

I. BACKGROUND

On February 1, 2012, as amended on February 2, 2012, SPP filed on behalf of Tri-County Electric Cooperative, Inc. (“Tri-County”) revisions to the SPP open access transmission tariff (“Tariff”) to incorporate Tri-County’s formula rate for transmission service into Attachment H.³ By an order dated March 30, 2012, the Commission accepted the proposed Tariff revisions for filing, to be effective April 1, 2012, and established hearing and settlement judge procedures.⁴ The Commission, however, did not make the rates subject to refund or set a refund effective date. Xcel on behalf of its utility operating company affiliate Southwestern Public Service Company (“SPS”), 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. (the “New Mexico Cooperatives”) (collectively, “Intervenors”) requested rehearing on this issue, which the Commission addressed in a rehearing order on February 21, 2013.⁵

³ Submission of Tariff Revisions to Incorporate Tri-County Electric Cooperative, Inc. as a Transmission Owner of Southwest Power Pool, Inc., Docket No. ER12-959-000 (Feb. 1, 2012) (“February 1 Filing”).

⁴ *Sw. Power Pool, Inc.*, 138 FERC ¶ 61,231, at P 15 (2012) (“March 30 Order”) This proceeding has been bifurcated into two phases, with Phase I addressing the appropriate classification of the facilities that form the basis for the annual transmission revenue requirement (“ATRR”) proposed by Tri-County, and Phase II addressing Tri-County’s proposed formula rate and protocols and related issues. The hearing is complete for Phase I and the Initial Decision is expected by April 22, 2013. The parties currently are in settlement negotiations with regard to Phase II.

⁵ *Sw. Power Pool, Inc.*, 142 FERC ¶ 61,135 (2013) (“Rehearing Order”).

In the Rehearing Order, the Commission “conclude[d] that the March 30 Order erred in allowing SPP’s rate proposal for Tri-County’s ATRR to go into effect April 1, 2012, without a commitment from Tri-County to refund the difference between the as-filed rate and the rate ultimately found to be just and reasonable by the Commission.”⁶ The Commission explained that “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.”⁷

The Commission also explained 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,” and directed that SPP either:

(a) submit a compliance filing removing from SPP’s [Tariff] the tariff sheets under which SPP has been collecting Tri-County’s rate and ceasing collecting the Tri-County rate effective as of [February 22, 2013] 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 commitment to be effective as of [February 22, 2013].⁸

Notably, the Commission denied “Xcel’s request to make Tri-County’s rates that have been collected to date subject to refund under section 205” of the Federal Power Act

⁶ Rehearing Order at 13.

⁷ *Id.* (citations omitted).

⁸ *Id.* at P 16 (footnote omitted).

(“FPA”), explaining that “the structure of the FPA reflects Congress’ intent to exempt non-public utilities . . . from the Commission’s refund authority.”⁹ Instead, the Commission set a refund effective date of February 22, 2013.

On March 19, 2013, SPP complied with the Rehearing Order and filed with the Commission Tri-County’s voluntary commitment to refund the difference between the proposed rate and the rate ultimately determined by the Commission to be just and reasonable from February 22, 2013 forward.¹⁰

On March 25, 2013, Intervenors filed requests for rehearing and clarification of the Rehearing Order.¹¹ Among other things, Intervenors assert: (i) the rates at issue in this proceeding are SPP’s rates, not Tri-County’s rates;¹² and, (ii) because SPP is a jurisdictional entity, the rates are subject to the Commission’s refund authority, allowing the Commission to set a refund effective date of April 1, 2012.¹³ Intervenors also request clarification that the refund commitment apply to amounts billed, but uncollected by SPP as of February 22, 2013.¹⁴ Raising similar issues, on April 8, 2013, Xcel, on behalf of SPS, filed a protest to the March 19 Filing in which it requests that the Commission reject

⁹ *Id.* at P 14 (citations omitted).

