155 FERC ¶ 61,126
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. ER04-691-093

Ameren Services Company
Northern Indiana Public Service Company

v. — Docket No. EL07-86-011

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.

v. — Docket No. EL07-88-011

Midwest Independent Transmission System Operator, Inc.

Wabash Valley Power Association, Inc.

v. — Docket No. EL07-92-011

Midwest Independent Transmission System Operator, Inc.

ORDER DENYING REHEARING

(Issued May 2, 2016)

1. This order addresses requests for rehearing of a Commission order issued on June 12, 2009,[1] in which the Commission dismissed requests for rehearing of a previous order in this proceeding[2] that, in turn, dismissed requests for rehearing of a prior Commission order[3] and waived refunds of certain amounts that the Midwest Independent Transmission System Operator, Inc. (MISO) billed under its real-time Revenue Sufficiency Guarantee rate.[4] These amounts were included in the rate under the assumption that there was a mismatch between the rate's numerator and denominator for the time period from April 25, 2006 through November 4, 2007.[5] In this order, we deny requests for rehearing of the June 12, 2009 order, referred to here as the Fifth Rehearing Order.

I. General Background

A. Initial Order and Rehearing

2. The rehearing requests being addressed here involve the issue of whether a mismatch existed between the numerator and the denominator of the rate formula used to calculate Revenue Sufficiency Guarantee charges. This issue has evolved over a series of Commission orders in this proceeding.

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[1] *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,241 (2009) (Fifth Rehearing Order).

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

[3] *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,132, at P 26 (2007) (Second Compliance Order).

[4] Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

[5] The Commission eventually determined that there was no mismatch. Fourth Rehearing Order, 125 FERC ¶ 61,156 at P 30; Second Compliance Order, 121 FERC ¶ 61,132 at P 26. *See also* Fifth Rehearing Order, 127 FERC ¶ 61,241 at P 42 (waiving refunds).

3. Section 40.3.3 of MISO's Open Access Transmission and Energy Markets Tariff (tariff) charges market participants withdrawing energy in the real-time energy market a real-time Revenue Sufficiency Guarantee charge that is based on their virtual supply offers and real-time load, and on injection, export, and import deviations. The purpose of the real time Revenue Sufficiency Guarantee charge is to ensure that any generator that 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 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.

4. 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. The effect of the proposed change would have been to exempt virtual supply offers from the allocation of Revenue Sufficiency Guarantee costs. The Commission rejected this proposal in its initial order in this proceeding issued in April 2006, and it found that because MISO had not been including virtual supply offers in its Revenue Sufficiency Guarantee calculations, it had violated its tariff.[6]

5. The Commission affirmed most of the findings of the April 2006 Initial Order in the First Rehearing Order. Among other things, the Commission analyzed Ameren Services Company's (Ameren) argument that while the Revenue Sufficiency Guarantee charge was derived based on a market participant's total real-time purchases, virtual supply offers, and uninstructed deviation quantities, it was recovered only from market participants who actually withdrew energy on a given operating day. Ameren contended that failure to allocate Revenue Sufficiency Guarantee charges on the same basis that was used to develop the charge, i.e., to virtual offers by both market participants that withdraw energy and those that do not, would result in a mismatch between the determination of the charge and its allocation. Ameren further argued that allocating Revenue Sufficiency Guarantee charges only to market participants who physically withdraw energy would lead to a revenue shortfall that must be uplifted to, i.e., recovered from, other market participants.[7] The Commission found that the rate calculation would not result in such shortfalls because the denominator of the Revenue Sufficiency

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[6] *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).

[7] *See* First Rehearing Order, 117 FERC ¶ 61,113 at P 129.

