

121 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Jon Wellingshoff.

E.ON U.S. LLC

v.

Docket No. EL07-100-000

Midwest Independent Transmission System Operator,
Inc.

ORDER ON COMPLAINT

(Issued November 28, 2007)

1. On September 17, 2007, E.ON U.S. LLC, on behalf of its utility operating companies Louisville Gas and Electric Company and Kentucky Utilities Company (collectively, E.ON) filed a complaint (Complaint), pursuant to Rules 206 and 212 of the Commission's Rules of Practice and Procedure,¹ against the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) regarding the allocation of Revenue Sufficiency Guarantee (RSG) charges to market participants under the Midwest ISO's Open Access Transmission and Energy Markets Tariff (TEMT). Specifically, E.ON argues that the Midwest ISO is erroneously calculating resettlements associated with RSG charges. For the reasons set forth below, we will deny the relief requested in E.ON's Complaint.

I. Background

2. The Midwest ISO's TEMT charges market participants withdrawing energy in the real-time energy market a real-time RSG charge based on their virtual supply offers and real-time load, injection, export and import deviations.² The purpose of the RSG charge

¹ 18 C.F.R. §§ 385.206, 385.212 (2007).

² Specifically, section 40.3.3.a.ii of the Midwest ISO TEMT provides:

On any Day when a Market Participant actually withdraws Energy, the Market Participant shall be charged a Real-Time Revenue Sufficiency Guarantee Charge. The Market

(continued...)

is to ensure that any generator scheduled or dispatched by the Midwest ISO after the close of the day-ahead energy market – either through the Reliability Assessment Commitment (RAC) or the real-time energy market – will receive no less than its offer price for start-up, no-load and incremental energy. RSG credits are paid to units scheduled in the RAC or in the real-time market that do not earn sufficient real-time energy revenues to cover start-up and no-load costs.

Participant's Real-Time Revenue Sufficiency Guarantee Charge shall be based on all Virtual Supply Offers for the Market Participant in the Day-Ahead Energy Market and for deviations based on the sum of the absolute value for the following four elements (a) Load deviations in the Real-Time Energy Market during the Operating Day (based on the difference between real-time Metered Load and Load scheduled in the Day-Ahead Energy Market, measured at each Commercial Node), (b) Import schedule deviations (based on the difference between real-time Import scheduled quantities and Imports scheduled in the Day-Ahead Energy Market), (c) Export schedule deviations (based on the difference between real-time Export scheduled quantities and Exports scheduled in the Day-Ahead Energy Market), and (d) injections of Energy including: (1) any difference between Energy output based on the Metered quantity of Energy (MWh) versus the hourly integrated Dispatch Instruction in the Real-Time Energy Market (excluding MW designated for either Regulation Down or Regulation Up); (2) any negative difference between Energy scheduled in the Day-Ahead Energy Market and real time Economic Minimum Dispatch amounts (excluding Resources committed in any RAC processes conducted for the Operating Day); and, (3) any negative difference between real time Economic Maximum Dispatch amounts and Energy scheduled in the Day-Ahead Energy Market. The sum of the absolute value for such amounts set forth in section 40.3.3.a.ii.(a) through (d) shall be multiplied by the per unit Real-Time Revenue Sufficiency Guarantee Charge rate to determine the Real-Time Revenue Sufficiency Guarantee Charge to be paid by the Market Participant, provided, that, no charges shall be assessed for any difference caused by lags in the State Estimator and Unit Dispatch System tracking of unit output that complies with Dispatch Instructions.

3. On April 25, 2006, the Commission issued an order rejecting the Midwest ISO's proposal to, among other things, remove references to virtual supply from the TEMT provisions related to calculating RSG charges.³ The Commission further found that because the Midwest ISO had not been including virtual supply offers in its RSG calculations, it had violated its tariff and must make appropriate refunds.⁴ However, the requests for rehearing of the RSG Order persuaded the Commission to change course and exercise its equitable discretion not to require refunds for the Midwest ISO's failure to include virtual supply offers in its calculation of RSG charges.⁵

4. On March 15, 2007, the Commission issued two orders regarding the Midwest ISO's RSG charges, the RSG Second Rehearing Order and the RSG Compliance Order.⁶ In the RSG Second Rehearing Order, the Commission reiterated that "the Midwest ISO's tariff requires allocation of RSG costs to virtual supply offers, and . . . the Midwest ISO violated its tariff by failing to do so. There no longer seems to be any dispute that this is how the tariff should properly be read."⁷ The Commission then revisited the issue of whether to exercise its discretion to require refunds, but based on a balancing of equities, reaffirmed its prior decision not to impose refunds.⁸ In the RSG Compliance Order, the Commission found that the Midwest ISO failed to analyze the relationship between virtual supply offers and RSG cost incurrence. The Commission, therefore, rejected the Midwest ISO's proposal to allocate costs based on net virtual offers, *i.e.*, virtual offers minus virtual bids, and clarified that the currently-effective tariff, which allocates RSG costs to virtual supply offers, remains in effect.⁹

³ *Midwest Independent Transmission System Operator, Inc.*, 115 FERC ¶ 61,108, at P 48-49 (RSG Order), *order on reh'g*, 117 FERC ¶ 61,113 (2006) (RSG First Rehearing Order), *order on reh'g*, 118 FERC ¶ 61,212 (RSG Second Rehearing Order), *order on reh'g*, 121 FERC ¶ 61,131 (2007) (RSG Third Rehearing Order).

⁴ RSG Order, 115 FERC ¶ 61,108 at P 26.

⁵ RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 92-96.

