

155 FERC ¶ 61,124
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Ameren Services Company
Northern Indiana Public Service Company

Docket No. EL07-86-009

v.

Midwest Independent Transmission System Operator,
Inc.

Great Lakes Utilities
Indiana Municipal Power Agency
Missouri Joint Municipal Electric Utility Commission
Missouri River Energy Services
Prairie Power, Inc.
Southern Minnesota Municipal Power Agency
Wisconsin Public Power Inc.

Docket No. EL07-88-009

v.

Midwest Independent Transmission System Operator,
Inc.

Wabash Valley Power Association, Inc.

Docket No. EL07-92-009

v.

Midwest Independent Transmission System Operator,
Inc.

ORDER ON REHEARING

(Issued May 2, 2016)

1. At the conclusion of a paper hearing earlier in this proceeding, the Commission found that the complainants had met their burden of proof under section 206(b) of the Federal Power Act (FPA)¹ to demonstrate that the cost allocation in effect under the Midwest Independent Transmission System Operator, Inc.'s (MISO)² Transmission and Energy Markets Tariff (tariff) was unjust and unreasonable, and that complainants' proposed alternative cost allocation was just and reasonable.³ The Commission also exercised its discretion to require refunds. The Commission later denied rehearing of its decision to approve the proposed alternative cost allocation, but it granted rehearing of its decision to require refunds from the date of the underlying complaints.⁴

2. The requests for rehearing and clarification at issue in this order all are related to the Commission's decision in the Paper Hearing Rehearing Order to waive refunds for the period from August 10, 2007 to November 10, 2008. In this order, we deny the requests for rehearing and clarification, as discussed below.

I. Background

3. To date the Commission has addressed issues associated with the allocation of Revenue Sufficiency Guarantee charge costs principally in two separate proceedings – the first under FPA section 205 in Docket No. ER04-691 and the second under FPA section 206 in these complaint dockets. Revenue Sufficiency Guarantee charges recover start-up, no-load and incremental costs of generators that are not otherwise recovered in the locational marginal price. In MISO, certain Revenue Sufficiency Guarantee charges apply to the day-ahead market and others apply to the real-time market. The charge at issue in this proceeding relates to the real-time market.

4. Real-time Revenue Sufficiency Guarantee charges recover the costs of generators that are committed in the reliability assessment commitment process that occurs following the close of the day-ahead market and in subsequent intra-day commitments. These commitments are meant to ensure that sufficient resources are on-line to meet operating requirements during the operating day. When MISO started its energy markets

¹ 16 U.S.C. § 824e (2012).

² Effective April 26, 2013, MISO changed its name from “Midwest Independent Transmission System Operator, Inc.” to “Midcontinent Independent System Operator, Inc.”

³ *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161 (2008) (Order on Paper Hearing), *order on reh'g*, 127 FERC ¶ 61,121 (2009) (Paper Hearing Rehearing Order).

⁴ Paper Hearing Rehearing Order, 127 FERC ¶ 61,121.

on April 1, 2005, the tariff provision for the Revenue Sufficiency Guarantee charge was allocated to market participants who “actually withdraw energy” during an operating day.⁵

5. On April 25, 2006, the Commission issued an order in Docket No. ER04-691 rejecting MISO’s proposal to remove references to virtual supply from the tariff provisions related to calculating Revenue Sufficiency Guarantee charges.⁶ The Commission also found that because MISO had not been including virtual supply offers in its Revenue Sufficiency Guarantee calculations, it had violated its tariff and must make appropriate refunds.⁷ However, requests for rehearing of the Revenue Sufficiency Guarantee Order persuaded the Commission to exercise its equitable discretion and not require refunds.⁸

6. On March 15, 2007, the Commission issued two orders regarding MISO’s Revenue Sufficiency Guarantee charges, the Second Rehearing Order and the First Compliance Order.⁹ The Commission reiterated in the Second Rehearing Order that MISO had violated its tariff by failing to allocate Revenue Sufficiency Guarantee costs to virtual supply offers. The Commission then revisited the issue of whether to exercise its discretion to require refunds, and it reaffirmed its decision in the First Rehearing Order not to impose refunds based on a balancing of equities.¹⁰ In the First Compliance Order,