Guarantee charge (which included load, virtual supply offers, and resource deviations) matched the basis on which Revenue Sufficiency Guarantee costs were allocated to each market participant. The Commission stated that as long as the divisor and the market participant allocation have the same definition, the charge will recover all costs.[8]

6. Ameren sought rehearing of this finding, again arguing that assessing Revenue Sufficiency Guarantee costs only to market participants who actually withdraw energy creates a mismatch between the megawatt-hours used to develop the rate and those to which the rate is applied. Ameren contended that narrowing the body of virtual supply offers to which the rate is applied is arbitrary, capricious, and unduly discriminatory, and it argued that the Commission should grant rehearing and require refunds for this incorrect allocation from April 1, 2005 through April 26, 2006.[9] This time the Commission agreed. Specifically, it found in paragraph 58 of the Second Rehearing Order that while the end result of the charge did not result in any harm, "the divisor to the charge includes all virtual supply – not just virtual supply offered by market participants withdrawing energy – and therefore may result in under-recovery of [Revenue Sufficiency Guarantee] costs."[10] No party sought rehearing of this finding.

B. Compliance Order and Rehearing

7. During the same time period, MISO made various compliance filings to implement the requirements of the Initial Order, the First Rehearing Order, and the Second Rehearing Order. The second of these filings – an April 17, 2007 filing to comply with the First Rehearing Order and the First Compliance Order – is the most relevant here.[11] In the First Compliance Order, the Commission had clarified that the original tariff provisions relating to the real-time Revenue Sufficiency Guarantee remained in effect.[12] MISO therefore sought in its April 17, 2007 filing to reinstate all Commission-approved tariff language, including language regarding the actual withdrawal of energy by market participants. The Commission dealt with this compliance filing in the Second Compliance Order.

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[8] *Id.* P 145.

[9] Second Rehearing Order, 118 FERC ¶ 61,212 at PP 45-46.

[10] *Id.* P 58.

[11] *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,213 (2007) (First Compliance Order), *order on reh'g*, Third Rehearing Order, 121 FERC ¶ 61,131.

[12] First Compliance Order, 118 FERC ¶ 61,213 at P 93.

8. Protestors had objected to aspects of the April 17, 2007 compliance filing, and in response the Midwest ISO proposed to add the word "aggregate" to describe the deviations being calculated in the per-unit rate.[13] In the Second Compliance Order, the Commission conditionally accepted the proposed tariff sheets, finding that MISO's April 17, 2007 compliance filing complied with the Commission's directives. The Commission required MISO to make a further compliance filing to include the term "aggregate" in the denominator of the per-unit Revenue Sufficiency Guarantee rate, stating in paragraph 23 of the Second Compliance Order that this:

> will correctly and clearly state that the market participant's virtual offers and deviations will be multiplied by a per-unit rate that is determined on the basis of all virtual offers and deviations, and thereby conform the filing with the currently-effective tariff.[14]

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

> We interpret this formulation to mean that the [Revenue Sufficiency Guarantee] rate denominator is the aggregate of the amounts for market participants withdrawing energy on that day, since they are the entities being assessed the [Revenue Sufficiency Guarantee] charge in section 40.3.3.a.ii. Therefore, the amounts in the individual [Revenue Sufficiency Guarantee] charges in section 40.3.3.a.ii should sum to the same summed and aggregate number in the denominator of section 40.3.3.a.iii, thereby eliminating the possibility of developing the [Revenue Sufficiency Guarantee] charge and [Revenue Sufficiency Guarantee] rate on different bases and resulting in a shortfall in recovery of [Revenue Sufficiency Guarantee] costs.[15]

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[13] Second Compliance Order, 121 FERC ¶ 61,132 at PP 15-20.

[14] *Id.* P 23.

[15] *Id.* P 26.

10. In response to requests for rehearing of the Second Rehearing Order, the Commission stated in the Fourth Rehearing Order[16] that it had not changed the Revenue Sufficiency Guarantee rate in its prior orders in this proceeding. Instead, all of its statements regarding a rate mismatch had been restricted to interpreting the tariff that was in effect.[17] The Commission quoted the effective rate, and noted that its virtual supply components included: (1) in the numerator, the virtual supply offers of an individual market participant that withdraws energy; and (2) in the denominator, the sum of the virtual supply offers for all market participants who withdraw energy on a given day.[18] Because the definition of virtual supply in the numerator matches the definition of the summed components in the denominator, the Commission found that there is no rate mismatch and that its statement in paragraph 58 of the Second Rehearing Order regarding the inclusion of all virtual supply in the denominator of the charge had been an error. The Commission further noted that its error would have established a new rate, which is impermissible in a proceeding under section 205 of the Federal Power Act.[19] The Commission indicated that the MISO billing should be based upon the interpretation of the rate provided in the Fourth Rehearing Order, and it required MISO to provide refunds to the extent that this was not the case.[20]

