

125 FERC ¶ 61,162
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Ameren Services Company
Northern Indiana Public Service Company

Docket No. EL07-86-001

v.

Midwest Independent Transmission System Operator,
Inc.

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
Wisconsin Public Power Inc.

Docket No. EL07-88-001

v.

Midwest Independent Transmission System Operator,
Inc.

Wabash Valley Power Association, Inc.

Docket No. EL07-92-001

v.

Midwest Independent Transmission System Operator,
Inc.

ORDER ON REHEARING

(Issued November 10, 2008)

1. On November 28, 2007, the Commission issued an order granting in part and denying in part the relief requested in three complaints filed under section 206 of the Federal Power Act (FPA)¹ against the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) regarding the allocation of Revenue Sufficiency Guarantee charges to market participants under the Midwest ISO's Open Access Transmission and Energy Markets Tariff (tariff).² The three complaints were filed in separate proceedings by Ameren Services Company and Northern Indiana Public Service Company (collectively, Ameren/Northern Indiana); 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); and Wabash Valley Power Association, Inc. (Wabash). The Commission found that the Midwest ISO's existing Revenue Sufficiency Guarantee cost allocation methodology may not be just and reasonable, but that the alternative cost allocation methodologies complainants proposed also had not been shown to be just and reasonable. The Commission established a refund effective date of August 10, 2007, and set the three complaints for paper hearing and investigation to review evidence and to establish a just and reasonable Revenue Sufficiency Guarantee cost allocation methodology. The Commission held this paper hearing in abeyance pending the conclusion of a then-ongoing stakeholder proceeding or February 1, 2008, whichever is earlier.

2. This order addresses requests for clarification and/or rehearing of the Order on Revenue Sufficiency Guarantee Complaints. For the reasons discussed below, we grant in part and deny in part the requests for clarification and/or rehearing.

I. Background**A. On-Going Proceedings in Docket No. ER04-691**

3. The Midwest ISO's tariff charges market participants withdrawing energy in the real-time energy market a real-time Revenue Sufficiency Guarantee charge based on their

¹ 16 U.S.C. § 824e (2006).

² *Ameren Services Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,205 (2007) (Order on Revenue Sufficiency Guarantee Complaints).

virtual supply offers and real-time load, injection, export and import deviations.³ The

³ Specifically, section 40.3.3.a.ii of the Midwest ISO tariff 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 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.

purpose of the Revenue Sufficiency Guarantee charge 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 or the real-time energy market – will receive no less than its offer price for start-up, no-load and incremental energy. Revenue Sufficiency Guarantee credits are paid to units scheduled in the Reliability Assessment Commitment or in the real-time market that do not earn sufficient real-time energy revenues to cover start-up and no-load costs.

4. On April 25, 2006, the Commission issued an order in Docket No. ER04-691 rejecting the Midwest ISO’s proposal to, among other things, remove references to virtual supply from the tariff provisions related to calculating Revenue Sufficiency Guarantee charges.⁴ The Commission further found that because the Midwest ISO had not been including virtual supply offers in its Revenue Sufficiency Guarantee calculations, it had violated its tariff and must make appropriate refunds.⁵ However, requests for rehearing of the Revenue Sufficiency Guarantee 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 Revenue Sufficiency Guarantee charges.⁶ It also required the Midwest ISO to undertake analysis to determine the amount of RSG costs caused by virtual supply offers and to resubmit a proposal.⁷

5. On March 15, 2007, the Commission issued two orders regarding the Midwest ISO’s Revenue Sufficiency Guarantee charges, the Second Rehearing Order and the First Compliance Order.⁸ In the Second Rehearing Order, the Commission reiterated that “the Midwest ISO’s tariff requires allocation of [Revenue Sufficiency Guarantee] 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

⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,108, at P 48-49 (Revenue Sufficiency Guarantee Order), *order on reh’g*, 117 FERC ¶ 61,113 (2006) (First Rehearing Order), *order on reh’g*, 118 FERC ¶ 61,212 (Second Rehearing Order), *order on reh’g*, 121 FERC ¶ 61,131 (2007) (Third Rehearing Order).

⁵ Revenue Sufficiency Guarantee Order, 115 FERC ¶ 61,108 at P 26.

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

⁷ *Id.* at P 117.

⁸ *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 (2007).

read.”⁹ 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.¹⁰ In the First Compliance Order, the Commission found that the Midwest ISO failed to analyze the relationship between virtual supply offers and Revenue Sufficiency Guarantee cost incurrence as required by the First Rehearing Order. The Commission 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 Revenue Sufficiency Guarantee costs to virtual supply offers, remains in effect.¹¹ On November 5, 2007, the Commission denied rehearing of the Second Rehearing Order and First Compliance Order and conditionally accepted the Midwest ISO’s second compliance filing in this proceeding.¹²

B. Revenue Sufficiency Guarantee Complaints

6. The complaints challenged the existing allocation of Revenue Sufficiency Guarantee charges to market participants under the tariff. The complainants alleged that the Revenue Sufficiency Guarantee rate, which is based in part on virtual supply offers, is unjustly and unreasonably assessed on only a subset of virtual supply offers.¹³ They argued that there is no justification for differentiating among virtual supply offers with regard to Revenue Sufficiency Guarantee charge allocation, and that the Commission’s prior orders have found that there is no basis to do so. They asked the Commission to set for hearing the issue of the revisions to the tariff necessary to remedy this alleged discrimination.

⁹ Second Rehearing Order, 118 FERC ¶ 61,212 at P 88 (internal citation omitted).

¹⁰ *Id.* P 88-98.

