

126 FERC ¶ 61,174
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Wabash Valley Power Association, Inc.

Docket No. EL09-9-000

v.

Midwest Independent Transmission
System Operator, Inc.

Ameren Services Company

Docket No. EL09-10-000

v.

Midwest Independent Transmission
System Operator, Inc.

ORDER DISMISSING COMPLAINTS

(Issued February 25, 2009)

1. On November 10, 2008, Ameren Services Company (Ameren) filed a complaint against the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) seeking an extension of the refund period that applies in an ongoing proceeding involving the allocation of Revenue Sufficiency Guarantee charges under the Midwest ISO Open Access Transmission and Energy Markets Tariff (Tariff).¹ On November 12, 2008, Wabash Valley Power Association, Inc. (Wabash Valley) filed a similar complaint. In this order we dismiss both complaints as moot.

¹ In light of the Midwest ISO's initiation of ancillary services markets in January 2009, the Tariff was renamed the Open Access Transmission, Energy and Operating Reserve Markets Tariff.

I. Background

2. On November 28, 2007, the Commission granted in part and denied in part the relief requested in three complaints (collectively, Prior Complaints) filed under section 206 of the Federal Power Act (FPA)² against the Midwest ISO regarding the allocation of Revenue Sufficiency Guarantee charges to market participants under the Tariff.³ (One of the Prior Complaints was filed by Ameren, and one was filed by Wabash.) The Commission found that the Midwest ISO's existing Revenue Sufficiency Guarantee cost allocation methodology may not be just and reasonable, but the alternative cost allocation methodologies that complainants proposed also had not been shown to be just and reasonable. The Commission established a refund effective date of August 10, 2007, and set the Prior Complaints for paper hearing and investigation to review evidence and to establish a just and reasonable Revenue Sufficiency Guarantee cost allocation methodology. The Commission held the paper hearing in abeyance pending the earlier of the conclusion of a then-ongoing stakeholder proceeding or February 1, 2008.

3. On February 1, 2008, the Midwest ISO made an informational filing stating that it could not meet the February 1, 2008 deadline because the Revenue Sufficiency Guarantee Task Force was still in negotiations. The Midwest ISO proposed to file specific tariff provisions and supporting documentation on or about March 3, 2008.

4. On March 3, 2008, the Midwest ISO filed what it referred to as "indicative" tariff revisions that reflect an alternative mechanism for allocating Revenue Sufficiency Guarantee charges and costs. The Midwest ISO explained that these provisions represent a new real-time Revenue Sufficiency Guarantee cost allocation methodology that was developed based on principles agreed to in stakeholder discussions, but that they had not yet been conformed to incorporate the Midwest ISO's new Ancillary Services Markets market design elements. The Midwest ISO asked the Commission to determine whether the language of the indicative revisions represents a just and reasonable basis for a subsequent section 205 filing that would replace the Revenue Sufficiency Guarantee cost allocation methodology for the Ancillary Services Markets.

5. On August 21, 2008, the Commission issued an order commencing the paper hearing that it had held in abeyance pending completion of the stakeholder proceeding.⁴

² 16 U.S.C. § 824e (2006).

³ *Ameren Services Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,205 (2007) (Order on Revenue Sufficiency Guarantee Complaints).

⁴ *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,173 (2008).

The Commission noted that the stakeholder process had not resolved the issues the complainants had raised, and it ruled that the complainants carried the burden of proof under section 206(b). They must demonstrate both that the rate in effect is unjust and unreasonable and that their proposed alternative rate is just and reasonable.⁵ The Commission explained that it is not the Midwest ISO's responsibility to propose and justify a new cost allocation because the Midwest ISO is not the complainant but rather the party to which the complaints are directed.⁶

6. On November 10, 2008, the last day of the refund period established in the Order on Revenue Sufficiency Guarantee Complaints, the Commission issued an order finding that the complainants, through the submission of briefs in the paper hearing, had met their burden of proof under FPA section 206(b) to propose a just and reasonable alternative cost allocation.⁷ It directed the Midwest ISO to submit revised cost allocation tariff language, to resettle its Revenue Sufficiency Guarantee costs among Market Participants using the revised cost allocation, and to issue refunds including interest for the period starting on August 10, 2007.

II. Complaints

7. Wabash refers to its complaint as a second complaint and states that it relies on, adopts, and incorporates the allegations in the Prior Complaints. Wabash also incorporates into the second complaint the briefs and supporting affidavits filed in the paper hearing proceeding on September 22, 2008, and it adopts and incorporates the Paper Hearing Order. Wabash states that it has filed its second complaint to ensure that refunds may be provided for a period between August 10, 2007 and the final date of implementation of the paper hearing and issuance of refunds.

8. Wabash states that its second complaint involves the same issues as the Prior Complaints. It argues that the Commission should consolidate its second complaint with those proceedings, particularly because the sole purpose of the second complaint is to prevent any gap in refund coverage. It argues in the alternative that the Commission should extend the refund period initiated in the Order on Revenue Sufficiency Guarantee Complaints.