C. <u>Fifth Rehearing Order</u>

11. In the Fifth Rehearing Order the Commission dismissed the requests for rehearing of the Fourth Rehearing Order, explaining that it does not allow rehearing of an order denying rehearing unless the order on rehearing modifies the result reached in the original order in a way that gives rise to a wholly new objection.[21] The Commission stated that the Fourth Rehearing Order did not modify the result reached in the Second Compliance Order in this way. It explained that the Fourth Rehearing Order acknowledged for the first time an incorrect statement in the Second Rehearing Order and that this acknowledgement relates to the discussion in the Fourth Rehearing Order of certain hypothetical propositions. The Commission concluded that this in no way

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[16] Fourth Rehearing Order, 125 FERC ¶ 61,156.

[17] *Id.* P 28.

[18] *Id.* P 30.

[19] 16 U.S.C. § 824d (2006).

[20] Fourth Rehearing Order, 125 FERC ¶ 61,156 at P 30.

[21] Fifth Rehearing Order, 127 FERC ¶ 61,241 at P 25.

modifies the result reached in the Second Compliance Order finding that there was no mismatch.[22]

12. The Commission also provided guidance in the Fifth Rehearing Order, explaining that it was appropriate and permissible for the Commission to make subsequent interpretations of the Revenue Sufficiency Guarantee rate in the Second Compliance Order and the Fourth Rehearing Order for several reasons, specifically: (1) the Commission has ongoing authority to review the rate; (2) such ongoing review was particularly appropriate under the circumstances of this proceeding, where for several years market participants did not have revised tariff language upon which to rely with respect to the effect of Commission rulings on the rate mismatch issue; (3) the Commission's most recent statement regarding the mismatch issue was both incorrect and, in any event, academic, in that it was made in response to rehearing arguments about a potential rate formulation; (4) market participants have relied on this incorrect interpretation and have mistaken it for formal Commission review of tariff provisions for purposes of acceptance; and (5) in the Fourth Rehearing Order, which addressed the rate mismatch issue comprehensively, the Commission discussed a compliance filing containing a new rate formulation that had not been before the Commission previously.

13. In the Fifth Rehearing Order, the Commission exercised its discretion to waive the refunds ordered in the Fourth Rehearing Order in light of the confusion that the Second Rehearing Order had created.[23] Accordingly, refunds were waived for the period from April 25, 2006 through November 4, 2007, representing the period starting with the effective date for refunds associated with virtual transactions and ending on the date the Commission made a comprehensive determination on the rate mismatch issue.[24]

14. Timely requests for rehearing of the Fifth Rehearing Order were submitted by Indianapolis Power & Light Company (IPL), Ameren and Northern Indiana Public Services Company (collectively, Ameren and Northern Indiana), Westar Energy, Inc. (Westar), Wisconsin Electric Power Company (Wisconsin Electric) and WPPI Energy.[25]

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[22] *Id.* P 27.

[23] Fifth Rehearing Order, 127 FERC ¶ 61,241 at P 41.

[24] Second Compliance Order, 121 FERC ¶ 61,132.

[25] WPPI Energy, formerly known as Wisconsin Public Power Inc., intervened in this proceeding as one of the Midwest TDUs on May 6, 2004.

II. Discussion

A. Rehearing Requests

15. Ameren and Northern Indiana assert that the Commission provides no rational basis for the waiver of refunds ordered in the Fifth Rehearing Order. They argue that the Commission cannot acknowledge that the Second Rehearing Order was in error – a finding that the Commission recognized market participants have relied on – without providing a remedy. Ameren and Northern Indiana fault the Commission for not providing a reasoned explanation of why its view of the Second Rehearing Order justifies a refusal to correct the error and a reasoned explanation of the connection between its assertions and its decisions to waive the refunds. Similarly, Wisconsin Electric states that the Commission failed to provide an adequate explanation or justification for its decision to waive refunds. IPL argues that the Commission is required to provide a reasoned analysis for a change in course.