⁵ The MISO tariff specification of the Revenue Sufficiency Guarantee charge originally stated, in relevant part: “On any Day when a Market Participant actually withdraws any Energy the Market Participant shall be charged a Real-Time Revenue Sufficiency Guarantee Charge.” The allocation factors are specified as the market participant’s total load purchased in the real-time energy market, virtual supply for the market participant in the day-ahead market and resource uninstructed deviation quantities. MISO, FERC Electric Tariff, Original Sheet Nos. 577 and 578. We refer to this rate throughout the order as the “Original Rate.”

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,108, at PP 48-49 (Revenue Sufficiency Guarantee 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).

⁷ Revenue Sufficiency Guarantee Order, 115 FERC ¶ 61,108 at P 26.

⁸ First Rehearing Order, 117 FERC ¶ 61,113 at PP 92-96.

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

¹⁰ Second Rehearing Order, 118 FERC ¶ 61,212 at PP 88-98.

the Commission found that MISO had failed to analyze the relationship between virtual supply offers and Revenue Sufficiency Guarantee cost incurrence as the First Rehearing Order required. The Commission rejected MISO's proposal to allocate costs based on net virtual offers, *i.e.*, virtual offers minus virtual bids, and it clarified that MISO's existing Revenue Sufficiency Guarantee cost allocation methodology (the Original Rate), which allocated Revenue Sufficiency Guarantee costs to virtual supply offers, remained in effect.¹¹ In the Second Rehearing Order, however, the Commission observed that the Original Rate "arguably could be refined or improved."¹² On November 5, 2007, the Commission denied rehearing of the Second Rehearing Order and the First Compliance Order, and accepted MISO's April 17, 2007 filing to comply with the First Compliance Order.¹³

7. As captioned above, Ameren Services Company and Northern Indiana Public Service Company (Ameren and Northern Indiana); Great Lakes Utilities, Indiana Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Prairie Power, Inc., Southern Minnesota Municipal Power Agency, and Wisconsin Public Power Inc.; and Wabash Valley Power Association, Inc. (collectively, Complainants) filed complaints against MISO pursuant to section 206 of the FPA and Rule 206 of the Commission's Rules of Practice and Procedure.¹⁴ These complaints concern the allocation of Revenue Sufficiency Guarantee charges to market participants under MISO's tariff. Complainants alleged that the Original Rate, which is based in part on virtual supply offers, is unjustly and unreasonably assessed on only a subset of market participants with virtual supply offers and withdrawals of energy. Complainants argued that there is no justification for differentiating among virtual supply offers with regard to Revenue Sufficiency Guarantee charge allocation and that the Commission's prior orders have found that there is no basis to do so. Complainants asked that the Commission set for hearing the issue of the tariff revisions necessary to remedy this alleged discrimination.

¹¹ First Compliance Order, 118 FERC ¶ 61,213 at PP 92-93 ("[T]he currently-effective tariff provisions relating to the real-time Revenue Sufficiency Guarantee charge in section 40.3.3 remain in effect.").

¹² Second Rehearing Order, 118 FERC ¶ 61,212 at P 22.

¹³ Third Rehearing Order, 121 FERC ¶ 61,131, *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,132 (2007) (Second Compliance Order).

¹⁴ 18 C.F.R. § 385.206 (2015).

