

**ORAL ARGUMENT IS NOT YET SCHEDULED**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 04-1398, *et al.***

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**NEW MEXICO ATTORNEY GENERAL, *et al.*  
PETITIONERS,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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**ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**JOHN S. MOOT  
GENERAL COUNSEL**

**ROBERT H. SOLOMON  
SOLICITOR**

**BETH G. PABELLA  
SENIOR ATTORNEY**

**FEDERAL ENERGY REGULATORY  
COMMISSION  
WASHINGTON, DC 20426**

**MAY 30, 2006**

## **CIRCUIT RULE 28(a)(1) CERTIFICATE**

A. Parties and Amici

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Southwest Power Pool*, 106 FERC ¶ 61,110 (February 10, 2004); and
2. *Southwest Power Pool*, 109 FERC ¶ 61,010 (October 1, 2004).

C. Related Cases:

This case has not previously been before this Court or any other court.

There are no related cases pending judicial review.

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Beth G. Pacella  
Senior Attorney

May 30, 2006

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## GLOSSARY

Commission	Federal Energy Regulatory Commission
Conditional Approval Order	<i>Southwest Power Pool, Inc.</i> , 106 FERC ¶ 61,110 (2004)
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Louisiana PSC	Louisiana Public Service Commission
New Mexico AG	New Mexico Attorney General
Order No. 2000	<i>Regional Transmission Organizations</i> , Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), 65 Fed. Reg. 810 (2000), <i>order on reh'g</i> , Order No. 2000-A, FERC Stats & Regs. ¶ 31,092, 65 Fed. Reg. 12,088 (2000) (codified at 18 C.F.R. § 35.34), <i>appeal dismissed sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC</i> , 272 F.3d 607 (D.C. Cir. 2001)
Orders Granting SPP RTO Status	<i>Southwest Power Pool, Inc.</i> , 109 FERC ¶ 61,009, <i>order on reh'g</i> , 110 FERC ¶ 61,137 (2005)
Petitioners	Louisiana Public Service Commission and New Mexico Attorney General
Rehearing Order	<i>Southwest Power Pool, Inc.</i> , 109 FERC ¶ 61,010 (2004)
RTO	Regional Transmission Organization

## GLOSSARY (con't)

Snohomish	<i>Public Utility District No. 1 of Snohomish County, Washington v. FERC</i> , 272 F.3d 607 (D.C. Cir. 2001)
Southwest Electric	Southwest Electric Power Company
Southwestern Public Service	Southwestern Public Service Company
SPP	Southwest Power Pool, Inc.
State Committee	Regional State Committee

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**STATEMENT OF THE ISSUES**

The issues presented for review are:

1. Whether the petitions for review should be dismissed for lack of jurisdiction as Petitioners Louisiana Public Service Commission (“Louisiana PSC”) and New Mexico Attorney General (“New Mexico AG”) are not aggrieved by the conditional determinations in the challenged orders.
2. Whether the conditional determinations of the Federal Energy Regulatory Commission (“Commission” or “FERC”) regarding the proposal by

Southwest Power Pool, Inc. (“SPP”) for recognition as a Regional Transmission Organization (“RTO”) were reasonable.

### **STATUTORY AND REGULATORY PROVISIONS**

The pertinent statutory and regulatory provisions are contained in the Appendix to this Brief.

### **COUNTER-STATEMENT OF JURISDICTION**

Louisiana PSC and New Mexico AG invoke this Court's jurisdiction under Federal Power Act (“FPA”) § 313, 16 U.S.C. § 825*l*. Pet. Br. at 1. As shown in Point I of the Argument below, the petitions for review should be dismissed for lack of jurisdiction because Louisiana PSC and New Mexico AG are not aggrieved by the challenged orders, which were conditional and subject to further filings and approvals. *E.g.*, *DTE Energy Co. v. FERC*, 394 F.3d 954, 961 (D.C. Cir. 2005); *California Dep’t of Water Res. v. FERC*, 306 F.3d 1121, 1125-26 (D.C. Cir. 2002).

### **INTRODUCTION**

This proceeding involves merely the first step in the Commission’s review of SPP’s proposal for recognition as an RTO. R. 1. After reviewing the proposal and the parties’ comments on it, the Commission determined that the proposal, if supplemented by certain requirements set out in the instant orders, would satisfy the Commission’s prerequisites, established in its Order No. 2000 rulemaking,<sup>1</sup> for

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<sup>1</sup> *Regional Transmission Organizations*, Order No. 2000, FERC Stats. &

RTO recognition. *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110 at P 1, JA 161 (“Conditional Approval Order”), *order on reh’g*, 109 FERC ¶ 61,010 (2004), JA 285-320 (“Rehearing Order”).

The Commission concluded, therefore, that the proposal would benefit the public interest significantly by enhancing regional transmission grid reliability, providing non-discriminatory transmission service, and assuring transmission planning that best addresses the reliability and economic needs of the region. Conditional Approval Order at PP 2-4, JA 161-62; Rehearing Order at P 6, JA 287. Accordingly, the Commission stated that it would approve SPP’s proposal in a future proceeding if SPP chose to fulfill the prerequisites set out in the instant orders. Conditional Approval Order at P 2, Ordering Para. (A), JA 161-62, 230.

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Regs. ¶ 31,089 (1999), 65 Fed. Reg. 810 (2000), *order on reh’g*, Order No. 2000-A, FERC Stats & Regs. ¶ 31,092, 65 Fed. Reg. 12,088 (2000) (codified at 18 C.F.R. § 35.34) (collectively, “Order No. 2000”), *appeal dismissed sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (“*Snohomish*”).

## STATEMENT OF FACTS

### I. Events Leading To The Challenged Orders

#### A. Order No. 888 – Development Of Open Access, Non-Discriminatory Transmission

“Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling those services as a ‘bundled’ package to wholesale and retail customers in a limited geographical area.”

*Snohomish*, 272 F.3d at 610. Significant economic changes and technological advances in generation and transmission, however, fostered the introduction of new generators which, because of their efficient operations, could generate energy at lower costs than many existing utilities. *Id.*

Nonetheless, “barriers to a competitive wholesale power market remained because if and when the existing vertically integrated utilities provided regional transmission access to these new efficient generating plants, they favored their own generation.” *Id.* Finding these practices unduly discriminatory and anti-competitive, in 1996 the Commission issued Order No. 888.<sup>2</sup> That rulemaking

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<sup>2</sup> *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *order on reh’g*, Order No. 888-A, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), *order on reh’g*, Order No. 888-B, 62 Fed. Reg. 64,688 (1997), *order on reh’g*, 82 FERC ¶ 61,046 (1997); *aff’d 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).

“established the foundation for the development of competitive wholesale power markets by requiring nondiscriminatory open access transmission services by public utilities.” *Id.* (citing *Transmission Access*, 225 F.3d at 682).

