

150 FERC ¶ 61,052
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Golden Spread Electric Cooperative, Inc.,
Central Valley Electric Cooperative, Inc.,
Farmers' Electric Cooperative, Inc.,
Lea County Electric Cooperative, Inc.,
Roosevelt County Electric Cooperative, Inc.,
and West Texas Municipal Power Agency

Docket No. EL15-8-000

v.

Southwestern Public Service Company

ORDER ON COMPLAINT AND ESTABLISHING HEARING PROCEDURES

(Issued January 29, 2015)

1. On October 20, 2014, Golden Spread Electric Cooperative, Inc. (Golden Spread), Central Valley Electric Cooperative, Inc. (Central Valley); Farmers' Electric Cooperative, Inc. (Farmers' Electric); Lea County Electric Cooperative, Inc. (Lea County); Roosevelt County Electric Cooperative, Inc. (Roosevelt County); and West Texas Municipal Power Agency (collectively, Complainants)¹ filed a complaint against Southwestern Public Service Co. (SPS) pursuant to sections 201, 206, and 306 of the Federal Power Act (FPA)² and Rule 206 of the Commission's regulations.³ The

¹ In this order, Central Valley, Farmers' Electric, Lea County, and Roosevelt County are collectively referred to as the New Mexico Cooperatives.

² 16 U.S.C. §§ 824, 824e, 825e (2012).

³ 18 C.F.R. § 385.206 (2014).

complaint alleges that the rate of return on common equity (ROE) input values of (1) 10.25 percent for the formula rate applicable to the Replacement Power Sales Agreement (RPSA) between Golden Spread and SPS (Golden Spread RPSA); (2) 10.50 percent for the formula rate applicable to the RPSAs between SPS and each of Central Valley, Farmers' Electric, Lea County, and Roosevelt County (New Mexico Cooperatives RPSAs); and (3) 10.77 percent for the formula rate applicable to SPS's annual transmission revenue requirement in both the Xcel Energy, Inc. (Xcel) Open Access Transmission Tariff (OATT) and the Southwest Power Pool, Inc. (SPP) OATT, are unjust and unreasonable. In this order, we establish hearing procedures and set a refund effective date of October 20, 2014.

I. Background

2. Golden Spread purchases energy and capacity from SPS pursuant to the Golden Spread RPSA, which commenced on April 20, 2012, and will continue for a term of seven years.⁴ The cost-based Golden Spread RPSA has a formula rate that contains a 10.25 percent ROE, which was established by a black box settlement in Docket No. ER06-274-003.⁵ The New Mexico Cooperatives purchase energy and capacity from SPS pursuant to the New Mexico Cooperatives RPSAs, which commenced on October 1, 2010, and will continue for a term of approximately 16 years.⁶ The cost-based New Mexico Cooperatives RPSAs each have a formula rate that contains a 10.50 percent ROE, which was established by settlement in Docket Nos. EL05-19-002 and ER05-168-001.⁷ The settlements that established the ROEs in the Golden Spread RPSA and the New Mexico Cooperatives RPSAs provided that the ROEs could be changed by filings made with the Commission pursuant to section 205 or 206 of the FPA. Moreover, the

⁴ Complaint at 12.

⁵ See *Golden Spread Cooperative Inc.*, 123 FERC ¶ 61,054 (2008) (approving the settlement). The settlement established a formula rate for service under a then-existing power sales agreement between SPS and Golden Spread that expired on April 19, 2012. The Golden Spread RPSA was negotiated as part of that settlement and under its terms the rates in effect immediately prior to the commencement of service under the Golden Spread RPSA were to be carried forward to the Golden Spread RPSA.

⁶ Complaint at 12. In this order, the Golden Spread RPSA and the New Mexico Cooperatives RPSAs are collectively referred to as the RPSAs.

⁷ See *Golden Spread Cooperative Inc. v. Southwestern Pub. Serv. Co.*, 131 FERC ¶ 61,260 (2010) (approving the settlement).

RPSAs contain language regarding the rights of the parties to seek unilateral modification of the rates, terms, and conditions pursuant to section 205 or 206 of the FPA.⁸

3. Complainants take Network Integration Transmission Service under the SPP OATT, with rates for service calculated pursuant to the formula rate for SPS as set forth in the Xcel OATT.⁹ The ROE formula rate input used to determine SPS's annual transmission revenue requirement, and ultimately the charges applicable to Complainants' transmission service, is 11.27 percent. This formula rate consists of a base ROE of 10.77 percent and a 50 basis point adder to reflect SPS's membership in SPP. The transmission formula rate was established by settlement in Docket No. ER08-313, *et al.*¹⁰ The settlement reserved the parties' rights to seek changes to the negotiated ROE through filings made with the Commission pursuant to sections 205 and 206 of the FPA.