⁶ *Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,213 (2007) (RSG Compliance Order), *order on reh'g*, RSG Third Rehearing Order, 121 FERC ¶ 61,131 (2007).

⁷ RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 88 (internal citation omitted).

⁸ *Id.* P 88-98.

⁹ RSG Compliance Order, 118 FERC ¶ 61,213 at P 92-93.

5. Since November 2005, the RSG Task Force, a working group of Midwest ISO market participants organized under the Midwest ISO's Market Subcommittee (organized under the Midwest ISO's Advisory Committee) has been working to identify improvements that could be made to the RSG cost allocation methodology.

6. In August 2007, several entities filed complaints challenging the justness and reasonableness of the Midwest ISO's existing cost allocation for RSG charges (collectively, Prior RSG Complaints).¹⁰ The Commission issued an order granting in part and denying in part the relief requested in the Prior RSG Complaints, finding that the Midwest ISO's existing cost allocation methodology may not be just and reasonable. The Commission established a refund effective date of August 10, 2007 and paper hearing procedures to review evidence and to establish a just and reasonable RSG cost allocation methodology. The Commission held the paper hearing in abeyance pending the conclusion of the ongoing activities of the RSG Task Force or February 1, 2008, whichever is earlier. The Commission consolidated the three Prior RSG Complaints because they raise common issues of law and fact, but denied E.ON's request to consolidate the instant Complaint with the Prior RSG Complaints.¹¹

II. Notice of Filing and Responsive Pleadings

7. Notice of E.ON's Complaint was published in the *Federal Register*, 72 Fed. Reg. 54,440-41 (2007), with interventions and protests due on or before October 9, 2007. The Midwest ISO filed a timely answer to the Complaint. Timely motions to intervene were filed by: Ameren Services Company on behalf of certain of its affiliates; the Coalition of Midwest Transmission Customers; Consumers Energy Company; FirstEnergy Service Company on behalf of its affiliate operating utility companies; and Hoosier Energy Rural Electric Cooperative, Inc. Timely motions to intervene and comments were filed by:

¹⁰ In each of those proceedings, complainants filed a complaint under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000), against the Midwest ISO with respect to the allocation of RSG charges to market participants under the Midwest ISO's TEMT. Docket No. EL07-86-000 is a complaint by Ameren Services Company, on behalf of certain of its affiliates, and Northern Indiana Public Service Company (collectively, Ameren/NIPSCO). Docket No. EL07-88-000 is a complaint by 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 Wisconsin Public Power Inc. (collectively, the Midwest TDUs). Docket No. EL07-92-000 is a complaint by Wabash Valley Power Association, Inc. (Wabash).

¹¹ *Ameren Services Company v. Midwest Independent Transmission System Operator, Inc.*, 121 FERC ¶ 61,205 (2007) (Order on Prior RSG Complaints).

CAM Energy Trading, LLC, EPIC Merchant Energy, LP and SESCO Enterprises, LLC (collectively, the Financial Marketers); DC Energy Midwest, LLC, Lehman Brothers Commodity Services, Inc., Morgan Stanley Capital Group Inc., Credit Suisse Energy, LLC, Edison Mission Energy, Edison Mission Marketing & Trading, Inc., and Midwest Generation EME, LLC (collectively, the Financial Participants);¹² Dynegy Power Marketing, Inc. (Dynegy); Indianapolis Power & Light Company (IPL); Integrys Energy Services, Inc. (Integrys); and Wisconsin Electric Power Company (Wisconsin Electric). An untimely motion to intervene was filed by The Detroit Edison Company and DTE Energy Trading, Inc. (collectively, Detroit Edison).

8. On October 24, 2007, E.ON filed an answer to the Financial Participants' motion for summary dismissal. As part of that filing, E.ON also filed an answer to the Midwest ISO's answer and other comments on the Complaint.

III. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

10. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2007), the Commission will grant Detroit Edison's late-filed motion to intervene given its interests in the proceedings, the early stage of the proceedings, and the absence of undue prejudice or delay.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept E.ON's answer because it has provided information that assisted us in our decision-making process.

1. Motion to Consolidate

a. Complaint

12. E.ON asks the Commission to consolidate its Complaint with the Prior RSG Complaints. E.ON argues that consolidation is appropriate because the Prior RSG

¹² The Financial Participants styled their comments as a motion for summary dismissal.

Complaints and the Midwest ISO's answer to those complaints raise resettlement issues.¹³

b. Responsive Pleadings

13. Dynegy and Wisconsin Electric support the motion to consolidate. They argue that E.ON's Complaint and the Prior RSG Complaints raise similar issues, and consolidation "would increase procedural efficiency, conserve valuable resources and avoid needless duplication."¹⁴

14. By contrast, the Midwest ISO and Financial Marketers oppose consolidation. The Midwest ISO argues that E.ON's Complaint is procedurally deficient in that E.ON has failed to show in what specific ways the Prior RSG Complaints overlap E.ON's claims in this proceeding. The Midwest ISO also notes that "E.ON fails to cite any rules or jurisprudence allowing a complaint in a later proceeding to merely cite and adopt by reference a separate complaint in an earlier proceeding, without including allegations clearly showing that the complainant in the subsequent proceeding has standing, rights and injury relevant to the earlier complaint."¹⁵ The Midwest ISO also argues that consolidation would amount to a late intervention by E.ON to the Prior RSG Complaints proceeding.

