

149 FERC ¶ 61,050
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket Nos. ER12-959-000
ER12-959-005

ORDER DENYING REHEARING AND ACCEPTING COMPLIANCE FILING,
SUBJECT TO FURTHER COMPLIANCE FILING

(Issued October 16, 2014)

1. In this order, we deny requests for rehearing of the Commission's order issued on February 21, 2013.¹ In addition, we accept Southwest Power Pool, Inc.'s (SPP) March 19, 2013 compliance filing on behalf of Tri-County Electric Cooperative, Inc. (Tri-County), instituting Tri-County's voluntary commitment to pay refunds of the difference between the proposed rate and the rate ultimately determined by the Commission to be just and reasonable in the hearing in Docket No. ER12-959, subject to a further compliance filing.

I. Background

2. On February 1, 2012, SPP filed proposed revisions to its Open Access Transmission Tariff (Tariff), on behalf of Tri-County, to implement Tri-County's formula rate for transmission service.² In its filing, made under section 205 of the Federal Power Act (FPA),³ SPP stated that the formula rate would be used to calculate the annual transmission revenue requirement (ATRR) and the resulting update to Attachment H, ATRR for Network Integration Service, for Tri-County's transmission facilities. SPP also submitted Tariff revisions to Attachment T, Rate Sheets for Point-to-Point Transmission Service, to incorporate Tri-County's charges for point-to-point

¹ *Southwest Power Pool, Inc.*, 142 FERC ¶ 61,135 (2013) (February 21 Order).

² *Southwest Power Pool, Inc.*, 138 FERC ¶ 61,231 (2012) (Hearing Order).

³ 16 U.S.C. § 824d (2012).

transmission service for the SPP Zone 11. SPP requested an effective date of April 1, 2012.

3. By order issued on March 30, 2012, the Commission accepted the proposed Tariff revisions for filing, effective April 1, 2012, and set them for hearing and settlement judge procedures. In so doing, the Commission found that the record in the proceeding did not provide enough information to determine the appropriate classification of the facilities that formed the basis for the annual revenue requirements proposed by Tri-County.⁴ Furthermore, the Commission found that Tri-County's proposed formula rate template and protocols raised issues of material fact that could not be resolved based on the record before it and would be more appropriately addressed in the hearing and settlement procedures.

4. Certain parties filed requests for rehearing or clarification of the Hearing Order. They noted that Tri-County, which is an exempt public utility,⁵ had not voluntarily committed to a refund obligation. They argued that, in allowing the proposed rates to become effective immediately and without a refund obligation from Tri-County, the Hearing Order failed to ensure that: (1) the ATRR of Tri-County is subject to a full review under section 205 of the FPA to ensure that transmission rates under the SPP Tariff are just and reasonable; and (2) consumers are protected from excessive rates and charges, particularly where the Commission's preliminary analysis found that the proposed rates may be unjust and unreasonable, unduly discriminatory or preferential or otherwise unlawful. They also sought clarification as to the appropriate burden of proof that applied to Tri-County's proposed rates.

5. In the February 21 Order, the Commission determined that the Hearing Order erred in allowing SPP's rate proposal for Tri-County's ATRR to go into effect April 1, 2012 (the requested effective date of the filing), without a commitment from Tri-County to refund the difference between the as-filed rate and the rate ultimately found to be just

⁴ In an order being issued concurrently with this order, in Docket No. ER12-959-003, the Commission affirms the Initial Decision in which the Presiding Judge found that none of Tri-County's facilities is eligible for rolled-in rate recovery from SPP's Zone 11 transmission customers. *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,051.

⁵ Although we sometimes refer to entities like Tri-County as "non-public utilities" because they are not subject to our traditional regulatory authority over rates, terms and conditions of transmission of electric energy in interstate commerce and sales of electric energy at wholesale in interstate commerce, it is more accurate, consistent with section 201(f) of the FPA, *see* 16 U.S.C. § 824(f) (2012), to characterize them as "exempt public utilities" because they are exempt from certain (but not all) provisions of the FPA.

and reasonable by the Commission. The Commission determined that, consistent with Commission policy in other instances involving non-public utilities, without such a refund commitment, the effective date for Tri-County's ATRR should be the date the Commission makes the ATRR effective in its order approving the ATRR following hearing and settlement judge procedures.⁶

6. The Commission denied the request to make Tri-County's rates that had been collected from April 1, 2012, the original effective date of the filing, subject to refund under section 205. Citing *Riverside*, the Commission determined that the FPA reflects Congress' intent to exempt non-public utilities, including governmental entities, from the Commission's refund authority.⁷

