151 FERC ¶ 61,126
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Golden Spread Electric Cooperative, Inc. Docket Nos. EL13-78-001

v.

Southwestern Public Service Company

Golden Spread Electric Cooperative, Inc. EL12-59-001

v.

Southwestern Public Service Company

ORDER ON REHEARING

(Issued May 14, 2015)

1. On June 19, 2014, the Commission issued two orders establishing hearing and settlement judge procedures for two complaints that Golden Spread Electric Cooperative, Inc. (Golden Spread) filed, pursuant to sections 201, 206, and 306 of the Federal Power Act (FPA).[1] In the complaints, Golden Spread alleged that the rate of return on common equity (ROE) input values in Southwestern Public Service Company's (SPS) formula rates applicable to (1) the Replacement Power Sales Agreement between SPS and Golden Spread, and (2) SPS's annual transmission revenue requirement in Xcel Energy, Inc.'s Open Access Transmission Tariff (OATT) are unjust and unreasonable (collectively, Hearing Orders).[2] On July 21, 2014, Xcel Energy Services Inc. (Xcel) requested rehearing of the Hearing Orders. In this order, we deny rehearing.

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[1] 16 U.S.C. §§ 824, 824e, 825e (2012).

[2] *Golden Spread Elec. Coop., Inc., v. Sw. Pub. Serv. Co.*, 147 FERC ¶ 61,238 (2014) (First Hearing Order); *Golden Spread Elec. Coop., Inc., v. Sw. Pub. Serv. Co.*, 147 FERC ¶ 61,239 (2014) (Second Hearing Order).

I. Background

2. Golden Spread purchases energy and capacity from SPS pursuant to the Replacement Power Sales Agreement, which commenced on April 20, 2012, and will continue for a term of seven years.[3] The cost-based Replacement Power Sales Agreement has a formula rate that contains a 10.25 percent ROE, which was established by a black box settlement in Docket No. ER06-274-003.[4] The settlement provided that this ROE could be changed through filings made with the Commission pursuant to sections 205 or 206 of the FPA. Moreover, the Replacement Power Sales Agreement contains language regarding the rights of the parties to seek unilateral modification of the rates, terms, and conditions pursuant to section 205 or 206 of the FPA.[5]

3. Golden Spread takes Network Integration Transmission Service under Southwest Power Pool, Inc.'s (SPP) OATT, with rates for service calculated pursuant to the formula rate for SPS as set forth in Xcel Energy Inc.'s OATT.[6] The ROE formula rate input used to determine SPS's annual transmission revenue requirement, and ultimately the charges applicable to Golden Spread's transmission service, is 11.27 percent. This formula rate consists of a base ROE of 10.77 percent and a 50 basis point adder to reflect SPS's membership in SPP. The transmission formula rate was established by settlement in Docket No. ER08-313, *et al.*[7] The settlement reserved the parties' rights to seek changes to the negotiated ROE through filings made with the Commission pursuant to sections 205 and 206 of the FPA.

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[3] *See* Golden Spread, Complaint, Docket No. EL13-78-000 at 10 (filed July 19, 2013).

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

[5] 2013 Complaint at 10.

[6] *Id.*

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

4. On April 20, 2012, Golden Spread filed a complaint,[8] supported by a discounted cash flow (DCF) analysis, alleging that the ROEs in both the Replacement Power Sales Agreement and SPS's transmission formula rate are unjust and unreasonable, and that a just and reasonable base ROE for both is now 9.15 percent (2012 Complaint).[9] On July 19, 2013, one day before the expiration of the 15-month maximum refund period for the April 2012 Complaint, Golden Spread filed another complaint challenging the same ROEs as in the 2012 Complaint, based on more recent market data indicating that the just and reasonable ROE is 9.15 percent (2013 Complaint). Golden Spread's DCF studies, in both the 2012 Complaint and the 2013 Complaint, were based on the one-step DCF methodology that the Commission used in public utility cases at the time the complaints were filed.[10] The one-step DCF methodology determines high and low estimates of the cost of equity for each member of a proxy group of comparable-risk companies.[11] For each proxy company, those estimates are determined based on the high and low estimates of the company's average dividend yield and two estimates of short-term dividend growth.[12]

5. On June 19, 2014, after a hearing concerning the ROE for a group of New England transmission owners, the Commission in Opinion No. 531 changed its policy on the DCF methodology to be used in public utility ROE cases, by adopting the two-step DCF methodology that the Commission has used in natural gas pipeline and oil pipeline cases for many years.[13] Under the two-step DCF methodology, the Commission

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[8] Golden Spread, Complaint, Docket No. EL12-59-000 (2012 Complaint).

