

156 FERC ¶ 61,057  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket No. ER12-959-007

ORDER ON REMAND

(Issued July 21, 2016)

1. In response to a petition for review of Commission orders issued on March 30, 2012, February 21, 2013, and October 16, 2014 in this proceeding, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an opinion on March 8, 2016 remanding the matter to the Commission for further consideration.<sup>1</sup> At issue is whether, after finding that it originally erred in accepting without a refund commitment and setting for hearing and settlement judge procedures Southwest Power Pool, Inc.'s (SPP) proposed revisions to its Open Access Transmission Tariff (Tariff) to implement Tri-County Electric Cooperative Inc.'s (Tri-County) formula rate to be used to calculate Tri-County's annual transmission revenue requirement (ATRR), the Commission erred by then failing to correct its original error on rehearing. As discussed below, in response to the court's directive, we remedy the legal error by directing SPP to bill Tri-County for the amounts of Tri-County's ATRR that SPP collected from ratepayers between April 1, 2012 and February 21, 2013,<sup>2</sup> with interest. We also direct SPP to make refunds to ratepayers of the funds recouped from Tri-County.

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<sup>1</sup> *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947 (D.C. Cir. 2016) (*Xcel*).

<sup>2</sup> As discussed below, Tri-County's facilities were found to be ineligible to be rolled into SPP's Zone 11 annual transmission revenue requirement under the SPP Tariff. Accordingly, the amounts to be refunded are all of the revenues SPP collected from ratepayers, for Tri-County's ATRR, during the period from between April 1, 2012 to February 21, 2013.

## I. Background

2. As a general matter, under section 201(f) of the Federal Power Act (FPA),<sup>3</sup> certain utilities, such as Tri-County, are not subject to the Commission's jurisdiction under sections 205 and 206<sup>4</sup> of the Federal Power Act (FPA). However, the courts have found that the Commission may analyze and consider the rates of these non-public utilities to the extent that their rates affect jurisdictional transactions.<sup>5</sup> Thus, the courts have recognized that the Commission may review the revenue requirements of a non-public utility that is part of a jurisdictional Regional Transmission Organization (RTO) or Independent System Operator (ISO) to ensure that, even with the inclusion of the revenue requirements of the non-public utility, the RTO's or ISO's rates will be just and reasonable under section 205 of the FPA.<sup>6</sup>

3. The courts also have found, however, that the Commission is without authority to require these non-public utilities to pay refunds.<sup>7</sup> As a result of these determinations, in cases where the Commission requires further procedures (e.g., hearing and settlement judge procedures) to evaluate the justness and reasonableness of the proposal, the Commission's practice has been to accept the RTO's or ISO's rate filings to take effect subject to refund, pending the outcome of the proceeding, when the non-public utility voluntarily agrees to make refunds in the event the Commission, upon its subsequent review in that proceeding, determines the rate as proposed is not just and reasonable.

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<sup>3</sup> See 16 U.S.C. § 824(f) (2012). Tri-County is a not-for-profit distribution cooperative. For ease of reference, while such utilities are subject to the Commission's authority in certain respects, but not in other respects, *compare* 16 U.S.C. §§ 825u, 825v (2012) *with* 16 U.S.C. § 824c (2012), we nevertheless often refer to FPA section 201(f) entities as non-jurisdictional entities, non-jurisdictional utilities, or non-public utilities.

<sup>4</sup> 16 U.S.C. §§ 824d, 824e (2012).

<sup>5</sup> *Pac. Gas and Elec. v. FERC*, 306 F.3d 1112, 1114 (D.C. Cir. 2002) (citing *S.C. Pub. Serv. Auth.*, 75 FERC ¶ 61,209, at 61,696 & n.7 (1996)); *Pub. Utils. Comm'n of Colo. v. FERC*, 660 F.2d 821, 826 (D.C. Cir. 1981).

<sup>6</sup> *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007) (*TANC*).

<sup>7</sup> See *TANC*, 495 F.3d at 673 (holding that the structure of the FPA clearly reflects Congress's intent to exempt governmental entities and non-public utilities from the Commission's refund authority under FPA section 205 over wholesale electric energy sales and that FPA section 201(f) exempts from Part II of the FPA "any political subdivision of a state").