8. The Commission granted in part and denied in part the relief that Complainants requested.¹⁵ It found that MISO's Original Rate may not be just and reasonable, but that the Revenue Sufficiency Guarantee cost allocation methodologies that Complainants proposed also had not been shown to be just and reasonable. The Commission thus established a refund effective date of August 10, 2007 – the date of the earliest of the three complaints – and set the complaints for paper hearing and investigation to review evidence and to establish a just and reasonable cost allocation methodology. The Commission held the paper hearing in abeyance pending the conclusion of a then-ongoing stakeholder proceeding by the MISO Revenue Sufficiency Guarantee Task Force that was seeking to identify improvements that could be made to the Revenue Sufficiency Guarantee cost allocation methodology, or February 1, 2008, whichever was earlier.¹⁶

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

10. On March 3, 2008, MISO filed what it referred to as “indicative” tariff revisions that reflect an alternative mechanism for allocating Revenue Sufficiency Guarantee charges and costs. MISO 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 had not yet been conformed to incorporate MISO's new Ancillary Services Markets' market design elements. MISO submitted that the Commission should determine whether the language in its indicative tariff 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. MISO stated that if the Commission determines that the proposed indicative tariff language is a just and reasonable basis for further developing provisions that would adapt the new Revenue Sufficiency Guarantee cost allocation methodology to the Ancillary Services Markets context, it would agree to file Ancillary Services Markets-specific tariff provisions embodying this suggested new cost allocation methodology.

¹⁵ *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,205 (2007), *order on reh'g*, 125 FERC ¶ 61,162 (2008).

¹⁶ The Revenue Sufficiency Guarantee Task Force is a working group consisting of market participants organized by the MISO Market Subcommittee. The Task Force was charged with exploring potential improvements to the Revenue Sufficiency Guarantee cost allocation methodology.

11. On August 21, 2008, the Commission issued an order commencing a paper hearing.¹⁷ It stated that under section 206(b) of the FPA, Complainants carry the burden of proof and therefore must demonstrate, on the basis of substantial evidence, both that the rate in effect is unjust and unreasonable and that their proposed alternative rate is just and reasonable.¹⁸

12. In the Order on Paper Hearing, the Commission found that the Complainants had met their burden of demonstrating that the application of the Original Rate was unduly discriminatory and therefore unjust and unreasonable. The Commission found that for Revenue Sufficiency Guarantee purposes, there is no cost-causation basis for differentiating between market participants that withdraw energy on a particular day and market participants that are engaged in the same activities but do not withdraw energy. The Commission also found that each of the two replacement rate proposals, *i.e.*, an interim cost allocation resulting from the removal of the phrase “actually withdraws energy” from the Original Rate (the Interim Rate) and the cost allocation developed by the MISO Revenue Sufficiency Guarantee Task Force (the Indicative Rate), were just and reasonable. The Commission ordered MISO to implement the Indicative Rate on a going-forward basis, and to use the Interim Rate to compute Revenue Sufficiency Guarantee charges until Indicative Rate tariff provisions are finalized and approved. The Commission also exercised its discretion to require refunds based on the Interim Rate for the period starting on August 10, 2007.

13. In the Paper Hearing Rehearing Order, the Commission upheld its determination that the Original Rate was unjust and unreasonable and that the proposed alternative cost allocations were just and reasonable. However, it granted rehearing of its decision to require refunds for the period from August 10, 2007 to November 10, 2008, finding that it was unreasonable to expect market participants to adjust their economic decisions during that time in order to accommodate the eventual rate change correctly. The Commission stated that the allocation of Revenue Sufficiency Guarantee costs to virtual offers will be a function of a wide range of factors. The interaction of such factors is particularly hard to predict when a market participant also must understand, and account for, other market participants’ expectations of an ongoing Commission proceeding and how those other participants alter their behavior in response. The Commission stated that it hesitated to undo decisions of market participants retroactively under these conditions and also that in cases involving changes in market design, it generally exercises its discretion and does not order refunds when doing so would require re-running a market. Finally, the Commission found that the computation of refunds will be complex, and it likely would encourage needless litigation.

¹⁷ *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,173 (2008).

¹⁸ *Id.* P 9.

