149 FERC ¶ 61,072
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Illinois Power Marketing Company Docket No. ER14-2718-000

ORDER REJECTING TARIFF FILING

(Issued October 24, 2014)

1. On August 27, 2014, pursuant to section 205 of the Federal Power Act (FPA)[1] and the Commission's Order Granting In Part and Denying In Part Complaint, Addressing Tariff Filings, Denying Rehearing, Instituting Section 206 Proceeding, Establishing Hearing and Settlement Judge Procedures, and Consolidating Proceedings issued in Docket No. ER13-1962-000, *et al*.,[2] Illinois Power Marketing Company (Illinois Power) submitted a revised unexecuted Amended and Restated System Support Resource (SSR)[3] Agreement between Illinois Power and MISO under the Tariff (Illinois Power Restated 2013 SSR Agreement).[4] As discussed more fully below, the Illinois Power Restated

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[1] 16 U.S.C. § 824d (2012).

[2] *Midcontinent Indep. Sys. Operator, Inc*., 148 FERC ¶ 61,057 (2014) (Ameren Complaint Order).

[3] The Midcontinent Independent System Operator's (MISO) Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Tariff) defines SSRs as "Generation Resources or Synchronous Condensor Units [(SCU)] that have been identified in Attachment Y – Notification to this Tariff and are required by the Transmission Provider for reliability purposes, to be operated in accordance with the procedures described in Section 38.2.7 of this Tariff." MISO, FERC Electric Tariff, 1.643, System Support Resource (SSR):, 0.0.0. Unless indicated otherwise, all capitalized terms shall have the same meaning given them in the MISO Tariff.

[4] Illinois Power Marketing Company, FERC FPA Electric Tariff, Ameren Energy Marketing Company General Tariff, 2013 SSR Agreement, Amended and Restated System Support Resources Agreement, 0.0.0.

2013 SSR Agreement revises the rate set forth in the unexecuted Amended and Restated SSR Agreement (Edwards Year 1 SSR Agreement) that was filed by MISO, pursuant to section 205 of the FPA, on July 11, 2013, in Docket No. ER13-1962-000, designated as Service Agreement No. 6502 under the Tariff.[5] In this order, we reject the Illinois Power Restated 2013 SSR Agreement.

I. Background

2. Under the Tariff, market participants that have decided to retire or suspend a generation resource or SCU must submit a notice (Attachment Y Notice), pursuant to Attachment Y (Notification of Potential Resource/SCU Change of Status) of the Tariff, at least 26 weeks prior to the resource's retirement or suspension effective date. During this 26-week notice period, MISO will conduct a study (Attachment Y Study) to determine whether all or a portion of the resource's capacity is necessary to maintain system reliability, such that SSR status is justified. If so, and if MISO cannot identify an SSR alternative that can be implemented prior to the retirement or suspension effective date, then MISO and the market participant shall enter into an agreement, as provided in Attachment Y-1 (Standard Form SSR Agreement) of the Tariff, to ensure that the resource continues to operate, as needed.[6]

3. On July 25, 2012, in Docket No. ER12-2302-000, MISO submitted proposed Tariff revisions regarding the treatment of resources that submit Attachment Y Notices. On September 21, 2012, the Commission conditionally accepted MISO's proposed Tariff revisions effective September 24, 2012, subject to two compliance filings due within 90 and 180 days of the date of the order.[7] On July 22, 2014, the Commission conditionally accepted MISO's compliance filing made in response to the SSR Order subject to further compliance.[8]

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[5] MISO, FERC FPA Electric Tariff, Midwest ISO Agreements, SA 6502, Illinois Power-MISO SSR Agreement, 31.0.0.

[6] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, *reh'g denied*, 109 FERC ¶ 61,157 (2004).

[7] *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237 (2012) (2012 SSR Order), *order on compliance*, 148 FERC ¶ 61,056 (2014) (2014 SSR Order).

[8] 2014 SSR Order, 148 FERC ¶ 61,056 at P 1.

4. On July 5, 2013, pursuant to section 206 of the FPA,[9] AmerenEnergy Resources Generating Company filed a complaint (Complaint) in Docket No. EL13-76-000 against MISO, which was supplemented by Illinois Power Marketing Company and Illinois Power Resources Generating, LLC[10] on February 20, 2014. The Complaint argued that the Commission should find that, regarding SSR compensation, the term "going forward costs" includes the fixed costs of existing plant, which are recovered as depreciation expense, return on rate base, and associated taxes; or alternatively, the Commission should find that the existing Tariff is unjust and unreasonable and unduly discriminatory or preferential, to the extent that it does not compensate SSRs for the fixed costs of existing plant.