If the non-public utility does not agree to such refund protection, the Commission will delay the effective date of the proposed rate while it conducts its review.<sup>8</sup>

4. SPP is an RTO that administers its Tariff on a regional basis for transmission facilities located within its boundaries. Tri-County is a non-jurisdictional not-for-profit distribution cooperative with headquarters in Hooker, Oklahoma serving approximately 23,000 customers in Oklahoma, Kansas, Texas, Colorado, and New Mexico. Xcel Energy Services Inc. (Xcel) is the service company affiliate of Southwestern Public Service Company (SPS), an electric utility that provides generation, transmission, and distribution services. SPS is a transmission-owning member of SPP and provides transmission services over its transmission facilities under the SPP Tariff.

5. This proceeding began on February 1, 2012, when SPP filed revisions to its Tariff, pursuant to section 205 of the FPA,<sup>9</sup> to implement a formula rate to be used to calculate Tri-County's ATRR as a non-public utility participating transmission owning member in the SPS pricing zone (Zone 11). In response to the filing, protesters argued, among other things, that Tri-County had not provided sufficient evidence that its facilities met the requirements of "Transmission Facilities" as defined in Attachment AI of the SPP Tariff. In addition, Xcel argued that the Commission should allow the proposed tariff pages to be placed into effect on April 1, 2012 only if Tri-County voluntarily agreed to issue refunds for the difference between the filed rate and the rate ultimately determined through settlement judge or hearing procedures. The Commission accepted SPP's filing and set it for hearing and settlement judge proceedings, to be effective on April 1, 2012, without following its policy of accepting such a rate filing to take effect pending the outcome of such further procedures only when the non-public utility (Tri-County) agreed to refund the difference between the as-filed rate and the rate ultimately found to be just and reasonable by the Commission.<sup>10</sup>

6. On April 25, 2012, several parties, including Xcel, on behalf of SPS, sought clarification and/or rehearing of the 2012 Hearing Order.<sup>11</sup> Xcel argued that in allowing the proposed rates to become effective immediately and without a refund obligation, the

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<sup>8</sup> Xcel, 815 F.3d at 950 (and cases cited therein).

<sup>9</sup> 16 U.S.C. § 824d (2012).

<sup>10</sup> *Sw. Power Pool, Inc.*, 138 FERC ¶ 61,231 (2012) (2012 Hearing Order), *order on reh'g*, 142 FERC ¶ 61,135 (2013) (2013 Rehearing Order), *denying reh'g and accepting compliance filing subject to further compliance filing*, 149 FERC ¶ 61,050 (2014), (2014 Rehearing and Compliance Order).

<sup>11</sup> Xcel also filed a motion for stay.

2012 Hearing Order failed to ensure that transmission rates under the SPP Tariff are just and reasonable.<sup>12</sup> Xcel also argued that the Commission should reverse its acceptance of SPP's filing and, instead, suspend the filing, make it effective subject to refund and hearing procedures. In addition, Xcel contended that nothing in Commission precedent suggests that the Commission lacks the authority to take such action as to the proposed rates of a jurisdictional public utility (i.e., SPP) that include the pass-through of the costs of a non-public utility (i.e., Tri-County).<sup>13</sup>

7. In response to the requests for rehearing, the Commission affirmed its prior determination that it was appropriate to apply the just and reasonable standard of FPA section 205 to the proposed rates and to determine the justness and reasonableness of those rates through hearing and settlement judge procedures. The Commission added that:

[o]n further consideration, however, we conclude 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. 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.<sup>[14]</sup>

8. The Commission stated that "the structure of the FPA reflects Congress' intent to exempt non-public utilities, . . . from the Commission's refund authority."<sup>15</sup> The Commission explained that, although it can subject the rates of non-public utilities (like Tri-County) to a section 205-like review to ensure that, in turn, SPP's proposed rate is

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<sup>12</sup> 2013 Rehearing Order, 142 FERC ¶ 61,135 at P 7.

<sup>13</sup> *Id.* P 8.

<sup>14</sup> 2013 Rehearing Order, 142 FERC ¶ 61,135, at P 13 (citing *Lively Grove Energy Partners, LLC*, 140 FERC ¶ 61,252, at P 47 & n.59 (2012) (*Lively Grove*); *City of Riverside, Cal.*, 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*)).