7. However, the Commission determined that it would not be just and reasonable to allow SPP to continue to pass through Tri-County's proposed rate prior to the Commission's order establishing a just and reasonable rate following hearing and settlement judge proceedings, without refund protection in place to ensure that ratepayers are ultimately paying only a just and reasonable rate. Therefore, to ensure that SPP's rates were just and reasonable pending the outcome of hearing and settlement judge proceedings, the Commission acted pursuant to its authority under section 206 of the FPA⁸ and directed that, within 30 days of the date of issuance of its order, SPP either: (a) submit a compliance filing removing from SPP's Tariff the Tariff sheets under which SPP had been collecting Tri-County's rate and ceasing collecting the Tri-County rate effective as of the day after the date of the order and until the Commission issues an order following hearing and settlement judge proceedings; or (b) submit a compliance filing providing a voluntary commitment by Tri-County to refund the difference between the proposed rate and the rate ultimately determined by the Commission to be just and reasonable following hearing and settlement judge procedures, with such voluntary

⁶ February 21 Order, 142 FERC ¶ 61,135 at P 13 (citing *Lively Grove Energy Partners, LLC*, 140 FERC ¶ 61,252, at P 47 and n.59 (2012) (*Lively Grove*). Cf. *City of Riverside, California*, 128 FERC ¶ 61,207, at P 26 (2009) (*Riverside*); *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,131, at P 70 & n.92 (2011) (*MISO*)).

⁷ *Id.* P 14 (citing *Riverside*, 128 FERC ¶ 61,207 at P 24 (citing *Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 673-674 (D.C. Cir. 2007) (*TANC*))).

⁸ 16 U.S.C. § 824e (2012).

commitment to be effective as of the day after the date of the February 21 Order, i.e., February 22, 2013.⁹

II. Discussion

A. Rehearing

1. Parties' Positions

8. On March 25, 2013, requests for rehearing of the February 21 Order were filed by: (1) Xcel Energy Services Inc. (Xcel) on behalf of its affiliate Southwestern Public Service Company (Southwestern); and (2) Occidental Permian, Ltd. and Occidental Power Marketing, L.P. (Occidental) and Central Valley Electric Cooperative, Inc., Farmers' Electric Cooperative, Inc., Lea County Electric Cooperative, Inc. and Roosevelt County Electric Cooperative, Inc. (New Mexico Cooperatives) (collectively, Occidental and New Mexico Cooperatives).

a. Xcel

9. To the extent the refund effective date is premised upon a Commission finding that the rates are "Tri-County rates," the Commission erred, according to Xcel. Xcel states that it did not request that the Commission establish a refund effective date for refunds from Tri-County, as the Commission stated in the February 21 Order. To the contrary, Xcel specifically explained that the rates at issue were SPP rates, but the Commission failed to address why refunds could not be established effective April 1, 2012 against SPP. Xcel also asserts that the Commission appeared to view SPP as merely Tri-County's billing agent. Xcel contends that the Commission's lack of jurisdiction to accept Tri-County rates under the FPA cannot be cured by SPP consenting to act as Tri-County's agent in passing-through Tri-County rates to SPP customers. Xcel also argues that Order No. 2000¹⁰ requires that regional transmission operators (RTOs) be independent of market participants and, thus, SPP cannot merely be an agent of Tri-County's, administering "Tri-County's rate." Thus, Xcel concludes that the rates at issue

⁹ The Commission also clarified that under section 205 of the FPA, SPP and Tri-County had the burden to support the proposed rates in the hearing. February 21 Order, 142 FERC ¶ 61,135 at P 17.

¹⁰ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

are not Tri-County rates, but are instead SPP rates, which have been assessed since April 1, 2012 without refund protection due to the Hearing Order error.¹¹

10. Xcel argues that the February 21 Order's reliance on *TANC* for the proposition that the Commission lacked authority to order refunds by non-jurisdictional utilities was misplaced. Xcel asserts that *TANC* only addressed the standard of review to be applied when reviewing a proposal to include non-jurisdictional costs in independent system operator (ISO) or RTO rates, and whether the Commission could direct a non-jurisdictional utility to pay refunds related to its ATRR to an ISO or RTO. Xcel asserts that *TANC* did not address potential constraints upon the Commission's authority under the FPA to order refunds from the jurisdictional ISO or RTO that has made the filing under section 205 of rates that included non-jurisdictional ATRR and the actual jurisdictional rates.¹² Xcel also argues that the February 21 Order was inconsistent with the Commission's general policy of providing refunds, a policy of providing maximum refund protection and a general policy of providing refunds to remedy overcharges.¹³ Xcel contends that the denial of a refund effective date prior to February 22, 2013 preemptively denied refunds before findings of fact could be made in the hearing, and that this was done without any explanation.¹⁴

11. Xcel contends that the Commission did not craft a proper remedy for its error. Although the Commission undertook prospective measures to mitigate the harm, the Commission did not undo the prior harm caused from April 1, 2012 to February 21, 2013. Xcel argues that without any refund protection for this period, the Commission's error causes Southwestern irreparable harm.¹⁵ Under these circumstances, Xcel argues, the Commission must remedy the harm caused by the March 30 Order. Xcel states that the courts have explained that "[w]hen the Commission commits legal error, the proper remedy is one that puts the parties in the position they would have been in had the error

¹¹ Xcel Rehearing at 6-10.

