

155 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System
Operator, Inc.

Docket No. ER04-691-095

ORDER DENYING REHEARING

(Issued May 2, 2016)

1. On August 30, 2010, the Commission issued an order accepting a compliance filing that the Midwest Independent Transmission System Operator, Inc. (MISO)¹ made on December 8, 2008 (December Compliance Filing) regarding its proposal to allocate real-time Revenue Sufficiency Guarantee costs.² The Commission also waived certain refunds that the Commission granted on November 7, 2008 in the order that required MISO to make the December Compliance Filing.³ In this order, we deny requests for rehearing of the Third Compliance Order.

¹ Effective April 26, 2013, MISO changed its name from “Midwest Independent Transmission System Operator, Inc.” to “Midcontinent Independent System Operator, Inc.”

² *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,185 (2010) (Third Compliance Order).

³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,156 (2008) (Fourth Rehearing Order).

I. Background

2. Section 40.3.3 of MISO's Open Access Transmission and Energy Markets Tariff (tariff) charges market participants a real-time Revenue Sufficiency Guarantee charge based on their virtual supply offers and real-time load, injection, export, and import deviations. The purpose of the real time Revenue Sufficiency Guarantee charge is to ensure that any resource MISO schedules or dispatches 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 cost for start-up, no-load and incremental energy. Units that are committed in the Reliability Assessment Commitment or in the real-time market, for example, that do not earn sufficient revenues to cover incremental energy, start-up, and no-load costs receive Revenue Sufficiency Guarantee credits.

3. This proceeding began on October 27, 2005, with MISO's proposal to delete a reference to virtual supply offers from the tariff provision governing the real-time Revenue Sufficiency Guarantee charge. The deletion would have eliminated the responsibility of market participants who actually withdrew energy from MISO's transmission system to pay for Revenue Sufficiency Guarantee charges associated with their virtual supply offers. The Commission issued several orders⁴ on the virtual supply offer issue in which it rejected MISO's proposal and found that MISO had violated its tariff by failing to assess Revenue Sufficiency Guarantee charges to virtual supply offers for a period of time after energy market start-up.⁵ The Commission eventually exercised its equitable discretion not to require refunds, but it ordered MISO to resubmit a proposal to allocate Revenue Sufficiency Guarantee costs to virtual supply offers based on a cost-causation analysis.⁶ The Commission subsequently issued several orders that denied a number of requests for rehearing and required additional compliance filings.⁷

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).

⁵ Initial Order, 115 FERC ¶ 61,108 at PP 26, 48-49.

⁶ First Rehearing Order, 117 FERC ¶ 61,113 at PP 92-96.

⁷ Second Rehearing Order, 118 FERC ¶ 61,212; Third Rehearing Order, 121 FERC ¶ 61,131.

4. The Commission issued a further rehearing order in which it clarified its interpretation of the tariff's Revenue Sufficiency Guarantee cost allocation formula.⁸ In that order, the Commission required refunds for the period from April 26, 2006 through March 14, 2007, and for the period after March 15, 2007, to the extent that MISO may not have been allocating Revenue Sufficiency Guarantee costs based on the Commission's clarified interpretation. Specifically, the Fourth Rehearing Order clarified that from energy market start-up until the day prior to the effective date of the tariff revisions that the Second Compliance Order accepted (i.e., from April 1, 2005, through March 14, 2007), the tariff's Revenue Sufficiency Guarantee cost allocation formula's numerator and denominator both pertained only to market participants – including those making virtual supply offers – that actually withdrew energy on a given operating day.⁹ The Commission also found that it had incorrectly stated in the Second Rehearing Order that the denominator of the Revenue Sufficiency Guarantee cost allocation formula also included virtual supply offers of market participants that did not actually withdraw energy. The Commission therefore required MISO to make appropriate refunds to the extent that it may not have been allocating Revenue Sufficiency Guarantee costs based on the Commission's clarified interpretation of the Revenue Sufficiency Guarantee cost allocation formula. These refunds would apply to the period from April 26, 2006 through March 14, 2007. The Commission also required MISO to file revised tariff language intended to ensure consistency between the revised tariff and the tariff in effect since market start-up.¹⁰ The Commission required MISO to make refunds to the extent that it may have been settling Revenue Sufficiency Guarantee costs on a different basis on and after March 15, 2007.¹¹

5. In its December Compliance Filing, MISO made the specific tariff revisions that the Fourth Rehearing Order required, and it proposed to delete from the rate denominator certain deviations that it asserted were exempt from Revenue Sufficiency Guarantee charges. MISO also called the Commission's attention to revisions that it said were required to ensure its compliance with the more general Commission directive that there should be no mismatch within the Revenue Sufficiency Guarantee rate. MISO explained that it has been excluding from the Revenue Sufficiency Guarantee charge megawatt-

⁸ Fourth Rehearing Order, 125 FERC ¶ 61,156 at PP 30, 52-57.

⁹ *Id.* PP 28-30.

¹⁰ *Id.* P 55.

¹¹ *Id.* P 56. The Commission subsequently exercised its discretion and waived refunds for the period prior to November 5, 2007. *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,241, at PP 41-42 (2009).

hours associated with certain “exempted deviations,” as MISO defines them. It also included in the denominator of the Revenue Sufficiency Guarantee charge rate megawatt-hours associated with exempted deviations for all market participants, not just those withdrawing energy.¹² This practice, which MISO described for the first time in the December Compliance Filing, resulted in an under-collection of Revenue Sufficiency Guarantee costs through the real-time Revenue Sufficiency Guarantee charge and an increase in uplift to the MISO footprint.