### **B. Order No. 2000 – Development Of Regional Transmission Organizations**

The availability of open access transmission “resulted in a much greater reliance on wholesale markets to provide generation resources, which in turn, . . . resulted in the increase of interregional electricity transfers.” *Id.* This “put new stresses on regional transmission systems,” *id.* at 611 (quoting *Notice of Proposed Rulemaking, Regional Transmission Organizations*, 64 Fed. Reg. 31,390, 31,393 (1999)), and exposed two remaining barriers to competitive wholesale markets: (1) inefficiencies in the transmission grid; and (2) lingering opportunities for transmission owners to discriminate in favor of their own activities, *id.* To resolve these matters, the Commission issued Order No. 2000. *Id.*

Order No. 2000 specifies the minimum characteristics and functions a regional entity must satisfy in order to be approved as an RTO, *id.* at 611 (citing 18 C.F.R. §§ 35.34(j), (k), (l)), including, in relevant part, that the entity:

- “must have operational authority for all transmission facilities under its control.” 18 C.F.R. § 35.34(j)(3).
- “must be the only provider of transmission service over the facilities under its control, and must be the sole administrator of its own Commission approved open access transmission tariff. The Regional Transmission Organization must have the sole authority to



receive, evaluate, and approve or deny all requests for transmission service.” 18 C.F.R. § 35.34(k)(1)(i).

- “must be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such efforts with the appropriate state authorities.” 18 C.F.R. § 35.34(k)(7).

- “must ensure the integration of reliability practices within an interconnection and market interface practices among regions.” 18 C.F.R. § 35.34(k)(8).

### **C. Southwest Power Pool’s RTO Proposal**

SPP was formed in 1941 by a voluntary, inter-company agreement between 11 utilities. R. 1 at 16, JA 21. It encompasses all of Oklahoma and parts of Kansas, Missouri, New Mexico, Arkansas, Louisiana and Texas. Conditional Approval Order at P 47 and Att. B, JA 177, 233. SPP became a regional reliability council in 1968, and has been the North American Electric Reliability Council reliability coordinator for the SPP region since 1997. *Id.* at PP 6, 48, JA 163, 178. In addition, SPP has administered a regional open access transmission tariff for its member transmission owners since 1998. *Id.* at P 6, JA 163.

On October 15, 2003, SPP submitted a proposal, under Federal Power Act Section 205, 16 U.S.C. § 824d, for recognition as an RTO. R. 1. SPP explained that the “filing [was] the culmination of extended, open deliberations,” in which “input was solicited and received from all stakeholder (and various non-stakeholder) interests. Ultimately, this filing was developed and approved by

SPP's diverse Membership largely by consensus.” R. 1 at 22, 25, JA 27, 30; *see also* R. 1 at 1, JA 6 (noting that the proposal was authorized by SPP's Board of Directors).

SPP asserted that its proposal met the Order No. 2000 prerequisites for RTO approval. R. 1 For instance, SPP proposed that “all Member Transmission Owners will cede functional control to SPP with regard to transmission facilities as required by Order Nos. 2000 and 2000-A,” and SPP would be the sole provider of transmission service over the facilities under its control. R. 1 at 3, 4, 45, JA 8, 9, 49.<sup>3</sup> In addition, SPP proposed that it would “be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and to coordinate such efforts with the appropriate state authorities.” R. 1 Membership Agreement at 8 § 2.1.5(b) and at 13 § 3.3(a), JA 121, 126.

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<sup>3</sup> *See also* R. 1 Membership Agreement at 11 § 3.0(a), JA 124 (“Transmission Owner shall transfer functional control related to the rates, terms and conditions of the [open access transmission service tariff] of its Transmission Facilities, subject to receiving all necessary regulatory authorizations, thereby allowing SPP (i) to direct the operation of the Transmission Facilities in accordance with the terms of this Agreement and (ii) to administer transmission service under the Transmission Tariff over that Transmission Owner's Tariff Facilities”); R. 1 Membership Agreement at 4 § 2.1.1(a), JA 117 (“SPP shall schedule transactions and to (sic) administer transmission service over Tariff Facilities as necessary to provide service in accordance with the SPP [open access transmission tariff]”) (deleted portions of redlined provision omitted).

SPP also proposed that it would continue in its role as regional reliability coordinator. R. 1 at 4, 38, 44, Ex. 1 at 12, JA 9, 43, 49, 89. As SPP explained, it had been the regional reliability coordinator for its region since 1997 and, in that role, had gained experience in maintaining reliability, security and adequacy which are pertinent to the responsibilities it will undertake as an RTO. *Id.* R. 1 at 38, JA 43.

Furthermore, SPP proposed to participate in a Joint and Common Market<sup>4</sup> with the Midwest ISO and PJM RTOs in order to resolve seams management issues between the regions. R. 1 at 11, 34, 50, Ex. 10 at 15, JA 16, 39, 55, 143.

Moreover, SPP proposed to establish a Regional State Committee (“State Committee”), composed of one commissioner from each state regulatory commission having jurisdiction over an SPP member. R. 1 Bylaws at 29-30 §§

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<sup>4</sup> “Although RTOs . . . are developing individually, with significant regional variations, they also are interdependent.” *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,448 at P 64 (2005). A Joint and Common Market is intended to provide an effective means for the RTOs to work together, despite any market design and operational differences. *Id.* at P 65.

7.0-7.2, JA 108-09. The State Committee would “provide both direction and input on all matters pertinent to the participation of the Members in SPP.” *Id.* at § 7.2, JA 109.

SPP’s proposed member withdrawal rights were substantively identical to existing withdrawal rights. Under both the existing and proposed Membership Agreements, a transmission owning member is permitted to withdraw only after providing 12 months’ written notice and, for FERC-jurisdictional utilities, after FERC approval. R. 1 Membership Agreement at 16 § 4.1.1, JA 129.

SPP’s proposal explicitly stated that it was not intended to diminish existing state regulatory jurisdiction. For example, Section 7.1 of SPP’s Bylaws states that “[n]othing in the formation or operation of SPP as a FERC recognized regional transmission organization is in any way intended to diminish existing state jurisdiction and authority.” R. 1 Bylaws at 29 § 7.1, JA 108.<sup>5</sup>

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<sup>5</sup> *See also, e.g.*, R. 1 Membership Agreement at 5 § 2.1.1(*I*), JA 118 (“SPP shall take any actions necessary for it to carry out its duties and responsibilities[,] subject to receiving any necessary regulatory approvals”); *id.* at 8 § 2.1.5(a), JA 121 (SPP’s “planning shall conform to . . . all applicable requirements of federal or state regulatory authorities”); *id.* at 13 § 3.3(a), JA 126 (“Transmission Owner shall use due diligence to construct transmission facilities as directed by SPP . . . subject to such siting, permitting, and environmental constraints as may be imposed by state, local, and federal laws and regulations, and subject to the receipt of any necessary federal or state regulatory approvals.”); *id.* at 13-14 § 3.3(b), JA 126-27 (“After a new transmission project has received the required approvals and been approved by SPP, SPP will direct the appropriate Transmission Owner(s) to begin implementation of the project.”) (deleted portion of redlined provision omitted); *id.* at 19 § 5.1, JA 132 (“This Agreement and the participation of

A number of parties intervened in the proceeding. Conditional Approval Order at P 14 and Att. A, JA 165, 231-32. The Petitioners here, the Louisiana PSC and the New Mexico AG, submitted comments claiming that: (1) SPP's proposal did not establish that there will be benefits to it being approved as an RTO; (2) SPP should not be both an RTO and a reliability organization; (3) any Louisiana PSC-jurisdictional utility's participation in the SPP RTO is subject to advance Louisiana PSC approval; and (4) existing state jurisdiction must be recognized. R. 39 at 2, JA 155; R. 44 at 2, JA 157.