¹² *Id.* at 9-10.

¹³ *Id.* at 13 (citing *Town of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (regarding general policy of providing refunds); *City of Fallon, Nevada v. NV Energy Operating Cos.*, 142 FERC ¶ 61,166, at P 43 (2013) (regarding policy of providing maximum refund protection to customers); and, *e.g.*, *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009)).

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 14-15.

not been made.”¹⁶ It states that there is a presumption of retroactive remedies for erroneous Commission decisions, and the remedy for error by the Commission can include retroactive surcharges.¹⁷ Xcel cites cases in which courts of appeals found the Commission had committed errors and found that the injured parties should be put in the same position they would have been in absent the error.¹⁸

12. Xcel also argues that section 309 of the FPA¹⁹ authorizes the Commission to “perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act.” Xcel argues that the courts have noted that section 309 gives the Commission “the authority in fashioning remedies to consider equitable principles, one of which is to do what should have been done.”²⁰

13. Xcel also requests clarification or, in the alternative, rehearing, with regard to Tri-County’s voluntary refund commitment. Xcel requests clarification that the Commission’s compliance filing requirement includes the requirement that Tri-County commit to refund all accumulated interest on the principal amounts refunded by Tri-County. It argues that this clarification is consistent with the Commission’s regulations and precedent, as well as consistent with the voluntary commitments by other non-jurisdictional utilities provided in connection with Commission review of their costs.²¹

14. Xcel also requests clarification that any voluntary refund commitment by Tri-County must apply to all amounts billed, but uncollected by SPP as of February 22, 2013. Otherwise, Xcel requests rehearing on this issue. Xcel argues that this clarification is

¹⁶ *Id.* at 15 (citing *Exxon Co. v. FERC*, 182 F.3d 30, 40 (D.C. Cir. 1999); *Pub. Util. Comm’n v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993); *Panhandle Eastern Pipe Line Co. v. FERC*, 907 F.2d 185, 189 (D.C. Cir. 1990); *Office of Consumers’ Counsel, State of Ohio v. FERC*, 826 F.2d 1136, 1139 (D.C. Cir. 1987)).

¹⁷ *Id.* (citing *Southeastern Michigan Gas Co. v. FERC*, 133 F.3d 34, 42 (D.C. Cir. 1998) (regarding presumption of remedies); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073-74 (D.C. Cir. 1992) (regarding retroactive surcharges)).

¹⁸ *Id.* at 15-16.

¹⁹ 16 U.S.C. § 825h (2012).

²⁰ *Id.* at 16 (quoting *Northern Natural Gas Co. v. FERC*, 785 F.2d 338, 343 (D.C. Cir. 1986)).

²¹ *Id.* at 16-18.

consistent with Commission precedent, which establishes a refund effective date, and all charges assessed after the refund effective date must be returned to customers. Xcel argues that this clarification is consistent with the February 21 Order's directive to SPP to "cease collecting" from customers the rates including the Tri-County costs.²² Further, Xcel argues that when the Commission requires refunds of a public utility, it typically requires the public utility to refund "amounts collected."²³

b. Occidental and New Mexico Cooperatives

15. Although the rates at issue in this proceeding are based on cost data from Tri-County's facilities, the rates are at law and in reality SPP rates, according to Occidental and New Mexico Cooperatives. They assert that, if the Commission treats these rates as SPP rates, as it should, SPP would bear the responsibility for supporting and justifying proposed rate changes in its Tariff, just as any other public utility filing for a rate change under FPA section 205. By correctly treating the rates as those of SPP, a public utility, the Commission has the undisputed authority to order SPP to pay refunds back to the effective date of the initial filing.²⁴

16. Regarding the determination that the Commission could not order Tri-County, a non-jurisdictional entity, to make refunds, Occidental and New Mexico Cooperatives argue that the Commission has previously rejected the idea that SPP is a "mere billing agent" for non-public utility members. To the contrary, it found that the rates at issue were SPP rates.²⁵ Distinguishing *TANC*, they argue that, unlike the situation with non-jurisdictional utilities, the courts have never held that the Commission is barred from ordering a public utility to provide refunds of rates that are unjust and unreasonable as a result of overcharges from a non-jurisdictional utility. Instead, the courts have only held

²² *Id.* at 18-19.