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

[10] *See Coakley, Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC 61,234, at P 24, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *reh'g denied*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015).

[11] *Id.* P 25.

[12] *Id.* The two growth rates used in the one-step DCF methodology are (1) security analysts' five-year forecast for the company, as published by the Institutional Brokers Estimate System (IBES); and (2) the "br+sv" sustainable growth formula, where "b" represents the percentage of earnings expected to be retained (after the payment of dividends), "r" represents the expected rate of return on book equity, "s" represents the percent of common equity expected to be issued annually as new common stock, and "v" is the equity accretion rate. *Id.* PP 17, 25.

[13] *Id.* P 13.

determines a single cost of equity estimate for each member of the proxy group, based on the company's average dividend yield and a growth rate that is determined by taking a weighted average of a short-term growth estimate and a long-term growth estimate.[14]

6. Contemporaneously with Opinion No. 531, on June 19, 2014, the Commission issued an order on the 2012 Complaint (the First Hearing Order), establishing hearing and settlement judge procedures and setting a refund effective date of April 20, 2012.[15] Concurrently with that order, the Commission issued an order on the 2013 Complaint (the Second Hearing Order), establishing hearing and settlement judge procedures, setting a refund effective date of July 19, 2013, and consolidating the 2013 Complaint proceeding with the 2012 Complaint proceeding for purposes of hearing, settlement and decision.[16]

7. On July 21, 2014, Xcel requested rehearing of the First and Second Hearing Orders.

II. <u>Request for Rehearing</u>

8. Xcel argues that the Commission erred in setting the 2012 Complaint for hearing, because Golden Spread did not make a *prima facie* showing that SPS's ROEs were unjust and unreasonable. Xcel asserts that the 2012 Complaint is based on a DCF model that the Commission determined, in Opinion No. 531, is no longer appropriate and that, therefore, cannot support the establishment of hearing and settlement judge procedures. Xcel states that Opinion No. 531 mandated the use of a two-step DCF methodology for determining the ROE for public utilities, but that the 2012 Complaint presented no evidence, argument, or position supporting a claim that SPS's ROEs are unjust and unreasonable under the two-step DCF methodology.

9. Xcel argues that, in order to determine whether a complainant has made a *prima facie* showing, the Commission considers "whether, if the facts alleged by the

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[14] *Id.* P 17. The short-term growth estimate, which is given two-thirds weight, is based on the same IBES estimate that the Commission used in the one-step DCF methodology. The long-term growth estimate, which is given one-third weight, is based on forecasts of long-term growth of the economy as a whole, as reflected in gross domestic product. *Id.*

[15] First Hearing Order, 147 FERC ¶ 61,238 at P 1.

[16] Second Hearing Order, 147 FERC ¶ 61,239 at P 1.

complainant are true, there is a violation of the applicable statute or rule."[17] According to Xcel, because the Commission in Opinion No. 531 adopted the two-step DCF methodology in place of the one-step DCF methodology that Golden Spread used in the 2012 Complaint, "if all of the analyses in Golden Spread's complaint are assumed to be true, this would do no more than support a finding that SPS's ROEs are unjust and unreasonable under the single-step DCF methodology, which the Commission discarded in Opinion No. 531."[18] According to Xcel, in challenging a company's ROE, a complainant cannot satisfy its FPA section 206 burden through evidence that does not directly support its claim or through a flawed DCF analysis.[19] Therefore, Xcel argues that it is impossible to conclude that the 2012 Complaint makes the necessary *prima facie* showing to establish hearing and settlement judge procedures.