4. On April 20, 2012, Golden Spread filed a complaint,¹¹ supported by a discounted cash flow (DCF) analysis, alleging that the ROEs in both the Golden Spread RPSA and SPS's transmission formula rate are unjust and unreasonable, and that a just and reasonable base ROE for both is 9.15 percent.¹² On July 19, 2013, one day before the expiration of the 15-month maximum refund period for the April 2012 Complaint, Golden Spread filed a complaint, supported by a new DCF analysis based on more recent data, alleging that the ROEs in both the Golden Spread RPSA and SPS's transmission formula rate are unjust and unreasonable, and that a just and reasonable base ROE for both is 9.15 percent.¹³

⁸ Complaint at 12-13.

⁹ *Id.* at 13.

¹⁰ See *Xcel Energy Services, Inc.*, 132 FERC ¶ 61,170 (2010) (approving the settlement).

¹¹ Golden Spread, Complaint, Docket No. EL12-59-000 (April 2012 Complaint).

¹² Golden Spread's 9.15 percent figure in Docket No. EL12-59-000 was the median of a zone of reasonableness from 7.51 percent to 10.79 percent.

¹³ Golden Spread, Complaint, Docket No. EL13-78-000 (July 2013 Complaint).

5. On June 19, 2014, the Commission established hearing and settlement judge procedures for the April 2012 Complaint and July 2013 Complaint and consolidated those two proceedings for purposes of hearing, settlement, and decision.¹⁴ On November 26, 2014, settlement judge procedures in the consolidated proceeding were terminated.¹⁵

II. The Complaint

6. Complainants contend that SPS's ROEs are excessive and that a DCF analysis performed by their expert witness, using the two-step DCF methodology the Commission established in Opinion No. 531,¹⁶ shows that, based on current market data, a just and reasonable ROE for SPS is 8.61 percent. Complainants state that the existing 10.25 percent and 10.50 percent ROEs for the RPSAs, and 10.77 percent ROE for the transmission formula rate, are 164 to 310 basis points above what is acceptable under the FPA's just and reasonable standard.¹⁷ Complainants contend that this disparity could become even larger if SPS seeks to include a 100 basis point incentive ROE adder that is currently contemplated within the formula rate for certain new transmission projects.

¹⁴ *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, 147 FERC ¶ 61,238 (2014) (establishing hearing and settlement judge procedures for the April 2012 Complaint); *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, 147 FERC ¶ 61,239 (2014) (establishing hearing and settlement judge procedures for the July 2013 Complaint, and consolidating the July 2013 Complaint proceeding with the April 2012 Complaint proceeding for purposes of settlement, hearing, and decision).

¹⁵ *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, Docket No. EL13-78-000, *et al.* (Nov. 26, 2014) (order of Chief Judge terminating settlement judge procedures).

¹⁶ *Martha Coakley, Massachusetts Attorney Gen. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234 (2014) (Opinion No. 531).

¹⁷ Complaint at 15. Complainants state that, if SPS's current ROEs are not adjusted downward to 8.61 percent, the financial impact will be: (1) \$907,000 per year for Golden Spread, under the Golden Spread RPSA; (2) \$593,000 per year for the New Mexico Cooperatives, under the New Mexico Cooperatives RPSAs; and (3) \$25 million per year for SPS's transmission customers under the transmission formula rate. *Id.* at 27.

7. Complainants assert that capital market conditions have changed significantly since the ROEs in the RPSAs and transmission formula rates were established.¹⁸ According to Complainants, their expert's DCF analysis followed the Commission's recently-established methodology and produced a national proxy group of 24 companies. Complainants assert that the proxy group was selected using screening criteria that the Commission has applied in previous cases, including Opinion No. 531.¹⁹ Of the resulting 24 companies in the proxy group, Complainants explain that their expert eliminated two companies due to major merger and acquisition activity during the analysis period.²⁰ Complainants explain that the proxy group produced a range of reasonableness from 6.36 percent to 11.6 percent, and that Complainants' expert used the median of 8.61 percent, because the median is the Commission's strongly preferred approach in cases involving a single utility.²¹

¹⁸ *Id.* at 15. Specifically, Complainants assert that average utility bond yields have decreased since SPS's ROEs were established. Complainants also contend that an 8.61 percent ROE would imply a risk premium of 527 basis points over the cost of SPS's most recently issued long-term debt.

