

171 FERC ¶ 61,142
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Southwest Power Pool, Inc.	Docket Nos. EL16-91-001 EL18-19-001 (consolidated)
Southwest Power Pool, Inc.	ER18-939-000

ORDER GRANTING REHEARING AND DISMISSING COMPLIANCE FILING

(Issued May 21, 2020)

1. On July 21, 2016, pursuant to section 206 of the Federal Power Act (FPA),¹ the Commission instituted a proceeding in Docket No. EL16-91-000² 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.³

2. In an order issued on October 19, 2017, the Commission: (1) held the FPA section 206 paper hearing in abeyance pending the ongoing SPP stakeholder process; (2) granted, in part, and denied, in part, SPP's requests for clarification; (3) addressed some issues raised by parties; (4) directed a compliance filing; (5) instituted a proceeding in Docket

¹ 16 U.S.C. § 824e (2018).

² *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,059 (2016) (July 2016 Order).

³ *Id.* PP 1, 9-10. *See* 16 U.S.C. § 824(f). 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 (2018) *with* 16 U.S.C. § 824c, we nevertheless refer to FPA section 201(f) entities herein as non-jurisdictional entities, non-jurisdictional utilities, or non-public utilities.

No. EL18-19-000 pursuant to FPA section 206 to examine the SPP Membership Agreement (Membership Agreement) and other jurisdictional documents; and (6) consolidated Docket Nos. EL16-91-000 and EL18-19-000.⁴

3. On November 20, 2017, Nebraska Public Power District (NPPD) and American Public Power Association (APPA) submitted timely requests for rehearing of the October 2017 Order. In addition, National Rural Electric Cooperative Association (NRECA) and Midwest Energy, Inc. (Midwest) filed a timely request for rehearing and clarification of the October 2017 Order. On February 28, 2018, SPP submitted a compliance filing in Docket No. ER18-939-000 in response to the October 2017 Order (SPP's Compliance Filing). For the reasons discussed below, we grant rehearing of the October 2017 Order and, accordingly, dismiss SPP's Compliance Filing as moot.

I. Background

A. Non-Public Utility Rates and Refund Commitments

4. FPA section 201(f) exempts certain entities, such as state- or municipally-owned utilities and cooperative utilities, from Part II of the FPA, "unless such provision makes specific reference thereto."⁵ With one limited exception,⁶ sections 205 and 206 of the FPA do not contain such references and, by their terms, apply only to public utilities.⁷ However, the D.C. Circuit has held that when a non-public utility becomes a transmission-owning member of a regional transmission organization (RTO) or independent system operator (ISO) and its revenue requirement becomes a component of the RTO's/ISO's jurisdictional rate, the Commission has jurisdiction to analyze the non-

⁴ *Sw. Power Pool, Inc.*, 161 FERC ¶ 61,062 (2017) (October 2017 Order).

⁵ *See* 16 U.S.C. § 824(f).

⁶ Section 206(e) provides the Commission with refund authority when section 201(f) entities (except for electric cooperatives or entities that sell less than 8,000,000 MWh per year) make voluntary short-term wholesale sales in organized markets under rates established by a Commission-approved tariff and the sale violates the terms of the tariff or applicable Commission rule, subject to additional restrictions as applied to Bonneville Power Administration and Tennessee Valley Authority.

⁷ *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 918 (9th Cir. 2005) (*Bonneville*) ("FERC's rate jurisdiction under § 205 and its refund jurisdiction under § 206 expressly apply only to public utilities"); *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007) (*TANC*) (noting that "the structure of the FPA clearly reflects Congress's intent to exempt governmental entities from FERC's refund authority").

public utility's rates, to the extent that those rates affect jurisdictional transactions, to ensure that the RTO's/ISO's rates remain just and reasonable.⁸

5. Courts previously have found that the authority to review the rates of non-jurisdictional entities, to the extent these rates are included in jurisdictional rates, does not give the Commission the ability to direct non-jurisdictional entities to pay refunds. In *TANC*, for example, the D.C. Circuit found that, although the Commission had authority to review the City of Vernon, California's (Vernon) transmission revenue requirement, it lacked authority to direct Vernon to pay refunds.⁹ The D.C. Circuit expressly rejected the Commission's argument "that it has authority to enforce [an agreement by a non-jurisdictional entity to pay refunds ordered by the Commission] because it was filed by [California Independent System Operator, Inc. (CAISO)], a jurisdictional entity, and approved by FERC."¹⁰

