

171 FERC ¶ 61,143
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System Operator, Inc.	Docket Nos. EL16-99-001 EL18-18-001 (consolidated)
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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. EL16-99-000² to examine whether the Midcontinent Independent System Operator, Inc. (MISO) Transmission, Energy and Operating Reserve Markets Tariff (Tariff) may be unjust, unreasonable, unduly discriminatory or preferential because it does not include a refund commitment by non-public utility transmission owners whose revenue requirements are recovered under the MISO Tariff, and established paper hearing procedures.³

¹ 16 U.S.C. § 824e (2018).

² *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 156 FERC ¶ 61,061 (2016) (July 2016 Order).

³ *Id.* PP 1, 47, 49. See 16 U.S.C. § 824(f) (2018). 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 (2018), we nevertheless refer to FPA section 201(f) entities herein as non-jurisdictional entities, non-jurisdictional utilities, or non-public utilities.

2. In an order issued on October 19, 2017, the Commission: (1) held the FPA section 206 paper hearing in abeyance pending the ongoing MISO stakeholder process; (2) granted, in part, and denied, in part, requests for clarification; (3) addressed some issues raised by parties; (4) directed a compliance filing; (5) instituted a proceeding in Docket No. EL18-18-000 pursuant to FPA section 206 to examine the MISO Transmission Owners Agreement (Owners Agreement) and other jurisdictional documents; and (6) consolidated Docket Nos. EL16-99-000 and EL18-18-000.⁴

3. On November 20, 2017, Nebraska Public Power District (NPPD), American Public Power Association (APPA), Dairyland Power Cooperative (Dairyland), and MISO Transmission Owners⁵ submitted timely requests for rehearing of the October 2017 Order. In addition, National Rural Electric Cooperative Association (NRECA); Midwest Energy, Inc. (Midwest); and Hoosier Energy Rural Electric Cooperative, Inc., Southern Illinois Power Cooperative, and WPPI Energy (collectively, Hoosier, Southern Illinois, and WPPI) filed timely requests for rehearing and clarification of the October 2017 Order. On February 28, 2018, MISO submitted a compliance filing in Docket Nos. ER18-937-000 and ER18-937-001 in response to the October 2017 Order (MISO's Compliance Filing). For the reasons discussed below, we grant rehearing of the October 2017 Order and, accordingly, dismiss MISO's Compliance Filing as moot.

⁴ *Midcontinent Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,057 (2017) (October 2017 Order).

⁵ Ameren Services Company, as agent for Union Electric Company, Ameren Illinois Company; American Transmission Company LLC; Cleco Power LLC; Duke Energy Business Services, LLC for Duke Energy Indiana, Inc.; Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, Inc.; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Indiana Gas & Electric Company; and Wolverine Power Supply Cooperative, Inc.

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.”⁶ With one limited exception,⁷ sections 205 and 206 of the FPA do not contain such references and, by their terms, apply only to public utilities.⁸ 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-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.⁹

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’s transmission revenue requirement, it lacked authority to

⁶ See 16 U.S.C. § 824(f) (2018).

⁷ 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.

⁸ *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”).

⁹ *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.

direct Vernon to pay refunds.¹⁰ 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] because it was filed by [California Independent System Operator, Inc. (CAISO)], a jurisdictional entity, and approved by FERC."¹¹

6. Although the Commission "does not have refund authority over . . . governmental entities and non-public utilities,"¹² 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."¹³ 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."¹⁴

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 Southwest Power Pool, Inc.'s (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.¹⁵

¹⁰ *Id.* at 673-76.

¹¹ *Id.* at 676.

¹² *Bonneville*, 422 F.3d at 911.

¹³ 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*) (citing *Lively Grove Energy Partners, LLC*, 140 FERC ¶ 61,252, at P 47 n.59 (2012); *City of Banning*, 136 FERC ¶ 61,134 (2011); *City of Riverside*, 128 FERC ¶ 61,207, at P 26 (2009); *Great River Energy*, 130 FERC ¶ 61,001 (2010)).

¹⁴ *Xcel*, 815 F.3d at 950.