15. The Financial Marketers argue that the Midwest ISO's resettlement of its energy markets and the appropriate assessment of RSG costs for past periods has no relationship to the issues raised in the Prior RSG Complaints, *i.e.*, whether the current RSG TEMT provisions are just and reasonable. The Financial Marketers state that E.ON is incorrect in asserting that cleared virtual supply offers are wholly responsible for the entirety of the resettlement of past periods, arguing that "the Midwest ISO resettled past periods based on several factors, including the Commission's decisions on import transactions and Make-Whole Payments."¹⁶ The Financial Marketers assert there is no relation between past period refunds and the legality of the current provisions for RSG cost allocation

¹³ Complaint at 2.

¹⁴ Dynegy Comments at 3; *see also* Wisconsin Electric Comments at 3.

¹⁵ Midwest ISO Answer at 10. The Midwest ISO also sets forth the arguments from its answer to the Prior RSG Complaints in the event the Commission grants the request for consolidation. *Id.* at 11-14.

¹⁶ Financial Marketers Comments at 7-8.

under the TEMT. They argue that, without the requisite nexus of common facts and law, consolidating E.ON's Complaint with the Prior RSG Complaints would not increase efficiency or reduce the administrative burden on the Commission.

16. Finally, the Financial Marketers stress the need to resolve the complaints quickly since virtual marketers face considerable price uncertainty caused by the Prior RSG Complaints, and therefore request the Commission not to delay the resolution of the Prior RSG Complaints because of the billing disputes raised in E.ON's Complaint.

c. Answer

17. In its answer, E.ON argues that "there are common issues of law and fact associated with allocation of RSG charges, and administrative efficiency dictates that such proceedings should be dealt with together."¹⁷ E.ON asserts that Wabash raised resettlement issues in its prior complaint, as did the Midwest ISO in its answers to the Prior RSG Complaints. E.ON also argues that the Midwest ISO's assertions that the Complaint is an untimely intervention are "baseless and frivolous" because E.ON timely intervened as to the Prior RSG Complaints.¹⁸

d. Commission Determination

18. We need make no determination here because in the Order on Prior RSG Complaints, we denied E.ON's motion to consolidate.¹⁹ As the Commission indicated in that order, the issues E.ON raises do not implicate cost causation, the primary concern in the Prior RSG Complaints. We also consider the customer bill resettlement issues raised in this proceeding to be separate and distinct from the rate calculation issues raised in the Prior RSG Complaints. The issues in this proceeding can be decided without relying on the record in the previously-consolidated proceeding and accordingly, consolidation is not required.

B. Resettlement of Customer Bills for the Period April 1, 2005 through April 24, 2006

1. Background

19. In the RSG Order, the Commission found that, by not assessing RSG costs on market participants with virtual supply offers, the Midwest ISO had violated its TEMT

¹⁷ E.ON Answer at 19.

¹⁸ *Id.* at 16.

¹⁹ Order on Prior RSG Complaints, 121 FERC ¶ 61,205 at P 23.

and must make refunds back to the start of the energy markets, *i.e.*, April 1, 2005.²⁰ Upon reconsideration, the Commission exercised its equitable discretion and waived refunds applicable to this component of the RSG charge from market start.²¹ The Commission subsequently clarified that the waiver covered the period of time from market start to April 24, 2006, the date of the first order specifying that market participants making virtual supply offers would be liable for RSG costs per the terms of the TEMT. After that date, the Midwest ISO would be required to assess refunds.²²

2. Complaint

20. E.ON asserts that the Midwest ISO is erroneously resettling the hourly RSG rate for the period April 1, 2005 through April 24, 2006, even though the Commission did not order refunds for that period. E.ON notes that any refunds for this time period are improper, because while the RSG Order initially required cleared day-ahead virtual supply be resettled back to market startup on April 1, 2005 and ordered refunds for that period, the Commission later reversed that ruling and permitted the Midwest ISO to provide refunds beginning on April 25, 2006.

21. In addition, E.ON objects to the Midwest ISO's recalculation of the hourly RSG rate for this time period to include megawatt-hours of cleared day-ahead virtual supply. E.ON argues that the result of this recalculation is that the Midwest ISO has lowered the hourly rate more than 50 percent and caused a corresponding under-recovery of RSG costs. E.ON maintains that this has dramatically increased the second-pass Revenue Neutrality Uplift charge. E.ON estimates that the Midwest ISO's calculation will cost E.ON an additional cost of \$1.06 million.²³

22. E.ON asks that the Commission direct the Midwest ISO to: (1) correct its erroneous resettlement process; (2) "rerun the resettlements to charge all cleared virtual RSG charges based upon the fact that all cleared virtuals are required to make real-time energy withdrawals and, therefore, all cleared virtuals are eligible to pay RSG pursuant to the Commission's orders"; and (3) refund the amounts disproportionately allocated to market participants by the erroneous resettlements.²⁴

²⁰ RSG Order, 115 FERC ¶ 61,108 at P 26.

²¹ RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 92-96.

²² RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 102.

²³ Complaint, Exh. 2 at 5.

²⁴ Complaint at 2.

3. Responsive Pleadings

23. IPL filed comments in support of E.ON's Complaint. IPL contends that load-serving entities (LSEs) have been denied refunds for the period from April 1, 2005 to April 24, 2006, and are now assessed uplift payments based upon a recalculation that the Commission did not order. IPL argues that the Midwest ISO's resettlement method unilaterally recalculates RSG charges in a way that goes beyond the requirement of the Commission's orders and creates a new, unjust and unreasonable uplift burden on LSEs. Specifically, IPL argues that the Midwest ISO inappropriately calculates the RSG rate by including the megawatt-hours of cleared day-ahead virtual supply in the denominator of the rate calculation even though virtual suppliers cannot be assessed RSG charges for this time period. IPL argues that the correct rate would divide the RSG costs by the billing determinants for market participants paying the costs (rather than the billing determinants for all market participants). IPL argues the Midwest ISO's calculation results in a rate that is too low to collect the full amount of the RSG funds that are needed and the remaining unrecovered costs must be recovered via uplift to all load. IPL asks that the Commission clarify that any resettlement for this period should not add charges to LSEs – the parties originally injured by the Midwest ISO's misapplication of the TEMT.