6. Although the Commission "does not have refund authority over . . . governmental entities and non-public utilities,"¹¹ it has established the policy that, "when an RTO proposes to include a non-public utility's revenue requirement in the RTO's rates, the RTO may not implement the 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."¹² That is, where there is a voluntary refund commitment, the Commission will allow an RTO/ISO to collect a non-public utility's proposed rate while the Commission reviews its justness and reasonableness (similar to accepting a public utility's rate subject to refund). However, in the absence of such a voluntary refund commitment, "the Commission will delay the effective date of the proposed rate while it conducts a section 205 review."¹³

⁸ *TANC*, 495 F.3d at 667 (explaining that "FERC may consider the rates of a municipal utility [participating transmission owner] to the extent that they affect the rates of the ISO, which is subject to the FPA") (citing *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1114 (D.C. Cir. 2002)). The Commission thus reviews the non-public utility's rate under the same just and reasonable standard as FPA section 205. *Id.* at 672.

⁹ *Id.* at 673-76.

¹⁰ *Id.* at 676.

¹¹ *Bonneville*, 422 F.3d at 911.

¹² See October 2017 Order, 161 FERC ¶ 61,062 at P 20; *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 950 (D.C. Cir. 2016) (*Xcel*).

¹³ *Xcel*, 815 F.3d at 950.

7. In 2016, the D.C. Circuit held in *Xcel* that the Commission erred by concluding that it had no authority to direct refunds after it failed to apply this established policy and instead allowed SPP's filing of Tri-County Electric Cooperative's (Tri-County) annual transmission revenue requirement (ATRR) to go into effect without suspension or a voluntary refund commitment, despite finding that the rates may be unjust and unreasonable.¹⁴

B. July 2016 Order

8. 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 205¹⁵ when they include the revenue requirement of a non-public utility transmission owning member.¹⁶ These concerns arose in an order that the Commission issued concurrently with the July 2016 Order, on remand from *Xcel*, regarding refunds resulting from SPP's proposed revisions to its Tariff to implement a formula rate for Tri-County.¹⁷ 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.¹⁸ The Commission granted SPP's request,¹⁹ but recognizing the concern regarding the collection of refunds from non-public utility transmission owning members in SPP, the

¹⁴ The Commission initially found that SPP's filing of Tri-County's ATRR may be unjust and unreasonable, but let the rate go into effect on April 1, 2012 without suspension or voluntary refund commitment. Following rehearing, SPP obtained a voluntary commitment from Tri-County to make refunds back to the February 22, 2013 date of the rehearing order. The Commission ultimately determined that Tri-County's facilities were not eligible to be rolled into SPP's revenue requirement. *Id.* at 956.

¹⁵ 16 U.S.C. § 824d.

¹⁶ July 2016 Order, 156 FERC ¶ 61,059 at P 6.

¹⁷ *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,057 (2016).

¹⁸ SPP, Motion for Clarification, Docket No. ER16-791-000 (filed May 13, 2016).

¹⁹ *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,058 (2016).

Commission 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 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 required to provide refunds of such revenues under FPA sections 205 or 206.²⁰

9. 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 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.²¹ 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.²²

²⁰ July 2016 Order, 156 FERC ¶ 61,059 at P 7.

²¹ *Id.* P 9.

²² *Id.*

C. October 2017 Order

10. In the October 2017 Order, the Commission granted in part and denied in part requests in the briefs for clarification of the July 2016 Order, and held in abeyance the paper hearing pending completion of SPP's stakeholder process.²³ Among other things, the Commission clarified that the refund commitment described in the July 2016 Order must be a contractual commitment that is enforceable by the court, not the Commission. The Commission explained that "[w]hen 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."²⁴ The Commission stated that, under its 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."²⁵ The Commission relied on *TANC* for the proposition that "a non-public utility's voluntary contractual commitment to make refunds does not authorize the Commission to issue an order requiring the nonpublic utility to make refunds" and *Alliant* for the proposition that a court may enforce such commitments.²⁶ On the other hand, the Commission described the D.C. Circuit in *Xcel* as acknowledging this policy and holding that the Commission erred in "failing to adhere to its policy and in not providing full retroactive relief to remedy this error."²⁷

11. In addition, the Commission instituted a new proceeding in Docket No. EL18-19-000, pursuant to FPA section 206, to examine the SPP Membership Agreement and other jurisdictional documents and consolidated it with Docket No. EL16-91-000. The Commission also directed SPP to submit a compliance filing by February 28, 2018, with a proposal to address the lack of a refund commitment for non-public utility transmission

²³ October 2017 Order, 161 FERC ¶ 61,062. The Commission granted SPP's request for clarification that it should have flexibility to develop a proposal that recognizes the unique status of Western Area Power Administration (Western) Upper Great Plains (UGP) Region (Western-UGP) as a federal power marketing agency and participating transmission owner in SPP. *Id.* P 56.

