182 FERC ¶ 61,100
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Southwest Power Pool, Inc. Docket Nos. ER22-379-003
ER22-379-004

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING AND SETTING ASIDE PRIOR ORDER, AND DISMISSING COMPLIANCE FILING AS MOOT

(Issued March 2, 2023)

1. Clean Energy Advocates[1] seek rehearing of the Commission's August 5, 2022 order,[2] which accepted, subject to condition, Southwest Power Pool, Inc.'s (SPP) proposed revisions to Attachment AA of the SPP Open Access Transmission Tariff (Tariff)[3] and proposal to adopt an Effective Load Carrying Capacity (ELCC) capacity accreditation methodology for wind and solar resources.

2. Pursuant to *Allegheny Defense Project v. FERC*,[4] the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act (FPA),[5] we are modifying the discussion in the

[1] Clean Energy Advocates is comprised of American Clean Power Association, Advanced Energy Economy, Solar Energy Industries Association, Sustainable FERC Project, Natural Resources Defense Council, Advanced Power Alliance, and Sierra Club.

[2] *Sw. Power Pool, Inc.*, 180 FERC ¶ 61,074 (2022) (August 2022 Order).

[3] SPP, Tariff, attach., AA § 7.8 (3.2.0).

[4] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

[5] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

August 2022 Order and setting it aside, and rejecting SPP's ELCC proposal without prejudice, as discussed below.[6]

3. On September 6, 2022, SPP submitted a compliance filing in response to the August 2022 Order (Compliance Filing) with updated Tariff sheets that include additional detail on its use of the ELCC methodology. Because we are setting aside the August 2022 Order and rejecting SPP's filing without prejudice, we dismiss the Compliance Filing as moot.

I. Background

4. SPP imposes a Resource Adequacy Requirement on all Load Responsible Entities (LRE) within its footprint by requiring each LRE to own or procure sufficient capacity to meet its non-coincident peak load plus a Planning Reserve Margin.[7] SPP performs a Loss of Load Expectation (LOLE) analysis every two years to determine the amount of planning reserves needed to maintain a reliability metric of one day (or less) in 10 years, as required by Attachment AA of the SPP Tariff, to reliably serve the SPP Balancing Authority Area's forecasted Peak Demand.[8] Details regarding the operational and performance requirements of SPP's Resource Adequacy Requirement are located in the SPP Planning Criteria.[9]

5. At issue in the instant proceeding are SPP's proposed revisions to Attachment AA governing the capacity accreditation methodology for wind and solar resources.[10] SPP

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[6] *Allegheny Def. Project*, 964 F.3d at 16-17.

[7] Capitalized terms used but not otherwise defined in this order have the meanings ascribed to them in the Tariff.

[8] August 2022 Order, 180 FERC ¶ 61,074 at P 2 (citing SPP Tariff, attach. AA, § 4.0 (0.0.0)).

[9] SPP's Planning Criteria provide "background information, guidelines, business rules, and processes for the operation and administration of the SPP Planning Process." The details of the Planning Criteria are not in the SPP Tariff. *See* SPP Planning Criteria, (Feb. 4, 2021) https://www.spp.org/documents/58638/spp%20planning%20criteria%20v2.4.pdf.

[10] SPP's proposed tariff revisions to section 7.8.2 of the SPP Tariff also reference run-of-the-river hydroelectric resources to clarify that the existing accreditation methodology for those resources utilizes historical data. However, SPP's new proposed ELCC methodology does not extend to run-of-the-river hydroelectric resources. *See* August 2022 Order, 180 FERC ¶ 61,074 at PP 13, 33, n.45.

had previously used a deterministic methodology to analyze the same hours of each historical year regardless of how many wind or solar resources were interconnected to the SPP system.[11] In its November 10, 2021 filing, as amended on March 14, 2022 and June 8, 2022, SPP proposed to begin using an ELCC capacity accreditation methodology for wind and solar resources in response to increasing penetration levels of those resource types.[12] SPP specifically proposed to revise section 7.8 of Attachment AA of the Tariff to state that a resource qualified in accordance with sections 7.1, 7.2, 7.4, or 7.7 of Attachment AA[13] has its accredited capacity determined based on historical performance in accordance with the methodology described in the SPP Business Practices as well as the SPP Planning Criteria.[14]

6. In the August 2022 Order, the Commission found that it was just and reasonable and not unduly discriminatory or preferential for SPP to accredit wind and solar resources based on historical performance using an ELCC methodology, in accordance with the SPP Business Practices and the SPP Planning Criteria.[15] However, the Commission also found that SPP's filing failed to satisfy the Commission's rule of reason, under which practices significantly affecting rates, terms, and conditions of service must be on file with the Commission.[16] Accordingly, the Commission accepted SPP's proposal subject to the condition that SPP revise its Tariff to include additional details about the ELCC

[11] August 2022 Order, 180 FERC ¶ 61,074 at P 3.

[12] *Id.* PP 4-5, 44.

[13] Sections 7.1, 7.2, 7.4, and 7.7 of Attachment AA address the qualification of Deliverable Capacity, Firm Capacity, Firm Power, and Behind-The-Meter Generation for purposes of meeting SPP's Resource Adequacy Requirement. August 2022 Order, 180 FERC ¶ 61,074 at P 4.

[14] *Id.*

[15] *Id.* P 23.

[16] *Id.* P 24; *Energy Storage Ass'n v. PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,296, at P 103 (2018) (describing the rule of reason); *see also City of Cleveland v. FERC*, 773 F.2d 1368, 1376-77 (D.C. Cir. 1985) (affirming the Commission's decision not to include term in tariff explaining that "only those practices that affect rates and service *significantly*, that are reasonably *susceptible* of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous" must be included in a tariff).

methodology that SPP provided through its transmittal letter, deficiency responses, and a noticed conference call.[17]

7. On rehearing, Clean Energy Advocates allege that the Commission erred by: (1) accepting SPP's filing as just and reasonable notwithstanding its finding that the filing failed to satisfy the rule of reason; (2) accepting a proposal that was based "in part on a 'publicly noticed conference call' between SPP and Commission staff, where no other party was permitted to speak" and for which no transcript was available; and (3) accepting an unduly discriminatory proposal that would accredit wind and solar resources based on unforced capacity (UCAP), which accounts for historical forced outages and other reliability events, while accrediting thermal resources based on installed capacity (ICAP), which does not account for historical forced outage rates.

II. Rehearing Request

8. Clean Energy Advocates allege that the Commission erred by accepting an FPA section 205 filing that omitted tariff details that significantly affect rates, terms, and conditions of service.[18] Clean Energy Advocates contend that the August 2022 Order presents a non sequitur in finding both that SPP's filing failed to satisfy the rule of reason, while also determining that these "manifest flaws" could be remedied by a later compliance filing following acceptance.[19] Clean Energy Advocates claim that this is inconsistent with FPA section 205 and the Commission's regulations, which require that rates be "clearly and specifically stated."[20] They argue that the Commission cannot lawfully reach the merits of a just and reasonable determination without having the key elements of the tariff provision before it, and the public, for inspection.[21] Clean Energy Advocates add that SPP's new capacity accreditation methodology is not "some minor technical modification, rather, it is a new 'complex' rate scheme that represents a

[17] August 2022 Order, 180 FERC ¶ 61,074 at P 31. Commission staff issued two deficiency letters and conducted a publicly noticed conference call to obtain enough information for the Commission to rule on SPP's filing. *Id.* n.43.

[18] Rehearing Request at 4-9.

[19] *Id.* at 2-3 (Statement of Issue 1).

[19] *Id.* at 6-7.

[20] *Id.* at 3-4 (citing 16 U.S.C. § 824d(c); 18 C.F.R. § 35.1 (2022); *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 811 (D.C. Cir. 2007)).

[21] *Id.* at 4.

