

161 FERC ¶ 61,062
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Southwest Power Pool, Inc.

Docket Nos. EL16-91-000
EL18-19-000
(consolidated)

ORDER ON PAPER HEARING AND INSTITUTING SECTION 206 PROCEEDING,
ESTABLISHING REFUND EFFECTIVE DATE, AND CONSOLIDATING
PROCEEDINGS

(Issued October 19, 2017)

1. On July 21, 2016, pursuant to section 206 of the Federal Power Act (FPA),¹ the Commission instituted a proceeding to examine whether the Southwest Power Pool, Inc. (SPP) Open Access Transmission Tariff (Tariff) may be unjust, unreasonable, and unduly discriminatory or preferential because it does not include a refund commitment by non-public utility transmission owning members whose revenue requirements are recovered under the SPP Tariff and established paper hearing procedures.²
2. As discussed below, we will hold the FPA section 206 paper hearing in abeyance pending the ongoing SPP stakeholder process. We also grant, in part, and deny, in part, SPP's requests for clarification. Moreover, we address some issues raised by parties below. Finally, we institute a proceeding in Docket No. EL18-19-000 pursuant to FPA section 206 to examine the SPP Membership Agreement and other jurisdictional

¹ 16 U.S.C. § 824e (2012).

² *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,059 (2016) (July 2016 Order). *See* 16 U.S.C. § 824(f) (2012). For ease of reference, while such utilities are subject to the Commission's authority in certain respects, but not in other respects, *compare* 16 U.S.C. §§ 825u, 825v (2012) *with* 16 U.S.C. § 824c (2012), we nevertheless often refer to FPA section 201(f) entities as non-jurisdictional entities, non-jurisdictional utilities, or non-public utilities.

documents, as discussed more fully below, and consolidate Docket Nos. EL16-91-000 and EL18-19-000.

I. Background

3. In the July 2016 Order, the Commission instituted an FPA section 206 proceeding and commenced paper hearing procedures to address concerns regarding the Commission's ability to ensure that SPP's rates will be just and reasonable under FPA section 205³ when they include the revenue requirement of a non-public utility transmission owning member.⁴ These concerns arose in an order that was issued concurrently with the July 2016 Order, regarding refunds resulting from SPP's proposed revisions to its Tariff to implement a formula rate for Tri-County Electric Cooperative Inc. (Tri-County).⁵ A similar issue arose in another proceeding concerning SPP's proposal to allocate revenues it received on behalf of certain SPP transmission owners under a settlement. In that case, SPP sought clarification that it could withhold revenues from the settlement from non-public utility transmission owning members of SPP who had not committed to make refunds in the event that the tariff revisions that SPP proposed were revised as a result of the settlement judge procedures instituted in that proceeding.⁶ The Commission ultimately granted SPP's request,⁷ but recognized the concern regarding the collection of refunds from non-public utility transmission owning members in SPP, and issued the July 2016 Order, instituting the paper hearing in this docket. In the July 2016 Order, the Commission stated that:

It is of concern that the refund commitments provided by the non-public utility transmission owners thus far do not apply to the full range of situations in which they may receive revenue associated with service provided due to their status as transmission-owning [RTO] members based on RTO rates, terms or conditions that are found to be unjust and

³ 16 U.S.C. § 824d (2012).

⁴ July 2016 Order, 156 FERC ¶ 61,059 at P 6.

⁵ *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,057 (2016) (Tri-County Remand Order).

⁶ SPP, Motion for Clarification, Docket No. ER16-791-000 (filed May 13, 2016).

⁷ *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,058 (2016).

unreasonable, in the same manner that public utility transmission owners could be required to provide refunds of such revenues under FPA sections 205 or 206.^[8]

4. Therefore, the Commission instituted an FPA section 206 proceeding, established paper hearing procedures, and noted that SPP might address the Commission's concerns by revising the SPP Tariff to require a prospective refund commitment from non-public utility transmission owning members for all manner of funds that may be ordered in FPA section 205 and 206 proceedings related to revenues that they may receive associated with service provided due to their status as transmission-owning RTO members.⁹ The Commission stated that, if a non-public utility transmission owning member chooses not to make such a refund commitment under the Tariff revisions, then SPP would remove the non-public utility transmission owning member's transmission revenue requirement from the SPP Tariff as of a prospective date determined by the Commission.¹⁰ The Commission also required that any interested persons file a notice of intervention or motion to intervene, as appropriate, within 21 days of the date of issuance of July 2016 Order.¹¹

II. Notice and Responsive Pleadings

5. On July 28, 2016, notice of the Commission's institution of the FPA section 206 proceeding was published in the *Federal Register*, 81 Fed. Reg. 69,638 (2016). The notice indicated that the refund effective date will be the date of publication of the notice in the *Federal Register*.

6. Timely motions to intervene were filed by: National Rural Electric Cooperative Association (NRECA); Arkansas Electric Cooperative Corporation; Nebraska Public Power District (NPPD); Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company (collectively, KCP&L); Missouri Public Service Commission; Central Power Electric Cooperative, Inc.; Basin Electric Power Cooperative (Basin Electric); South Central MCN LLC; Prairie Power, Inc.; Sunflower Electric Power Corporation (Sunflower); Mid-Kansas Electric Company, LLC (Mid-Kansas); American Public Power Association (APPA); Western Farmers Electric Cooperative; SPP; American Electric Power Service Corporation (AEP); East Texas Electric Cooperative, Inc. and Tex-La Electric Cooperative of Texas, Inc.; Southwestern Power

⁸ July 2016 Order, 156 FERC ¶ 61,059 at P 7.

⁹ *Id.* P 9.

¹⁰ *Id.*

¹¹ *Id.* at ordering paragraph (C).

Administration; Midwest Energy, Inc. (Midwest Energy); Western Area Power Administration (Western-UGP); East Kentucky Power Cooperative, Inc.; Westar Energy, Inc. (Westar); Xcel Energy Services Inc. (Xcel); Minnkota Power Cooperative, Inc; Kansas Power Pool, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, and Municipal Energy Agency of Nebraska; and Corn Belt Power Cooperative, Inc.

7. Motions to intervene out-of-time were filed by: Omaha Public Power District (OPPD); Harlan Municipal Utilities; Oklahoma Gas & Electric Company (Oklahoma Gas & Electric); Missouri River Energy Services; the Empire District Electric Company (Empire); City Utilities of Springfield, Missouri; and Kansas Corporation Commission.

8. On August 9, 2016, SPP filed a request for an extension time to submit the initial and reply briefs in this proceeding to October 21, 2016 and November 18, 2016, respectively. On August 15, 2016, NPPD filed an answer in support of SPP's request. On August 16, 2016, the Commission issued a Notice of Extension of Time granting SPP's requested extension.

