

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

American Wind Energy Association,)	
The Wind Coalition)	
)	
v.)	Docket No. EL19-11-000
)	
Southwest Power Pool, Inc.)	

**COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION
IN SUPPORT OF COMPLAINT**

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”)¹, the Electric Power Supply Association (“EPSA”)² hereby comments on the November 2, 2018 complaint (“Complaint”) submitted by the American Wind Energy Association and the Wind Coalition (“AWEA” or “Complainants”) against Southwest Power Pool, Inc. (“SPP”) in the above-captioned proceeding. Complainants request that the Commission find sections of the “Financial Obligations of Withdrawing Members” (hereinafter “exit fees”) in SPP’s Bylaws and Membership Agreement, as applied to Independent Power Producer (“IPPs”) and other similarly situated non-transmission owners (“non-TOs”) and non-load-serving entities (“non-LSEs”), are unlawful, unjust and unreasonable, and unduly discriminatory. EPSA supports Complainants’ request that the Commission

¹ 18 C.F.R. § 385.212.

² Launched over 20 years ago, EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. Power supplied on a competitive basis collectively accounts for 40 percent of the U.S. installed generating capacity. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA filed a (doc-less) motion to intervene in this proceeding on November 9, 2018.

direct SPP to cease and desist from imposing those sections of the exit fee on IPPs, as well as other non-TOs and non-LSEs, and order SPP to revise Section 8.7 of the SPP Bylaws and Sections 4.2.1 of the SPP Membership Agreement.

I. OVERVIEW AND SUMMARY

As AWEA points out, SPP's exit fees are exorbitant and unique among all other Commission-approved independent system operators ("ISOs") and regional transmission organizations ("RTOs") in this nation (collectively, "RTOs/ISOs"). No other organized market imposes general RTO/ISO costs on non-TO/non-LSE members through membership fees, let alone imposing them through a member-specific exit fee. In fact, when a TO/non-LSE is withdrawing its membership (which is distinct from any level of market participation or investment), all other RTOs/ISOs only consider the withdrawing member's open positions in the marketplace. Such exit fees are not only unjust and unreasonable, they present an issue of imprudent governance that warps SPP's stakeholder process in a way that overrepresents TOs and therefore may not result in just and reasonable market design or rules.

II. COMMENTS

A. SPP's Exit Fees are Unjust and Unreasonable

Under Section 206 of the Federal Power Act, if "any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential," the Commission must "determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."³ As AWEA extensively outlines

³ 16 U.S.C. § 824e(a).

in the instant complaint,⁴ SPP's exit fees require that exiting members pay for ongoing, very forward-looking obligations⁵ that they have not caused either by their membership or a change in their membership status. Such an approach does not comport with cost causation principles.⁶ As the Complainants provide,

The obligation to pay for pensions, leases, debts, and interest on debts that are based on SPP operating 10, 20, or more years after a member decides to leave are simply not related to a party's decision to terminate membership in SPP and are clearly not what the Commission had in mind with respect to ensuring that members are financially invested in SPP. Rather, because these costs are not actually caused by the exiting member who must pay them, they result in rates that are not just and reasonable.⁷

Such an obvious inequity should be eliminated at the Commission's direction.

B. SPP's Exit Fees Result in Imprudent Governance

In FERC Order 2000, while the Commission opted against detailed governance requirements for RTO boards, the Commission ruled that "any RTO governance proposals, whether from an ISO, transco or a hybrid arrangement, will be judged on a case-by-case basis against the overarching standard that its decisionmaking process must be independent of individual market participants and classes of market

⁴ See generally, *American Wind Energy Association v. Southwest Power Pool, Inc.* Complaint. Docket No. EL 19-11-000.

⁵ See SPP Bylaws, section 8.71. These obligations include debts of SPP, whether held through mortgages, loans, loan agreements, borrowings, promissory notes, bonds, or credit lines; payments on equipment leases, financing leases, capital leases, real estate and office space, consulting contracts, and other contracts for services; SPP employee pension funds' unfunded liabilities; and SPP's overhead for three months.

⁶ See *KN Energy Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) (applying the cost-causation principles to determine whether the rates are just and reasonable); see also *Old Dominion Elec. Coop. v. FERC*, 2018 U.S. App. LEXIS 21527 (D.C. Cir. 2018) (same); *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009) (same); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004) (same).