¹⁹ *Id.* at 16-17. Complainants applied the following criteria: electric utilities that (1) are covered by Value Line; (2) have a Standard & Poors (S&P) corporate credit rating of A, A-, or BBB+, and a Moody's Investor Service, Inc. (Moody's) long-term issuer or senior unsecured rating of Baa2, Baa1, or A3; (3) have an IBES published analysts' consensus 5-year earnings per share growth rate; (4) are not engaged in any major merger activity, nor were they during the six-month dividend yield analysis period; (5) paid dividends throughout the six-month dividend yield analysis period, did not cut dividends during that period, and have not subsequently announced a dividend cut; and (6) whose DCF results pass threshold tests of economic logic and are not outliers.

²⁰ *Id.* at 17.

²¹ *Id.* at 18-20 (citing *S. Cal. Edison Co. v. FERC*, 717 F.3d 177 (D.C. Cir. 2013); *Pacific Gas and Elec. Co.*, 143 FERC ¶ 61,190 (2013); *Pub. Serv. Co. of New Mexico*, 143 FERC ¶ 61,227 (2013); *Southern Cal. Edison Co.*, 139 FERC ¶ 61,042 (2012); *Southern Cal. Edison Co.*, 131 FERC ¶ 61,020 (2010); *Golden Spread Elec. Coop.*, 123 FERC ¶ 61,047 (2008); *Virginia Elec. and Power Co.*, Opinion No. 501, 123 FERC ¶ 61,098 (2008); *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,302 (2004), *aff'd in relevant part sub nom. Pub. Serv. Comm'n of Kentucky v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005)).

8. Complainants assert that their expert's proxy group of 22 companies represents risks comparable to SPS's, and that SPS "exhibits equal or lower risk than the proxy group."²² Complainants state that SPS's ROE should not be set at a point above the central tendency of the proxy group, as the Commission did in Opinion No. 531 for the New England transmission owners' ROE, because this case involves a single utility, not a group of utilities, and the economic conditions that existed during the analysis period in Opinion No. 531 were different from current economic conditions.²³ Complainants also contend that the Commission's determinations in natural gas rate cases establish a high bar for deviating from the median of a proxy group.²⁴

9. Complainants assert that, since the Commission issued Opinion No. 531, the ROEs authorized by state utility commissions and requested by utilities have decreased. Complainants further contend that ROE decisions from state utility commissions reflect regulatory lag that SPS's ROEs do not, because SPS follows a true-up process that produces "an annual revenue requirement that earns an ROE precisely at the level expressed in the formula."²⁵

10. If the Commission does determine that it is necessary to place SPS's ROE in the upper half of the proxy group results, Complainants argue that the Commission should use the median of the upper half, which they calculate to be 9.14 percent. Complainants also assert that, regardless of where the Commission places SPS's ROE in the proxy group results, SPS should not be allowed to "add any incentive projects to its open access transmission tariff rates that, together with incentive ROE, exceeds the top end of the range of reasonableness set in this case."²⁶

11. Complainants request that the Commission consolidate this proceeding with the proceeding in Docket Nos. EL12-59-000 and EL13-78-000.

²² *Id.* at 21.

²³ *Id.* at 22. Complainants assert that bond yields have risen, unemployment rates have dropped, the stock market has made substantial gains, and the Federal Reserve has reduced its quantitative easing initiative.

²⁴ *Id.* (citing *El Paso Natural Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040 (2013)).

²⁵ *Id.* at 23.

²⁶ *Id.* at 24.

III. Notice and Responsive Pleadings

12. Notice of the complaint was published in the *Federal Register*, 79 Fed. Reg. 64,185 (2014), with interventions and protests due on or before October 30, 2014.²⁷ On November 12, 2014, SPS filed an answer. On November 28, 2014, Complainants filed an answer to SPS's answer. On December 10, 2014, SPS filed an answer to Complainants' answer.