## **II. The Challenged Orders**

After considering the matters raised by all parties, the Commission determined that SPP's proposal for recognition as an RTO would be granted in a future proceeding if SPP chose to fulfill certain prerequisites. Conditional Approval Order at PP 1 and 2 and Ordering Para. (A), JA 161-62, 230; Rehearing Order at PP 1, 6, JA 285, 287.

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Member is subject to acceptance or approval by FERC, and may be subject to actions of respective state regulatory authorities to which Member may be subject, and to the actions of any other governmental body which may affect the ability of Member to participate in this Agreement”) (deleted portions of redlined provision omitted); R. 1 at 56, JA 61 (SPP's planning activities must be “consistent with federal and state regulatory obligations.”).

The Commission found that SPP’s proposal, if supplemented by the specified prerequisites, would significantly benefit the public interest by enhancing regional transmission grid reliability, providing non-discriminatory transmission service, assuring transmission planning that best addresses the reliability and economic needs of the region, and assuring comparability of interconnection service. Conditional Approval Order at P 4, JA 162. Because, “as discussed in Order No. 2000, the Commission believes that RTOs in general offer numerous benefits that will help ensure just and reasonable rates for jurisdictional services,” a cost/benefit analysis of the specific proposal here was not necessary prior to RTO approval. Rehearing Order at P 12, JA 289-90 (citing Order No. 2000 at 30,993 and 31,017); *see also id.* (explaining that Order No. 2000 does “not require a cost/benefit analysis demonstrating that a specific RTO proposal will result in just and reasonable rates, prior to RTO approval”); Order No. 2000 at 31,018-28 (discussing general RTO benefits).

The Commission added, however, that SPP will conduct an SPP-specific cost/benefit analysis before implementing phases 2 and 3 of its market development plan. Rehearing Order at P 13, JA 290; *see also id.* at P 59, JA 305 (SPP will “not pursue market development, beyond its planned Phase 1 energy imbalance market, without first performing cost/benefit analyses, following its establishment of high-level designs for Phase 2 (Financial Transmission Rights . .

.) and Phase 3 (ancillary services), respectively”). “[T]his approach will achieve the same goals as conducting one cost/benefit analysis prior to granting SPP RTO status, by ensuring that the expenditure of funds for each phase will result in particular benefits to customers in SPP’s region.” *Id.*

The Commission also found, as it had when it first reviewed SPP’s Membership Agreement in 1999, *Southwest Power Pool, Inc.*, 89 FERC ¶ 61,284 at 61,895 (1999), that the member withdrawal provision, which was effectively unchanged in the RTO proposal, was just and reasonable. Conditional Approval Order at P 66, JA 183. Under both the then-effective and proposed withdrawal provisions of the Membership Agreement, an SPP member may withdraw from SPP only upon 12 months’ notice and, for FERC-jurisdictional members, only upon FERC approval. Conditional Approval Order at P 65, JA 183; Rehearing Order at PP 20-21, JA 293-94; *see* R. 1 Membership Agreement at 16 § 4.1.1, JA 129.

Moreover, “[c]onsistent with Order No. 2000,” the Commission required that SPP “TOs [Transmission Owners], on behalf of their entire load including . . . bundled retail loads, take service under the non-rate terms and conditions in the SPP [open access transmission tariff] as a prerequisite to [SPP] obtaining RTO status from the Commission.” Conditional Approval Order at P 108, JA 196 (citing Order No. 2000 at 31,108; Order No. 2000-A at 31,375-76; *Midwest*

*Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,033 at 61,169-70 (2001), *order denying reh’g*, 98 FERC ¶ 61,141 at 61,411 (2002), *order on remand*, 102 FERC ¶ 61,192, *order denying reh’g*, 104 FERC ¶ 61,012 (2003), *pet. denied sub nom. Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004) (affirming Commission’s finding that all Midwest ISO loads, including bundled retail loads, must share in the Midwest ISO’s Cost Adder)); Rehearing Order at P 42, 47 JA 300, 302.

As the Commission explained, “under a functioning SPP RTO, the SPP transmission owners will no longer be the transmission providers. SPP will become the sole provider of transmission service as prescribed by Order No. 2000,[<sup>6</sup>] and the transmission owners must take all transmission services from SPP.” Conditional Approval Order at P 109, JA 196 (citing *Midwest ISO*, 102 FERC at 61,532-33). This requirement “[did] not disturb state authority over retail ratemaking matters.” Rehearing Order at P 47, JA 302. The specific rates, terms and conditions of bundled retail service arrangements remained unchanged. *Id.*

Turning to SPP’s proposal to establish a representative State Committee, the Commission found that it “will benefit SPP and market participants by instituting a partnership between the FERC and State commissions through which regional issues can be addressed.” Conditional Approval Order at P 218, JA 229;

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<sup>6</sup> Citing Order No. 2000 at 31,108; Order No. 2000-A at 31,375-76.



Rehearing Order at PP 82, 90, JA 312, 314. Nonetheless, the Commission determined that SPP's State Committee proposal would need to meet certain prerequisites before it could be approved. Conditional Approval Order at P 218, JA 229; Rehearing Order at P 92, JA 314. Specifically, the Commission explained, the State Committee should have primary responsibility for determining certain regional proposals, which SPP would then file with the Commission under FPA § 205. Conditional Approval Order at P 219, JA 229. SPP also would be able to file its own proposal regarding these matters pursuant to FPA § 205. *Id.*

Additionally, the Commission approved, "as consistent with Order No. 2000," SPP's proposal that it will be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades and to coordinate such efforts with the appropriate state authorities. Conditional Approval Order at PP 175, 188, JA 217, 221-22. The Commission specifically found that "SPP's responsibilities as an RTO in developing a regional transmission plan do not infringe on matters within state jurisdiction, such as siting and certification of new transmission facilities. SPP's RTO responsibilities in this area should be exercised in coordination with the participation and input of states, the SPP [State Committee], and interested parties." Rehearing Order at P 78, JA 311.

The Commission also addressed the New Mexico AG's comment, and the rehearing contention of another party (Southwest Public Service Co.), that SPP

should not serve as both an RTO and a reliability organization. Conditional Approval Order at P 91, JA 190; Rehearing Order at PP 39-41, JA 299-300. While the Commission explained that it will consider issues relevant to SPP performing these dual functions, it determined that it would not require a separation of functions at this time.<sup>7</sup> Conditional Approval Order at P 91, JA 190; Rehearing Order at P 41, JA 300.

The Commission also determined that “SPP must fulfill its commitment to . . . participate in the Joint and Common Market with [the] Midwest ISO and PJM” RTOs. Conditional Approval Order at P 3, JA 162. “SPP’s participation in the Joint and Common market is necessary to alleviate balkanized transmission control and additional seams costs in the region.” Rehearing Order at P 32, JA 297.

Throughout the challenged orders, the Commission emphasized that the “orders in this proceeding set forth the standards with which SPP must comply in order to achieve RTO status, but [the Commission] ha[s] not required SPP to become an RTO.” Rehearing Order at P 33, JA 298. Rather, the Commission simply set out certain prerequisites SPP must satisfy “*if* it chooses to proceed in becoming an RTO.” *Id.* at P 23, JA 294. *See also, e.g.*, Conditional Approval Order at PP 36, 42, 79, 108, 172, JA 173, 176, 187-88, 196, 215 (requiring SPP to

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<sup>7</sup> As explained below, because neither New Mexico AG nor Louisiana PSC raised this contention on rehearing to the Commission, they did not preserve their right to challenge this determination on appeal.

make certain proposal changes and filings “as a prerequisite to obtaining RTO status”); Rehearing Order at PP 42, 92, JA 300, 314 (same).