6. On February 9, 2009, Commission staff notified MISO that its filing was deficient and requested additional information regarding the proposed Revenue Sufficiency Guarantee charge exemptions. MISO filed a response on February 24, 2009.

7. On May 8, 2009, Commission staff notified MISO that its February 24, 2009 deficiency answers were deficient, and sought additional information regarding the Revenue Sufficiency Guarantee charge exemptions that MISO proposed. MISO filed a response on June 5, 2009.

8. In the Third Compliance Order, the Commission accepted in principle MISO’s approach to revising its calculation of the denominator of the Revenue Sufficiency Guarantee charge rate.¹³ These revisions make the denominator the sum of the amounts in the Revenue Sufficiency Guarantee charge, per the terms of the tariff and in accordance with the Commission’s directions to MISO in previous orders.¹⁴ The Commission noted that no retroactive ratemaking was involved in this revision because it does not result in a new rate.

9. With respect to the deviations that MISO stated it was exempting from the Revenue Sufficiency Guarantee charge, the Commission observed that some of the exemptions comply with the tariff and Commission orders that specifically allow them. These exemptions pertain to deviations associated with carved-out grandfathered agreements (GFA),¹⁵ carved-out GFA and dynamically dispatchable schedule changes

¹² The Revenue Sufficiency Guarantee charge is multiplied by the Revenue Sufficiency Guarantee charge rate in calculating a market participant’s bill for Revenue Sufficiency Guarantee charges.

¹³ Third Compliance Order, 132 FERC ¶ 61,185 at P 68.

¹⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,132, at P 26 (2007); Fourth Rehearing Order, 125 FERC ¶ 61,156 at PP 52-57.

¹⁵ *Southern Illinois Power Cooperative v. Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,234, at PP 25-32, *order on reh’g*, 116 FERC ¶ 61,117, at

that follow MISO instructions, uninstructed deviations during emergency conditions, and deviations resulting from state estimator lags. The Commission further noted that neither the tariff nor Commission orders specifically provided for the remaining exemptions that MISO stated it had been recognizing, including the exemption for intermittent resources. The primary guidance on the treatment of these deviations instead came from MISO's Business Practices Manuals. Specifically, MISO cited to the following Business Practices Manual language:

Generation assets that receive an hourly Uninstructed Deviation exemption, are not considered to have contributing Real-Time RSG First Pass Distribution volume for that hour as and such are exempted from paying for Real-Time Revenue Sufficiency Guarantee First Pass Distribution Amount.¹⁶

10. MISO explained in its response to the May 8, 2009 deficiency letter that the Business Practices Manuals have provided this exemption since June 2005. But the Commission took the position that while "generation assets" could be interpreted as not including intermittent resources, because intermittent resources generally cannot follow setpoint instructions, the MISO tariff suggests the opposite.¹⁷ It noted that under the tariff, intermittent resources are specifically exempted from uninstructed deviation penalties, which implies that MISO considers them part of the set of generation assets receiving an uninstructed deviation penalty exemption from Revenue Sufficiency Guarantee charges.¹⁸

11. The Commission concluded that while there was support for the exemption, it was not appropriate to use MISO's Business Practices Manuals to establish an exemption that

PP 11-13 (2006) (finding that assessment of Revenue Sufficiency Guarantee charges on transactions under carved-out GFAs is inconsistent with the Transmission and Energy Markets Tariff).

¹⁶ MISO Second Deficiency Letter Response at 4 (citing Market Settlements Business Practices Manual Version 7 at A-211; Tab A at 4).

¹⁷ An Intermittent Resource is a Resource that is not capable of being committed or decommitted by, or following Set-Point Instructions of, the Transmission Provider in the Real-Time Energy and Operating Reserves Market. MISO FERC Electric Tariff, Section 1.329.

¹⁸ Third Compliance Order, 132 FERC ¶ 61,185 at P 71.

was not specified in the tariff. The Commission stated that MISO has a general responsibility to ensure that the rates and terms of service are clearly set forth in the tariff. MISO had not provided that clarity in this instance, and therefore it had been violating its tariff. The Commission stated it was particularly inappropriate for MISO to attempt to put such an exemption on file with the Commission in the context of a compliance proceeding, rather than through a new filing under FPA section 205.¹⁹

12. However, the Commission exercised its discretion to waive refunds for those exemptions that are not specifically established in the MISO tariff or in Commission orders.²⁰ The Commission noted that it is well-established that it has broad discretion to fashion appropriate remedies unless the statute mandates a particular remedy.²¹ The Commission explained that because MISO had exempted the deviations in question from Revenue Sufficiency Guarantee charges in the Business Practices Manuals, and because the tariff does not specifically address these deviations, market participants' most reasonable expectation would be that these deviations are exempt.²² The Commission explained that it hesitates to undo economic decisions made on this basis, given that they cannot be revisited regardless of the grounds for reliance.²³

13. The Commission also found that it was appropriate for MISO to resettle its markets with the exemptions discussed in the Third Compliance Order starting on November 5, 2007.²⁴ The Commission stated that because the exemptions have been specified either in the Business Practices Manuals since June 2005, in Commission orders, or in the tariff, market participants have had sufficient notice of them. The Commission clarified that the resettlement must reflect the Commission's determination

¹⁹ *Id.* P 72.

