

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket Nos. ER19-2522-000
ER19-2523-000

MOTION TO INTERVENE, PROTEST AND COMMENTS OF THE ELECTRICITY
CONSUMERS RESOURCE COUNCIL (“ELCON”) AND TEXAS INDUSTRIAL
ENERGY CONSUMERS (“TIEC”)

Pursuant to Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”), 18 C.F.R. §§ 385.211 and 385.214, the Electricity Consumers Resource Council (“ELCON”) and Texas Industrial Energy Consumers (“TIEC”) appreciate the opportunity to submit this motion to intervene, protest and comments in response to the August 1, 2019 filings by Southwest Power Pool, Inc. (“SPP”) in these two proceedings: (1) a compliance filing¹ in which SPP would implement the Commission’s Order requiring removal of membership exit fees in the prior complaint-initiated proceeding;² and (2) a second, related filing in which SPP asks the Commission to disregard the compliance filing and instead approve

¹ *Submission of Exit Free Compliance Revisions in Response to Order Issued in Docket No. EL19-11-000*, Docket No. ER19-2522-000 (Aug. 1, 2019) (hereinafter the “SPP Compliance Filing”).

² *American Wind Energy Association, et al. v. Southwest Power Pool, Inc.*, 167 FERC ¶ 61,033 (2019) (Docket No. EL19-11-000) (hereinafter the “April 18 Order”).

a newly proposed, revised exit fee.³ In this protest and comment, ELCON and TIEC urge the Commission to reject SPP's unusual gambit and to require SPP to implement the removal of the exit fee pursuant to its compliance filing, with an accelerated effective date.

MOTIONS TO INTERVENE OF ELCON AND TIEC

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and are consumers of electricity in the footprints of the organized markets, including SPP. Reliable electricity supply at just and reasonable rates is essential to our members' operations.

TIEC is an unincorporated trade association of industrial consumers of electricity. TIEC's members own and operate industrial facilities in SPP and are eligible to join as members of SPP.

ELCON and TIEC intervened and filed comments in the SPP exit fee complaint proceeding in Docket No. EL19-11-000 that is the background for SPP's current filings. ELCON's and TIEC's members have been aggrieved by SPP's exit fee policy as they have been locked out of the opportunity to become SPP members and fully participate in discussions about and vote on SPP policy issues that impact them. Therefore,

³ *Submission of Revisions to the Bylaws and Membership Agreement to Amend the Exit Fee*, Docket No. ER19-2523-000 (Aug. 1, 2019) (hereinafter the "SPP \$100K Exit Fee Proposal").

ELCON and TIEC have a direct, substantial and vital interest in the outcome of this proceeding, and their participation is in the public interest.

PROTEST AND COMMENTS OF ELCON AND TIEC

ELCON and TIEC support the portion of the SPP Compliance Filing in which SPP proposes to amend its Bylaws and Membership Agreement to eliminate its exit fee for non-transmission owners (“non-TOs”). Such action is necessary to comply with the Federal Power Act and the Commission’s April 18 Order in Docket EL19-11-000.⁴

However, ELCON and TIEC protest and oppose SPP’s requests (i) that the Commission “disregard this compliance filing and instead accept” a new “alternative proposal” of a “minimum \$100,000 exit fee on all [SPP members]” including non-TOs/non-LSEs,⁵ or (ii) that, to the extent that the Commission considers the SPP Compliance Filing, it via a clarification accept SPP’s adoption of a new exit fee that includes an unquantified “processing fee” that apparently would equal or exceed a “withdrawal deposit” of \$50,000 for non-LSEs.⁶ SPP makes these proposals notwithstanding the April 18 Order, in which the Commission correctly noted that “when a non-transmission owner withdraws from an RTO/ISO, the financial impact is not the same as when a transmission owner withdraws because the non-transmission owner does not have transmission assets” and therefore that “there is not a financial need for SPP to charge an exit fee to non-transmission owners.”⁷ SPP’s proposals also

⁴ The reasons for ELCON’s and TIEC’s objection to SPP’s current exit fee were explained in the above-referenced Comments in Docket No.EL19-11-000.

⁵ SPP \$100K Exit Fee Proposal.

⁶ SPP Compliance Filing at p. 6.

⁷ April 18 Order at ¶61.

are without precedent -- as was noted in the Complaint that initiated this proceeding, none of the other RTOs/ISOs have a membership exit fee and the obligations, if any for non-TOs/non-LSEs are limited to the financial obligations actually incurred by the entity in the market.⁸

Each of the SPP's proposals for a new exit fee would have the same infirmities as the current SPP exit fee. They would violate Section 206 of the Federal Power Act in that they would establish a barrier to SPP membership for non-TOs and non-LSEs that would be unjust, unreasonable, and unduly discriminatory.⁹ They would violate cost causation principles¹⁰ in that they in effect require a member who wishes to leave SPP to incur a charge that is unconnected to the financial impact of an exiting non-TO/non-LSE member on the cost of running SPP's business.