10. Notwithstanding the alleged deficiencies in the 2012 Complaint, Xcel asserts that under FPA section 206 the Commission could have instituted, on its own motion, an investigation into SPS's ROEs if it determined that the 2012 Complaint raised issues warranting such an investigation. Thus, Xcel requests that the Commission grant rehearing to clarify that it established the hearing and settlement judge procedures on its own motion under FPA section 206. In addition, Xcel requests that the Commission correct the refund effective date in the First Hearing Order to a date "that is no earlier than publication of the notice of the Commission's initiation of its investigation in the Federal Register, and no later than five months after the publication date."[20]

11. Xcel also argues that the Commission erred in setting the 2013 Complaint for hearing and settlement judge procedures, and that the 2013 Complaint must be dismissed as "an impermissible attempt to circumvent the 15-month statutory refund limit" under FPA section 206.[21] Xcel asserts that the Regulatory Fairness Act "mandates that, absent dilatory behavior by the utility, refund protection for the customers be limited to a single fifteen-month period."[22] Xcel contends that the intent of the 15-month refund period is,

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[17] Xcel Request for Rehearing at 9 (citing *Sunrise Energy Co. v. Transwestern Pipeline Co.*, 62 FERC ¶ 61,087 (1993)).

[18] *Id.*

[19] *Id.* at 10 (citing *La. Pub. Serv. Comm'n v. Sys. Energy Res. Inc.*, 124 FERC ¶ 61,003 (2008); *S. Co. Serv., Inc.*, Opinion No. 427, 84 FERC ¶ 61,266 (1998), *reh'g denied*, Opinion No. 427-A, 87 FERC ¶ 61,097 (1999)).

[20] *Id.* at 12.

[21] *Id.* at 13.

[22] *Id.* (quoting *Allegheny Elec. Coop., Inc. v. Niagara Mohawk Power Corp.*,

(continued ...)

"absent dilatory behavior by the utility, to limit the time during which refund liability can accrue, and thus to mitigate concerns regarding the adverse financial consequences of unlimited refund potential."[23] Xcel states that the status of these proceedings is not a result of SPS's behavior.

12. Xcel contends that the Commission has permitted a second complaint during the pendency of an earlier complaint when the Commission has found that the second complaint presented "new information or changed circumstances that could result in a different rate and the record in the first complaint had closed."[24] Xcel argues that the Commission "prohibits successive complaints where the complaint is 'instituting a duplicative proceeding intended solely to expand the amount of refund protection beyond 15 months."[25] According to Xcel, the additional information provided in the 2013 Complaint is "entirely irrelevant," because "there will be only one ROE established based on the same factual record whether there are two complaints or one, not upon two different sets of data covering the two refund periods requested in Golden Spread's complaints."[26] Therefore, Xcel argues that the only purpose of the 2013 Complaint would be "to expand the refund effective period beyond 15 months."[27] Xcel further contends that "the fact that the refund period for the 2012 Complaint has expired does not provide a basis for the 2013 Complaint."[28]

13. Xcel contends that the facts of this case are similar to *Niagara Mohawk*, in which the Commission dismissed a complaint that was filed three weeks after an almost identical complaint was filed by a different complainant. Xcel asserts that the

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58 FERC ¶ 61,096, at 61,349 (1992) (*Niagara Mohawk*)) (internal quotations omitted).

[23] *Id.* (citing S. Rep. No. 100-491 at 6 (1988); Regulatory Fairness Act: Hearings on S. 1567 and H.R. 2858 Before the S. Comm. on Energy and Natural Resources, 100th Cong., 74-76, 85-87, 91-92, 99-100, 107-08, 115-17, 138, 295-97 (1988)).

[24] *Id.* at 14 (citing *S. Co. Servs., Inc.*, 68 FERC ¶ 61,231 (1994) (*Southern Co. I*), *reh'g*, 83 FERC ¶ 61,079 (1998) (*Southern Co. II*); *Consumer Advocate Div. of the Pub. Serv. Comm'n of W.V. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288 (1994) (*Consumer Advocate I*)).

[25] *Id.* at 14-15 (quoting *Southern*, 83 FERC at 61,386).

[26] *Id.* at 15 (citing Opinion No. 531, 147 FERC ¶ 61,234 at PP 56, 64-67, 160).

[27] *Id.*

[28] *Id.*

Commission dismissed the second complaint in *Niagara Mohawk*, because accepting both complaints and establishing different refund effective dates "would thwart Congress' intent in establishing the limited fifteen-month refund period."[29] Xcel argues that failure to dismiss the 2013 Complaint would similarly thwart Congress's intent by extending the refund period beyond 15 months.[30]