'substantial market design change.'"[22] Clean Energy Advocates allege that the Commission reaches the merits of the filing by relying on generalities rather than specific tariff language, noting that "specific critical elements of SPP's methodology, including the determination of the base and change cases and the definition of seasonal net peak load, were missing."[23]

9. Clean Energy Advocates also argue that the August 2022 Order was not supported by substantial evidence insofar as the Commission's conclusion was predicated "at least in part" upon the April 6, 2022 noticed conference call, which "affords no transparency or reviewability."[24] Clean Energy Advocates allege that they were denied due process because they were unable to participate in the discussion on the noticed conference call in order to offer additional information or counter any of SPP's arguments.[25] Clean Energy Advocates also argue that the assertions made during the call cannot be verified or contested by interested parties or an appellate court because there is no transcript or summary available for public review.[26]

10. Clean Energy Advocates allege that the Commission failed to provide a reasoned explanation for accepting a UCAP-based capacity accreditation methodology, which accounts for historical outages, for wind and solar resources, notwithstanding SPP's continuing use of an ICAP methodology, which does not account for historical outages, for conventional resources.[27] Clean Energy Advocates argue that it is unduly discriminatory to account for outages experienced by wind and solar resources while ignoring outages of thermal resource types.[28] Clean Energy Advocates argue that such disparate treatment results in overvaluing thermal resources while undervaluing wind and solar resources.[29]

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[22] *Id.* (quoting August 2022 Order, 180 FERC ¶ 61,074 at P 5 (Clements, Comm'r, dissenting)).

[23] *Id.* at 7.

[24] Clean Energy Advocates Rehearing Request at 9.

[25] *Id.* at 10.

[26] *Id.* at 9.

[27] Rehearing Request at 3-4, 11-16.

[28] *Id.* at 11.

[29] *Id.* at 11-12.

11. Clean Energy Advocates dispute as inaccurate and unsupported the Commission's finding that the "use of ICAP for conventional resources and UCAP for intermittent resources is not unduly discriminatory because each methodology is predicated on the specific attributes and the dispatchable operating characteristics of their respective resource."[30] Clean Energy Advocates maintain that the ICAP methodology does not take into account any of the attributes of a resource beyond performance in a set test, whereas the ELCC methodology lowers the accreditation of wind and solar resources based upon their performance over multiple years, diminishing the value for outages and fuel availability.[31] Clean Energy Advocates argue that the Commission did not explain what specific attributes or characteristics of different resource types purportedly merit differential treatment, other than stating that "resources with correlated output profiles, like wind and solar, bring declining resource adequacy value to the system as their penetration increases."[32] Clean Energy Advocates maintain that such differences in performance characteristics do not explain or justify why outage risks of conventional resources should be "*ignored* when determining capacity accreditation; or, in other words, why the facial discrimination evident in SPP's proposal is not 'undue.'"[33]

12. Clean Energy Advocates question the relevance of the Commission's statement in the August 2022 Order that it has "not required any RTO/ISO to apply an ELCC framework consistently across all resource types."[34] Clean Energy Advocates maintain that they are not advocating for a single ELCC framework across all resource types but are instead asking for consistent accounting of outages across all resource types in SPP's accreditation methodologies.[35] Clean Energy Advocates argue that "while *differences* in capacity or resource adequacy value for different classes of resources can be appropriate, *failure to account* for correlated outages in some resources constitutes undue

[30] *Id.* at 12 (quoting August 2022 Order, 180 FERC ¶ 61,074 at P 71).

[31] *Id.*

[32] *Id.* (quoting August 2022 Order, 180 FERC ¶ 61,074 at P 71).

[33] *Id.* at 13 (emphasis in pleading).

[34] *Id.* at 14 (quoting August 2022 Order, 180 FERC ¶ 61,074 at P 71).

[35] *Id.* Similarly, Clean Energy Advocates state that they "have never asserted that the capacity value for thermal resources must match that of clean energy resources or decline at precisely the same rate as more thermal resources come online." *Id.* at 21.

discrimination."[36] Clean Energy Advocates contend that the Commission misconstrued their argument in this regard and therefore failed to respond to it.[37]

13. Clean Energy Advocates contend that unjustified discrepancies between the thermal resource accreditation methodology and the new renewable capacity accreditation methodology would form the basis of unlawful discrimination.[38] According to Clean Energy Advocates, SPP's practice of setting load requirements in ICAP and valuing most resources in ICAP but nonetheless measuring intermittent resources in UCAP is discriminatory "and results in ELCC resources receiving a capacity value 12% lower than a thermal resource with identical resource adequacy value."[39] Clean Energy Advocates argue that this results in "unequal compensation for equal service and unnecessary costs for load."[40] Clean Energy Advocates argue that, where there is a disparity in the treatment of entities, a valid reason for the disparity must be presented to show that the disparity is not unduly discriminatory.[41] Clean Energy Advocates argue that it is unreasonable and unrealistic to assume a near-perfect thermal resource accreditation, while adjusting the accreditation for a class of non-thermal resources. According to Clean Energy Advocates, SPP's statement that it is considering the UCAP methodology for thermal generation "is a tacit admission, if not an overt one, that such factors need to be considered for rates to be just and reasonable."[42]

14. Clean Energy Advocates argue that SPP's proposal "creates a competitive disadvantage for an entire class of resources and will result in unjust and unreasonable rate[s] for consumers who will now overpay for capacity that may not be deliverable from thermal resources."[43] Clean Energy Advocates state that Commissioner Christie recognized this problem in his dissent from the Commission's order accepting an ELCC

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[36] *Id.* at 20-21 (emphasis in pleading).

[37] *Id.*

[38] *Id.* at 14-15.

[39] *Id.* at 17.

[40] *Id.* (quoting August 2022 Order, 180 FERC ¶ 61,074 at P 13 (Clements, Comm'r, dissenting)).

[41] *Id.* at 18 (citing *Tenaska Clear Creek Wind, LLC v. SPP*, 177 FERC ¶ 61,200, at PP 62, 73 (2021)).

[42] *Id.* at 19.

[43] *Id.*

proposal in PJM Interconnection, L.L.C. (PJM).[44] Clean Energy Advocates add that the facts that may have supported the PJM ELCC filing no longer exist, as evident from the Commission's final report on Winter Storm Uri, which highlighted "how the unplanned outages in thermal resources had deadly consequences."[45] Clean Energy Advocates maintain that the PJM ELCC Order does not allow the Commission to "similarly justify the discriminatory and unjust proposal offered here."[46]

III. Compliance Filing

A. Notice of Filing and Responsive Pleadings

15. Notice of SPP's Compliance Filing was published in the *Federal Register*, 87 Fed. Reg. 56,045 (Sept. 13, 2022) with interventions and protests due on or before September 27, 2022. Clean Energy Advocates filed a timely protest. On October 13, 2022, SPP filed an answer to Clean Energy Advocates' protest. On November 4, 2022, Xcel Energy Services Inc. (Xcel), on behalf of its utility operating company affiliate Southwestern Public Service Company, filed a motion to intervene out-of-time and comments in Docket Nos. ER22-379-000, ER22-379-001, ER22-379-002, ER22-379-003, and ER22-379-004.

B. Clean Energy Advocates Protest

16. Clean Energy Advocates argue that certain portions of the Compliance Filing introduce new tariff language, which the Commission must review de novo and which must comply with the Commission's rule of reason.[47] Clean Energy Advocates assert that the Commission may not implement a new rate design distinct from SPP's original filing.[48] Arguing that the Commission prejudged whether SPP's proposed tariff was just and reasonable without having seen the tariff language, Clean Energy Advocates claim that simply determining whether the Compliance Filing comports with the requirements of the August 2022 Order would inappropriately shield the purported new substantive

[44] *Id.* (citing *PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,056, at P 10 (2021) (Christie, Comm'r, dissenting) (PJM ELCC Order)).

[45] *Id.* at 19-20.

[46] *Id.* at 20.

[47] Clean Energy Advocates Protest at 4 (citing 16 U.S.C. § 824d(e); *City of Cleveland v. FERC*, 773 F.2d at 1376-77; 18 C.F.R. § 35.1(a)).