¹⁵ The Commission initially had 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

B. July 2016 Order

8. On February 12, 2015, certain non-public utilities¹⁶ filed a complaint in Docket No. EL15-45-000 against certain MISO Transmission Owners,¹⁷ contending that the 12.38 percent base return on equity (ROE) that the MISO Transmission Owners earn through the MISO Tariff is unjust and unreasonable. All of the named MISO Transmission Owners were subject to the Commission's jurisdiction as public utilities under the FPA. On June 18, 2015, the Commission established a paper hearing on the complaint and set a refund effective date of February 12, 2015.¹⁸ The Commission also found that the issues of the base ROE of non-public utility MISO Transmission Owners and their refund obligations were not before the Commission in that proceeding, because they were not raised in the complaint.¹⁹

9. In the July 2016 Order, the Commission generally denied requests for rehearing of the Hearing Order. However, the Commission granted in part a request for rehearing with respect to the issue of refunds by non-public utility transmission owners. The Commission stated that, while it does not have refund authority over non-public

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.

¹⁶ Arkansas Electric Cooperative Corporation; Mississippi Delta Energy Agency and its two members, Clarksdale Public Utilities Commission of the City of Clarksdale, Mississippi and Public Service Commission of Yazoo City, Mississippi; and Hoosier Energy Rural Electric Cooperative, Inc.

¹⁷ MISO Transmission Owners named in the 2015 complaint are: ALLETE, Inc. (for its operating division Minnesota Power, Inc. and its wholly-owned subsidiary Superior Water Light, & Power Company); Ameren Illinois Company; Union Electric Company (identified as Ameren Missouri); Ameren Transmission Company of Illinois; American Transmission Company LLC; Cleco Power LLC; Duke Energy Business Services, LLC; Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, LLC; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, Inc.; Indianapolis Power & Light Company; International Transmission Company; MidAmerican Energy Company; Montana-Dakota Utilities Co., Northern Indiana Public Service Company; Northern States Power Company-Minnesota; Northern States Power Company-Wisconsin; Otter Tail Power Company; and Southern Indiana Gas & Electric Company.

¹⁸ *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 151 FERC ¶ 61,219 (2015) (Hearing Order).

¹⁹ Hearing Order, 151 FERC ¶ 61,219 at P 50.

utilities,²⁰ when an RTO has proposed under FPA section 205²¹ to include a non-public utility transmission owner'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 transmission owner's agreement to make refunds if the rate, as filed, is later found to be not just and reasonable. However, the Commission stated that, until recently, the Commission has only required such a refund commitment in the specific FPA section 205 proceeding where the RTO has proposed to include the non-public utility transmission owner's transmission revenue requirement in the RTO's jurisdictional tariff. 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. The Commission stated that, to reduce this regulatory gap in MISO, the Commission has conditioned approval of FPA section 205 tariff filings by MISO and non-public utility transmission owners to add an RTO adder to their base ROEs on commitments by the non-public utility transmission owners to provide refunds in any proceeding resulting in a new base ROE for MISO Transmission Owners, including in the complaint proceeding before it on rehearing.²²

10. The Commission also granted in part Xcel's request for rehearing of the Hearing Order, and instituted a proceeding under FPA section 206, with paper hearing procedures, to investigate MISO's Tariff.²³ The Commission explained that, absent a refund commitment, MISO's resulting jurisdictional rates may not be just and reasonable, noting with respect to the MISO Tariff that:

It thus appears that the lack of a refund commitment in the MISO 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

²⁰ July 2016 Order, 156 FERC ¶ 61,061 at P 42 (citing *Bonneville Power Admin. v. Fed. Energy Reg. Comm'n*, 422 F.3d 908, 911 (9th Cir. 2005) (*Bonneville*)).

²¹ 16 U.S.C. § 824d (2018).

²² July 2016 Order, 156 FERC ¶ 61,061 at P 44.