¹⁰ See Compliance Filing of Southwest Power Pool, Inc., Docket No. ER12-959-000 (Mar. 19, 2013) (“March 19 Filing”).

¹¹ See *supra* note 2.

¹² Xcel Request at 5, 6-8, 10-12; Joint Request at 3, 5-7.

¹³ Xcel Request at 8-10, 14-16; Joint Request at 3, 7-10.

¹⁴ Xcel Request at 18-19; Joint Request at 13-14.

the March 19 Filing and declare SPP liable for any collection undertaken on or after February 22, 2013.

II. ANSWER

A. The Rates At Issue In This Proceeding Are Those Of Tri-County And Not Of SPP

Contrary to the assertions made by Intervenors in their rehearing requests,¹⁵ the rates in this proceeding are those of Tri-County, and not of SPP.

Pursuant to the SPP Tariff and Membership Agreement, each Transmission Owner is responsible for filing its own rates, which SPP then incorporates into its Tariff. Specifically, the SPP Membership Agreement provides that a “Transmission Owner shall possess the unilateral right to file with [the Commission] . . . pursuant to Section 205 of the [FPA] modifications to change the rates or rate structure for transmission service over its Tariff Facilities,” and that “if the Transmission Owner is non-jurisdictional, the Transmission Owner shall have the option to file with [the Commission], or submit to SPP for filing with [the Commission],” modifications to its rates.¹⁶ It further provides that “[n]o approval from SPP is required for such filings.”¹⁷

In accordance with the SPP Membership Agreement, Tri-County as a non-jurisdictional Transmission Owner, elected to submit its formula rate and protocols to SPP for filing with the Commission. Accordingly, SPP filed Tariff revisions to incorporate Tri-County’s formula rate and protocols into Attachment H of the Tariff. The

¹⁵ Xcel Request at 5, 6-8, 10-12; Joint Request at 3, 5-7.

¹⁶ SPP Membership Agreement § 3.10.

¹⁷ *Id.*

actions by SPP were consistent with the plain meaning of the Tariff and SPP Membership Agreement. The fact that SPP submitted the Tri-County rates on Tri-County's behalf does not transform Tri-County's rate into an SPP rate. Tri-County has submitted its rate for Commission review, albeit through SPP due to Tri-County being a non-jurisdictional entity, but it is nonetheless still Tri-County's rate.

Furthermore, by asserting that the rates in this proceeding are SPP's rates, Intervenors essentially argue that SPP may set the rates of its Transmission Owners. However, SPP does not have this authority. The plain language of the Tariff and SPP Membership Agreement clearly provide that the SPP Transmission Owners have retained fully their right to file their rates.

As SPP explained in the February 1 Filing, "[e]ach SPP Transmission Owner is responsible for the filing of rate changes for its zone" and "SPP, as administrator of its Tariff, makes filings necessary to incorporate any such rate changes in its Tariff."¹⁸ This includes rates filed on behalf of non-jurisdictional SPP Transmission Owners.¹⁹ Furthermore, the Commission has recognized that the rates that SPP incorporates into Attachment H are those of the Transmission Owners. In *Westar Energy*, the Commission ruled that SPP could no longer simply reference the rates in a transmission-owning

¹⁸ February 1 Filing at 2 (citing *Westar Energy, Inc.*, 122 FERC ¶ 61,268, at P 105 (2008)); see also *Sw. Power Pool, Inc.*, 125 FERC ¶ 61,333, at P 10 (2008) (accepting SPP Tariff revisions to incorporate a Transmission Owner's formula rate, pending the outcome of that Transmission Owner's rate proceeding); *Sw. Power Pool, Inc.*, 86 FERC ¶ 61,090, 61,329 (1999) ("direct[ing] SPP to include its members' rates in the SPP tariff sheets").