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

¹² Third Rehearing Order, 121 FERC ¶ 61,131 (2007); *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,132 (2007) (Second Compliance Order). An order on requests for rehearing and compliance as to the Second Compliance Order was issued November 7, 2008, in Docket Nos. ER04-691-088 and ER04-691-089. *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,156 (2008) (November 7 Order on Rehearing and Compliance).

¹³ The current tariff assesses Revenue Sufficiency Guarantee charges to the subset of market participants making a withdrawal of energy on the same day as they submit a virtual supply offer.

7. As discussed in greater detail below, the Order on Revenue Sufficiency Guarantee Complaints granted in part and denied in part the relief requested in the three complaints. The Commission found that the Midwest ISO's existing Revenue Sufficiency Guarantee cost allocation methodology may not be just and reasonable. The Commission also found that the Revenue Sufficiency Guarantee cost allocation methodologies complaints proposed also had not been shown to be just and reasonable. Therefore, the Commission established a refund effective date of August 10, 2007, consolidated the three complaint proceedings, and set the complaints for paper hearing and investigation to review evidence and to establish a just and reasonable Revenue Sufficiency Guarantee cost allocation methodology. The Commission held this paper hearing in abeyance pending the conclusion of an ongoing stakeholder proceeding or February 1, 2008, whichever is earlier.

C. Stakeholder Proceedings

8. Since November 2005, a working group of Midwest ISO market participants (RSG Task Force) has been working to identify possible improvements to the Revenue Sufficiency Guarantee cost allocation methodology. As discussed in greater detail below, on February 1, 2008, the Midwest ISO filed an informational filing stating that it is not able to meet the February 1, 2008 deadline set in the Order on Revenue Sufficiency Guarantee Complaints because the stakeholder proceeding was still ongoing (February 1 Informational Filing).

9. On March 3, 2008, the Midwest ISO filed what it calls "indicative" revisions to the tariff that reflect an alternative mechanism for allocating Revenue Sufficiency Guarantee charges and costs, and could form the basis for a later filing under section 205 of the FPA (Indicative Revisions).¹⁴ On August 21, 2008 the Commission issued an order commencing the paper hearing.¹⁵

II. Requests for Clarification and/or Rehearing

10. On December 6, 2007, Dynegy Power Marketing, Inc. (Dynegy) filed a motion for leave to intervene out of time.

11. Timely requests for clarification and/or rehearing of the Order on Revenue Sufficiency Guarantee Complaints were filed by: CAM Energy Trading, LLC, EPIC Merchant Energy, LLC (EPIC) and SESCO Enterprises, LLC (SESCO) (collectively, the

¹⁴ 16 U.S.C. § 824d (2006).

¹⁵ *Ameren Services Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,173 (2008).

Financial Marketers); Credit Suisse Energy LLC, DC Energy Midwest LLC, Lehman Brothers Commodity Services, Inc. and Morgan Stanley Capital Group Inc. (collectively, the Financial Participants); Edison Mission Energy, Edison Mission Marketing and Trading, Inc., and Midwest Generation EME, LLC (collectively, Edison); Integrys Energy Group, Inc. (Integrys); and Otter Tail Power Company (Otter Tail).

12. In addition, EPIC and SESCO (collectively, EPIC/SESCO) filed a separate emergency motion for clarification and/or rehearing. Indianapolis Power & Light Company (Indianapolis Power & Light) filed an answer.

13. On February 15, 2008, Integrys filed comments in response to the Midwest ISO's February 1 Informational Filing.

III. Discussion

A. Procedural Matters

14. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2008), the Commission will grant Dynegey's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

15. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1)(2008), prohibits answers to requests for rehearing. We will therefore reject Indianapolis Power & Light's answer.

B. Whether the Commission erred in finding the existing rate may be unjust and unreasonable

1. Order on Revenue Sufficiency Guarantee Complaints

16. In the Order on Revenue Sufficiency Guarantee Complaints, the Commission determined that the complainants established a *prima facie* case under FPA section 206 that the existing Revenue Sufficiency Guarantee cost allocation methodology may be unjust, unreasonable, unduly discriminatory and/or preferential. The Commission noted that the fact that a tariff provision was at one time found to be just and reasonable does not preclude the Commission from later reviewing the tariff provision to determine whether it continues to be just and reasonable.¹⁶

¹⁶ Order on Revenue Sufficiency Guarantee Complaints, 121 FERC ¶ 61,205 at P 33.

2. Requests for Clarification and/or Rehearing

17. Edison, EPIC/SESCO, the Financial Marketers and Integrys argue that the Commission erred in finding that complainants met their burden under section 206 to demonstrate that the existing rate may be unjust and unreasonable.

18. The Financial Marketers argue that there are no facts or evidence supporting the Commission's finding since the complainants presented no cost-of-service evidence demonstrating that virtual supply offers, unaccompanied by physical withdrawals of energy, cause Revenue Sufficiency Guarantee costs to be incurred. The Financial Marketers argue that without this showing it is factually and legally impermissible to find the existing Revenue Sufficiency Guarantee rate is unjust and unreasonable.¹⁷ The Financial Marketers also assert that granting the Revenue Sufficiency Guarantee Complaints is inconsistent with the Commission's findings that a study must be conducted that identifies Revenue Sufficiency Guarantee costs in a market that includes virtual supply as compared to Revenue Sufficiency Guarantee costs in a hypothetical market without virtual supply. They conclude that it is impossible to determine the impact of virtual supply offers on the incurrence of Revenue Sufficiency Guarantee costs without a cost-of-service study.

