

ORDER DISMISSING REHEARING REQUESTS, WAIVING REFUNDS, AND
PROVIDING GUIDANCE

(Issued June 12, 2009)

1. On November 7, 2008, the Commission issued an order¹ addressing requests for clarification and/or rehearing of an earlier order in this proceeding² that:

(1) conditionally accepted the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) April 17, 2007 compliance filing regarding its proposal to allocate real-time Revenue Sufficiency Guarantee costs; and (2) provided guidance on the proper interpretation of existing Midwest ISO tariff provisions. In the Fourth Rehearing Order, the Commission also accepted in part and rejected in part the Midwest ISO's December 5, 2007 compliance filing, which was made in response to the Second Compliance Order. The Fourth Rehearing Order also further clarified the provisions of the Revenue Sufficiency Guarantee charge in effect since market start and the effective date for refunds.

2. In this order, the Commission dismisses requests for rehearing of the Fourth Rehearing Order and exercises its discretion to waive refunds of amounts billed that were included in the Revenue Sufficiency Guarantee rate under the assumption that there was a rate mismatch (Applicable Refunds) for the time period prior to the Commission's determination that there is no rate mismatch, i.e. from April 25, 2006 through November 4, 2007.³ Although we dismiss the requests for rehearing, we will provide additional guidance to correct certain misunderstandings that are apparent from those requests.

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,156 (2008) (Fourth Rehearing Order).

² *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,132 (2007) (Second Compliance Order).

³ Some parties have also filed their pleadings in the related Federal Power Act section 206 proceedings, and have, to a limited degree, addressed issues related to those proceedings. This order deals only with those matters related to the Fourth Rehearing Order, and the refund processes associated with that order. Any remaining matters will be dealt with at a later date.

I. General Background

A. Initial Order and Rehearing

3. The rehearing requests involve an issue that has evolved over a series of orders: whether there is a mismatch between the numerator and the denominator of the rate formula used to calculate Revenue Sufficiency Guarantee charges.

4. Section 40.3.3 of the Midwest ISO Open Access Transmission and Energy Markets Tariff (tariff) charges market participants withdrawing energy in the real-time energy market a real-time Revenue Sufficiency Guarantee charge based on their virtual supply offers and real-time load, and injection, export, and import deviations. The purpose of the Revenue Sufficiency Guarantee charge is to ensure that any generator scheduled or dispatched by the Midwest ISO after the close of the day-ahead energy market – either through the Reliability Assessment Commitment or the real-time energy market – will receive no less than its offer price for start-up, no-load and incremental energy. Units in the Reliability Assessment Commitment or in the real-time market that do not earn sufficient real-time energy revenues to cover start-up and no-load costs receive Revenue Sufficiency Guarantee credits.

5. This proceeding began on October 27, 2005, with the Midwest ISO's proposal to delete a reference to virtual supply offers from the tariff provision governing the real-time Revenue Sufficiency Guarantee. The effect of the proposed change would have been that virtual supply offers would not be allocated Revenue Sufficiency Guarantee costs. The Commission rejected this proposal in April 2006, and found that because the Midwest ISO had not been including virtual supply offers in its Revenue Sufficiency Guarantee calculations, it had violated its tariff.⁴

6. The Commission affirmed most of the findings of the April 2006 Initial Order in the First Rehearing Order. Among other things, the Commission analyzed Ameren Services Company's (Ameren) argument that although the Revenue Sufficiency Guarantee charge was derived based on a market participant's total real-time purchases, virtual supply offers, and uninstructed deviation quantities, it was recovered only from market participants who actually withdrew energy on a given operating day. Ameren contended that failure to allocate Revenue Sufficiency Guarantee charges on the same basis that was used to develop the charge, i.e., to virtual offers both by market

⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,108 (Initial Order), *order on reh'g*, 117 FERC ¶ 61,113 (2006) (First Rehearing Order), *order on reh'g*, 118 FERC ¶ 61,212 (Second Rehearing Order), *order on reh'g*, 121 FERC ¶ 61,131 (2007) (Third Rehearing Order).

participants that withdraw energy and those that do not, would result in a mismatch between the determination of the charge and its allocation. Ameren further argued that allocating Revenue Sufficiency Guarantee charges only to market participants who physically withdraw energy would lead to a revenue shortfall that must be uplifted to other market participants.⁵ The Commission found that the rate calculation would not result in such shortfalls, because the denominator of the Revenue Sufficiency Guarantee charge (which included load, virtual supply offers, and resource deviations) matched the basis on which Revenue Sufficiency Guarantee costs were allocated to each market participant. The Commission stated that as long as the divisor and the market participant allocation have the same definition, the charge will recover all costs.⁶

7. Ameren sought rehearing of this finding, again arguing that assessing Revenue Sufficiency Guarantee costs only to market participants who actually withdraw energy creates a mismatch between the megawatt-hours used to develop the rate and those to which the rate is applied. It contended that narrowing the body of virtual supply offers to which the rate is applied is arbitrary, capricious and unduly discriminatory, and that the Commission should grant rehearing and require refunds for this incorrect allocation from April 1, 2005 through April 26, 2006.⁷ This time the Commission agreed, finding in paragraph 58 that while the end result of the charge did not result in any harm, “the divisor to the charge includes all virtual supply – not just virtual supply offered by market participants withdrawing energy – and therefore may result in under-recovery of [Revenue Sufficiency Guarantee] costs.”⁸ Importantly, no party sought rehearing of this finding.