²⁰ *Id.* P 73.

²¹ *Id.* (citations omitted).

²² The Commission has found such an expectation by market participants to be reasonable. *See* Second Rehearing Order, 118 FERC ¶ 61,212, at P 89 (2007) (citing *PPL EnergyPlus, LLC v. New York Independent System Operator, Inc.*, 115 FERC ¶ 61,383 at P 29 (“It is unfair to market participants to assume that interpretations made by [an RTO] in its own publications...cannot be regarded as coming from a credible source.”)).

²³ Third Compliance Order, 132 FERC ¶ 61,185 at P 74.

²⁴ *Id.* P 102.

that there is no rate mismatch. Therefore MISO must delete exempted quantities from both the Revenue Sufficiency Guarantee charge and the denominator of the Revenue Sufficiency Guarantee rate, and the sum of exempted quantities in the Revenue Sufficiency Guarantee charges for individual market participants will sum to the exempted quantity in the denominator of the rate, thereby ensuring that there is no rate mismatch.

14. Timely requests for rehearing of the Third Compliance Order were submitted by Westar Energy, Inc., Cargill Power Markets, LLC and Tenaska Power Services Co. (Westar/Cargill/Tenaska), Northern Indiana Public Service Company (Northern Indiana), Wisconsin Electric Power Company (Wisconsin Electric) and EPIC Merchant Energy, LP, SESCO Enterprises, LLC, Energy Endeavors LP, Jump Power, LLC and Solios Power LLC (collectively Financial Marketers).

II. Discussion

A. Rehearing Requests

15. Northern Indiana asserts that the Third Compliance Order lacks a reasonable basis for waiving refunds and instead is an after-the-fact endorsement of MISO's erroneous decisions to exempt transactions that were not exempt under the tariff. Northern Indiana also considers it to be an abuse of the Commission's discretion to waive refunds despite a finding that MISO has engaged in a pattern of tariff violations.²⁵

16. Northern Indiana maintains that the Commission cannot claim that market participants relied on MISO exemptions without evidence of such reliance and without evidence that such reliance is reasonable. Northern Indiana contends that it is more reasonable for market participants not to rely on the exemptions because they are not spelled out in the tariff and because the Revenue Sufficiency Guarantee charge has been in dispute.²⁶

17. Northern Indiana notes that the Commission indicated in Docket No. ER09-411 that market participants should not rely on exemptions that are not on file at the Commission or approved as just and reasonable,²⁷ and it states that this is contrary to the Commission's position in this proceeding that refunds are inappropriate because MISO

²⁵ Northern Indiana Rehearing Request at 13.

²⁶ *Id.*

²⁷ *Id.* at 12 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,184, at P 38 (2010)).

has exempted the deviations in question in its Business Practice Manuals and because the tariff is silent on them. Northern Indiana maintains that the law forbids the Commission from resting its policy choices on contradictory explanations.²⁸ Financial Marketers also fault the Commission for giving the MISO Business Practices Manuals precedence over the tariff in providing guidance on the exemption for intermittent resources.²⁹

18. Northern Indiana contends that the Commission did not consider equitable factors in the Third Compliance Order, such as the amount of refunds owed, whether the refunds would pass to consumers, the need to enforce filed tariffs, or the fact that market participants have been on notice for five years that the Revenue Sufficiency Guarantee tariff provisions have been in dispute. Northern Indiana also faults the Commission for not meeting its responsibility of affording consumers complete, permanent, and effective protection from excessive rates and charges when considering equitable factors.³⁰

19. Northern Indiana argues that this is not a case where equitable relief is being sought under FPA section 206 but rather a case arising under section 205. It maintains that there is a strong presumption in section 205 cases that refunds will be paid. Northern Indiana also claims that the Commission's decision to deny refunds is at odds with the presumption that agency decisions will be given full retroactive effect to the refund effective date.³¹

20. Wisconsin Electric argues that the Commission cannot maintain that it has provided a reasoned basis for the exercise of its discretion to waive refunds if it does not acknowledge the resettlement that MISO initiated following the Second Rehearing Order on the premise that a rate mismatch existed. Wisconsin Electric states the original settlement that MISO conducted prior to this April 17, 2007 resettlement reflects the

²⁸ *Id.* at 11.

²⁹ Epic Merchant Energy, LP, SESCO Enterprises, LLC, Energy Endeavors LP, Jump Power, LLC, and Solios Power, LLC (Financial Marketers) Rehearing Request at 24.

³⁰ *Id.* 14 (citing *Atlantic Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388 (1959)).