²³ *Id.* at 19 (citing *Rail Splitter Wind Farm, LLC v. Ameren Servs. Co.*, 142 FERC ¶ 61,047 (2013) (*Rail Splitter*)).

²⁴ Occidental and New Mexico Cooperatives Rehearing at 5.

²⁵ *Id.* at 6 (citing *Southwest Power Pool, Inc.*, 119 FERC ¶ 61,307, at P 11 (2007) ("SPP is a jurisdictional public utility, and SPP (and not [Western Farmers Electric Cooperative (WFEC)]) is providing the services at issue. It is SPP's Tariff and rates (and not WFEC's rates) that are at issue and the fact that SPP's rates may ultimately be traceable to WFEC do not make the services or the rates at issue here WFEC services or rates.")).

that the Commission does not have the statutory authority to order non-jurisdictional utilities to issue refunds, according to Occidental and New Mexico Cooperatives.²⁶

17. Occidental and New Mexico Cooperatives contend that the Commission's refund protection can extend back to when the SPP rates incorporating Tri-County's ATRR first went into effect because the ATRR is an input into the SPP formula rate. They assert that the Commission has the authority to do so under either FPA section 205 or section 206. According to Occidental and New Mexico Cooperatives, the Commission has authority to order refunds for past periods where a public utility has either misapplied a formula rate or otherwise charged rates contrary to the filed rate.²⁷ Thus, they assert, if the Commission ultimately finds that no transmission facilities, as defined in SPP's Tariff, are properly included in Tri-County's ATRR, it would be the case that SPP, as of April 1, 2012, had been charging an erroneous rate, i.e., a rate calculated using a formula in which an erroneous, mistaken and otherwise improper ATRR value was inputted. In other words, in that situation, SPP misapplied the formula rate by improperly including the costs of non-transmission facilities within Tri-County's ATRR. Thus, Occidental and New Mexico Cooperatives argue, the Commission has the authority to order the refund of unjust and unreasonable charges (charges that have never been found to be just and reasonable) back to the date the rates went into effect (in this case, April 1, 2012).²⁸

18. Occidental and New Mexico Cooperatives also argue that establishing a refund condition extending back to the earliest date possible is strongly supported by equity considerations, and that the Commission has a policy of providing maximum protection to its customers by establishing a refund date at the earliest date possible.²⁹ They contend that the Commission departed from its policy without explanation. According to Occidental and New Mexico Cooperatives, establishing a refund condition as of the date the rates went into effect would put Zone 11 ratepayers in the same position that they would have been in if the Commission had not erred by allowing the rates to go into effect without a current refund commitment before a just and reasonable determination had been made. If any portion of the SPP rates incorporating Tri-County's ATRR are found by the Commission not to be just and reasonable, SPP Zone 11 ratepayers will have paid unjust and unreasonable rates without any ability to recoup the overcharges.

²⁶ *Id.* at 6-7.

²⁷ *Id.* at 8 (citing, e.g., *DTE Energy Trading, Inc. v. Midwest Independent Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,062, at P 28 (2005)).

²⁸ *Id.* at 9.

²⁹ *Id.* (citing *Louisville Gas & Elec. Co.*, 142 FERC ¶ 61,157, at P 23 (2013)).

This violates the requirement of FPA section 205 that rates be just and reasonable as well as the consumer protection purpose of the FPA, according to Occidental and New Mexico Cooperatives.³⁰ In addition, they assert that forcing Zone 11 ratepayers to pay rates that are unjust and unreasonable goes against the Commission's policy to assure from the beginning that ratepayers are protected from unjust and unreasonable rates.³¹

19. In addition, Occidental and New Mexico Cooperatives request clarification or, in the alternative, rehearing that all refunds, no matter the date of the refund obligation, must include interest. They note that in other cases, non-public utilities have specifically agreed to provide interest as part of their voluntary commitment to provide refunds. They assert that this clarification is necessary because Tri-County sought to exploit the error in the Hearing Order to evade a refund condition and can be expected to continue to do so if the Commission does not mandate refunds back to April 1, 2012. Occidental and New Mexico Cooperatives request that the Commission direct SPP to have Tri-County confirm that its voluntary refund commitment includes an obligation to make payments with interest calculated according to the Commission's regulations or, alternatively, require SPP to direct Tri-County to provide interest payments as part of its voluntary refund commitment.³²

20. Occidental and New Mexico Cooperatives also request that the Commission clarify that this voluntary refund commitment applies to all revenues collected by SPP beginning as of February 22, 2013, as opposed to only applying to charges that are accrued as of February 22, 2013. Thus, if, prior to February 22, 2013, SPP had already billed SPP Zone 11 ratepayers for charges accrued as a result of Tri-County's ATRR, but did not receive payment until on or after February 22, 2013, then those charges must be included as part of Tri-County's voluntary refund commitment. They assert that this would be consistent with the Commission's terminology in the February 21 Order giving SPP the option to "cease collecting" after February 21, 2013 if it did not provide Tri-County's voluntary refund commitment.³³

³⁰ *Id.* at 10.