5. As noted above, on July 11, 2013 in Docket No. ER13-1962-000, MISO submitted the Edwards Year 1 SSR Agreement for Edwards Unit 1, covering a one-year term beginning on January 1, 2013 and terminating on December 31, 2013. The Edwards Year 1 SSR Agreement only included compensation for Ameren's going-forward costs and did not include any compensation for Ameren's fixed costs of existing plant. On November 25, 2013, the Commission accepted the Edwards Year 1 SSR Agreement and the associated rate schedule, suspended them for a nominal period, to be effective January 1, 2013, as requested, subject to refund and further Commission order.[11]

6. On January 30, 2014 in Docket No. ER14-1210-000, pursuant to section 205 of the FPA, MISO filed the unexecuted Amended and Restated SSR Agreement (Edwards Year 2 SSR Agreement), designated as Service Agreement No. 6502 under the Tariff.[12] MISO filed the Edwards Year 2 SSR Agreement for Edwards Unit 1, covering a one-year term beginning on January 1, 2014 and terminating on December 31, 2014. Like the

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[9] 16 U.S.C. § 824e (2012).

[10] On December 2, 2013, Illinois Power Holdings acquired several Ameren Corporation subsidiaries, including AmerenEnergy Resources Generating Company and Ameren Energy Marketing. AmerenEnergy Resources Generating Company was renamed as Illinois Power Resources Generating, LLC, and Ameren Energy Marketing was renamed as Illinois Power Marketing Company. For purposes of this order, both AmerenEnergy Resources Generating Company and Ameren Energy Marketing will be referred to as Ameren, and both Illinois Power Marketing Company and Illinois Power Resources Generating, LLC will be referred to as Illinois Power.

[11] *Midcontinent Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,163 (2013).

[12] MISO, FERC FPA Electric Tariff, Midwest ISO Agreements, SA 6502, Illinois Power-MISO SSR Agreement, 31.0.0.

Edwards Year 1 SSR Agreement, the Edwards Year 2 SSR Agreement also only included compensation for Illinois Power's going-forward costs and did not include any compensation for Illinois Power's fixed costs of existing plant. On March 31, 2014, the Commission accepted the Edwards Year 2 SSR Agreement and the associated rate schedule, suspended them for a nominal period, to be effective January 1, 2014, as requested, subject to refund and further Commission order.[13]

7. On July 22, 2014, the Commission issued the Ameren Complaint Order which addressed several issues raised in these proceedings. Among other things, the Commission denied the Complaint as to Ameren's argument that the term "going forward costs" in the then-existing Tariff can be construed to include the fixed costs of existing plant, but granted the Complaint and found the Tariff to be unjust, unreasonable, and unduly discriminatory or preferential because when MISO negotiates with a market participant to determine the level of SSR compensation, the Tariff did not allow SSRs compensation for the fixed costs of existing plant. Additionally, the Commission found the MISO Tariff to be unjust, unreasonable, and unduly discriminatory or preferential because it provided MISO with unilateral rights to file rates under unexecuted SSR agreements.[14]

8. The Commission directed MISO, in a compliance filing due within 60 days of the date of the Ameren Complaint Order, to revise its Tariff to reflect that SSR compensation should not exceed a resource's full cost of service, including the fixed costs of existing plant (rather than providing that this compensation must not exceed a resource's going-forward costs), effective as of the date of the Ameren Complaint Order.[15] In addition, the Commission directed MISO, in a compliance filing due within 60 days of the date of the Ameren Complaint Order, to revise the Tariff to address the situation where MISO and the generation owner cannot agree on the appropriate level of compensation for an SSR agreement, effective as of the date of the Ameren Complaint Order. The Commission required that the Tariff should provide that: (1) in instances where MISO and the generation or SCU owner cannot agree on compensation for SSR service, the generation owner or SCU owner may submit an FPA section 205 filing for the rate associated with the unexecuted SSR agreement; and (2) MISO will be required to file an unexecuted SSR agreement with the Commission that includes only the non-rate terms and conditions within 15 days after MISO and the generation or SCU owner determine that they are at an

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[13] *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,238 (2014).

[14] Ameren Complaint Order, 148 FERC ¶ 61,057 at P 82.