²³ *Id.* PP 41-51.

because, absent such a commitment, MISO's resulting jurisdictional rates may not be just and reasonable.²⁴

11. The Commission explained that its concerns might be addressed by Tariff revisions that require a prospective refund commitment from non-public utility transmission-owning members. The Commission noted that, while it has previously conditioned approval of FPA section 205 tariff filings made by the RTOs on behalf of non-public utility transmission owners on commitments to provide refunds, such refund commitments only apply to the specific proceeding at issue, e.g., refunds if the Commission establishes a lower ROE than what was proposed, and not to "the full range of situations in which [non-public utility transmission owners] may receive revenues associated with service provided due to their status as transmission-owning RTO members."²⁵ The Commission added that, under such a prospective refund commitment, non-public utility transmission owning members would be subject to the same refund obligations as public utility transmission owning members 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. These include, but are not limited to, refunds to: (1) correct any errors in the application of their formula rates; (2) remedy any other elements of, or costs passed through, their formula rates that are found to be unjust and unreasonable; or (3) remedy any rules governing allocation of Tariff revenues among transmission owners that are found to be unjust and unreasonable.²⁶

C. October 2017 Order

12. 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 MISO's stakeholder process.²⁷ 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 a court, not the Commission. In so clarifying, 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."²⁸ The Commission

²⁴ *See id.* P 46.

²⁵ *Id.* PP 44-45.

²⁶ *Id.* P 47.

²⁷ October 2017 Order, 161 FERC ¶ 61,057.

²⁸ *Id.* P 19.

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.”²⁹ 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 non-public utility to make refunds” and *Alliant* for the proposition that a court may enforce such commitments.³⁰ On the other hand, the Commission described the D.C. Circuit in *Xcel* as holding that the Commission erred in “failing to adhere to its policy and in not providing full retroactive relief to remedy this error.”³¹

13. In addition, the Commission instituted a new proceeding in Docket No. EL18-18-000, pursuant to FPA section 206, to examine the Owners Agreement and other jurisdictional documents and consolidated it with Docket No. EL16-99-000. The Commission also directed MISO 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 owning members or show cause as to why revisions to its Tariff or other governing documents are not necessary.

14. NPPD, APPA, Dairyland, and MISO Transmission Owners filed timely requests for rehearing of the October 2017 Order, and NRECA, Midwest, and Hoosier, Southern Illinois, and WPPI filed timely requests for rehearing and clarification of the October 2017 Order.

II. MISO’s Compliance Filing

15. On February 28, 2018, MISO made concurrent filings in response to the October 2017 Order revising the Owners Agreement and the MISO Tariff. MISO proposes to add the following language to section 5.A.2 of the Owners Agreement to require non-public utility transmission owners to provide “all manner of refunds” that may be ordered pursuant to FPA sections 205 or 206 proceedings initiated on or after October 26, 2017 related to revenues that they may receive associated with service provided due to their status as transmission owners.

²⁹ *Id.* P 21.

³⁰ *Id.* P 22 (citing *TANC*, 495 F.3d at 663, 675; *Alliant*, 347 F.3d 1046, 1050).

³¹ *Id.* (citing *Xcel*, 815 F.3d at 950 (internal citations omitted)).

16. MISO also proposes to create a new section 12F of Module A of the MISO Tariff memorializing this refund commitment made pursuant to the corresponding obligations set forth in the Owners Agreement.

17. Additionally, MISO states that it “requested that each of its non-public utility transmission owning members indicate to MISO its intent to commit to make refunds as ordered by FERC or seek to initiate the process to remove its assets from MISO’s functional control” before it submitted its filing.³² It received a response from each non-public utility transmission owner and “none [has] elected to initiate the process to remove assets from MISO’s functional control.”³³

III. Notice and Responsive Pleadings

18. Notice of the FPA section 206 proceeding in Docket No. EL18-18-000 initiated in the October 2017 Order to examine the MISO Owners Agreement and any other Commission-jurisdictional MISO 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. 49,603 (Oct. 26, 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*.

19. Timely motions to intervene were filed by Associated Electric Cooperative, Inc. and Michigan Public Power Agency.

20. Notice of MISO’s Compliance Filing in Docket No. ER18-937-000 was published in the *Federal Register*, 83 Fed. Reg. 9728 (Mar. 7, 2018), with interventions and protests due on or before March 21, 2018.