24. By contrast, the Midwest ISO and the Financial Marketers oppose E.ON's Complaint. They argue that the Complaint is an impermissible rehearing request and collateral attack on the Commission's decision in the prior RSG orders not to require refunds for the period before April 25, 2006.

25. In particular, the Midwest ISO states that the Commission's reconsideration of its refund directive did not modify its rate calculation directives. According to the Midwest ISO, the RSG First Rehearing Order did not specifically direct the Midwest ISO to include virtual supply offers as a component of the RSG charge's divisor until after April 25, 2006. The Midwest ISO notes that E.ON did not seek rehearing of this issue and therefore, E.ON's argument is a collateral attack on the RSG First Rehearing Order. The Midwest ISO also disputes E.ON's claim that the results of the Midwest ISO's recalculation of pre-April 25, 2006 rates were unjust and unreasonable. The Midwest ISO argues that the RSG Second Rehearing Order found that the true-up mechanism in the TEMT was unchallenged, and was deemed to be just and reasonable when earlier accepted by the Commission.²⁵

26. The Financial Marketers note that, as of August 31, 2006, E.ON is no longer a member of the Midwest ISO and therefore, would be unaffected by any prospective change in the allocation of RSG costs granted under FPA section 206. They further argue

²⁵ Midwest ISO Answer at 7 (citing RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 58).

that there is no basis to consider section 40.3.3.a.ii (the RSG charge) separately from section 40.3.3.a.iii (the deviation rate), as E.ON recommends, since E.ON presents no reasonable argument to consider only half of the RSG tariff provisions.

4. Answer

27. E.ON contends that the Midwest ISO's resettlement for the period before April 25, 2006 is not based on an express Commission directive, "but rather upon the absence of any Commission statement *not* to do so."²⁶ E.ON is not taking issue with the Commission's prior RSG orders, but rather, the Midwest ISO's interpretation of the resettlement process. E.ON asserts that it only recently experienced a negative impact from the Midwest ISO's implementation of the Commission's RSG Orders and therefore, a rehearing request based on the absence of any directive would have been speculative.

28. While E.ON agrees with the Midwest ISO that the true-up mechanism was unchallenged, it argues that the mechanism was never formally proposed to the Commission or approved as a just and reasonable mechanism for collecting revenue shortfalls. E.ON further contends that

The Commission's observation that following the requirement in the TEMT to *only* charge entities that withdraw energy in real-time 'may result' in an under collection that can be recovered through uplift does not provide a basis for the Midwest ISO to fail to follow the TEMT by *not* charging entities that withdraw energy in real-time and then attempt to recover costs caused by failing to following the TEMT through uplift.[²⁷]

5. Commission Determination

29. We deny E.ON's request for a change in the resettlement process and corrections to the amounts allocated thereunder. We find that the Midwest ISO has implemented the RSG charge and rate according to the terms of the currently-effective TEMT. While we understand E.ON's concern that the effect of the Commission's orders has been to zero out the virtual supply component from the numerator of the rate formula and to retain virtual supply in the denominator, the Midwest ISO is correct that such a result conforms to Commission orders and to the effective rate on file.

²⁶ E.ON Answer at 14 (emphasis in original).

²⁷ *Id.* at 15 (emphasis in original).

30. Since the Commission exercised its discretion not to impose a refund requirement for the period from April 1, 2005 through April 24, 2006, the Midwest ISO was not required to allocate RSG costs in the RSG charge to market participants making virtual supply offers. Therefore, the allocation to virtual supply may be zero. However, the rest of the RSG rate formula requires the Midwest ISO to multiply the RSG charge by the per-unit RSG charge, which includes virtual supply in the denominator. Section 40.3.3.a.ii of the TEMT specifies that the real-time RSG charge is divided by the sum of total uncovered load withdrawn in the operating day, *virtual supply for the market participant in the day-ahead energy market*, and deviations from dispatch instructions of market participants withdrawing during that hour for the operating day.²⁸

31. The Midwest ISO is also correct that collecting amounts not recovered through the true-up provision conforms to the TEMT requirements previously accepted by the Commission. We disagree with E.ON that the Commission has not been presented with or approved the true-up mechanism. The true-up mechanism was included in the filing that led to the RSG Order, and the Commission accepted that provision in TEMT section 40.3.3.a.iii in the RSG Order.²⁹

C. Resettlement of Customer Bills for the Period Starting April 25, 2006

1. Background

32. In its prior RSG orders, the Commission stated that, consistent with the currently-effective TEMT, RSG charges can only be assessed on virtual supply offers for market participants that withdraw energy.³⁰ The Commission defined the withdrawal of energy to be a physical withdrawal since all transactions in the real-time market are physical.

²⁸ TEMT, Third Revised Volume No. 1, Second Revised Sheet No. 578.

²⁹ See RSG Order, 115 FERC ¶ 61,108 at P 87. The Commission affirmed that it had accepted this provision in the RSG Second Rehearing Order. RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 58.

³⁰ Section 40.3.3.a.ii states that, on any day when a market participant “actually withdraws Energy,” the market participant shall be charged a real-time RSG charge. See *supra* note 2.