<sup>15</sup> *Id.* P 14 (citing *Riverside*, 128 FERC ¶ 61,207 at P 24; *TANC*, 495 F.3d at 673-74).

just and reasonable, Tri-County is not itself subject to section 205, including Commission-imposed rate suspension and refund obligations. However, the Commission found 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. Accordingly, the Commission acted pursuant to its authority under section 206 of the FPA and directed that, within 30 days of the date of issuance of the order, SPP either (1) remove Tri-County's rate from its Tariff until the Commission issues an order following hearing proceedings; or (2) submit a compliance filing providing, prospective from the day after its order, a voluntary commitment by Tri-County to refund any difference between the proposed rate and the rate ultimately found to be just and reasonable.<sup>16</sup>

9. To comply with the 2013 Rehearing Order, on March 19, 2013, SPP submitted a letter from Tri-County stating that Tri-County committed 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." SPP stated that, in light of Tri-County's refund commitment, SPP would continue to collect the Tri-County rate, unless and until otherwise ordered by the Commission.

10. On March 25, 2013, certain parties, including Xcel, filed requests for rehearing and clarification of the 2013 Rehearing Order. Xcel contended that the Commission had not addressed its argument that the rates at issue were SPP's rates, not Tri-County's, and thus its request that SPP's rates be suspended and made effective subject to refund was within the Commission's jurisdiction. Xcel also argued that the 2013 Rehearing 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.<sup>17</sup> In addition, Xcel asserted that the Commission must remedy the harm caused by the 2013 Rehearing Order, there is a presumption of retroactive remedies for erroneous Commission decisions, and the remedy for error by the Commission can

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<sup>16</sup> *Id.* P 16.

<sup>17</sup> Xcel March 25, 2013 Request for Rehearing 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, Nev. v. NV Energy Operating Cos.*, 142 FERC ¶ 61,166, at P 43 (2013) (regarding policy of providing maximum refund protection to customers); *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009)).

include retroactive surcharges.<sup>18</sup> Xcel argued that the courts have noted that section 309 of the FPA gives the Commission “the authority in fashioning remedies to consider equitable principles, one of which is to do what should have been done.”<sup>19</sup>

11. On October 16, 2014, the Commission issued an opinion affirming an initial decision in this proceeding in which the presiding administrative law judge found that none of Tri-County’s facilities were eligible to be rolled into SPP’s Zone 11 annual transmission revenue requirement under the SPP Tariff.<sup>20</sup> On that same day, the Commission conditionally accepted SPP’s compliance filing and required SPP to cease collecting Tri-County’s ATRR, effective on October 16, 2014 (the date of the 2014 Rehearing and Compliance Order) and to pass through refunds received from Tri-County’s refund commitment, with interest, back to February 22, 2013.<sup>21</sup>

12. The Commission also denied the requests for rehearing of the 2013 Rehearing Order. The Commission stated that the 2013 Rehearing Order mistakenly referred to “SPP’s rate” and “Tri-County’s rate” interchangeably but that the parties’ emphasis on the affected rate being an SPP rate rather than a Tri-County rate did not change the Commission’s view that it could not establish refunds against SPP back to April 1, 2012. The Commission stated that where the error was in the 2012 Hearing Order allowing SPP’s filing to take effect on April 1, 2012 without a voluntary refund commitment from Tri-County, the only remedy available at the time of the 2013 Rehearing Order was the prospective remedy adopted in that order. The Commission found unpersuasive arguments on rehearing that there is an equitable presumption in favor of ordering refunds because the Commission committed legal error. The Commission stated that it may not act inconsistent with the statute where the Commission has accepted the rates and they have since become effective. The Commission rejected Xcel’s suggestion that Commission could have suspended the proposed rates and made them effective, subject to a refund obligation by SPP because they are SPP’s rates. The Commission concluded that even if it should have suspended SPP’s proposed rates and made them effective, subject to a refund obligation, because those rates were already in effect without

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<sup>18</sup> *Id.* at 15 (citing *Se. Mich. 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) (*Natural Gas Clearinghouse*) (regarding retroactive surcharges)).

<sup>19</sup> *Id.* at 16 (quoting *N. Natural Gas Co. v. FERC*, 785 F.2d 338, 343 (D.C. Cir. 1986)).

<sup>20</sup> *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,051 (2014).