21. Timely motions to intervene were filed by Cooperative Energy, Hoosier, Muscatine Power and Water, Consumers Energy Company, Central Power Electric Cooperative, Inc., Associated Electric Cooperative, Inc., American Municipal Power, Inc., Michigan Public Power Agency, Michigan South Central Power Agency, Rochester Public Utilities, NRECA, APPA, Basin Electric Power Cooperative, and Dairyland Power Cooperative. MISO Transmission Owners filed a timely motion to intervene and comments supporting MISO’s Compliance Filing. No entities protested MISO’s Compliance Filing.

³² MISO Compliance Filing at 6.

³³ *Id.*

IV. Discussion

A. Procedural Matters

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

B. Substantive Matters

1. Rehearing Requests of the October 2017 Order

23. APPA alleges that the Commission erred in the October 2017 Order, by finding that it has authority to require MISO 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 MISO's 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.³⁴ 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 MISO to make a compliance filing without first finding that MISO's 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 MISO.

24. NPPD suggests that the Commission impose a carve-out for existing MISO 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."³⁵ NPPD also asserts that this order contradicts the Commission's approval of WestConnect's regional transmission planning and cost allocation process

³⁴ APPA Rehearing Request at 7-8 (citing *Alliant*, 347 F.3d at 1050); NPPD Rehearing Request at 7-10.

³⁵ NPPD Rehearing Request at 12-13.

that enables non-public utilities to participate as coordinating transmission owners without being subject to regional cost allocation.

25. Like APPA and NPPD, NRECA argues that the Commission erred in doing indirectly what it is prohibited from doing directly, i.e., by requiring that MISO include a refund commitment by non-public utility transmission owning members, a requirement that the Commission concedes that it could not enforce.³⁶

26. Dairyland makes a similar argument with regard to the requirement in the Owners Agreement that non-public utility transmission owning members provide refunds. Dairyland argues that the Commission's reliance upon *TANC* and *Alliant* is inapplicable because those cases involved refunds made pursuant to voluntary commitments by non-public utilities, rather than a Commission directive to modify an existing Commission-jurisdictional contract to include such a commitment.³⁷ Dairyland contests the Commission's characterization of refund commitments as voluntary given the significant costs incurred in withdrawing from an RTO and terminating an RTO membership agreement should the non-public utility transmission owning member refuse to commit to paying refunds. Dairyland states that the FPA expressly prohibits the Commission's action, even if this measure would fulfill other aspects of the FPA's statutory mandate.³⁸

27. MISO Transmission Owners request rehearing of the Commission's rejection of MISO's and MISO Transmission Owners' request that the Commission clarify MISO's refund responsibilities by stating, in any final order in this proceeding, "that MISO is not required to provide refunds unless and until it collects monies owed from non-public utility transmission owners from whom refunds are due."³⁹ MISO Transmission Owners argue that the Commission's failure to excuse MISO from paying refunds until it collects from non-public utility transmission owning members is inconsistent with prior precedent addressing SPP's refund obligations from revenues improperly distributed to a non-public utility transmission owning member. Specifically, MISO Transmission Owners assert that the Commission erred in describing the Tri-County Remand Order⁴⁰ as relieving SPP from making refunds in advance because Tri-County lacked a refund commitment.

³⁶ NRECA Rehearing Request at 3-4.

³⁷ Dairyland Rehearing Request at 5-6 (citing *Alliant*, 347 F.3d at 1050; *TANC*, 495 F.3d at 675).

³⁸ *Id.* at 6-10 (citing *Nat'l Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1521 (D.C. Cir. 1990)).

³⁹ MISO Transmission Owners Rehearing Request at 1-2.

⁴⁰ *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,057 (2016) (Tri-County Remand Order).

Instead, MISO Transmission Owners state that the Commission was able to direct Tri-County to pay refunds and therefore Tri-County already had a refund commitment.⁴¹ MISO Transmission Owners argue that the Commission ignored the potential for protracted and uncertain judicial proceedings that could yield prolonged or permanent revenue shortfalls that would violate MISO's revenue-neutral status and impose an unreasonable obligation on MISO Transmission Owners to backstop the refund obligations of non-public utility transmission owners.