The Commission also found that eligibility for RSG charges is based on whether the market participant is actually paying for real-time energy, *i.e.*, making a physical withdrawal.³¹ The Commission affirmed these findings in subsequent orders.³²

2. Complaint

33. E.ON asserts that the Midwest ISO is erroneously resettling the hourly RSG rate for the period beginning on April 25, 2006 because it is not assessing the recalculated hourly RSG rate to all cleared day-ahead virtual supply transactions. E.ON states that the Commission directed the Midwest ISO to ensure all market participants withdrawing energy in real time are charged an RSG charge. E.ON argues that all cleared virtual supply transactions are required to make real-time energy withdrawals and therefore are eligible to pay RSG charges. According to E.ON, every cleared day-ahead virtual supply transaction necessitates a subsequent equivalent volume of real-time energy withdrawal for which the virtual supplier is assessed the real-time locational margin price (LMP).

34. As support for the proposition that all cleared virtual supply transactions are required to make real-time energy withdrawals or purchases in real time, E.ON cites to a statement in the Midwest ISO's April 2005 Business Practices Manual that "[v]irtual Supply Offers are not tied to physical supply and as such become spot supply transactions in Real-Time."³³ E.ON concludes that since every cleared day-ahead virtual supply transaction results in a real-time physical withdrawal of energy, 100 percent of cleared day-ahead virtual supply transactions fall within the Commission's definition of physical withdrawal.³⁴

35. E.ON asserts that the Midwest ISO's failure to charge RSG costs to all cleared day-ahead virtual supply transactions results in significant net additional charges to E.ON due to the revenue shortfall that is being recovered through the second-pass Revenue

³¹ RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 139; RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 15.

³² RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 55; RSG Third Rehearing Order, 121 FERC ¶ 61,131 at P 54.

³³ Complaint at 8 and Exh. 1 (citing Midwest Market Initiative, Manual No. 003, Business Practices Manual for Energy Market Instruments, Version 5, Apr. 5, 2005, at pp. 6-1 to 6-5).

³⁴ *Id.* at 9 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 139).

Neutrality Uplift charge. E.ON estimates that the Midwest ISO's calculation will cost E.ON an additional \$625,000 for the period of time from April 25, 2006 through August 31, 2006.³⁵

3. Responsive Pleadings

36. Dynegy, IPL and Wisconsin Electric³⁶ filed comments supporting E.ON's Complaint. IPL argues that the prior RSG orders make clear that, from April 24, 2006 forward, virtual suppliers should be assessed RSG costs, and even with the "actually withdrawing energy" caveat, cleared day-ahead virtual supply transactions are eligible for RSG cost incurrence.³⁷

37. Dynegy states that the RSG charge allocation issues raised in the Complaint "are merely the symptom of a larger problem. As a result of an overly conservative interpretation of the [RAC] tariff provisions, the Midwest ISO regularly commits too many units via the RAC process," and therefore the resulting uplift charges are large.³⁸

38. By contrast, the Midwest ISO, the Financial Marketers, the Financial Participants and Integrys oppose E.ON's Complaint. The Midwest ISO disagrees with E.ON's assertion that all day-ahead cleared virtual supply offers result in a physical withdrawal of energy in real-time and as such, should be assessed RSG charges. The Midwest ISO states that, in the prior RSG orders, the Commission repeatedly stated that, under the currently-effective TEMT, RSG charges should be assessed only to virtual supply offers that result in the actual physical withdrawal of energy. The Midwest ISO notes that the Commission distinguished the assignment of RSG costs under the currently-effective TEMT (which assigns costs only to virtual traders withdrawing energy) and the assignment of RSG costs under any future tariff amendments (which could instead

³⁵ *Id.*, Exh. 2 at 5. E.ON notes that it withdrew from the Midwest ISO on September 1, 2006 and therefore is not affected by the resettlement of second-pass Revenue Neutrality Uplift charge for periods after that date.

³⁶ Wisconsin Electric incorporates by reference its comments in support of the Prior RSG Complaints.

³⁷ IPL Comments at 9.

³⁸ Dynegy Comments at 4.

allocate RSG costs to all virtual supply offers regardless of whether or not they withdraw energy).³⁹ The Midwest ISO also argues that the Commission explicitly recognized that a subset of virtual supply offers would not be assessed RSG costs.⁴⁰

39. Further, the Midwest ISO argues that the TEMT “must be construed in a manner that avoids rendering any of its provisions nugatory or self-contradictory.”⁴¹ The Midwest ISO argues that E.ON’s position is unreasonable because it undercuts the TEMT’s definition of virtual supply offer,⁴² and would render meaningless the “actual withdrawal” requirement in section 40.3.3.a.ii of the TEMT, by eliminating any difference between “virtual” and “actual” energy.

40. Finally, the Midwest ISO asserts that many parties sought rehearing on the “actual withdrawal” requirement and, therefore, understood that some virtual supply offers would be found not to have made actual withdrawals. The Midwest ISO argues that the Commission found these to be real issues in controversy and, therefore, its other pronouncements about the physical nature of transactions in the real-time energy market must be construed in that context.

41. Like the Midwest ISO, the Financial Participants argue that E.ON takes the prior RSG orders out of context to support its assertion that all virtual supply transactions that clear the day-ahead market must pay RSG charges. The Financial Participants argue that

³⁹ Midwest ISO Answer at 8 (citing RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 58).

⁴⁰ *Id.* at 8-9 (citing RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 58 (“[T]he charge is assessed only on market participants withdrawing energy in real-time and payment of the charge may result in less than full recovery of RSG costs since 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 RSG costs.”)).

⁴¹ *Id.* at 9 (citing *City of Holland, Mich. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,076, at P 21 (2005); *DTE Energy Trading, Inc., v. Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,062, at P 25 (2005); *Great Lakes Gas Transmission Ltd. P’ship and Ocean Energy Res., Inc.*, 93 FERC ¶ 61,008, at 61,019 (2000); *Panhandle Eastern Pipe Line Co.*, 74 FERC ¶ 61,109 (1996)).