²⁴ *Id.* P 18.

²⁵ *Id.* P 20.

²⁶ *Id.* P 21 (citing *TANC*, 495 F.3d at 675; *Alliant Energy v. Neb. Pub. Power Dist.*, 347 F.3d 1046, 1050 (8th Cir. 2003) (*Alliant*)).

²⁷ *Id.* (citing *Xcel*, 815 F.3d at 950 (internal citations omitted)).

owning members or show cause as to why revisions to its Tariff or other governing documents are not necessary.

12. APPA and NPPD filed timely requests for rehearing of the October 2017 Order. NRECA and Midwest filed a timely request for rehearing and clarification of the October 2017 Order. The Kansas Corporation Commission (Kansas Commission) filed an answer in support of NRECA's and Midwest's request for rehearing and clarification.

II. SPP's Compliance Filing

13. On February 28, 2018, SPP made a filing proposing amendments to its Membership Agreement and the company-specific provisions of the Membership Agreement applicable to Western-UGP (Western-UGP Membership Agreement). Specifically, SPP proposes to add a new section 3.0(i) of its Membership Agreement to require non-public utility transmission owning members to pay refunds on any amount collected by SPP on behalf of and distributed to such non-jurisdictional member for overcharges caused by (1) a billing or computational error, as agreed by SPP and the non-jurisdictional member, or (2) the inclusion of facilities not deemed Transmission Facilities, as defined by Attachment AI of the SPP Tariff.

14. SPP also proposes language in new section 3.0(i) of its Membership Agreement to require non-public utility transmission owning members to pay refunds for charges "in excess of the rate ultimately determined in any other order issued by the [Commission] to be just and reasonable" ²⁸ SPP states that such refunds would be limited in the event that the non-jurisdictional member cannot issue refunds because, as the language proposed in new section 3.0(i) provides, "[(1)] its rates are subject to a state regulatory authority authorized by state statute to set transmission rates that are subject to judicial review and [(2)] the refund order issued by the [Commission] is inconsistent with applicable state law, regulation, or regulatory determination." ²⁹

15. With respect to Western-UGP Membership Agreement, SPP proposes new section A1.12, which SPP states will limit and condition Western-UGP's refund obligations as follows: (1) by paying refunds, Western-UGP does not waive its non-jurisdictional status or its rights described in sections 3.10 and 3.11 of the Western-UGP Membership Agreement; (2) Western-UGP's refund obligations shall be prospective from the date of an initial Commission order establishing the date of any refund; (3) Western-UGP shall make a refund only if such refund is not otherwise covered by section 3.10 of the Western-UGP Membership Agreement; and (4) any disputes related

²⁸ SPP Compliance Filing, Docket No. ER18-939-000, Transmittal Letter, at 9 (Feb. 28, 2018) (SPP Compliance Filing Transmittal Letter).

²⁹ *Id.*

to section A1.12 shall be resolved in accordance with federal contract law and interest shall be capped at the Prompt Payment Act interest rates.

III. Notice and Responsive Pleadings

16. Notice of the FPA section 206 proceeding in Docket No. EL18-19-000 initiated in the October 2017 Order 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 was published in the *Federal Register*, 82 Fed. Reg. 49,364 (Oct. 25, 2017) with interventions and protests due on or before November 9, 2017. The notice indicated that the refund effective date will be the date of publication of the notice in the *Federal Register*.

17. The Missouri Public Service Commission filed a notice of intervention. Timely motions to intervene were filed by: Midwest; Associated Electric Cooperative, Inc.; Western Farmers Electric Cooperative; Minnkota Power Cooperative, Inc.; Southwestern Power Administration; Sunflower Electric Power Corporation (Sunflower); Mid-Kansas Electric Company, LLC (Mid-Kansas); NPPD; Xcel Energy Services Inc. (Xcel); APPA; Tri-County; Western Area Power Administration (Western); Southwest Transmission Dependent Utility Group;³⁰ and Michigan Public Power Agency. SPP filed a motion to intervene out of time.

