

156 FERC ¶ 61,059  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket No. EL16-91-000

ORDER INSTITUTING SECTION 206 PROCEEDING AND COMMENCING PAPER  
HEARING PROCEDURES AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued July 21, 2016)

1. In this order, we find that Southwest Power Pool, Inc.'s (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<sup>1</sup> whose revenue requirements are recovered under the SPP Tariff. Accordingly, to address this concern, we institute a proceeding in Docket No. EL16-91-000 pursuant to section 206 of the Federal Power Act (FPA)<sup>2</sup> to examine the SPP Tariff, as discussed more fully below.

**I. Background**

2. SPP is a regional transmission organization (RTO) that is responsible for overseeing the bulk electric grid and wholesale power market on behalf of its transmission members in the central United States, across 14 states. It is an Arkansas

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<sup>1</sup> 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.

<sup>2</sup> 16 U.S.C. § 824e (2012).

non-profit corporation with its principal place of business in Little Rock, Arkansas. Membership in SPP is voluntary and is open to any electric utility, Federal Power Marketing Agency, transmission service provider, any entity engaged in the business of producing, selling and/or purchasing electric energy for resale, and any entity willing to meet the membership requirements, including execution of the SPP Membership Agreement.<sup>3</sup> Membership also is open to any entity eligible to take service under the SPP Tariff.

3. 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,” such as the rates charged by an RTO.<sup>4</sup> The Commission’s authority in this regard extends to the review of non-public utilities’ rates if they are a component of an RTO’s rate design. The Commission reviews such non-public utility rates under the statutory just and reasonable standard.<sup>5</sup> 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 member non-public utility transmission owner’s] rates under the same standard.”<sup>6</sup>

4. Still, the Commission’s rate jurisdiction under FPA section 205 and its refund jurisdiction under FPA section 206 “expressly apply only to public utilities.”<sup>7</sup> Thus, the Commission does not “have refund authority over . . . governmental entities and non-public utilities.”<sup>8</sup>

5. While the Commission cannot directly order refunds from non-public utility transmission owners that have joined RTOs, where the Commission has set for hearing

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<sup>3</sup> Southwest Power Pool, Inc., Bylaws, 2.1 Qualifications (1.0.0).

<sup>4</sup> *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1114 (D.C. Cir. 2002).

<sup>5</sup> *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, at 671-72 (D.C. Cir. 2007) (*TANC v. FERC*) (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).

<sup>6</sup> *Id.* at 672.

<sup>7</sup> *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911 (9th Cir. 2005) (*Bonneville v. FERC*); *see also TANC v. FERC*, 495 F.3d at 673.

<sup>8</sup> *Bonneville v. FERC*, 422 F.3d 908 at 911.

an RTO's FPA section 205 filing proposing to include a non-public utility's transmission revenue requirement in its tariff, the Commission has conditioned implementation of the proposal pending completion of the proceeding upon that non-public utility's agreement to make refunds if the rate, as filed, is later found to be not just and reasonable.<sup>9</sup> However, until recently, the Commission has only required the non-public utility to agree to make refunds in the specific FPA section 205 proceeding where the RTO has proposed to include its transmission revenue requirement in its jurisdictional tariff.<sup>10</sup> Thus, the refund commitment has not extended to future FPA section 205 and 206 proceedings where the justness and reasonableness of the RTO's tariff and rates are at issue.

6. Issues have arisen concerning the Commission's ability to ensure that SPP's rates will be just and reasonable under section 205 of the FPA when they include the revenue requirement of a non-public utility transmission owner. In an order being issued concurrently, on remand from the U.S. Court of Appeals for the District of Columbia Circuit, the Commission orders refunds resulting from SPP's proposed revisions to its Tariff to implement a formula rate for Tri-County Electric Cooperative Inc.<sup>11</sup> A similar issue has arisen concerning SPP's proposal to allocate revenues it received on behalf of certain of SPP transmission owners under a settlement.<sup>12</sup> 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 filed proposing how to allocate the settlement revenues, which were set for hearing and settlement judge procedures, were revised as a result of those procedures. In an order being issued concurrently, the Commission grants SPP's motion with respect to withholding the settlement revenues from non-public utility transmission owning members of SPP who had not committed to make refunds pending hearing and settlement judge procedures.<sup>13</sup>

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<sup>9</sup> See *Xcel Energy Serv. Inc. v. FERC*, 815 F.3d 947, 950 (D.C. Cir. 2016) (citing, *inter alia*, *Lively Grove Energy Partners, LLC*, 140 FERC ¶ 61,252, at P 47 & n.59 (2012)).

