Order Directed to Entergy Arkansas, Inc., Regarding its Continued Membership in the Current Entergy System Agreement, or any Successor Agreement Thereto, and Regarding the Future Operation and Control of its Transmission Assets, Docket No. 10-011-U, Order No. 29, at P 4 & note 3 (Jan. 3, 2011) (holding that removing the uncertainty with respect to the future application of section 5.2 to Entergy Arkansas will be important to the Arkansas Commission's ability to make an informed decision).

See, e.g., Nicole Gas Production Ltd., 103 FERC ¶ 61,328 (2003) (rejecting request to dismiss petition for declaratory order where parties were involved in ongoing litigation in state and federal court). Further, it is in the public interest to resolve this issue in advance of any filings under section 205 of the Federal Power Act, 16 U.S.C. 824d (2006), required to implement a potential decision by Entergy Arkansas to join MISO. *See Express Pipeline Partnership*, 75 FERC ¶ 61,303 (1996) (finding that the public interest is better served by a review of the issues presented before a filing to put the rates into effect.).

After preparing position papers on their respective interpretations of section 5.2 of the SPP JOA, the President & CEO's of SPP and MISO exchanged four letters regarding their differences in interpretations and initiation of dispute resolution proceedings. *See Petition Ex. E, F, and H through K*. The differences in contract interpretation were also discussed at two meetings of the Seams Agreement Coordinating Committee on March 11, 2011 and March 22, 2011. *See Petition at 11*.

SPP Protest at 29 (citing *Marathon LNG Marketing, LLC*, 109 FERC ¶ 61,031 at P 21). SPP argues that "the very purpose of dispute resolution procedures is to allow parties to 'refine their position through negotiations that possibly could eliminate the need for the Commission's involvement in resolving the dispute.' *Id.*"

(continued...)

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