³¹ *Id.* (citing *Lively Grove*, 140 FERC ¶ 61,252 at P 47, n.59).

³² *Id.* at 11-12.

³³ *Id.* at 13.

2. Commission Determination

a. Procedural Matters

21. On April 9, 2013, SPP filed an answer to the requests for rehearing. On April 22, 2013, Occidental and New Mexico Cooperatives filed an answer to SPP's answer. On April 24, 2013, Xcel filed an answer to SPP's answer.

22. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2014), prohibits answers to requests for rehearing, and therefore we will reject SPP's answer to the requests for rehearing and the answers of Xcel and Occidental and New Mexico Cooperatives.

b. Substantive Matters

23. First, we acknowledge that in several places, the February 21 Order referred to "SPP's rate" and "Tri-County's rate" interchangeably, which was inaccurate.³⁴ To be accurate, in those places the order should have referred to SPP's rate through which it proposed to recover Tri-County's ATRR. Alternatively, it should have referred to Tri-County's "ATRR," not Tri-County's "rate."³⁵ However, the parties' emphasis on the affected rate being an SPP rate rather than a Tri-County rate does not change our view that the Commission cannot grant the relief that the rehearing parties seek; i.e., it cannot establish refunds against SPP back to April 1, 2012, and we deny the requests for rehearing, as discussed below.

24. As the Commission acknowledged in the February 21 Order, the appropriate action in the Hearing Order would have been to withhold an effective date for SPP's

³⁴ See, e.g., February 21 Order, 142 FERC ¶ 61,135 at PP 14-16 and Ordering Paragraph (C). However, other than these references, the February 21 Order contained accurate references. See, e.g., *id.* P 1 (noting that SPP proposed revisions to the SPP Tariff to implement Tri-County's formula rate), P 3 (noting that the proposed formula rate was used to calculate Tri-County's ATRR), P 13 (concluding that it was an error to allow "SPP's rate proposal for Tri-County's ATRR" to go into effect without a voluntary refund commitment from Tri-County), P 16 ("to ensure that SPP's rates are just and reasonable pending the outcome of hearing and settlement judge proceedings," the Commission directed SPP to either remove the affected Tariff sheets from the SPP Tariff or submit a compliance filing providing Tri-County's voluntary refund commitment).

³⁵ We distinguish such references from the order's accurate references to Tri-County's proposed formula rate as being implemented in SPP's Tariff.

filing until SPP provided Tri-County's voluntary refund commitment. However, the Commission did not do so, but it remedied its error as best it could within the limitations on its authority to do so. For this reason, the Commission in the February 21 Order required SPP either to cease collecting the Tri-County ATRR on or after February 22, 2013 or submit a voluntary commitment from Tri-County to provide refunds.

25. Here, the Commission, in the Hearing Order, accepted SPP's filing and made it effective April 1, 2012 without any voluntary refund commitment from Tri-County. Thus, where the error was in allowing SPP's filing to take effect in the Hearing Order on April 1, 2012 without a voluntary refund commitment from Tri-County, the only remedy available at the time of the February 21 Order was the prospective remedy adopted in the February 21 Order – tied to either a prospective reduction from February 22, 2014 or a voluntary refund commitment by Tri-County from February 22, 2014.³⁶

26. In addition, the argument by Occidental and New Mexico Cooperatives that SPP violated the filed rate doctrine by having an unjust and unreasonable rate on file is unpersuasive. The filed rate doctrine prohibits a public utility from charging rates for its services other than those properly filed with the Commission.³⁷ SPP's rates were properly filed with the Commission, and accepted by the Commission. Even if the rehearing parties successfully challenge the justness and reasonableness of Tri-County's ATRR as reflected in SPP's rates, which they did,³⁸ that would not mean that SPP violated the filed rate doctrine and charged a rate other than the filed and accepted rate.

³⁶ See, e.g., *Dynegy Midwest Generation, Inc.*, 110 FERC ¶ 61,358, at P 5 (2005) (where Dynegy's rate schedule had been accepted, without suspension, and was currently in effect, the Commission denied a rehearing request to make the rate subject to refund, determining that its available relief to address concerns about the rate that were raised on rehearing was to institute an investigation under section 206 of the FPA and establish a refund effective date); *FirstEnergy Operating Cos.*, 86 FERC ¶ 61,152, at 61,544, n.12 (“[o]nce a rate goes into effect without suspension, the Commission must act pursuant to Section 206 of the Federal Power Act in order to change that rate.”) (citing *Cooperative Power Association v. FERC*, 733 F.2d 577, 580 (8th Cir.) *reh'g denied*, 739 F.2d 390 (8th Cir.) (1984)) (*Cooperative Power Association*)); *Consumers Energy Co.*, 80 FERC ¶ 61,316, at 62,077 (1997) (“[o]nce a rate is accepted and goes into effect, we cannot suspend [it]” but a party may file a complaint under FPA section 206 to seek to change the rate at issue) (citing *Cooperative Power Association*).