SPP's proposed alternative exit fee in Docket No. ER19-2523¹¹ would establish a minimum, flat exit fee of \$100,000 on all categories of SPP members, including non-TO/non-LSE members, and an additional balance charged to LSE members based on SPP's long term obligations and interest and the LSE members' system-wide net energy to load. ELCON and TIEC focus here on the flat \$100,000 exit fee that would apply to its members who are non-TOs/non-LSEs. SPP appears to make three arguments in

⁸ *Complaint of the American Wind Energy Association, et al.*, Docket No. EL19-11-000, Nov. 2, 2018, (hereinafter "AWEA Complaint") at p. 11.

⁹ See April 18 Order at ¶49 (finding current SPP exit fee unreasonable "because it creates a barrier to SPP membership and because it appears to be excessive . . .").

¹⁰ See *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 87 (D.C. Cir. 2014), quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007) and citing *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) ("[t]he cost causation principle requires costs 'to be allocated to those who cause the costs to be incurred and reap the resulting benefits'"); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 at 1368-69 (D.C. Cir. 2004) (the Commission must "compar[e] the costs assessed against a party to the burdens imposed or benefits drawn by that party").

¹¹ See SPP \$100K Exit Fee Proposal.

support of the flat \$100,000 fee on non-LSEs: (i) it represents “a withdrawing non-LSE Member[’s] . . . share of SPP’s outstanding long-term financial obligations”;¹² (ii) it “avoid[s] the imposition of increased responsibility on remaining Members”;¹³ and (iii) it “ensure[s] that SPP membership is taken seriously and remains stable.”¹⁴

The Commission explicitly addressed each of these points in the April 18 Order. With respect to the first two points, which have similar import, the Commission unequivocally rejected SPP’s position. The Commission observed that the proper vehicle for SPP to address its long-term financial obligations consistent with cost causation principles is ultimately through recovery in transmission rates rather than through exit fees on non-TOs.¹⁵ Noting that “the potential effect of a member’s withdrawal on the RTO/ISO’s ability to recover costs through the administrative fee differs depending on whether the withdrawing member is a transmission owner or a non-transmission owner,” the Commission found that “charging an exit fee to non-transmission owners is not necessary for SPP to be able to ensure it recovers its costs or services its debt or to ensure withdrawing members do not leave increased responsibility for SPP’s financial obligations on remaining members”¹⁶ and similarly that “because a non-transmission owner’s withdrawal from membership does not result in a reduction of the customer base paying the administrative fee, there is not the same

¹² *Id.* at p. 11.

¹³ *Id.* at p. 10.

¹⁴ *Id.*

¹⁵ April 18 Order at ¶¶ 5, 60.

¹⁶ April 18 Order at ¶ 60.

concern about remaining members bearing increased responsibility for the financial obligations recovered through the administrative fee”.¹⁷

SPP’s current filing fails to offer any new rationale as to why a non-TO/non-LSE member, notwithstanding the Commission’s explicit determinations to the contrary, should have any responsibility for SPP’s “outstanding long term financial obligations,” or for “increased responsibility on remaining Members.” Nor has SPP explained why its RTO/ISO structure would require such an exit fee, in contrast with all the other RTOs/ISOs that have not found such an exit fee to be necessary or appropriate.¹⁸ The gaps in SPP’s reasoning are not surprising, as there is no causal relationship between the amount of the proposed fee (or SPP’s “long term financial obligations” to operate its markets and to plan and operate the transmission system) and the actions of a newly joining, serving or departing non-TO/non-LSE member. In fact, a uniform flat fee by its very nature could have no relationship with an amount of costs caused by a particular withdrawing non-TO/non-LSE member. Moreover, SPP has made no attempt to quantifiably correlate \$100,000 with any costs that it actually incurs or to justify its selection of that amount. As such, SPP’s exit fee proposal is arbitrary and capricious.

For these reasons, SPP’s new proposal bears exactly the same infirmities that the American Wind Energy Association raised in its Complaint (and that the Commission validated in its April 18 Order): it would violate cost causation principles because “it [would require] an exiting member to: (1) subsidize future members’ means to do

¹⁷ April 18 Order at ¶ 61.