[48] *Id.* (citing *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017) (*NRG*)).

elements of the Compliance Filing from a fulsome review, in violation of FPA section 205.[49] Clean Energy Advocates also argue that the Commission should perform a *de novo* review because this is the first time the parties have had a chance to inspect, analyze, and determine whether certain details of SPP's proposal are just and reasonable, not unduly discriminatory, and otherwise compliant with the FPA and the Commission's regulations.[50]

17. Clean Energy Advocates aver that the compliance requirements established in the August 2022 Order were not merely incidental, or directions to fill in minor details as would be permitted under *NRG*. Clean Energy Advocates quote Commissioner Clements' dissent to the August 2022 Order, noting that the Commission "majority reaches the merits of SPP's filing based only on a description of how SPP intends to implement the proposal" which represents a "substantial market design change."[51] Clean Energy Advocates argue that because they have not had "sufficient notice as to how this new accreditation proposal will work," the harm they have suffered is not *de minimis*, nor can it be remedied by the submission of the Compliance Filing.[52] Clean Energy Advocates claim that the Commission, by accepting SPP's proposal without review of substantive provisions, prevented stakeholders from having an opportunity to fully assess the proposal, provide comments, and file a protest—and, thus, deprived stakeholders of their right to a fair hearing.[53]

18. Clean Energy Advocates state that neither SPP nor the Commission have identified precedent in which the Commission has preemptively assumed that a future Tariff revision would be just and reasonable, particularly not where the revision approved in advance was required due to a violation of the rule of reason. Clean Energy Advocates argue that such an approval is analogous to rejecting a proposed Tariff change and telling

[49] *Id*.

[50] *Id*. at 5.

[51] *Id*. (quoting August 2022 Order, 180 FERC ¶ 61,074 at PP 4-5 (Clements, Comm'r, dissenting)).

[52] *Id*. at 5-6 (citing August 2022 Order, 180 FERC ¶ 61,074 at P 3 (Clements, Comm'r, dissenting)).

[53] *Id*.

a party what the Commission would find acceptable in its place, in that it deprives the utility's customers of early and adequate notice of the proposed rate changes.[54]

19. Clean Energy Advocates argue that, even as amended, the Tariff violates the rule of reason. Clean Energy Advocates state that, despite SPP's insistence that its ELCC methodology would utilize "historical performance," the Compliance Filing contains little meaningful reference to, or capacity adjustment based on, actual wind and solar performance. Clean Energy Advocates also state that SPP fails to define the "assessment period" over which historical performance will be assessed.[55]

20. Clean Energy Advocates state that the Compliance Filing also fails to clearly describe how the actual value of accredited capacity would be calculated. For instance, Clean Energy Advocates point to proposed section 15.4 and state that the language appears to require SPP to determine a system-wide value for the accredited capacity in Tier 1 and Tier 2, but that this percentage of the system-wide accredited capacity is somehow then changed to a different value based upon an unknown adjustment to reflect an individual LRE's top three percent load hours. In addition, Clean Energy Advocates state that the adjustment of ELCC based on the performance of a wind or solar facility during the individual LRE's top three percent of load hours also appears to *not* be used for resources in Tier 3. Clean Energy Advocates state that for Tier 3, the calculation is based entirely upon the accreditation value given during the initial system-wide analysis, and that the rationale for this difference is not explained in the filing or the Tariff language. Clean Energy Advocates state that SPP's approach to adjusting a system-wide ELCC based on a resource class's contribution to meeting LRE load also seems to conflict with language found elsewhere in the Tariff.[56]

21. Clean Energy Advocates state that while the Compliance Filing provides a definition of Seasonal Net Peak Load, as required by the August 2022 Order, this term appears to apply only to wind and solar resources. Clean Energy Advocates argue that while this new evaluation of net load might conceivably have merit, SPP does not explain why Seasonal Net Peak Load, which accounts for transmission losses, behind-the-meter generation, and demand response, is an appropriate basis from which to accredit wind and solar resources given that SPP apparently does not use such a measure of net load to accredit resources such as fossil thermal, nuclear, hydroelectric, storage, or hybrid resources. Clean Energy Advocates state that the newly defined term differs from SPP's existing definition of Peak Demand not only because it is seasonal, but also because it

[54] *Id*. at 6 (citing *NRG*, 862 F.3d at 115; *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984)).

[55] *Id.* at 7-8.

[56] *Id.* at 9 (citing SPP, Proposed Tariff, attach. AA, § 15.5 (0.0.0)).

nets out the effects of all demand response (not only non-controllable and non-dispatchable demand response), and that SPP has offered no explanation for netting out this additional factor when determining the peak load against which wind and solar resource tiers will be calculated, which effectively lowers the quantity of wind and solar resources that can receive the higher Tier 1 accreditation.[57]

22. Clean Energy Advocates argue that the Compliance Filing is inconsistent with the August 2022 Order. Clean Energy Advocates state that proposed section 15.2 determines the tiered quantity of designated resources for a given LRE based upon NITS only, which would automatically consign all wind or solar resources using firm point-to-point transmission service to Tier 3, as they would not meet the requirements of Tier 1 or Tier 2 due to the facial restriction to NITS resources. Clean Energy Advocates state that this definition of Tier 1 and Tier 2 resources is inconsistent with the Commission's direction in the August 2022 Order, which stated that "because the SPP Tariff requires that a generator be designated as a network resource *or have point to point transmission service associated with it* to serve Net Peak Demand, accreditation of resources that have firm transmission service should not be reduced by resources that cannot be used to serve Net Peak Demand (i.e., those without firm transmission service)."[58]

23. Clean Energy Advocates argue that SPP's method to calculate ELCC by scaling load versus adding generation underestimates the ELCC values of resources.[59] Clean Energy Advocates argue that SPP fails to provide analysis demonstrating the accuracy of its approach and further argue that SPP should be required to provide analysis showing that its approach leads to correct results.[60] Clean Energy Advocates argue that SPP's proposal is unreasonable as it replicates a method shown in other RTOs/ISOs to underestimate the ELCC value of all resource types without a record to demonstrate accuracy in SPP.[61]

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[57] *Id.* at 10-11.

[58] *Id.* at 11 (citing August 2022 Order, 180 FERC ¶ 61,074 at P 71 (emphasis added); SPP Response to First Deficiency Letter at 16).

[59] Clean Energy Advocates Protest at 12 (citing PJM Interconnection, L.L.C., Updated Effective Load Carrying Capability Construct, attach. C, Affidavit of Dr. Patricio Rocha Garrido at 20-21, Docket ER21-2043-000 (filed July 1, 2021) (PJM ELCC Filing)).

[60] *Id.*

[61] *Id.* at 12-13.

24. Clean Energy Advocates argue that SPP's proposal to set ELCC based on the amount of additional load a group of resources can support is inconsistent with how other resource types are treated in SPP's resource adequacy construct.[62] Clean Energy Advocates argue that 1 MW from non-ELCC resources is not capable of serving one MW of load, making the one-to-one ratio proposed by SPP for ELCC resources discriminatory.[63] Clean Energy Advocates argue that the ELCC MW assigned to a tier should not be the amount of additional load that a tier can serve, but rather the amount of accredited capacity from non-ELCC resources needed to serve the same amount of additional load.[64] Clean Energy Advocates note that each MW of accredited capacity is capable of serving 893 kilowatts (kW) of peak load with SPP's current reserve margin.[65] Clean Energy Advocates then argue that the accredited capacity of ELCC resources should be one MW for each 893 kW of peak load those resources are able to serve.[66] Clean Energy Advocates argue that the Commission should direct SPP to correct or demonstrate that this treatment does not result in unjust, unreasonable, and unduly discriminatory rates.[67]

25. Clean Energy Advocates argue that SPP's proposal considers the reliability contributions of wind and solar resources separately and makes no provision for synergistic effects of wind and solar.[68] Clean Energy Advocates note that these synergistic effects are a component of ELCC approaches in PJM and NYISO. Clean Energy Advocates argue that SPP should add a "diversity study" to its proposed wind and solar studies that takes the system absent wind and solar resources as its base case, creates change cases with both wind and solar, and measures the "diversity benefit" or "diversity loss" as the surplus or shortfall of load carrying capacity between the study cases and the sum of the load carrying capacity increase in the wind and solar test cases.[69] Clean Energy Advocates argue that, absent remedy, SPP's proposal is unjust and

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[62] *Id.* at 14.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 13.