III. Commission Determination

14. We deny Xcel's request for rehearing, as discussed below.

15. Xcel argues that the Commission erred in setting the 2012 Complaint and 2013 Complaint for hearing because Golden Spread supported its complaints using the one-step DCF methodology rather than the two-step DCF methodology. We disagree. Xcel overstates the Commission's findings regarding the one-step DCF methodology in Opinion No. 531. In changing the Commission's approach to determining the ROE for public utilities by adopting a two-step DCF methodology in Opinion No. 531, the Commission did not find that the one-step DCF methodology was inadequate to make a *prima facie* case to determine, at the outset, whether to investigate a public utility's ROE.[31] Rather, the Commission found that, given the evolution of the electric industry, it had become more appropriate to use the two-step DCF methodology to determine what ROE to set as a public utility's ROE.[32] That the two-step DCF methodology "is preferable to the one-step DCF methodology"[33] for ultimately setting a public utility's ROE does not preclude the Commission from relying on DCF studies using the one-step DCF methodology in the circumstances here, that is, where the Commission adopted a different, two-step DCF methodology after the submission of complaints which were consistent with the Commission's ROE policy in place at the time the complaints were filed.[34]

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[29] *Id.* at 15-16 (quoting *Niagara Mohawk*, 58 FERC at 61,349).

[30] *Id.* at 16.

[31] Opinion No. 531, 147 FERC ¶ 61,234 at P 8.

[32] *Id.* P 32.

[33] *Id.* P 41.

[34] We note that, consistent with our current policy on public utilities' ROE, we expect future ROE complaints to be supported by the Commission's two-step DCF methodology.

16. Golden Spread submitted the 2012 Complaint over two years before, and the 2013 Complaint almost one year before, the Commission adopted the two-step DCF methodology in Opinion No. 531. While Golden Spread's DCF studies supporting the 2012 Complaint and 2013 Complaint did not include the two-step DCF methodology and may have had other flaws, Golden Spread provided detailed DCF analyses that were generally consistent with the Commission's one-step DCF methodology that was in place both when SPS's existing 10.77 percent base ROE was established and when the 2012 Complaint and 2013 Complaint were filed.[35] Thus, in setting the 2012 Complaint and 2013 Complaint for hearing, the Commission properly found Golden Spread's one-step DCF analyses showing a substantial decline in SPS's base ROE to 9.15 percent from the level previously established under the one-step DCF methodology was adequate to establish a *prima facie* case that SPS's cost of equity may have declined significantly below the level of its existing 10.77 percent base ROE.[36] Thus, we conclude that the Commission properly relied upon Golden Spread's DCF analyses in setting the complaints for hearing. Accordingly, we also disagree with Xcel's contention that the Commission could only have instituted the FPA section 206 investigation into SPS's ROE on the Commission's own motion. Therefore, we will not change the refund effective date for the 2012 Complaint as Xcel requests.

17. While Xcel cites *Louisiana Public Service Commission v. System Energy Resources, Inc.*, 124 FERC ¶ 61,003 (2008) (*Louisiana*), and *Southern Co. Services, Inc.*, Opinion No. 427, 84 FERC ¶ 61,266 (1998) (*Southern*), as requiring dismissal of the 2012 Complaint and 2013 Complaint, we find those cases to be inapposite. In *Louisiana*, the Commission denied the Louisiana Public Service Commission's request to reduce the target utility's ROE because the complaint did not include supporting data, "such as a list of the utilities in the comparison group or the DCF methodology used for the DCF analysis," and "only provided statistical evidence of a change in bond yields, without making clear what effect this information alone has on [the target utility's] cost of equity."[37] In *Southern*, the Commission affirmed an Administrative Law Judge's finding that the DCF analysis presented at hearing could not be used to determine the ROE, because the DCF analysis contained significantly flawed and unsupported growth rate

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[35] We note that the complaint in the Opinion No. 531 proceeding was also supported by a one-step DCF methodology, not the two-step DCF methodology that the Commission ultimately adopted.

[36] *See, e.g., Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,049, at P 184 (2014).

[37] *Louisiana*, 124 FERC ¶ 61,003 at P 15.

inputs.[38] In contrast to *Louisiana* and *Southern*, Golden Spread provided a DCF analysis, and the data underlying its DCF analyses of each company in its proposed proxy groups in the instant proceedings, using inputs that were generally consistent with the Commission's one-step DCF methodology that the Commission used when Golden Spread filed the 2012 Complaint and 2013 Complaint.

18. Xcel also argues that the Commission erred in setting the 2013 Complaint for hearing and establishing a separate refund effective date for that complaint, because doing so circumvents the 15-month maximum refund period under FPA section 206 and is contrary to Commission precedent.[39] We disagree. As discussed below, the Commission's treatment of the 2013 Complaint is consistent with both the FPA and long-standing Commission policy on ROE complaints.