16. Ameren and Northern Indiana state that it is well established that where the Commission has committed legal error, the proper remedy is to put market participants back in the position in which they would have been had the Commission not erred.[26] They maintain that since the Commission has determined that there was no mismatch and thus no reason for resettlement, it cannot allow the uplift charges to stand.[27] They also contend that the Commission's claims in the Fifth Rehearing Order regarding confusion that the Second Rehearing Order created and its other rationalizations are irrelevant to the relief that must be provided.[28]

17. WPPI Energy faults the Commission for not adequately justifying its departure from the general policy of granting full refunds for overcharges – particularly where such overcharges resulted from a regulated entity's failure to implement a filed tariff correctly. WPPI Energy maintains that the Commission is not justified in denying refunds on the

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[26] Ameren and Northern Indiana Rehearing Request at 25-26 (citing *Pub. Utils. Comm'n of the State of Cal. v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993) (*CPUC v. FERC*); *Northern Natural Gas Co.*, 101 FERC ¶ 61,382, at P 23 (2002) ("When the Commission corrects legal error, its primary goal is to 'restore the parties to the position they would have been in but for [the Commission's] legal error.'") (quoting *Panhandle Eastern Pipe Line Co. v. FERC*, 95 F.3d 62, 67 (D.C. Cir. 1996) (*Northern Natural Gas*)).

[27] *Id.* at 26.

[28] *Id.*

grounds that it originally offered an erroneous opinion with respect to the mismatch issue. As support for this assertion, WPPI Energy cites to precedent in which a court found that it was inappropriate for the Commission to give any weight to an earlier, erroneous conclusion that a tax was recoverable.[29] WPPI Energy notes that the key factor in that case was whether market participants had been on notice that the recoverability of the tax was open to question, and it states that in this proceeding market participants have been on notice since April 25, 2006 that the MISO's Revenue Sufficiency Guarantee charges are open to question.[30]

18. Ameren and Northern Indiana claim that the Commission must show that it considered relevant factors and struck a reasonable accommodation among them, and it must show that an order granting or denying refunds was equitable under the circumstances of this litigation. Ameren and Northern Indiana fault the Commission for not addressing the inequitable impact that the denial of refunds will have on load serving entities and for not addressing other factors germane to the core purposes of the Federal Power Act.[31] They assert that by waiving refunds for the third time in this docket, the Commission unduly discriminates against load-serving entities.[32] IPL views the Commission's action in not directing refunds as an abandonment of cost causation principles because it shifts Revenue Sufficiency Guarantee costs from market participants that caused those costs to market participants that did not cause them.[33]

19. Ameren and Northern Indiana claim that the Commission's waiver of refunds violates the filed rate doctrine because it would force MISO to charge a rate different from its lawful rate as determined in this proceeding. They also assert that the Commission cannot refuse to provide a remedy once it has found that the filed rate does

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[29] WPPI Rehearing Request at 8-10 (citing *Public Serv. Co. of Colo. v. FERC,* 91 F.3d 1478 (D.C. Cir. 1996) (*Public Service Company of Colorado*)).

[30] *Id.*

[31] WPPI Energy also considers the Commission's waiver of refunds to be inconsistent with the core purposes of the Federal Power Act.

[32] Ameren and Northern Indiana Rehearing Request at 30.

[33] IPL Rehearing at 10 (citing *California Indep. Sys. Operator Corp,* 108 FERC ¶ 61,022, at P 62 (2004); *Midwest Indep. Transmission Sys. Operator, Inc.,* 108 FERC ¶ 61,163 (2004); *Pennsylvania Power and Light Co,* Opinion No 176, 23 FERC ¶ 61,395, at 61,850 (1983)).

not contain a mismatch.[34] For this reason, Ameren and Northern Indiana recommend that the Commission reinstate the resettlement for the period that MISO resettled customer bills based on the assumption of a rate mismatch, i.e., April 1, 2005 through November 4, 2007.[35]

20. Wisconsin Electric contends that the Commission's decision to waive refunds allows rates to stand that it has already determined to be unjust and unreasonable, and thereby renders the Commission's actions arbitrary and capricious. It states that there was no rate mismatch prior to the Second Rehearing Order, but then in 2007 MISO resettled the market back to market start with a rate mismatch.[36]