[15] *Id.* P 87.

impasse regarding the appropriate level of compensation.[16] The Commission also established hearing and settlement judge procedures in order to address issues of material fact with regard to the appropriate level of compensation under the Edwards Year 1 SSR Agreement and Edwards Year 2 SSR Agreement.[17]

9. On August 7, 2014, in Docket No. ER14-2619-000, Illinois Power, pursuant to FPA section 205 and the Ameren Complaint Order, submitted a revised unexecuted Amended and Restated SSR Agreement between Illinois Power and MISO under the Tariff (Illinois Power Restated 2014 SSR Agreement) that revises the rate set forth in the Edwards Year 2 SSR Agreement to provide for a monthly compensation based on its full cost of service for Edwards Unit 1 for 2014 SSR service. Illinois Power also requested waiver of the Commission's prior notice requirements so that the Illinois Power Restated 2014 SSR Agreement could be effective January 1, 2014, the effective date of the Edwards Year 2 SSR Agreement. On October 6, 2014, the Commission accepted the Illinois Power Restated 2014 SSR Agreement, suspended it for a nominal period, to become effective August 8, 2014, subject to refund and compliance, set Illinois Power's proposed rates under the Illinois Power Restated 2014 SSR Agreement for hearing and settlement procedures and consolidated that proceeding with the ongoing hearing and settlement procedures established by the Ameren Complaint Order in Docket No. ER13-1962-000, et al. (Edwards SSR Proceedings).[18]

II. Illinois Power's Filing

10. Illinois Power states that, pursuant to the Ameren Complaint Order, it is filing the Illinois Power Restated 2013 SSR Agreement to provide for a monthly compensation (Monthly SSR Payment for 2013) based on its full cost of service from Edwards Unit 1 for 2013 SSR service. Illinois Power asserts that, as set forth in the Direct Testimony of Alan C. Heintz, the Monthly SSR Payment for 2013 is $1,823,661. According to Illinois Power, its cost data consists of those items required to support the Monthly SSR Payment for 2013. As a result, Illinois Power states that it requests waiver of those provisions of section 35.13 of the Commission's regulations that are not necessary for a fixed monthly charge for SSR service for 2013.[19]

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[16] *Id.* P 93.

[17] *Id.* PP 82, 88.

[18] *Ill. Power Mktg. Co.*, 149 FERC ¶ 61,017 (2014).

[19] Illinois Power Transmittal Letter at 6-7.

11. Illinois Power requests waiver of the Commission's prior notice requirements so that the Illinois Power Restated 2013 SSR Agreement can be effective on January 1, 2013, or, in the alternative, July 5, 2013 (the refund effective date established by the Commission for the Complaint in Docket No. EL13-76-000). Illinois Power contends that the Commission has granted waiver of its notice requirements in the context of SSR service where the service has been provided prior to the SSR agreement being filed with the Commission. For example, Illinois Power explains that, in the Ameren Complaint Order, the Commission rejected a request for rehearing of the Commission's decision to allow the Edwards Year 1 SSR Agreement to become effective January 1, 2013, even though the agreement was not filed until July 11, 2013.[20]

12. Furthermore, Illinois Power asserts that, with respect to SSR service for 2013, this proposed Monthly SSR Payment was first identified by Ameren in Docket Nos. ER13-1962-000 and EL13-76-000. Illinois Power reports that the Monthly SSR Payment, which reflects the fixed costs of existing plant, is the amount included in Ameren's Motion to Intervene, Limited Protest, and Motion to Consolidate (Protest) made in Docket No. ER13-1962-000 and referenced in testimony accompanying the Complaint. Consequently, Illinois Power argues that interested parties have been aware of and have challenged Illinois Power's proposed Monthly SSR Payment for 2013 for an extended period of time.[21] Illinois Power maintains that the rate set forth in the Protest is intended to fully compensate Illinois Power for the costs incurred to ensure the continued availability of Edwards Unit 1 in 2013.[22]

13. Illinois Power states that, with the Commission's finding in the Ameren Complaint Order that SSR owners should have the right to make their own FPA section 205 filings for compensation, and indicating that Illinois Power could make such a filing as of July 22, 2014, Illinois Power's Monthly SSR Payment for 2013 is being filed with the Commission after providing a full year of SSR service. Illinois Power argues that the Commission should, in light of the extraordinary circumstances of MISO being vested under the MISO Tariff with filing SSR agreements, waive the prior notice requirement and grant the requested January 1, 2013 effective date for the Illinois Power Restated 2013 SSR Agreement so that Illinois Power can be fully compensated for the cost of

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[20] *Id*. at 7-8 (citing Ameren Complaint Order, 148 FERC ¶ 61,057 at P 160 (stating that "all SSR units should be fully compensated for any costs incurred because of their extended service") (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,170, at P 84 (2013))).

[21] *Id.* at 8.