13. Occidental Permian Ltd., SPP, Tri-County Electric Cooperative, Inc. (Tri-County), and Western Farmers Electric Cooperative (Western Farmers) timely filed motions to intervene. On November 12, 2014, Tri-County and Western Farmers filed comments in support of the complaint.

A. SPS's Answer

14. SPS asserts that Complainants have not met their burden of proof under FPA section 206 to provide sufficient evidence to support a prima facie case that the existing ROEs in SPS's RPSAs and transmission formula rate are unjust and unreasonable. Therefore, SPS argues that the Commission should deny the complaint.²⁸ SPS states that, although Complainants' two-step DCF methodology is generally consistent with Opinion No. 531, Complainants' analysis is flawed because it uses an incorrect weighted average growth rate to increase the dividend yield. SPS asserts that it is appropriate to increase the dividend yield "by one-half the expected growth rate, but the correct growth rate to use is the short-term growth rate alone, not the weighted average growth rate which is a composite of the short-term growth rate and the long-term growth rate."²⁹ SPS states that correcting this flaw in Complainants' DCF analysis produces a DCF range of 6.35 percent to 11.64 percent, with a median of 8.61 percent and a midpoint of the upper half of the DCF range of 10.13 percent.

15. SPS states that the same concerns that led the Commission in Opinion No. 531 to place the ROE above the central tendency above the midpoint of the proxy group results are equally applicable in ROE proceedings involving a single utility as they are in

²⁷ The *Federal Register* notice incorrectly listed the comment date as October 30, 2014. On October 22, 2014, SPS filed a motion for extension of time to respond to the Complaint. On October 22, 2014, the Commission issued a notice extending the comment date to November 12, 2014.

²⁸ SPS November 12, 2014 Answer at 11.

²⁹ *Id.* at 12.

proceedings involving multiple utilities.³⁰ SPS further asserts that a correct application of Opinion No. 531 requires consideration of whether capital market conditions are anomalous and may adversely affect the results of a two-step DCF analysis. SPS argues that, if capital market conditions are anomalous, alternative benchmark methodologies for examining an ROE must be considered.

16. SPS argues that capital market conditions are comparable to the conditions in the time period at issue in Opinion No. 531. SPS asserts that, as of October 2014, the yields on long-term, triple-B rated utility bonds and 10-year U.S. Treasury bonds remain historically low, with the latter averaging 2.46 percent for the six-month period ending October 2014.³¹ SPS states the persistence of the historically low yields on U.S. Treasury bonds is a direct result of the Federal Reserve's Quantitative Easing program because, while the Federal Reserve has announced that it would end its Quantitative Easing program in October 2014, the Federal Reserve continues to hold \$4 trillion in securities purchased under that program. SPS contends that the Federal Reserve's reinvestment of the principal payments from those securities continues to place downward pressure on interest rates.³² SPS states that the capital market conditions do not represent a "new normal," because investors do not anticipate that current interest rate levels will continue.³³

17. SPS highlights three alternative benchmark methodologies for assessing whether anomalous market conditions are suppressing DCF results and for ensuring a just and reasonable ROE. SPS shows the results from an expected earnings analysis, a risk premium analysis, and a Capital Asset Pricing Model (CAPM) analysis. SPS argues that these analyses show that setting SPS's ROE at the median of the proxy group ROEs would not satisfy the requirements of *Hope*³⁴ and *Bluefield*.³⁵ SPS states that its expected earnings analysis establishes a range of results from 7.62 percent to 14.67 percent, with a

³⁰ *Id.* at 14.

³¹ *Id.* at 15.

³² *Id.* at 16.

³³ *Id.* at 17.

³⁴ *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (*Hope*).

³⁵ *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) (*Bluefield*).

median of 10.71 percent and a midpoint of 11.14 percent.³⁶ According to SPS, its risk premium analysis implies an ROE of 10.61 percent, and its CAPM analysis produces a range of returns from 8.85 percent to 12.91 percent, with a median of 11.45 percent and a midpoint of 10.87 percent.³⁷

18. SPS further contends that comparing SPS's ROEs to state commission-approved ROEs similarly shows that the 8.61 percent median of Complainants' analysis would not be a just and reasonable ROE for SPS. SPS states that 76 percent of the proxy group companies have state commission-authorized ROEs above 10 percent, and the median state commission-authorized ROE for the proxy group is 10.38 percent.³⁸ SPS also asserts that, between 1974 and 2013, the average allowed ROE for electric utilities ranged from 10.02 to 15.78 and has never fallen into single digits.³⁹ SPS also states that, while Complainants assert that SPS is not riskier than the proxy group companies in Complainants' DCF analysis, SPS's risk relative to the proxy group companies is irrelevant under Opinion No. 531.⁴⁰

19. SPS argues that the ROE Complainants' request could undermine SPS's ability to attract capital for new transmission investment, because the resulting 216 basis point reduction in SPS's transmission base ROE would put downward pressure on SPS's credit profile and undermine SPS's ability to retain equity investors.⁴¹ SPS asserts that it is in a period of elevated capital investment and plans to invest \$3.2 billion dollars over the five-year period from 2014 to 2018.