[69] *Id.*

unreasonable and unduly discriminatory because it ignores benefits and understates the value of one class of resources to the benefit of others.[70]

26. Clean Energy Advocates argue that SPP's proposal fails to account for correlated outage potential of all resource types.[71] Clean Energy Advocates argue that the rate is unduly discriminatory because it accounts for correlated outage potential among wind and solar resources, while failing to acknowledge that thermal resources also have correlated outages like those observed in Texas in Winter Storm Uri and those that were recently identified by NERC as a risk for SPP based upon potential drought conditions affecting cooling water.[72]

27. Clean Energy Advocates assert that the "fundamental failure" of PJM's recent capacity accreditation proposal was that it did not make adjustments for universal system reliability events to all resources, including thermal resources.[73] Clean Energy Advocates claim that the August 2022 Order approves rules for capacity accreditation of wind and solar that account for non-performance events using an ELCC framework to measure historical performance, which directly contrasts with how SPP fails to account for historical performance of thermal resources despite outages by thermal resources in recent winters.[74] Clean Energy Advocates argue that the Commission failed to grapple with this discriminatory treatment in the August 2022 Order and that SPP provided nothing in the Compliance Filing to address the problem. Clean Energy Advocates contend that merely asserting that there are differences in performance characteristics

[70] *Id.* at 13, 14.

[71] *Id.* at 15.

[72] *Id.* (citing SPP, *A Comprehensive Review of Southwest Power Pool's Response to the February 2021 Winter Storm* (July 19, 2021), https://www.spp.org/documents/65037/comprehensive%20review%20of%20spp's%20response%20to%20the%20feb.%202021%20winter%20storm%202021%2007%2019.pdfhttps://www.spp.org/documents/65037/comprehensive%20review%20of%20spp's%20response%20to%20the%20feb.%202021%20winter%20storm%202021%2007%2019.pdf; North American Electric Reliability Corp., *2022 Summer Reliability Assessment*, at 5 (May 2022), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_SRA_2022.pdf).

[73] *Id.* (citing PJM ELCC Order, 176 FERC ¶ 61,056 at P 10).

[74] *Id.*

does not explain why outage risks of conventional resources should be ignored in determining accreditation.[75]

28. Clean Energy Advocates argue that SPP's proposal creates a competitive disadvantage for wind and solar resources and will result in unjust and unreasonable rates for consumers.[76] Clean Energy Advocates assert that SPP's approach obstructs wind and solar resources from serving as qualifying capacity while allowing thermal resources that may not be available when called upon to participate at artificially inflated capacity accreditations.[77] Clean Energy Advocates argue that this creates an excessive and unnecessary reliability risk that could be averted by using a comparable methodology for all resources.[78]

C. SPP Answer

29. SPP states that it agrees with Clean Energy Advocates about the use of the term "Network Integration Transmission Service" in section 15.2 of Attachment AA. SPP states that, as indicated previously in this proceeding,[79] it intended to capture the concept of firm transmission service, and it is possible for a party to have firm transmission service in the form of firm point-to-point transmission service. Accordingly, SPP states that, if ordered to do so on compliance, SPP would be agreeable to amending section 15.2 and proposes to add clarifying language to sections 15.2 and 15.3 to include resources with firm point-to-point transmission service agreements.

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[75] *Id.* at 15, 16.

[76] *Id.* at 16.

[77] *Id.*

[78] *Id.*

[79] SPP Answer at 2-3 (citing First Deficiency Response at 16 ("Because the SPP Tariff requires that a generator be designated as a network resource *or have firm point to point transmission service associated with it to serve Net Peak Demand*, it is imperative that the accreditation of resources that [] *have firm transmission service* not be reduced by resources that cannot be used to serve load. . . . Accordingly, facilities that *do not have Firm Transmission Service* associated with them are designated to a Tier 3, and those facilities that *do have Firm Transmission Service* are designated to either Tier 1 or Tier 2." (emphasis added)); *id.* at 17-20 (containing numerous references to "firm transmission service")).

30. SPP states that these changes are "minor modifications" that the Commission may order on compliance and not an "entirely new rate scheme" that would exceed the Commission's authority to order and SPP's ability to implement on compliance.[80]

IV. Discussion

A. Procedural Matters

31. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2022), we deny Xcel's late intervention in Docket Nos. ER22-379-000, ER22-379-001, ER22-379-002, and ER22-379-003. In ruling on a motion to intervene out-of-time, we apply the criteria set forth in Rule 214(d) of the Commission's Rules of Practice and Procedure, and consider, among other things, whether the movant had good cause for failing to file the motion within the time prescribed. When, as here, late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, the movant bears a higher burden to demonstrate good cause for granting such late intervention.[81] Having offered no explanation for why the motion could not have been timely filed, we find that Xcel has failed to demonstrate the requisite good cause, and we deny the motion to intervene out-of-time in Docket Nos. ER22-379-000, ER22-379-001, ER22-379-002, and ER22-379-003.

32. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), we grant Xcel's late-filed motion to intervene in Docket No. ER22-379-004 given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Xcel's participation at the compliance stage in this proceeding is restricted to the scope of the compliance filing and does not include the right to seek rehearing of earlier orders in the root or other sub-dockets listed in the previous paragraph.[82]

33. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2022), prohibits an answer to a protest unless otherwise

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[80] *Id.* at 3 (citing *NRG*, 862 F.3d at 115-17; *City of Winnfield v. FERC*, 744 F.2d at 875-76).

[81] *See, e.g.*, *PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,209, at P 24 (2019); *PáTu Wind Farm LLC v. Portland Gen. Elec. Co.*, 151 FERC ¶ 61,223, at P 39 (2015); *Columbia Gas Transmission Corp.*, 113 FERC ¶ 61,066, at P 5 (2005).

[82] *See PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,265, at PP 24, 27 (2010) (finding that intervention in a compliance filing does not establish party status in the root docket or earlier sub-dockets).

ordered by the decisional authority. We accept SPP's answer to Clean Energy Advocates' protest to the Compliance Filing because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

34. Upon consideration of the arguments raised on rehearing, we find that the Commission erred, in the August 2022 Order, by accepting, subject to condition, SPP's proposed tariff revisions. Section 205 of the FPA and the Commission's regulations require that rates be "clearly and specifically" stated.[83] These requirements ensure that the public has adequate notice of the proposed rate, and that the Commission has an opportunity to evaluate the proposal to ensure that it is just and reasonable and not unduly discriminatory or preferential.[84]

35. In the August 2022 Order, the Commission found that a definition of seasonal net peak load must be clearly defined in SPP's Tariff in order to provide sufficient notice as to how SPP will calculate its ELCC values.[85] While the Commission made this finding as part of an overall finding that SPP's capacity accreditation methodology significantly affects rates and therefore accepted SPP's filing subject to the condition that these details must be in the Tariff pursuant to the rule of reason, the Commission did so without SPP providing a definition of seasonal net peak load.[86] We find that this resulted in a lack of

[83] *See* 16 U.S.C. § 824d(c); 18 C.F.R. § 35.1 (requiring public utilities to file "full and complete rate schedules and tariffs … *clearly and specifically* setting forth all rates and charges").

[84] *See Cargill Power Mkts., LLC v. Pub. Serv. Co. of N.M.*, 132 FERC ¶ 61,079, at P 23 (2010) (explaining that the FPA "requires all practices that significantly affect rates, terms and conditions of service to be on file with the Commission" so that customers have "proper notice" and "obtain service on a just and reasonable and not-unduly discriminatory basis"); *Kern River Gas Transmission Co.*, 85 FERC ¶ 61,294, at 62,202 n.11 (1998) (requiring all of the terms and conditions that affect transportation service and rates be "clearly reflected in the pipeline's tariff, that the Commission and the pipeline's shippers have notice of the proposed changes, and that the Commission has an opportunity to review the proposal to ensure that it is just and reasonable" under comparable provision in the Natural Gas Act).

[85] August 2022 Order, 180 FERC ¶ 61,074, at P 30.

[86] The dissent contends that the definition provided on compliance "essentially combines the existing definitions of Peak Demand, Net Peak Demand, Summer Season and Winter Season, into one new definition" but does not dispute that SPP had not

adequate notice to interested parties and does not comport with the notice requirement under section 205 of the FPA and the Commission's regulations.[87] Accordingly, we hereby set aside the August 2022 Order's acceptance of SPP's proposal and reject SPP's proposal without prejudice.

36. In light of the relationship between ELCC and reliability, we encourage SPP to expeditiously submit any future filing it may choose to make. As a result of our determination to set aside the August 2022 Order's acceptance of SPP's proposal, we need not address the remainder of Clean Energy Advocates' arguments on rehearing. For similar reasons, we find that SPP's compliance filing is moot, and we dismiss it.