19. The Financial Marketers also argue that the Commission erred in granting the Revenue Sufficiency Guarantee Complaints because the complainants did not prove that the existing Revenue Sufficiency Guarantee rate is outside the zone of reasonableness. The Financial Marketers contend that the fact that Revenue Sufficiency Guarantee costs could be assigned more accurately is not sufficient to demonstrate that the existing rate is unjust and unreasonable. The Financial Marketers and Edison assert that the Commission erred in concluding that no party has challenged the finding that virtual supply offers cause Revenue Sufficiency Guarantee costs to be incurred. Each states that it has repeatedly challenged this claim.

20. The Financial Marketers and Edison further argue that it is arbitrary and capricious and a violation of the standards of reasoned decision-making for the Commission to find that the Revenue Sufficiency Guarantee tariff [provision?] is just and reasonable in one proceeding, but then reach a different conclusion in a later proceeding, based on the same evidence.¹⁸ Moreover, Edison argues that the Commission found in

¹⁷ The Financial Marketers assert a rate that allocates Revenue Sufficiency Guarantee costs in contravention of cost-causation principles is not just and reasonable and therefore is unlawful.

¹⁸ Financial Marketers Request for Rehearing at 12-13 (citing Second Rehearing Order, 118 FERC ¶ 61,213 at P 22, 58); Edison Request for Rehearing at 11 (citing, *inter alia*, Second Rehearing Order, 118 FERC ¶ 61,213 at P 22).

Docket No. ER04-691 that so long as the existing methodology required all parties that physically withdraw energy to share in the cost of reliably supplying energy, including Revenue Sufficiency Guarantee charges, the rate was consistent with cost-causation principles.¹⁹ Edison argues that the Commission erred in reversing this position, asserting that there is no evidence demonstrating that the current allocation methodology misallocates costs, and complainants did not submit additional facts on which to base a change in methodologies.

21. EPIC/SESCO and Integrys argue that the uncertainty caused by the Order on Revenue Sufficiency Guarantee Complaints is irreparably harming the Midwest ISO virtual and physical markets. EPIC/SESCO argue that because the order “threatens to retroactively assign a highly variable [Revenue Sufficiency Guarantee] surcharge on each megawatt of cleared virtual supply,” the number of economic virtual trades has decreased and is leading some companies to leave the Midwest ISO virtual market altogether.²⁰ EPIC/SESCO argue that reduction in virtual market activity in the Midwest ISO directly leads to a substantial increase in the price of energy in the region.

3. Commission Determination

22. The predicate for Commission authority under section 206 is that rate or practice that has been found to be just and reasonable may be found unjust and unreasonable in a later proceeding. “The fact that a rate was once found reasonable does not preclude a finding of unreasonableness in a subsequent proceeding.”²¹ The Commission also has found that litigation of the same issues does not preclude reexamination of very similar issues in a different context.²²

23. In the instant complaints, the complainants pointed to the Commission’s finding, based on the record in Docket No. ER04-691, that virtual supply offers can cause Revenue Sufficiency Guarantee costs whether the virtual offers are made by financial traders (that do not withdraw energy) or other participants with physical load and generation (that do withdraw energy).²³ The complainants argued that the currently-

¹⁹ Edison Request for Rehearing at 10-11 (citing Second Rehearing Order, 118 FERC ¶ 61,213 at P 22).

²⁰ EPIC/SESCO Request for Rehearing at 4.

²¹ *Oxy USA v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995).

²² See, e.g., *Am. Elec. Power Serv. Corp.*, 122 FERC ¶ 61,083 (2008); *Transcontinental Gas Pipe Line Corp.*, 85 FERC ¶ 61,357 (1998).

²³ See First Rehearing Order, 117 FERC ¶ 61,113 at P 111.

effective tariff is unduly discriminatory because it only assesses a Revenue Sufficiency Guarantee charge on market participants withdrawing energy. Market participants that do not withdraw energy, such as purely financial traders, escape the assignment of Revenue Sufficiency Guarantee costs.

24. We agree with the complainants that the critical issue is whether *any* virtual supply offer can cause Revenue Sufficiency Guarantee costs or whether only virtual supply offers of certain market participants can cause Revenue Sufficiency Guarantee costs – *i.e.*, whether the existing rate is unduly discriminatory. In the Order on Revenue Sufficiency Guarantee Complaints, the Commission considered the evidence in the record of Docket No. ER04-691, as sponsored by complainants, to provide a sufficient basis to find that the existing rate is unduly discriminatory. Since the central claim in the Revenue Sufficiency Guarantee Complaints is undue discrimination, we do not consider a zone of reasonableness to be the correct metric for determining if the Revenue Sufficiency Guarantee charge is just and reasonable.²⁴ We also do not find that a cost-of-service study would add guidance as to whether the current rate is unduly discriminatory. Accordingly, the assertion that virtual supply offers do not cause Revenue Sufficiency Guarantee costs does not persuade us to grant rehearing.

25. We disagree with the Financial Marketers' and Edison's contention that the Order on Revenue Sufficiency Guarantee Complaints concluded that no parties challenged the finding that virtual offers cause Revenue Sufficiency Guarantee costs. The Order on Revenue Sufficiency Guarantee Complaints found that no party challenged the Commission's prior finding that *purely virtual participants* cause Revenue Sufficiency Guarantee costs. In that order, the Commission was appropriately focused on the issue raised in the Revenue Sufficiency Guarantee Complaints – *i.e.*, whether market participants can cause Revenue Sufficiency Guarantee costs through their virtual supply offers, whether or not they withdraw energy.²⁵

²⁴ See *FPC v. Conway Corp.*, 426 U.S. 271, 279 (1976) ("The Commission must arrive at a rate level deemed by it to be just and reasonable, but in doing so it must consider the tendered allegations that the proposed rates are discriminatory and anticompetitive in effect.").