18. Notice of SPP's Compliance Filing was published in the *Federal Register*, 83 Fed. Reg. 9728 (Mar. 7, 2018), with interventions and protests due on or before March 21, 2018.

19. Timely motions to intervene were filed by: ITC Great Plains, LLC; Westar Energy, Inc. (Westar); Mid-Kansas; Sunflower; Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company (KCP&L Companies) Companies; American Electric Power Service Corporation; NPPD; Central Power Electric Cooperative, Inc.; Associated Electric Cooperative, Inc.; Xcel, City Utilities of Springfield, Missouri; United States Department of Energy – Headquarters; Empire District Electric Company; Lincoln Electric; Western; Southwestern Power Administration; Kansas Power Pool; Western Farmers Electric Cooperative; NRECA;

³⁰ Southwest Transmission Dependent Utility Group is comprised of Aguila Irrigation District, Ak-Chin Energy Services, Buckeye Water Conservation and Drainage District, Central Arizona Water Conservation District, Electrical District No. 3, Electrical District No. 4, Electrical District No. 6, Electrical District No. 7, Electrical District No. 8, Harquahala Valley Power District, Hohokam Irrigation and Drainage District, Maricopa County Municipal Water District No. 1, McMullen Valley Water Conservation and Drainage District, City of Needles, Roosevelt Irrigation District, City of Safford, Tonopah Irrigation District, and Wellton-Mohawk Irrigation and Drainage District.

Omaha Public Power District (OPPD); Midwest; APPA; Basin Electric Power Cooperative; Oklahoma Gas and Electric Company; and Southwest Transmission Dependent Utility Group.

20. NPPD, OPPD, Lincoln Electric, Midwest, Sunflower, Mid-Kansas, and Western-UGP filed comments in support of SPP's Compliance Filing. Indicated SPP Transmission Owners³¹ and KC&PL Companies filed protests opposing SPP's Compliance Filing. SPP and APPA filed answers to the comments and protests on its Compliance Filing.

IV. Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceedings in which they sought intervention.

22. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), we grant SPP's late-filed motion to intervene in Docket No. EL18-19-001 given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

23. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2019), prohibits an answer to a request for rehearing. Accordingly, we reject the Kansas Commission's answer in support of Midwest's and NRECA's request for rehearing and clarification in Docket Nos. EL16-91-001 and EL18-19-001.

24. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept SPP's and APPA's answers in Docket No. ER18-939-000 and will, therefore, reject them.

³¹ Indicated SPP Transmission Owners are American Electric Power Service Corporation, Public Service Company of Oklahoma, Southwestern Electric Power Company, Empire District Electric Company, Oklahoma Gas & Electric Company, Westar, Xcel, and Southwestern Public Service Company.

B. Substantive Matters**1. Rehearing Requests of the October 2017 Order**

25. APPA alleges that the Commission erred in the October 2017 Order by finding that it has authority to require SPP to revise its Tariff and governing documents to include refund commitments by non-public utility transmission owning members, and by relying on the non-public utility transmission owning members' choice as to RTO membership and revenue recovery under the SPP Tariff to justify that finding. APPA asserts that the Commission's reliance on *Alliant* is misplaced because that case held that a court can enforce a refund commitment in an agreement that an entity has itself already chosen to execute, not whether the Commission may require a jurisdictional agreement to include such a commitment.³² APPA argues that, because the Commission may not regulate non-jurisdictional transmission owning members of an RTO, whether these entities have refund commitments is irrelevant to whether an RTO's rates are just and reasonable. APPA and NPPD argue that the Commission erred by ordering SPP to make a compliance filing without first finding that the SPP Tariff and governing documents were unjust, unreasonable, and unduly discriminatory, or preferential. APPA states that the requirements the Commission has imposed contravene the Commission's policy of accommodating participation of non-public utilities in RTOs, thereby discouraging non-public utility participation in SPP.