<sup>21</sup> 2014 Rehearing and Compliance Order, 149 FERC ¶ 61,050 at P 38.

suspension, retroactively suspending SPP's rates would be inconsistent with the Commission's longstanding policy—i.e., the Commission cannot suspend a rate schedule after its effective date.<sup>22</sup>

13. On December 15, 2014, Xcel petitioned the D.C. Circuit for review of the Commission's orders in this proceeding.

## **II. Court of Appeals Determination**

14. On appeal, the D.C. Circuit held that the Commission failed to justify its decision to allow SPP's filing to go into effect without a refund commitment by Tri-County, thus failing to ensure that SPP's rates would be just and reasonable.<sup>23</sup> The court noted that, when reviewing a non-public utility's rates as a component of an RTO's rates, the Commission is exercising jurisdiction over the RTO, not over the non-public utility and that the Commission has no authority under section 205 to order a non-public utility to make refunds.<sup>24</sup> The court found that the Commission acknowledged that it erred as a matter of law in allowing SPP's proposed rates to take effect without voluntary refund protection despite the acknowledged need for further review. The court also found that “[t]he Commission appears, from the record before the court, to have misapprehended its remedial powers and thus arbitrarily declined to weigh the equities underlying Xcel's request for retroactive relief.”<sup>25</sup> The court held that, to the extent the Commission denied Xcel relief because it lacks authority to order refunds from Tri-County, a non-public utility, this was not responsive to Xcel's request, which the court stated was based on the Commission's remedial authority with respect to SPP.

15. The court also found the Commission's reliance on section 2.4(a) of its regulations to be misplaced. The court concluded instead that section 309 of the FPA<sup>26</sup> provides the

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<sup>22</sup> *Id.* P 28 (citing 18 C.F.R. § 2.4(a) (2014); *Coop. Power Ass'n v. FERC*, 733 F.2d 577, 580, *reh'g denied*, 739 F.2d 390 (8th Cir. 1984); *Ill. Power Co.*, 73 FERC ¶ 61,348, at 62,058 (1995); *Ky. Power Co.*, 64 FERC ¶ 61,112, at 61,922 (1993)).

<sup>23</sup> *Xcel*, 815 F.3d at 953, 954-56.

<sup>24</sup> *Id.* at 950.

<sup>25</sup> *Id.* at 953.

<sup>26</sup> Section 309 of the FPA provides in part that “[t]he Commission shall have power 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.” 16 U.S.C. § 825h (2012).

Commission broad remedial authority, including the ability to remedy its errors retroactively.<sup>27</sup> The court found that, under the Commission's interpretation that it lacks any power to correct its legal error even where no section 205 review has occurred despite the recognition that such review is needed, consumers are denied the protection that Congress mandated in section 205 of the FPA. The court held that "[i]t is no answer to suggest that in enacting section 206 [of the FPA] to provide only prospective relief, Congress anticipated that there would be situations in which customers would not be made whole."<sup>28</sup>

16. In addition, the court found to be premature Xcel's suggestion that the court could exercise its equity power "in order to eliminate 'compelling' hardship from non-recoverable excess rates"<sup>29</sup> finding that the Commission had yet to evaluate the equities of providing refund protection to recover unlawful rates resulting from its failure to adhere to the mandate of section 205 of the FPA. The court remanded the case to the Commission for appropriate action.

### **III. Discussion**

17. For the reasons explained below, we remedy the legal error made in the 2012 Hearing Order by directing SPP to bill Tri-County for the amounts of Tri-County's ATRR that SPP collected from ratepayers between April 1, 2012 and February 21, 2013, with interest.<sup>30</sup> We also direct SPP to make refunds to ratepayers of the funds recouped from Tri-County. Given SPP's not-for-profit status,<sup>31</sup> we will not require it to issue refunds until it has received payment from Tri-County.

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<sup>27</sup> *Xcel*, 815 F.3d at 954-55 (citing *Town of Concord*, 955 F.2d at 73; *N. Natural Gas Co.* 785 F.2d at 341).

<sup>28</sup> *Id.* at 956.

<sup>29</sup> *Id.*

<sup>30</sup> To the extent that SPP obtains from Tri-County funds that include interest, SPP is required to pass through this interest to its ratepayers. In addition, SPP is required to pay interest from the time it receives any funds from Tri-County and when it disburses refunds to its ratepayers.

<sup>31</sup> See *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111, at P 42 (2012) (2012 Black Oak Order) (as not-for-profit entities, RTOs have no retained earnings or other independent source of funds to pay refunds).