[22] *Id.*

providing SSR service.[23] Illinois Power also states that this relief is within the Commission's power under FPA section 309.[24]

14. Illinois Power also asserts that the Monthly SSR Payment for 2013, including the cost support included in its filing, is already subject to the Edwards SSR Proceedings by virtue of its inclusion in Ameren's Protest in Docket No ER13-1962-000. Illinois Power therefore requests consolidation of this proceeding with the Edwards SSR Proceedings.[25]

15. Finally, Illinois Power states that the Illinois Power Restated 2013 SSR Agreement is limited to its proposed cost of service rate – i.e., the revised Monthly SSR Payment for 2013 – and that it does not include any of the changes that the Commission directed be made to the non-rate terms and conditions of the Edwards Year 1 SSR Agreement in the Ameren Complaint Order. Illinois Power notes that MISO has submitted a separate compliance filing in Docket No. ER14-1210-001 that addresses the non-rate terms and conditions required by the Commission's directives in the Ameren Complaint Order. As such, Illinois Power states that once the Commission addresses the instant Illinois Power cost of service rate filing and MISO's filing in Docket No. ER14-1210-001, a compliance filing incorporating the Commission's findings with regard to the two filings will need to be made.[26]

III. Notice of Filing and Responsive Pleadings

16. Notice of the Illinois Power Restated 2013 SSR Agreement was published in the *Federal Register*, 79 Fed. Reg. 53,180 (2014), with protests and interventions due on or before September 17, 2014.

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[23] *Id*. at 8-9 (citing *Cent. Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*)); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 n.8 (1981) (stating that, even if the Commission "has no power to alter a rate retroactively,…it may for good cause shown, waive the usual requirement of timely filing of an alteration in a rate").

[24] *Id.* at 9 (citing 16 U.S.C. § 825h (2012) ("The 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 chapter")).

[25] *Id*.

[26] *Id.* n.25.

17. Ameren Services Company, Prairie Power Inc., and Wisconsin Electric Power Company filed timely motions to intervene. The Illinois Commerce Commission (Illinois Commission) filed a notice of intervention. Southern Illinois Power Cooperative (Southern Illinois) and Hoosier Energy Rural Electric Cooperative, Inc. (Hoosier) filed a timely motion to intervene and protest. Illinois Municipal Electric Agency (Illinois Municipal) and Wabash Valley Power Association, Inc. (Wabash Valley) filed timely motions to intervene and a joint protest. MISO filed a timely motion to intervene and comments. Southwestern Electric Cooperative, Inc. (Southwestern) filed a motion to intervene, protest, and alternative request for consolidation. On September 18, 2014, the Illinois Commission filed a motion to file comments out-of-time. On October 2, 2014, Illinois Power filed a request for leave to answer and answer. On October 9, 2014, Illinois Municipal/Wabash Valley filed a joint answer, and Hoosier/Southern Illinois filed a motion for leave to answer and answer.

A. Protests and Comments

1. Effective Date

18. Hoosier/Southern Illinois, Illinois Municipal/Wabash Valley, Southwestern, and the Illinois Commission assert that the Commission should deny Illinois Power's request for an effective date of either January 1, 2013 or July 5, 2013 for the Illinois Power Restated 2013 SSR Agreement. They further argue that the Commission should deny Illinois Power's claim for waiver of the FPA section 205 notice requirements.

19. The Illinois Commission argues that fixed cost recovery prior to July 22, 2014 cannot be granted by the Commission. The Illinois Commission notes that, in the Ameren Complaint Order, the Commission explained that fixed cost recovery for any period prior to July 22, 2014 cannot be granted by the Commission. Moreover, the Illinois Commission states that, in the Ameren Complaint Order, the Commission found that:

> We note that the hearing and settlement judge procedures established below in Docket Nos. ER13-1962-000 and ER14-1210-000 *will also determine Ameren's compensation under the entire term of the Edwards Year 1 SSR Agreement* effective January 1, 2013 and the term of the Edwards Year 2 SSR Agreement effective January 1, 2014 until the date of this order, pursuant to existing Tariff language providing that SSR agreements *will provide compensation only for the unit's going-forward costs*. For the period beginning on the date of this order, the level of compensation that MISO filed in the Edwards Year 2 SSR Agreement will be evaluated against the appropriate level of compensation for Illinois Power's full cost

> of service, including fixed costs of existing plant. Any rate increase above the level that MISO filed would only take effect prospectively from the date of the Commission order adopting the increased rate.[27]

20. The Illinois Commission further argues that the Commission should reject Illinois Power's alternative request for a July 5, 2013 effective date. Citing to the Ameren Complaint Order, the Illinois Commission states that "when MISO unilaterally files a rate under an unexecuted SSR agreement that is lower than the compensation preferred by the generation or [SCU] owner – as occurred with regard to the Edwards Year 1 and Year 2 SSR Agreements – the Commission's ability to provide relief to the generation or SCU owner may be limited."[28]