²⁵ Order on Revenue Sufficiency Guarantee Complaints, 121 FERC ¶ 61,205 at P 81, n.79 ("We disagree with opponents to the Complaints that the evidence developed during the [Revenue Sufficiency Guarantee] proceeding does not support the position that purely virtual participants cause [Revenue Sufficiency Guarantee] costs. In the several compliance and rehearing orders after the . . . First Rehearing Order, no party challenged this finding. . . . Some entities did contend that the [Revenue Sufficiency Guarantee] rate should be modified or refined.").

26. Finally, we disagree with the Financial Marketers and Edison's claims that the Commission's action in the Order on Revenue Sufficiency Guarantee Complaints was improper because the Commission had previously found, in the Second Rehearing Order, that the current rate is just and reasonable. First of all, as noted above, a finding that a rate is reasonable does not preclude the Commission from finding in a later proceeding that the same rate is unreasonable.²⁶ Second, the finding was made in response to a very narrow argument, which was that the Commission had improperly failed to limit the definition of a withdrawal of energy.²⁷ The Commission found that it could not make changes to an approved rate (such as the proposed change to the definition of a withdrawal) in a section 205 proceeding. It also concluded that the basic approach of the rate was just and reasonable, *i.e.*, the currently-effective tariff "ensures that market participants buying real-time energy pay the full cost of energy, including guarantee costs for generators," but noted that the cost allocation "arguably could be refined or improved."²⁸ We resist Financial Marketers' and Edison's efforts to take the Commission's initial finding out of its specific context and use it to preclude further inquiry generally.

27. Similarly, in paragraph 58 of the Second Rehearing Order, which the Financial Marketers cite in support of their arguments, the Commission stated that "we do not find the calculation of the charge to be arbitrary or unduly discriminatory since the end-result of the charge does not result in any harm." This determination was made in the context of a discussion of the impact of a potential rate mismatch; it is not an all-purpose endorsement of the cost allocation. For these reasons we do not find a basis for Financial Marketers and Edison's claims that the Commission's specific findings in these instances demonstrate that its later action was improper, and we deny the requests for rehearing.

C. **Whether the Commission erred in finding that there was no mismatch between the Revenue Sufficiency Guarantee charge and Revenue Sufficiency Guarantee rate**

1. **Order on Revenue Sufficiency Guarantee Complaints**

28. Certain complainants argued that there was a mismatch between the Revenue Sufficiency Guarantee charge and Revenue Sufficiency Guarantee rate. Specifically, these complainants are concerned that the numerator of the charge and rate only include virtual offers for market participants withdrawing energy whereas the denominator of the

²⁶ *See supra* P 22.

²⁷ Second Rehearing Order, 118 FERC ¶ 61, 212 at P 16, 22.

²⁸ *Id.*

rate includes virtual offers for all market participants, resulting in a mismatch. The Commission found that the Revenue Sufficiency Guarantee charge and rate calculations appropriately recover the costs at issue but, to the extent the Midwest ISO is misinterpreting the tariff provisions, refunds will be required.²⁹

2. Requests for Clarification and/or Rehearing

29. The Midwest TDUs argue that the Midwest ISO has consistently implemented section 40.3.3 of its tariff in a way that causes the denominator used in calculating the real-time Revenue Sufficiency Guarantee rate to exceed the billing determinants to which the rate is applied. They argue that the Commission's findings in the Second Compliance Order and Order on Revenue Sufficiency Guarantee Complaints make clear that if the rate is properly interpreted, there is no mismatch. To the extent this finding could be reversed by the Commission or the Court of Appeals, the Midwest TDUs seek clarification and/or rehearing of the Commission's denial of relief on this issue.

3. Commission Determination

30. As stated in the Order on Revenue Sufficiency Guarantee Complaints and the Second Compliance Order, and reiterated in the concurrently-issued order on rehearing and compliance in Docket No. ER04-691-088, the existing tariff language, if properly interpreted, does not create a mismatch. If the Midwest ISO properly calculates Revenue Sufficiency Guarantee charges, the amounts of the individual Revenue Sufficiency Guarantee charges in section 40.3.3.ii should sum to the same 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.

D. Whether the Commission erred in finding the Complainants met their burden to specify a new rate

1. Order on Revenue Sufficiency Guarantee Complaints

31. In the Order on Revenue Sufficiency Guarantee Complaints, the Commission found that complainants offered alternative Revenue Sufficiency Guarantee cost allocation methodologies, as required as part of their burden under FPA section 206, but

²⁹ Order on Revenue Sufficiency Guarantee Complaints, 121 FERC ¶ 61,205 at P 86.

could not find these mechanisms to be just and reasonable without additional facts and analysis.³⁰

2. Requests for Clarification and/or Rehearing

32. The Financial Marketers argue that complainants failed to meet their burden under section 206 to propose a new, just and reasonable, rate. The Financial Marketers argue that complainants presented no evidence that eliminating the phrase “actually withdraws energy” from the existing Revenue Sufficiency Guarantee tariff provisions would result in a rate that is more closely aligned with cost causation principles than the existing rate. The Financial Marketers also object to complainants’ suggestion that the Commission should rely on a future FPA section 205 rate proposal, established through the RSG Task Force, to develop a new, just and reasonable Revenue Sufficiency Guarantee rate. The Financial Marketers argue that this would shift the burden from complainants, the proponents of the new rate, to the Midwest ISO.

33. The Financial Marketers also note that the Commission previously rejected the very rate change complainants propose,³¹ and therefore, the Commission erred in finding that complainants met their burden under section 206 to propose a new rate.