Although the challenged orders provided only conditional determinations and required further compliance filings before SPP could receive RTO approval, Louisiana PSC and New Mexico AG petitioned for their review. SPP was not granted RTO status until after it submitted two sets of compliance filings in response to the Conditional Approval Order and later Commission orders. *See Southwest Power Pool, Inc.*, 108 FERC ¶ 61,003 (2004) (reviewing first compliance filing and requiring an additional compliance filing), *order on reh’g*, 110 FERC ¶ 61,138 (2005); *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,009 at PP 1, 3, 4, and Ordering Para. (A) (2004) (granting SPP RTO status), *order on reh’g*, 110 FERC ¶ 61,137 at P 1 (2005) (collectively, “Orders Granting SPP RTO Status”).

### **SUMMARY OF ARGUMENT**

The challenged orders are conditional, subject to a further compliance filing, and, thus, are without binding effect. It was not the challenged orders, but other Commission orders, that granted SPP RTO status. Accordingly, Louisiana PSC and New Mexico AG are not aggrieved by the challenged orders, and their petitions for review should be dismissed for lack of jurisdiction.

In any event, the Commission's conditional determinations were reasonable and should be upheld. First, the Commission reasonably interpreted SPP's Commission-approved Membership Agreement.

Under the plain language of that Agreement, existing SPP members had agreed to be, and were, bound to amendments approved by the SPP Board subject to rights to challenge any amendments at FERC and to exercise any withdrawal rights they possess. In addition, the plain language established that an existing SPP member could withdraw from SPP only upon 12 months' notice and, for FERC-jurisdictional members, only upon FERC approval. The Commission also reasonably found Membership Agreement §§ 5.1.a and 5.1.b, relied upon by Petitioners, inapplicable under the circumstances here because the challenged orders did not disapprove, refuse to accept, or amend the Membership Agreement.

The Commission did not usurp state authority by interpreting the Membership Agreement it previously accepted in 1999. In this proceeding, the Commission simply reviewed SPP's voluntary FPA § 205 proposal for recognition as an RTO, which included proposed amendments to its Membership Agreement. This FPA § 205 review was within the Commission's jurisdiction, and did not intrude upon any authority properly exercised by the states.

Nor did the Commission require bundled retail load to take service under the SPP's RTO tariff. Rather, "[c]onsistent with Order No. 2000," the Commission

required that SPP Transmission Owners, on behalf of their entire load, including bundled retail load, take service under the non-rate terms and conditions in the SPP tariff as a prerequisite to SPP obtaining RTO status.

Furthermore, SPP's proposed planning provisions were required for RTO recognition by Order No. 2000, and do not infringe on matters within state jurisdiction, such as siting and certification of new transmission facilities. Not only did the proposal leave state-jurisdictional matters to the states, but FERC stated that it expected SPP to exercise its planning responsibilities in coordination with the states.

The Commission also appropriately conditionally approved SPP's voluntary proposal to participate in the Joint and Common Market with neighboring RTOs. Not only was SPP's participation in the Joint and Common Market necessary to alleviate balkanized transmission control and additional seams costs in the region, but the Commission made clear that only market proposals that provide net benefits to SPP RTO customers will be put into effect.

Finally, there is no jurisdiction to address Petitioners' challenges to the Commission's conditional requirement that SPP file certain State Committee regional proposals with the Commission, or to the Commission's determination that SPP does not have to separate its RTO and reliability functions. Petitioners

did not raise either of these challenges in their petitions for rehearing and, thus, are barred from raising them on appeal.

In any event, neither appellate challenge has merit. SPP is required to comply with the Commission's FPA § 205 filing determination only if it voluntarily chooses to pursue its RTO proposal. As this Court has recognized, public utilities may choose voluntarily to give up some of their rate-filing freedom under FPA § 205. In addition, the record fully supported the Commission's determination that, while it would consider issues relevant to SPP performing dual functions as an RTO and reliability organization, it would not require a separation of functions at this time.

## **ARGUMENT**

### **I. THE PETITIONS FOR REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION**

Louisiana PSC and New Mexico AG seek judicial review under FPA § 313(b), Br. at 1, which provides that only parties aggrieved by FERC orders may obtain judicial review. FPA § 313(b); *DTE*, 394 F.3d at 961; *California*, 306 F.3d at 1126; *Snohomish*, 272 F.3d at 613. To be aggrieved, a party must establish Article III constitutional standing by showing, among other things, that it has suffered an injury in fact – an invasion of a legally protected interest which is: (1) concrete and particularized; and (2) actual or imminent, not conjectural or

hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *California*, 306 F.3d at 1126; *Snohomish*, 272 F.3d at 613.

Louisiana PSC and New Mexico AG cannot establish that they have suffered an injury-in-fact in the instant case because the challenged orders are “conditional, subject to a further compliance filing, and thus [are] without binding effect . . . .” *DTE*, 394 F.3d at 960; *see also, e.g., Transmission Agency of Northern California v. FERC*, No. 05-1400, 2006 U.S. App. LEXIS 6177, at \*1-2 (D.C. Cir. March 13, 2006) (attached as addendum to this Brief as required by Circuit Rule 28(c)(3)) (party suffered no injury-in-fact from order containing only FERC’s conditional approval); *California*, 306 F.3d at 1125-26 (same).

The challenged orders did not approve SPP’s proposal for recognition as an RTO and thereby put into effect the aspects of the proposal Louisiana PSC and New Mexico AG challenge on appeal. Rather, the orders merely found the proposal “to be a significant step toward satisfying all of the conditions and requirements for qualification as an RTO pursuant to Order Nos. 2000 and 2000-A,” Conditional Approval Order at P 1, JA 161, and required SPP, if it voluntarily chose to pursue its proposal to become an RTO, to take certain additional steps and to submit compliance filings “prior to receiving RTO authorization,” *id.* at P 2, JA 161-62. *See also* Conditional Approval Order at PP 1-2, 36, 37, 42, 79, 108, 172 and Ordering Paras. (A) and (B), JA 161-62, 173, 174, 176, 187-88, 196, 215;

Rehearing Order at PP 1, 6, 8, 23, 33, 42, 63, 92, JA 285, 287, 288, 294, 298, 300, 306-07, 314.

It was only after SPP chose to proceed with its RTO application and submitted its second compliance filing that, in orders not on review here, the Commission granted SPP's application for RTO status, thereby making effective the provisions Louisiana PSC and New Mexico AG allege will cause them harm. Orders Granting SPP RTO Status, 109 FERC ¶ 61,009 at PP 1, 3, 4, and Ordering Para. (A) ("SPP is hereby granted RTO status"), 110 FERC ¶ 61,137 at P 1. Louisiana PSC's and New Mexico AG's injury-in-fact arises, therefore, if at all, not from the conditional orders challenged here, but from the Orders Granting SPP RTO Status. *DTE*, 394 F.3d at 960; *California*, 306 F.3d at 1125-26; *Snohomish*, 272 F.3d at 617. Accordingly, the instant petitions for review should be dismissed for lack of jurisdiction.

## **II. THE COMMISSION'S CONDITIONAL DETERMINATIONS WERE REASONABLE**

### **A. Standard of Review**

Assuming jurisdiction, the Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *E.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under that standard, the Commission's decision must be reasoned and based upon



substantial evidence in the record. For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b).