9. On October 21, 2016, SPP, NRECA, the SPP Indicated Transmission Owners,¹² Midwest Energy, Sunflower and Mid-Kansas, NPPD, OPPD, and APPA filed initial briefs. In its Initial Brief, SPP also requested clarification on certain aspects of the July 2016 Order. On October 21, 2016, Basin Electric filed comments in support of initial briefs. On October 21, 2016, the United States Department of Energy (DOE) filed a notice of intervention and comments. On November 18, 2016, NPPD, NRECA, and Midwest Energy filed reply briefs.

10. On August 31, 2017, SPP submitted correspondence in Docket No. EL16-91-000, informing the Commission that, although SPP and its stakeholders have met on five separate occasions to consider the issues raised by the Commission and to attempt to construct revisions to the SPP Membership Agreement and/or Tariff, they require additional time to analyze the issues and develop language to address the Commission's concerns. SPP anticipates that it will make a filing addressing the issues on or before February 28, 2018.

¹² The SPP Indicated Transmission Owners are: AEP, Public Service Company of Oklahoma, Southwestern Electric Power Company, Empire, KCP&L, Great Plains Energy Incorporated, Oklahoma Gas & Electric, Westar, Xcel, and Southwestern Public Service Company.

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2017), we will grant the late-filed motions to intervene given the entities' interest in the proceeding and the absence of undue prejudice or delay.

B. Substantive Matters

1. Refund Authority

a. Initial Briefs

12. SPP urges the Commission to consider adopting policy changes to address the lack of a refund obligation for non-public utilities, noting that the current case-by-case approach has resulted in protracted litigation.¹³ SPP states that recent cases underscore the need for the Commission to examine its refund authority and consider changes to ensure that all transmission owners, whether public or non-public utilities, are treated comparably to ensure that the SPP Tariff and rates for transmission service remain just and reasonable and not unduly discriminatory or preferential.

13. NRECA, Sunflower/Mid-Kansas, NPPD, Midwest Energy, and APPA contend that the Commission does not have the statutory authority to order or require non-public utility transmission owning members to make refunds, directly or indirectly.¹⁴ NRECA

¹³ SPP Initial Brief at 12-15 (citing *Xcel Energy Servs. Inc. v. Fed. Energy Reg. Comm'n*, 815 F.3d 947, 954-56 (D.C. Cir. 2016) (*Xcel Energy Serv. Inc.*); *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,058 at PP 10-11; Tri-County Remand Order, 156 FERC ¶ 61,057 at P 26; *Sw. Power Pool, Inc.*, 154 FERC ¶ 61,021 (2016); *Sw. Power Pool, Inc.*, 154 FERC ¶ 61,237, at PP 12, 42 (2016); *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,050, at P 38 (2014); *Sw. Power Pool, Inc.*, Opinion No. 535, 149 FERC ¶ 61,051, at P 180 (2014); *Sw. Power Pool, Inc.*, 142 FERC ¶ 61,135, at PP 13-16 (2013); *Sw. Power Pool, Inc.*, 138 FERC ¶ 61,231 (2012)).

¹⁴ NRECA Initial Brief at 10 (citing *Bonneville Power Admin. v. Fed. Energy Reg. Comm'n*, 422 F.3d 908, 924 (9th Cir. 2005) (*Bonneville*)); Sunflower/Mid-Kansas Initial Brief at 4-5; NPPD Initial Brief at 8; Midwest Energy Initial Brief at 7-8; APPA Initial Brief at 2 (citing *Richmond Power & Light v. Fed. Energy Reg. Comm'n*, 574 F.2d 610, 620 (D.C. Cir. 1978) (*Richmond Power*); *Altamont Gas Transmission Co. v. Fed. Energy*

requests that the Commission acknowledge, regardless of the action taken in these proceedings, its statutory limits on its jurisdiction over non-public utilities.¹⁵ NRECA and Sunflower/Mid-Kansas disagree with the Commission's assertion in the July 2016 Order that the SPP Tariff is unjust and unreasonable without a refund commitment from non-public utilities.¹⁶

14. NRECA asserts that the Commission must acknowledge that non-public utilities lie outside the Commission's FPA ratemaking and refund authority, and the Commission's actions here must not be seen as an invitation to revisit established precedent.¹⁷ NRECA states that the participation by non-public utilities in Commission-jurisdictional markets does not provide the Commission with refund authority over non-public utilities, and non-public utilities cannot volunteer to be subject to Commission refund authority.¹⁸ NRECA and APPA thus contend that the Commission does not have the authority "to order refunds from" non-public utility transmission owning members, which it argues, the Commission did in the July 2016 Order.¹⁹ NRECA argues that "it cannot be deemed unjust and/or unreasonable for the Commission not to do something which it is statutorily barred from doing."²⁰ Further, it argues that "there can be no undue discrimination because non-public utilities are not similarly situated with public utilities for purposes of [the Commission's] refund authority."²¹ NRECA argues that, even if the Commission determines that the SPP Tariff is unjust, unreasonable, unduly

Reg. Comm'n, 92 F.3d 1239 (D.C. Cir. 1996) (*Altamont*), *cert. denied sub nom.*, *Indicated Expansion Shippers v. Fed. Energy Reg. Comm'n*, 520 U.S. 1204 (1997)).

¹⁵ DOE Comments at 4.

¹⁶ NRECA Initial Brief at 10; Sunflower/Mid-Kansas Initial Brief at 5.

¹⁷ NRECA Initial Brief at 9.

¹⁸ *Id.* at 10.

¹⁹ *Id.* at 10-11; APPA Initial Brief at 2 (citing *Transmission Agency of N. Cal. v. Fed. Energy Reg. Comm'n*, 495 F.3d 663, 676 (D.C. Cir. 2007) (*TANC*)).

²⁰ NRECA Initial Brief at 11.

²¹ *Id.*

discriminatory, or preferential without a refund commitment, it should not reopen debate on fundamental jurisdictional issues.²²

15. NRECA asserts that, if the Commission does not change its positions from the July 2016 Order, it must proceed similar to the Order No. 888 reciprocity provision by acknowledging its inability to require refunds and by providing that the refund commitment is a condition precedent to non-public utility transmission owners recovering revenues through the SPP Tariff “associated with service provided due to their status as transmission-owning RTO members.”²³

16. APPA concedes that the Commission may review a public power utility’s transmission revenue requirement if it is included in an RTO’s rates, but states that any revision of the SPP Tariff arrangements should respect the “established limitations on the Commission’s authority.”²⁴ NPPD states that there have been no changed circumstances or new evidence that would allow the Commission to meet the legal basis for finding the SPP Tariff unjust and unreasonable.²⁵ Similarly, APPA states that a generic finding that the SPP Tariff must be revised to require a broad refund commitment by all non-public utility transmission owning members is inappropriate and unjustified because there may be no basis for ordering Tariff revisions until the Commission has considered specific tariff provisions to determine if they are unjust and unreasonable.²⁶

b. Reply Briefs

17. NRECA reiterates its argument that Congress has prohibited the Commission from ordering non-public utilities to make refunds.²⁷

c. Commission Determination

18. We reject certain parties’ claims that the Commission has no authority to require SPP to revise the SPP Tariff or governing documents to include a refund commitment by non-public utility transmission owning members whose revenue requirements are

²² *Id.*

²³ *Id.* at 12.