II. Procedural Matters

14. Timely requests for rehearing of the Paper Hearing Rehearing Order were filed by Ameren and Northern Indiana; Cargill Power Markets, LLC and Exelon Corporation (Cargill and Exelon); Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (collectively, Constellation); E.ON U.S. LLC (E.ON);¹⁹ FirstEnergy Service Company (FirstEnergy);²⁰ the Midwest TDUs;²¹ Otter Tail Corporation (Otter Tail); and Wisconsin Electric Power Company (Wisconsin Electric).²²

15. Ameren and Northern Indiana filed an answer to Cargill and Exelon, as did Wisconsin Electric. The Missouri Public Service Commission (Missouri Commission) filed comments in support of Ameren and Northern Indiana's rehearing request.

16. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(2) (2015), prohibits answers to requests for rehearing. We therefore reject the answer of Ameren and Northern Indiana and that of Wisconsin Electric. While the Missouri Commission has filed comments in support of Ameren and Northern Indiana, they were filed out of time.²³ We will treat the Missouri Commission's comments as an answer and as a result reject them in accordance with the prohibition on answers to rehearing requests.

¹⁹ E.ON's filing is also made on behalf of Louisville Gas and Electric Company and Kentucky Utilities Company.

²⁰ FirstEnergy made its filing on behalf of The Cleveland Electric Illuminating Company, Ohio Edison Company, The Toledo Edison Company, Pennsylvania Power Company, and FirstEnergy Solutions Corp.

²¹ The Midwest TDUs are: 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 WPPI Energy.

²² Certain parties also filed their comments in Docket No. ER04-691-092. As discussed below, matters arising in Docket No. ER04-691 are beyond the scope of this proceeding.

²³ Section 313(a) of the FPA requires that rehearing requests be filed within 30 days after the issuance of the Commission's order. 16 U.S.C. § 8251(a) (2012).

III. Substantive Matters

A. Extension of Refund Waiver to Docket No. ER04-691

1. Requests For Clarification

17. Cargill and Exelon, FirstEnergy, E.ON., and Constellation argue that the rationale underlying the Commission's decision to cease resettlement of Revenue Sufficiency Guarantee charges in this proceeding applies equally to all resettlements directed by the Commission's November 2008 orders dealing with Revenue Sufficiency Guarantee matters. This includes resettlements associated with the November 7, 2008 order in Docket No. ER04-691.²⁴ They thus request that the Commission clarify that MISO should not implement any resettlements for the period prior to November 2008. Cargill and Exelon note that the Paper Hearing Rehearing Order states that when applying revised charges, the Commission will "look forward, and not backward," and they maintain that refunds that require rerunning the market are inappropriate when applied to the unique circumstances surrounding the MISO Revenue Sufficiency Guarantee charge. Similarly, FirstEnergy argues that in both cases market participants lacked the knowledge necessary to anticipate the rate that would result from the Commission proceeding and to adjust their actions accordingly. This justifies waiving refunds in both cases.

18. E.ON points out that the Commission acknowledged in the Paper Hearing Rehearing Order that Revenue Sufficiency Guarantee resettlements would have a significant financial impact on market participants that were not able to determine that impact in advance. E.ON thus argues that there is no basis for distinguishing the factors that led the Commission to grant rehearing in the Paper Hearing Rehearing Order on refunds from those involved in the decision to require refunds in Docket No. ER04-691. Constellation agrees and requests rehearing if the Commission does not clarify that this is the case. It argues that the Commission acted arbitrarily and capriciously in ordering a resettlement that would have greater market impact than the one it halted and that requiring resettlement of only some market transactions is unduly prejudicial and fails to provide market certainty.