18. Under the circumstances present, we will exercise our discretion and direct SPP to bill Tri-County for the amounts of Tri-County's ATRR that SPP collected from ratepayers between April 1, 2012 and February 21, 2013 as a result of our legal error to put the parties in the positions in which they would have been absent Commission legal error. In this case, the Commission's legal error was the acceptance of SPP's filing, to be effective on April 1, 2012, as requested without suspension and without obtaining a voluntary commitment from Tri-County to refund the difference between the as-filed rate and the rate ultimately found to be just and reasonable.<sup>32</sup>

19. Where the Commission has committed legal error, the courts have found that the Commission has the authority to order refunds as well as authorize the utility to seek recoupment from non-public utility customers. For example, in *Panhandle Eastern Pipe Line v. FERC*,<sup>33</sup> the court affirmed the Commission's order authorizing Panhandle, a jurisdictional pipeline, to recoup overpayments from non-jurisdictional customers even though they were no longer customers of the pipeline.<sup>34</sup> Panhandle sought to enforce that authorization in two district court proceedings, and the district courts ruled the former customers were required to repay those funds.<sup>35</sup>

20. In *United Gas Improvement Co. v. Callery Properties, Inc.*, the Supreme Court similarly found that the Commission has authority to correct its legal error, concluding

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<sup>32</sup> *Xcel*, 815 F.3d at 955.

<sup>33</sup> 95 F.3d 62, 73-74 (D.C. Cir. 1996).

<sup>34</sup> See also *Pub. Utils. Comm'n of Cal. v. FERC*, 143 F.3d 610, 617 (D.C. Cir. 1998) (upholding the Commission authority to direct refund orders at customers normally outside of the Commission's jurisdiction); *H.Q. Energy Servs. (U.S.), Inc. v. New York Indep. Sys. Operator, Inc.*, 113 FERC ¶ 61,184, at P 38 & n.45 (2005) (noting that the courts have authorized utilities to collect surcharges from former customers no longer under contract to the utility); *N. Natural Gas Co.*, 82 FERC ¶ 61,195, at 61,775 (1998) (finding that if the protesting party ultimately prevailed in any of its arguments, the Commission would follow its court approved procedure in such situations of authorizing each entity in the chain through which the contested refunds have flowed to recover the amounts they paid from the next person in the chain).

<sup>35</sup> *Panhandle E. Pipe Line Co. v. Mich. Consol. Gas Co.*, 937 F. Supp. 641, 646 (E.D. Michigan 1996) (Panhandle) (finding an obligation to pay based on the parties' contractual relationship and 15 U.S.C. § 717u providing courts with jurisdiction over "... all suits ... brought to enforce any liability or duty created by ... any ... order thereunder"); *Panhandle E. Pipe Line Co. v. Utilicorp United Inc.*, 928 F. Supp. 466, 472 (D. Delaware 1996) (finding an obligation under 15 U.S.C. § 717u).

that “an agency, like a court, can undo what is wrongfully done by virtue of its order.”<sup>36</sup> In *Natural Gas Clearinghouse*, the court found that the principle announced in *Callery* applies equally to the authorization of recoupment of refunds: “if a successful appeal of an erroneous FERC decision against the pipeline could not be enforced retroactively, a pipeline’s incentive to vindicate its rights under the [Natural Gas Act (NGA)] through judicial review would be similarly diminished. We do not believe Congress intended either result.”<sup>37</sup>

21. In its remand order, the D.C. Circuit found that “the Commission ha[d] yet to evaluate the equities of providing refund protection to recover unlawful rates resulting from its failure to adhere to section 205’s mandate.”<sup>38</sup> Here, we must weigh the equities of requiring SPP to seek recoupment from Tri-County of the amounts Tri-County unjustly received against providing no relief to the parties that sought rehearing to correct the Commission’s erroneous determination in the first place.<sup>39</sup> Because none of Tri-County’s facilities were eligible to be rolled into SPP’s Zone 11 ATRR under the SPP Tariff, Tri-County received funds to which it was not entitled and SPP ratepayers paid