³¹ Northern Indiana cites the following cases in support of this conclusion: *National Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289 (D.C. Cir. 1995) (*National Fuel*); *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 899 (D.C. Cir. 1995) (*Transcontinental*); *Public Utils. Comm'n of the State of Cal. v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993).

reasonable expectation of market participants.³² Wisconsin Electric maintains that a return to the original settlement structure restores the *status quo ante* and places market participants where they reasonably expected to be when they made their economic decisions at market start.³³

21. Wisconsin Electric maintains that while the Commission waived refunds on the grounds that market participants could not revisit their decisions retroactively, market participants were not able to revisit their prior market decisions when MISO resettled rates on the assumption that there was a rate mismatch. Wisconsin Electric asserts that the only solution is for the Commission to reinstate the original settlement back to market start through April 17, 2007.³⁴

22. Financial Marketers argue that the December Compliance Filing is deficient because the MISO used this compliance filing to implement significant rate changes that the Commission did not direct and that were not previously raised in the proceeding. Financial Marketers assert that such rate changes can only be made through a section 205 proceeding.³⁵

23. Financial Marketers argue that the Commission must require MISO to make refunds with interest for Revenue Sufficiency Guarantee overcharges that occurred due to its decision to exclude certain categories of deviations from the denominator of the Revenue Sufficiency Guarantee charge in its resettlement.³⁶ Financial Marketers view the resettlement as an unlawful rate increase because the December Compliance Filing was still pending before the Commission when MISO resettled.³⁷

24. Financial Marketers fault the Third Compliance Order for not recognizing that the current Revenue Sufficiency Guarantee charge creates a new mismatch and that the new rate is unjust and unreasonable. They base this argument on analysis that the Independent Market Monitor conducted in Docket No. ER09-411 that found that deviations excluded from the denominator of the Revenue Sufficiency Guarantee formula

³² Wisconsin Electric Rehearing Request at 5.

³³ *Id.* at 6.

³⁴ *Id.* at

³⁵ Financial Marketers Rehearing Request at 15.

³⁶ *Id.* at 8.

³⁷ *Id.* at 10.

cause Revenue Sufficiency Guarantee costs. Financial Marketers claim that the current rate has caused consumers, the market, and virtual traders irreparable harm.³⁸ They thus recommend that the Commission grant rehearing and require that Revenue Sufficiency Guarantee charges for the period November 5, 2007 forward be determined without excluding any deviations from the denominator and also require refunds with interest to market participants that have been overcharged.³⁹

25. Financial Marketers assert that allocating Revenue Sufficiency Guarantee costs based on non-exempt real-time deviations, as MISO proposed, violates cost causation principles. Financial Marketers recommend a market load ratio share allocation as the only non-discriminatory method to allocate Revenue Sufficiency Guarantee costs caused by exempt deviations.⁴⁰

26. Financial Marketers claim that there is no basis for excluding load imbalances served under GFA carve-out schedules from the denominator of the Revenue Sufficiency Guarantee charge since the GFA provisions of MISO tariff say nothing about the Revenue Sufficiency Guarantee rate formula. They state that if MISO wanted to exempt these schedules, it must make a filing under section 205 of the FPA.⁴¹

27. Financial Marketers maintain that there also is no basis in the tariff for excluding dynamically dispatchable schedules and uninstructed deviation resources from the cost allocation and that the associated cost shift has not been found to be just and reasonable. According to Financial Marketers, exempting these categories of deviations from the denominator of the Revenue Sufficiency Guarantee charge, while keeping the costs caused by these deviations in the denominator, creates a new rate mismatch.⁴²

28. Financial Marketers fault the Commission for giving the Business Practices Manuals precedence over the tariff, noting Commission precedent to the contrary.⁴³ They also assert that the Business Practices Manuals do not address the issue of

³⁸ *Id.* at 13.

³⁹ *Id.* at 14.

⁴⁰ *Id.* at 17.

⁴¹ *Id.* at 18-19.

⁴² *Id.* at 21.

⁴³ Financial Marketers Request for Rehearing at 24 (citing Initial Order, 115 FERC ¶ 61,108 at P 29 n.19).

excluding deviations from the denominator of the Revenue Sufficiency Guarantee charge.⁴⁴

29. Financial Marketers recommend that the Commission exercise its enforcement authority to hold MISO accountable for its repeated unlawful actions in violation of the Commission's compliance filing policies. Financial Marketers state that the Commission has made clear that compliance filings are not section 205 filings, and they do not become effective until the Commission approves them.⁴⁵ Financial Marketers maintain that MISO disregarded these principles and began imposing an unauthorized rate increase via its December Compliance Filing, notwithstanding the fact that the filing remained pending before the Commission and notwithstanding the fact that the Commission had never addressed the issue of whether the six categories of deviations at issue should be excluded from the Revenue Sufficiency Guarantee rate formula.⁴⁶ Financial Marketers also state that FPA section 206(b) requires the Commission to order refunds of any amounts paid in excess of those that would have been paid under the just and reasonable rate.⁴⁷ Financial Marketers also state that the Commission is required to establish the earliest refund effective date allowed.

30. Westar/Cargill/Tenaska state that MISO should be required to calculate the Revenue Sufficiency Guarantee charge with the exempted quantities included in both the numerator and denominator, consistent with cost causation and the MISO tariff, and to allocate the resulting shortfall on a load-ratio share basis. Westar/Cargill/Tenaska claim that because of software limitations, MISO cannot allocate total Revenue Sufficiency Guarantee costs between non-exempt and exempt market participants based on the costs they actually caused.⁴⁸

B. Commission Determination

31. We deny the requests for rehearing. We first clarify for Northern Indiana that the Commission waived refunds in the Third Compliance Order because MISO had been

⁴⁴ *Id.* at 24.

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 10.

⁴⁷ *Id.* at 8 (citing *City of Anaheim, California v. FERC*, 558 F.3d 521 (D.C. Cir. 2009)).