⁴² The definition of virtual supply offer in section 1.340 of the TEMT states that a virtual supply offer is a transaction “not supported by a physical injection or reduction in withdrawals in commitment by a Resource.”

the Commission's prior orders demonstrate that RSG charges do not apply to virtual supply offers that do not actually withdraw any energy as determined on a daily or hourly basis. Rather, "the Commission has defined 'actually withdraws Energy' as requiring the physical withdrawal of energy in the [real-time] market and has held that virtual suppliers do not actually withdraw energy by virtue of their virtual supply transactions."⁴³

42. The Financial Participants argue that the Commission's prior RSG orders make clear that, under the currently-effective TEMT, the RSG charge is only applied to market participants withdrawing energy in real time, and that withdrawal refers to the demand for energy at a node or sink point.⁴⁴ The Financial Participants assert that, by virtue of its virtual supply offer, a market participant with an accepted virtual supply offer never: "demands energy; purchases energy; accepts title to energy; resells or transfers title to energy; physically removes energy from the [Midwest ISO] grid . . .; or is a [Midwest ISO] load,"⁴⁵ and therefore does not meet the common industry definition of a withdrawal of energy or demand for energy.⁴⁶

43. The Financial Participants also argue that the Commission's prior findings are inconsistent with the application of RSG charges to all accepted virtual supply offers.⁴⁷ The Financial Participants cite to Commission statements that, among other things: not all accepted virtual supply offers would be assessed RSG charges; "virtual supply offers do not involve physical withdrawals" when those virtual suppliers actually physically withdraw energy in other transactions; under the currently-effective TEMT, RSG charges would not recover all RSG costs; and, in the prior RSG proceedings, the Commission was not presented with a filing to amend the TEMT under FPA section 205 or a complaint

⁴³ Financial Participants Motion to Dismiss at 6.

⁴⁴ *Id.* (citing RSG Order, 115 FERC ¶ 61,108 at P 26, 77).

⁴⁵ *Id.* at 7.

⁴⁶ Integrys also agrees, noting that the Commission has recognized the difference between financial and physical transactions, and a financial participant never takes title to electricity or serves load. Integrys Protest at 10.

⁴⁷ Financial Participants Motion to Dismiss at 12-13 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 45, 139; RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 45, 57-58).

under FPA section 206.⁴⁸ They argue that these findings are incompatible with an interpretation of “withdraw energy” that means that virtual supply transactions involve the physical withdrawal of energy by virtual suppliers.⁴⁹

44. The Financial Participants also consider E.ON’s position to be unsupportable since a virtual supplier never pays for real-time energy because it never makes a physical withdrawal of energy. They contend that the Commission’s statements that virtual supply offers do not involve physical withdrawals, and that non-physical transactions such as virtual offers and bids are restricted to the day-ahead market do not permit an interpretation that a virtual supplier is engaging in physical withdrawals of energy.

45. The Financial Marketers, the Financial Participants and Integrys further argue that E.ON’s Complaint is an impermissible collateral attack on the Commission’s prior RSG orders. They argue that E.ON’s arguments have already been raised by other parties and rejected by the Commission. For example, they note that parties have previously asked the Commission to assess RSG costs not just to market participants that withdraw energy, but the Commission has rejected those requests on the basis that eligibility for RSG charges is based on whether the market participant is paying for real-time energy, *i.e.*, making a physical withdrawal.⁵⁰ The Financial Marketers and Financial Participants also note that because E.ON itself did not seek rehearing of the RSG First Rehearing Order on the issue of whether the “actually withdraws Energy” clause referred to physical withdrawal in real-time or settlement of virtual supply offers, E.ON’s arguments are a collateral attack on the prior RSG Orders.

⁴⁸ *Id.* at 14 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 45).

⁴⁹ The Financial Marketers also note that the Commission has stated, on several occasions, that the phrase “withdraw energy” refers to a physical withdrawal of energy. Financial Marketers Comments at 5 (citing RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 55).

⁵⁰ *Id.* at 6 (citing RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 60 (“[W]e also disagree with [Wisconsin Electric’s] position that virtual bids and offers will settle their entire day-ahead financial commitment in the real-time physical market. The financial settlement for virtual offers and bids are made in the day-ahead market. *No further settlement is required in the real-time market.*”) (emphasis in original)); Financial Participants Motion to Dismiss at 8-9, 15-16 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 129, 139-41; RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 55); Integrys Protest at 11-12 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 139-41; RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 22).

46. The Financial Marketers and Integrys further argue that E.ON's reliance on the Midwest ISO's April 2005 Business Practices Manual is misplaced. The Financial Marketers argue that "the Commission specifically noted that there were numerous flaws and errors in the Business Practice Manuals and that they did not correspond with the Tariff."⁵¹ The Financial Marketers also note that, even if the Business Practices Manual were current and accurate, "a company's tariff, not its manuals or handbooks, must define the rates, terms, and conditions of jurisdictional services provided by the company."⁵² Similarly, Integrys argues that the April 2005 Business Practices Manual does not assess RSG costs on virtual supply offers and only sets forth the financial arbitrage arrangement that provides the markets with virtual activity. Integrys also asserts that this language is contradicted by the TEMT, which expressly provides that, on any day when a market participant actually withdraws any energy, it shall be charged the real-time RSG charge.