The Commission orders:

(A) In response to Clean Energy Advocates' request for rehearing, the August 2022 Order is hereby modified and set aside, as discussed in the body of this order.

(B) SPP's proposed Tariff revisions are hereby rejected, without prejudice, as discussed in the body of this order.

provided a definition, at all, in its transmittal or deficiency letter responses. *See* Dissent at P 11.

[87] *Compare, e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 166 FERC ¶ 61,236, at P 71 (2019) (directing compliance filing to include the term "maintenance margin" in the tariff where MISO had provided the definition in a proposed business practices manual); *Nevada Power Co.*, 182 FERC ¶ 61,048, at PP 17, 37 (2023) (directing compliance filing where utility consented to filing new language as reflected in a deficiency letter response); *Sw. Power Pool, Inc.*, 161 FERC ¶ 61,157, at P 23 (2017) (same).

(C) SPP's compliance filing is hereby dismissed as moot, as discussed in the body of this order.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.
Commissioner Clements is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc. Docket Nos. ER22-379-003
ER22-379-004

(Issued March 2, 2023)

DANLY, Commissioner, *dissenting*:

1. I dissent from today's order[1] overturning the Commission's August 5, 2022 order,[2] which conditionally accepted Southwest Power Pool, Inc.'s (SPP) proposed revisions to Attachment AA of the SPP Open Access Transmission Tariff (Tariff)[3] and proposal to adopt an Effective Load Carrying Capacity (ELCC) capacity accreditation methodology for wind and solar resources.[4] It also dismisses as moot SPP's compliance filing in response to the August 2022 Order that contains updated Tariff sheets with additional detail on its use of the ELCC methodology.[5]

2. I dissent from this order because the reasoning upon which it is based fails to address the merits *at all*. SPP's proposal is just and reasonable, and rehearing should not be granted here. There was no reason not to. Were there procedural defects, we should have cured them in the course of this proceeding's interminable back-and-forth. Instead, having repeatedly returned to the filer for more information, we now declare that which we asked for insufficient, and grant rehearing, implicitly terminating decades of (admittedly questionable) FERC practice without even acknowledging it.

3. I also dissent on procedural grounds. As always, when discussing a procedural failure, real or imagined, a recitation of the facts is necessary.

4. SPP submitted a filing pursuant to section 205 of the Federal Power Act (FPA) to incorporate its capacity accreditation methodology provisions in its SPP Planning Criteria

[1] *Sw. Power Pool, Inc.*, 182 FERC ¶ 61,100 (2023).

[2] *Sw. Power Pool, Inc.*, 180 FERC ¶ 61,074 (2022) (August 2022 Order).

[3] SPP Tariff, Attach. AA (0.0.0).

[4] *Sw. Power Pool, Inc.*, 182 FERC ¶ 61,100 at P 2.

[5] *Id.* P 3.

and a new SPP Business Practice manual that included details of the process by which SPP staff would study data provided by resources.

5. SPP proposed to modify its existing Section 7.8 of Attachment AA of the SPP Tariff as follows:

> 7.8 A resource qualified in accordance with Section 7.1, 7.2, 7.4, or 7.7 of this Attachment AA shall ~~be capable of supplying its accredited capacity, as~~ have its accredited capacity determined in accordance with SPP Planning Criteria and SPP Business Practices~~, for a minimum of four (4) continuous hours. The requirement set forth in Section 7.8 shall not apply to run-of-theriver hydroelectric, wind, or solar resources~~.
>
> 7.8.1 Qualified resources shall be capable of supplying their accredited capacity for a minimum of four (4) continuous hours.
>
> 7.8.2 The requirement set forth in Section 7.8.1 shall not apply to run-of-the-river hydroelectric, wind, or solar resources. Qualified run-of-the-river hydroelectric, wind, or solar resources shall be capable of supplying their accredited capacity based on historical performance in accordance with the SPP Planning Criteria and SPP Business Practices.[6]

6. Subsequently, SPP provided additional information regarding its proposal in responses[7] to two deficiency letters.[8] Responses to deficiency letters are considered amendments or supplemental filings to a filing party's initial FPA section 205 filing.[9] Notices of filings are issued with a comment date and the statutory 60-day clock for Commission action is reset. In addition, on March 30, 2022, the Commission Secretary issued notice for a conference call to be held on April 6, 2022 regarding responses to the

[6] Transmittal at 4 & n.11; Proposed SPP Tariff at Attach. AA at § 7.8.

[7] *See* SPP, March 14, 2022 Response to First Deficiency Letter; SPP, June 8, 2022 Response to Second Deficiency Letter.

[8] First Deficiency Letter, February 11, 2022 (First Deficiency Letter); Second Deficiency Letter May 10, 2022 (Second Deficiency Letter).

[9] First Deficiency Letter at 6 (citing *Duke Power Co.*, 57 FERC ¶ 61,215, at 61,713 (1991) ("[T]he Commission will consider any amendment or supplemental filing filed after a utility's initial filing . . . to establish a new filing date for the filing in question.")); Second Deficiency Letter at 5 (citing *Duke Power Co.*, 57 FERC ¶ 61,215 at 61,713 ("[T]he Commission will consider any amendment or supplemental filing filed after a utility's initial filing . . . to establish a new filing date for the filing in question.")).

First Deficiency Letter. Clean Energy Advocates filed a motion to intervene, protest and comments on December 1, 2021. They then filed a protest regarding the first deficiency response on April 4, 2022, a protest regarding the second deficiency response on June 29, 2022, a request for rehearing of the August 5, 2022 order on September 2, 2022, and a protest to the compliance filing on September 27, 2022.

7. As relevant here, in response to Question 2 posed in the Second Deficiency Letter, SPP explained that "[f]or ELCC accreditation, the respective 35% and 20% thresholds for Tier 1 wind and solar resources are not measured in relation to Peak Demand or Net Peak Demand as those terms are defined in the SPP Tariff. Instead, the thresholds for Tier 1 are measured using the individual [Load Responsibility Entity's (LRE)] actual average seasonal net peak load from the previous three years."[10] SPP further explained that "[t]he Tier 1 allocation will be a seasonal designation because the individual LRE net peak load values can vary between seasons. The ELCC accreditation to individual resources is a seasonal value. Currently, the separately assigned seasons are for the summer and winter months, as defined in the SPP Tariff."[11] SPP, therefore, explained its use of the term seasonal net peak load, even though it did not propose to define it in its Tariff.

8. In the August 5, 2022 order, we accepted SPP's proposal subject to condition that SPP revise its Tariff to include some of the additional detail it provided through its transmittal letter, deficiency responses, and the noticed conference call. Specifically, we directed SPP to include the following additional detail in its compliance filing: "(1) an explanation of its ELCC methodology,[12] including its tier allocation process and base

[10] SPP June 8, 2022 Response to Second Deficiency Letter at 6-7.

[11] *Id.*

[12] August 2022 Order, 180 FERC ¶ 61,074 at P 31 & n.40 (SPP First Deficiency Response, Attachment 1 at 6 ("[N]et planning capability for wind and solar facilities will be established using Effective Load Carrying Capability (ELCC) methodology.")).

case and change cases,[13] with a level of detail similar to that provided in *NYISO*;[14] and (2) a definition of seasonal net peak load."[15]

9. Clean Energy Advocates contend that there are procedural infirmities with our underlying order, claiming that SPP was required to file its rate proposal under FPA section 205 and was required to afford parties adequate notice of the filing.[16] Contrary to their arguments, the two deficiency responses filed by SPP, consistent with Commission precedent, were amendments to its initial FPA section 205 rate filing.[17] Clean Energy Advocates filed protests in response to every filing SPP made including the initial filing, deficiency responses, and the compliance filing in this proceeding. Clearly, Clean Energy Advocates not only had notice but also took advantage of their opportunity to be heard.

10. In today's order, the majority reverses course, stating that, although we accepted SPP's filing under the rule of reason and subject to condition, we did so absent a proposed definition of seasonal net peak load. They conclude that we therefore failed to provide the required notice to interested parties in violation of FPA section 205 and its implementing regulations.[18] To reiterate, there are no merits determinations at all. In fact, the majority summarily finds that it need not even address the remainder of the

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[13] *Id.* at P 31 & n.41 (("Wind and solar resources will be studied in three tiers based on meeting the requirements [in the SPP Planning Criteria.]"); SPP Second Deficiency Response at 4 (The base case "is defined as a system load supplied by all other resource types in the SPP footprint that are not being evaluated in the instant analysis."); *id.* (explaining that each tier has its own change case and includes resources in that tier and any higher priority tiers)).