²⁴ APPA Initial Brief at 2.

²⁵ NPPD Initial Brief at 10, 12-13.

²⁶ APPA Initial Brief at 3.

²⁷ NRECA Reply Brief at 3-5.

recovered under the SPP Tariff. The FPA requires the Commission to assure that the jurisdictional rates charged by RTOs, such as SPP, are just and reasonable.²⁸ When a non-public utility becomes a participating transmission owner in an RTO, its transmission revenue requirement becomes a component of the RTO's jurisdictional rate.²⁹

Accordingly, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has held that the Commission has jurisdiction under the FPA to “analyze and consider the rates of [non-public] utilities to the extent that those rates affect jurisdictional transactions” through their inclusion in the RTO's rates.³⁰ The Commission reviews such non-public utility rates under the statutory just and reasonable standard.³¹ The reason for applying this standard is that “it is impossible to ensure that [an RTO's] rates are just and reasonable without reviewing [a non-public utility transmission owning member's] rates under the same standard.”³²

19. However, as the Commission acknowledged in the July 2016 Order, the Commission's rate jurisdiction under FPA section 205 and its refund jurisdiction under FPA section 206 “expressly apply only to public utilities.”³³ Thus, the Commission does not “have refund authority over . . . governmental entities and non-public utilities.”³⁴

20. In fact, the Commission's established policy acknowledges the limits of the Commission's authority. Pursuant to this policy, when an RTO proposes to include a non-public utility's revenue requirement in the RTO's rates, the RTO may not implement that proposal unless the non-public utility makes a voluntary commitment to make refunds if the rate, as filed, is later found to be not just and reasonable. In *Xcel Energy Serv. Inc.*, the D.C. Circuit acknowledged the Commission's policy in this regard and

²⁸ *Pac. Gas & Elec. Co. v. Fed. Energy Reg. Comm'n*, 306 F.3d 1112, 1114 (D.C. Cir. 2002) (*Pac. Gas & Elec. Co.*).

²⁹ *TANC*, 495 F.3d at 671-72 (finding that once a municipality becomes a participating transmission owner, its transmission revenue requirement becomes a component of the rate design under which an RTO operates).

³⁰ *Pac. Gas & Elec. Co.*, 306 F.3d at 1114; *TANC*, 495 F.3d at 667.

³¹ *TANC*, 495 F.3d at 671-72.

³² *Id.* at 672.

³³ *Bonneville*, 422 F.3d 908, 911; *see also TANC*, 495 F.3d at 673.

³⁴ *Bonneville*, 422 F.3d at 911.

held that the Commission erred by failing to adhere to its policy and by not providing full retroactive relief to remedy this error.³⁵

21. Contrary to parties' assertions, the July 2016 Order and the Commission's policy with regard to non-public utility RTO transmission owners do not extend the limits of the Commission's authority or provide the Commission with the ability to order non-public utility transmission owning members to provide refunds. To this point, we note that, in *TANC*, the D.C. Circuit held that a non-public utility's voluntary contractual commitment to make refunds does not authorize the Commission to issue an order requiring the non-public utility to make refunds.³⁶ Nor does the Commission have authority to enforce the contract. However, as the United States Court of Appeals for the Eighth Circuit held in *Alliant Energy v. Nebraska Public Power District*, a court can enforce such a contractual agreement.³⁷ For these reasons, we clarify that the refund commitment described in the July 2016 Order and here must be a contractual commitment that is enforceable by the court, not the Commission.

22. APPA has suggested that the refund commitment requirement sought by the July 2016 Order is an attempt by the Commission to achieve indirectly what it cannot do directly. In support of this argument, APPA cites *Richmond Power*³⁸ and *Altamont*.³⁹ However, the situation at hand is distinguishable from the circumstances underlying those cases.

23. *Richmond Power* involved electricity transfers during the 1970s oil embargo whereby heavily oil-dependent utilities sought electricity from regions with excess non-oil-fired capacity. The Federal Power Commission approved rate schedules for a "series of transfers" with rate structures resembling "those frequently employed for short-term power, including recovery of the replacement cost of fuel, incremental operating costs . . . and a pro rata share of fixed costs."⁴⁰ *Richmond Power and Light Company* objected to the proposed rates, and the Commission instituted a rulemaking proceeding in which

³⁵ 815 F.3d at 950 (citing *Lively Grove Energy Partners, LLC*, 140 FERC ¶ 61,252, at P 47 & n.59 (2012)).

³⁶ *TANC*, 495 F.3d at 675.

³⁷ 347 F.3d 1046, 1050 (8th Cir. 2003).

³⁸ 574 F.2d 610 at 620.

³⁹ 92 F.3d 1239 at 1248; see APPA Initial Brief at 2.

⁴⁰ *Richmond Power*, 574 F.2d at 613.

Richmond Power and Light Company further complained that the Commission erred by rejecting “a single joint rate for a transmission crossing two or more systems as opposed to individual rates for each utility or power pool involved in the transaction.”⁴¹

Richmond Power and Light Company acknowledged that establishment of such a rate “would be feasible only if the Commission could order all intervening utilities to wheel electricity.”⁴² The court explained, however, that Congress did not provide the Commission with the authority to mandate wheeling. It was in this context that the court explained that the Commission could not indirectly require wheeling by rejecting proposals that did not mandate wheeling.⁴³

24. The situation here is distinguishable because in *Richmond Power*, the court focused on the Commission’s ability to reject rates that were otherwise just and reasonable to accomplish something that Congress did not authorize the Commission to do.⁴⁴ Conversely, the issue here involves rates that, without the establishment of a refund commitment, would be unjust and unreasonable. In the July 2016 Order, the Commission proposed to require non-public utility transmission owning members to commit to provide refunds in situations where the Commission finds the inclusion of their revenue requirement in SPP’s jurisdictional rates has caused some aspect of SPP’s jurisdictional rates to be unjust and unreasonable. As the Commission noted in the July 2016 Order, currently, refund commitments provided by the non-public utility transmission owning members do not apply to the full range of situations in which they may receive revenues associated with service provided due to their status as transmission-owning RTO members based on RTO rates, terms or conditions that are found to be unjust and unreasonable, in the same manner that public utility transmission owners could be

⁴¹ *Id.* at 614.

⁴² *Id.* at 619.

⁴³ *Id.* at 620.