3. Commission Determination

34. As discussed above, in the Revenue Sufficiency Guarantee Complaints, the complainants argue that Revenue Sufficiency Guarantee costs should be allocated to market participants regardless of whether they withdraw energy. In the Order on Revenue Sufficiency Guarantee Complaints, the Commission found that complainants established a sufficient basis for their claim and that further cost-causation evidence is not needed to determine whether the current rate is unjust and reasonable.

35. In order for a section 206 complaint to *succeed*, a new, just and reasonable rate must be established. Commission precedent does not require that the final rate be completely specified in the initial filing by complainants; it may be necessary to specify such a rate through hearing procedures and/or additional filings.³² We expect that a

³⁰ Order on Revenue Sufficiency Guarantee Complaints, 121 FERC ¶ 61,205 at P 81.

³¹ Financial Marketers Request for Rehearing at 16 (citing First Compliance Order, 118 FERC ¶ 61,213, at P 84, 88).

³² *See, e.g., San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120, at 61,156, *order on reh’g*, 97 FERC ¶ 61,175 (2001), *order on reh’g*, 99 FERC ¶ 61,160, *order on reh’g*, 101 FERC ¶ 61,329 (2002), *order on reh’g*, 105 FERC ¶ 61,065 (2003) (collectively,

(continued)

fully-specified rate will result from the proceedings in this docket, and therefore, the ultimate rate will meet the requirements of section 206. As detailed in the Order Commencing Paper Hearing, the burden of proof remains with the complainants and does not shift to the Midwest ISO.³³

E. Whether the Commission erred in establishing a refund effective date of August 10, 2007

1. Order on Revenue Sufficiency Guarantee Complaints

36. In the Order on Revenue Sufficiency Guarantee Complaints, the Commission established a refund effective date of August 10, 2007. In addition, the Commission denied relief with respect to the alleged mismatch between the Revenue Sufficiency Guarantee rate and the Revenue Sufficiency Guarantee charge, noting that the Revenue Sufficiency Guarantee Second Compliance Order found there is no mismatch and required refunds to the extent the Midwest ISO had erroneously interpreted these tariff provisions.³⁴

2. Requests for Clarification and/or Rehearing

37. Edison, EPIC/SESCO, the Financial Marketers, the Financial Participants, Integrys and Otter Tail argue that the Commission erred in establishing a refund effective date of August 10, 2007.

38. Edison, the Financial Marketers and Otter Tail argue that, contrary to the precedent cited in the Order on Revenue Sufficiency Guarantee Complaints,³⁵ market participants in this case did not have notice that the existing rate is tentative and might be disallowed. The Financial Marketers argue that the precedent cited by the Commission requires that the Commission – not complainants – provide notice to market participants

California Refund Proceeding cases).

³³ *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Oper.*, 124 FERC ¶ 61,173 at P 9 (2008), *reh'g pending*.

³⁴ Order on Revenue Sufficiency Guarantee Complaints, 121 FERC ¶ 61,205 at P 86.

³⁵ Financial Marketers Request for Rehearing at 20-21 (citing, *inter alia*, *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007); *OXY USA, Inc. v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995); *Pub. Utils. Comm'n of the State of Cal. v. FERC*, 988 F.2d 154, 163 (D.C. Cir. 1993)) (*CAPUC v. FERC*); Edison Request for Rehearing at 22 (citing same).

before changing a rate. Edison argues that it, and others, submitted virtual supply bids that assumed that the existing methodology would remain in place. It argues that, by failing to establish a replacement rate, the Commission has made it difficult for virtual suppliers to participate efficiently in the marketplace. Edison also notes that the Midwest ISO has informed stakeholders in the RSG Task Force proceedings that it:

does “not have the capability to” provide historical information as to how its proposed new allocation methodology would have allocated costs in the past. . . . Therefore, when and if the Commission approves a new cost allocation methodology, the information likely will not be available to determine cost responsibility on an historical basis for purposes of calculating refunds.³⁶

39. The Financial Marketers and Integrys argue that FPA section 206 does not permit the Commission to assign retroactive Revenue Sufficiency Guarantee charges on transactions exempt from paying them. The Financial Marketers argue that

[s]ection 206 states that the Commission may order a utility to refund the difference between the rates charged and the rate later determined to be just and reasonable for any period subsequent to the refund effective date. There is a critical legal distinction, however, between modifying the magnitude of an existing rate already paid by a Market Participant, and retroactively imposing a new charge on a Participant that is currently not subject to paying the rate at all.³⁷

40. EPIC/SESCO also ask the Commission to clarify that it will not impose “retroactive” refunds from market participants that currently pay no Revenue Sufficiency Guarantee costs under the current tariff. They argue that “[e]xercising the Commission’s discretion to not order retroactive refunds until after a new rate is accepted would allow virtual Market Participants to continue transacting in the [Midwest ISO] energy markets without becoming subject to unknown, unknowable and potentially very high [Revenue Sufficiency Guarantee] transaction costs.”³⁸ EPIC/SESCO ask that, at a minimum, the Commission clarify that the current Revenue Sufficiency Guarantee rate will remain in effect until a new rate has been approved.

³⁶ *Id.* at 24-25.

³⁷ Financial Marketers Request for Rehearing at 22 (internal citations omitted).

³⁸ EPIC/SESCO Request for Rehearing at 7.

41. Similarly, the Financial Participants argue that, under section 206(b), “the Commission cannot use a refund effective date to impose a new rate on market participants that are not currently subject to the rate under the filed tariff and who have not provided the subject jurisdictional services or collected, let alone over-collected, any charges for such services.”³⁹ The Financial Participants also argue that the Commission has conflated sections 206(a) and section 206(b). They argue that the Commission may hold a hearing to correct rates that are not just and reasonable and may establish just and reasonable rates to be “thereafter observed and in force” under section 206(a). However, the Financial Participants argue that section 206(b) does not authorize the Commission to require parties that neither provided the jurisdictional services nor collected the excessive charges to refund over-payments. They argue that section 206(b) does not permit the Commission to use a refund effective date as a new charge effective date where no refunds of overpayments from the parties who received the overpayment are involved.