19. Otter Tail states that MISO has proposed unauthorized resettlements in Docket Nos. ER04-691 and EL07-86, *et al.*, and it seeks clarification that the Commission's direction to MISO in the Paper Hearing Rehearing Order to cease the ongoing refund process applies to all resettlements related to these dockets, not simply the one related to the Paper Hearing Rehearing Order. Otter Tail requests rehearing if the Commission does not make this clarification. Otter Tail also requests rehearing of the Commission's ruling in the Paper Hearing Rehearing Order that Otter Tail's argument regarding the

²⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,156 (2008), *reh'g dismissed*, 127 FERC ¶ 61,241 (2009).

inclusion of all virtual supply offers in the Revenue Sufficiency Guarantee rate denominator is presented in Docket No. ER04-691 and is beyond the scope of this proceeding. Otter Tail states that MISO will engage in additional unauthorized resettlements if the Commission does not clarify that MISO must suspend all resettlements other than the specific resettlement directed in the Paper Hearing Rehearing Order.

2. Commission Determination

20. We deny the requests of Cargill and Exelon, FirstEnergy, E.ON, and Constellation for clarification that the decision to waive refunds in this section 206 proceeding should apply equally to the section 205 proceeding in Docket No. ER04-691. We also deny any related requests for rehearing. These requests are requests for action in Docket No. ER04-691, and they are beyond the scope of this proceeding. Such action would have to be based on a timely request for rehearing in Docket No. ER04-691. Even if the requests at issue here were timely, which they are not, no ruling in this section 206 proceeding can have the effect of waiving refunds in that section 205 proceeding. We likewise deny Otter Tail's request for clarification that our requirement on the cessation of resettlement in the Paper Hearing Rehearing Order applies to all resettlements related to Docket Nos. ER04-691 and EL07-86, *et al.* and not just the one at issue in the Paper Hearing Rehearing Order. Otter Tail points to nothing in the Paper Hearing Rehearing Order that would support this conclusion. Finally, we note that Otter Tail's argument on the inclusion of all virtual supply offers in the Revenue Sufficiency Guarantee rate denominator was made in a request for rehearing of, among other things, the Order on Paper Hearing and was denied in the Paper Hearing Rehearing Order. We therefore reject Otter Tail's request for rehearing on this point as an impermissible request for rehearing of a rehearing.²⁵

B. Requests for Rehearing of Waiver of Refunds

1. Rehearing Requests

21. Wisconsin Electric requests rehearing of the Commission's decision in the Paper Hearing Rehearing Order to waive refunds. It states that the Commission acted arbitrarily in finding that it was unreasonable to expect market participants to adjust their economic decisions to accommodate the eventual rate change correctly. It argues that by establishing a refund effective date, the Commission put market participants on notice of the possibility of refunds, and this allowed them to determine a course of action. Wisconsin Electric states that it had to make decisions on how to proceed under these circumstances, and it had no greater insight into the precise rate than did parties for whom refunds have been waived. Ameren and Northern Indiana similarly argue that

²⁵ *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

market participants were on notice that market resettlements may be needed, and they maintain that if some of them erred in factoring a refund risk into their trades, the Commission should not bail them out to the detriment of the rest of the market. Ameren and Northern Indiana state that courts have repeatedly found that the filed rate doctrine and the rule against retroactive ratemaking are not violated when parties are on notice at the outset that a rate is provisional or tentative and may be revised or adjusted at a later date.²⁶

22. Wisconsin Electric states that the Commission based its conclusions about the financial impact of resettlements and refunds on statements by market participants that chose not to make adjustments to virtual offers or that made the wrong adjustments. It argues that the Commission should have heard evidence from all market participants when considering financial impacts. Wisconsin Electric maintains that the Commission's grant of rehearing will shift cost responsibility to load-serving entities that already have paid more than their appropriate share of Revenue Sufficiency Guarantee costs.

23. Ameren and Northern Indiana argue that while the Commission pointed to alleged difficulties and market uncertainty that refunds had caused, it did not explain how these factors justify denying refunds. They argue that the Commission failed to balance the interests involved in granting relief, such as the harm done to physical entities that have been over-charged based on the original allocation. They state that the financial entities involved can easily limit or adapt their activity or exit the MISO markets, whereas the physical entities and load-serving entities with captive customers do not have the option of reducing their load or generation or easily exiting the market.