¹⁹ February 1 Filing at 4 (citing *Sw. Power Pool, Inc.*, Letter Order, Docket No. ER11-2309-000 (Jan. 31, 2011) (the Commission accepted a formula rate that SPP filed on behalf of a non-jurisdictional SPP Transmission Owner); *Sw. Power Pool, Inc.*, Letter Order, Docket No. ER09-257-000 (Jan. 27, 2009) (same)).

member's tariff, but must include *the Transmission Owner's entire formula rate* in SPP's Tariff.²⁰ Simply put, consistent with the Tariff, SPP Membership Agreement and Commission precedent, the rates filed by SPP on behalf of Tri-County in this proceeding are Tri-County rates.²¹

B. The Commission Should Not Order SPP To Refund The Tri-County Rate Collected For The Period Of April 1, 2012 Through February 21, 2013

Even if the Commission were to agree with Intervenors' assertion that the rates in this proceeding are SPP's rates, the Commission should not order SPP to refund the amounts collected for the period of April 1, 2012 through February 21, 2013 because SPP has no established mechanism for providing such refunds. The Commission would be unable to order SPP to collect those amounts from Tri-County pursuant to the FPA.²²

²⁰ *Westar Energy, Inc.*, 122 FERC ¶ 61,268, at P 105. Intervenors' citation to *Southwest Power Pool, Inc.*, 119 FERC ¶ 61,307 (2007) carries little weight because the Commission dismissed the rehearing request in that case as moot after the non-jurisdictional utility voluntarily settled all issues.

²¹ Occidental and the New Mexico Cooperatives erroneously argue that, if the Commission finds in Phase I that none of Tri-County's facilities should have been included in its ATRR, then SPP would have misapplied Tri-County's formula rate. Joint Request at 8-9. Occidental and the New Mexico Cooperatives are mistaken because SPP correctly would have applied the rate accepted by and on file with the Commission. *See, e.g., TC Ravenswood, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,205, at P 49 (2010) ("the filed rate doctrine bars the application of a rate other than that which is properly filed with the Commission" and it "requires [the RTO] to pay the tariff rate on file"); *see also Black Hills Power, Inc.*, 136 FERC 61,088, at P 5 (2011) ("The Commission's authority under the filed rate doctrine holds that the only rate that a regulated public utility may legally charge for its services is the one properly submitted to and made effective by the appropriate regulatory authority") (citations omitted).

²² As the Commission noted in the Rehearing Order, because Tri-County is a non-jurisdictional entity, "Tri-County is not itself subject to the refund requirements of section 205, and [the Commission] cannot direct Tri-County to pay refunds." Rehearing Order at P 15.

Absent collection from Tri-County, SPP would not have any established source from which to pay any such refunds.²³

If the Commission nonetheless were to order SPP to provide refunds, the Commission should clarify that SPP, pursuant to section 10.5 of the Tariff,²⁴ may collect from all of its members any amount it must refund. As the Commission has explained in a similar context, “[s]ince SPP has limited assets, it would not be able to pay substantial indemnification costs without recovering the costs associated with indemnification in rates.”²⁵ It explained that an RTO “may pass on indemnification costs to all market participants on a rolled-in basis under its administrative services and capital funding tariffs” and that “the same result would be achieved . . . through section 10.5” of the SPP Tariff.²⁶

²³ See, e.g., *Sw. Power Pool, Inc.*, 112 FERC ¶ 61,100, at P 43 (2005) (“SPP is a non-profit organization, so it has no shareholders from whom to recover indemnification costs”).

²⁴ Section 10.5 states:

Transmission Provider Recovery:

To the extent that the Transmission Provider is required to pay any money damages or compensation or pay amounts due to its indemnification of any other party, the Transmission Provider shall be allowed to recover any such amounts (subject to crediting all amounts recovered by Transmission Provider through insurance or through any indemnification it receives) under Schedule 1 of this Tariff as part of the Administrative Charges, provided that the cap in Schedule 1, Section 1 shall not apply to or prohibit the recovery of these amounts.