⁴⁴ *Id.*; see also *Nat’l Fuel Gas Supply Corp. v. Fed. Energy Reg. Comm’n*, 909 F.2d 1519, 1522 (D.C. Cir. 1990) (“The Commission may not . . . when it lacks the power to promote the public interest directly, do so indirectly by attaching a condition to a certificate that is in, unconditional form, already in the public convenience and necessity”).

required to provide refunds of such revenues under FPA sections 205 or 206.⁴⁵ Absent such a commitment, SPP's resulting jurisdictional rates may not be just and reasonable.⁴⁶

25. The present case is also distinguishable from the circumstances underlying *Altamont*, where the D.C. Circuit found that the Commission exceeded its jurisdiction under the Natural Gas Act by conditioning the issuance of a certificate to an interstate pipeline on that pipeline lowering its authorized return on equity until the pipeline's interconnecting intrastate affiliate removed certain anti-competitive provisions from its intrastate rates. The court in *Altamont* stated that the Commission's action was intended to influence "rate policies approved or required by the [state commission]" that are wholly "within the jurisdiction of the [state commission]."⁴⁷ Characterizing the Commission's action there, the court stated that, "recognizing that it could not lawfully regulate [an intrastate pipeline's] rates, the Commission moved indirectly but frankly to 'induc[e] a change to a policy beyond [its] jurisdictional purview.'"⁴⁸ The court pronounced that "the Commission ordinarily has the authority to consider a matter beyond its jurisdiction if the matter affects jurisdictional sales—at least if there would otherwise be a regulatory gap—here there is no such gap."⁴⁹ The court further pronounced that the Commission was "attempting to . . . intercede in a matter the Congress has reserved to the state."⁵⁰

26. The situation here is distinguishable from that in *Altamont* in multiple respects. First, the Commission will not be enforcing any refund commitment to be included in the SPP Tariff and governing documents; any contractual refund commitment would be enforced in a court of law. Second, here, the Commission's exclusive objective is to include new refund commitments related to non-public utility rates recovered through the SPP Tariff, a document that falls within the Commission's FPA jurisdiction and for which the Commission must ensure just and reasonable rates, terms, and conditions. Third, unlike the situation in *Altamont*, the lack of refund commitments for non-public utilities that have collected or will collect unjust and unreasonable rates affects Commission jurisdictional services. Fourth, non-public utilities would only be subject to

⁴⁵ July 2016 Order, 156 FERC ¶ 61,059 at P 7.

⁴⁶ *Id.* P 8.

⁴⁷ 92 F.3d at 1246.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1248.

⁵⁰ *Id.*

refund commitments to the extent that they wish to remain or become SPP transmission owners.

27. The proposal as laid out in the July 2016 Order gives non-public utility transmission owning members the choice to leave SPP if SPP membership is no longer financially advantageous. The Commission is, however, under no obligation to permit non-public utilities that choose to become members of SPP and to recover revenues through the SPP Tariff to collect unjust and unreasonable rates through an RTO's jurisdictional tariff without any consequence. We acknowledge, as NRECA requests and as discussed above, that we lack the statutory authority to order non-public utility transmission owners to make refunds. Instead, the refund commitment would serve as a condition precedent for non-public utility transmission owning members to recover revenues through the SPP Tariff associated with service provided due to their status as transmission-owning RTO members and based on a choice they made to become members and to recover revenues through the SPP Tariff.

28. For these reasons, we disagree with parties that characterize the requirements of the July 2016 Order as an attempt to extend the Commission's FPA authority, and find that we have the authority to require SPP to revise the SPP Tariff and/or governing documents to include a refund commitment by non-public utility transmission owning members whose revenue requirements are recovered under the SPP Tariff.

2. Process

a. Initial Briefs

29. SPP argues that the Commission should allow stakeholders to develop any necessary changes to SPP's governing documents. SPP asserts that, given the complex legal and practical issues involved in any change to address the disparity in refund obligations between public and non-public utilities, SPP's stakeholder process is the appropriate forum to vet any proposed revisions to the SPP Tariff or other governing documents to resolve issues identified by the Commission. SPP observes that the Commission proposes to require revisions to the SPP Tariff;⁵¹ however, the more appropriate fix may be to adopt revisions to the Membership Agreement or other governing documents, either in lieu of, or in concert with, Tariff revisions. SPP notes that SPP transmission owners, including all non-public utility transmission owning members that recover revenue requirements under the SPP Tariff, are required to sign the Membership Agreement as transmission owners and comply with all the associated obligations.

⁵¹ SPP Initial Brief at 9 (citing July 2016 Order, 156 FERC ¶ 61,059 at P 9).

30. SPP states that this matter is currently assigned to the Strategic Planning Committee of the SPP Board of Directors. SPP proposes to file changes with the Commission by August 31, 2017, which will allow the SPP Board of Directors adequate time to review and approve the stakeholder proposal at its July 2017 meeting.⁵² SPP also offers to provide updates to the Commission as to the status of the stakeholder efforts.

31. Several parties also argue that the Commission should allow the stakeholder process to develop a solution.⁵³ NRECA states that stakeholders could develop *pro forma* language to be included in the appropriate governing documents.

b. Reply Briefs

32. NPPD, NRECA, and Midwest Energy state that there is broad consensus that the stakeholder process is the most appropriate vehicle to resolve the issue of refunds by non-public utility entities, and urge the Commission to defer any ruling on the non-public utility refund issue until the SPP stakeholder process has reached its conclusion.⁵⁴ Midwest Energy observes that this broad consensus is indicative that SPP's stakeholders are willing to work cooperatively and productively to determine a solution that will be satisfactory to the parties and the Commission.⁵⁵

c. Commission Determination

33. As noted above, SPP and its stakeholders have initiated a stakeholder proceeding to explore possible changes to the SPP Tariff or governing documents to address the lack of a refund commitment for non-public utility transmission owning members. We note that the stakeholder process is supported by SPP and virtually all the commenters to this proceeding, and that SPP has stated that it will file a proposal by February 28, 2018. Accordingly, to allow this stakeholder process to continue its discussions, we will hold the FPA section 206 paper hearing in abeyance. We accept SPP's commitment to

⁵² As discussed above, on August 31, 2017, SPP submitted correspondence requesting additional time for SPP and its stakeholders to develop a proposal to address the Commission's concerns. SPP anticipates that it will make a filing addressing the issues on or before February 28, 2018.

⁵³ NRECA Initial Brief at 14; NPPD Initial Brief at 14; OPPD Initial Brief at 3; Sunflower/Mid-Kansas Initial Brief at 6-8; Basin Electric Comments at 2; Midwest Energy Initial Brief at 3-6; SPP Indicated Transmission Owners; DOE Comments at 3-4.

⁵⁴ NPPD Reply Brief at 2; NRECA Reply Brief at 6-7; Midwest Energy Reply Brief at 1-2.