B. Compliance Order and Rehearing

8. During the same time period, the Midwest ISO made various compliance filings to implement the requirements of the Initial Order, the First Rehearing Order, and the Second Rehearing Order. The second of these filings – an April 17, 2007 filing to comply with the First Rehearing Order and the First Compliance Order – is most relevant here.⁹ The First Compliance Order had clarified that the original tariff provisions

⁵ See First Rehearing Order, 117 FERC ¶ 61,113 at P 129.

⁶ *Id.* P 145.

⁷ Second Rehearing Order, 118 FERC ¶ 61,212 at P 45-46.

⁸ *Id.* P 58.

⁹ *Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,213 (First Compliance Order), *order on reh’g*, Third Rehearing Order, 121 FERC ¶ 61,131

relating to the real-time Revenue Sufficiency Guarantee remained in effect.¹⁰ The Midwest ISO therefore sought in its April 17, 2007 filing to reinstate all Commission-approved tariff language, including language regarding the actual withdrawal of energy by market participants. The Commission dealt with this filing in the Second Compliance Order.

9. Protestors objected to aspects of the compliance filing, and in response the Midwest ISO proposed to add the word “aggregate” to describe the deviations being calculated in the per-unit rate.¹¹ The Commission conditionally accepted the proposed tariff sheets in the Second Compliance Order, finding that the Midwest ISO’s April 17, 2007 compliance filing complied with the Commission’s directives. The Commission required the Midwest ISO to make a further compliance filing to include the term “aggregate” in the denominator of the per-unit Revenue Sufficiency Guarantee rate, stating in paragraph 23 of the Second Compliance Order that this:

will correctly and clearly state that the market participant’s virtual offers and deviations will be multiplied by a per-unit rate that is determined on the basis of all virtual offers and deviations, and thereby conform the filing with the currently-effective tariff.¹²

10. In addition, in response to Ameren’s concern that the rate would unfairly allocate shortfalls in the amount of Revenue Sufficiency Guarantee costs, the Commission explained in paragraph 26 of the Second Compliance Order that under the terms of the April 17, 2007 filing, there was no rate mismatch that would produce such a shortfall:

We interpret this formulation to mean that the [Revenue Sufficiency Guarantee] rate denominator is the aggregate of the amounts for market participants withdrawing energy on that day, since they are the entities being assessed the [Revenue Sufficiency Guarantee] charge in section 40.3.3.a.ii. Therefore, the amounts in the individual [Revenue Sufficiency Guarantee] charges in section 40.3.3.a.ii should sum to the same summed and aggregate number in the denominator of section 40.3.3.a.iii, thereby eliminating the possibility of developing the [Revenue Sufficiency

(2007).

¹⁰ First Compliance Order, 118 FERC ¶ 61,213 at P 93.

¹¹ Second Compliance Order, 121 FERC ¶ 61,132 at P 15-20.

¹² *Id.* P 23.

Guarantee] charge and [Revenue Sufficiency Guarantee] rate on different bases and resulting in a shortfall in recovery of [Revenue Sufficiency Guarantee] costs.¹³

C. Fourth Rehearing Order

11. A number of parties sought rehearing of the Second Compliance Order. They argued, among other things, that: (1) the Commission erred by changing the rate in paragraph 26 of the Second Compliance Order, when it concluded that the rate divisor includes only virtual supply offers made by market participants withdrawing energy in the same day; (2) such a rate change is not permissible in an order on compliance filing; (3) the Commission erred in failing to identify a rate mismatch; (4) the Commission erred by finding in paragraph 23 of the Second Compliance Order that inclusion of virtual supply offers in the denominator of the Revenue Sufficiency Guarantee rate is consistent with the tariff; and (5) there is no inconsistency between paragraphs 23 and 26 of the Second Compliance Order, and paragraph 58 of the Second Rehearing Order.¹⁴

12. The Commission clarified in the Fourth Rehearing Order that it had not changed the Revenue Sufficiency Guarantee rate in its prior orders in this proceeding. Instead, all of its statements regarding the rate mismatch had been restricted to interpreting the effective tariff.¹⁵ The Commission quoted the effective rate, and noted that its virtual supply components included: (1) in the numerator, the virtual supply offers of an individual market participant that withdraws energy; and (2) in the denominator, the sum of the virtual supply offers for all market participants who withdraw energy on a given day.¹⁶ The definition of virtual supply in the numerator matches the definition of the summed components in the denominator. For this reason, the Commission found that there is no rate mismatch, and that its statement in paragraph 58 of the Second Rehearing Order that the denominator of the charge includes all virtual supply had been an error. The Commission further noted that its error would have established a new rate, which is impermissible in a proceeding under section 205 of the Federal Power Act.¹⁷ The Commission indicated that the Midwest ISO billing should be based upon the

¹³ *Id.* P 26.