19. FPA section 206 requires that "[w]henever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint[.]"[40] FPA section 206 also provides that

> [a]t the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, 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[.][41]

20. As FPA section 206 makes clear, the Commission "*shall* establish a refund effective date" for each proceeding instituted on complaint,[42] and at the conclusion of such a proceeding "the Commission *may* order refunds" for up to fifteen months after the refund effective date established for that proceeding.[43] In the instant case, Golden Spread

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[38] *Southern*, 84 FERC at 62,310. Further, unlike the instant proceedings, the section 206 investigation in *Southern* did not involve a complaint, but was instead instituted *sua sponte* by the Commission. *See id.* at 62,307.

[39] Xcel Request for Rehearing at 12-16.

[40] 16 U.S.C. § 824e(b) (2012).

[41] *Id.*

[42] *Id.* (emphasis added).

[43] *Id.* (emphasis added).

filed two separate complaints, based on different facts, thereby commencing two separate proceedings. The Commission set the two proceedings for hearing and, as required by FPA section 206, established a refund effective date for each proceeding. Because the 15-month refund limitation in FPA section 206 is linked to the refund effective date *in each proceeding*, the 15-month refund limitation imposed by FPA section 206 separately applies to the 2012 Complaint proceeding and the 2013 Complaint proceeding.[44] That the Commission consolidated the two proceedings for purposes of hearing, settlement, and decision does not affect this analysis, as the Commission's decision to consolidate the proceedings does not relieve the Commission of its statutory obligation to establish separate refund effective dates (and thus separate 15-month refund periods) for each of the two proceedings.[45]

21. Congress granted the Commission its refund authority under FPA section 206 through the Regulatory Fairness Act.[46] The Commission has consistently interpreted the Regulatory Fairness Act—in the specific context of public utility ROE cases—to allow subsequent complaints in the circumstances of this case.[47] The Regulatory Fairness Act was "intended to add symmetry" between the Commission's treatment of section 205 rate-increase filings and section 206 complaints seeking rate decreases.[48] As the Commission has explained:

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[44] *See id.*

[45] *See id.*

[46] Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299 (1988).

[47] *Consumer Advocate I*, 67 FERC ¶ 61,288, at 62,000, *order on reh'g*, 68 FERC ¶ 61,207 (1994) (*Consumer Advocate II*); *Southern Co. I*, 68 FERC ¶ 61,231 (1994), *order on reh'g*, 83 FERC ¶ 61,079; *see also San Diego Gas & Elec. Co. v. Pub. Serv. Co. of New Mexico*, 85 FERC ¶ 61,414 (1998) (*San Diego Gas & Elec.*), *reh'g denied*, 86 FERC ¶ 61,253 (1999), *reh'g denied*, 95 FERC ¶ 61,073 (2001). *But see EPIC Merchant Energy NJ/PA, L.P. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130 (2010) (*EPIC I*), *reh'g denied*, 136 FERC ¶ 61,041 at PP 15-18 (2011) (rejecting the "pancaked" complaint, by distinguishing it from the complaints in *Consumer Advocate I, Southern Co. II*, and *San Diego Gas & Elec.*).

[48] *Consumer Advocate I*, 67 FERC at 62,000, *order on reh'g*, *Consumer Advocate II*, 68 FERC at 61,997 (citing 133 Cong. Rec. S10925 (daily ed. July 30, 1987) (statement of Sen. Chafee) ("[u]nder the current law, . . . section 205 and section 206 filings are not treated in the same manner, and this inequality serves to favor the wholesale supplier over the wholesale customers and their residential and commercial customers"); 134 Cong. Rec. H9030 (daily ed. Oct. 27, 1987) (statement of Rep. Bruce) (the

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> [u]tilities are free to file for successively higher rate increases based on later common equity cost data without regard to the status of their prior requests, and a fair symmetry requires that complainants also be free to file complaints requesting further rate decreases based on later common equity cost data without regard to the status of their prior complaints.[49]

Accordingly, the Commission has allowed multiple complaints regarding the same ROE, where the subsequent complaints are based on "new, more current data," explaining that "[t]his is particularly critical given that what is at issue is return on equity[,]" which, "in contrast to other cost of service issues . . . can be particularly volatile."[50] The Commission has also explained that, in such cases, it is not "instituting a duplicative proceeding intended solely to expand the amount of refund protection beyond 15 months, but rather [is] initiating an entirely new proceeding, based on an entirely separate factual record, that may or may not reach the same conclusions as those reached in the earlier ROE proceeding."[51]