21. Similarly, Southwestern argues that the Commission should reject the Illinois Power Restated 2013 SSR Agreement and Illinois Power's requests for establishment of a January 1, 2013 or July 5, 2013 retroactive effective date because it is contrary to the filed rate doctrine and the Ameren Complaint Order. Southwestern explains that the filed rate doctrine and its corollary prohibition on retroactive ratemaking together stand for the principle that "a utility may not set rates to recoup past losses . . . ."[29] Moreover, Southwestern asserts that, in the Ameren Complaint Order, the Commission invited Illinois Power to make an FPA section 205 filing in its discussion of 2014 rates, but the Commission did not discuss these filing rights with respect to 2013 rates.[30] Southwestern notes that the instant filing contrasts sharply with the Illinois Power Restated 2014 SSR Agreement, because in that proceeding there are still several months left on the term of the contract. Southwestern adds that, because the Edwards Year 1 SSR Agreement has concluded, the only relief that could be provided is retroactive. Therefore, Southwestern contends that it is appropriate to reject the Illinois Power Restated 2013 SSR Agreement

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[27] Illinois Commission Comments at 4 (quoting Ameren Complaint Order, 148 FERC ¶ 61,057 at n.176 (emphasis added)).

[28] *Id.* at 5 (quoting Ameren Complaint Order, 148 FERC ¶ 61,057 at P 92).

[29] Southwestern Protest at 5-6 (quoting *Pub. Util. Comm'n of Cal. v. FERC*, 988 F.2d 154, 161 (D.C. Cir. 1993) (quoting *S. Cal. Edison Co. v. FERC*, 805 F.2d 1068, 1070 n.2 (D.C. Cir. 1986)).

[30] *Id.* at 7 (citing Ameren Complaint Order, 148 FERC ¶ 61,057 at P 209).

as a "substantive nullity" since Illinois Power is seeking an order that would violate the terms of a filed rate.[31]

22. Hoosier/Southern Illinois and Illinois Municipal/Wabash Valley allege that Illinois Power's claim for waiver of FPA section 205's notice requirements for any period prior to July 22, 2014 should be denied by the Commission as an attempt to receive an unlawful retroactive rate increase. Hoosier/Southern Illinois and Southwestern argue that the filed rate doctrine forbids retroactive implementation of the Illinois Power Restated 2013 SSR Agreement. According to Hoosier/Southern Illinois, while it is true that a rate may be subject to retroactive adjustment when customers have received sufficient advance notice that retroactive adjustment is possible, that is not the case here. Hoosier/Southern Illinois aver that advance notice "in no way dilutes the general rule that once a rate is in place with ostensible full legal effect and is not made provisional, it can be changed only prospectively."[32] Here, Hoosier/Southern Illinois explain, the Tariff provision in place from January 1, 2014 through July 22, 2014 limited compensation of SSR units to going-forward costs, which the Commission acknowledged excluded recovery of fixed costs such as depreciation, return on investment, and related taxes.[33] Hoosier/Southern Illinois also note that the Commission's acceptance of the Tariff provision pertaining to going-forward costs was unconditional.[34] As such, Hoosier/Southern Illinois conclude that, notwithstanding the Commission's subsequent finding that limiting SSR compensation to going-forward costs is unjust and unreasonable, the Commission is without power to retroactively substitute a just and reasonable rate for the one it has found to be unjust and unreasonable.[35]

23. Illinois Municipal/Wabash Valley similarly argue that Illinois Power cannot be given a waiver to retroactively recover rates under FPA section 205 for a period during which it had no right to file for those rates. Illinois Municipal/Wabash Valley assert that,

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[31] *Id*. at 6-8 (citing *United Gas Pipe Line Co. v. FERC*, 707 F.2d 1507, 1511-12 (D.C. Cir. 1983) (holding that the Commission may reject a filing "that patently is either deficient in form or a substantive nullity" (quoting *Mun. Light Boards v. Fed. Power Comm'n*, 450 F.2d 1341, 1345 (D.C. Cir. 1971)).

[32] Hoosier/Southern Illinois Protest at 5-6 (quoting *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990) (*Columbia Gas*)).

[33] *Id.* at 6 (citing Ameren Complaint Order, 148 FERC ¶ 61,057 at P 82).

[34] *Id.* (citing 2014 SSR Order, 148 FERC ¶ 61,056 at P 48).