⁵⁵ Midwest Energy Reply Brief at 3.

provide updates on the status of the stakeholder process and, therefore, we direct SPP to file a report updating the Commission on the status of the stakeholder process by December 15, 2017. In addition, we will require SPP to submit a compliance filing with a proposal to address the lack of a refund commitment for non-public utility transmission owning members by February 28, 2018 explaining how its proposal satisfies the Commission's concerns in the July 2016 Order, regardless of the outcome of the stakeholder process, or show cause as to why revisions to the SPP Tariff or other governing documents are not necessary.

34. We recognize that the July 2016 Order instituting this FPA section 206 proceeding stated that the purpose of this proceeding is “to examine the SPP Tariff,” and the July 2016 Order made no reference to the SPP Membership Agreement or any other document except the SPP Tariff. However, the refund commitment sought by the July 2016 Order is intended make non-public utility transmission owning members “subject to the same refund obligations as public utility transmission owners on all matters involving the justness and reasonableness of revenues that they may receive associated with service provided due to their status as transmission-owning RTO members based on RTO rates”⁵⁶ We believe that goal may require revising the SPP Membership Agreement and other jurisdictional documents, as well as the SPP Tariff. For this reason, SPP and its stakeholders should consider revisions to all Commission-jurisdictional documents, including the SPP Membership Agreement, that are necessary to effectuate this result.

35. Accordingly, in order to ensure that all relevant documents may be examined and revised pursuant to FPA section 206, we institute a proceeding in Docket No. EL18-19-000, pursuant to FPA section 206, to examine the SPP Membership Agreement and any other Commission-jurisdictional SPP documents that must be revised to fully implement the refund commitment concerns identified in the July 2016 Order. The concerns identified by the Commission in the July 2016 Order might be addressed by revising the SPP Membership Agreement and any other Commission-jurisdictional SPP documents to require a prospective refund commitment from non-public utility transmission owning members for all manner of refunds that may be ordered in FPA section 205 and 206 proceedings related to revenues that they may receive associated with service provided due to their status as transmission-owning RTO members. Under the refund commitment, non-public utility transmission owning members would be subject to the same refund obligations as public utility transmission owners on all matters involving the justness and reasonableness of revenues that they may receive associated with service provided due to their status as transmission-owning RTO members based on RTO rates, including, but not limited to, refunds (1) to correct any errors in the application of their formula rates, (2) to remedy any other elements of, or costs passed through, their formula

⁵⁶ July 2016 Order, 156 FERC ¶ 61,059 at P 9.

rates that are found to be unjust and unreasonable, or (3) to remedy any rules governing allocation of SPP Tariff revenues among transmission owners that are found to be unjust and unreasonable. Additionally, SPP would revise the SPP Membership Agreement and any other Commission-jurisdictional SPP documents such that any new non-public utility transmission owning members must also commit to providing refunds consistent with the terms of this commitment before they may recover their transmission revenue requirement(s) through SPP Tariff rates. As ordered below, any person desiring to participate in the paper hearing must file a notice of intervention or timely motion to intervene, as appropriate, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017).

36. In cases where, as here, the Commission institutes a proceeding under FPA section 206, the Commission must establish a refund effective date that is no earlier than publication of notice of the Commission's initiation of the proceeding in the *Federal Register*, and no later than five months subsequent to that date.⁵⁷ Consistent with Commission precedent,⁵⁸ we will establish a refund effective date at the earliest date allowed, i.e., the date the notice of the initiation of the proceeding in Docket No. EL18-19-000 is published in the *Federal Register*. The Commission is also required by FPA section 206 to indicate when it expects to issue a final order. We expect to issue a final order in this proceeding by April 30, 2018.

37. We will consolidate the new proceeding in Docket No. EL18-19-000 with the current proceeding in Docket No. EL16-91-000 for purposes of the paper hearing established by the July 2016 Order, and, consistent with our determination above, we will hold the proceeding in Docket No. EL18-19-000, along with the proceeding in Docket No. EL16-91-000, in abeyance pending completion of the SPP stakeholder process.

3. Scope of Refund Commitment

a. Initial Briefs

38. SPP argues that requesting individual refund commitments or seeking clarification to withhold funds for every situation in which the Commission may eventually order refunds is impractical, imposes a large legal and administrative burden on SPP, and is insufficient to provide adequate ratepayer protection. According to SPP, a blanket refund obligation, tailored to address the various non-public utility restrictions currently

⁵⁷ 16 U.S.C. § 824e(b) (2012).

⁵⁸ See, e.g., *PJM Interconnection, L.L.C.*, 90 FERC ¶ 61,137 (2000); *Cambridge Elec. Light Co.*, 75 FERC ¶ 61,177, clarified, 76 FERC ¶ 61,020 (1996); *Canal Elec. Co.*, 46 FERC ¶ 61,153, reh'g denied, 47 FERC ¶ 61,275 (1989).

contained in the SPP Tariff and governing documents, would avoid these burdens and better ensure just and reasonable rates, terms, and conditions under the SPP Tariff.

39. NRECA argues that the lack of a refund commitment in the SPP Tariff requiring non-public utility transmission owning members to refund revenues in the same manner as public utility transmission owners under FPA section 205 or 206 is misplaced and inaccurate.⁵⁹ For example, NRECA notes that the Commission has successfully conditioned implementation of FPA section 205 proposals to include transmission revenue requirements of non-public utilities in the SPP Tariff on the non-public utilities' agreement to make refunds. NRECA acknowledges the Commission's concern over its ability to ensure a refund commitment in subsequent FPA section 205 or FPA section 206 proceedings; however, both NRECA and DOE caution the Commission against undermining the progress made in non-public utility transmission owning members becoming members of SPP.⁶⁰ NRECA states that the Commission has long acknowledged that participation by non-public utilities in RTOs will provide many reliability and economic benefits and is vital to ensure appropriate size and scope of RTOs.

40. NRECA and Sunflower/Mid-Kansas state that one area of concern is the impact of a Commission determination on non-public utilities that are subject to state commission ratemaking jurisdiction.⁶¹ NRECA notes that SPP has adopted Commission-approved provisions to protect non-public utilities from violating state or federal law, or allow them to terminate their membership if necessary to maintain compliance with federal or state law, and that these provisions must not be undermined in this proceeding.⁶² Additionally, NPPD, APPA, and OPPD are concerned that a broad refund requirement on all non-public utilities could cause certain non-public utilities to be in conflict with state law.⁶³ NPPD and OPPD state that they cannot agree to an unknown level of retroactive refund liability flowing from a future potential FPA section 206 proceeding because their

⁵⁹ NRECA Initial Brief at 3.

⁶⁰ *Id.* at 7; DOE Comments at 6-7.

⁶¹ NRECA Initial Brief at 8; Sunflower/Mid-Kansas Initial Brief at 8.

⁶² NRECA Initial Brief at 8-9; OPPD Initial Brief at 3; DOE Comments at 5.