⁴⁸ Westar/Cargill/Tenaska Rehearing Request at 2.

exempting certain deviations from the Revenue Sufficiency Guarantee charge since the start of its energy markets in April 2005, and this had significant effects on the expectations of market participants. Although this practice was “not specifically provided for in either the tariff or Commission orders,” and “the primary guidance on the treatment of these deviations comes from the Business Practices Manuals,”⁴⁹ the Commission concluded that market participants had a reasonable expectation that the deviations in question were exempt.⁵⁰ The Commission exercised its discretion to waive refunds, because the market participants’ economic decisions could not be revisited. Indeed, it is Commission policy to deny refunds in cost allocation cases such as this one,⁵¹ and the inability of market participants to revisit past decisions is one of the primary reasons for doing so.⁵² While the Commission found certain aspects of the explanations in the MISO Business Practices Manuals to be confusing, as Northern Indiana notes, it is not the precise wording of the of the Business Practice Manuals that justifies a waiver of refunds, but rather MISO’s operating practices that were based on the Business Practice Manuals.

32. This rationale is not an after-the-fact endorsement of MISO decisions, as Northern Indiana maintains. MISO’s policy of exempting certain deviations had a significant effect on rates, and therefore should have been in the tariff.⁵³ However, the

⁴⁹ Third Compliance Order, 132 FERC ¶ 61,185 at P 71.

⁵⁰ *Id.* P 74.

⁵¹ *Black Oak Energy, L.L.C.*, 136 FERC ¶ 61,040, at P 25 & n.36 (2011).

⁵² *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).

⁵³ Third Compliance Order, 132 FERC ¶ 61,185 at P 72 (“[MISO] has a general responsibility to ensure that the rates and terms of service are clearly set forth in the tariff. It has not provided that clarity in the instances at issue, and therefore has been violating its tariff. As we have stated many times in this proceeding, the Business Practices Manuals should conform to the tariff, not the other way around.” (internal citation omitted)). The Commission’s “rule of reason” policy dictates that provisions that “significantly affect rates, terms, and conditions” of service must be included in the tariff, while items better classified as implementation details may be included only in the business practice manual. *See, e.g., City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (finding that utilities must file “only those practices that affect rates and service significantly, that are reasonably susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous”); *Public Serv. Comm’n of N.Y. v. FERC*, 813 F.2d 448, 454 (D.C. Cir. 1987) (holding that

(continued)

Commission recognizes as a practical matter that despite its error in tariff drafting, MISO had been exempting these deviations for a significant period of time. As a result, this practice formed the basis for the expectations of market participants, as reflected in their monthly bills. While the Commission reiterated the Commission's policy that Business Practices Manuals should conform to the tariff and not the other way around – and admonished MISO for not following this policy – the language of the Business Practices Manuals exempting deviations from Revenue Sufficiency Guarantee charges when they are exempt from uninstructed deviation charges has served as guidance to market participants since market start. The tariff did not contain a contrary instruction, but rather was silent on this issue.⁵⁴ We note that no market participants, including Northern Indiana, questioned or challenged these exemptions until MISO explained the Business Practices Manuals specifications and its practices to the Commission in December 2008 – over three years after its energy markets started. It is reasonable to conclude from this that market participants have relied on MISO's practice, even if that practice was not based on MISO's tariff.

33. Given this background, we do not agree with Northern Indiana that it is more reasonable to assume that market participants did not rely on the exemptions because they were not spelled out in the tariff and because the Revenue Sufficiency Guarantee charge had long been in dispute. Such an assumption is particularly implausible in the context of these proceedings, given that the Commission waived refunds associated with the Revenue Sufficiency Guarantee charge once before for essentially the same reason that it gave in the Third Compliance Order – namely, given that MISO had, as an operating practice defined in its Business Practices Manuals, been exempting virtual offers from the Revenue Sufficiency Guarantee cost allocation, it would be an unfair and inequitable remedy to require refunds when market participants cannot revisit the economic decisions that they made in light of MISO's operating practice.⁵⁵ In addition, it

the Commission properly excused utilities from filing policies or practices that dealt with only matters of “practical insignificance” to serving customers); *Midwest Indep. Transmission Sys. Operator, Inc.*, 98 FERC ¶ 61,137, at 61,401 (2002), *clarification granted*, 100 FERC ¶ 61,262 (2002) (stating that “[i]t appears that the proposed Operating Protocols could significantly affect certain rates and services and as such are required to be filed pursuant to Section 205.”).

⁵⁴ *Cf.* Initial Order, 115 FERC ¶ 61,108 (finding that affirmative language in the tariff assessing Revenue Sufficiency Guarantee charges to virtual supply offers governed over affirmative language in the Business Practices Manuals that exempted the same transactions from Revenue Sufficiency Guarantee charges).

⁵⁵ First Rehearing Order, 117 FERC ¶ 61,113 at P 95.

is clear that over the three-year period in question, market participants paid monthly bills that were calculated based on the exemptions laid out in the MISO Business Practices Manuals without questioning or challenging that operating practice.

34. We thus do not agree with the argument that the Commission has abused its discretion by waiving refunds despite finding that MISO has engaged in a pattern of tariff violations. Any refunds paid ultimately come not from MISO but from surcharges on market participants who have not engaged in activities that violate Commission requirements. Tariff violations can be a reason for granting refunds, but it is more difficult to justify refunds on this basis when the parties that ultimately would pay them did not themselves violate the tariff.