[35] *Id.*

in the orders approving the Edwards Year 1 SSR Agreement and Edwards Year 2 SSR Agreement, the SSR agreements were permitted to go into effect retroactively under the terms of the then-existing MISO Tariff and involved only such costs as could be fairly recovered under the then effective terms of the Tariff. Illinois Municipal/Wabash Valley state that the Commission's authority to allow a waiver of the statutory notice requirements cannot be made to stretch that far to permit retroactive rates increases for periods during which the filing utility had no right to request a rate increase.[36] Finally, Illinois Municipal/Wabash Valley observe that Ameren and Illinois Power's parent company, Dynegy, fully participated in the proceedings concerning the SSR Tariff provisions prior to the issuance of the Ameren Complaint Order, and neither Ameren nor Dynegy raised concerns regarding the section 205 filing rights.[37]

24. Illinois Municipal/Wabash Valley and Southwestern assert that Illinois Power's claim for an FPA section 205 waiver for a retroactive rate increase rests on an FPA section 206 remedy and thus cannot be permitted. According to Illinois Municipal/Wabash Valley, the Commission's finding that generators should be able to file under section 205 for compensation under SSR agreements was in response to the Commission's finding that, under section 206, the Tariff was unjust and unreasonable because it provided MISO with unilateral filing rights.[38] Illinois Municipal/Wabash Valley further explain that FPA section 206 provides that, after making the requisite findings as it did here, "the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be *thereafter* observed and in force, and shall fix the same by order."[39] Illinois Municipal/Wabash Valley add that only in the case of a refund being ordered for customers under FPA section 206(b) does the Commission have authority to provide retroactive relief prior to the date of its order.[40] Illinois Municipal/Wabash Valley state that "[section] 206(b) authorizes only retroactive refunds (rate decreases), not retroactive rate increases . . . ."[41] Finally, Illinois Municipal/Wabash Valley argue that Illinois Power's reliance on the Commission's authority under FPA section 309 is misplaced because, according to Illinois

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[36] Illinois Municipal/Wabash Valley Protest at 9-11.

[37] *Id*. at 11-12.

[38] *Id.* at 7.

[39] *Id*. at 8 (quoting 16 U.S.C. § 824e(a) (2012) (emphasis added)).

[40] *Id.* citing 16 U.S.C. § 824e(b) (2012)).

[41] *Id.* (quoting *City of Anaheim v. FERC*, 558 F.3d 521, 525 (D.C. Cir. 2009)).

Municipal/Wabash Valley, section 309 is intended to effectuate the substantive provisions of the FPA, not undermine prohibitions against retroactive rate increases under section 205 and 206.[42]

25. Hoosier/Southern Illinois, Illinois Municipal/Wabash Valley, and the Illinois Commission also aver that waiver of the prior notice rule is not justified. Hoosier/Southern Illinois state that the Commission will generally waive the 60-day prior notice requirement in only two circumstances. According to Hoosier/Southern Illinois, the first circumstance is in the case of an uncontested filing that does not change rates and the second is when the filing would reduce rates and charges. Hoosier/Southern Illinois contend that neither criterion is met here. Hoosier/Southern Illinois and the Illinois Commission reject Illinois Power's characterization of the circumstances as "extraordinary." They argue that it is not "extraordinary" to require a public utility to provide service subject to a Tariff provision that the Commission has now found to be unjust and unreasonable.[43]

26. Hoosier/Southern Illinois and Illinois Municipal/Wabash Valley also claim that Illinois Power's arguments that retroactive rates are permissible in this case on the grounds of prior notice cannot be squared with judicial and Commission precedent. Illinois Municipal/Wabash Valley explains that the Commission can implement retroactive rate surcharges in certain limited circumstances when parties have been put on notice that the contested rates should be subject to potential increases. However, according to Illinois Municipal/Wabash Valley, the proceedings under which the Commission exercised that limited ability to require a retroactive rate increase involved cases in which refunds had previously been required for lawfully filed rates.[44] In addition, Illinois Municipal/Wabash Valley report that the Commission can, under its remedial authority, require surcharges to correct a legal error exposed by court review, or to provide an equitable remedy based on reliance on an order later found to be unlawful.[45] Illinois Municipal/Wabash Valley assert that those conditions do not apply here.[46]

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[42] *Id.* at 12-13.

[43] Hoosier/Southern Illinois Protest at 7-8; Illinois Commission Comments at 5-7.

[44] Illinois Municipal/Wabash Valley Protest at 14 (citing *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) (*Natural Gas Clearinghouse*)).