[14] August 2022 Order, 180 FERC ¶ 61,074 at P 31 & n.42 (SPP Second Deficiency Response at 7).

[15] *Id.* P 31 & n.43 ("We note that Commission staff issued two deficiency letters and conducted a publicly noticed conference call to obtain enough information for the Commission to rule on SPP's filing. We expect SPP, in its compliance filing, to provide sufficient detail in its tariff, consistent with the directives of this order, to allow the Commission to act in a subsequent order without the need for additional record development.").

[16] Clean Energy Advocates September 27, 2022 Protest of Compliance Filing, at 6.

[17] *See* SPP March 14, 2022 Response to First Deficiency Letter; SPP June 8, 2022 Response to Second Deficiency Letter.

[18] August 2022 Order, 180 FERC ¶ 61,074 at P 35.

arguments advanced by Clean Energy Advocates on rehearing (e.g., their undue discrimination claims).

11. As to the new definition, the Commission itself directed that the term be defined in the Tariff.[19] In its compliance filing, SPP stated that the term seasonal net peak load[20] is distinguished from the existing defined term "Net Peak Demand," which refers to a forecasted amount rather than data based on events that have actually occurred.[21] In its second deficiency response, SPP explained that ELCC is a seasonal value.[22] The new definition essentially combines the existing definitions of Peak Demand,[23] Net Peak Demand,[24] Summer Season[25] and Winter Season,[26] into one new definition, and each of

[19] *Id.* P 31.

[20] SPP September 6, 2022 Compliance Filing, at Attach. AA, § 2 ("The actual demand including a) transmission losses for energy, b) the impacts of Non-Controllable and Non-Dispatchable Behind-The-Meter Generation, c) the impacts of Non-Controllable and Non-Dispatchable Demand Response Programs, and d) the impacts of Demand Response Programs measured over a one clock hour period during either the Summer Season or Winter Season.").

[21] *Id.*, Transmittal Letter at 3.

[22] SPP June 8, 2022 Response to Second Deficiency Letter at 7.

[23] Attach. AA, § 2 ("The highest demand including a) transmission losses for energy, b) the projected impacts of Non-Controllable and Non-Dispatchable Behind-The-Meter Generation, and c) the projected impacts of Non-Controllable and Non-Dispatchable Demand Response Programs measured over a one clock hour period.").

[24] *Id.* ("The forecasted Peak Demand less the a) projected impacts of a Demand Response Program and b) adjusted to reflect the contract amount of Firm Power with another entity as specified in Section 8.2 of this Attachment AA."); *see also id.* Attach. AA § 8.2 ("When the purchaser and seller are both LREs, a power purchase agreement that qualifies as Firm Power shall result in a Net Peak Demand adjustment of the obligation for capacity and planning reserves from the purchaser to the seller. The purchaser shall deduct the purchased contract amount from its Net Peak Demand and the seller shall add the amount to its Net Peak Demand. The responsibility to maintain the Resource Adequacy Requirement and the Winter Season obligation shall transfer from the purchaser to the seller.").

[25] *Id.* at Attach. AA, § 2 ("June 1st through September 30th of each year.").

[26] *Id.* ("December 1st through March 31st of each year.").

these terms was identified either in a question in a deficiency letter or in one of SPP's responses. Contrary to the language in the majority's order[27] and the concurrence by Commissioner Clements,[28] it cannot be said that SPP did not explain its use of the term in its deficiency response nor can it be said that there was insufficient notice of the *existing* Tariff provisions that SPP combined to form the new definition. And lest any reader suffer a lapse of memory, for FERC to direct 205 filers to submit tariff language reflecting a deficiency response upon compliance is hardly novel. In fact, it is routine.[29]

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[27] *Sw. Power Pool, Inc.*, 182 FERC ¶ 61,100 at P 35 n.86.

[28] *Id.* (Clements, concurring at P 1 n.1).

[29] *See, e.g.*, *PJM Interconnection, L.L.C.*, 181 FERC ¶ 61,162, at P 82 (2022) ("PJM stated in its Deficiency Letter Response that New Service Requests that do not contribute to the need for any network upgrades and do not require subsequent studies may accelerate to a final interconnection-related agreement. However, this language does not appear in the proposed Tariff. . . . Therefore, we direct PJM . . . to submit a compliance filing to include language in the Tariff memorializing PJM's representation that only New Service Requests with no network upgrade cost assignment and that do not require further studies are eligible for acceleration, consistent with PJM's stated intent in its Deficiency Letter Response.") (citation omitted); *Wabash Valley Power Ass'n, Inc.*, 172 FERC ¶ 61,215, at P 23 (2020) ("[W]e accept the Distributed Generation Policy as just and reasonable, effective June 29, 2020, subject to the condition that Wabash make a compliance filing within 30 days of the date of this order revising the Distributed Generation Policy to add its clarification, provided in its Deficiency Letter Response, regarding the limited applicability of the Distributed Generation Policy to members who have chosen to retain their [Public Utility Regulatory Policies Act of 1978] purchase obligations.") (citations omitted); *PacifiCorp*, 171 FERC ¶ 61,112, at P 67 (2020) ("[C]onsistent with PacifiCorp's offer in response to the Deficiency Letter, we direct PacifiCorp to submit a compliance filing within 45 days of the date of this order proposing revisions, consistent with the proposal in its Deficiency Response, to allow interconnection customers to be studied for both [Network Resource Interconnection Service] and [Energy Resource Interconnection Resource] in the initial Cluster Study."); *PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,020, at P 55 (2012) ("In response to the deficiency letter, PJM has clarified that the incentive factor, or Z, does not apply to any black start cost recovery other than those units that have elected to forego recovery of new or additional Black Start Capital Costs and commit to provide black start service for a term of two years as set forth in paragraph, or section, 5 of Schedule 6A. Since PJM's Tariff does not state this, the Commission requires that PJM, as part of its compliance filing revise its Tariff to specify that the incentive factor (Z) does not apply to any black start cost recovery other than those units that have elected to forego recovery of new or additional Black Start Capital Costs and commit to provide black start service for a term

This order, and the procedural maneuvers by which it has come to issue, fall squarely within existing Commission precedent, right or wrong.

12. That does not mean I like it. I have long argued against the use of deficiency letters as a delay tactic.[30] I have also questioned their use as a means by which to cure deficient tariff filings.[31] Simply put, FPA section 205[32] does not contemplate a back-and-forth exchange between a filing utility and the Commission. Needless to say, I am sympathetic to the process concerns raised in the protests. Should the Commission decide to reconsider the use of deficiency letters, I would enthusiastically support reforms to our practice.

13. All this aside, SPP has proposed a well-pleaded, just and reasonable Tariff. The Commission provided adequate notice (at least under Commission precedent) at every stage to the litigants, even with respect to the definition the Commission directed be filed. And there is no denying that we often approve Tariff filings piecemeal.[33] Let there be no doubt, we are departing from long-standing precedent without acknowledging we are

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of two years as set forth in paragraph, or section, 5 of Schedule 6A.").

[30] *See* Statement of James P. Danly, Docket Nos. ER21-1111-002, et al. (Oct. 20, 2021).

[31] The issuance of deficiency letters is a practice employed for many years at the direction of many different Chairmen. I understand well the temptation to employ such a convenient procedural mechanism. I sparingly directed the issuance of deficiency letters myself. *See, e.g.*, *PJM Interconnection, L.L.C.*, December 22, 2020 Deficiency Letter, Docket No. ER21-278-000 (deficiency letter regarding an October 30, 2020 filing submitted pursuant to section 205 of the FPA noting that, pending receipt of the information requested to be provided 30 days from the date of the letter, a filing date will to be assigned to the filing).

[32] 16 U.S.C. § 824d.