⁵ *Id.* P 9.

⁶ *Id.*

⁷ *Ameren Services Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161 (2008) (Paper Hearing Order).

9. Ameren argues that the Commission should find that the Tariff will continue to be unjust and unreasonable after November 10, 2008, to the extent it is interpreted to impose Revenue Sufficiency Guarantee charges only on market participants that physically withdraw energy in real time. The Commission also should set for hearing the issue of the necessary revisions to the Tariff and establish a refund effective date for those revisions of November 10, 2008. Like Wabash, Ameren maintains that its new complaint should be consolidated with the earlier complaints involving Revenue Sufficiency Guarantee charges.

10. Ameren argues in the alternative that if the Commission finds that a new complaint in a new docket dealing with Revenue Sufficiency Guarantee cost allocation methodology is inappropriate, the Commission should extend the 15-month refund period that began on August 10, 2007 until the conclusion of the Prior Complaints proceedings. Ameren notes that the refund period that began on August 10, 2007 expires on November 10, 2008. It maintains that despite diligent work by the Midwest ISO, the stakeholders, and the Commission, the proper Revenue Sufficiency Guarantee cost allocation methodology has not been established prior to the refund period's expiration date. According to Ameren, this means that the complainants and other load-serving entities that are paying significant uplift charges will not be entitled to refunds after November 10, 2008, even though they are incurring excessive Revenue Sufficiency Guarantee charges.

11. Ameren notes that section 206(b) of the FPA permits the Commission to order refunds after the 15-month period specified in section 206 if the proceeding has not been resolved within 15 months because of dilatory behavior. Ameren notes that the term "dilatory" has negative connotations, but it need not be interpreted that way. The term can mean, among other things, "tending or intending to cause delay."⁸ In this case, "the Commission determined that holding the case in abeyance was the optimal way to proceed pending completion of the stakeholder process and no party objected." In doing this, the Commission and the parties "tended or intended to cause delay" here, and Ameren maintains that it should not suffer as a result.⁹ Finally, Ameren argues that Congress intended the Commission "to exercise its refund authority under section 206 in a manner that furthers the long-term objective of achieving the lowest cost for consumers consistent with the maintenance of safe and reliable service."¹⁰

⁸ Ameren Complaint at 15 (citing Merriam-Webster Online at <http://www.merriam-webster.com/dictionary/dilatory>).

⁹ *Id.* at 15-16.

¹⁰ *Id.* at 16 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the*
(continued)

III. Notice of Filings and Responsive Pleadings

12. Notice of Ameren's November 10, 2008 complaint was published in the *Federal Register*, 73 Fed. Reg. 70,633 (2008), with interventions and protests due on or before December 1, 2008. Notice of Wabash's November 12, 2008 complaint was published in the *Federal Register*, 73 Fed. Reg. 70,995 (2008), with interventions and protests due on or before December 1, 2008. Timely motions to intervene in both dockets were filed by Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; Exelon Corporation; and, filing jointly, Great Lakes Utilities, Indiana Municipal Power Agency, Midwest Municipal Transmission Group, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Prairie Power, Inc., Southern Minnesota Municipal Power Agency, and Wisconsin Public Power Inc. EPIC Merchant Energy, LP, SESCO Enterprises, LLC, and CAM Energy Trading, LLC (collectively, the Financial Marketers) filed a timely motion to intervene in Docket No. EL09-10-000 and comments. DC Energy Midwest, LLC, Integrys Energy Services, Inc., Edison Mission Energy, Edison Mission Marketing and Trading, Inc., and Midwest Generation EME, LLC (collectively, the Financial Participants); and FirstEnergy Service Company (FirstEnergy) filed timely motions to intervene and comments in both dockets. E.ON U.S., LLC (E.ON) filed untimely motions to intervene and comments in both dockets. The Midwest ISO filed answers to both complaints.

13. The Midwest ISO states in its answer that it does not oppose Wabash's complaint or the relief Wabash requests. The Midwest ISO believes that the FPA supports the objectives set forth in the Wabash complaint. Those objectives are consistent with the Commission's directives in the Paper Hearing Order and are intended only to ensure that the Midwest ISO complies with them. The Midwest ISO states that if the refund period is not extended, it will be required to assess Revenue Sufficiency Guarantee charges found to be unjust and unreasonable until it makes a section 205 filing proposing a new just and reasonable Revenue Sufficiency Guarantee cost allocation methodology pursuant to the Paper Hearing Order. Extending the refund period will avoid ongoing use of a cost allocation methodology determined to be unjust and unreasonable.

14. For the same reasons, the Midwest ISO does not oppose Ameren's request to extend the refund period beyond November 10, 2008. It does, however, oppose Ameren's request for a second refund period starting November 10, 2008. The Midwest ISO states that the Paper Hearing Order appropriately established the basis for its efforts to modify and revise its prospective Revenue Sufficiency Guarantee cost allocation methodology. It argues that given the compliance procedures set forth in the Paper

California Power Exchange, 93 FERC ¶ 61,121, at 61,379 (2000) (citing S. Rep. No. 491 at 5-6, reprinted in 1988 U.S.C.C.A.N. 2687-88)).