¹⁴ Fourth Rehearing Order, 125 FERC ¶ 61,156 at P 16-27.

¹⁵ *Id.* P 28.

¹⁶ *Id.* P 30.

¹⁷ 16 U.S.C. § 824d (2006).

interpretation of the rate provided in the Fourth Rehearing Order, and that the Midwest ISO should provide refunds to the extent it is not.¹⁸

13. Timely requests for rehearing of the Fourth Rehearing Order were submitted by FirstEnergy Service Company (FirstEnergy), Otter Tail Power Company (Otter Tail), Wisconsin Electric Power Company (Wisconsin Electric), and Xcel Energy Services Inc. (Xcel). Otter Tail filed an answer to Wisconsin Electric's request for rehearing.

14. DTE Energy Trading Inc. (DTE) and Tenaska Power Services Co. (Tenaska) and Westar Energy, Inc. (Westar) filed motions requesting that the Commission issue an order before June 12, 2009 directing the Midwest ISO not to resettle Revenue Sufficiency Guarantee charges associated with the Fourth Rehearing Order. Energy Endeavors LP and SESCO Enterprises LLC (Financial Marketers) filed a motion requesting that before June 12, 2009, the Commission either: (1) issue an order on the Midwest ISO's December 8, 2008 compliance filing in this proceeding; or (2) issue an order clarifying that the Midwest ISO has no authority to implement the December 8, 2008 compliance filing unless and until it is approved by the Commission.

15. All of these parties allege that the resettlement process must stop in order avoid harm to the market. DTE, Tanaska, and Westar state that the Midwest ISO unilaterally proposed to exclude six additional types of deviations from the denominator of the Revenue Sufficiency Guarantee charge calculation. Financial Marketers argue that the Commission cannot permit the Midwest ISO to implement a compliance filing that has not been approved as just and reasonable.

16. The Midwest ISO submitted an answer to these motions. The Midwest ISO states that it disagrees with several arguments set forth in the motions, but it does share the desire expressed in them for either expedited Commission action on the December 8, 2008 compliance filing or deferment of the resettlements associated with the rate mismatch ruling of the Fourth Rehearing Order. The Midwest ISO states that deferment until the Commission has acted on the compliance and rehearing filings will avoid having to untangle the resettlement that it is scheduled to start on June 12, 2009.

17. Edison Mission Energy (Edison Mission) filed an answer to the Midwest ISO's answer in which it objects to the Midwest ISO's willingness to defer the resettlement process and requests that the Commission order the Midwest ISO to comply promptly

¹⁸ Fourth Rehearing Order, 125 FERC ¶ 61,156 at P 30.

with the order issued on May 6, 2009 in the related Federal Power Act section 206 proceedings.¹⁹

II. Discussion

A. Procedural Matters

18. Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2008), prohibits answers to requests for rehearing. Accordingly, we will not accept Otter Tail's answer to Wisconsin Energy's request for rehearing. We will accept the Midwest ISO's answer because it has provided information that assisted us in our decision-making process.

19. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Edison Mission's answer and will, therefore, reject it.

B. Motions to Stay the Refund Process

20. We deny the motions submitted by DTE and Tenaska, Westar Energy, Inc., and Financial Marketers. To the extent that DTE and Tenaska, Westar Energy, Inc., and Financial Marketers ask the Commission to order the Midwest ISO to stop its currently-ongoing resettlement, they request that the Commission stay that process. Under section 705 of the Administrative Procedure Act, the Commission may stay its action "when justice so requires."²⁰ In addressing motions for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.²¹ The Commission's general policy is to refrain from granting a stay of its orders, to assure definiteness and finality in Commission proceedings.²² The key

¹⁹ *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121 (2009), *reh'g pending*.

²⁰ 5 U.S.C. § 705 (2006).

²¹ *Pinnacle West Capital Corp.*, 115 FERC ¶ 61,064, at P 8 (2006) (citing *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,361 (1991), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 990 (1993)).

²² *Id.*

element in the inquiry is irreparable injury to the moving party.²³ If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.²⁴ However, the Commission may examine the other factors where appropriate.²⁵

21. DTE and Tenaska, as well as Financial Marketers, allege that the resettlement process will disrupt the markets. DTE and Tenaska add that the resettlement process will waste resources. Westar alleges that the Midwest ISO's resettlement plans violate the directives of earlier Commission orders in this proceeding. None of the parties have demonstrated that these effects will amount to irreparable harm, which is required to support a stay.²⁶ We therefore deny the requests for stay. We note that these motions contain a number of substantive arguments that we will address in due course.

22. The Midwest ISO states that it shares the desire of these parties for a deferment of the resettlements it has scheduled for June 12, 2009. This date was selected by the Midwest ISO, not mandated by the Commission. If the Midwest ISO prefers to commence the resettlements at a later date, it is free to do so.

23. We also deny Financial Marketers' request that we rule on the Midwest ISO's December 8 compliance filing before June 12, 2009. Commission staff has issued a deficiency letter in response to that compliance filing, and the Midwest ISO's June 8, 2009, answers to that deficiency letter have been noticed for public comment.²⁷ As the predicates for the order that Financial Marketers request have not been fulfilled,

²³ *Id.*

²⁴ *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,361 (1991).