[33] *See Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (June 2018 Order), *order establishing just & reasonable rate*, 169 FERC ¶ 61,239 (2019) (December 2019 Order), *order on reh'g & clarification*, 171 FERC ¶ 61,034 (Order Denying Rehearing of June 2018 Order), *order on reh'g & clarification*, 171 FERC ¶ 61,035 (Rehearing Order of December 2019 Order), *order on reh'g & compliance*, 173 FERC ¶ 61,061 (2020) (October 2020 Rehearing Order), *order on compliance & clarification*, 174 FERC ¶ 61,036 (January 2021 Compliance & Clarification Order), *order setting aside prior order, in part*, 174 FERC ¶ 61,109 (2021) (Order Setting Aside Prior Order) (collectively, the Expanded MOPR).

doing so, a black letter Administrative Procedure Act violation.[34] I am therefore compelled to dissent.

14. I must pause to ask: whence comes this newfound pang of conscience, especially in the face of decades of practice? What are the implications going forward? Will we no longer accept compliance filings following deficiency responses? Will we keep issuing deficiency letters until all new language to be included in a Tariff has been filed? Will we simply reject initial filings and deny any opportunity to cure other than starting anew? We owe regulated entities an answer. And if this order does mark a pivot from earlier practice, I am all for it. But we must announce our changes in policy, not hide them.

15. There is another due process concern. SPP is clearly being treated differently in this case than other Regional Transmission Organizations are when deficiency letters are required to fix deficient tariff filings. No doubt today's order will come as a shock to SPP. They answered every question we asked and did so in what they reasonably believed to be the ordinary course of Commission practice, answering questions and preparing to cure them in its compliance filing as has happened so many times before. I sympathize.

16. Today's order could never have issued absent the Commission's abuse of deficiency letters. I eagerly await the courts' instruction on their proper employment. Eventually they will be challenged. Such judicial guidance is far from unthinkable. After all, the courts recently addressed another procedural scheme employed by the Commission. As everyone is aware, we suffered a severe rebuke from the D.C. Circuit for our abuse of tolling orders.[35]

17. Potential procedural defects aside, I leave SPP with a word of warning: beware of issues lying in wait. The majority declines to address the substantive arguments raised by

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[34] 5 U.S.C. § 706; *FCC v. Fox Television Stations, Inc.*, 556 US. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 57 (1983) ("[A]n agency changing its course must supply a reasoned analysis . . . .") (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).

[35] *See Allegheny Def. Project v. FERC*, 964 F.3d 1, 11 (D.C. Cir. 2020) ("[W]e turn to first principles and ask whether the Natural Gas Act allows the Commission to issue tolling orders for the sole purposes of preventing rehearing from being deemed denied by its inaction and the statutory right to judicial review attaching. As a matter of plain statutory text and structure, the Commission lacks that authority.").

Clean Energy Advocates. I strongly encourage SPP to address all of them when it submits its new FPA section 205 filing. Otherwise, this already protracted litigation will continue even longer.

18. We should not be granting rehearing and reversing course. If we saw a procedural defect, we should have acted to cure it and then denied rehearing. The Commission's underlying order in these proceedings upholds the rule of reason and complies with statutory requirements of the FPA.

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc. Docket Nos. ER22-379-003
ER22-379-004

(Issued March 2, 2023)

CLEMENTS, Commissioner, *concurring*:

1. I concur with today's order setting aside the Commission's prior acceptance of a capacity accreditation proposal from Southwest Power Pool (SPP) and instead rejecting it without prejudice. The Commission has carried out an important course correction, and this order helps to ensure that parties will be afforded proper notice and a fair process as any future proposal from SPP is evaluated.[1]

2. I write separately, however, because I believe that it is important to send SPP a clear signal of what I expect as it goes back to the drawing board. In my view, the proposal that SPP submitted to the Commission was both unjust and unreasonable and unduly discriminatory. As the protestors have compellingly argued, SPP's capacity accreditation structure is unduly discriminatory because it reduces the capacity accreditation of wind and solar resources based on historically demonstrated performance, while failing to account in any way for non-performance of other resource types.[2] Moreover, SPP's proposal is unjust and unreasonable because it applies different credits to the wind and solar resources of different Load Responsible Entities (LREs) in a manner that distorts market signals to inefficiently spread those resources across the SPP region even if economic fundamentals otherwise indicate that they should be more concentrated.

[1] This case distinguishable from the prior proceedings, cited by the dissent, where the Commission directed filers to submit tariff language that had explicitly been memorialized in deficiency letter responses. *See* Dissent at n. 22. In the August 2022 Order, the Commission did not reference any language in SPP's filing that could form the basis of the definition of Seasonal Net Peak Load, but rather directed SPP to develop one anew.

[2] Request for Rehearing at 3, 16-21. SPP's proposal also credits the capacity of run-of-the-river hydroelectric resources based on historical performance, but because the bulk of its tariff revisions filed on compliance focus on wind and solar resources, my statement focuses on the aspects of SPP's proposal addressing those resources.

3. Further, the record in this proceeding indicates that SPP's status quo capacity accreditation rules may not be just and reasonable and may be unduly discriminatory. The Commission has an obligation to ensure just and reasonable rates, including reliable operation of the bulk power system and markets administered by SPP, and must act under FPA section 206 if reliable operations are jeopardized.[3] I expect prompt action by SPP on reforms, including a just and reasonable and not unduly discriminatory approach to capacity accreditation, to address reliability concerns.

C. SPP's proposal unduly discriminates against wind and solar resources

4. As the Clean Energy Advocates explain, SPP's proposal "methodically account[s] for non-performance events" of wind and solar resources "using an effective load carrying capability framework to measure historical performance," while simultaneously not accounting in any way for non-performance events of other resource types.[4] This is unduly discriminatory because "*all* resource types experience outages (and other system reliability events) that affect their ability to serve load."[5]

5. An important distinction between SPP and other RTOs that have recently proposed ELCC capacity accreditation methodologies in that SPP's existing methodology for non-ELCC resources is based on an Installed Capacity (ICAP) method that accounts only for performance in a set test and does not capture historical outages.[6] While that method is not itself filed before the Commission in this proceeding,[7] the ICAP method *is* the relevant point of comparison when assessing whether SPP's proposal is unduly discriminatory. As with any undue discrimination inquiry, the Commission's task is to compare SPP's treatment of the class of resources addressed in its proposal with its treatment of other resources under the existing tariff, and to determine whether there is a reasoned and justifiable basis supported by substantial evidence for any differences in treatment.[8]

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[3] 16 U.S.C. § 825e.

[4] Request for Rehearing at 11.

[5] *Id.* (emphasis in original).

[6] *See id.* at 12.

[7] Order at P 24 (citing Request for Rehearing at 14).

[8] *See Federal Power Commission v. Conway Corp.*, 426 U.S. 271, 278 (1976) (quoting *In re Otter Tail Power Co.*, 2 F.P.C. 134, 149 (1940) (observing that an undue discrimination inquiry considers "one rate in its relation to another rate"; notably, undue discrimination may occur even where "each rate Per se, if considered independently"

6. The record contains unrebutted information that non-ELCC resources can and do experience unit-specific outages.[9] Even setting aside the disparity of treatment for ELCC and non-ELCC resources with regard to correlated outage risk (despite evidence that thermal resources present similar risks),[10] SPP's asymmetrical treatment of historical outages alone constitutes undue discrimination. "Correlated outages in one resource type are not a reason to completely ignore historic outages, particularly unit-specific outages, in another resource type."[11]

7. "To say that entities are similarly situated does not mean that there are no differences between them; rather, it means that there are no differences that are material to the inquiry at hand."[12] SPP has not identified any specific attribute of solar and wind resources that warrants reducing their accreditation for unit-specific non-performance events while entirely declining to do so for other resources, given that unit-specific non-performance events occur across all resource types. Its proposal is therefore unduly discriminatory.

8. This case is not analogous to prior Commission proceedings approving ELCC methodologies. Undue discrimination in assessing unit-specific outages was not raised as an issue in the PJM proceeding,[13] perhaps because PJM already accounted for forced

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would be just and reasonable).

[9] *See* Request for Rehearing at 15 ("The Clean Energy Advocates have provided a plethora of data showing that outages of conventional resources in SPP is problematic."). The Commission's determination that an ELCC framework is not required for the resources not captured in SPP's proposal is non-responsive to the Clean Energy Advocates' undue discrimination claims, because they "are *not* asking for a single ELCC framework across all resource types; rather, the Clean Energy Advocates are asking that outages—which are universal and well-studied system events—*be consistently accounted for across all resource types* in SPP's accreditation methodologies." Request for Rehearing at 14 (citations omitted; emphasis in original).