26. NPPD suggests that the Commission impose a carve-out for existing SPP non-public utility transmission owning members so that only new members would be bound by the refund commitments imposed in this case. NPPD argues that the October 2017 Order reverses "a decade-long policy of approving and maintaining provisions in RTO tariffs and membership agreements to accommodate the needs of non-jurisdictional public power entities."³³ NPPD also asserts that this order contradicts the Commission's approval of WestConnect's regional transmission planning and cost allocation process that enables non-public utilities to participate as coordinating transmission owners without being subject to regional cost allocation.

27. Like APPA and NPPD, NRECA and Midwest argue that the Commission in the October 2017 Order erred in doing indirectly what it is prohibited from doing directly, i.e., by requiring that SPP include a refund commitment by non-public utility

³² APPA Rehearing Request at 7-8 (citing *Alliant*, 347 F.3d at 1050); NPPD Rehearing Request at 9-12.

³³ NPPD Rehearing Request at 17.

transmission owning members, a requirement that the Commission concedes that it could not enforce.³⁴

28. NPPD asserts that, if exercised, imposing a commitment by NPPD to make refunds of unknown amounts in response to future Commission orders creates a conflict with Nebraska state law and a portion of SPP's existing Tariff that elevates state law over Commission regulation with respect to public power entities. NPPD states that the Commission has not made the requisite threshold finding or provided analysis showing that conditions have changed such that the SPP Tariff and NPPD's Membership Agreement are unjust and unreasonable. NPPD argues that the October 2017 Order unduly discriminates against NPPD by providing SPP flexibility to develop a proposal that recognizes the federal-regulated status of Western-UGP without recognizing the similarly situated state-regulated status of NPPD.

29. NRECA and Midwest argue that, before the ATRR of a non-public transmission owning member of SPP is included in the SPP Tariff, any refund commitment before the Commission should account for prior findings made by state regulators in order to prevent a jurisdictional conflict. NRECA and Midwest request that the Commission clarify that in the October 2017 Order the Commission held that accommodating and accounting for these jurisdictional issues is within the scope of what SPP must address in its stakeholder process. NRECA and Midwest argue that if these issues are not resolved, non-public utility transmission owning members of SPP could be forced to choose either to make refunds that expose them to non-recovery under state-jurisdictional rates or undertake the complex and costly decision to withdraw from SPP.

2. Commission Determination

30. For the reasons discussed below, we grant rehearing of the October 2017 Order and find that it is neither necessary nor appropriate to impose the refund commitment contemplated there on non-public utility transmission owning members in SPP.

31. First, we find that the D.C. Circuit's *Xcel* decision does not compel the Commission to require a prospective refund commitment from all non-public utility transmission owning members in SPP, as contemplated by the October 2017 Order. In *Xcel*, the D.C. Circuit based its decision on the fact that, having adopted a policy of requiring voluntary refund commitments before allowing RTOs to implement rates including the revenue requirements of non-jurisdictional entities, the Commission failed to follow its established policy and allowed a rate that it had determined may be unjust and unreasonable to go into effect without suspension or voluntary refund commitment.³⁵

³⁴ NRECA Rehearing Request at 4-5.

³⁵ *Xcel*, 815 F.3d at 953.

The Commission had acknowledged its own legal error, and the court found that, in light of that legal error, the Commission could provide a remedy under FPA section 309. Here, by contrast, prior to the July 2016 Order, as clarified and confirmed in the October 2017 Order, the Commission had no comparable policy requiring non-public utility transmission owners to provide a prospective refund commitment for all situations under which refunds might be directed pursuant to FPA sections 205 and 206. In addition, here the Commission made no legal error analogous to the facts of *Xcel*, where the court focused on the Commission's remedial discretion to address such an error.

32. Second, the D.C. Circuit has recognized that the Commission generally does not have authority to require FPA section 201(f) entities to make refunds if they do not voluntarily do so.³⁶ Instead, the Commission's refund authority found in FPA sections 205 and 206 applies to FPA section 201(f) entities only in the limited circumstances described in FPA section 206(e); FPA sections 205 and 206 otherwise apply only to jurisdictional public utilities. The *Xcel* decision is consistent with that understanding, acknowledging that the Commission has no authority under FPA section 205 to require a non-jurisdictional entity to make refunds.³⁷ Thus, non-public utilities are not similarly situated to other RTO transmission owning-members with respect to refunds by virtue of the fact that they are not generally subject to the Commission's jurisdiction under FPA sections 205 and 206.