²⁵ *Pinnacle West Capital Corp.*, 115 FERC ¶ 61,064, at P 8 (2006) (citing *The Montana Power Company, Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 85 FERC ¶ 61,400, at 62,535 (1998) (granting stay even without a finding of irreparable injury)).

²⁶ *Id.* (citing *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,361 (1991), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 990 (1993)).

²⁷ *Combined Notice of Filings #1*, Docket No. ER04-691-091 (June 10, 2009) (setting deadline of June 26, 2009 for responses to the Midwest ISO's deficiency answers).

the Commission cannot properly act on the filing at this time; to do so would prejudice its merits.

24. Finally, we deny Financial Marketers' request for an order clarifying that the Midwest ISO has no authority to implement the December 8, 2008 compliance filing unless and until the Commission approves such filing. The Commission gave the Midwest ISO a general directive to resettle the markets consistent with the clarifications regarding the rate mismatch set forth in the Fourth Rehearing Order. The Midwest ISO chose to carry out this instruction using the calculation specified in the December 8, 2008 compliance filing as its basis for implementing the refunds. As described above, the Commission cannot evaluate the merits of the December 8, 2008 compliance filing until the public comment period has closed. We decline to prejudge that filing by deciding here, as Financial Marketers urge, that it is an improper basis for implementing the guidance of the Fourth Rehearing Order. We will deal with any matters implicated by the outcome of our review of the compliance filing at the appropriate time.

C. Dismissal of Rehearing Requests

25. We dismiss the rehearing requests. The Commission does not allow rehearing of an order denying rehearing.²⁸ Any other result would lead to never-ending litigation as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing unless presumably that response were word-for-word identical to what the Commission earlier said.²⁹ Litigation before the Commission cannot be allowed to drag on indefinitely – at some point it must end – and so the Commission does not allow parties to seek rehearing of an order denying rehearing. And, as the District of Columbia Circuit has put it, even “an improved rationale” would not justify a further request for rehearing.³⁰

²⁸ See, e.g., *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

²⁹ Accord, e.g., *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of “infinite regress” that would “serve no useful end”).

³⁰ *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (*Southern*) (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)).

26. Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.³¹ In fact, a second rehearing request is required in instances when the later order modifies the results of the earlier order in a significant way.³²

27. The Fourth Rehearing Order does not modify the result reached in the Second Compliance Order in a manner that gives rise to a wholly new objection. As discussed below, the Fourth Rehearing Order for the first time acknowledges an incorrect statement in the Second Rehearing Order. As also discussed below, that acknowledgment relates to the discussion in the Fourth Rehearing Order of certain hypothetical propositions, and it in no way modifies the result reached in the Second Compliance Order. However, the rehearing requests reflect a number of misunderstandings that the Commission believes it is important to correct. Therefore, although we dismiss the rehearing requests, we will discuss them for the purpose of providing guidance on the Revenue Sufficiency Guarantee charge calculation.

D. Virtual Supply Offers in Revenue Sufficiency Guarantee Rate Denominator

Requests for Rehearing

28. Otter Tail contends that the Commission has not provided a reasoned analysis for its departure from precedent that the Revenue Sufficiency Guarantee rate denominator should include all virtual supply offers irrespective of the phrase “actually withdraws energy.” Otter Tail notes that paragraph 58 of the Second Rehearing Order confirmed that the Revenue Sufficiency Guarantee rate denominator includes all cleared virtual supply offers and that order also stated the provision remains in effect until a section 206 investigation determines the current provision is unjust and unreasonable. Otter Tail asserts that since no one requested rehearing of the Second Rehearing Order, which denied rehearing of the First Rehearing Order, the issue was conclusively resolved subject to appellate review.

29. Otter Tail maintains that the Second Rehearing Order confirmed the Commission’s conclusion in the First Rehearing Order that the real-time Revenue Sufficiency Guarantee rate includes all virtual supply offers scheduled in the day-ahead

³¹ See *Southern*, 273 F.3d at 424.

³² See *California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood, Massachusetts v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990).

market, and the Commission again confirmed its interpretation of the application of the Revenue Sufficiency Guarantee charge to virtual supply offers in the Second Compliance Order.³³ Otter Tail also claims the Commission relied on this interpretation of the Revenue Sufficiency Guarantee rate denominator in its order dismissing E.ON's Revenue Sufficiency Guarantee complaint.³⁴ Otter Tail further notes that the order the Commission now relies upon for its new interpretation read the current tariff language to include all virtual supply offers in the rate denominator.³⁵

30. Otter Tail argues that the Commission offers in the Fourth Rehearing Order a new interpretation of the Second Compliance Order that is inconsistent with the plain language of paragraph 23 of that order. Paragraph 23 of the Second Compliance Order states that the Revenue Sufficiency Guarantee rate is based on all virtual offers, not to just market participants withdrawing energy.