⁶³ NPPD Initial Brief at 13-14; APPA Initial Brief at 3; OPPD Initial Brief at 2.

revenue requirements and rates must be approved by their publicly-elected Board of Directors.⁶⁴

41. Similarly, DOE states that the ability of Western-UGP and Southwestern Power Administration, as federal power marketing agencies, to spend money is limited to appropriation acts. Thus, DOE cannot commit contractually to a refund obligation that is entirely open-ended in its amount and potential causes.⁶⁵

42. NRECA states that the governing documents should state that non-public utility transmission owning members' voluntary commitment to make refunds for Commission determinations of the justness and reasonableness of revenues received associated with transmission service under the MISO or SPP Tariff does not affect the non-public utilities' jurisdictional status. Additionally, NRECA argues that the scope of the refund commitment must be limited to revenues associated with transmission services, not revenues from non-public utility participation in other markets and services. Further, NRECA states that the governing documents should include the procedures for removal of revenue requirements for non-public utility transmission owning members who do not agree to the refund commitment. NRECA and Midwest Energy state that, if a non-public utility has its revenue requirement removed from the SPP Tariff, the non-public utility might elect to withdraw its facilities from the SPP Tariff and operational control of SPP as well and/or might wish to terminate its membership in the RTO.⁶⁶ DOE states that flexibility is needed because Southwestern Power Administration is not a transmission owner and has not entered into an SPP Membership Agreement even though it has agreed to allow SPP to utilize its transmission system.⁶⁷

43. NPPD states that its concerns could be addressed by providing a process for obtaining limited waivers of such obligation for non-public utility transmission owning members that have procedures already in place to maintain the justness and reasonableness of rates.⁶⁸ At a minimum, NPPD states that the existing provisions in the governing documents that address resolution of conflicts between revisions to the SPP Tariff and state laws must remain in place. NPPD states that these provisions allow non-

⁶⁴ NPPD Initial Brief at 3; OPPD Initial Brief at 2.

⁶⁵ DOE Comments at 3.

⁶⁶ NRECA Initial Brief at 14-15; Midwest Energy Initial Brief at 7-8.

⁶⁷ DOE Comments at 9.

⁶⁸ NPPD Initial Brief at 4, 13-14.

public utilities to remain compliant with state law while working on ways to resolve such conflict at the Commission.

44. While Midwest Energy is not necessarily opposed to a refund requirement for non-public utility transmission owning members under the SPP Tariff, Midwest Energy does have concerns regarding how such a commitment would be structured.⁶⁹ Midwest Energy states that its revenue requirement is approved by a state commission, and that the refund commitment process should not result in Midwest Energy being caught between conflicting commission orders or provide protesters an opportunity to collaterally attack the state commission's decision.

45. Midwest Energy states that the refund effective date should be revised so that non-public utility transmission owning members will be fully aware of their potential refund exposure before committing to a retroactive refund obligation. Midwest Energy states that the refund obligation should be effective only when the revisions to the SPP governing documents become effective.⁷⁰

46. SPP Indicated Transmission Owners state that, unless the Commission were to require a refund commitment from non-public utility transmission owning members, others in SPP may end up paying for unlawful rates.⁷¹ If the Commission does not order a stakeholder process, the SPP Indicated Transmission Owners state that the following language should be added to the SPP Membership Agreement:

Transmission Owner shall refund, consistent with any refund order issued by FERC, any amounts collected in excess of FERC-approved rates, regardless of when such amounts were billed or collected.^[72]

b. Reply Briefs

47. NPPD and Midwest Energy disagree with SPP Indicated Transmission Owners' suggestion that, if the Commission does not hold the paper hearing in abeyance, the Membership Agreement should be revised to clarify that all Transmission Owners have committed to provide refunds to SPP in the event those Transmission Owners receive

⁶⁹ Midwest Energy Initial Brief at 4.

⁷⁰ *Id.* at 10.

⁷¹ SPP Indicated Transmission Owners Initial Brief at 3.

⁷² *Id.* at 4.

revenues that have been determined to be unlawful.⁷³ Midwest Energy argues that the SPP Indicated Transmission Owners' "one size fits all" proposal is too open-ended and subject to varying interpretations to be an effective solution, it could have the potential to cause confusion, and years of protracted and costly litigation as a result of attempts to interpret it.

48. Midwest Energy argues that any solution should not upset the balance currently in place in SPP's governing documents that accommodate non-public utility transmission owning members' status, balance the requirements of federal and state laws, and encourage non-public utility transmission owning members to join RTOs like SPP.⁷⁴

49. Midwest Energy agrees with NRECA's recommendation that the scope of the refund commitment be limited to revenues associated with transmission service, and not include revenues from non-public utility participation in other markets or services.⁷⁵ Midwest Energy also recommends that any stakeholder process in this proceeding should limit itself to considering only revenues associated with transmission services.

c. Commission Determination

50. Given our finding to hold the paper hearing in abeyance pending stakeholder proceedings to explore possible changes to the SPP Tariff or governing documents to address the lack of a refund commitment for non-public utility transmission owning members, we decline to make findings on the scope of the refund commitment in this order.

4. Requests for Clarification

51. In connection with its request that the Commission hold the proceeding in abeyance, SPP seeks clarification on several aspects of the Commission's July 2016 Order. Specifically, SPP requests that the Commission: (1) confirm that SPP would be required to remove the transmission owner's facilities from the SPP Tariff and SPP's functional control if the non-public utility transmission owning member declines to be subject to a refund obligation, and any such removal will be subject to the procedures and requirements in the SPP Bylaws and individual Membership Agreements; (2) clarify that any directives will allow flexibility for SPP to develop a proposal that recognizes Western-UGP's unique status; (3) allow SPP to propose the effective date of any

⁷³ Midwest Energy Reply Brief at 3; NPPD Reply Brief at 3-4.

⁷⁴ Midwest Energy Reply Brief at 4 (citing NRECA Initial Brief at 7-8; Sunflower/Mid-Kansas Initial Brief at 2; DOE Comments at 5-7).