In addition, “[w]hen, as here, FERC has accepted agreements as rate schedules, [the Court] defer[s] to the Commission’s interpretation of ambiguous contract provisions, because Congress has explicitly delegated to FERC broad powers over ratemaking, including the power to analyze relevant contracts.” *Southern Co. Services, Inc. v. FERC*, 353 F.3d 29, 34 (D.C. Cir. 2003) (internal quotation omitted) (quoting *Baltimore Gas & Elec. Co. v. FERC*, 26 F.3d 1129, 1135 (D.C. Cir. 1994), and *Tarpon Transmission Co. v. FERC*, 860 F.2d 439, 441-42 (D.C. Cir. 1988)). Similarly, the Court “defer[s] to FERC’s interpretation of its orders so long as the interpretation is reasonable.” *Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004).

**B. The Commission Reasonably Interpreted SPP’s Commission-Approved Membership Agreement.**

The SPP Membership Agreement in effect at the time of the RTO proposal was approved by the Commission in *Southwest Power Pool, Inc.*, 89 FERC ¶ 61,284 (1999). The Membership Agreement stated that SPP Members “agree to be bound by this Agreement as it may be amended, provided that the signatories possess the right to challenge any amendments at FERC and to exercise any withdrawal rights that they possess under this Agreement if they are dissatisfied with the amendment.” R. 1 Membership Agreement at 26 § 8.12, JA 139; *see also*

Conditional Approval Order at P 65, JA 183. The Membership Agreement further provided that it “may be amended by SPP’s Board of Directors, subject to receiving any necessary regulatory approvals.” R. 1 Membership Agreement at 26 § 8.12, JA 139; *see also* Conditional Approval Order at P 65, JA 183.

In light of this plain language, the Commission concluded in the instant case that existing SPP members had agreed to be, and were, “bound to amendments approved by the Board subject to rights to challenge any amendments at FERC and to exercise any withdrawal rights they possess[.]” Rehearing Order at P 27, JA 295; *see also* Conditional Approval Order at P 65, JA 183.

In addition, at that time, the Membership Agreement explicitly provided for member withdrawal from SPP as follows:

Transmission Owner may, upon submission of a written notice of withdrawal to the President, commence a process of withdrawal of its Tariff Facilities from SPP’s administration. Such withdrawal shall not be effective until October 31 of the calendar year following the calendar year in which notice is given; provided that the Transmission Owner must provide at least 12 months’ notice. With regard to any such withdrawal by a FERC public utility, the withdrawing Transmission Owner’s withdrawal shall not become effective until FERC has accepted the notice of withdrawal or otherwise allowed such withdrawal.

R. 1 Membership Agreement at 16 § 4.1, JA 129. In view of this plain language, which was, effectively, unchanged by SPP’s proposal, the Commission concluded here that an existing SPP member could withdraw from SPP only upon 12 months’ notice and, for FERC-jurisdictional members, only upon FERC approval.

Conditional Approval Order at P 65, JA 183; Rehearing Order at PP 20-21, JA 293-94.

Petitioners contend that “FERC, in conjunction with SPP, has attempted to lock former SPP reliability organization members into the SPP by approving a provision of the SPP RTO Membership Agreement that requires FERC approval before any utility can withdraw from the RTO.” Br. at 14; *see also* Br. at 15 (“FERC is attempting . . . to force RTO membership”). This contention ignores the explicit language of the withdrawal provisions. Under both the existing and SPP-proposed withdrawal provisions, FERC approval is not required for *any*, but only for *FERC-jurisdictional*, utilities to withdraw. R. 1 Membership Agreement at 16 § 4.1, JA 129; Conditional Approval Order at P 65, JA 183; Rehearing Order at PP 20-21, JA 293-94.

Thus, the Commission has not “attempted to lock” SPP members into SPP but, simply, has interpreted the plain language of the Membership Agreement, with whose provisions existing SPP members agreed to abide. Petitioners’ brief essentially admits this, as it states: “The SPP accomplished the proposed transition from a reliability organization to a RTO by amending its pre-existing membership agreement. This had the effect of grandfathering into the RTO all former members of the reliability organization.” Br. at 5; *see also* Br. at 11 (“The existing voluntary members of the old SPP reliability organization were automatically made members

of the new SPP RTO because SPP merely amended and filed its pre-existing membership agreement”).

Petitioners point to Membership Agreement § 5.1 as purportedly providing existing SPP members the ability to withdraw from SPP under the circumstances here without having to seek FERC approval to do so. Br. at 17-19. In Petitioners’ view, the challenged orders modified the Membership Agreement, thereby triggering § 5.1.b, Br. at 17-18, which provides that:

In the event of any order or decision by FERC or by a court modifying this Agreement or the [Open Access Transmission Tariff] submitted as part of the initial filing seeking FERC acceptance or approval, that in the judgment of the Member adversely affects it, then Member, at its sole discretion, may withdraw from this Agreement by providing written notice to the President of SPP no later than thirty days after such order or decision without receiving any FERC authorization.

Membership Agreement at 20, JA 133. Petitioners also contend that, “by requiring SPP to file a revised Membership Agreement as a condition of obtaining RTO status, FERC is effectively disapproving the Membership Agreement,” making the Membership Agreement no longer effective in accordance with § 5.1.a. Br. at 18 n.14. That provision states that, if “FERC disapproves or refuses to accept this Agreement or the changes to the [Open Access Transmission Tariff] developed together with this Agreement, then this Agreement shall cease to be effective . . . ,” R. 1 Membership Agreement at 19, JA 132.

The Commission reasonably found Membership Agreement §§ 5.1.a and 5.1.b inapplicable under the circumstances here. First, because the challenged orders neither disapproved nor refused to accept the Membership Agreement, § 5.1.a was not triggered. Rehearing Order at P 22, JA 294.

Likewise, § 5.1.b was not triggered, as the challenged orders did not:

require[] any changes to the Agreement pursuant to section 206 of the FPA. Here, the Commission has reviewed a voluntary filing pursuant to section 205 of the FPA, where SPP sought to be designated as an RTO, and the Commission, rather than ‘issuing an order or decision modifying the Membership Agreement,’ issued an order setting forth the requirements with which SPP must comply in order to be considered an RTO. We did not order any modifications, but found that, for SPP to achieve RTO status, it would need to undertake such modifications. We have simply directed SPP to, among other things, file its Membership Agreement, pursuant to section 205 of the FPA, *if* it chooses to proceed in becoming an RTO. We have not required SPP to revise its current Membership Agreement in order to maintain *status quo* with the Commission.

Rehearing Order at P 23, JA 294. Furthermore, the Commission noted, “no signatories to the Membership Agreement sought rehearing contending that section 5.1.b applies to the instant facts.” Rehearing Order at P 20, JA 293.

The Commission’s reasonable interpretation of these Commission-approved contract provisions, leading to its determination that they are inapplicable in the circumstances here, should be upheld. *Southern Co.*, 353 F.3d at 34; *Entergy*, 375 F.3d at 1209. The Commission recognized and reconciled all relevant contractual provisions dealing with SPP member withdrawal. Petitioners, by contrast, do not

even mention Membership Agreement § 4.1.1, entitled “Withdrawal,” upon which the Commission principally relied.