³⁷ See, e.g., *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 77 (1st Cir. 2002) (citing *Ark. La. v. Hall*, 453 U.S. 571, 577 (1981)).

³⁸ See *supra* note 4.

There is no assertion that SPP recovered other than the formula rates for Tri-County's ATRR that were on file.

27. The argument by rehearing parties that there is an equitable presumption in favor of ordering refunds because the Commission committed legal error is also unpersuasive. The Commission may not act inconsistent with the statute – as relevant here, where the Commission has accepted the rates and they have since become effective – even to achieve what some parties have claimed is a more equitable result.³⁹ Further, the “legal error” precedent cited by the rehearing parties as a basis for ordering equitable relief is not on point where, as here, the Commission was not acting on remand from a court decision authorizing the Commission to grant such relief.⁴⁰

28. Xcel suggests that the Hearing Order also could have suspended the proposed rates and made them effective, subject to a refund obligation by SPP because they are SPP's rates. However, the Commission accepted those rates in the Hearing Order, and they have since become effective. As a result, as noted elsewhere in this order, the Commission does not have the option to order the relief back to April 1, 2012 that Xcel seeks. Moreover, what is at issue here at the outset is Tri-County's ATRR, and, the Commission explained in the February 21 Order, the structure of the FPA reflects Congress' intent to exempt certain utilities, such as governmental utilities, from the Commission's traditional rate regulation and thus likewise from its refund authority.⁴¹ The Commission explained that “FPA section 201(f) thus exempts from Part II of the FPA, including section 205, ‘any political subdivision of a state.’”⁴² In addition, Xcel's suggested approach would have been inconsistent with the Commission's policy regarding filings to implement formula rates of non-jurisdictional entities.⁴³ Moreover,

³⁹ See, e.g., *Pub. Utils. Comm'n of the State of Calif. v. FERC*, 988 F.2d 154, 168 n.12 (D.C. Cir. 1993).

⁴⁰ See *City of Anaheim, Calif. v. FERC*, 558 F.3d 521, 525 (D.C. Cir. 2009) (rejecting an argument that a retroactive rate adjustment was analogous to the Commission's power to remedy its own errors after being reversed in court).

⁴¹ February 21 Order, 142 FERC ¶ 61,135 at P 14 (citing *City of Riverside, California*, 128 FERC ¶ 61,207, at P 24 (citing *Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 673-674 (D.C. Cir. 2007))).

⁴² *Id.*

⁴³ See February 21 Order, 142 FERC ¶ 61,135 at P 15 (“As the Commission held in MISO, although the Commission can subject the rates of non-public utilities (like Tri-County) to a section 205-like review to ensure that, in turn, SPP's rate, through which

(continued ...)

even if the Commission should have suspended SPP's proposed rates and made them effective, subject to a refund obligation by SPP, because those rates are already in effect without suspension, the rehearing parties are requesting, in effect, that the Commission retroactively suspend SPP's rates to recover the Tri-County ATRR. This would be inconsistent with the Commission's longstanding policy; section 2.4(a) of the Commission's regulations explains that Commission policy is that "[t]he Commission cannot suspend a rate schedule after its effective date."⁴⁴

29. We also deny the requests for clarification or rehearing with respect to the rehearing parties' argument concerning amounts billed, but uncollected by SPP as of February 22, 2013. In the *Rail Splitter* case cited by Xcel, the complainant requested refunds of amounts collected above what the complainant alleged was just and reasonable. The Commission denied the complaint, finding that the complainant did not support its claim that the rate at issue was unjust and unreasonable. Thus, the Commission did not order refunds. Accordingly, *Rail Splitter* is inapposite and provides no support for Xcel's position, and Xcel cites no other precedent in support of its position. Further, while Occidental and New Mexico Cooperatives argue that their position on refunds of uncollected amounts is consistent with Commission precedent, they cite no such precedent. We find no such precedent either. However, we note that

SPP will recover Tri-County's proposed rate, is just and reasonable, [footnote omitted] Tri-County is not itself subject to section 205, including Commission-imposed rate suspension and refund obligations. [footnote omitted]" (citing *MISO*, 135 FERC ¶ 61,131 at P 72 (citing *TANC*, 495 F.3d at 672)). Furthermore, as a practical matter, Xcel does not suggest the means by which SPP, a non-profit entity, would provide refunds.