47. Further, Integrys argues that E.ON's baseline assumption that all virtual supply offers cause RSG costs is wrong. Integrys asserts that assumption has not been tested despite the Commission's direction that the Midwest ISO prepare a study prior to implementation of a charge on virtual supply offers.⁵³

48. Finally, Integrys argues that the relief sought by E.ON – further resettlements and another assessment of RSG charges – would "further exacerbate the market uncertainty that exists today" and harm entities, such as itself, that have followed the Commission's direction and the Commission's orders.⁵⁴ Integrys argues that any changes to the RSG cost allocation methodology should be prospective, pursuant to a filing by the Midwest ISO under section 205, and result from the on-going stakeholder process.

4. Answer

49. E.ON disagrees that its Complaint is a collateral attack on prior Commission orders. It states that it has always interpreted those orders to require "assessment of RSG charges to all RSG-eligible market participants as resulting in RSG charges being assessed to one hundred percent of cleared day-ahead virtual supply transactions."⁵⁵

⁵¹ Financial Marketers Comments at 6.

⁵² *Id.* at 6-7 (citing RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 89-90; *Quest Energy, LLC v. Detroit Edison Co.*, 106 FERC ¶ 61,227 at P 20 (2004)).

⁵³ Integrys Protest at 8 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 88, 117; RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 22, 54).

⁵⁴ *Id.* at 12.

⁵⁵ E.ON Answer at 7.

Accordingly, it had no reason to request rehearing of prior orders. E.ON asserts that it is the Midwest ISO's flawed interpretation of Commission orders, notably the resulting erroneous resettlements, that are now negatively impacting E.ON; therefore E.ON is within its rights to challenge implementation in a new Complaint.

50. E.ON answers the comments of the Midwest ISO, the Financial Marketers, the Financial Participants and Integrys by expanding upon its interpretation of the Commission's prior orders.

51. First, E.ON states that its references to the prior RSG orders are not out of context, but rather "appropriate and demonstrative." Specifically, E.ON responds to the Financial Participants' arguments regarding the definition of "physical withdrawal" by noting that its definition is based on the Commission's prior orders.

52. Moreover, E.ON agrees with the Midwest ISO and Financial Participants that the Commission has "held that virtual suppliers are not to be charged RSG charges by virtue of their cleared day-ahead virtual supply offers *alone*, even if the clearing of such virtual supply is the factor that causes RSG to be incurred."⁵⁶ However, E.ON argues that the Commission "clearly held that whenever a virtual supplier purchases real-time energy for which the virtual supplier is charged LMP (*i.e.*, makes a 'physical withdrawal'), it is those real-time transactions that establish the virtual supplier's RSG eligibility."⁵⁷ E.ON asserts that for every cleared day-ahead virtual supply offer, "the market participant must execute in real-time a second transaction in which the market participant purchases real-time energy (*i.e.*, makes a physical withdrawal) . . . [and t]his real-time purchase makes the market participant eligible for RSG charges"⁵⁸

53. E.ON contends that the Commission ordered all enumerated RSG charge-type transactions to be assessed RSG costs if the market participant is eligible to pay RSG charges. According to E.ON, since entities that provide offers for virtual supply that clear day-ahead must subsequently withdraw real-time energy, the RSG rate is appropriately applied to virtual supply transactions as transactions that fall within the category of all RSG charge-type transactions of the market participants. E.ON maintains that the prior RSG orders would not make any sense if they were applied to all real-time energy purchases made by virtual suppliers because they would allow the Midwest ISO to avoid the TEMT requirement to charge RSG to virtual suppliers that engaged in real-time physical withdrawals.

⁵⁶ *Id.* at 4 (emphasis in original).

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 4.

54. E.ON further contends that “the reason the Commission ruled that all entities that engage in real-time energy withdrawals must also be eligible to pay RSG charges is that ‘it ensures that market participants buying real-time energy pay the full costs of energy, including guarantee costs for generators’ as the real-time LMP was not collecting all of the costs of real-time energy production.”⁵⁹ According to E.ON, the Commission concluded that “RSG charges should be applied to all cleared virtual supply transactions due to Midwest ISO’s market structure, which requires all virtual supply to be covered by the market participant with a second, subsequent real-time energy purchase for a like amount.”⁶⁰

55. In response to the Financial Participants, E.ON explains that the Commission recognized that the effective TEMT language

requires actual real-time energy withdrawal as a pre-requisite to charging any of the enumerated RSG charge allocation types. These statements are not rendered nugatory simply because one such charge type, virtual supply, always leads to a subsequent physical withdrawal of real-time energy, which effectively establishes the virtual supply market participant’s RSG eligibility.^{61]}

Also, E.ON claims that the Financial Participants err in stating that a virtual supplier never pays for real-time energy, noting that all of E.ON’s cleared day-ahead virtual supply transactions have resulted in assessment of the real-time LMP charge for the subsequent real-time energy withdrawal in settlement statements.

56. Finally, in response to Integrys’ arguments that resettlements would constitute retroactive refunds, E.ON asserts that refunds are appropriate because the current resettlements constitute retroactive charges that are inconsistent with the TEMT.

5. Commission Determination

57. We deny the relief requested in E.ON’s Complaint. First, we address E.ON’s argument that all cleared virtual supply offers must be assessed RSG charges because they result in a subsequent real-time energy purchase. We find no support for this interpretation in the TEMT or the Commission’s prior orders. The TEMT states that

⁵⁹ *Id.* at 5-6 (citing RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 22).

⁶⁰ *Id.* at 6.

⁶¹ *Id.* at 6-7.