22. In the instant proceedings, while the DCF analyses in the 2012 Complaint and the 2013 Complaint produced the same numerical result, i.e., a median of 9.15 percent, the two analyses were based on financial data from different time periods and produced different proxy groups. The DCF analysis in the 2012 Complaint was based on financial data from a 6-month period ending March 2012 and produced a proxy group of 11 companies, with a range of returns between 7.51 percent and 10.79 percent.[52] By comparison, the DCF analysis in the 2013 Complaint was based on financial data from a

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Regulatory Fairness Act, in setting a "refund effective date for consumers . . . [uses] essentially the same system used to grant rate increases"); 134 Cong. Rec. H8095 (daily ed. Sept. 23, 1988) (statement of Rep. Gejdenson) ("[t]his legislation represents an attempt to make the current regulatory process more equitable, giving electric consumers the same protections and considerations that supplying utilities currently receive")); *see also E. Tenn. Natural Gas Co. v. FERC*, 863 F.2d 932, 945 n. 21 (D.C. Cir. 1988) (characterizing the Regulatory Fairness Act as "designed to overcome the disincentive facing electric utilities to speed and settle § 206 cases").

[49] *Consumer Advocate I*, 67 FERC at 62,000.

[50] *Consumer Advocate II*, 68 FERC at 61,998; *see also Southern Co. II*, 83 FERC at 61,385-86.

[51] *Southern Co. II*, 83 FERC at 61,386.

[52] 2012 Complaint at Ex. GS-2, 1; *see also* First Hearing Order, 147 FERC ¶ 61,238 at P 5.

6-month period ending March 2013 and produced a proxy group of 18 companies, with a range of returns between 6.37 percent and 11.51 percent.[53] The differences in the proxy groups produced by the two DCF analyses and the ROEs of the proxy group companies are the result of changes in, *inter alia*, the dividend yields and growth rates for each proxy group company.[54] The differences in those data constitute different factual circumstances. Thus, because Golden Spread's 2013 Complaint is based on newer, more current data than the 2012 Complaint, the Commission properly allowed Golden Spread's 2013 Complaint.[55]

23. Xcel further argues that the 2013 Complaint proceeding is duplicative and serves only to extend the 15-month refund period, because Opinion No. 531 makes clear that, in this case, "there will be only one ROE established based on the same factual record whether there are two complaints or one, not upon two different sets of data covering the two refund periods requested in Golden Spread's complaints."[56] Xcel misinterprets Opinion No. 531, which involved a distinctly different scenario from the instant case. Unlike the consolidated proceedings in this case, the Opinion No. 531 proceeding did not involve multiple ROE complaints and refund periods. Rather, the Opinion No. 531 proceeding involved one complaint, on which the Commission did not issue a final order until more than 15 months after the refund effective date.[57] The Commission in that case explained that its practice in such circumstances was to determine only one base ROE, to apply both during the 15-month refund period and prospectively, based on one 6-month

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[53] 2013 Complaint at Ex. GS-2, 1; *see also* Second Hearing Order, 147 FERC ¶ 61,239 at P 6.

[54] *Compare* 2012 Complaint at Ex. GS-2, 1 *with* 2013 Complaint at Ex. GS-2, 1.

[55] The facts in the instant case are thus distinguishable from the facts presented in *Allegheny Electric Cooperative, Inc. v. Niagara Mohawk Power Corp.*, 58 FERC ¶ 61,096 (1992) (*Niagara Mohawk*), and *EPIC I*, 131 FERC ¶ 61,130, in both of which the Commission dismissed a second complaint against the same rate that was challenged by an earlier complaint. Here, as described above, Golden Spread's 2013 Complaint presented new factual allegations, based on a different time period. In both *Niagara Mohawk* and *EPIC I*, the second complaint was identical to the first complaint and presented no different factual or legal allegations, and so in both cases the Commission properly dismissed the second complaint. *See Consumer Advocate II*, 68 FERC at 61,999 n.11.

[56] Xcel Request for Rehearing at 15.

[57] *See generally* Opinion No. 531, 147 FERC ¶ 61,234.