20. SPS contends that the current ROEs are just and reasonable, as the ROEs in SPS's RPSAs and transmission formula rate are below the average result of the alternative benchmark methodologies. Further, SPS states that the ROEs in SPS's RPSAs are below the lowest result of the alternative benchmark methodologies, and the ROE in SPS's transmission formula rate is only 16 basis points above that benchmark. SPS states that, in comparison, the ROE established in Opinion No. 531 was above the result of two of

³⁶ SPS November 12, 2014 Answer at 18.

³⁷ *Id.* at 19.

³⁸ *Id.* at 21.

³⁹ *Id.* at 22.

⁴⁰ *Id.*

⁴¹ *Id.* at 23.

the alternative benchmark methodologies in that case. Therefore, SPS asserts that its current ROEs are “within the area of ROEs that are compensatory to SPS but not excessive to consumers.”⁴²

21. While SPS contends that its current ROEs are just and reasonable, SPS states that, if the Commission finds those ROEs to be unjust and unreasonable, the appropriate point of central tendency in the upper half of the proxy group results should be the midpoint, not the median. SPS asserts that there is no precedent in which the Commission has used the median of the upper half of the proxy group results.⁴³

22. SPS disputes Complainants’ calculation of the transmission rate impacts associated with the ROE reduction that Complainants seek. SPS asserts that, while the estimated financial impacts under SPS’s RPSAs are reasonably accurate, Complainants have overestimated the impact under the transmission formula rate by overstating the financial effects of the Base Plan Upgrade costs and miscalculating the impact that the ROE reduction would have on the annual transmission revenue requirement in the SPS rate zone.⁴⁴ SPS calculates that, if the base ROE in the transmission formula rate is reduced to 8.61 percent, the annual financial impact on the Complainants will be \$6.959 million.⁴⁵

23. SPS states that, if the Commission sets the complaint for hearing, the Commission should reject Complainants’ request for Fast Track Procedures and their request for consolidation with the proceedings in Docket Nos. EL13-78-000 and EL12-59-000. SPS asserts that there are no common issues of law or fact between those proceedings and the instant proceeding, because the result reached in one ROE complaint has no bearing on the result reached in a separate ROE complaint.⁴⁶ SPS also argues that no administrative efficiency will be promoted by consolidating the proceedings, but instead consolidation will result in a delay of the Commission’s decision in Docket Nos. EL13-78-000 and EL12-59-000.

⁴² *Id.* at 27.

⁴³ *Id.* at 28-30.

⁴⁴ *Id.* at 31.

⁴⁵ *Id.* at 32.

⁴⁶ *Id.* at 35.

B. Complainants' Answer to Answer

24. Complainants argue that SPS misreads Opinion No. 531 as establishing a new default for adjusting ROEs upward from the median, in all cases for all utilities without regard to the specifics at hand. Complainants also assert that SPS erroneously elevates its alternative cost of equity benchmarks above the two-stage DCF analysis, in direct conflict with Opinion No. 531.⁴⁷ Complainants contend that they have shown that use of the midpoint of the upper half of the DCF range is not an appropriate measure for a single utility of average risk, and that they have met their burden of demonstrating that SPS's current ROEs are unjust and unreasonable.⁴⁸ Complainants state that SPS's argument is premised on its alternative cost of equity benchmarks and evidence of state commission-approved ROEs. Complainants note that SPS is attempting to use its alternative benchmarks in place of the DCF analysis, but that the Commission in Opinion No. 531 found only that alternative benchmarks and state commission-approved ROEs were "informative" and that the Commission "did not depart from [its] use of the DCF methodology."⁴⁹ Complainants assert that SPS's approach is not consistent with Opinion No. 531 or any other Commission precedent.