21. Westar considers the refund date of November 5, 2007 – which is different from the refund date for the FPA section 206 proceeding in Docket Nos. EL07-86, *et al*. – to be discriminatory because it treats similarly situated market participants differently.[37] Westar notes that Docket Nos. ER04-691 and EL07-86, *et al*. are interrelated and result in a single calculation of a Revenue Sufficiency Guarantee rate for any given time period.[38]

22. Westar asserts that the Commission's requirement that MISO resettle the market between November 5, 2007 and November 10, 2008 violates the filed rate doctrine and constitutes an unlawful retroactive surcharge. It states that before the Fifth Rehearing Order and the Commission order in Docket Nos. EL07-86, *et al.*,[39] market participants could not have known that virtual supply offers would be exempted during this time period or that the rate mismatch refund date would be set such that real-time deviations were the only market participants included in the denominator of the Revenue Sufficiency Guarantee charge calculation.[40]

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[34] Ameren and Northern Indiana Rehearing Request at 16.

[35] *Id.* at 22.

[36] Wisconsin Electric Rehearing at 6-7.

[37] Westar Rehearing Request at 11.

[38] *Id*. at 9.

[39] *Ameren Services Company v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121 (2009).

[40] Westar Rehearing Request at 14.

23. IPL faults the Commission for not explaining its determination that no refunds are due for the period from market start to April 25, 2006.[41] WPPI Energy claims that there is no basis for waiving refunds for the period prior to the Second Rehearing Order since the Commission has not asserted any basis for establishing that market participants could have expected that MISO's mismatch application was correct prior to the issuance of that order. Instead, the Commission's rationale only justifies waiving refunds for the period after the Second Rehearing Order and before the issuance of the Second Compliance Order.[42]

24. IPL challenges the Commission's finding that the Fourth Rehearing Order contained a new rate formulation, noting that the tariff text cited in that order was in effect during the time periods at issue for refunds. IPL maintains that contrary to the findings in the Fifth Rehearing Order, the Commission's interpretation in the Fourth Rehearing Order was of the same tariff language that the Midwest ISO tariff should have been following and that market participants relied on.[43]

B. Commission Determination

25. We deny the requests for rehearing. Other than dismissing the rehearing requests, the Commission's sole findings in the Fifth Rehearing Order were: (1) that while the Fourth Rehearing Order determined that the Second Rehearing Order included an erroneous interpretation of the rate that posited the possible existence of a rate mismatch, the Second Rehearing Order was not subject to rehearing; and (2) the Commission nevertheless could provide further interpretations of the Revenue Sufficiency Guarantee rate.[44]

26. In the Fifth Rehearing Order the Commission waived refunds for the period from April 25, 2006 to November 5, 2007 on two grounds: (1) the confusion created in the Second Rehearing Order, and (2) the fact that the Commission did not comprehensively

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[41] IPL Rehearing Request at 7.

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

[43] IPL states that this language was contained in Original Sheet Nos. 577 and 578, which the Commission cited in P 29 of the Fourth Rehearing Order. *See* IPL Rehearing Request at 14.

[44] Fifth Rehearing Order, 127 FERC ¶ 61,241 at P 40.

address the mismatch issue until November 5, 2007.[45] It acknowledged that the misstatement concerning the rate mismatch in paragraph 58 of the Second Rehearing Order "led parties to believe that the Commission was ruling on the rate mismatch issue, even when that determination was procedurally defective and hypothetical."[46] The Commission also noted a prior case in which the Commission declined to impose refunds that would undermine confidence in markets.[47] We therefore disagree with Ameren and Northern Indiana, Wisconsin Electric, and IPL that the Commission did not explain, or that the Commission merely rationalized, its decision to waive refunds; rather, the Commission's analysis represents reasoned decision making in the exercise of the Commission's equitable powers.