42. Moreover, the Financial Participants argue that the Commission “completely failed to engage in any legal analysis of its authority to use FPA section 206 in the contortionist manner implicit in the [Order on Revenue Sufficiency Guarantee Complaints].”⁴⁰ The Financial Participants argue that the cases cited in the original complaints and in the answers to its motion to dismiss the original complaints do not support refunds. The Financial Participants argue that, in the Order on Revenue Sufficiency Guarantee Complaints, the Commission failed to address the two cases Ameren/Northern Indiana cited in support of their request for a refund effective date. They state that, as argued in their motion to dismiss the complaints, the cases cited in the original complaints⁴¹ do not support complainants’ attempt to use a refund effective date to establish a new rate for customers who never supplied or overcharged for the jurisdictional service. The Financial Participants also argue that relying on the California Refund Proceeding cases is not appropriate because, unlike the situation in California, virtual suppliers did not provide jurisdictional services for which the alleged unjust and unreasonable rate was charged. The Financial Participants also argue that reliance on *ISO New England, Inc.*⁴² is inapposite because market participants have not received adequate notice regarding the type of Revenue Sufficiency Guarantee allocation the Commission will accept. The Financial Participants also argue that *Canal Electric*

³⁹ Financial Participants Request for Rehearing at 30.

⁴⁰ Financial Participants Request for Rehearing at 44.

⁴¹ *Id.* at 35-37 (citing *Louisiana Pub. Serv. Comm’n*, 51 FERC ¶ 61,218 (1990); *Maine Pub. Utils. Comm’n v. Central Maine Power Co.*, 111 FERC ¶ 61,283 (2005)).

⁴² *Id.* at 37-38 (citing California Refund Proceeding cases; *ISO New England Inc.*, 100 FERC ¶ 61,245, at P 25 (2002)).

*Company*⁴³ is irrelevant because it did not involve using a refund effective date to establish a new rate applicable to customers who were exempt from charges under the applicable tariff and where the application of the rate would negatively affect the commercial decisions made by the parties that would be subject to the new rate. Finally, the Financial Participants argue that reliance on the *Independent Energy Producers Association v. California Independent System Operator Corporation* proceeding⁴⁴ does not support the complaints either, because the rates in that case were applied prospectively, and the Commission was acting pursuant to its broad settlement authority.

43. The Financial Marketers and Otter Tail also argue that the Order on Revenue Sufficiency Guarantee Complaints improperly directs the Midwest ISO to make refunds in a separate proceeding before the Commission. They seek clarification that any refunds relating to the calculation of Revenue Sufficiency Guarantee charges and any refunds prior to August 10, 2007 will be directed in Docket No. ER04-691 alone, and that the Commission statement ordering refunds is not intended to be a requirement of the Order on Revenue Sufficiency Guarantee Complaints. Otter Tail argues that the sole basis for requiring refunds associated with the Midwest ISO's misinterpretation of tariff language is the clarification offered in paragraph 26 of the Second Compliance Order. Otter Tail argues that if the Commission agrees with the Midwest ISO and certain protesters that the clarification is incorrect, and therefore, reverses its decision to require refunds, then it should also reverse its decision to require refunds in this docket for the period beginning August 10, 2007.

44. Edison and EPIC/SESCO ask that the Commission set a refund effective date as of the date of the Commission's final merits order on the complaint. If the Commission does not issue its final merits ruling on the Complaint until more than five months after the filing date, the Commission should set January 10, 2008, the latest possible refund effective date allowed under section 206, as the refund effective date. They maintain that this is necessary to encourage virtual trading to continue. Integrys seeks a refund effective date that is prospective based on similar considerations.

3. Commission Determination

45. We disagree that market participants in this case did not have notice that the existing rate is tentative and might be disallowed. The Financial Marketers argue that the

⁴³ *Id.* at 41 (citing *Canal Electric Co.*, 46 FERC ¶ 61,153, *order on reh'g*, 47 FERC ¶ 61,275 (1989)).

⁴⁴ *Id.* at 41-42 (citing *Indep. Energy Producers Ass'n v. Cal. Indep. System Operator Corp.*, 116 FERC ¶ 61,069, *clarified*, 116 FERC ¶ 61,297 (2006), *order on paper hearing*, 118 FERC ¶ 61,096, *order on reh'g*, 119 FERC ¶ 61,266 (2007)).

relevant precedent requires notice by the Commission and not the complainants, but that precedent in no way makes notice dependent on mere formalities. On the contrary, the courts have made clear the relevant question is whether “as a practical matter” a party had sufficient notice,⁴⁵ and “notice from FERC is not always required.”⁴⁶ There will be sufficient notice when “the events surrounding” a matter “cannot have failed to alert” a party of a possible change.⁴⁷

46. The Commission stated in the First Rehearing Order that virtual supply offers can cause Revenue Sufficiency Guarantee costs “whether [the offers] are made by financial trader market participants or other market participants with physical load and generation,” and found “no basis to differentiate among virtual supply offers since any virtual supply offer could result in physical unit commitment to meet the physical needs of the real-time energy market.”⁴⁸ Given the Commission’s unequivocal statements on this point, we fail to see how the Financial Marketers or others were not alerted to a possible change in the rate.