²⁵ *Sw. Power Pool, Inc.*, 112 FERC ¶ 61,100, at P 43.

²⁶ *Id.* (citing *ISO New England, Inc.*, 109 FERC ¶ 63,015, at P 191 (2004)).

C. The Commission Intended For SPP To Charge The Tri-County Rates Through February 21, 2013

The Commission further should reject Intervenors' request that the Commission find that the required refund commitment should apply to amounts "billed, but uncollected by SPP as of February 22, 2013."²⁷ Intervenors impermissibly seek to make the refund effective date earlier than February 22, 2013, as directed by the Commission. For example, if SPP billed in February for service provided in January, but the payments for that service were not collected until after February 22, 2013, under Intervenors' interpretation of the refund effective date, the service provided in January would be subject to refund. In other words, Intervenors are asking the Commission to do indirectly what it cannot do directly: make Tri-County's rates subject to refund prior to the February 22, 2013 refund effective date. The Commission, therefore, should reject this request and clarify that refunds for Tri-County's rates should be for *services* provided on or after February 22, 2013, regardless of when the payments for those services may be collected.

Additionally, the Commission ordered either (a) SPP to remove the Tariff sheets incorporating the Tri-County rate from Attachment H of the Tariff effective February 22, 2013 or (b) for Tri-County voluntarily to commit to provide refunds, with such commitment to be effective February 22, 2013.²⁸ Therefore, had Tri-County declined to offer voluntary refunds, in accordance with the Rehearing Order, SPP would have removed the Tariff sheets incorporating the Tri-County rate effective February 22, 2013.

²⁷ Xcel Request at 18-19; see also Joint Request at 13-14.

²⁸ Rehearing Order at P 16.

As a result, the Tri-County rate would have been the rate on file with the Commission until February 22, 2013, and SPP would have been required to charge that rate through February 21, 2013 and to recover such charges, regardless of the date those charges were invoiced. It would be incongruous to interpret Tri-County's voluntary commitment to refund as applying to service prior to the date SPP would have been required to remove the Tariff sheets and cease charging the rate. Simply put, under any circumstance, until February 21, 2013, the Tri-County rate was the rate on file with the Commission and SPP is required to collect the charges for such rate regardless of the invoice date. The Commission, therefore, should reject Intervenors request that the required refund commitment should apply to amounts "billed, but uncollected by SPP as of February 22, 2013"²⁹ and instead clarify that refunds for Tri-County's rates should be for *services* provided on or after February 22, 2013, regardless of when the payments for those services may be collected.

Similarly, the Commission should reject the Xcel Protest of the March 19 Filing. In its protest, Xcel argues that SPP failed to comply with the Commission's Rehearing Order because it "has continued to collect the Tri County ATRR after February 22, 2013 and without obtaining the necessary refund commitment from Tri-County."³⁰ It further requests that the Commission "require the SPP to *cease collecting* Tri County (sic) ATRR on and after February 22, 2013, and declare SPP liable for any collection undertaken on or after February 22, 2013, unless Tri-County agrees to provide a

²⁹ Xcel Request at 18-19.

³⁰ Xcel Protest at 7.

voluntary refund commitment that complies with the [Rehearing] Order.”³¹ In different words, this is the same request that Xcel made in the Xcel Request—that SPP be required to provide refunds for amounts billed, but uncollected by SPP as of February 22, 2013. For the same reasons provided above, such request is impermissible and should be rejected. In short, the March 19 Filing complies with the Rehearing Order and Xcel provides no basis for the Commission to “declare SPP liable for any collection undertaken on or after February 22, 2013.”³²

III. CONCLUSION

For the reasons set forth above, the Commission should reject the Xcel Request, the Joint Request, and the Xcel Protest and accept the March 19 Filing as compliant with the Rehearing Order.

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³¹ *Id.*

³² *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 9th day of April, 2013.

/s/ Patrick L. Morand

Patrick L. Morand