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<sup>36</sup> 382 U.S. 223, at 229-30 (1965) (*Callery*) (finding the Commission could properly conclude that the public interest required natural gas producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, at 159 (D.C. Cir. 1967) (“the breadth of agency discretion is . . . at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions . . .”); *Natural Gas Clearinghouse*, 965 F.2d at 1073-74 (holding the Commission has “broad discretion” in its remedial authority to “correct errors resulting from orders overturned by a reviewing court”); *Pub. Util. Comm’n of Cal. v. FERC*, 988 F.2d 154, 162 (D.C. Cir. 1993) (reaffirming the Commission’s “retroactive corrective authority” to implement judicial reversals); *Black Oak Energy, LLC v. PJM Interconnection, LLC*, 153 FERC ¶ 61,231, at P 44 (2015) (2015 Black Oak Remand Order), *aff’d on reh’g*, 155 FERC ¶ 61,013 (2016) (2016 Black Oak Rehearing Order) (if parties could receive no relief from improvidently issued tariffs, they would have no reason to incur the legal and other expenses involved in seeking rehearing of orders).

<sup>37</sup> *Natural Gas Clearinghouse*, 965 F.2d at 1073-74.

<sup>38</sup> *Xcel*, 815 F.3d at 956.

<sup>39</sup> Requiring SPP to pay refunds without authorizing the recovery of such funds from Tri-County would be inconsistent with Commission refund policy because SPP is a not-for-profit entity that is independent with no shareholders, and therefore ordering such refunds would lead to an undercollection of revenue by SPP. *See* 2012 Black Oak Order, 139 FERC ¶ 61,111, at P 42.

amounts that they should not have paid. In these circumstances, we find that equity favors requiring SPP to seek recoupment. Moreover, as the Commission has found previously, failing to permit recoupment of erroneous payments such as those received by Tri-County would reduce the incentive of parties to seek to correct legal errors or policy deviations made by the Commission in initial orders.<sup>40</sup> Tri-County had notice from Xcel's request for rehearing that the Commission's initial order was in question and that the payments it received from SPP were not final. In these circumstances, we find the equities lie in favor of following our general policy of ensuring that the parties harmed by our legal error are put in the same position in which they would have been had the Commission not erred:

In doing so, the Commission has, and must, balance the relevant equities and, if necessary, make limited departures from traditional ratemaking principles. All this is done with the objective of placing the parties as closely as possible in the position they would have been in if the Commission had not erred ....<sup>[41]</sup>

22. In *Transcontinental Gas Pipe Line Corp. v. FERC (Transco)*<sup>42</sup> the court found the Commission's failure to put the parties in the position in which they would have been if the Commission had not erred constituted legal error. In *Transco*, the Commission rejected a rate design change, but in a subsequent order, granted rehearing and accepted the filing. The Commission, however, determined not to order refunds and repayments, because parties may have relied on its initial order, concluding that the effective date of the rate design change therefore should be the date of its rehearing order. The court reversed the Commission's determination to delay the effective date.

23. The court recognized that requiring both refunds and repayment does not constitute retroactive ratemaking as the rehearing put all parties on notice that the Commission's determination to reject the rate design change may have been in error. As the court stated, the notice provided by the rehearing process "changes what would

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<sup>40</sup> 2015 Black Oak Remand Order, 153 FERC ¶ 61,231, at P 44. The ability to seek rehearing of Commission orders to correct such errors is particularly important since, in many cases, the Commission is required to issue initial orders on very short time frames (30 days after filing under the Natural Gas Act, 15 U.S.C. § 717 (2012), and 60 days under the Federal Power Act, 16 U.S.C. § 824 (2012)).

<sup>41</sup> *Id.* at P 45 (quoting *Nw. Pipeline Corp.*, 69 FERC ¶ 61,359, at 62,330-31 (1994), *reh'g denied*, 71 FERC ¶ 61,012 (1995)).

<sup>42</sup> 54 F.3d 893, 898-99 (D.C. Cir. 1995).

be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision.”<sup>43</sup> The court concluded that “this permissible and relatively benign sort of retroactivity is in fact enshrined in § 4(e) of the Natural Gas Act [citation omitted] which explicitly allows [the Commission] to make refunds when a filed rate increase has taken effect but the Commission later determines that a portion of the increase is not justified.”<sup>44</sup> While the court recognized that during the pendency of the rehearing process “every party’s action or inaction involved some risk,” it concluded that in balancing these interests, application of the “right rate, i.e., whatever rate the Commission lawfully determines to be right” seemed most appropriate because “the expectations of those who act in anticipation of the right rate are protected, and they would seem presumptively the most deserving.”<sup>45</sup> In order to place the parties in the position in which they would have been had the Commission not erred, the Commission required the pipelines to pay refunds to those shippers who paid too much under the wrong rate and recoup funds from shippers that paid too little.<sup>46</sup>

24. When Tri-County sought to have its facilities included under the SPP Tariff, it signed the same Membership Agreement as other transmission owning members of SPP.