47. In response to EPIC/SESCO, the concurrently-issued Order on Paper Hearing requires refunds of all market participants. That order states, in response to a similar argument from other financial traders, that virtual market participants are market participants under the tariff, and therefore the justness and reasonableness of the terms of the tariff that are pertinent to them is an appropriate subject. The Commission has found in that order that the tariff provision under which EPIC/SESCO (and other virtual participants) paid no RSG charges is unduly discriminatory because it exempts certain market participants that cause RSG costs from a share of the responsibility for those costs. It would be unduly discriminatory to continue this pattern by exempting EPIC/SESCO, and other market participants that did not pay RSG charges, from such charges during the refund period. We therefore decline to make the clarification that these participants request.

48. The Order on Revenue Sufficiency Guarantee Complaints does not conflate the Commission’s authority under sections 205 and 206, or the various provisions of section 206 itself. The Financial Participants’ statement that “section 206(b) does not authorize

⁴⁵ *Calif. Public Utils. Comm’n v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993).

⁴⁶ *Id.* at 165 (citing *Consolidated Edison v. FERC*, 958 F.2d 429 (D.C. Cir. 1992)).

⁴⁷ *Id.* at 164.

⁴⁸ Revenue Sufficiency Guarantee First Rehearing Order, 117 FERC ¶ 61,113 at P 111.

the Commission to require parties that neither provided the jurisdictional services nor collected the excessive charges to refund over-payments” fundamentally mischaracterizes the situation at hand. Virtual market participants are market participants under the tariff, and therefore the justness and reasonableness of the terms and conditions of the tariff that are pertinent to them is an appropriate subject here. The issue is not whether virtual market participants “supplied or overcharged for the jurisdictional service” but rather whether any refunds made or any surcharges assessed by the Midwest ISO would apply to them also. We conclude that they would apply to virtual market participants in the same way that they would apply to other market participants, and whether a market participant is supplying a jurisdictional service does not affect this conclusion.

49. The purpose of the section 206 investigation is to determine whether the existing rate is unjust and unreasonable and, if so, what the appropriate Revenue Sufficiency Guarantee cost allocation methodology should be. The Commission does not have the authority to order refunds under FPA section 206 prior to the refund effective date of August 10, 2007 set in Order on Revenue Sufficiency Guarantee Complaints.⁴⁹ Therefore, in response to Financial Marketers and Otter Tail, we confirm that the Order on Revenue Sufficiency Guarantee Complaints does not direct the Midwest ISO to order refunds in a separate proceeding.

50. In response to requests that the refund effective date be the date of the Commission’s final merits order on the complaint, or January 10, 2008 if the order is issued more than five months after the filing date, we noted in the Order on Revenue Sufficiency Guarantee Complaints that Commission policy is to establish the earliest refund effective date allowed. The purpose of this policy is to give maximum protection to the customers that are exposed to a charge that is unjust and unreasonable.⁵⁰ The requests for the latest possible refund effective date are based on the premise that this approach is necessary to encourage virtual trading to continue. They do not, however, explain why this goal outweighs the considerations on which existing policy is based, and we therefore deny the requests.

⁴⁹ As discussed in the November 7 Order on Rehearing and Compliance in Docket Nos. ER04-691-088 and ER04-691-089, that ongoing Revenue Sufficiency Guarantee proceeding (under FPA section 205) pertains to the applicable tariff provisions and whether refunds/resettlements are warranted prior to August 10, 2007.

⁵⁰ *See, e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal*, 46 FERC ¶ 61,153, at 61,539, *reh’g denied*, 47 FERC ¶ 61,275 (1989).

51. Finally, we clarify that the refunds associated with the rate mismatch are requirements of the Second Compliance Order, and do not represent separate and additional requirements of the Order on Revenue Sufficiency Guarantee Complaints.

F. Whether the Commission erred in limiting the scope of the paper hearing

1. Order on Revenue Sufficiency Guarantee Complaints

52. In the Order on Revenue Sufficiency Guarantee Complaints, the Commission instituted a paper hearing investigation to develop the cost causation analysis needed to develop and support a revised cost allocation.⁵¹ The Commission clarified that the paper hearing process would be limited to the issues of cost allocation and would not include reargument of the benefits of virtual offers.⁵²

2. Requests for Clarification and/or Rehearing

53. Several entities, including the Financial Participants, Financial Marketers, Edison and Integrys, seek clarification and/or rehearing regarding the scope of the paper hearing. These entities seek to ensure that the paper hearing process will include an analysis of cost causation and the harm to the Midwest ISO energy markets that would result if the Commission adopts a rate that reduces virtual suppliers' participation in virtual energy markets.

54. With respect to whether an analysis of cost causation is necessary, the Financial Participants and Integrys note that the proceedings in Docket No. ER04-691 did not resolve cost causation issues because the Commission did not receive the requested cost causation analysis from the Midwest ISO.⁵³ They request clarification that the hearing will include issues of whether particular virtual supply transactions cause Revenue Sufficiency Guarantee costs to be incurred, and if so, the extent of such incurrence.

⁵¹ Order on Revenue Sufficiency Guarantee Complaints, 121 FERC ¶ 61,205 at P 82.

⁵² *Id.* P 84.

⁵³ Financial Participants disagree with the Commission determination that no party challenged the Commission finding that virtual participants cause Revenue Sufficiency Guarantee costs. Financial Participants Request for Rehearing at 23 (citing Order on Revenue Sufficiency Guarantee Complaints, 121 FERC ¶ 61,205 at P 81). Financial Participants, as well as Edison, repeat their claims that virtual offers do not cause Revenue Sufficiency Guarantee costs to be incurred.