25. Complainants contend that the Commission's determination that the appropriate ROE in Opinion No. 531 was 10.57 percent was specific to the facts of that case, and thus that determination is not directly applicable here. The differences that distinguish Opinion No. 531 from the facts of this case include: (1) size of the proxy group and spectrum of credit risk; (2) use of the midpoint versus the median as the measure of central tendency; and (3) financial data derived from a different six-month study period. Complainants once again assert that the anomalous circumstance that the Commission relied upon in Opinion No. 531 to set a higher point of central tendency within the zone of reasonableness no longer exists, as demonstrated by the testimony of expert witness J. Bertram Solomon.

26. Complainants contend that the SPS answer presents essentially the same arguments the Commission rejected in its order on Golden Spread's April 2012 Complaint and July 2013 Complaint. Complainants assert that SPS's persistence in

⁴⁷ Complainants November 28, 2014 Answer at 3.

⁴⁸ *Id.* at 4.

⁴⁹ *Id.* n.11 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 146).

advancing those points should be rejected as an impermissible collateral attack on that order.⁵⁰

27. Complainants explain that the Commission has correctly and consistently rejected the types of alternative analyses and approaches discussed by SPS expert witness, Mr. McKenzie, in favor of its longstanding reliance on the DCF methodology. Complainants contend that the alternative analyses are ill-conceived and do not offer a reasonable basis for determining investors' required return for investing in a company such as SPS. Complainants add that each of the alternative benchmark analyses are flawed and defy economic reason. As a result, the alternative benchmarks provide little or no justification for setting the point of central tendency in the upper half of the zone of reasonableness as the Commission did in Opinion No. 531.⁵¹

28. Complainants dispute SPS's argument that Complainants' quantification of transmission rate effects is overstated. Complainants contend that nothing in SPS's answer contradicts Complainants' showing that one adverse impact of SPS's excessive transmission base ROE is that SPS's transmission customers are being overcharged by millions of dollars.⁵²

C. SPS's Answer to Answer

29. SPS argues that Complainants misinterpret Opinion No. 531 and mischaracterize SPS's position. SPS states that the Commission made clear that its decision was based on the arguments and facts in that case, and that nothing in Opinion No. 531 precludes parties in other proceedings from developing a record "supporting a different point in the range of reasonable returns than the midpoint of the upper half of the range."⁵³ The Commission also explained that it has "in the past established the base ROE at the top of the zone of reasonableness."⁵⁴ SPS adds that the Commission's task is to ensure that an ROE it establishes or approves satisfies the requirements of *Hope* and *Bluefield*. Furthermore, SPS states that, if an ROE that does not reflect a measure of central

⁵⁰ *Id.* at 11-12 (citing *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, 147 FERC ¶ 61,239 (2014)).

⁵¹ *Id.* at 13-24.

⁵² *Id.* at 25.

⁵³ SPS December 10, 2014 Answer at 4.

⁵⁴ *Id.*

tendency is required to satisfy a legal standard, the Commission will adopt that ROE.⁵⁵ According to SPS, it explained that the facts of each case must be considered, as is required by the Commission, and in contrast to Complainants' analysis, SPS contends that it provided detailed analyses of each of the factors considered under Opinion No. 531. That analysis concluded that SPS's current ROEs continue to be within the upper half of the range of reasonableness, and thus they continue to be just and reasonable.

30. SPS states that in *El Paso Natural Gas Co.*,⁵⁶ the Commission did not address whether conditions in capital markets were anomalous during the period relevant in that proceeding, contrary to Complainants' assertion. SPS adds that *El Paso* was issued prior to Opinion No. 531, and therefore prior to the Commission's finding that anomalous capital market conditions required an increase from the midpoint of the proxy group ROEs.

31. SPS argues that Complainants' assertions that SPS "appears to abandon the DCF methodology altogether," and that SPS's "argument depends entirely on its alternative cost of equity benchmarks and evidence of state approved ROEs," have no merit. SPS asserts that it applied the same analysis that the Commission employed in Opinion No. 531, by considering alternative benchmarks and state commission-approved ROEs to "gain insight into the potential impacts of the capital market conditions on the appropriateness of using the resulting midpoint" of the DCF analysis.⁵⁷

32. SPS states that Complainants are correct that the 10.57 percent ROE adopted in Opinion No. 531 "is not directly applicable here."⁵⁸ However, SPS also asserts that it never claimed otherwise or claimed that Opinion No. 531 established some sort of floor in this proceeding. Nonetheless, SPS contends that a comparison to the findings in Opinion No. 531 is instructive. As an example, SPS states that given that the alternative analyses in Opinion No. 531 and this proceeding show similar results, with two of the three alternative benchmark analyses higher here, there is no basis to conclude that an ROE almost 200 basis points below the ROE adopted in Opinion No. 531 would be just and reasonable.