Next, without citing any authority, Petitioners complain that SPP “proposed to establish the RTO” by “merely amend[ing] its then current membership agreement without putting those changes to a formal membership vote.” Br. at 14. As the Commission found, however, the existing Membership Agreement provided that any amendments were to be approved by SPP’s Board of Directors, not its members. Rehearing Order at P 27, JA 295-96; *see also* Conditional Approval Order at P 64, JA 182 (pointing out that the order accepting SPP’s current Membership Agreement noted “that SPP would act at the direction of the SPP Board or pursuant to the provisions of this Membership Agreement”). The record established, nonetheless, that the “filing [was] the culmination of extended, open deliberations,” in which “input was solicited and received from all stakeholder (and various non-stakeholder) interests. Ultimately, this filing was developed and approved by SPP’s diverse Membership largely by consensus.” R. 1 at 22, 25, JA 27, 30. Moreover, under the Membership Agreement, Members have the right to challenge any amendments at the Commission and to exercise their withdrawal rights. Rehearing Order at P 27, JA 295.

Petitioners further contend that “FERC is attempting . . . to override state authority to approve RTO membership.” Br. at 15. As the Commission explained, however, it:

did not usurp state authority by interpreting the Membership Agreement it previously accepted in 1999. That agreement set forth the rights and obligations of the parties with respect to FERC-jurisdictional matters generally relating to transmission. No state contended that its terms provided the Commission with authority that was properly held by the states, and [the Commission] accepted it without modification. Section 4.1.1 of the Membership Agreement provides, *inter alia*, that a [transmission owner’s] withdrawal “shall not become effective until FERC has accepted the notice of withdrawal or otherwise allowed such withdrawal . . . .” Further, under section 8.12, members have agreed “to be bound to amendments approved by the Board subject to rights to challenge any amendments at FERC and to exercise any withdrawal rights [they] possess[] . . . .” In this proceeding, SPP has asked that [the Commission] consider its request for RTO status in the context of its jurisdictional Membership Agreement, including proposed revisions thereto. [The Commission’s] consideration under such facts, of whether we should grant RTO status, relates to matters that are jurisdictional to the Commission and does not intrude upon any authority properly exercised by the states.”

Rehearing Order at P 27, JA 295-96. *See also* Conditional Approval Order at P 64, JA 182, and Rehearing Order at P 20, JA 293 (the Commission “accepted SPP’s current Membership Agreement . . . effective January 1, 2000. Thus, SPP’s current Membership Agreement and the duties and obligations of its members are subject to [the Commission’s] jurisdiction under [FPA] § 205”).

Petitioners also assert that FERC ignored a request for clarification by Southwest Electric Power Company (“Southwest Electric”), an SPP member

subject to the retail regulation of the Louisiana PSC, “that FERC not automatically make [Southwest Electric] an SPP RTO member, unless state regulators are ‘given an adequate opportunity to conduct their reviews’ to satisfy state approval requirements for joining an RTO.” Br. at 14 (quoting R. 76 at 10, JA 273).

Southwest Electric’s clarification request acknowledged, however, that:

As the Commission correctly notes at Paragraph 65 of the [Conditional Approval Order], the SPP Membership Agreement provides for withdrawal of a member only upon 12 months’ notice, and then the withdrawal may become effective only after FERC approval. The Commission also notes that the Membership [Agreement] binds the members to the Agreement ‘as it may be amended.’ These provisions can be interpreted to mean that signatories to the Membership Agreement are automatically RTO members and can withdraw from the RTO only by notice under the Agreement, notwithstanding the fundamental nature of the organizational changes to SPP.

R. 76 at 10, JA 273. The clarification request, therefore, buttressed the Commission’s finding that, under the plain language of the Membership Agreement, current SPP members automatically would become SPP RTO members upon SPP’s RTO approval. Conditional Approval Order at P 65, JA 183; Rehearing Order at PP 20-21, 27, JA 293-94, 295-96.

While Petitioners concede, citing *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 12 (D.C. Cir. 2002), that “FERC may have authority to review . . . agreements at the outset and decide, based upon the evidence in the record, whether the entrance and exit rights contained in the agreement are just and



reasonable within the meaning of Section 205,” they assert “that is not what FERC did in the instant Order.” Br. at 19. Petitioners are mistaken. The Commission explicitly found in the instant orders, as it did when it first reviewed SPP’s Membership Agreement in 1999, *Southwest Power Pool*, 89 FERC at 61,895, that the member withdrawal provision, which was substantively unchanged in the RTO proposal, was just and reasonable. Conditional Approval Order at PP 65-66, JA 183; *see also* Rehearing Order at P 28, JA 296.

Moreover, the challenged orders do not, as Petitioners assert, Br. at 15-16, “require utilities to transfer control of their transmission assets or to transfer system operating responsibilities to [SPP],” or “unilaterally . . . configure and mandate participation in [SPP].” Rather, the challenged orders simply reviewed SPP’s voluntary FPA § 205 proposal for recognition as an RTO. That proposal, in conjunction with SPP’s existing Membership Agreement, not the challenged orders, set SPP’s proposed RTO configuration, and requires member Transmission Owners, defined as signatories to the Membership Agreement, to transfer functional control of their transmission facilities to SPP. R. 1 Membership Agreement at 3 § 1.19, JA 116; *id.* at 11 § 3.0(a), JA 124.

**C. The Commission Did Not Require Bundled Retail Load To Take Service Under SPP’s RTO Tariff**

Petitioners’ contention that “FERC has no jurisdiction to require bundled retail load to take service under the SPP [Open Access Transmission Tariff],” Br.

at 19 (capitalization in heading altered); Br. at 19-24, is a red herring. The Commission did not require this. Rather, “[c]onsistent with Order No. 2000,” the Commission required that SPP “**TOs [(Transmission Owners)]**, on behalf of their entire load including . . . bundled retail loads, take service under the non-rate terms and conditions in the SPP [open access transmission tariff] as a prerequisite to [SPP] obtaining RTO status from the Commission.” Conditional Approval Order at P 108, JA 196 (emphasis added); Rehearing Order at P 42, 47 JA 300, 302.

As both the Commission, *see* Conditional Approval Order at P 109, JA 196 (citing Order No. 2000 at 31,108;<sup>8</sup> Order No. 2000-A at 31,375-76;<sup>9</sup> *Midwest ISO*, 102 FERC at 61,532-33<sup>10</sup>), and this Court have held, an RTO:

must have operational authority over *all* of the transmission loads wheeled across the [RTO]’s transmission facilities. *See* 18 C.F.R. § 35.34(j)(3) (“The [RTO] must have operation authority for all transmission facilities under its control.”); *id.* § 35.34(k)(1)(i) (“The [RTO] must be the only provider of transmission service over the

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<sup>8</sup> Adopting the “requirement that the RTO be the sole provider of transmission service and sole administrator of its own open access tariff. Included in this is the requirement that the RTO have the sole authority for the evaluation and approval of all requests for transmission service including requests for new interconnections.”

<sup>9</sup> Rejecting a party’s request that the Commission revise 18 C.F.R. § 35.34(k)(1)(i), which requires an RTO to be the only provider of transmission service over the facilities under its control, “to limit it to wholesale transmission service.”