33. Third, the Commission retains authority to approve voluntary contractual refund commitments when RTOs include a non-public utility's ATRR in their jurisdictional rates. Although the Commission has the authority to review non-public utility rates included in jurisdictional rates to ensure that the jurisdictional rate remains just and

³⁶ See, e.g., *Bonneville*, 422 F.2d at 926; *TANC*, 495 F.3d at 673.

³⁷ *Xcel*, 815 F.3d at 950 (citing *TANC*, 495 F.3d at 672). In addition, the D.C. Circuit subsequently cited *TANC* in finding that the Commission could order recoupment of funds paid in error to a non-jurisdictional entity because, although "[t]he case law is clear that § 205, when read in conjunction with § 201(f), bars [the Commission] from ordering a non-jurisdictional entity to provide a *refund* to another entity," recoupment under FPA section 309, 16 U.S.C. § 825h (2018), is a distinct remedy. *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354, 359-62 (D.C. Cir. 2017) (citing *TANC*, 495 F.3d at 673-75).

reasonable, it does not necessarily follow that a refund commitment from those non-public utilities is an intrinsic component of a just and reasonable rate. Generally, the Commission does not treat refunds as a measure of a just and reasonable rate, but as an available remedy when a rate has been found unjust and unreasonable.³⁸

34. Fourth, declining to require the refund commitment contemplated in the October 2017 Order is consistent with the Commission's longstanding policy goal of encouraging the participation of non-public utilities in RTOs/ISOs,³⁹ and appropriately accounts for distinct characteristics of these entities like those described above.

35. For these reasons, we find that the lack of a general refund commitment by non-public utilities similar to that applicable to non-jurisdictional entities pursuant to FPA sections 205 and 206 does not render SPP's rates unjust and unreasonable or unduly discriminatory or preferential.⁴⁰ In light of this determination, we terminate the FPA section 206 proceedings instituted by the Commission in the July 2016 Order in Docket No. EL16-91-000 and the October 2017 Order in Docket No. EL18-19-000.

36. In granting rehearing of the October 2017 Order and terminating these section 206 proceedings, we note that the Commission's longstanding policy regarding its treatment of section 205 filings by RTOs to implement rate changes by non-public utility

³⁸ See, e.g., *City of Redding v. FERC*, 693 F.3d 828, 838-39 (9th Cir. 2012) (citations omitted) ("Congress expanded FERC's authority to address 'unjust and unreasonable' rates by adding § 206(b) to the FPA in 1988, over fifty years after the enactment of the original law. Section 206(b) provides that after FERC has determined a rate to be unjust and unreasonable, it 'may order refunds of any amounts paid . . . in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force.'").

³⁹ *TANC*, 495 F.3d at 667 (citing Order Nos. 888 and 2000 and explaining that the Commission encouraged all transmission owners, including non-public utility transmission owners, to place their transmission under the control of RTOs voluntarily).

⁴⁰ Because we grant rehearing of the October 2017 Order and find that it is neither necessary nor appropriate to impose the refund commitment contemplated there on non-public utility transmission members in SPP, we do not address requests for rehearing regarding conflicts with Nebraska state law or accounting for prior findings made by state regulators.

transmission owners has not changed. In *Xcel*, the D.C. Circuit described that policy as one pursuant to which the Commission:

will accept the RTO's filing of a tariff revision where the non-jurisdictional entity voluntarily agrees to make refunds in the event the Commission determines the rate as filed is not just and reasonable, or the Commission will delay the effective date of the proposed rate while it conducts a section 205 review, unless there is no material issue.⁴¹

The Commission intends to apply this policy with respect to such filings made by SPP.

37. Finally, because we are granting rehearing of the October 2017 Order, we dismiss SPP's Compliance Filing in Docket No. ER18-939-000 as moot, and terminate that proceeding.

The Commission orders:

(A) The requests for rehearing of the October 2017 Order are hereby granted, as discussed in the body of this order.

(B) SPP's Compliance Filing is hereby dismissed as moot, as discussed in the body of this order.

(C) The proceeding in Docket No. ER18-939-000 is hereby terminated, as discussed in the body of this order.

(D) The proceedings in Docket Nos. EL16-91-000 and EL18-19-000 are hereby terminated, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴¹ *Xcel*, 815 F.3d at 950 (citing, e.g., *Lively Grove Energy Partners, LLC*, 140 FERC ¶ 61,252, at P 47 & n. 59 (2012)).