31. Otter Tail considers the Commission's interpretation in the Second Compliance Order – that the Revenue Sufficiency Guarantee rate denominator is the aggregate of the amounts for market participants withdrawing energy³⁶ – to be irrelevant for two reasons. First, the interpretation was not relevant to the compliance filing, which the Commission accepted, or necessary to enable the Midwest ISO to make its follow-up compliance filing. And second, the clarification was not required to provide guidance regarding any subject matter controversy. According to Otter Tail, since the Commission was providing guidance, no compliance was needed. Otter Tail claims there was no controversy in the compliance filing regarding the Revenue Sufficiency Guarantee rate denominator because that issue had been conclusively determined in the Second Rehearing Order and was no longer subject to rehearing.

32. Otter Tail claims that to the extent protestors misconstrued the Commission's clarification to apply to the treatment of virtual supply offers in the Revenue Sufficiency Guarantee rate denominator, their interpretation was misplaced. Otter Tail notes that the issue of which virtual supply offers comprise the rate denominator was not required to be addressed in the compliance filings underlying the second or the third compliance filings. Otter Tail states that protestors' requests in the ongoing compliance proceedings to

³³ Third Rehearing Order, 121 FERC ¶ 61,131 at P 17.

³⁴ *E.ON U.S. LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,206, at P 29 (2007) (E.ON Order), *reh'g denied*, 125 FERC ¶ 61,163 (2008).

³⁵ Second Compliance Order, 121 FERC ¶ 61,132 at P 23, 25.

³⁶ *Id.* P 26.

reverse the Second Rehearing Order were collateral attacks on the Commission's earlier orders and that the Commission should have rejected those requests as impermissible. Otter Tail also considers irrelevant the interpretation of paragraph 26 of the Second Compliance Order, because it did not address virtual supply offers and instead clarified that the other components of the denominator must equal the same components in the billing determinants. According to Otter Tail, paragraph 23 of the Second Compliance Order found that the Midwest ISO compliance filing did not sufficiently include all virtual supply offers in the denominator and directed the Midwest ISO to make another compliance filing to add the word "aggregated" to ensure that all virtual supply offers were included in the denominator. Otter Tail argues that no reasonable interpretation that gives effect to these two separate paragraphs could lead to the conclusion that the Commission directed the Midwest ISO in the Second Compliance Order to vary from its earlier explicit directions to include all virtual supply offers in the Revenue Sufficiency Guarantee rate denominator.

E. Resettlement of Revenue Sufficiency Guarantee Charges
Requests for Rehearing

33. According to Xcel, where the Commission has offered an interpretation of an ambiguous provision in the Midwest ISO tariff, it is reasonable for the Midwest ISO and other parties rely on that interpretation, and it is inappropriate to order resettlement and refunds based on a competing interpretation. According to Xcel, the Second Compliance Order failed to address the inconsistency between the Commission's earlier statements, and it was not until the Fourth Rehearing Order that the Commission stated the earlier interpretation was in error. Xcel contends that the Commission implicitly recognizes that the ambiguity in the tariff language lends itself to multiple interpretations, none of which actually constitutes a change in the rate.³⁷ Xcel also contends that it is inappropriate for the Commission to propose retroactive refunds for a time period that occurred prior to the effectiveness of the tariff provisions on which it bases its determination.

34. Xcel asserts that while the Commission found the earlier interpretation to be in error, it did not find that the interpretation in the Second Rehearing Order constituted a tariff violation or that such a settlement method would create an unjust, unreasonable, or unduly discriminatory result. Xcel also argues that there is nothing in the record to suggest that the resettlement of Revenue Sufficiency Guarantee charges carried out in

³⁷ Xcel Rehearing Request at 14 (referencing the Commission's statement in P 28 of the Fourth Rehearing Order that "all the Commission statements on the rate mismatch in this proceeding have been restricted to the interpretations of the tariff in effect and have not been determinations to change the rate in effect.").

reliance on the Second Rehearing Order was done in bad faith or that it resulted in an inequitable windfall for any market participant or for the Midwest ISO, given that refunds will not make injured parties whole but instead create random winners and losers.

35. Xcel considers the Commission's waiver in the First Rehearing Order of refunds for the Midwest ISO's failure to include virtual supply offers in the calculation of Revenue Sufficiency Guarantee charges to be a guide for the Commission's actions in this proceeding. According to Xcel, the Commission explained in granting the waiver that a proper balancing of the equities concluded that market participants reasonably relied on statements by the Midwest ISO for accurate information concerning the application of Revenue Sufficiency Guarantee charges to virtual supply offers. Xcel argues that further recalculation of market transactions will undermine confidence in the stability of the Midwest ISO energy markets.

36. FirstEnergy asserts that the Commission should reverse the decision to order refunds because the Commission's interpretation of the tariff that supports refunds is diametrically opposed to its interpretation of the same provision in the Second Rehearing Order. The more recent interpretation therefore was unexpected. FirstEnergy notes that in the First Rehearing Order, the Commission found refunds to be inappropriate where market participants relied on Business Practices Manuals, and this ruling supports the conclusion that refunds are also inappropriate where market participants relied on a Commission order explicitly interpreting the tariff. According to FirstEnergy, by ordering refunds, the Commission undermines market participants' ability to rely in the future on the Commission's interpretation of the tariff. FirstEnergy also notes that the Commission's dismissal of the E.ON Complaint, which sought relief based on an alleged mismatch between the numerator and denominator, would lead market participants to believe that refunds relating to such alleged mismatch would not be ordered.