24. Midwest TDUs request rehearing of the Commission's denial of refunds on the grounds that allegations made by financial traders regarding the impacts of refunds were premised on non-final calculations. They also maintain that the decision to deny refunds was premised on unsupported allegations that the Commission accepted without allowing other parties to challenge them. Ameren and Northern Indiana similarly argue that the Commission's waiver of refunds is based on unsubstantiated allegations of harm rather than substantial evidence. They maintain that the Commission disregarded evidence that the national financial crisis affected activity in all financial markets for the time period at issue and that the drop in virtual trading activity in MISO since the Order on Paper Hearing is no greater, on a percentage basis, than the drop in other markets. Ameren and Northern Indiana add that accepting evidence from financial players without allowing Ameren and Northern Indiana to question the evidence by cross-examination or discovery violates due process.

²⁶ Ameren and Northern Indiana cite to *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794 (D.C. Cir. 2007); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990); *Consol. Edison Co. v. FERC*, 347 F.3d 964 (D.C. Cir. 2003); *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995).

25. Midwest TDUs argue that in granting rehearing, the Commission created a new rule that requires market participants to have notice of the specific magnitude and/or nature of the rate changes that may arise from a contested case, rather than relying on precedent holding that it is sufficient to place ratepayers on guard that rates may change.²⁷ Midwest TDUs assert that the Commission did not acknowledge and justify its departure from existing precedent, and it cannot do so given the impossibility of providing specific notice of the exact implications of changes to complex markets.

26. Midwest TDUs maintain that the Commission should not base its decision on the impacts of refunds on virtual traders and require other market participants to subsidize them. They also maintain that the denial of refunds is inconsistent with the core purposes of the FPA, which are to ensure that rates are just and reasonable and to protect customers rather than speculative traders. Finally, Midwest TDUs argue that the Commission failed to consider other alternatives to denying refunds, such as accommodating particularly hard-hit traders, granting partial refunds, or delaying the decision on or implementation of refunds.

27. Ameren and Northern Indiana argue that the Commission may not selectively give some of its rulings purely prospective application, as opposed to applying its decisions retrospectively in all cases. They base this argument on the Supreme Court's rulings in *James B. Beam Distilling Co. v. Georgia*,²⁸ and *Harper v. Virginia Department of Taxation*,²⁹ which they maintain create a rule that provides for retroactive effect for rules of federal law to open cases. They argue that the U.S. Court of Appeals for the D.C. Circuit applied this doctrine of retroactivity to agency decisions.³⁰ Under this precedent, Ameren and Northern Indiana argue that the Commission is not free to apply its decision only prospectively based on equitable considerations.

²⁷ Midwest TDUs cite to *Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007); *Louisiana Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007); *San Diego Gas & Elec. Co.*, 127 FERC ¶ 61,191 (2009), *pet. for review denied*, *City of Redding, Cal. v. FERC*, 693 F.3d 828 (9th Cir. 2012) *Northern Cal. Power Agency v. FERC*, No. 09-1156 (D.C. Cir. filed May 29, 2009).

²⁸ 501 U.S. 529 (1991) (*Beam Distilling*).

²⁹ 509 U.S. 86 (1993) (*Harper*).

³⁰ To support this conclusion, Ameren cites to *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30 (D.C. Cir. 1999) (*Exxon*) and *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893 (D.C. Cir. 1995) (*Transcontinental*).

2. Commission Determination

28. We deny rehearing on the issue of refunds. To explain this action, we begin by placing this case within the broader context of Commission precedent on refunds. The Commission has two lines of precedent, each of which deals with a different situation. When a case involves over-collection of revenues by a utility, the Commission generally holds that the excess revenues should be refunded to customers.³¹ By contrast, in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds.³² This proceeding concerns the allocation of Revenue Sufficiency Guarantee costs, and our waiving of refunds here is consistent with our practice of denying refunds in cost allocation cases.