[45] *Id.* at 14-15 (citing *Natural Gas Clearinghouse*, 965 F.2d at 1074-1076; *Office*

(continued …)

27. Both Hoosier/Southern Illinois and Illinois Municipal/Wabash Valley take issue with Illinois Power's assertion that Illinois Power first identified its proposed Monthly SSR Payment for 2013 in earlier proceedings and question the notice provided.[47] Hoosier/Southern Illinois claim that such action is not sufficient to provide notice that rates may be revised retroactively. According to Hoosier/Southern Illinois, retroactive rate adjustment is lawful only "when the Commission itself places parties on notice . . . that the rates they will be paying are subject to retroactive adjustment at a later date."[48]

2. Illinois Power's Proposed Rate for Cost-of-Service Recovery

28. The Illinois Commission and Illinois Municipal/Wabash Valley note that Illinois Power has filed the same cost support that Ameren previously filed with its Protest in Docket No. ER13-1962-000, and they further note that they have both filed comments or protests in those proceedings in response to this cost support. The Illinois Commission alleges that the Ameren Complaint Order precluded fixed cost recovery for SSR service provided in 2013, and the Illinois Commission will therefore not make specific comments on the testimony or exhibits of Mr. Heintz in this proceeding.[49]

29. Southwestern and Illinois Municipal/Wabash Valley state that, if the Commission does not reject Illinois Power's filing as requested, the case should be set for a full evidentiary hearing.[50]

30. Illinois Municipal/Wabash Valley restate the arguments they made in their protest of Illinois Power's cost support that it provided in its Protest in Docket No. ER13-1962-000.[51] Specifically, Illinois Municipal/Wabash Valley argue that a full evidentiary

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of Consumers' Counsel v. FERC, 826 F.2d 1136, 1139 (D.C. Cir. 1987)).

[46] *Id.* at 15.

[47] Hoosier/Southern Illinois Protest at 6; Illinois Municipal/Wabash Valley Protest at 15-16.

[48] Hoosier/Southern Illinois Protest at 6 (quoting *Columbia Gas*, 895 F.2d at 796-797).

[49] Illinois Commission Comments at 7-8.

[50] Southwestern Comments at 9; Illinois Municipal/Wabash Valley Protest at 16.

[51] Illinois Municipal/Wabash Valley Protest at 16 (citing Illinois Municipal/Wabash Valley, Joint Protest, Docket No. ER13-1962-000, *et al*. (filed

(continued …)

hearing is necessary to: (1) verify Illinois Power's claimed inputs; (2) determine the underpinnings of Illinois Power's assumptions for the claimed rate of return on equity; (3) examine Illinois Power's cost of long-term debt; (4) evaluate Illinois Power's claim for depreciation for the entire gross plant investment in a single year; and (5) investigate other cost-of-service issues such as labor costs, administrative and general expenses, and fixed operations and maintenance costs.[52] Illinois Municipal/Wabash Valley add that the Commission should also impose suspension and refund requirements before accepting Illinois Powers' proposed rate.[53] Southwestern adds that Illinois Power's requested fixed costs have not been established by the Commission or investigated to date by transmission customers.[54]

31. MISO states that it is concerned with how compensation for an SSR agreement would be submitted, accepted, and implemented, and that, as administrator of the Tariff, MISO should be the entity that ultimately submits revisions to the Tariff, including SSR agreements. While MISO takes no position at this time regarding the compensation requested by the Illinois Power, it observes that the Ameren Complaint Order does not detail the procedure under which compensation may be adjusted for filed SSR agreements. According to MISO, the Ameren Complaint Order would be served if the Commission directs MISO to revise its Tariff in its role as Tariff administrator, should the Commission approve additional compensation for Edwards Unit 1.[55]

32. Regarding Illinois Power's motion to consolidate this proceeding with the Edwards SSR Proceedings, to the extent the Commission does not reject the filing, Hoosier/Southern Illinois does not oppose the motion to consolidate,[56] and Southwestern

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Aug. 13, 2013)).

[52] *Id.* at 16-21.

[53] *Id.* at 2.

[54] Southwestern Protest at 7.

[55] MISO Comments at 2-3.

[56] Hoosier/Southern Illinois Protest at 8.

concurs in the motion.[57] Illinois Municipal/Wabash Valley express no opinion of Illinois Power's motion to consolidate.[58]

IV. Discussion

A. Procedural Matters

33. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

34. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by Illinois Power, Illinois Municipal/Wabash Valley, and Hoosier/Southern Illinois and we will therefore reject them.

B. Substantive Matters

35. We reject the Illinois Power Restated 2013 SSR Agreement and we deny Illinois Power's request for waiver of the prior notice requirement back to January 1, 2013 or, in the alternative, July 5, 2013.