27. This ruling is the last in a series of orders in which the Commission interpreted revisions to the real-time Revenue Sufficiency Guarantee charge in MISO's tariff. A statement that one of these interpretations was incorrect does not, as Ameren and Northern Indiana allege, mean that the Commission made an erroneous legal determination of the type involved in *Northern Natural Gas*. In that case, the Commission stated that it had made a legal error in allowing gas producers to treat *ad valorem* taxes as a severance tax that may be added on to maximum lawful prices under the Natural Gas Policy Act of 1978, and found that this was a basis to require producers to refund Kansas *ad valorem* tax reimbursements to pipelines.[48] There the Commission made an incorrect finding in establishing how a tax should be classified as a matter of law, and this had a direct effect on the price paid for gas. Nothing in paragraph 58 of the Second Rehearing Order creates an analogous situation because nothing in that paragraph constitutes a legal finding that establishes a rate provision.

28. The Commission noted in the Second Rehearing Order that it was "interpreting a currently-effective tariff provision . . . now that parties dispute its meaning,"[49] and that "the currently-effective tariff provision cannot be revised in this proceeding and remains

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[45] *Id.* P 41. The Commission noted that the refund period for the rate mismatch issue began on November 5, 2007, which was the date that the Commission made a determination concerning the entire Revenue Sufficiency Guarantee rate. *Id.* P 42 & n.41.

[46] *Id.* P 41.

[47] *Id.* P 41 & n.40.

[48] *Northern Natural Gas*, 101 FERC ¶ 61,382 at P 23.

[49] Second Rehearing Order, 118 FERC ¶ 61,382 at P 57.

in effect."[50] The Commission's misstatement concerning the rate mismatch therefore did not constitute an erroneous legal ruling that had the effect of authorizing certain charges, as in *Northern Natural Gas*, because the Commission affirmed at the time that it had no authority to make any legal determination at all regarding the rate. In other words, the Commission incorrectly alluded to the existence of a mismatch, but it did not act in a way that created one. We thus disagree with Ameren and Northern Indiana that the Second Rehearing Order included legal error that requires us to reconsider the Commission's earlier ruling on refunds.

29. We thus also disagree with Ameren and Northern Indiana that the error in question allows one to invoke the principle that the proper remedy when the Commission commits a legal error is to put market participants back in the position in which they would have been in the absence of the error. That principle applies where the Commission has erred in determining the just and reasonable rate.[51] Here the error did not involve a rate determination. It occurred in the course of a discussion of certain hypothetical propositions. As a result, the error did not place market participants in a position with regard to the rate that they would not have been in if the error had not occurred, and the principle that Ameren and Northern Indiana refer to therefore is inapplicable in this situation.

30. WPPI Energy also cites inapplicable precedent to support the proposition that the Commission is not justified in denying refunds because it originally offered an erroneous opinion with respect to the mismatch issue. *Public Service Company of Colorado* deals with a gas pipeline company's retention of amounts received to cover its payment of a state tax that was subsequently found not to be recoverable. The court's ultimate conclusion was that "[a]bsent detrimental and reasonable reliance, anything short of full retroactivity . . . allows the producers to keep some unlawful overcharges without any justification at all."[52] *Public Service Company of Colorado* thus deals with overcharges

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[50] *Id.* P 58.

[51] *See CPUC v. FERC*, 988 F.2d at 168 (finding that the Commission erred when it allowed a sunset provision to deprive a pipeline of one of two potential take-or-pay recovery mechanisms and thereby denied the pipeline under the circumstances of any means to recover charges that it had reasonably incurred); *Consumers' Counsel, State of Ohio v. FER*C, 826 F.2d 1136, 1139 (D.C.Cir.1987) (finding that the Commission erred in failing to provide a remedy for pipeline customers once it found that a pipeline's take-or-pay contract clauses violated section 5 of the Natural Gas Act; providing the remedy retroactively would merely place the customers in the position that they would have been in if the error had not occurred).