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<sup>43</sup> *Id.* at 898; *Natural Gas Clearinghouse*, 965 F.2d at 1075 (“The filed rate doctrine simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.”); *Can. Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299-300 (D.C. Cir. 2001) (finding Northwest’s initial rate filing provided adequate notice to the shippers that they might have to pay rates up to the level originally filed); *La. Pub. Serv. Comm’n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007).

<sup>44</sup> 54 F.3d 893 at 897-98. The court also found that parties cannot rely on a Commission order until the order becomes final, since under section 19(a) of the Natural Gas Act (section 313(a) of the FPA), the Commission has the authority to amend its order any time before the record is filed with the court of appeals.

<sup>45</sup> *Id.* See *Transcontinental Gas Pipe Line Corp.*, 73 FERC ¶ 61,077 (1995) (establishing the date service commenced, and rates were charged, as the effective date for the refunds).

<sup>46</sup> See *Transcontinental Gas Pipeline Co.*, Refund/Surcharge Report, Docket No. CP88-760-021 (filed Apr. 1, 1995) <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=8278637>; *Transcontinental Gas Pipeline Co.*, Docket No. CP88-760-021 (Feb. 5, 1997) (delegated letter order) (accepting refund/surcharge report), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=8209789>.

While the Membership Agreement specifically indicated that Tri-County was not subjecting itself to Commission jurisdiction,<sup>47</sup> Tri-County, like all other members of SPP, has obligations to SPP as a result of being a member, including a requirement to “comply with and abide by the provisions of the SPP Bylaws and pay, when due, any dues, assessments, OATT charges, and other amounts owing to SPP.”<sup>48</sup>

25. A contractual obligation is a permissible means for a regulated entity to seek to recover revenues from otherwise non-public utilities. In *Alliant Energy Inc. v. Nebraska Public Power District*, the court held that the Nebraska Public Power District (NPPD), a non-public utility was contractually liable to pay refunds as a result of FERC’s orders that changed the Mid-Continent Area Power Pool’s (MAPP) FERC-jurisdictional tariff and the MAPP agreement.<sup>49</sup> The court affirmed that, while the Commission had no direct authority to order NPPD to pay refunds, NPPD, a signatory to the MAPP agreement, could still be ordered to pay based on its contractual commitment.<sup>50</sup> MAPP-member parties themselves could take action to enforce the contract.<sup>51</sup>

26. For these reasons, SPP is directed to bill Tri-County for the amounts of Tri-County’s ATRR that SPP collected from ratepayers between April 1, 2012 and February 21, 2013, with interest and to refund those collected amounts, to the affected customers for that period, consistent with the determination above. In addition, SPP is required to submit a refund report within 30 days of issuing refunds to its customers. The Commission will not require SPP to pay refunds until it has completed any necessary process, including any legal process under its Membership Agreement or other contracts with Tri-County, to recover the payments it made to Tri-County.<sup>52</sup> Requiring SPP, as a not-for-profit entity with no retained earnings or source of revenue other than amounts collected from ratepayers, to pay refunds immediately could result in a revenue shortfall. In these circumstances, we find that delaying the refund payment until the funds are received from Tri-County is the equitable result.

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<sup>47</sup> SPP, Membership Agreement, § 3.11 No Waiver of Jurisdictional Immunity.

<sup>48</sup> SPP, Membership Agreement, § 3.8 Compliance with Bylaws and Other Policies and Procedures.

<sup>49</sup> *Alliant Energy v. Neb. Pub. Power Dist.*, 347 F.3d 1046, 1050 (8th Cir. 2003).

<sup>50</sup> *Id.* at 1046.

<sup>51</sup> *Id.* at 1050; *see also Panhandle*, 937 F. Supp. at 646.

<sup>52</sup> *See supra* note 30.

The Commission orders:

(A) SPP is hereby directed to bill Tri-County for refunds, with interest, and to pay refunds, with interest, as discussed in the body of this order.

(B) SPP is hereby directed to submit a report within 30 days of issuing refunds to its ratepayers, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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