37. FirstEnergy asserts that the Commission's decision to require resettlement is unfair because market participants cannot revisit economic decisions undertaken in reliance on a prior Commission interpretation of the tariff. FirstEnergy contends the order creates substantial financial liabilities to market participants that have done nothing wrong and who could not reasonably anticipated those liabilities. FirstEnergy also argues that the Commission did not weigh the need for consistency and predictability when it abrogated its prior interpretation of the tariff and imposed on market participants unforeseen surcharges on past transactions.

38. FirstEnergy and Xcel request that the Commission clarify that refunds should be limited to the period from April 25, 2006 onward if it does not grant rehearing. Wisconsin Electric asks the Commission to clarify that refunds are required beginning April 1, 2005. According to Wisconsin Electric, if refunds do not become effective until April 25, 2006, there will be a period between April 1, 2005 and April 25, 2006 during which the Midwest ISO would charge a rate found to be impermissible. Wisconsin

Electric also requests clarification that all refunds should include interest calculated pursuant to the Commission's regulations.³⁸

F. Commission Determination

39. As described above, we have dismissed the rehearing requests. However, for purposes of supplying additional guidance, we will elaborate further on the determination in the Fourth Rehearing Order that there is no rate mismatch in the Revenue Sufficiency Guarantee charge. The Commission's interpretations in the Second Compliance Order and the Fourth Rehearing Order correctly explain the effective rate.

40. Although the Commission indicated in the Second Rehearing Order that there is a mismatch, that statement was in error. The Second Rehearing Order is no longer subject to rehearing, so the Commission cannot now rectify its error directly. Despite this, we disagree with the arguments that we can never revisit the erroneous statement. It was appropriate and permissible for the Commission to make subsequent interpretations of the Revenue Sufficiency Guarantee rate in the Second Compliance Order and the Fourth Rehearing Order because: (1) the Commission has ongoing authority to review that rate;³⁹ (2) such ongoing review was particularly appropriate under the circumstances of this proceeding, in which parties did not have for several years revised tariff language upon which to rely with respect to the effect of Commission rulings on the rate mismatch issue; (3) the Commission's most recent statement regarding the mismatch issue was both incorrect and, in any event, academic, in that it was made in response to rehearing arguments about a *potential* rate formulation; (4) parties have relied on this incorrect interpretation and mistaken it for formal Commission review of tariff provisions for purposes of acceptance; and (5) in the Fourth Rehearing Order, in which the Commission addressed the rate mismatch issue comprehensively, the Commission was discussing a compliance filing containing a new rate formulation that had not been before the Commission previously.

41. In light of the confusion the Second Rehearing Order created (and that was not remedied on rehearing), we will exercise our discretion to waive the Applicable Refunds for a portion of the period at issue.⁴⁰ We will not require refunds for the period from April 25, 2006 through November 4, 2007 since the Commission did not make a

³⁸ 18 C.F.R. § 35.19a.

³⁹ *Oxy USA v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995).

⁴⁰ *See, e.g., Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810 (D.C. Cir. 1998) (declining to impose refunds that would undermine confidence in the markets).

determination on the complete tariff provision and did not address the rate mismatch issue comprehensively until the Second Compliance Order issued on November 5, 2007. We recognize that the Commission statement on virtual offers in the Second Rehearing Order led parties to believe the Commission was ruling on the rate mismatch issue, even when that determination was procedurally defective and hypothetical.

42. For these reasons, we will not require the Applicable Refunds for the time period from April 25, 2006 through November 5, 2007. This period starts with the effective date for refunds associated with virtual transactions,⁴¹ and continues through to the date the Commission made its determination that there is no rate mismatch. We clarify for Xcel that the Fourth Rehearing Order does not require refunds for the period prior to April 25, 2006, and that the Commission's rulings on refunds in the section 206 complaint in Docket No. EL07-86, *et al.* have no bearing on the Commission's refund requirements in this proceeding. Refunds are required starting on November 5, 2007. The Commission determination on that date with respect to the entire rate calculation, and a review of the entire tariff provision for the first time since market start, provided sufficient notice to parties. We clarify that interest applies to the refunds, as specified in the Commission's regulations.⁴²

43. We affirm the Commission's findings subsequent to the Second Rehearing Order that there is no rate mismatch, and we consider the Commission's determination on that point to have a reasoned basis. As the Commission explained in the Fourth Rehearing Order, the definition of virtual supply in the numerator matches the definition of the summed components in the denominator.⁴³ The Commission came to the same conclusion in the Third Rehearing Order when it stated that the amounts in the individual Revenue Sufficiency Guarantee charges in the numerator should sum to the same summed and aggregate number in the denominator, thereby eliminating the possibility of

⁴¹ The Commission exercised its discretion not to require refunds associated with virtual transactions from market start until April 24, 2006, the period prior to the date of the Commission's first order requiring the Midwest ISO to allocate Revenue Sufficiency Guarantee costs to virtual offers in accordance with the terms of the Midwest ISO tariff. First Rehearing Order, 117 FERC ¶ 61,113 at P 92-95. We clarify for Wisconsin Electric that the refund period begins November 5, 2007 for the rate mismatch, as discussed above.