[52] *Public Service Company of Colorado*, 91 F.3d at 1490.

that result in an over-collection by a utility, and Commission policy is to award refunds in such cases. We are not dealing with an over-collection of a charge, i.e., an unlawful overcharge. Commission policy is to grant refunds in such cases, but in cost-allocation cases, such as this proceeding, Commission policy is to deny refunds.[53]

31. We see no filed rate implications in the Commission's decision to waive refunds. The Commission has made clear in several orders in this proceeding that the filed rate has no mismatch between the numerator and denominator of the Revenue Sufficiency Guarantee charge and rate. As discussed above, the erroneous statement in paragraph 58 of the Second Rehearing Order does not constitute a legal finding that a mismatch existed. The Fifth Rehearing Order made no new findings in this regard. Rather, it simply re-affirmed that there is no rate mismatch.[54] In short, the Commission made no statements and took no actions that contradicted a filed rate.

32. Wisconsin Electric's argument that the Commission's decision to waive refunds allows rates to stand that the Commission has already determined to be unjust and unreasonable, thereby rendering the Commission's actions arbitrary and capricious, misconstrues the Commission's authority in this respect. Determining what constitutes a just and reasonable rate and determining whether refunds are appropriate are two separate inquiries, and a decision on refunds does not authorize a particular rate. If this were not the case, it is not clear how the Commission would have any measure of discretion at all on the issue of refunds since any ruling on refunds would be limited to an implementation of what is deemed to be the just and reasonable rate regardless of the circumstances involved.

33. We disagree with Westar that the refund date of November 5, 2007 is arbitrary, capricious, and discriminatory because it differs from the refund date for the Section 206 proceeding in Docket No. EL07-86, *et al*. Our decision on refunds in the Fifth Rehearing Order was based on a matter that is specific to Docket No. ER04-691, viz., the rate mismatch issue. As noted above, the Commission provided a comprehensive explanation of the rate mismatch (or the lack of it) in the Second Compliance Order on November 5, 2007. This course of action was based on specific facts and considerations relevant to this proceeding and thus constitutes reasoned decision-making.

34. Westar argues that refunds for the period November 5, 2007 to November 10, 2008 represent retroactive surcharges that violate the filed rate doctrine. However, the Commission took no action pertaining to those refunds in the Fifth Rehearing Order, and

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

[54] Fifth Rehearing Order, 127 FERC ¶ 61,241 at P 43.

Westar's argument thus represents an out-of-time request for rehearing of an earlier Commission order, specifically the Fourth Rehearing Order.

35. In response to IPL, we clarify that the only purpose of stating in the Fifth Rehearing Order that the refund period starts on April 25, 2006 was to recognize that the First Rehearing Order did not require refunds prior to this date for virtual transactions. Therefore, the only period during which refunds associated with the rate mismatch would be applicable would be the period starting April 25, 2006. IPL maintains that the Commission failed to explain its determination that no refunds are due for the period from market start to April 25, 2006, but the Fifth Rehearing Order made no determination concerning refunds for that period when it referenced a ruling in the First Rehearing Order dealing with that matter. As a result, no further explanations were required in the Fifth Rehearing Order.

36. It is appropriate that the refund period continue to be from April 25, 2006 to November 4, 2007, rather than starting at the later date of the Second Rehearing Order, as WPPI Energy recommends. In the Second Rehearing Order, the Commission made determinations based on a tariff sheet that was unchanged since market start. Accordingly, market participants would reasonably have interpreted the Commission's determinations to be findings on the rate mismatch over this period. Moreover, in the Fifth Rehearing Order, the Commission was simply citing to the Commission's determination in the First Rehearing Order with respect to refunds from market start to April 24, 2006.

37. In response to IPL's challenge to the finding in the Fifth Rehearing Order that the Fourth Rehearing Order contained a new rate formulation, we provide the following clarification. The Second Rehearing Order addressed tariff revisions that MISO had yet to file. It was not until April 16, 2007 – one month after the Second Rehearing Order was issued – that MISO filed a full set of revised tariff sheets for the Revenue Sufficiency Guarantee charge and rate reflecting past Commission rulings. Based on this filing and further revisions filed on December 5, 2007, the Commission was able in the Fourth Rehearing Order to address for the first time the entire rate formulation, i.e., the new rate formulation, of the Revenue Sufficiency Guarantee charge – and thereby evaluate the rate mismatch issue. We thus disagree with IPL that the Commission was simply dealing with existing tariff language.

The Commission orders:

The requests for rehearing of the Fifth Rehearing 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.