35. We did not, as Northern Indiana maintains, fail to weigh properly the equitable factors that the Commission typically weighs when ruling on refund requests. The factors that Northern Indiana cites are, in part, drawn from a case dealing with over-collection by a natural gas producer, not a case dealing with cost-allocation. However, the specific factors that Northern Indiana cites from that case are factors that the Commission identified in the course of determining whether individual natural gas producers would be required to make refunds for charges in excess of maximum area rates.⁵⁶ These cases therefore are not only not relevant to Commission practice in cost allocation cases, they do not address normal Commission practice in over-collection cases, where the Commission has a general policy of awarding refunds. Northern Indiana also refers to equitable factors the Commission considered in a case denying refunds in connection with a tariff violation involving auction-determined rates.⁵⁷ This case concerns rate levels rather than cost allocation and is likewise not on point here.⁵⁸

⁵⁶ Northern Indiana Request for Rehearing at 10 (citing *Estate of L.D. French v. FERC*, 603 F.2d 1158, 1163 (5th Cir. 1979) (*Estate of French*); see also *Rosario Production Co.*, Opinion No. 781, 56 F.P.C. 2959 (1976); *Gillring Oil Co. v. FERC*, 566 F.2d 1323, 1326-27 (5th Cir. 1978). The court stated in *Estate of French* that the equitable factors in this class of cases “include the passage of time, the amounts owed, whether the sales are still jurisdictional, whether the refunds would pass to consumers who actually paid the money, the relative size of the producer, and whether on balance there is a benefit to the public interest.” *Estate of French*, 603 F.2d at 1163.

⁵⁷ Northern Indiana Request for Rehearing at 10 (citing *Md. Pub. Serv. Comm’n, v. PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,276, at P 32 (2008) (*Md. Pub. Serv. Comm’n*)).

⁵⁸ *Md. Pub. Serv. Comm’n*, 124 FERC ¶ 61,276 at P 32.

36. We also disagree with Northern Indiana that we did not meet our responsibility of affording consumers “complete, permanent and effective bond of protection from excessive rates and charges.”⁵⁹ The language that Northern Indiana quotes refers to protection of consumers from overcharges by utilities.⁶⁰ This protection does not implicate the Commission’s practice of denying refunds in cost allocation cases, which involve overcharges to some customers and undercharges to others, and where refunds come not from utility revenues but rather from surcharges on customers.

37. We do not agree with Northern Indiana that we have been inconsistent by finding that market participants’ reliance on MISO’s actions justifies a waiver of refunds but also determining in Docket No. ER09-411 no justifiable reliance expectation in exemptions that “have never been on file with the Commission, or approved as just and reasonable.”⁶¹ When the Commission made its finding in Docket No. ER09-411, it was not addressing whether market participant reliance on MISO’s actions granting

⁵⁹ Northern Indiana Request for Rehearing at 10 (quoting *Estate of L.D. French v. FERC*, 603 F.2d 1158, 1163 (5th Cir. 1979) (quoting *Atl. Refining Co. v. Pub. Serv. Comm’n*, 360 U.S. 378, 388 (1959) (*Atl. Refining*))).

⁶⁰ The Supreme Court stated in *Atl. Refining* that the Natural Gas Act (NGA) “was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges.” *Atl. Refining Co. v. Pub. Serv. Comm’n*, 360 U.S. at 388. This statement represents a conclusion that the Court drew from its observation that

As the original [section] 7(c) [of the NGA] provided, it was “the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.” 52 Stat. 825

The bond of protection was thus to protect consumers against utility over-collection, i.e., charges in excess of the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest. Even when a rate meets this criterion, issues may arise as to the allocation of costs among customers, and the language cited does not encompass that problem.

⁶¹ Northern Indiana Rehearing Request at 12 (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,184, at P 38 (2010)).

exemptions justified a waiver of refunds. It was rejecting the argument that the exemptions should be found to be just and reasonable because market participants had relied on MISO's statements regarding them.⁶² We see no inconsistency in finding that reasonable reliance in the past on MISO's statements regarding the exemptions can justify a waiver of refunds and also finding that this reliance does not demonstrate that exemptions should be deemed just and reasonable going forward.

38. In support of its argument against the waiver of refunds, Northern Indiana cites two cases that it maintains show that "the Commission's decision to deny refunds is at odds with the strong presumption that agency decisions will be given full retroactive effect to the refund effective date."⁶³ However, neither of these cases are applicable to the facts of this proceeding, and they thus do not support a claim that the waiver of refunds was improper.

39. The first case is *National Fuel*, which Northern Indiana describes as standing for the principle that the "decision of a federal court must be given retroactive effect regardless of whether it is being applied by a court or an agency."⁶⁴ Northern Indiana maintains that this principle applies equally to agency decisions and that it is at odds with the Commission's decision to waive refunds in the Third Compliance Order on the grounds that such a waiver negates the required retroactive effect. The principle at issue derives from a series of Supreme Court cases that begins with *James B. Beam Distilling Co. v. Georgia*.⁶⁵

40. The Supreme Court described this this principle as follows:

[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,

⁶² *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,184 at P 38; see Rehearing Request of Xcel Energy Services Inc. in Docket No. ER09-411-002 (filed Sept. 8, 2009) at 10-12 (arguing that market participants had reasonably relied on statements made by MISO regarding exempted categories, and failure by the Commission to find that the exemptions are just and reasonable would create market uncertainty).