⁴² 18 C.F.R. § 35.19a (2008).

⁴³ Fourth Rehearing Order, 125 FERC ¶ 61,156 at P 30.

developing the Revenue Sufficiency Guarantee charge and rate on different bases, with the result being a shortfall in the recovery of Revenue Sufficiency Guarantee costs.⁴⁴

44. We reject Otter Tail's position that because the Commission made an earlier statement on the rate mismatch, it cannot revisit its conclusion. We note as a preliminary matter that the Second Compliance Order addressed for the first time a number of revisions to a complex, two-part rate and charge calculation.⁴⁵ The fact that the Commission addressed an earlier formulation of this calculation does not foreclose consideration of whether the new formulation is just and reasonable. On the contrary, the Commission is obligated to ensure the revised calculation is just and reasonable. To restrict Commission action to providing guidance, which Otter Tail claims is necessary, would be a dereliction of the Commission's duties under the Federal Power Act.⁴⁶

45. Otter Tail's criticisms of the Commission's determinations in the Second Compliance Order are out of time and therefore beyond the scope of this proceeding. We will, however, respond to these arguments to ensure that Otter Tail's misstatements are fully addressed. Any Commission acceptances or directives regarding further edits to the Revenue Sufficiency Guarantee charge in paragraphs 23 and 25 of the Second Compliance Order cannot be read as if paragraph 26 did not exist. The Commission clearly stated in that latter paragraph that there is no rate mismatch. To interpret the phrase "*all virtual offers*" in paragraph 23 to mean all virtual offers of all market participants when the Commission states three paragraphs later that the virtual offers are the aggregate of the amounts *for market participants withdrawing energy* represents a simple failure to read the Commission determination in its entirety. Such a selective reading is by its nature a misreading. Contrary to Otter Tail's position, paragraph 26 represents a Commission ruling on the entire rate calculation and therefore applies to all elements of the denominator, including virtual offers. Otter Tail has not persuaded us that there is any other reasonable reading of this paragraph. Nowhere in paragraph 26 does the Commission state or imply that its interpretation of the rate calculation was restricted only to components of the denominator other than virtual offers, as Otter Tail claims.⁴⁷ For these reasons, we reject Otter Tail's claims that the Commission

⁴⁴ Second Compliance Order, 121 FERC ¶ 61,132 at P 26.

⁴⁵ *Id.* at P 14 (noting that, in its April 17 Filing, the Midwest ISO filed revised tariff provisions).

⁴⁶ For the same reasons, we do not consider the clarifications requested by commenters or their concerns regarding the revised tariff to be impermissible.

⁴⁷ Otter Tail at 12.

interpreted the tariff to include all virtual offers in the denominator in the Second Compliance Order.

46. We reject Otter Tail's claim that the Commission's determination in the Second Compliance Order that there is no rate mismatch was irrelevant and gratuitous. The Midwest ISO compliance filing at issue contained omissions and ambiguous language that led parties to request clarification.⁴⁸ The Commission accordingly provided an explanation of the entire tariff provision, including the revisions submitted by the Midwest ISO. In reviewing the tariff provision and the rate calculation, the Commission was engaged in an ongoing review of rates and tariffs subject to its jurisdiction and therefore was acting under its authority under the Federal Power Act.⁴⁹ Contrary to Otter Tail's characterization, the Commission was not simply providing guidance.

47. The citation by Otter Tail and FirstEnergy to the E.ON Order⁵⁰ are not on point. In that order, the Commission addressed the effect of its decision not to require refunds for virtual offers from market start to April 25, 2006. The statement there that the Commission's orders have in effect zeroed out the virtual supply component from the numerator of the rate formula and retained virtual supply in the denominator has no bearing on whether there is a rate mismatch when Revenue Sufficiency Guarantee costs are allocated to virtual offers. That statement supports the determination in the Second Compliance Order that there is no rate mismatch, as well as a contrary interpretation, since both conclusions – rate mismatch or no rate mismatch – would have megawatt-hour amounts for virtual offers in the denominator.

48. Also, paragraph 58 of the Second Rehearing Order did not confirm a statement made in the First Rehearing Order regarding the applicability of the Revenue Sufficiency Guarantee charge to day-ahead virtual supply offers. Otter Tail has taken the statement in the First Rehearing Order out of context. There the Commission was addressing a claim that market participants could avoid the Revenue Sufficiency Guarantee charge entirely by scheduling their transactions in the day-ahead market instead of the real-time

⁴⁸ Otter Tail misrepresents the circumstances of the Second Compliance Order when it states there was no controversy in the compliance filing regarding the rate mismatch. Protestors expressed confusion as to the components of the denominator and concern that the revised Revenue Sufficiency Guarantee charge was unfair. To respond to these concerns, the Midwest ISO clarified that virtual supply offers will be included in the aggregate calculation. Second Compliance Order, 121 FERC ¶ 61,132 at P 15, 19-20.