⁷⁵ *Id.* (citing NRECA Initial Brief at 13).

revisions; (4) clarify whether SPP can obtain refund commitments from all non-public utility transmission owning members at the time that it adopts the Tariff revisions, and that SPP can initiate the process to remove any transmission owners that decline to be bound by the refund obligation at that time; (5) clarify that the reason for excluding revenues and credits that a non-public utility transmission owning member may receive as a market participant for sales into the SPP markets or as a transmission customer is because the SPP Tariff's provisions for resettlement of transmission service charges and energy market charges already contractually obligates all market participants and customers to refund any excess revenues or credits, and that nothing in the July 2016 Order or any future order affects SPP's ability to effectuate netting of market participant charges and credits and transmission service charges and credits under existing Tariff provisions; and (6) find that SPP is never required to provide refunds until it is able to recover the associated revenues.

a. Removal of Facilities from SPP Functional Control

i. SPP Initial Brief

52. SPP notes that, under the Commission's proposal, if a non-public utility transmission owning member declines to be subject to a refund obligation, SPP would remove that member's transmission revenue requirement from the SPP Tariff effective as of a prospective date established by the Commission. SPP states that it is unclear whether the Commission's proposal envisions that the transmission owner's facilities would remain under SPP's functional control. Moreover, SPP states that the SPP Membership Agreement imposes on SPP the obligation to maximize transmission service revenues associated with transmission service that it provides using its members' transmission facilities,⁷⁶ and it is unclear how SPP could do so if it removes a transmission owner's revenue requirements from the SPP Tariff but continues to provide service over that transmission owner's facilities. Thus, SPP requests that the Commission confirm SPP's interpretation that the Commission's proposal requires not only that SPP remove the transmission revenue requirements from the SPP Tariff, but that SPP also remove the transmission owner's facilities from the SPP Tariff and SPP's functional control. SPP also requests that the Commission clarify that any such removal will be subject to the detailed procedures and requirements set forth in the SPP Bylaws and individual Membership Agreements to process a member's termination from SPP.⁷⁷ SPP argues that a non-public utility transmission owning member that declines to abide by the proposed refund obligation should not be permitted to escape these important obligations. Additionally, SPP states that removal of a transmission owner's

⁷⁶ SPP Initial Brief at 17 (citing Membership Agreement § 2.3(c)).

⁷⁷ *Id.* at 18-19 (citing Membership Agreement §§ 4.3.1, 4.3.2, 4.3.3, 4.3.3A; Bylaws §§ 8.7, 8.7.3, 8.7.4).

transmission facilities from the SPP Tariff potentially could redefine the scope and configuration of the SPP Region and Transmission System and could affect other transmission owners that are interconnected to the SPP Transmission System through the facilities of the transmission owner that is being removed.

ii. Commission Determination

53. We grant clarification that, if SPP is required to remove a non-public utility transmission owning member's transmission revenue requirement from the SPP Tariff, SPP should remove the non-public utility transmission owning member's facilities from the SPP Tariff and SPP's functional control. In addition, we grant clarification that any removal will be subject to the procedures and requirements in the SPP Bylaws and individual Membership Agreements.

b. Flexibility Regarding Western-UGP's Status

i. SPP Initial Brief

54. SPP observes that it is the only RTO with a federal power marketing agency participating as a transmission owner, Western-UGP, whose incorporation as a transmission owner under the SPP Tariff was highly complex and required a host of revisions to the SPP Tariff, Membership Agreement, and SPP Bylaws to account for Western-UGP's unique status. SPP argues that the Commission should clarify that any directives issued in this proceeding will allow sufficient flexibility for SPP to develop a proposal that recognizes and addresses the unique status of the SPP Tariff and Membership Agreement provisions applicable to specific non-public utility transmission owning members in SPP.

ii. Reply Brief

55. Midwest Energy agrees that Western-UGP has unique circumstances that must be taken into account when determining a solution in this proceeding.⁷⁸

iii. Commission Determination

56. We grant clarification that SPP should have flexibility to develop a proposal that recognizes the unique status of Western-UGP. As SPP states, it is the only regional transmission operator with a federal power marketing agency participating as a transmission owner, whose incorporation was highly complex and required revisions to the SPP Tariff, Membership Agreement, and SPP Bylaws to account for Western-UGP's unique status under federal law. Notably, Western-UGP's transmission rates are

⁷⁸ Midwest Energy Reply Brief at 5.

determined in accordance with the delegation letter from the Secretary of Energy to the Commission, and, thus, Western-UGP's rates are not subject to the same FPA section 205 review under the SPP Tariff as other non-public utility transmission owning members and flexibility is warranted.⁷⁹ We note, however, that it may be appropriate to require a commitment from Western-UGP for other refunds such as those resulting from changes in cost allocation or revenue distribution provisions, as we would require from other transmission owners to ensure that costs are being allocated, and revenues are being distributed, in a just and reasonable manner.

c. Effective Date

i. SPP Initial Brief

57. SPP notes that, in the July 2016 Order, the Commission stated that it does not expect to issue a final order in the proceeding until March 31, 2017, yet it established a refund effective date of July 28, 2016.⁸⁰ SPP argues that it will have been providing service over the facilities of non-public utility transmission owning members, and collecting rates and distributing revenues related to such service, for more than ten months by the time the Commission issues its final order. SPP claims it is also unclear from the July 2016 Order what is meant by the proposal that SPP would remove a transmission owner's revenue requirements from the SPP Tariff "as of a prospective date to be determined by the Commission."⁸¹ SPP requests, given these ambiguities, that the Commission allow SPP to propose the effective date of any revisions to the SPP Tariff or other governing documents that may be adopted as a result of this proceeding.

ii. Commission Determination

58. We grant clarification and allow SPP to propose a prospective effective date for any revisions to the SPP Tariff or governing documents. We note, however, that the Commission will ultimately determine whether the proposed effective date is reasonable as part of its evaluation of SPP's compliance filings ordered below.

⁷⁹ *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,113, at PP 48-50 (2014), *reh'g denied*, 153 FERC ¶ 61,051 (2015).

⁸⁰ SPP Initial Brief at 21 (citing July 2016 Order, 156 FERC ¶ 61,059 at P 12).

⁸¹ *Id.* (citing July 2016 Order, 156 FERC ¶ 61,059 at P 9).

d. **Timing to Obtain Refund Commitments and Initiate Removal Process**

i. **SPP Initial Brief**

59. SPP seeks clarification on the Commission's proposal that SPP adopt Tariff revisions "to require a prospective refund commitment from non-public utility transmission owners for all manner of refunds that may be ordered in FPA section 205 and 206 proceedings related to revenues that they may receive associated with service provided due to their status as transmission-owning RTO members."⁸² SPP states that the language could require that, upon adoption of the Tariff revisions, SPP must seek and obtain a refund commitment from all non-public utility transmission owning members for all future instances in which the Commission makes a determination that an existing Tariff provision, rate, or rate input is not just and reasonable. Alternatively, SPP states that the language could require SPP to adopt the Tariff revisions now, but not require SPP to seek refund commitments from non-public utility transmission owning members until such time as the Commission makes an initial determination that an existing provision of the SPP Tariff or any rate or rate input is unjust and unreasonable. SPP contends that the Commission should allow SPP to obtain refund commitments from all non-public utility transmission owning members at the time that it adopts the Tariff revisions establishing the refund commitment, and that the Commission should state that SPP is empowered to initiate the process to remove any transmission owners that decline to be bound by the refund obligation at that time.

ii. **Commission Determination**

60. We grant clarification that SPP would obtain refund commitments from all non-public utility transmission owning members at the time that it adopts the Tariff revisions establishing the refund commitment, as well as initiate the process to remove any transmission owner's transmission assets from SPP's functional control at that time (rather than requiring SPP to wait until after the Commission orders refunds in a particular case to initiate the process). Such removal must be consistent with the applicable provisions for the withdrawal of transmission owners in the SPP Tariff and governing documents.