⁵⁵ *Id.*

⁵⁶ 145 FERC ¶ 61,040 (2013) (*El Paso*).

⁵⁷ SPS December 10, 2014 Answer at 7-8 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 145).

⁵⁸ *Id.* at 10.

33. SPS states that there is no basis for Complainants' position that, in setting the April 2012 Complaint and July 2013 Complaint for hearing, the Commission rejected the merits of SPS's response to the Complainants' arguments. SPS contends that in both orders the Commission determined that issues of material fact exist that could not be resolved on the current record. In doing so, the Commission did not address the substance of the arguments related to SPS's ROE or find that Golden Spread had met its burden of proof. Rather, the Commission found that a hearing is required to address issues of material fact.⁵⁹

IV. Discussion

A. Procedural Matters

34. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

35. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Complainants' and SPS's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

36. We find that the complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing ordered below. Accordingly, we will set the complaint for investigation and a trial-type, evidentiary hearing under section 206 of the FPA. With regard to the request for consolidation, we leave to the discretion of the Chief Administrative Law Judge whether it is appropriate to consolidate this proceeding and Docket Nos. EL12-59-000 and EL13-78-000 for purposes of hearing and decision.⁶⁰

37. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Section 206(b) permits the Commission to order refunds for a 15-month period following the refund effective date. Consistent with our

⁵⁹ SPS December 10, 2014 Answer at 13-14.

⁶⁰ See 18 C.F.R. § 385.503(a) (2014).

general policy of providing maximum protection to customers,⁶¹ we will set the refund effective date at the earliest date possible, i.e., October 20, 2014, as requested.

38. If the Chief Administrative Law Judge determines that it is appropriate to consolidate this proceeding with Docket Nos. EL12-59-000 and EL13-78-000, the consolidated proceeding will involve multiple refund periods—the 15-month refund period in the instant proceeding, the 15-month refund period in Docket No. EL12-59-000, and the 15-month refund period in Docket No. EL13-78-000. In those circumstances, it would be appropriate for the parties to litigate a separate ROE for each refund period. Specifically, for the refund period covered by Docket No. EL12-59-000 (i.e., April 20, 2012 through July 20, 2013), the ROE for that particular 15-month refund period should be based on the most recent financial data available during that period, i.e., the last six months of that period.⁶² For the refund period in Docket No. EL13-78-000 (i.e., July 19, 2013 through October 19, 2014), the ROE for that particular 15-month refund period should be based on the most recent financial data available during that period, i.e., the last six months of that period. For the refund period in the instant docket (i.e., October 20, 2014 through January 20, 2016) and for the prospective period, the ROE should be based on the most recent financial data in the record.⁶³

39. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within twelve months of the commencement of hearing procedures, or by January 31, 2016. Thus, we estimate that, absent settlement,

⁶¹ See, e.g., *Seminole Elec. Coop., Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

⁶² See Opinion No. 531, 147 FERC ¶ 61,234 at P 160 (addressing the use of recent financial data to determine the ROE); see also *New York Ass'n of Pub. Power v. Niagara Mohawk Power Corp.*, 148 FERC ¶ 61,176, at P 24 (2014).

⁶³ See Opinion No. 531, 147 FERC ¶ 61,234 at PP 65-67, 160 (holding that a single ROE should be established for the most recent refund period addressed at the hearing and for the prospective period based on the most recent financial data in the record); see also *New York Ass'n of Pub. Power v. Niagara Mohawk Power Corp.*, 148 FERC ¶ 61,176 at P 24.

we would be able to issue our decision within approximately eight months of the filing of briefs on and opposing exceptions, or by November 30, 2016.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning this complaint.

(B) In the event that this proceeding is not consolidated with Docket Nos. EL12-59-000 and EL13-78-000, a presiding judge, to be designated by the Chief Administrative Law Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(C) The refund effective date in Docket No. EL15-8-000, established pursuant to section 206(b) of the FPA, is October 20, 2014.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.