[10] *See* Request for Rehearing at 15-16 (highlighting correlated outage risks for gas resources due to fuel supply, and for thermal resources more generally due to drought conditions in the Missouri River Basin, as supported respectively by SPP's Comprehensive Review of the February 2021 Winter Storm and NERC's 2022 Summer Reliability assessment).

[11] Request for Rehearing at 12.

[12] *N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124, at P 10 (2018)

[13] *See PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,056, at PP 70-71 (2021) ("The expressed concern with Unlimited Resources is with the potential for statistically

outages of so-called "unlimited resources,"[14] and applies a "capacity performance" framework to all resources that rewards or penalizes unit-specific performance.[15] The Commission's approval of NYISO's methodology is even less pertinent to whether SPP's proposal unduly discriminates because NYISO's methodology expressly "will apply to *all* resources, including conventional thermal resources."[16] If anything, the Commission's approval of NYISO's choice to apply ELCC to all resources shows that all resources are sufficiently similarly situated that an ELCC construct can be applied to them uniformly.[17]

9. As SPP goes back to the drawing board, the simplest way to avoid undue discrimination would be to adopt a consistent framework, such as ELCC, for all resource types. At minimum, it may not permissibly continue to use its ICAP method for thermal resources while adopting the ELCC method for wind and solar set forth in its proposal and compliance filing.

D. SPP's proposal sends distortionary economic signals that are unjust and unreasonable and unduly discriminatory

10. The tier structure of SPP's proposal is also designed in an unjust and unreasonable and unduly discriminatory manner. SPP's determination of tiers through an assessment of Seasonal Net Peak Load for each LRE is integral to the economic signals sent by the

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correlated forced outages.").

[14] *See* PJM Interconnection, L.L.C., Reliability Assurance Agreement, Definitions ("'Unforced Capacity' shall mean installed capacity rated at summer conditions that is not on average experiencing a forced outage or forced derating"), Schedule 5 (providing for forced outage rate calculations); PJM Interconnection, L.L.C., Open Access Transmission Tariff, Definitions ('Unforced Capacity' shall have the meaning specified in the Reliability Assurance Agreement"), Attachment DD § 5.6 (requiring sell offers to reflect Unforced Capacity and forced outage rates).

[15] *See Adv. Energy Mgmt. All. v. FERC*, 860 F.3d 656, 660-662 (D.C. Cir. 2017) (affirming FERC's approval of PJM's proposed capacity performance construct).

[16] *NY Indep. Sys. Operator, Inc.*, 179 FERC ¶ 61,102, at P 79 (2022) (emphasis in original).

[17] When the Commission approved PJM's ELCC construct despite the fact that its proposal was confined to wind, solar, and storage resources, Commissioner Christie argued that PJM's "failure to extend the ELCC to all resources, including thermal resources," was a "fundamental failure of PJM's ELCC proposal." *PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,056 (2021) (Christie, Comm'r, dissenting, at P 10).

rate scheme. Unfortunately, however, it sends *distortionary* signals about the marginal value of investment serving different LREs in a manner that may guide new investments away from where they are most economical and arbitrarily reward certain LREs and the solar and wind resources serving them at the expense of others.

11. SPP's proposal rewards Tier 1 resources as compared to other ELCC resources. But in awarding tier allocations according to Seasonal Net Peak Load, rather than for example, allocating Tier 1 based on the percentage of SPP's total ELCC resources of a given type owned by each LRE, SPP's structure inappropriately suggests that incremental investment will be more valuable if serving an LRE that has not yet reached its Tier 1 allocation. This is inappropriate where there are no transmission constraints or other factors causing a value differential and one new megawatt of the relevant resource type provides identical value to the SPP footprint regardless of which LRE it serves.[18]

12. This is unjust and unreasonable because it may push incremental investment away from where it is otherwise most economic, as it creates an artificial incentive to spread new solar and wind resources evenly across LREs in SPP's footprint, even if underlying economic indicators suggest that solar and wind resources should otherwise be concentrated where resource potential is highest and development cost and grid constraints are lowest. And it is unduly discriminatory insofar as it will "create arbitrary differences in the competitive position of generators in different zones."[19] As Clean Energy Advocates point out, these distortionary incentives apply only to solar and wind resources, as "SPP apparently does not use such a measure of net load to accredit resources such as fossil thermal, nuclear, hydroelectric, storage, or hybrid resources."[20]

13. Moreover, because SPP's newly proposed definition of Seasonal Net Peak Load reduces Tier 1 allocations based on the amount of dispatchable demand response supply serving a given LRE, it also unduly discriminates against LREs with comparatively more dispatchable demand response resources and the wind and solar resources contracting

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[18] While it is true that each LRE is individually responsible for satisfying its own Resource Adequacy Obligations, those obligations are based upon each LRE's expected contribution to resource adequacy across the SPP footprint. SPP has not articulated any physical or other basis for a requirement that each LRE contribute to resource adequacy with a similar resource mix, or for requiring that resources of a particular type be spread across LREs in the SPP footprint versus being more concentrated in particular LRE service territories.

[19] *Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122, 1127 (D.C. Cir. 2011) (describing a petitioner's undue discrimination claim and granting their petition for review).

[20] Clean Energy Advocates Protest at 10-11.

with those LREs. Even where dispatchable demand response resources provide identical system characteristics as another supply resource, such as energy storage, SPP's proposal will reduce the Tier 1 allocation for LREs with the demand response resources while leaving it unchanged for LREs utilizing other technologies.[21]

14. To be clear, in my view the issue is not with SPP's decision to use accreditation tiers, which is a rather elegant way in which its proposal blends some of the benefits of average and marginal ELCC approaches. Rather, the issue is that the tiers are allocated based on LRE Seasonal Net Peak Load, rather than for example, allocating Tier 1 based on the percentage of SPP's total ELCC resources of a given type owned by each LRE. To be just and reasonable and not unduly discriminatory, the allocation method must preserve efficient investment signals for resources serving the SPP footprint, and must not unduly discriminate between LREs or the resources serving them.

E. Conclusion

15. Resource adequacy is a pressing issue in SPP and across the country, as grid operators must update outdated frameworks in order to meet the demands of a changing resource mix and more frequent extreme weather. Grid operators, including SPP, are doing the right thing in examining their frameworks and seeking to modernize them.

16. But as the Commission reviews modernization proposals, we have a duty to ensure that those proposals meet the requirements of section 205 of the Federal Power Act. That a proposal improves the status quo is not enough to demonstrate that it is just and

[21] Take two LREs, each with 1000 MW of Seasonal Net Peak Load. If LRE 1 invests in dispatchable demand response with 100 MW of seasonal peak load capability, and LRE 2 invests in the same amount of dispatchable energy storage with identical resource performance characteristics, then under SPP's proposal LRE 1 would now have 900 MW of Seasonal Net Peak Load, whereas LRE 2 would retain 1000 MW of Seasonal Net Peak Load. This, in turn, would leave LRE 2 with a greater allocation of Tier 1 resources than LRE 1 despite their identical system characteristics, potentially disadvantaging LRE 1 and the wind and solar resources serving it. At the same time, SPP's chosen definition of Seasonal Net Peak Load will arbitrarily promote wind and solar investments serving LREs such as LRE 2 that have lower levels of dispatchable demand response. As Clean Energy Advocates contend, "SPP has offered no explanation for netting out this additional factor when determining the peak load against which wind and solar resource tiers will be calculated, which effectively lowers the quantity of wind and solar resources that can receive the higher Tier 1 accreditation." Clean Energy Advocates Protest at 11.

reasonable and not unduly discriminatory, where the underlying framework may itself no longer meet the requirements of the Federal Power Act.[22]

17. The most straightforward approach to meeting the requirements of the Federal Power Act, and the best one in the long run, would be for grid operators like SPP to develop capacity accreditation methodologies that are consistent across all resource types. I encourage SPP to develop such a proposal as it engages in next steps following the Commission's rejection of its proposal herein.

For these reasons, I respectfully concur.

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Allison Clements
Commissioner

[22] *See PJM Interconnection, L.L.C.*, 180 FERC ¶ 61,089, at P 47 n.111 (2022) (finding that even if PJM's contention that its Intelligent Reserve Deployment proposal is an improvement over its current approach is correct, that does not render the proposal just and reasonable).