28. NRECA also argues that the Commission erred in declining to determine whether MISO must commit affirmatively to submit filings pursuant to FPA section 205 to change its rates on behalf of non-public utility transmission owning members. NRECA argues that (1) MISO already undertakes this obligation for jurisdictional public utilities; (2) the Commission arbitrarily and capriciously stated that this issue is beyond the scope of this proceeding; and (3) requiring MISO to make such filings would ensure nondiscriminatory treatment of non-public utility transmission owning members under MISO's Tariff. NRECA suggests that the Commission should clarify that MISO must make Tariff changes upon request by a non-public utility transmission owning member as part of MISO's obligation to include each transmission owner's formula rate in MISO's Tariff and to remain consistent with a similar process in SPP.⁴²

29. Hoosier, Southern Illinois, and WPPI argue that the Commission erred in failing to provide access to a comparable remedy for *under*-collection of transmission revenues owed to non-public utility transmission owners, thereby unduly discriminating against these entities upon whom the Commission is now attempting to impose a refund obligation similar to that imposed on public utilities. These entities argue that they are left with two options to remedy this problem. First, they may file a complaint pursuant to FPA section 206; but they note that this would not provide complete relief because, even if granted, relief may not be immediately available. Second, they could request that MISO make a filing pursuant to FPA section 205 on their behalf. While these entities represent that MISO has been helpful in the past in this regard, they describe this option as entirely dependent on MISO's discretion and timing. These entities therefore request that the Commission require MISO to amend its governing documents such that MISO, "if requested to do so by a non-public utility [transmission owner], . . . file a revision to its Tariff pursuant to FPA section 205, within ten days of receiving such a request accompanied by a copy of the proposed filing."⁴³ These entities argue that, in the October 2017 Order, the Commission erred in describing the request to include this

⁴¹ MISO Transmission Owners Rehearing Request at 4-8 (citing Tri-County Remand Order, 156 FERC ¶ 61,057 at PP 17, 24, 26).

⁴² NRECA Rehearing and Clarification Request at 5-6.

⁴³ Hoosier, Southern Illinois, and WPPI Rehearing Request at 1, 4-8.

comparable treatment as outside the scope of this proceeding. These entities urge the Commission to clarify that MISO may file revisions to its Tariff and other governing documents, contemporaneously with the filing required by the October 2017 Order, to file changes to these documents that provide for comparable treatment by non-public utility transmission owning members to increase their rates.

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 owners in MISO.

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 owners in MISO, 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.⁴⁴ 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 affirmed 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.⁴⁵ 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

⁴⁴ *Xcel*, 815 F.3d at 953.

⁴⁵ See, e.g., *Bonneville*, 422 F.3d at 926; *TANC*, 495 F.3d at 673.

non-jurisdictional entity to make refunds.⁴⁶ Thus, non-public utilities are not similarly situated to other RTO transmission owners 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 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.⁴⁷

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,⁴⁸ and appropriately accounts for distinct characteristics of these entities like those discussed above.

35. For these reasons, we find that the lack of a general refund commitment by non-public utilities similar to that applicable to jurisdictional entities pursuant to FPA sections 205 and 206 does not render MISO's rates unjust and unreasonable or unduly

⁴⁶ *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).

⁴⁷ 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.'").

⁴⁸ *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).

discriminatory or preferential.⁴⁹ In light of this determination, we terminate the FPA section 206 proceedings instituted by the Commission in the July 2016 Order in Docket No. EL16-99-000 and the October 2017 Order in Docket No. EL18-18-000.

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 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.⁵⁰

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

37. Finally, because we are granting rehearing of the October 2017 Order, we dismiss MISO's Compliance Filing in Docket Nos. ER18-937-000 and ER18-937-001 as moot, and terminate those proceedings.

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

(C) The proceedings in Docket Nos. ER18-937-000 and ER18-937-001 are hereby terminated, as discussed in the body of this order.

⁴⁹ 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 owners in MISO, we do not address requests for rehearing regarding collecting refunds and submitting filings on behalf of, and the potential for under-collection of transmission revenues by, non-public utility transmission owners.

⁵⁰ *Xcel*, 815 F.3d at 950 (citing, e.g., *Lively Grove Energy Partners, LLC*, 140 FERC ¶ 61,252, at P 47 & n. 59 (2012)).

(D) The proceedings in Docket Nos. EL16-99-000 and EL18-18-000 are hereby terminated, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.