⁴⁹ *Oxy USA v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995).

⁵⁰ E.ON Order, 121 FERC ¶ 61,206, at P 29 (2007).

market. The Commission's response – which was that the real-time Revenue Sufficiency Guarantee charge includes all virtual supply offers scheduled in the day-ahead energy market – clarifies that virtual supply offers are a component of the Revenue Sufficiency Guarantee charge even though they occur in the day-ahead market.⁵¹ The Commission was neither addressing the calculation of the Revenue Sufficiency Guarantee charge, nor evaluating whether there was a mismatch between the numerator and denominator of the charge.

49. Likewise, Commission statements in the Third Rehearing Order concluding that the currently-effective tariff provision remains in effect have no bearing on the rate mismatch issue. There, the Commission was addressing concerns regarding refund effective dates and the assignment of Revenue Sufficiency Guarantee costs to virtual offers for the first time.⁵² These statements did not relate to the calculation of the Revenue Sufficiency Guarantee charge and therefore did not constitute a Commission determination on the rate mismatch issue.

50. We do not consider the Second Compliance Order to be in violation of the Commission's rule against relitigation.⁵³ As discussed above, that order addressed a revised tariff filing, and as a result protestors were responding to new information in the April 17 Filing that was not before the Commission until that time.

51. Nor do we find convincing Otter Tail's argument that the Commission engaged in retroactive ratemaking. Since the Commission rejected the first two Midwest ISO proposals regarding virtual supply offers, it was not until the April 17, 2007 Midwest ISO filing that parties saw a complete revised Revenue Sufficiency Guarantee rate and charge with all components fully specified in the numerator and denominator and reflecting all Commission rulings. Prior to this filing, parties did not have revised tariff language to rely upon to determine the impact of Commission rulings on the rate mismatch.

52. Finally, we do not agree with Otter Tail's conclusion that the Commission consistently determined over a series of orders that there was a rate mismatch. The only Commission statement that could be read to support a rate mismatch is the one in

⁵¹ First Rehearing Order, 117 FERC ¶ 61,113 at P 51-52.

⁵² Third Rehearing Order, 121 FERC ¶ 61,131 at P 14, 17, 39 (2007).

⁵³ See, e.g., *Am. Elec. Power Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,083 (2008); *Alamito Co.*, 41 FERC ¶ 61,312 (1987); *Cent. Kan. Power Co., Inc.*, 5 FERC ¶ 61,291 (1978), *order on reh'g*, 6 FERC ¶ 61,188 (1979).

paragraph 58 of the Second Rehearing Order. We do not consider this one statement to constitute explicit direction over a series of orders, as Otter Tail would have it, nor do we consider it to apply to a revised calculation that was filed in compliance with a different order altogether. None of the Commission statements Otter Tail cites to support the proposition that the virtual offers are assessed per the currently-effective tariff address the rate mismatch issue. The more accurate characterization is that the Commission did not fully address this issue until the Second Compliance Order, in response to concerns raised about a rate mismatch, and that when it did fully address the issue there and in the Fourth Rehearing Order, it provided a reasoned explanation for its interpretation of the calculation.⁵⁴

53. Otter Tail's position that paragraph 58 of the Second Rehearing Order provided the clear and unambiguous interpretation upon which parties relied is not persuasive. That paragraph was part of a rehearing order that addressed issues arising from an earlier rehearing order. Since the Commission had rejected the Midwest ISO proposals on virtual offers, and the Midwest ISO was yet to file a full and complete Revenue Sufficiency Guarantee charge tariff provision that complied with Commission rulings, the interpretation of the rate mismatch in paragraph 58 with respect to virtual offers represented a hypothetical interpretation of a portion of the tariff language that the Commission was yet to review in a subsequent order. Furthermore, the second pass portion of the Revenue Sufficiency Guarantee charge that provided for a load-ratio share recovery of any amounts not recovered in the Revenue Sufficiency Guarantee charge – and thereby indicated the denominator of the rate may not match the numerator – applied to a proposed Revenue Sufficiency Guarantee charge *that did not allocate any costs to virtual offers*. Finally, we note that the Commission did not require the Midwest ISO to make a compliance filing as a result of this statement.⁵⁵

The Commission orders:

(A) The requests for rehearing of the Fourth Rehearing Order are hereby

⁵⁴ We consider the fact that neither Otter Tail nor any other party challenges the logic of the Commission's determination that there is no rate mismatch to be evidence that parties understand the basis for the Commission's determination and do not find fault with the reasons provided for the determination.

⁵⁵ Responding to FirstEnergy, we note that this statement, which was made in response to rehearing requests on a tariff provision yet to be filed, did not constitute an acceptance of a section 205 filing.

dismissed.

(B) The Applicable Refunds are hereby waived for the time period from April 25, 2006 through November 4, 2007, as discussed in the body of this order.

(C) To the extent that the motions ask the Commission to direct the Midwest ISO to defer the Applicable Refunds not waived herein, those motions are denied, as discussed in the body of this order.

By the Commission. Commissioner Philip D. Moeller is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.