¹⁸ As noted by AWEA, no other RTO/ISO imposes a membership exit fee for non-TOs/non-LSEs or any type of departing member fee to allocate a portion of the RTO/ISO’s long term costs. AWEA Complaint at p. 23.

business in SPP; (2) pay for costs for which they will receive no further benefit once they withdraw; and (3) pay for costs that are not caused by them.”¹⁹

Respecting SPP’s final point, the April 18 Order noted that while “there may be some benefit” to promoting “seriousness” and “stability” of members, “the exit fee must not be so high as to create a barrier to membership” or be “excessive,” and in fact that “no exit fee for non-transmission owners will result in just and reasonable rates.”²⁰ SPP has offered no support for its position that a \$100,000 exit fee will not be a barrier to entry for non-TO/non-LSE members, aside from calculations showing that it would be lower in magnitude than SPP’s current exit fee that the Commission has rejected. In fact, SPP’s new proposal still would be exorbitant and unduly excessive compared to SPP’s annual membership fee of \$6,000 – it would represent nearly 17 years of membership – and would continue to keep electricity consumers from becoming SPP members.²¹ ELCON members that want to become SPP members have explicitly stated that the \$100,000 exit fee would prohibit their SPP membership.

A fixed fee, as SPP observes, would avoid “the fluid nature and potential uncertainty” of the current exit fees, but that characteristic does not render its new alternative proposal just and reasonable. The more fundamental shortcomings remain. As it did with respect to the current exit fee, the Commission should conclude that “SPP’s exit fee for non-transmission owners is unjust and unreasonable because it

¹⁹ AWEA Complaint at p. 3.

²⁰ April 18 Order at ¶ 62.

²¹.

creates a barrier to membership, is not needed to maintain SPP's financial solvency or avoid cost shifts, and is excessive as a means of ensuring stability in membership and members' financial commitment."²²

In its separate compliance filing in Docket No. ER19-2252,²³ SPP proposed as part of its exit fee a "processing fee." Although ELCON and TIEC would expect that such a fee would be a small fraction of the \$100,000 minimum proposed in Docket No. ER19-2253, there are no guarantees. In fact, SPP has failed to provide any quantification of the amount other than that a "withdrawal deposit" of \$50,000 would be imposed on non-LSEs and that the actual processing fees in excess of that amount would be invoiced to the exiting member. To our knowledge, none of the other RTOs/ISOs have identified a need for such a fee to be assessed.

Each of the proposed alternative exit fee formulations, therefore, have not been adequately supported by SPP. Each would appear to be the same sort of mere subsidy to SPP, unrelated to any cost that a non-TO/non-LSE causes SPP to incur, that the Commission rejected in the April 18 Order. Only an exit fee that is based on outstanding market and transmission service charge obligations or outstanding dues, as have been adopted by other RTOs/ISOs, would be supportable, and in those RTOs/ISOs our member companies participate as members.²⁴

²² April 18 Order at ¶ 50.

²³ SPP Compliance Filing at p. 6.

²⁴ See Complaint of AWEA *et al.* to Revise the Membership Exit Fees in the Southwest Power Pool, Inc., Docket No. EL19-11-000, at p. 11.

Finally, SPP asks that the changes to its Member Rules and Bylaws have an effective date of January 1, 2020, with the stated reason to allow the Commission time to consider SPP's rehearing request and compliance filing.²⁵ ELCON and TIEC request that instead the changes have a more accelerated effective date of December 1, 2019, so that their members can take the exit fee changes into account in considering whether to become SPP members for the entirety of calendar year 2020, beginning on January 1.

CONCLUSION

For the foregoing reasons, ELCON and TIEC urge the Commission to promptly accept the changes to the SPP Member Rules and Bylaws set out in SPP's filing in Docket No. ER19-2522-000 that would exclude non-TOs from the exit fee requirement, with an effective date of December 1, 2019, and to reject SPP's proposals (including the proposed processing fee and the alternative exit fee newly proposed in Docket No. ER19-2523-000) that would be in contravention of the Commission's April 18 Order.

²⁵ See, e.g., SPP \$100K Exit Fee Proposal at pp. 13-14.

Respectfully submitted,

Devin Hartman
President and CEO
ELECTRICITY CONSUMERS RESOURCE COUNCIL
1101 K Street, NW, Suite 700
Washington, DC 20005
Email: dhartman@elcon.org
Phone: (202) 682-1390

Phillip G. Oldham
Katherine L. Coleman
THOMPSON & KNIGHT LLP
98 San Jacinto Blvd., Suite 1900
Austin, Texas 78701
Email: Phillip.Oldham@tklaw.com; Katie.Coleman@tklaw.com
Phone: (512) 469-6100
ATTORNEYS FOR TEXAS INDUSTRIAL ENERGY CONSUMERS

Dated: August 22, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: August 22, 2019

/s/ W. RICHARD BIDSTRUP
W. Richard Bidstrup

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