29. Wisconsin Electric, Midwest TDUs, and Ameren and Northern Indiana all argue that in waiving refunds for virtual traders, the Commission failed to consider the impacts that this action would have on other parties or the fairness of the allocation of Revenue Sufficiency Guarantee charges that would result. However, a finding that a cost allocation is not just and reasonable means that some entities have paid too much and others have paid too little. A key consideration when ruling on refund requests in such situations involves the fairness of requiring parties to revisit past decisions made in reliance on an existing cost allocation and that cannot be undone.³³

30. The Commission did this here when it found that it was unreasonable to expect market participants to adjust their economic decisions during the period August 10, 2007 to November 10, 2008 in order to accommodate the eventual rate change correctly. The Commission stated that the allocation of Revenue Sufficiency Guarantee costs to virtual offers will be a function of a wide range of factors, and the interaction of such factors is particularly hard to predict when a market participant also must understand, and account for, other market participants' expectations of an ongoing Commission proceeding and how those other participants alter their behavior in response. The Commission stated that it hesitated to undo decisions of market participants retroactively under these conditions, and the computation of refunds will be complex and likely would encourage needless litigation.³⁴

³¹ *Black Oak Energy, L.L.C.*, 136 FERC ¶ 61,040, at P 25 & n.36 (2011).

³² *Id.*

³³ *La Pub. Serv. Comm'n and the Council of the City of New Orleans v. Entergy Corp.*, 155 FERC ¶ 61,120, at PP 25-28 (2016).

³⁴ Paper Hearing Rehearing Order, 127 FERC ¶ 61,121 at P 157.

31. None of the parties seeking rehearing challenge these findings or their consistency with established Commission practice. Indeed, Wisconsin Electric confirms the essential premise of our decision when it states that it “had no greater insight into the precise rate that would result from Commission action in this proceeding than Financial Marketers had, yet it was required to make decisions for itself during this period.”³⁵ Midwest TDUs refer to “[t]he continuing uncertainty surrounding the MISO refund calculation.”³⁶ It is because of this pervasive uncertainty that the Commission hesitated to undo decisions of market participants retroactively. We referred to the impact of refunds on some market participants to point out that refunds were compounding the problem and thus reinforcing the argument for following the Commission’s established practice in cost allocation cases.³⁷

32. The fact that market participants were on notice of the possibility of refunds is not relevant here. The presence of notice means that refunds will not constitute retroactive ratemaking or violate the filed rate doctrine,³⁸ not that refunds must be granted. The Commission found that it was unreasonable to expect market participants to adjust their economic decisions during the period August 10, 2007 to November 10, 2008 in order to accommodate the eventual rate change correctly. The presence of notice does not affect that conclusion, and it therefore does not support an argument in favor of refunds. We thus disagree with Midwest TDUs that in waiving refunds we are creating a new rule that requires market participants to have notice of the specific magnitude and/or nature of the rate changes that may arise from a contested case. In waiving refunds we are following our established practice of denying refunds in cost allocation cases and are doing so for the reasons set forth above. We are not creating any new rules that go beyond existing precedent.

33. Finally, Midwest TDUs’ argument that the Commission failed to consider other alternatives to denying refunds is based on a misunderstanding about our purpose in denying them. Midwest TDUs state that “one of the Commission’s chief concerns was the allegation that financial marketers were going out of business because they were unable to fund currently MISO’s re-allocation of [Revenue Sufficiency Guarantee] charges.”³⁹ Midwest TDUs offer suggestions on alternatives to refunds that they

³⁵ Wisconsin Electric Rehearing Request at 5.

³⁶ Midwest TDUs Rehearing Request at 26.

³⁷ *See* Paper Hearing Rehearing Order, 127 FERC ¶ 61,121 at P 156 (stating that “refund and resettlement requirements have caused difficulties and market uncertainty well in excess of the financial impact the Commission anticipated”).

³⁸ *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007).