⁴⁴ 18 C.F.R. § 2.4(a) (2014); *accord*, *Cooperative Power Association*, 733 F.2d at 580 (noting that the Commission had adhered to such an interpretation of section 2.4(a) for 40 years and holding that "[n]or do we find that the Commission must suspend otherwise effective rates under a vague theory of 'remedial' powers"); *id.* n.3 ("Although the Commission has never been asked to interpret § 2.4(a) in the context of a rehearing, the Commission's position has consistently been that, once rates become effective, they cannot be suspended. We conclude that the Commission's interpretation of § 2.4(a) as applying to rates subject to a rehearing is consistent with the Commission's historical interpretation and application of its powers. Thus, the deference afforded an agency's interpretation of its own regulations is applicable in the instant case."); *Illinois Power Co.*, 73 FERC ¶ 61,348, at 62,058 (1996) ("the Commission is powerless under the FPA to suspend, even on rehearing, an effective rate") (citing *Cooperative Power Association Kentucky Power Co.*, 64 FERC ¶ 61,112 at 61,922 (1993) (same).

the rehearing parties' request would effectively apply a refund condition prior to February 22, 2013, and thus prior to the remedy established in the February 21 Order, i.e., applying a refund condition retroactively to rates that had previously been accepted and that had already become effective rather than prospectively as the Commission properly did in its February 21 Order. As discussed above, that would be contrary to not only the February 21 Order, but also the Commission's regulations and both court and Commission precedent. (This issue is also raised by the rehearing parties in more detail concerning the compliance filing, and we address it in that section of this order.)

30. Finally, with respect to the requests for clarification concerning interest on refunds, we clarify that any refunds should include interest.⁴⁵ Section 35.19a of the Commission's regulations⁴⁶ provides guidance concerning how the Commission believes the interest on refunds is appropriately calculated.

B. Compliance Filing

31. On March 19, 2013, SPP submitted a letter from Tri-County to SPP stating Tri-County's voluntary commitment to pay refunds. In the letter, dated March 14, 2013, Tri-County commits to "refund the difference between the proposed rate and the rate ultimately determined by the Commission to be just and reasonable in Docket No. ER12-959, effective as of the day after the date of the February 21, 2013 Order."⁴⁷ SPP further states that, in light of Tri-County's refund commitment, SPP will continue to collect the Tri-County rate, unless and until otherwise ordered by the Commission.

32. Notice of SPP's March 19, 2013 compliance filing was published in the *Federal Register*, 78 Fed. Reg. 18,580 (2013), with comments or protests due on or before

⁴⁵ See, e.g., *PPL Wallingford Energy, LLC*, 116 FERC ¶ 61,089, at P 31 & n.38 (2006) (the purpose of ordering interest is to make the recipient whole for the time value of money it otherwise would have received). In the instant case, interest would make customers whole for the time value of money they otherwise would not have paid to SPP for Tri-County's ATRR. See also *Anadarko Petroleum v. FERC*, 196 F.3d 1264, 1268 (D.C. Cir. 1999) (interest ensures full compensation, makes the prevailing party whole); *Central Power and Light Co.*, 98 FERC ¶ 61,069, at 61,185 & n.25 (2002) (quoting *Washington Urban League v. FERC*, 886 F.2d 1381, 1386 (3rd Cir. 1989) ("adjusting the payment of the refunds so that the recipient receives payment in inflation-adjusted dollars [i.e., interest] is a way of ensuring that the recipient is in fact 'refunded.'")).

⁴⁶ 18 C.F.R. § 35.19a (2014).

⁴⁷ SPP Transmittal Letter at 2 & Att. A.

April 9, 2013. Xcel filed a timely protest. SPP's April 9, 2013 answer to the rehearing requests was also, in part, an answer to Xcel's protest.

1. Parties' Positions

33. Xcel argues that the Tri-County ATRR collected by SPP after February 21, 2013 is not protected by Tri-County's refund commitment. Xcel notes that settlement statements provided by SPP reflect service provided in prior months. Xcel states that, on March 5, 2013, Southwestern received a settlement statement (February 2013 Statement) that: (1) included the Tri-County ATRR for January 2013; and (2) required settlement on March 25, 2013. As an exhibit, Xcel submits a March 14, 2013 letter to SPP in which Xcel, on behalf of Southwestern, disputed the bill, questioning whether the billed amount was subject to the refund protection required by the February 21 Order. In the letter, Xcel noted that Southwestern had been informally advised that Tri-County agreed to the refund condition, but as of the date of the letter neither had written confirmation been provided nor had SPP made a compliance filing indicating Tri-County's refund commitment.⁴⁸ Xcel stated that:

Because the [February 2013 Statement] include[s] the Tri-County ATRR and no written confirmation of Tri[-]County's agreement to pay refunds or compliance filing has been made, the [February 2013 Statement] conflict[s] with the February 21 Order. Therefore, it is necessary to submit this notice disputing the portion of the [February 2013 Statement] associated with Tri-County's formula rate. In particular, Southwestern requests the SPP recalculate the [February 2013 Statement] to remove the impact of the Tri[-]County ATRR until such time as SPP has complied with the directives in the February 21 Order. Southwestern stands ready to pay amounts associated with Tri-County's January 2013 rate upon SPP's submittal of a compliance filing that provides confirmation of Tri[-]County's agreement to provide refunds in conformity with the February 21 Order.⁴⁹

34. Subsequently, in a letter to SPP dated April 1, 2013, Xcel acknowledged that SPP had made the compliance filing containing Tri-County's voluntary refund commitment, but Southwestern still disputed the bill. Xcel stated that it was unclear to Southwestern whether Tri-County's refund commitment covered the February 2013 Statement. To the extent it did not, then Southwestern believed that the refund commitment was

⁴⁸ Xcel Protest, Exh. A at 2.

⁴⁹ *Id.*

inconsistent with the requirements of the February 21 Order and, thus, SPP had not complied with the order.⁵⁰

35. Xcel argues that absent refund protection, the collection of Tri-County's ATRR in the settlement of the February 2013 Statement was in contravention of the February 21 Order. Xcel further asserts that, if those funds were remitted to Tri-County, rather than placed into escrow in recognition of the billing dispute,⁵¹ Southwestern may not be able to recoup those funds. Xcel argues that the Commission should reject SPP's compliance filing, require SPP to cease collecting the Tri-County ATRR on and after February 22, 2013, and declare SPP liable for any collection undertaken on and after February 22, 2013, unless Tri-County agrees to provide a voluntary refund commitment that complies with the February 21 Order.

2. Commission Determination

a. Procedural Matters

36. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), answers to protests are prohibited unless otherwise ordered by the decisional authority. We are not persuaded to accept SPP's answer and will therefore reject it.

b. Substantive Matters

37. SPP's compliance filing complies with the February 21 Order, and we conditionally accept it, subject to a further compliance filing discussed below. In the February 21 Order, the Commission gave SPP the choice either to cease collecting the Tri-County ATRR or to provide Tri-County's voluntary refund commitment, effective as of the date after the order. As noted above, SPP submitted Tri-County's voluntary refund commitment, "effective as of the day after the date of the February 21, 2013 Order," i.e., February 22, 2013. Tri-County's voluntary refund commitment complies with the February 21 Order. Our intent was that Tri-County's voluntary refund commitment apply to SPP's Tri-County ATRR-related rates for service provided beginning on February 22, 2013. The relief available in the February 21 Order was limited to the

⁵⁰ Xcel Protest, Exh. B at 1-2.

⁵¹ Xcel states that SPP has not responded to its request to indicate whether the funds were remitted to Tri-County or placed into escrow. Xcel Protest at 5 & n.11.

Commission's authority under FPA section 206, which does not allow the Commission to change the rate for service provided prior to the refund effective date.⁵²

38. In view of the Commission's determination in the order being issued concurrently that none of Tri-County's facilities is eligible for rolled-in rate recovery from SPP's Zone 11 transmission customers, *supra* note 4, we require SPP to: (1) cease collecting Tri-County's ATRR, effective the date of this order; (2) pass through refunds received from Tri-County's refund commitment, with interest,⁵³ back to February 22, 2013, and submit a refund report within 45 days thereafter; and (3) submit a further compliance filing, within 30 days of the date of this order, to remove from the SPP Tariff the tariff sheets under which SPP has been collecting Tri-County's ATRR.

The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) SPP's compliance filing is hereby accepted, subject to a further compliance filing to be submitted within 30 days of the date of this order, as discussed in the body of this order.

(C) SPP is hereby directed to cease collecting Tri-County's ATRR, effective as of the date of this order, as discussed in the body of this order.

⁵² See *Pepco Energy Services, Inc. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,051, at P 23 (2009) ("The purpose of the refund effective date in section 206(b) [of the FPA] is to limit the utility's risk of paying refunds *only to service that it provides after the refund effective date*. Service provided before the refund effective date must be governed by the Tariff in effect when the service was provided.") (Emphasis added.)

⁵³ See *supra* at p 30, clarifying that any refunds should include interest.

(D) SPP is hereby directed to pass through Tri-County's refunds, with interest, back to February 22, 2013, and to submit a refund report within 45 days thereafter, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose
Secretary.