DCF study period.[58] In contrast, in consolidated cases that involve multiple refund effective dates and associated refund periods, the Commission has explained that it is appropriate for the parties to litigate a separate ROE for each refund period.[59] This is just such a case, and therefore we expect the parties in this case to litigate a separate ROE for each refund period. Specifically, for the refund period in Docket No. EL12-59-000 (i.e., April 20, 2012 through July 19, 2013[60]), the ROE for that particular period should be based on the most recent financial data available during that period, i.e., the last six months of that period. For the refund period in Docket No. EL13-78-000 (i.e., July 19, 2013 through October 18, 2014) and for the prospective period, the ROE should be based on the most recent financial data in the record. Accordingly, and contrary to Xcel's assertion, the ROE determination for the 2013 Complaint proceeding will not be based on the same factual record as the ROE determination for the 2012 Complaint proceeding.

24. Finally, we also reject Xcel's assertion that the 2013 Complaint serves only to extend the refund period associated with the 2012 Complaint, because Golden Spread requests that Xcel's ROE be reduced to the same level, 9.15 percent, in both complaints. Xcel's assertion misses the point. In assessing the 2013 Complaint, the relevant comparison is between the current ROE and the ROE sought in the 2013 Complaint.[61] The relief Golden Spread seeks in the 2013 Complaint is an ROE that falls well *below* the current ROE, using financial data for a later period than the DCF analysis presented in the 2012 Complaint.

25. In any event, Xcel's arguments that the Commission violated the 15-month refund limitation are premature. The decision to order refunds, or not order refunds, in a section 206 proceeding is made "at the conclusion of" such a proceeding.[62] Thus, whether the

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[58] *Id.* P 64.

[59] *See, e.g.*, *New York Ass'n of Pub. Power v. Niagara Mohawk Power Corp.*, 148 FERC ¶ 61,177, at P 28 (2014).

[60] We note that, in an order setting for hearing a third complaint against SPS's ROE, the Commission listed incorrect end dates of the refund periods associated with the 2012 Complaint and 2013 Complaint. *See Golden Spread Elec. Coop., Inc.*, 150 FERC ¶ 61,052, at P 38 (2015) (Docket No. EL15-8-000 Order). Those refunds periods end on July 19, 2013, and October 18, 2014, respectively—not July 20, 2013, and October 19, 2014, as stated in the Docket No. EL15-8-000 Order.

[61] *See Delaware Div. of Pub. Advocate v. Baltimore Gas and Elec. Co.*, 150 FERC ¶ 61,081, at P 19 (2015).

[62] 16 U.S.C. § 824e(b) (2012); *see also, e.g.*, *S. Co. Servs. Inc.*, 46 FERC ¶ 61,381, at 62,191-192 (1989).

Commission will direct refunds as a result of either, or both, of the instant proceedings will depend on the currently unknown outcome of those proceedings. While Congress' adopting a 15-month refund limitation in the Regulatory Fairness Act gave public utilities some rate certainty in FPA section 206 proceedings, Xcel misinterprets the level of certainty that Congress provided. To find, as Xcel argues, that the 15-month refund limitation in FPA section 206 requires the Commission to deny a complaint under these circumstances—i.e., deny a complaint that is based on unique facts when a similar complaint is already pending before the Commission—would prohibit any party from challenging a utility's ROE as long as there is another complaint involving that utility's ROE pending before the Commission. The language of FPA section 206 does not support such a finding. Limiting refunds in a particular case to 15 months was not intended to shield a utility's rates from a later complaint, any more than the existence of one pending section 205 rate increase shields the customers of a public utility from a second, pancaked section 205 rate increase filed by that same utility later in that same year or in the next.[63] Rather, the 15-month refund limitation in FPA section 206 affects only the Commission's refund authority in a particular proceeding at the conclusion of that proceeding; it does not limit either a party's right to file a new complaint under FPA section 206, the Commission's authority to set such a new complaintfor hearing, or the Commission's obligation to establish a new refund effective date (and thus establish a 15-month refund period) for that new proceeding. A contrary determination would be inconsistent with the purpose of the Regulatory Fairness Act.

The Commission orders:

Xcel's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

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[63] *See supra* P 21. Just as Congress did not bar, in section 205, the filing of a successive rate increase while an earlier rate increase was still pending, Congress equally did not bar, in section 206, the filing of a successive complaint while an earlier complaint was still pending.

Nathaniel J. Davis, Sr.,
Deputy Secretary.