⁶³ Northern Indiana Rehearing Request at 14-15.

⁶⁴ *Id.* at 15 (citing *National Fuel*, 59 F.3d at 1289).

⁶⁵ 501 U.S. 529 (1991) (*Beam Distilling*); see *National Fuel*, 59 F.3d at 1285-88.

regardless of whether such events predate or postdate our announcement of the rule.⁶⁶

41. 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.”⁶⁷

42. 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.”⁶⁸ 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 rules.’”⁶⁹ Northern Indiana states that the D.C. Circuit applied this principle to rate matters in *Transcontinental*, “where it discussed the ‘norm . . . [that] the rate finally determined will be applied retroactively . . . as it means that the “right rate,” i.e., whatever rate the Commission lawfully determines to be right, is applied throughout the period despite the Commission’s initial uncertainty and delay.’”⁷⁰ This argument fails for several reasons.

43. First, 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.”⁷¹ Northern Indiana concedes that “the Commission has some

⁶⁶ *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993).

⁶⁷ *Beam Distilling*, 501 U.S. at 534.

⁶⁸ *Id.* at 543 (emphasis supplied).

⁶⁹ *Harper*, 509 U.S. at 97 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)).

⁷⁰ Northern Indiana Rehearing Request at 15.

⁷¹ *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 757 (1995).

equitable discretion to apply a rate determination retroactively,”⁷² and given that this is the case, a principle of law that limits the principle of retroactivity is present here. Second, *Transcontinental*, which acknowledges that the Commission’s refund authority is discretionary,⁷³ has no connection with the principle enunciated in *Beam Distilling*, which is not cited in that case.

44. The language in *Transcontinental* to which Northern Indiana refers concerns Commission practice where service on a natural gas pipeline begins under section 7 of the NGA⁷⁴ before final determination of rates for service has been established. Section 7(c)(1)(a) of the NGA prohibits the transportation or sale of natural gas, subject to the jurisdiction of the Commission without first acquiring a certificate of public convenience and necessity from the Commission. The court in *Transcontinental* was considering the Commission’s authority to issue a section 7 certificate when it has not yet resolved the validity of proposed rates and instead has accepted those rates conditionally, subject to refund if it later finds the rates unreasonable. The court concluded that

[t]he norm seemingly represented by these FERC decisions . . . is that where service starts under [section] 7 before final determination of the rates, the rate finally determined will be applied retroactively to the start of service. . . . The norm makes a good deal of sense, as it means that the "right rate", i.e., whatever rate the Commission lawfully determines to be right, is applied throughout the period despite the Commission’s initial uncertainty and delay.⁷⁵

45. Northern Indiana quotes this statement, but omits the reference to section 7⁷⁶ or the fact that that the norm in question expressly applies to situations where service begins

⁷² Northern Indiana Rehearing Request at 15 (quoting *Transcontinental*, 54 F.3d 893, 899).

⁷³ *Transcontinental*, 54 F.3d 893, 898.

⁷⁴ 15 U.S.C. § 717f (2012).

⁷⁵ *Transcontinental*, 54 F.3d at 899.

⁷⁶ Northern Indiana states that the court discussed the “‘norm . . . [that] the rate finally determined will be applied retroactively . . . as it means that the “right rate,” i.e., whatever rate the Commission lawfully determines to be right, is applied throughout the period despite the Commission’s initial uncertainty and delay.’” Northern Indiana Rehearing Request at 15 (quoting *Transcontinental*, 54 F.3d at 899).

on gas pipelines before a final determination of rates. Northern Indiana instead presents this language as establishing a general principle regarding refunds. *Transcontinental* does not support such a conclusion, which, among other things, contradicts the Commission's long-established practice of denying refunds in cost allocation and rate design cases. According to Northern Indiana's reading, once the Commission determines the "right rate" in such cases, it must be applied retroactively, and refunds must be ordered. There is no support for this conclusion, which, among other things, contradicts the Commission discretionary authority to order refunds.

46. Wisconsin Electric's position on the significance of the rate mismatch issue for the waiver of refunds involves matters that the Commission has already addressed in previous orders.⁷⁷ In the Third Compliance Order, the Commission relied on the reasoning given in those earlier rulings on waivers for the period April 25, 2006 to November 4, 2007 when waiving refunds for the period prior to April 25, 2006.⁷⁸ Contrary to Wisconsin Electric's contention, when waiving refunds the Commission acknowledged that MISO resettled its market assuming a rate mismatch back to the start of its markets.⁷⁹

47. We do not agree with Wisconsin Electric's claim that the most reasonable expectation of market participants was that there was no rate mismatch for the period prior to April 25, 2006. The Second Rehearing Order, in which the Commission acknowledged that there may be a rate mismatch, addressed the Revenue Sufficiency Guarantee charge tariff provision that had been in effect at market start. The reasonable conclusion to be drawn from the Second Rehearing Order thus was that the issue of the rate mismatch was in dispute and the outcome of the controversy could be a finding that there is a rate mismatch. Wisconsin Electric's assertion that the most reasonable expectation of market participants prior to this time was that there was no rate mismatch is a speculative assumption that lacks evidentiary support. The only evidence we have is to the contrary, viz., the fact that market participants were questioning whether there was a rate mismatch and thus the need for the Commission to address the issue in the Second Rehearing Order.