<sup>10</sup> Explaining that the Commission “did not exercise jurisdiction over bundled retail load when [it] ordered Midwest ISO to place all bundled retail load under the Midwest ISO Tariff. The terms and conditions of the service agreements that serve bundled retail load have not been modified.”

facilities under its control”). This authority reaches even the bundled and grandfathered loads that are not subject to [the RTO]’s open access tariff transmission rates . . . . See [*Midwest ISO*], 98 FERC at 61,411[;] [*Midwest ISO*], 102 FERC at 61,532-33. This means that the [RTO Transmission] Owners “must take all transmission services, including transmission used to deliver power to bundled retail customers, from [the RTO].” [*Midwest ISO*], 102 FERC at 61,532.

*Midwest ISO Transmission Owners*, 373 F.3d at 1369.

Moreover, as the Commission explained, this requirement “[did] not disturb state authority over retail ratemaking matters.” Rehearing Order at P 47, JA 302. The specific rates, terms and conditions of bundled retail service arrangements remained unchanged. *Id.*

Accordingly, the Commission’s determination that, if SPP chose to pursue its proposal to obtain RTO status, its transmission owners must take service, on behalf of their entire load, including bundled retail load, under the non-rate terms

and conditions of the SPP open access transmission tariff, should be upheld, as it is consistent with, and required by, both precedent and the Commission's regulations.

**D. The Proposal's Planning Provisions Do Not Infringe On Matters Within State Jurisdiction**

The challenged orders conditionally approved, "as consistent with Order No. 2000," SPP's proposal that it will be responsible for planning, directing, or arranging necessary transmission expansions, additions, and upgrades, and will coordinate such efforts with the appropriate state authorities. Conditional Approval Order at PP 175, 188, JA 217, 221-22; *see also* R. 1 Membership Agreement at 8 § 2.1.5(b) and at 13 § 3.3(a), JA 121, 126; 18 C.F.R. § 35.34(k)(7) (requiring an RTO to be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades and to coordinate such efforts with the appropriate state authorities).

Petitioners interpret this holding to "reach into state-regulated retail service and resource planning . . . ." Br. at 24; *see also* Br. at 16 (asserting that "Section 202 of the Federal Power Act[, 16 U.S.C. § 824a,] does not give the FERC any authority to usurp state regulation over planning and siting decisions"); Br. at 24-26. The Commission specifically found, however, that "SPP's responsibilities as an RTO in developing a regional transmission plan do not infringe on matters within state jurisdiction, such as siting and certification of new transmission facilities." Rehearing Order at P 78, JA 311. In fact, the Commission noted,

“SPP’s RTO responsibilities in this area should be exercised in coordination with the participation and input of states, the SPP [State Committee], and interested parties.” *Id.*

**E. The Commission Appropriately Conditionally Approved SPP’s Proposal To Participate In A Joint And Common Market With Its Regional Neighbors.**

The challenged orders also conditionally approved SPP’s proposal to participate in the Joint and Common Market with the Midwest ISO and PJM RTOs to resolve seams management issues between the regions. Conditional Approval Order at P 3, JA 162; Rehearing Order at P 32, JA 297-98; R. 1 at 11, 34, 50, Ex. 10 at 15, JA 16, 39, 55, 143.

Petitioners’ brief, acting as if FERC imposed this requirement on SPP *sua sponte*, argues that “the ordering of a Joint and Common market with PJM/MISO is beyond the authority of this Commission.” Br. at 30 (capitalization in heading altered). According to Petitioners, the “implications of this requirement are that the market systems and congestion management schemes of SPP must be compatible with those existing for MISO and PJM,” Br. at 30, and, therefore, “this requirement is tantamount to ordering the SPP utilities into an RTO that includes the MISO and PJM regions,” Br. at 31. In addition, Petitioners claim “[t]here is no evidence that this integration of SPP with PJM/MISO is appropriate or would

provide any net benefits to the customers of RTO members.” Br. at 30; *see also* Br. at 32.

To the contrary, the Commission found “SPP’s participation in the Joint and Common market is necessary to alleviate balkanized transmission control and additional seams costs in the region.” Rehearing Order at P 32, JA 297-98. Moreover, the Commission pointed out, “there will be a cost-benefit test prior to SPP’s decision to proceed to a further phase of market development,” and the Commission “expect[s] the states to be actively involved in this analysis.” *Id.* at P 33, JA 298.

Furthermore, the Commission was explicit that only market proposals that provide net benefits to SPP RTO customers would be put into effect. For example, the Commission explained, if the cost/benefit analyses in Phase 2 conclude that the proposed markets will not provide SPP customers a net benefit, SPP will still participate in the Joint and Common Market, but in its current status, *i.e.*, without organized energy markets. Rehearing Order at P 32, JA 297-98. Thus, there is no basis to Petitioners’ concern that “[t]his requirement effectively commits the

SPP to adopt market design changes that are not fully known and may not be appropriate for consumers in the SPP footprint.” Br. at 30-31.<sup>11</sup>

The Commission did not exceed its authority here. Rather, as the Commission emphasized, its “orders in this proceeding set forth the standards with which SPP must comply in order to achieve RTO status, but [it] ha[s] not required SPP to become an RTO. SPP is voluntarily seeking RTO status, and as an RTO, SPP must participate in the Joint and Common Market with the Midwest ISO and PJM.” Rehearing Order at P 33, JA 298.

**F. There Is No Jurisdiction To Address Petitioners’ Challenge To The Commission’s Conditional Approval Of SPP’s Proposal To Establish A State Committee**

FPA §313(b) provides that “[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.” Courts strictly construe this jurisdictional requirement, as the express statutory limit it imposes on a court's jurisdiction cannot be relaxed.

*California*, 306 F.3d at 1125; *Town of Norwood v. FERC*, 906 F.2d 772, 774-75

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<sup>11</sup> Both the orders here and in other proceedings have left it to the RTOs to specify the details of what would constitute a Joint and Common Market. *See, e.g., Wisconsin Public Service Corp.*, 114 FERC ¶ 61,277 at P 3 (2006); *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,266 at PP 61, 76 (2005).

(D.C. Cir. 1990); *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1107, 1109 (D.C. Cir. 1989); *ASARCO, Inc. v. FERC*, 777 F.2d 764, 775 (D.C. Cir. 1985). Thus, “[p]arties seeking review of FERC orders must petition for rehearing of those orders and must *themselves* raise in that petition *all* of the objections urged on appeal.” *Entergy Services, Inc. v. FERC*, 391 F.3d 1240, 1247 (D.C. Cir. 2004) (quoting *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989)).

In response to SPP’s general proposal to establish a representative State Committee, the Commission found that a State Committee “will benefit SPP and market participants by instituting a partnership between the FERC and State commissions through which regional issues can be addressed.” Conditional Approval Order at P 218, JA 229. The Commission found, however, that, as a prerequisite to RTO approval, SPP’s proposal would have to provide the State Committee with primary responsibility for determining certain matters, including: (1) regional proposals and the transition process regarding participant funding for transmission enhancements; (2) rates for regional access; (3) firm transmission rights allocation where a locational price methodology is used; and (4) the transition mechanism to be used to assure that existing firm customers receive [firm transmission rights] equivalent to the customers’ existing firm rights. Conditional Approval Order at P 219, JA 229; Rehearing Order at P 92, JA 314.



The Commission further determined that, “[i]f the [State Committee] reaches a decision on the methodology that would be used, SPP would file this methodology pursuant to Section 205 of the FPA. SPP can also file its own proposal pursuant to Section 205.” Conditional Approval Order at P 219, JA 229.