RSG charges are applicable to market participants that withdraw energy. It is not reasonable to equate a physical withdrawal of energy with an accounting reconciliation for a purely financial trading transaction (which reconciles the sale of virtual energy in the day-ahead market with an equivalent purchase of virtual energy). Virtual supply offers occur in the day-ahead market only, and therefore are paid the day-ahead LMP. Virtual supply offers will never settle in the real-time market.

58. We recognize that E.ON relies on the Commission's prior findings in support for its position. However, the Commission's statement must be considered in its entirety and in the context of the words of the TEMT to determine the most reasonable interpretation. As E.ON notes, the Commission stated in the RSG First Rehearing Order:

All transactions in the real-time market are physical. Non-physical transactions such as virtual offers and bids, are restricted to the day-ahead market. Real-time settlement in currently-effective section 40.3.3 is based on quantity deviations from day-ahead schedules, including virtual offers and bids. In other words, settlement is based on the difference between real-time or physical injections and withdrawals, and the day-ahead schedules. Eligibility for RSG charges in the currently-effective tariff is based on whether the market participant is actually paying for real-time energy (and therefore paying the ex post LMP), *i.e.*, making a physical withdrawal; RSG charges are then allocated to that customer based on the costs that result from factors that cause additional unit commitment (load, virtual supply offers and resource deviations).^[62]

59. E.ON focuses on the language "eligibility for RSG charges in the currently-effective tariff is based on whether the market participant is actually paying for real-time energy," to make its argument that all cleared virtual supply offers result in a real-time energy purchase that triggers RSG liability. We find that its reading of the RSG First Rehearing Order is inappropriately narrow. The phrase E.ON cites is followed by "*i.e.*, making a physical withdrawal" – a circumstance not encompassed by a virtual supply accounting transaction. As we have found above, it is incorrect to equate a financial transaction with a physical one, and the paragraph also defines all transactions in the real-time market as physical transactions – inconsistent with E.ON's interpretation that there can be real-time virtual transactions. Accordingly, E.ON has taken the relied-upon language out of context.

⁶² RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 139.

60. Moreover, it is not reasonable to extrapolate, as E.ON does, that the Commission's labeling of all real-time transactions as physical means virtual offers are physical transactions. The second sentence of the above-cited paragraph directly refutes that interpretation by stating that non-physical transactions, such as virtual offers and bids, are restricted in the day-ahead market. Therefore, the most reasonable interpretation is that virtual transactions and real-time, physical transactions are separate and unrelated activities.

61. Second, E.ON has not provided any basis to conclude that a virtual supply offer necessitates a subsequent equivalent volume of real-time energy withdrawals. We believe E.ON has misinterpreted the accounting reconciliation example, and has assumed, without support, that an accounting reconciliation results in a physical withdrawal of energy. Similarly, E.ON has provided no support for its conjecture that virtual suppliers must execute real-time energy withdrawals. Again, there is a difference between the determination of a net charge to a virtual supplier and physical energy withdrawals and E.ON has failed to establish a basis to assume an accounting reconciliation necessarily entails a physical activity.

62. In this regard, we find unpersuasive the Business Practices Manual language that E.ON cites. The language is taken from an example of a financial accounting protocol for virtual traders that bears no relation to the actual withdrawal of energy. The (illustrative) accounting statement explains that the market participant making the virtual supply offer does not supply energy and thereby creates a short financial *position* in the real-time market – something that does not represent an actual withdrawal of energy. The Commission drew a similar distinction in the prior RSG orders, noting that bids and offers are market positions and are separate and distinct from the actual physical withdrawal of energy in the real-time market.⁶³ For this reason, we also disagree with E.ON's formulation that equates the real-time purchase in its example with the withdrawal of energy. In the context discussed above, the purchase of real-time energy denotes the accounting reconciliation for a virtual supply offer and therefore does not represent the actual withdrawal of energy. Therefore, reading in its entirety the statement in the Business Practices Manual E.ON cites – “[v]irtual supply offers are not tied to physical supply and as such become spot purchases in real-time” – we conclude the most reasonable interpretation is that a virtual supply offer represents a spot purchase for financial accounting purposes, in order to determine the basis to assess a net charge to the market participant. We find this interpretation further supported by language in the

⁶³ *Id.* P 141.

example cited by E.ON that characterizes the virtual supply offer as representing a short position in the real-time energy market. These statements therefore have no bearing on the actual withdrawal of energy.⁶⁴

63. In conclusion, we find E.ON's position to be an interpretation of select phrases in the TEMT and prior Commission orders that neither reflect the meaning of the TEMT provisions nor relate virtual supply offers to withdrawals of energy. We do not find it reasonable to interpret the statement "[o]n any day a market participant actually withdraws any energy" to include a purely financial transaction such as a virtual supply offer as a "withdrawal of energy." Rather, for the reasons outlined above, we consider the most reasonable interpretation of "withdraws any energy" to include only physical withdrawals of energy,⁶⁵ and not virtual supply offers and accounting reconciliations of virtual supply offers. Accordingly, we see no basis to allocate RSG charges to all virtual supply offers on the basis of the incorrect assertions that a virtual supply offer is equivalent to an energy withdrawal or that all cleared virtual offers and bids are required to make real-time physical withdrawals.

The Commission orders:

The relief requested in E.ON's Complaint is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

⁶⁴ Further, we agree with opponents of the Complaint that the statement cited to by E.ON is not a tariff provision and therefore does not represent a basis to determine the cost allocation of RSG charges. *See* RSG Third Rehearing Order, 121 FERC ¶ 61,131 at P 24-26, 37-39 (finding that the TEMT takes precedent over the Midwest ISO's statements and Business Practices Manuals).

⁶⁵ RSG Third Rehearing Order, 121 FERC ¶ 61,131 at P 54; RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 15, 55; RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 139.