<sup>10</sup> *Sw. Power Pool, Inc.*, 138 FERC ¶ 61,231, at PP 1, 14, 15 (2012).

<sup>11</sup> *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,057 (2016).

<sup>12</sup> SPP, Motion for Clarification, Docket No. ER16-791-000 (filed May 13, 2016).

<sup>13</sup> *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,058 (2016).

## II. Discussion

7. As noted, while the Commission cannot directly order refunds from non-public utility transmission owners that have joined RTOs, the Commission's authority extends to the review of non-public utility transmission owners' rates if they are a component of an RTO's rate design. 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. For example, the Commission could require SPP to correct errors in the application of an entity's formula rates, or to remedy any other elements of, or costs passed through, the transmission owners' formula rates that are found to be unjust and unreasonable. The Commission could also order refunds with respect to rules governing allocation of SPP Tariff revenues among transmission owners that are found to be unjust and unreasonable. The non-public utility transmission owners are currently under no obligation to provide refunds in these other situations because these situations are not covered by the limited refund commitments provided by the non-public utility transmission owners thus far. This is the case even though the inclusion of their transmission revenue requirements in SPP's jurisdictional rates could be causing those jurisdictional rates to be unlawfully inflated, or they may be otherwise receiving unjust and unreasonable revenues, contrary to the consumer protection purpose of the FPA.<sup>14</sup>

8. It thus appears that the lack of a refund commitment in the SPP Tariff requiring non-public utility transmission owners to refund revenues that they may receive associated with service provided due to their status as transmission-owning RTO members, in the same manner that public utility transmission owners could be required to provide refunds of such revenues under FPA section 205 or 206, may be unjust, unreasonable, or unduly discriminatory or preferential. That is because, absent such a commitment, SPP's resulting jurisdictional rates may not be just and reasonable.

9. Accordingly, we institute a proceeding in Docket No. EL16-91-000, pursuant to FPA section 206, to examine the SPP Tariff. Upon initial review, the concerns identified by the Commission might be addressed by revising the SPP Tariff 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

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<sup>14</sup> See *Xcel Energy Serv. Inc. v. FERC*, 815 F.3d at 952 (citing *Mun. Light Bds. of Reading and Wakefield v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971)).

to revenues that they may receive associated with service provided due to their status as transmission-owning RTO members.<sup>15</sup> Under such a tariff revision, if a non-public utility transmission owner chooses not to make such a refund commitment, then SPP would remove its transmission revenue requirement(s) from the SPP Tariff as of a prospective date to be determined by the Commission. Under the refund commitment, non-public utility transmission owners 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 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 Tariff such that any new non-public utility transmission owners 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.

10. We find that a paper hearing, as ordered below, is the appropriate procedure to resolve this matter. 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 (2015).

11. We will require SPP and other interested parties to file initial briefs no later than 30 days after the publication of notice in the *Federal Register* of the Commission's initiation of this section 206 proceeding in Docket No. EL16-91-000. Parties also may file reply briefs in response to parties' initial briefs due within 21 days after the due date of initial briefs.

12. 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

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<sup>15</sup> This refund commitment would not relate to revenues or credits that a non-public utility transmission owner 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). We seek comment, in the paper hearing established below, on how to most appropriately define revenues that non-public utility transmission owners may receive associated with service provided due to their status as transmission-owning RTO members.

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.<sup>16</sup> Consistent with Commission precedent,<sup>17</sup> 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. EL16-91-000 is published in the *Federal Register*. The Commission is also required by section 206 to indicate when it expects to issue a final order. We expect to issue a final order in this proceeding within six months of receiving reply briefs, or March 31, 2017.

The Commission orders:

(A) 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. EL16-91-000, as discussed in the body of this order.

(B) SPP and other interested parties may file initial briefs no later than 30 days after the publication of notice in the *Federal Register* of the Commission's initiation of the section 206 proceeding in Docket No. EL16-91-000. Reply briefs may be filed no later than 21 days thereafter.

(C) Any interested person desiring to be heard in Docket No. EL16-91-000 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 (2015)) within 21 days of the date of issuance of this order.

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<sup>16</sup> 16 U.S.C. § 824e(b) (2012).

<sup>17</sup> 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).

(D) 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. EL16-91-000.

(E) The refund effective date in Docket No. EL16-91-000 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 (D) above.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.