Petitioners complain for the first time on appeal that “FERC requires the SPP to file any proposal made by the [State Committee] on these delegated issues under Section 205 of the Federal Power Act.” Br. at 27. According to Petitioners, “[b]y requiring the SPP to make § 205 filings for the [State Committee], the FERC is merely doing indirectly that which it cannot do directly. A state cannot order a utility to make a § 205 filing to change its rates.” Br. at 29; *see also id.* (“FERC cannot give to the [State Committee] Section 205 filing rights”).

Petitioners did not raise these claims in their rehearing requests. *See* R. 72, 74, JA 238-61, 262-70. Only the Kansas Corporation Commission, which is not a Petitioner here, asserted on rehearing that the Conditional Approval Order “erroneously allows the [State Committee] to compel SPP to make a section 205 filing.” *See* Rehearing Order at P 88, JA 314. Accordingly, there is no jurisdiction to address Petitioners’ FPA § 205 filing rights contentions on appeal.

As the Commission explained in response to the Kansas Corporation Commission, in any event, “SPP voluntarily filed the RTO application at issue in this proceeding. . . . By deciding to proceed with its RTO application, SPP has

voluntarily agreed to file with the Commission, pursuant to section 205, certain regional proposals that may be developed by the [State Committee].” Rehearing Order at P 92, JA 314; *see also id.* at P 93, JA 315 (“SPP agreed to file with the Commission certain regional proposals that may be developed by the [State Committee]. In addition to [State Committee] proposals, SPP may file its own proposals.”). This Court has recognized that, as here, public utilities may choose voluntarily to give up some of their rate-filing freedom under FPA § 205. *See Atlantic City*, 295 F.3d at 10.

Petitioners also express concern that the State Committee will “be able to act as a group absent consent of all participating regulators,” Br. at 27, *see also* Br. at 30 (the State Committee “should not be able to substitute its own views over the objections of a participating state”), and “request SPP to make a Section 205 filing of a pricing proposal that may injure some states but benefit others,” Br. at 28.<sup>12</sup> These concerns are speculative, as the challenged orders did not establish the State Committee’s voting structure. Rather, these orders stated only that “the [State Committee] should determine its voting structure . . . .” Conditional Approval

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<sup>12</sup> As part of this argument, Petitioners contend for the first time on appeal that, if the State Committee “is granted authority to take independent actions that may be adverse to the interest of the Petitioners[,] . . . the individual [State Committee] members should have to file a section 206 complaint under the FPA with FERC, like all other non-utility affected persons.” Br. at 30. By not raising this issue on rehearing, Petitioners failed to preserve their right to raise it on appeal. FPA §313(b); *California*, 306 F.3d at 1125; *Norwood*, 906 F.2d at 774-75; *Tennessee Gas*, 871 F.2d at 1107, 1109; *ASARCO*, 777 F.2d at 775.

Order at P 221, JA 230. Such speculative concerns do not satisfy the concrete injury in fact or traceability elements for constitutional standing required under FPA § 313(b). *See Lujan*, 504 U.S. at 560 (to satisfy constitutional standing, a party must show both that it has suffered a concrete, imminent, non-hypothetical injury that is fairly traceable to the challenged orders); *California*, 306 F.3d at 1126; *Snohomish*, 272 F.3d at 613. Any injury flows, if at all, not from the challenged orders, which did not address the SPP voting structure but, rather, from SPP's subsequent development of that structure.

**G. There Is No Jurisdiction To Address Petitioners' Challenge To The Commission's Determination That SPP Does Not Have To Separate Its RTO And Regional Reliability Coordinator Functions**

While the New Mexico AG asserted in its comments on SPP's RTO proposal that it "believes that a reliability organization should be separate from a commercial interest organization – SPP should not be both," R. 44 at 2, JA 157, neither the New Mexico AG nor the Louisiana PSC raised that matter on rehearing to the Commission. *See* R. 72, 74, JA 238-61, 262-70. The Commission's determination that it would take the matter of SPP acting as both an RTO and a regional reliability coordinator into account, but would not presently require a separation of those functions, Conditional Approval Order at P 91, JA 190, was questioned on rehearing only by Southwestern Public Service Company ("Southwestern Public Service"). *See* R. 77 at 8-9, JA 281-82; Rehearing Order at

P 40, JA 299. As Southwestern Public Service is not a petitioner here, the challenge to the Commission’s dual role determination, Br. at 13, 33, is not properly before the Court.

In any event, the Commission’s determination to allow SPP to perform both regional reliability and RTO roles was reasonable. Although Petitioners assert there was no “evidence that such a dual role [is] appropriate,” Br. at 13, SPP had explained that:

For over sixty years, SPP has successfully managed its regional planning and operations functions with its reliability responsibilities. As Mr. Brown testified, SPP has historically been responsible for maintaining reliability and employs real-time flow information in determining what actions (*e.g.*, line loading relief, curtailment) may be necessary to protect regional reliability. Power flows are generally internalized within SPP’s footprint of security coordination and tariff administration, allowing SPP to effectively manage reliability. In addition, since 1998, SPP has been responsible for administering the regional transmission tariff, including the determination of available transmission capability and congestion management.

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The formalization of SPP’s regional coordinator role six years ago did not create a need for functional separation within SPP. That some regions have successfully implemented organizational separation between entities that establish and monitor reliability and those who implement reliability standards, does not suggest that such separation is, in all cases, warranted. SPP’s proven track record of successfully coordinating operational and reliability functions must be weighed against the potential disruption that any forced separation might cause. Without a meaningful evaluation of the potential impacts (*i.e.*, in terms of any measurable enhancements to reliability if separation were required) the case has not been made for precluding SPP from serving as both an RTO and as a regional reliability organization.

R. 55 at 14-15, JA 159-60; *see* Conditional Approval Order at P 88, JA 190. Thus, the Commission appropriately determined that, while it would “consider issues relevant to SPP performing dual functions as an RTO and reliability organization,” it would not require a separation of functions at this time. Rehearing Order at P 41, JA 300; *see also* Conditional Approval Order at P 91, JA 190.

Petitioners assert that the Commission “gave no reasoned analysis on why such a separation, which some other regions have successfully implemented[,] would not be appropriate for the SPP.” Br. at 33 (internal quotation omitted). This assertion misconstrues the nature of the Commission’s review of an FPA § 205 proposal. The question before the Commission in reviewing an FPA § 205 proposal is whether the proposal is just and reasonable. If it is, the Commission must approve the proposal; it cannot disapprove a just and reasonable FPA § 205 proposal in favor of another entity’s alternative proposal that also may be just and reasonable. *See Atlantic City*, 295 F.3d at 9 (FERC can reject an FPA § 205 filing “only if it finds that the changes proposed by the public utility are not ‘just and reasonable’”) (citing FPA § 205(e), 16 U.S.C. § 824d(e)).

Petitioners also contend “[t]here is no evidence that . . . FERC is still taking this matter into consideration.” Br. at 33 (internal quotation omitted). Even if that contention were true, that is not a matter to be raised here, but in the proceeding(s) in which Petitioners believe the Commission should be considering the matter.

### **CONCLUSION**

For the foregoing reasons, the petitions should be dismissed for lack of jurisdiction or, in the alternative, denied on their merits.

Respectfully submitted,

John S. Moot  
General Counsel

Robert Solomon  
Solicitor

Beth G. Pacella  
Senior Attorney

Federal Energy Regulatory  
Commission  
888 First Street, N.E.  
Washington, D.C. 20426  
Phone: 202-502-6048  
Fax: 202-273-0901

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