Edison, the Financial Participants and Integrys further argue that the evidence of cost causation in the record of Docket No. ER04-691 is flawed. They note that the Order on Revenue Sufficiency Guarantee Complaints relies on an example from Ameren cited in the First Rehearing Order, but that example, in turn, erroneously relies on a RAC commitment methodology that produces a result inconsistent with the tariff.⁵⁴ Integrys asserts that the Commission has failed to require a showing that an action causes costs to be incurred. Similarly, Edison objects to excluding cost causation from the paper hearing, asserting that the Commission's finding that virtual offers cause Revenue Sufficiency Guarantee costs is legal injury.

55. EPIC/SESCO also ask the Commission to clarify that cost causation will be considered in the paper hearing and that the paper hearing must consider the role of virtual transactions in reducing Revenue Sufficiency Guarantee costs. The Financial Marketers seek clarification that the Commission will require a cost-of-service analysis prior to accepting a new rate that imposes Revenue Sufficiency Guarantee costs on virtual supply offers to ensure that cost causation issues are considered.

56. With respect to the preclusion of the effects of any new Revenue Sufficiency Guarantee rate on the Midwest ISO markets, the Financial Participants argue that the Commission cannot establish a new just and reasonable rate without evaluating the impacts of that rate on the Midwest ISO energy markets. The Financial Participants assert that this analysis is needed because the proceeding in Docket No. ER04-691 did not address the competitive harms to the Midwest ISO energy markets⁵⁵ of a Revenue Sufficiency Guarantee charge assessed to virtual suppliers.⁵⁶ The Financial Participants also argue that the rate being proposed would apply to a broader range of market participants – all virtual suppliers, not just virtual suppliers of parties withdrawing energy – with potentially greater negative impacts than were considered in Docket No. ER04-691. The Financial Participants further assert that the financial harm to the Midwest ISO

⁵⁴ *Id.* at 27.

⁵⁵ As examples of such harms, the Financial Participants argue that a less robust market leads to less liquidity, less overall market efficiency, more volatility and less convergence between the day-ahead and real-time markets. Financial Participants Request for Rehearing at 6, 15-16.

⁵⁶ The Financial Participants assert that the proper interpretation of the Commission's orders in Docket No. ER04-691 is that the Commission deferred consideration of benefits until such time as parties were given an opportunity to review a proposed cost allocation and submit comments to the Commission. Financial Participants Request for Rehearing at 15.

is greater than the amounts collected by assessing the Revenue Sufficiency Guarantee charge to virtual suppliers.

57. The Financial Marketers also request that the paper hearing include evidence that virtual transactions may reduce Revenue Sufficiency Guarantee costs to the market, noting that they provided substantial evidence in Docket No. ER04-691 that virtual offers reduce or prevent Revenue Sufficiency Guarantee costs from being incurred. The Financial Marketers also cite the Commission's finding that the benefits of virtual transactions may have a bearing on the ultimate cost allocation the Commission approves.⁵⁷ Similarly, Integrys asserts that the Commission must declare that all issues related to costs, benefits and allocation may be addressed in deriving a just and reasonable rate for Revenue Sufficiency Guarantee charges.

58. Finally, Edison argues that the Commission needs to address another related problem in the Midwest ISO markets. It argues that the Midwest ISO's real-time pricing software that calculates locational energy pricing fails to identify a significant amount of energy that is supplied by peaking generation and, as a result, the cost of energy supplied by these peaking plants is included in the cost of Revenue Sufficiency Guarantee and energy prices are artificially suppressed. Edison notes that the Midwest ISO has acknowledged that there are flaws in the real-time pricing software, and these flaws are slated to be corrected by a major software overhaul that the Midwest ISO has informed market participants will take some time to complete. Edison states that the Commission should encourage a swift resolution and implementation of the software change.

3. Commission Determination

59. We clarify the scope of the paper hearing required by the Order on Revenue Sufficiency Guarantee Complaints to determine a just and reasonable cost allocation methodology. In order for a section 206 complaint to succeed, the existing rate must be shown to be unjust and unreasonable and an alternative rate must be proposed and demonstrated to be just and reasonable. In order to determine what that alternative rate should be, we expect parties to provide evidence bearing on the appropriate cost allocation for the Revenue Sufficiency Guarantee charge. A basis of a just and reasonable cost allocation is cost causation. Therefore, we will permit complainants and other parties to include cost causation evidence in the paper hearing process.⁵⁸

⁵⁷ Financial Marketers Request for Rehearing at 26 n.60 (citing First Rehearing Order, 117 FERC ¶ 61,113 at P 112).

⁵⁸ Inasmuch as we provide parties the opportunity to address cost causation, we find no basis to conclude that the Commission's initial finding that virtual supply offers cause Revenue Sufficiency Guarantee Charges is the legal injury, as Edison alleges it is.

60. With respect to market impacts, we will not require complainants and other parties to offer evidence, in the form of information or estimates, of: (1) what the market impact of the proposed cost allocation may be in the Midwest ISO energy market, or (2) the benefits of virtual supply offers. We clarify that while parties may raise such concerns and offer relevant information into the record, the primary task of the section 206 proceeding, as stated in the Order on Revenue Sufficiency Guarantee Complaints, is to determine whether the existing rate is unjust and unreasonable and if so, what would be a just and reasonable rate.

61. Similarly, with respect to software flaws, we will not require complainants and other parties to offer evidence. We clarify that while parties may raise such concerns and offer relevant information into the record, the primary task of the section 206 proceeding is to determine whether the existing rate is unjust and unreasonable and if so, what would be a just and reasonable rate.

62. These clarifications will ensure the complainants satisfy their burden required under section 206 and that the Commission has fully evaluated the effect of the revised rate.

The Commission orders:

The requests for clarification and/or rehearing of the Order on Revenue Sufficiency Guarantee Complaints are hereby denied in part and granted in part, as discussed in the body of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Kimberly D. Bose,
Secretary.