36. In the Ameren Complaint Order, the Commission stated that the ability of a generator to recover full cost-of-service under an SSR agreement was effective as of the date of that order,[59] and further explained that the Commission can only make a rate increase under FPA section 206 effective prospectively from the date of the order fixing the new rate.[60] Additionally, to permit cost-of-service rate recovery back to January 1,

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[57] Southwestern Protest at 9.

[58] Illinois Municipal/Wabash Valley Protest at 2 n.3.

[59] *See* Ameren Complaint Order, 148 FERC ¶ 61,057 at P 87 ("As a result of our findings, we direct MISO, in a compliance filing due within 60 days of the date of this order, to revise its Tariff to reflect that SSR compensation should not exceed a resource's full cost-of-service, including the fixed costs of existing plant (rather than providing that this compensation must not exceed a resource's going-forward costs), *effective as of the date of this order*.") (emphasis added).

[60] *Id.* at P 87 n.173 (citing *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, at 492-493 (D.C. Cir. 1985); *City of Anaheim*, 558 F.3d at 525-526).

2013 would violate the filed rate doctrine. As a general rule, the filed rate doctrine dictates that "once a rate is in place with ostensibly full legal effect and is not made provisional, it can then be changed only prospectively."[61] Here, the Tariff on file as of January 1, 2013 only provided that SSR owners receive their "going-forward" costs under SSR agreements. The Tariff did not permit for cost-of-service recovery until July 22, 2014 when the Ameren Complaint Order was issued, and thus there was no rate on file that could have permitted for cost-of-service recovery as of January 1, 2013, or, in the alternative, July 5, 2013, as requested by Illinois Power.[62] Furthermore, the Protest filed by Ameren in Docket No. ER13-1962-000 to support its proposed rate fails to provide sufficient notice to parties so as to justify a retroactive rate increase. The mere inclusion of cost support for a proposed rate increase sought in a protest cannot circumvent the requirements of section 206 that the Commission can only fix a rate increase prospectively from the date of the order fixing the new rate.[63] Moreover, we agree with Illinois Municipal/Wabash Valley that Illinois Power's contention that section 309 of the FPA would allow the Commission to provide it with a retroactive rate increase is misplaced, as section 309 is intended to effectuate the substantive provisions of the FPA, not undermine prohibitions against retroactive rate increases under sections 205 and 206.[64]

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[61] *Columbia Gas*, 895 F.2d at 797.

[62] The Commission's "good cause" waiver authority under section 205 of the FPA does not permit it to make a retroactive rate adjustment, and the courts have recognized only two circumstances in which a rate adjustment may take effect prior to a section 205 filing: when parties have notice that a rate is tentative and may be later adjusted with retroactive effect, or when they have agreed to make a rate effective retroactively. *See Consol. Edison Co. of NY, Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003). *See also Mirant Ams. Energy Mktg., L.P. v. ISO New England Inc.*, 112 FERC ¶ 61,056, at P 18 (2005) (finding that the Commission did not improperly use its prior notice waiver authority to give a rate retroactive effect absent actual notice to affected parties, because the rates authorized under the agreements that were in effect were no higher than the rates actually charged); *Nat'l Grid Generation LLC*, 148 FERC ¶ 61,075, at P 14 (2014) (allowing a formula rate reset filing to go into effect May 28, 2013, two days prior to the date of filing, because the filing was made pursuant to the provisions of a power supply agreement that became effective on May 28, 2013).

[63] *Cf. Columbia Gas*, 895 F.2d 791 at 797.

[64] *See e.g., People of the State of California, Ex Rel. Edmund G. Brown, Jr. Attorney Gen. of the State of California Complainant*, 135 FERC ¶ 61,178 at P 82 (2011)

(continued …)

37. Regarding MISO's comments concerning the procedures by which compensation may be adjusted for filed SSR agreements, we find that this is beyond the scope of this proceeding. If MISO believes that Tariff revisions are necessary, it may make a filing pursuant to FPA section 205.

38. We note that issues regarding the proper effective date for cost-of-service cost recovery and retroactive ratemaking have been raised by parties in requests for rehearing of the Ameren Complaint Order.[65] These arguments will be addressed in a later Commission order.

The Commission orders:

The Illinois Power Restated 2013 SSR Agreement is hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

(explaining that section 309 is not in itself an independent grant of authority and does not obviate the remaining provisions of the FPA).

[65] *See* Illinois Power Request for Rehearing and Clarification, Docket No. ER13-1962-001, *et al.*, at 22-25 (filed Aug. 21, 2014).