⁸² *Id.* (citing July 2016 Order, 156 FERC ¶ 61,059 at P 9).

e. **Exclusion of Certain Revenues or Credits**

i. **SPP Initial Brief**

61. SPP states that, in the July 2016 Order, the Commission requested comment “on how to most appropriately define revenues that non-public utility transmission owning members may receive associated with service provided due to their status as transmission-owning RTO members.”⁸³ SPP asserts that the Commission should define the refund commitment broadly to encompass any revenues that a transmission owner may receive from SPP, including but not limited to revenues for transmission service and any revenues that SPP receives as a result of a settlement that SPP proposes to distribute to transmission owners. In addition, SPP states that the Commission noted that the proposed “refund commitment would not relate to revenues or credits that a non-public utility transmission owning member may receive as a market participant for sales into the SPP markets or as a transmission customer (i.e., revenues or credits that other non-public utility market participants and transmission customers also receive).”⁸⁴ SPP asks that the Commission clarify that the reason for excluding these revenues and credits is because the SPP Tariff already contractually obligates all market participants and customers to refund any revenues or credits received in excess of what is appropriate, specifically, SPP Tariff provisions for resettlement of transmission service charges and energy market charges.⁸⁵ Likewise, SPP argues that the Commission should clarify that nothing in the July 2016 Order or any future order issued in this proceeding affects SPP’s ability to effectuate netting of market participant charges and credits and transmission service charges and credits under existing Tariff provisions.⁸⁶

ii. **Commission Determination**

62. We deny SPP’s requests for clarification that the reason for excluding revenues or credits that a non-public utility transmission owning member may receive as a market participant for sales into the SPP markets or as a transmission customer is because the SPP Tariff’s provisions for resettlement of transmission service charges and energy market charges already contractually obligate all market participants and customers, including non-public utilities, to refund any revenues or credits received in excess of what is appropriate. We find that the issue of market-related charges and charges incurred as a transmission customer are beyond the scope of the FPA section 206

⁸³ *Id.* at 23 (citing July 2016 Order, 156 FERC ¶ 61,059 at P 9 n.15).

⁸⁴ *Id.* (citing July 2016 Order, 156 FERC ¶ 61,059 at P 9 n.15).

⁸⁵ *Id.* at 24 (citing SPP Tariff, Part I § 7; SPP Tariff, Attachment AE § 10.1).

⁸⁶ *Id.* (citing SPP Tariff, Attachment AE § 10.0 and Attachment L § I).

proceeding. Moreover, we will deny SPP's request that the Commission clarify that nothing in the July 2016 Order or any future order in this proceeding affects SPP's ability to effectuate netting because SPP's request is overly broad.

f. Limitation on Refund Obligation

i. SPP Initial Brief

63. SPP states that, in the Commission's order addressing the remand of the Tri-County proceeding, the Commission directed SPP to bill Tri-County for the revenue requirements that were improperly collected due to the Commission's error in allowing the rate to go into effect and to refund such revenues to affected customers, but expressly stated that SPP would not be required to provide refunds until it completed any necessary legal proceedings and recovered the revenues from Tri-County.⁸⁷ SPP states that the Commission recognized that, because of its non-profit status, SPP lacks the resources to provide refunds until it recovers the revenues and that requiring immediate refunds would result in a revenue shortfall.⁸⁸ SPP asserts that the Commission should definitively state that SPP is never required to provide refunds until it is able to recover the associated revenues, and the Commission should permit SPP to adopt provisions in the SPP Tariff or other governing documents articulating this limitation on SPP's refund obligations.

ii. Reply Brief

64. Midwest Energy asserts that the Commission should clarify whether SPP must seek and obtain a refund commitment from all non-public utility transmission owning members for all future instances in which the Commission orders a refund associated with service related to non-public utility transmission owning members, or whether SPP must adopt Tariff revisions now, but not seek refund commitments from non-public utility transmission owning members until such time as the Commission makes an initial determination that a refund associated with non-public utility transmission owning members may be required.⁸⁹

iii. Commission Determination

65. We deny SPP's request for clarification that the Commission find that SPP is never required to provide refunds until it is able to recover the associated revenues because the request appears overly broad and unnecessary to grant at this time. SPP cites

⁸⁷ *Id.* (citing Tri-County Remand Order, 156 FERC ¶ 61,057 at P 26).

⁸⁸ *Id.* at 25 (citing Tri-County Remand Order, 156 FERC ¶ 61,057 at P 26).

⁸⁹ Midwest Energy Reply Brief at 6 (citing SPP Initial Brief at 21-22).

the Tri-County Remand Order in support of its position, but in that proceeding, SPP did not have a refund commitment from Tri-County. Therefore, the limitation on the pass through of refunds was necessary to protect SPP as a non-profit entity. However, in this proceeding, SPP will be developing a refund commitment, and therefore, this proceeding is distinguishable from the situation in the Tri-County Remand Order. Accordingly, we deny SPP's request clarification on this issue. With regard to Midwest Energy's argument, as discussed above, we clarify that SPP would obtain refund commitments from all non-public utility transmission owning members at the time that it adopts the Tariff revisions establishing the refund commitment (rather than requiring SPP to wait until after the Commission orders refunds in a particular case).

The Commission orders:

(A) The paper hearing in Docket No. EL16-91-000 is hereby held in abeyance, as discussed in the body of this order.

(B) SPP's requests for clarification are granted in part, and denied in part, as discussed in the body of this order.

(C) SPP is hereby directed to file a report updating the Commission on the status of the stakeholder process by December 15, 2017, as discussed in the body of this order.

(D) SPP is hereby directed to submit a compliance filing with a proposal to address the lack of a refund commitment for non-public utility transmission owning members by February 28, 2018 explaining how its proposal satisfies the Commission's concerns in the July 2016 Order, regardless of the outcome of the stakeholder process, or show cause as to why revisions to the SPP Tariff or other governing documents are not necessary, as discussed in the body of this order.

(E) Docket No. EL18-19-000 is hereby consolidated with Docket No. EL16-91-000 and is hereby held in abeyance, as discussed in the body of this order.

(F) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the 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), the Commission hereby institutes a proceeding in Docket No. EL18-19-000, as discussed in the body of this order.

(G) Any interested person desiring to be heard in Docket No. EL18-19-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426,

in accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2017)) within 21 days of the date of issuance of this order.

(H) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation under FPA section 206 of the proceeding in Docket No. EL18-19-000.

(I) The refund effective date in Docket No. EL18-19-000 established pursuant to section 206 of the FPA shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (H) above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.