Hearing Order, any additional hearings on this matter are unwarranted and unnecessary and amount to an impermissible collateral attack on that order.

15. FirstEnergy requests that the Commission dismiss both complaints as moot. The Paper Hearing Order was issued on November 10, 2008, and it ordered refunds back to August 10, 2007. Potential refund liability for the initial Revenue Sufficiency Guarantee complaint proceeding was captured within the initial 15-month refund period set by the Commission. FirstEnergy also requests that the Commission dismiss both complaints on the merits. It states that Commission precedent prohibits the setting of successive 15-month refund effective dates for duplicative complaints. In addition, the complaints fail to satisfy the sole statutory exception set forth in section 206(b) of the FPA, which permits an extension when the proceeding is not resolved primarily because of dilatory behavior. FirstEnergy states that in this case the proceeding has been resolved within the 15-month period, and in any event there is no evidence of dilatory behavior.

16. The Financial Participants also request that the Commission dismiss the complaints. They agree that there is no evidence of dilatory behavior and that Commission precedent prohibits the setting of successive 15-month refund effective dates for duplicative complaints. The Financial Participants argue that the Commission should deny the motions to consolidate the two new complaints with the initial complaints dealt with in the Paper Hearing Order. They maintain that the Commission denies consolidation when it “would result in serious delay” and would not foster administrative efficiency.¹¹ The Financial Participants argue that consolidation would not promote efficiency because: (1) the Commission has already issued a substantive order which is now subject to rehearing; and (2) the 15-month refund effective period specified under FPA section 206 has expired. The initial complaints are too far along in the administrative process to consolidate additional complaints at this stage.

17. The Financial Marketers state that the relief Ameren seeks represents an impermissible attempt to circumvent the requirements of FPA section 206. They maintain that Ameren has not attempted to establish a separate factual record, and it has not initiated an entirely new proceeding. Ameren’s complaint therefore contradicts Commission precedent that requires a party to “bring a new claim rather than reiterate . . . previous allegations. . . .”¹² The Financial Marketers maintain that the sole purpose of Ameren’s complaint is to expand refund protection beyond the 15-month period set forth

¹¹ Financial Participants Comments at 12 (citing *Florida Gas Transmission Co.*, 98 FERC ¶ 61,179, at 61,663 (2002)).

¹² Financial Marketers Comments at 8 (citing *Consumer Advocate Div. of the Pub. Serv. Comm’n of West Virginia et al. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288 at 62,000 (1994)).

in the statute. Finally, the Financial Marketers state that Ameren suggests that the Commission purposefully delayed resolution of the Revenue Sufficiency Guarantee proceeding. They argue that this claim is baseless and seeks to expand the meaning of the section 206 exception for dilatory behavior far beyond its intended scope.

18. E.ON also requests that the Commission dismiss the Ameren and Wabash complaints as moot. The Paper Hearing Order granted the complaints at issue and ordered refunds. It also amended the tariff on a prospective basis, which eliminates the need for refunds after November 10, 2008.

IV. Discussion

A. Procedural Issues

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities filing them parties to this proceeding. The motions to intervene out of time are granted, given the early stage of the proceedings, the parties' interest and the absence of undue prejudice or delay. 18 C.F.R. § 385.214(d) (2008).

B. Substantive Issues

20. We will dismiss the Ameren and Wabash complaints. We agree with the intervenors who have argued that issuance of the Paper Hearing Order on November 10, 2008 renders these complaints moot. That order resolved the issues raised by the initial complaints and did so within the 15-month refund period. Because the Paper Hearing Order moots the new complaints filed by Ameren and Wabash, we find it unnecessary to address the other legal issues raised by the parties.

21. We disagree with the Midwest ISO that extending the refund period beyond November 10, 2008 is needed to permit the Midwest ISO to implement its compliance actions. The Paper Hearing Order established a just and reasonable rate "to be thereafter observed and in force,"¹³ and the compliance process is an administrative one intended to ensure that the Commission-fixed rate is properly on file. The old, unjust and unreasonable rate ceased to be in effect with the issuance of the Paper Hearing Order. The Midwest ISO should charge the new, Commission-fixed rate going forward from the date of the Paper Hearing Order. To the extent that the Midwest ISO has not done so, it should adjust its billing accordingly. We note that this statement does not amount to

¹³ 16 U.S.C. § 824e(b) (2006).

acceptance of the Midwest ISO's December 10 compliance filing to the Paper Hearing Order, which the Commission will act on separately.¹⁴

The Commission orders:

The complaints filed by Ameren and Wabash are hereby dismissed as discussed in the body of this order.

By the Commission. Commissioner Kelliher is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁴ The Commission also will act separately on requests for rehearing of the Paper Hearing Order.