⁷ AWEA Complaint at p. 22, citing *Buckeye Power, Inc. v. Am. Transmission Sys.*, 142 FERC ¶ 63,007, 66077 (2013).

participants.”⁸ In the instant case, while SPP’s exit fees may not have been installed with the intent of biasing any one class of market participant, in practice they have demonstrably had such an impact. As AWEA points out, in SPP, unlike in other RTOs/ISOs, one or two classes (TOs and/or LSEs) have an overwhelming percentage of the influence in the direction of the organization by being able to dominate voting on committees.⁹ It is clear from these figures that balanced representation is not currently being realized in SPP. In a member-driven organization like SPP, this has the effect of biasing the interests of TOs and/or LSEs, who can overwhelmingly influence any vote on RTO policy and/or rules.

In addition, knowledge of SPP’s crippling exit fees -- which could be anywhere from \$700,000 to \$1 million¹⁰ -- surely contributes to the unusual disparity in the composition of SPP’s membership. The possibility of paying such fees could be debilitating to non-TOs and non-LSEs, many of whom may be smaller in size or relying on new or developing business models. The existence of these exorbitant exit fees very clearly contributes to further skewing the makeup of the SPP stakeholders and disproportionately favors TOs and LSEs.

While SPP’s exit fees present a barrier to entry for new stakeholders, they concurrently provide a usurious barrier to *exit* for SPP members who have diminished or ended business activities in the SPP market. As discussed above, the expectation that exiting SPP members should financially carry the risk and liability for costs that they are

⁸ 89 FERC ¶ 61,285, Docket No. RM99-2-000; Order No. 2000, Regional Transmission Organizations at p. 229.

⁹ AWEA Complaint at p. 29, See also; chart on p.12.

¹⁰ *Id.* at p. 3, citing Southwest Power Pool, Inc., Corporate Governance Committee Meeting at Attachment 12 (Feb. 25, 2016), available at <https://www.spp.org/documents/36436/cgc%20materials%2020160225%20np.pdf> (identifying \$822,008 exit fee for Trans-Elect which owns no transmission and serves no load within SPP).

not responsible for causing in the SPP market, years or decades after they have ended participation in that market, is on its face unjust and unreasonable. In fact, under SPP's construct, due to the unnecessarily punitive nature of SPP's exit fees, an SPP member who contemplates exiting the RTO may quickly determine that ending its membership status is not financially feasible. Such a stakeholder could then find itself trapped in a never-ending spiral of annual membership fees to simply avoid the much more egregious exit fees.

Take for example the following hypothetical: Per SPP's Bylaws, "SPP Members will be subject to an annual membership fee in the amount of \$6,000, or other amount established by the Board of Directors."¹¹ Using the lower estimate discussed above (\$700,000), it would be more cost-effective for an existing SPP member to maintain an inactive membership for *over 116 years* than to exit the RTO. EPISA knows of IPP companies that maintain SPP membership—despite not having any assets within the footprint—as it is cheaper to pay the annual fee than it is to be saddled with SPP's outsized exit fees. While the annual fee may be viewed by some parties as nominal in nature, such a "damned if you do, damned if you don't" construct is a textbook example of unreasonable governance that FERC should order SPP to immediately remedy.

II. CONCLUSION

WHEREFORE, for the foregoing reasons, EPISA respectfully requests that the Commission grant AWEA's complaint and: (1) find that the membership exit fees for IPPs, as well as for other non-TOs/non-LSEs, in SPP's Bylaws and Membership

¹¹ Southwest Power Pool - Governing Documents Tariff - Bylaws, First Revised Volume No. 4 - Bylaws 8.0 Fiscal Administration - Bylaws 8.2 Annual Membership Fee, Available at <https://www.spp.org/documents/13272/current%20bylaws%20and%20membership%20agreement%20tariff.pdf>

Agreement are not just and reasonable and are unduly discriminatory and preferential;
(2) order SPP to adopt the revisions (proposed by AWEA in Attachment 2) of its
Complaint; and (3) order that the revisions are effective as of November 2, 2018, the
date of AWEA's Complaint.

Respectfully submitted,

Nancy Bagot

Nancy Bagot, Senior Vice President
Bill Zuretti, Director of Regulatory Affairs and Counsel
Electric Power Supply Association
1401 New York Avenue, NW, Suite 950
Washington, DC 20005

Dated: November 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., November 26, 2018.

Bill Zuretti

Bill Zuretti, Director, Regulatory Affairs and Counsel