⁷⁷ Fourth Rehearing Order, 125 FERC ¶ 61,156; *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,241.

⁷⁸ Third Compliance Order, 132 FERC ¶ 61,185 at P 101.

⁷⁹ *Id.* P 80 (noting MISO's statement that the Fourth Rehearing Order implies that its prior resettlement from market start to April 24, 2006 was erroneous to the extent that it presume that there was a mismatch between the Revenue Sufficiency Guarantee formula numerator and denominator).

48. We disagree with Wisconsin Electric's position that the settlement of Revenue Sufficiency Guarantee charges should be returned to the situation that existed prior to the imposition of the rate mismatch because market participants could not revisit their prior market decisions when MISO resettled the market. For the period of resettlement that Wisconsin Electric recommends, i.e., from market start to April 17, 2007, multiple changes to the Revenue Sufficiency Guarantee charge were proposed and accepted, all of which were yet to be conveyed to market participants on revised tariff sheets. In these circumstances, the only reasonable basis for market participants' decisions would be a recognition that the Revenue Sufficiency Guarantee charge was in flux and that Wisconsin Electric's specific issue of concern, the rate mismatch, was also in transition. Accordingly, we disagree with Wisconsin Electric's assumption that there was a settled expectation over this time period that constituted the basis for the market decisions of market participants.

49. In response to Financial Marketers, we find no basis for rejecting MISO's adjustment of the Revenue Sufficiency Guarantee charge to eliminate a rate mismatch as an action that exceeds Commission directives. Earlier Commission orders in fact required such an adjustment, as Financial Marketers recognize. A resettlement that conforms customer billing to Commission rulings is not a new rate, and MISO's resettlement for this purpose thus did not result in a substantially higher Revenue Sufficiency Guarantee charge or a new rate mismatch. Rather, it simply implements tariff provisions that the Commission approved. Therefore, the resettlement does not encompass additional tariff revisions that would violate the Commission's requirement that compliance filings may not be combined with other rate or tariff changes,⁸⁰ such as occurred in the Commission proceedings that Financial Marketers cite.⁸¹ For these reasons, we reject Financial Marketers' request for an enforcement action on the grounds that MISO violated compliance filing policies and imposed an unauthorized rate increase.

50. In addition, we disagree with Financial Marketers that the December Compliance Filing created a new rate, and we therefore also disagree that a new section 205 filing is required. Since MISO did not revise its tariff when it conformed its billing of the Revenue Sufficiency Guarantee charge to previous Commission orders on the rate mismatch issue, there is no conflict between the Commission's rulings in the Third Compliance Order on the exemptions that MISO had been granting in practice and Commission policy that section 205 filings do not become effective until the Commission

⁸⁰ 18 C.F.R. § 154.203(b) (2015).

⁸¹ Financial Marketers Rehearing Request at 7 (citing *New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,206 (2008); *El Paso Natural Gas Co.*, 115 FERC ¶ 61,280 (2006)).

approves them. In addition, since there has been no rate increase, the MISO adjustment does not implicate the filed rate doctrine.

51. We also disagree with Financial Marketers that the Third Compliance Order was deficient for failing to order refunds. Financial Marketers state that FPA section 206(b) requires the Commission to order refunds of any amounts paid in excess of those that would have been paid under the just and reasonable rate, but it does not note that section 206(b) provides that the Commission “may” order refunds, not that it must.⁸² This proceeding involves an improper allocation of costs, and, as discussed above, Commission policy is not to order refunds in such cases.

52. This proceeding is restricted to the tariff revisions that MISO proposed in its December Compliance Filing and the resettlement process MISO discussed in that filing. Financial Marketers’ rehearing requests regarding the market impacts of the current allocation of Revenue Sufficiency Guarantee charges, and their claim that the current rate is unjust and unreasonable, are thus beyond the scope of this compliance proceeding. Financial Marketers’ arguments regarding the wording of the Revenue Sufficiency Guarantee charge in the tariff and costs caused by exempt deviations also are beyond the scope of this proceeding. This conclusion also applies to the issues that Westar/Cargill/Tenaska raise regarding their interpretation of the rate mismatch and the design of the Revenue Sufficiency Guarantee charge.⁸³

53. Inasmuch as the Third Compliance Order referenced the Commission orders providing exemptions for carved-out GFAs, dynamic dispatch, and uninstructed deviation resource transactions,⁸⁴ the fact that these exemptions are not specifically mentioned in the Revenue Sufficiency Guarantee charge tariff provisions or in the Business Practices Manuals does not represent a deficiency in the Commission’s rulings. As discussed above, MISO’s implementation of the Revenue Sufficiency Guarantee charge to conform to previous Commission orders did not constitute a rate change, and therefore no additional section 205 filing was necessary in connection with it.

⁸² *Louisiana Public Service Comm’n v. FERC*, 772 F.3d 1297, 1302 (D.C. Cir. 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)”).

⁸³ We note the Commission has addressed the cost causation impacts of exempt deviations in *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,184.

⁸⁴ Third Compliance Order, 132 FERC ¶ 61,185 at P 70.

The Commission orders:

The requests for rehearing of the Third Compliance Order are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.