³⁹ Midwest TDUs Rehearing Request at 24.

maintain would mitigate the difficulties that financial marketers faced. However, the Commission pointed to these difficulties for the purpose of substantiating that it was unreasonable to expect market participants to adjust their economic decisions during the period in question in order to accommodate the eventual rate change correctly. This, in turn, leads one to a primary consideration underlying the Commission's policy of denying refunds in cost allocation cases, the question of whether it is fair to require parties to revisit past decisions made in reliance on an existing cost allocation and that cannot be undone. Since Midwest TDUs have incorrectly interpreted our reasons for denying refunds, we see no error in failing to take actions that Midwest TDUs assert would be consistent with their interpretation.

34. Ameren's attempt to apply *Beam Distilling* and *Harper* in this proceeding misapplies the legal principle expressed in those cases. In a nutshell, the legal principle involved in those cases is, as Ameren notes, that:

[w]hen [the Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.⁴⁰

35. In *Beam Distilling*, the issue before the Court was whether it should apply retroactively its 1984 ruling that a Hawaii statute that imposed a discriminatory excise tax on intoxicating liquors imported into the state violated the commerce clause, to a separate open case in which an out-of-state bourbon manufacturer sought a refund from the State of Georgia of excise taxes that it paid for the years 1982-1984 under a similar Georgia statute. In other words, *Beam Distilling* addresses the question of whether a rule with retroactive application that the Court enunciates in one case should be applied in *other* open proceedings that commenced on the basis of the law as it existed prior to the enunciation of the rule – in short, “whether the court should apply the old rule or the new one.”⁴¹

36. The Court's conclusion was that “[o]nce retroactive application *is chosen* for an assertedly new rule, it is chosen for all others who might seek its prospective application.”⁴² The Court chose retroactivity in *Beam Distilling* because it was the “normal rule” in civil cases. As the Court stated in *Harper*, the principle underlying the reasoning in *Beam Distilling* involved a “ban against ‘selective application of new

⁴⁰ Ameren Protest at 36 (citing *Harper*, 509 U.S. at 97).

⁴¹ *Beam Distilling*, 501 U.S. at 534.

⁴² *Beam Distilling*, 501 U.S. at 543 (emphasis supplied).

rules.”⁴³ However, the Commission has not selectively applied a new rule in this proceeding.

37. Ameren attempts to use *Beam Distilling* to argue that once the Commission determines that Revenue Sufficiency Guarantee charges “must be allocated without regard to physical withdrawals of energy, [it] is not free . . . to apply that determination prospectively only based on what appear to be equitable considerations. . . .” The Commission instead “must apply [the new rate] back to the refund effective date of August 10, 2007.”⁴⁴ This argument, however, merges findings on the justness and reasonableness of rates with refund determinations, and in doing so it runs counter to the language of the FPA. Section 206(b) provides that the “the Commission *may* order refunds,” not that it must do so. The Supreme Court has held that retroactive application of a rule does not apply in cases where there is “a principle of law . . . that limits the principle of retroactivity itself.”⁴⁵ Ameren’s argument for retroactive application of a new rate established under section 206(a) would make refunds mandatory in all cases and thus would eliminate the discretion that the statute explicitly gives to the Commission and that has been recognized by the courts.⁴⁶ The Commission also has discretion as to when the refunds, if required, should take effect; under section 206(b), the Commission may set the refund effective date no “earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint.” Ameren’s argument that refunds must be strictly applied does not square with this discretion, which directly affects the amount of refunds owed at the conclusion of a proceeding under FPA section 206(b).

⁴³ *Harper*, 509 U.S. at 97 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)).

⁴⁴ Ameren Protest at 39.

⁴⁵ *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 757 (1995).

⁴⁶ *Louisiana Public Service Comm’n v. FERC*, 772 F.3d 1297, 1302 (2014) (stating that “[t]o hold that refunds are mandatory every time there is an unjust or unreasonable rate would be contrary to Congress’s use of the permissive ‘may’ in section 206(b)”).

The Commission orders:

The requests for rehearing and clarification of the Paper Hearing Rehearing Order are denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.